

UNIVERSAL
LIBRARY

OU_218923

UNIVERSAL
LIBRARY

OUP—786—13-6-75—10,000.

OSMANIA UNIVERSITY LIBRARY

Call No. 341

Accession No. 14133

Author

B 61 I Birkenhead
International Law.

It should be returned on or before the date last marked below.

INTERNATIONAL LAW

**THE RIGHT HON.
THE EARL OF BIRKENHEAD**

P.C., D.L., D.C.L., LL.D.

*His Majesty's Secretary of State for India
High Steward of Oxford University
Honorary Fellow of Wadham and Merton
Colleges*

RONW MOELWYN-HUGHES

B.A. (Wales), LL.B. (Cantab)

*Chancellor's Gold Medallist in English Law at
Cambridge University; formerly Yarborough-
Anderson Scholar of the Inner Temple; Assis-
tant Tutor to the Law Society's School of Law;
of the Inner Temple and the Northern Circuit,
Barrister-at-Law.*

INTERNATIONAL LAW

BY
THE RIGHT HON.
THE EARL OF BIRKENHEAD



SIXTH EDITION
EDITED BY
RONW MOELWYN-HUGHES

MCMXXVII
LONDON & TORONTO
J. M. DENT & SONS LTD.

All rights reserved

PRINTED IN GREAT BRITAIN

PREFACE TO THE SIXTH EDITION

THE fifth edition of this book has long been out of print and the preparation of the sixth has been undertaken by Mr. Moelwyn-Hughes, Barrister-at-law, and formerly Chancellor's Gold Medallist of the University of Cambridge.

It seems to me that Mr. Moelwyn-Hughes has brought to bear on his task equal industry and discrimination. The book has, on the whole, retained over a period of nearly twenty-five years a reasonable continuity of view and consistency of treatment. I cannot pretend not to be gratified by the evidence that it continues successfully to maintain its position in a branch of public jurisprudence upon which so many competent works have appeared in the same period. *

The present edition contains new chapters on the League of Nations and the Permanent Court of International Justice.

It has become necessary largely to rewrite, in view of the experience of the Great War, the chapters on blockade and contraband.

Such of the effects of the Great War as can be discussed with precision have been carefully considered. An attempt has been made to estimate war-conduct in a spirit unaffected by war-bias.

An attempt has *been* made to consider the result of the Imperial Conference of 1926.

It is hoped that the present edition will not fail to justify the support which it has received from the public and from the profession during so long a period of time.

BIRKENHEAD.

18 March, 1927.

PREFACE TO THE FIFTH EDITION

THE history of this book has been somewhat curious. It began its existence as a volume in Dent's Primer Series in 1899. I wrote it in the first year of my practice at the Bar while I was still waiting for briefs. New editions were called for in 1902 and 1906. Between 1906 and 1912 there were several reprints; and in the last-named year the publishers asked me to enlarge the book for the purpose of a new edition in order that it might become a companion volume to the late Lord Courtney's volume upon the English Constitution.

I was not able to carry out this task myself, but the duties of editorship were undertaken by Mr. James Wylie, Barrister-at-law, a distinguished member of Wadham College, to whose scholarship and industry the fourth edition owed much of its success. I was, of course, consulted upon all the additions to the original book; I made some of them myself; and I retained responsibility for the opinions expressed.

For the task of editing the fifth edition the publishers have secured the services of Dr. Coleman Phillipson; he has, in my judgment, shown equal skill and learning in the task of bringing the present edition up-to-date without unduly increasing its bulk, or sacrificing such distinctive character as the work possessed.

And here I may be allowed to add my voice to those who have pointed out how irreparable a loss the Empire has sustained in the loss of my friend Sir Samuel Evans. I know of no one living who can quite adequately fill his place. Quick, thorough, brilliant and industrious, he had a profound intuition of the foundations upon which our maritime greatness depends; and no judge upon the Bench was better equipped with the juridical learning which is its proper and necessary soil. I am sure of one thing: that his name will live in history side by side with that of Lord Stowell, whose learning (at the end) he almost rivalled, whose patriotism he equalled, and whose ingenuity

he excelled. Whoever takes his place will water what the late President planted.

It may appear to some that the present moment was hardly opportune for a new edition of a work upon International Law. I do not share that view. It is true that the authority of this body of public doctrine has for four years reeled before a savage, calculated and almost successful assault. It is true that an immensely powerful and highly educated nation has challenged the whole world by its repudiation of Public Law. It is true that the Kaiser, out-Bismarcking Bismarck, has alleged that International Law is dead. It is true that had victory, in the final result, settled upon the standards of Germany, we could have burned our Grotius, our Vattel, our Phillimore, our Wheaton, and our Hall. But in ever-increasing numbers the world is ranging itself against the international anarchist. The audience watching the arena in which his crimes are displayed grows more and more hostile. And more and more, too, the logic of the stricken field is asserting its cold and merciless conclusions. The tragedy has been long, and the agony of the world has passed imagination. But to-day it is moving to its close with the terrifying inevitableness of which, in ancient tragic literature, Æschylus almost alone was the master. And to-day there must be sounding in the ears of the guilty the dreadful words of Failure and of Doom.

And it should never be forgotten that Failure must involve Doom. The future of civilisation requires that the authority of Public Law shall be reasserted with as much notoriety as marked the challenge; **and** it cannot be so reasserted without requiring from those who sought to destroy it a punishment so memorable, because so dreadful, **that the** offence will not soon be repeated.

For the correction of specific infamies International Law does **not** exclude the castigation of guilty individuals, however highly placed.

Material injuries may be made good by the payment of pecuniary indemnity. **And** if it be objected that an impoverished nation has **no money wherewith** to make good the consequences of its crimes, it **may** be answered that the claims of a guilty nation to be repaid interest **on the money** it supplied, for the purpose of those crimes, **may be justly postponed to the** complaints **of the** victims.

PREFACE TO THE FIFTH EDITION ix

German policy publicly announced that it left to the vanquished nothing but eyes with which to weep. We, on our part, may more moderately announce that we leave them all that is not necessary to make the most complete compensation for the wrongs of which they have been guilty. And it may, in conclusion, be pointed out that the ordinary assumption that the Central Powers will be represented, in the sense that the Allies are, at the Peace Conference would seem to require very considerable qualification. They should be present in the later scenes to hear, but not to contribute to, the discussions of the Allies. If recent precedent is required for this view it may be found in the role which the Bolshevik and Rumanian representatives were recently allowed to play at the respective negotiations in which they, too, listened to decisions.

And if there be anyone who, after four years of war, feels dawning in his mind any sentiment of pity for a Power which has never known, in its arrogant triumphs, the meaning of compassion, or been moved by the conception of mercy, let him read and re-read the story of Bismarck's "negotiations" with Favre nearly fifty years ago. The French appeal was moving and even plangent; but the eyes of the Prussian were hard and dry.

The British Empire is very patient, and very slow in forming tenacious resentments; but I wholly misread the temper and the minds of my countrymen if they are not implacably resolved that the guilty shall pay for their crimes to the uttermost ounce in their bodies and in their purses. And the doctrines of International Law afford abundant warrant and precedent for both these demands.

FREDERICK SMITH.

ATTORNEY-GENERAL'S CHAMBERS,
18 September, 1918.

CONTENTS

	PAGE
PREFACE TO THE SIXTH EDITION	v
PREFACE TO THE FIFTH EDITION	vii
REFERENCES TO BOOKS AND DOCUMENTS	xxiii
 INTRODUCTORY CHAPTER— <i>Nature of International Law.</i>	
Definition of international law	1
Development of international law	1
Greece	2
Rome	3
Modern international law	4
Law of Nature	4
<i>Jus gentium</i> and <i>jus civile</i>	6
Law of Nature in modern times	7
The analysts and international law	8
Meaning of law	8
International law as law proper	9
Sanction of international law	9
Treaties and obligations	10
Nature of international rules	11
Sanction clauses of the Covenant	11
The Hague Conferences	12
International law and municipal law	16
Summary	19

PART I

SOURCES OF INTERNATIONAL LAW; INTERNATIONAL PERSONS; AND STATE REPRESENTATIVES

CHAPTER I.—*Sources of International Law.*

Name	21
Sources of international law	22
i. Writings of jurists	23
ii. Treaties	25
iii. Opinions of jurists in answer to their own Governments	26
iv. Tribunals of international arbitration	26
v. Prize courts	27
vi. Instructions issued by States to their armed forces, diplomatic agents, etc.	29

CHAPTER II.—*International Status or Persons in International Law.*

Subjects of international law	31
International States	31
Characteristics of a State	31
(i.) Existence of a Government	32
(ii.) Sovereign independence	32
Unions of States	33
Suzerainty	34
Korea	34

PAGE

CHAPTER II.—*International Status or Persons in International Law-contd.*

Egypt	35
South African Republic	36
Protectorates	36
Ionian Islands	36
Africa	37
India	38
Personal unions and federal systems	40
Confederations	40
The Self-governing Dominions	41
Imperial Conference, 1926	42
(iii.) Promise of durability	44
Birth of States	44
Congo Free State	45
Declaration of independence	45
(iv.) Possession of definite territory	46
(v.) Membership of the society of nations	47
Theory of equality	47
Neutralised States	49
Neutralisation of things other than States	50
Chartered companies	52
The Papacy	53

CHAPTER III.—*The League of Nations.*

Objects of the League	54
Members	54
The Assembly	55
The Council	56
The Secretariat	58
International Labour Organisation	58
Protection of minorities	59
League's work in Austria and Hungary	60
Status of the League	61

CHAPTER IV.—*The Representatives of States in Foreign Countries.*

State representatives	63
Refusal to receive	63
Precedence	64
(1) Ambassadors	64
Inviolability	64
Exterritoriality	65
Immunity from criminal jurisdiction	65
Immunity from civil jurisdiction	69
Ambassador's house	70
Position in regard to third States	71
Duties of diplomatic agents	71
(2) Consuls	71
Position	72
Termination of authority	72
Duties of consuls	72
Consular jurisdiction	73

CONTENTS

XV

CHAPTER V.—*Amicable Settlement of International Differences—International Arbitration.* PAGE

Earlier cases of arbitration	149
The Hague Peace Conference	149
Proposal for limitation of armaments	150
General results of Peace Conferences	151
Limits of arbitration	151
Recovery of contract debts by force	152
Pacific settlement of international disputes	154
Mediation	154
Commissions of Inquiry	155
Arbitration	156
Compulsory arbitration	156
Permanent Court of Arbitration	157
Summary procedure	160
Proposed Judicial Arbitration Court	160
Cases decided under the Convention	162
The Pious Fund of the Californias	162
The Venezuelan debts	162
The Japanese house tax	162
The Muscat dhows	163
The North Sea incident	163
The Casablanca case	164
Maritime frontier between Norway and Sweden	164
The North Atlantic coast fisheries	164
The Orinoco Steamship Company	168
The Savarkar case	168
The Canevaro claim	168
Interest on Turkish indemnities due to Russian subjects	169
The <i>Manouba</i>	169
The <i>Carthage</i>	170
The <i>Tavignano</i>	170
Timor boundaries	170

CHAPTER VI.—*The Permanent Court of International Justice and conciliation and arbitration by the Council of the League.*

Defects of arbitration	172
Permanent Court of International Justice	173
Election of judges	173
Tenure of judges	174
Sittings	174
Special tribunal for technical cases	175
<i>Locus standi</i>	175
Law applied by the Court	175
Procedure	176
Jurisdiction	176
The "Optional Clause"	177
Judgments: <i>The Wimbledon</i>	178
The Mavromatis Concessions (I)	179
The Mavromatis Concessions (II)	179
Interpretation of Treaty of Neuilly	180
German claims in Upper Silesia	180
Advisory Opinions	180
Nationality in Tunis	181
Græco-Turkish exchange of populations	181
Danzig letter-boxes	182
Mosul dispute	182
Pacific settlement by the Council	183
Gnæco-Bulgar frontier incident	184

PART III

BELLIGERENCY, OR THE RIGHTS AND DUTIES OF STATES IN TIME
OF WARCHAPTER I.—*Prebelligerent Acts ; Commencement of War and its Effects.* PAGE

Definition of war.	187
Forcible redress short of war.	187
Retorsion.	187
Reprisals	187
Embargo.	188
Pacific blockade	188
Declaration of war	190
The Hague rules	191
Persons affected by war.	192
Trading with the enemy.	193
Enemy character of corporations.	193
Enemy trade in neutral countries	194
Procedural capacity of enemies.	194
Licence to trade.	195
State debts.	196
Enemy persons in a State at the commencement of hostilities	196
Internment.	198
Enemy merchant vessels in port at outbreak of war	198
Enemy merchant vessels on the high sea ignorant of hostilities	200
Recognition of belligerency.	201
Revolutionary hostilities.	202

CHAPTER II.—*Qualifications of Lawful Belligerents.*

Earlier practice.	204
The Hague conventions	206
Non-combatants with the armed forces	207
Sailors on enemy merchantmen.	208
Who are lawful combatants	208
Guerilla troops.	208
Levies <i>e n masse</i>	209
Coloured and semi-civilised troops.	210
Naval combatant status.	211
Privateers.	211
Volunteer navies.	212
Conversion of merchant vessels into war vessels on the high seas	214
Defensively armed merchantmen.	216

CHAPTER III.—*Hostilities—Limits of Permissible Violence.*

Fundamental principle	218
Specific prohibitions	218
Expanding and explosive bullets	219
Use of poison	220
Asphyxiating gases.	220
Military necessity	221

CONTENTS

xvii

CHAPTER III.—*Hostilities—Limits of Permissible Violence—continued* PAGE

<i>Flammenwerfer.</i>	221
Questionable value of laws of war	222
Rights of action	222
Compulsion applied to population	224
Sieges and bombardments	225
Undefended places	226
Aerial bombardment in the Great War	226
Report of Commission on rules of aerial warfare	226
Suggested rules of aerial bombardment	227
Bombardment of coast towns	227
Ransom and contributions	229
Undefended places	230
Military works	231
Requisitions	231
Protected buildings	232
Mines	232
The Mines Convention	233
British and German declarations at the Hague	233
Suggested rules	234
Use of mines in the Great War	235
Prisoners of war	237
Information bureau	239
Spies	239
Who is a spy	240
Treatment of wounded	241
Hospital ships	243
Sick, wounded, or shipwrecked, on neutral vessel	244
Hospital ships and port dues	246
Flags of truce	246
Capitulations	246
Armistices or truces	246
Cartels	248

CHAPTER IV.—*Enemy Property on Land and Occupation of Enemy Territory.*

Seizable property	249
Exemptions	250
Destruction of protected buildings	251
Practice in the Great War	251
Submarine cables	251
Occupation of enemy territory	253
The occupant's authority and martial law	254
Compulsory information	256
Oath of fidelity	257
Private rights and property	257
Taxes, etc.	257
General penalty	258
Contributions	259
Requisitions	259
Ransom	260
Law and policy	260
Devastation	260
Reprisals	261
Hostages	262

CHAPTER V.—*Enemy Property on the Sea.*

PAGE

Capture of merchant vessels	263
Private property at sea	263
Recent history.	264
The policy of exemption	265
Arguments for immunity	265
Effects of Great War on question of immunity	265
Arguments against immunity	266
Destruction of prizes.	269
Exemptions from capture.	270
Free ships free goods.	270
Vessels charged with religious missions, etc.	270
Coast fisheries.	271
Postal correspondence	272
Changes of nationality.	274
Claims against captured vessels	275
Transfer of ships.	275
British cases.	276
Declaration of London	277
Enemy character.	278
Enemy character of ships	279
Enemy character of goods	280
Commercial domicile	280
Produce of enemy territory	281
Enemy goods on British ships	282
Nationality of occupied territory	282
Declaration of London as to goods on enemy vessel	282
Transfer <i>in transitu</i>	283
Neutral claims on captured vessels	285
Ransom bills.	286

CHAPTER VI.—*Postliminium; Salvage—Conclusion of War.*

1. Postliminium salvage.	287
Origin of term.	287
Restoration of captured property	287
Salvage.	288
Amount of salvage.	289
2. Conclusion of war.	290
Modes of terminating war.	290
Treaty of peace.	290
Date of operation.	291
Notice of peace.	292
Capture after peace.	293
Adjudication after peace	293
Indemnity clause.	294
Various articles of a peace treaty	294
Cession of territory and State succession	295
Conquest.	296
Case of Hesse Cassel.	296
Effects of conquest upon liabilities	297
War debts.	298
General debt.	298
Effects of conquest upon persons	300
War crimes.	301
Defence of orders of a superior.	302

CONTENTS

xix

PART IV

THE RIGHTS AND DUTIES OF NEUTRAL POWERS

CHAPTER I.— <i>General Principles of Neutrality as between States.</i>	PAGE
Meaning of neutrality	303
The Hague Conventions	303
Supply of troops and ships—former usage	304
The Hague rule	305
Neutral money loans	306
Foreign enlistment	308
Use of neutral territory	308
Fitting out vessels	309
Supply of war material, etc.	309
Supply of armed vessels	310
The <i>Alabama</i> case	311
Rules of the Treaty of Washington	312
The award	313
Test of permissible commerce	313
Terceira incident	314
Neutral rights	314
Hostilities in neutral waters	314
Pursuit in neutral waters	315
Indemnity	316
Self-defence in neutral waters	316
Right of asylum	317
Belligerent ships in neutral ports	317
Vessels of two belligerents in a neutral port	318
The Hague rules	319
Length of stay	320
What warships may do	320
Measures to be taken by neutral	321
Prisoners in neutral territory	322
Prizes in neutral ports	322
Passage through neutral territory	324
Wireless telegraphy	325
Railway material	326
The modern right of angary.	327
CHAPTER II.— <i>Belligerent Governments and Neutral Individuals.</i>	
General principles	329
Trade of neutrals	329
Commercial blockade	330
Rule of War of 1756	332
Various cases	333
Continuous voyage	334
CHAPTER III.— <i>The proposed International Prize Court and the Declaration of London.</i>	
The proposed International Prize Court	336
Jurisdiction	336
Who may appeal	337
What law to be applied	337
Remedy.	337
Constitution of the court	337
Procedure.	337
Applicability	337
Difficulties	338
The Conference of London	339
The Declaration of London	339

CHAPTER IV.—*The Law of Contraband.*

	PAGE
Contraband trading	341
Definition of contraband	341
Classes of merchandise	342
Absolute and conditional contraband	343
Distinctions made by various States	344
Decisions of prize courts	344
Treatment of various articles	347
Practice of States:	
Great Britain	347
United States	349
France	349
Prussia	349
Russia	349
The Hague Conference	350
The Declaration of London	351
List of absolute contraband	351
Power to add to the list	352
English interpretation before the Great War	354
Rule of the Declaration of London	355
Conditional contraband	356
Contraband lists during the Great War	356
Innocent carriers of contraband	358
Pre-emption	358
Conditional contraband	359
Conditional contraband, continuous voyage	360
(i.) Declaration of London	360
(ii.) during the Great War	361
(iii.) English Prize Court	361
Doctrine of substitution	362
Proof as required by Prize Courts	363
Liability to capture	364
Exemptions	365
Limit of exemption during the Great War	366
Free goods	366
Medical stores	367
Confiscation of contraband	367
Effect on vessel carrying contraband	368
Rule of proportion	369
Rule of infection	370
Ownership in Prize Law	371

CHAPTER V.—*The Law of Blockade.*

Definition of blockade	372
Limitations of blockade	373
Blockade must be effective	374
Criterion of "effectiveness"	375
British and American view	376
Interruption of blockade	377
Continental view	377
The Declaration of London	378
Temporary absence	378
Blockade must be impartial	379
Vessel in distress	380
Declaration of blockade	381
Notification: British view	383
American view	384
Continental view	385
The Declaration of London	385

CONTENTS

XXX

CHAPTER V.— <i>The Law of Blockade</i> —continued	PAGE
Knowledge	385
Neutral vessel leaving enemy port	386
Limits of liability to seizure	387
Area of operations	387
Termination of the offence	388
Termination of blockade	389
Penalty.	390
Continuous voyage.	390
Blockade in the Great War	392
Long-distance blockade	392
Submarine blockade.	393
CHAPTER VI.— <i>Unneutral Service.</i>	
Carriage of dispatches	396
Penalty.	398
Carriage of enemy persons	399
Duration of liability to capture	401
Identification with the enemy	401
Rule of War of 1756	403
Enemy persons found on neutral ships	403
The <i>Trent</i> case.	404
Recent practice.	406
The <i>China</i> case.	406
CHAPTER VII.—1. <i>Free Ships, Free Goods.</i> 2. <i>Enemy Ships, Enemy Goods,</i>	
Relation of these maxims	408
1. Free ships, free goods	408
Earlier practice.	408
The Armed Neutralities.	409
Practice in early part of nineteenth century	409
Declaration of Paris	409
2. Enemy ships, enemy goods.	411
British view.	411
American view	412
Declaration of Paris.	412
Declaration of London.	412
CHAPTER VIII.— <i>Visit and Search.</i>	
British view.	414
Forcible resistance.	414
Convoyed vessels	415
Earlier practice.	415
British view.	415
American view	416
Continental view.	416
Convoys and modern conditions	416
Conference of London.	417
Formalities of search.	418
CHAPTER IX.— <i>The Destruction of Prizes and Compensation.</i>	
x. Enemy prizes.	420
Relation of seizure to ownership.	420
When impossible to bring in	421
American view.	421
Continental practice.	422

CHAPTER IX.—*The Destruction of Prizes and Compensation*—continued PAGE

Safety of passengers and crew.	423
Warning necessary.	423
Resistance by merchantmen.	424
Armed merchantmen.	424
Ransom.	424
2. Neutral prizes	425
Adjudication necessary.	425
When attack excusable.	425
When destruction permissible.	426
Declaration of London	427
Conditions necessary for destruction.	427
Persons on board	427
Proof of exceptional necessity	428
Compensation	428
Neutral cargo and destruction	428
Compensation after release	428
Release before adjudication	429
The Declaration of London not ratified	430

TABLE OF JUDICIAL CASES { <i>British and foreign</i> }	431

INDEX OF SUBJECT-MATTER.	437

REFERENCES

This list contains only the principal works and documents referred to in the present volume. Many works are here omitted, e.g. (1) those mentioned in regard to some particular point; (2) those of the "fathers" of international law, such as Ayala, Gentilis, Grotius, Puffendorf, Bynkershoek, Vattel, and others ; (3) the collections of law reports.

Fuller bibliographies will be found in Hershey, Oppenheim, Bonfils and Despagnet.

Ariga, N., *La guerre russo-japonaise au point de vue de droit international* (Paris, 1907).

Azuni, D. A., *Systtme universel de principes de droit maritime de l'Europe. (Traduit de l'italien.)* (Paris, 1790).

Barboux, H., *Jurisprudence du conseil des prises pendant la guerre de 1870-1871* (Paris, 1872).

Bernard, M., *Historical account of the neutrality of Great Britain during the American Civil War* (London, 1870).

Bluntschli, J. C., *Das moderne Volkerrecht* (Nordlingen, 1872). French trans, by C. Lardy (Paris, 1895).

Bonfils, H., *Manuel de droit international public* (Paris, 1912).

Borchard, E. M., *Diplomatic protection of citizens abroad* (N.Y., 1915).

Calvo, C., *Le droit international thiorique et pratique*. 6 vols. 5th ed. (Paris, 1896).

Cobbett, P., *Cases and opinions on international law*. 2 vols. (London, 1909-1913).

Darby, W. E., *International tribunals* (London, 1904).

Despagnet, F., *Droit international public* (Paris, 1910).

Fachiri, A. P., *The Permanent Court of International Justice* (London, 1925).

Forsyth, W., *Cases and opinions in constitutional law* (London, 1869).

Garner, J. W., *International Law and the World War*. 2 vols. (London, 1920).

Gessner, L., *Le droit des neutres sur mer*. 2^e ed. (Berlin; Paris, 1876).

Hall, W. E., *International law*. 8th ed. by A. Pearce Higgins (Oxford, 1924).

Halleck, H. W., *International law*. 2 vols. Ed. by Sir S. Baker (London, 1908).

Harcourt, Sir W., *Letters of Historicus on some questions of international law* (London, 1863).

- Hautefeuille, L. B., *Des droits et des devoirs des nations neutres en temps de guerre maritime*. 3 vols. (Paris, 1868).
- Hazeltine, H. D., *The law of the air* (London, 1911).
- Heffter, A. W., *Le droit international de l'Europe*. 4^e ed. par F. H. Geffcken (Berlin; Paris, 1883).
- Heineccius, J. G., *De navibus ob vecturam vetitarum mercium commissis* (1721).
- Hershey, A. S., *Essentials of public international law* (New York, 1912).
- Hertslet, Sir E., *Map of Africa by treaty*. 2 vols. (London, 1896).
- *Map of Europe by treaty*, 4 vols. (London, 1875-1891).
- Holland (Sir) T. E., *European concert in the Eastern Question* (Oxford, 1895).
- *The laws of war on land* (Oxford, 1908).
- *Manual of naval prize law* (London, 1888).
- *Studies in international law* (Oxford, 1898).
- Holls, F. W., *The Peace Conference at the Hague* (New York, 1900).
- Holendorff, *Handbuch des Volkerrechts*. 4 vols. (1885-1889).
- Hubner, M. von, *De la saisie des batiments neutres* (London, 1778).
- Jacomet, R., *La guerre et les traites* (Paris, 1909).
- Keith, A. B., *War Government of the Dominions*.
- Kent, J., *Commentary on international law*. 2nd ed. by J. T. Abdy (Cambridge; London, 1878).
- Lapradelle, A. de, et N. Politis, *Recueil des arbitrages internationaux* (Paris, 1905, etc.).
- Latifi, A., *Effects of war on property* (London, 1909).
- Lawrence, T. J., *Principles of international law*. 5th ed. by P. H. Winfield (London, 1925).
- Macdonell, Sir John, and E. Manson (ed.), *Great jurists of the world* (London, 1913).
- Maine, Sir Henry, *Ancient Law*. Ed. Sir F. Pollock (London, 1906).
- *International law* (London, 1888).
- Manning, W. O., *Commentaries on the law of nations* (London, 1875).
- Martens, C. de, *Causes celebres de droit des gens*. 2 vols. (Leipzig, 1827).
- Martens, G. F. de, *Precis du droit des gens*. Ed. by C. Verge (Paris, 1858).
- *Recueil des traites ; Nouveau Recueil* (1761-1913). (Continued by C. de Martens, Saalfeld, Murhard, Samwer, Hopf, Stoerk and H. Triepel.)
- Moore, J. B., *Digest of international law*. 8 vols. (Washington, 1906).
- *History and digest of the international arbitrations to which the United States has been a party*. 6 vols. (Washington, 1898).
- Morgan, J. H. (trans.), *The German war book (Kriegsbrauch im Land-kriege)* (London, 1915).
- Oppenheim, L., *International Law*. 3rd ed. by R. F. Roxburgh. 2 vols. (London, 1920).

- Ortolan, T.**, *Regles internationales et diplomatic de la mev.* 2 vols. (Paris, 1864).
- Pearce Higgins, A.**, *Defensively armed merchant ships and submarine warfare* (London, 1917).
- *The Hague Peace Conferences* (Cambridge, 1909).
- Phillimore, Sir R.**, *Commentaries upon international law.* 4 vols. 3rd ed. (London, 1879-1889).
- Phillipson, C.**, *The international law and custom of ancient Greece and Rome.* 2 vols. (London, 1911).
- Piggott, Sir F. T., *Nationality, etc.* (London, 1907).
- Pistoye, A. de, et C. Duverdy, *Traite des prises maritimes.* 2 vols. (Paris, 1855-1859).
- Pollock, Sir Frederick, *The League of Nations* (London, 1922).
- Pradier-Fodere, P. L., *Cours de droit diplomatique.* 2 vols. (Paris, 1881).
- *Traiti de droit international public europeen et americain.* 8 vols. (Paris, 1885-1906).
- Pulling, A. (ed.), *Manual of emergency legislation* (London, 1914, etc.).
- Pyke, H. R., *The law of contraband of war* (Oxford, 1915).
- Rivier, A., *Principes du droit des gens.* 2 vols. (Paris, 1896).
- Roxburgh, R. F.**, *The Prisoners of War Information Bureau in London* (London, 1915).
- Satow, Sir E., *A guide to diplomatic practice.* 2 vols. (London, 1917).
- Schucking, Walther**, *Die Satzung des Volkerbundes kommentiert von Walther Schucking und Hans Wehberg* (Berlin, 1924).
- Scott, J. B., *Cases on international law* (Boston, 1906).
- *The Hague Peace Conferences.* 2 vols. (Baltimore, 1909).
- Smith, F. E. (Lord Birkenhead), and N. W. Sibley, *International law as interpreted during the Russo-Japanese War.* 2nd ed. (London, 1907).
- Smith, F. E. (Lord Birkenhead)**, *The destruction of merchant ships under international law* (London, 1917).
- Spaight, J. M., *Aircraft in war* (London, 1914).
- *War rights on land* (London, 1911).
- Stowell, E. C. *Consular cases and opinions* (Washington, 1909).
- Takahashi, S.**, *International law applied to the Russo-Japanese War* (London, 1908).
- Twiss, Sir Travers, *Law of nations.* 2 vols. (Oxford, 1875-1884).
- Valin, R. J.**, *Commentaire sur l'ordonnance de la marine de 1681* (Paris, 1836).
- Walker, T. A., *History of the law of nations* (Cambridge, 1890).
- Wehberg, H., *Capture in war on land and sea*, Eng. trans. (London, 1913).
- Westlake, J., *Collected papers.* Ed. by Prof. Oppenheim (Cambridge, 1914).
- *International law*, 2 vols. (Cambridge, 1910, 1913).
- Wheaton, H., *History of the law of nations* (New York, 1845).

Wheaton, H., *International law*. 5th English ed. by C. Phillipson (London, 1915).

Wilson, G. G., *The Hague arbitration cases* (Boston; London, 1915).

Woolsey, T. D., *Introduction to international law*. 5th ed. (New York, 1879).

A. J. I*. L. *American Journal of International Law* (New York).

American State Papers.

Annuaire de l'Institut de Droit International (Paris).

Annual Register (London).

British and Foreign State Papers.

B. Y. 1. L. *British Year Book of International Law* (London).

Grotius Society, Transactions and Publications of (London).

Hansard's Parliamentary Debates.

Journal du droit international prive (Paris).

Journal Officiel (Paris).

La deuxieme Conference internationale de la paix : Actes et documents.

Law Report (various).

League of Nations Monthly Summary (Geneva).

Opinions of U.S. Attorneys-General (Washington).

Parliamentary Papers.

P. C. I. J. *Permanent Court of International Justice, Publications* .
(Sijthoff, Leyden).

Revue de droit international et de legislation comparee (Bruxelles).

Revue ginirale de droit international public (Paris).

The Times.

U.S. diplomatic correspondence.

Zeitschrift fur Internationales Recht (Niemeyer, Kiel).

INTERNATIONAL LAW

INTRODUCTORY CHAPTER

NATURE OF INTERNATIONAL LAW

BY international law is meant/the rules acknowledged by the general [Definition. body of civilised independent states to be binding upon them in their mutual relations.

"In a form more or less rudimentary we may suppose such rules to have existed almost from the infancy of society, for national isolation or recognition of international rights and duties must always have been necessary alternatives. Small indeed was the area covered by these rough-and-ready conventions, and when a new rule was added to the code, it sprang from the imperious promptings of mutual convenience or mutual safety. The sanctity conceded by ancient sentiment to the office of herald supplies a well-known instance of this class of rules. The duty of respect to this office is insisted on in the Homeric poems, and when the people of Ammon sent back David's ambassadors ¹ without one side of their beards, it was felt that the limits of international outrage had been reached. We must not trace in the immunity of envoys the germs of a nascent humanity: it was an immunity involved in the necessity of international intercourse. Outrages would naturally have been followed by reprisals, until the calling of a herald gradually ceased to attract The constitution of ancient societies was little favourable to the development of a systematic body of rules. Since States are its units, international law can only exist where number of communities acknowledge a mutual equality before the law and make common submission to its authority.

Such conditions did not prevail amongst the nations of antiquity in general. There was a recognition of certain rules and customs as between peoples of cognate race; the obligation to observe them in regard to those outside the pale was either not admitted or much less stringent For the most part a state of hostility characterised the

¹2 Sam. x. 4.

relationships between a nation and alien races. Might was right. Neither person nor property was considered sacred. waged with extreme ferocity. The conqueror frequently to indiscriminate slaughter, destruction and devastation; captives were subjected to atrocious treatment: mutilation, burning alive, enslavement. Plutarch makes Brennus, chief of the Gauls, say to the Roman ambassadors who intervened on behalf of the Christians: "Upon these [mentioning various peoples] you make war; if they refuse to share with you their goods, you enslave their persons, lay waste their country, and demolish their cities. Nor are your proceedings dishonourable or unjust; for you follow the most ancient of laws, which directs the weak to obey the strong."¹

But such practice was neither universal nor consistent; there were here and there notable relaxations in practice and acceptance of humaner principles in theory. Thus the laws of Deuteronomy imposed restrictions on devastation²; in ancient India the *Ordinances of Manu* (c. 500 B.C.) contained rules inspired by humanity and even chivalry. In time of peace numerous rules were recognised in regard to embassies, treaty-making, the establishment of alliances, submission to arbitration, and other international transactions. Nowhere did these amount to anything like a regular body of international law; but in Greece and Rome we find the development of a rudimentary system of interstate jurisprudence.³

In ancient Greece a distinction was drawn between the Hellenic circle and the States outside it. Non-Hellenes were designated barbarians who, in Aristotle's view, were destined by Nature to be the slaves of the Greeks.⁴ At the assembly of the Ætolians an envoy of Philip is reported by Livy to have said: "With foreigners, with barbarians, all Greeks have and ever will have eternal war."⁵ Such antagonism to people beyond the pale was universal in ancient times: each race proclaimed itself the "chosen" race. But different sentiments were not infrequently expressed, and even applied in practice. However this may be, in the Greek city-state system various principles came to be recognised as applicable to interstate transactions; and these principles, relating to a number of autonomous and independent communities—small though they were—constituted a body of Hellenic public law which merited the name of international law as much as, say, modern European public law merits it. In the Greek writers we constantly meet with such expressions as *πρὸς τοῖς Ἑλλήνων νόμιμα* (the laws of the Hellenes), *τὰ κοινὰ τῶν Ἑλλήνων νόμιμα*

¹ Plutarch, *Life of Camillus* (Langhorne's trans.).

² *Deut.* xx. 10-20.

³ Cf. C. Phillipson, *International Law and Custom of Ancient Greece and Rome*, 2 vols. (London, 1911), 5

⁴ *Polit.*, i. 1, 5.

Livy, xxxi. 27.

(the common laws of the Hellenes), κοινὰ δίκαια τῆς Ἑλλάδος (the common rights of Hellas), and the like. No doubt these νόμιμα were consolidated by pride in Hellenic nationality and the abhorrence of savage practice, but the Greek mind with all its immense intellectual subtlety was never a legal mind; the area over which the interstate customs extended was curiously partial and arbitrary, and the sanction on which they uncertainly depended was really the sentiment of *noblesse oblige*.

The history of ancient Rome reveals an advance on the theory Rome. and practice of Greece. That the Romans were the greatest law-makers and law-givers of antiquity is a fact that has now become a commonplace. Their juridical spirit was manifested in a great variety of international transactions. Notably in the earlier part of her history, Rome recognised the existence, of sovereign and independent States other than her own; she had a clear conception of a *civitas gentium* (society of nations), and admitted the principle of reciprocity. Her career of war and conquest did not make the existence of rules of international law impossible. Her *jus fetiale* comprised a body of principles relating to war and diplomacy the observance of which was ensured by powerful sanctions. Modern writers have too frequently been misled, in drawing their conclusions, by casual remarks met with in the classical authors, e.g. "ubi solitudinem feciunt, pacem appellant," in Tacitus, "debellare superbos," in Virgil; or by such statements as "adversus hostem aeterna auctoritas esto," in the XII I. Tables. The law of force was not by any means the only dispensation. That international law was in the hands of the Romans distinctly progressive is shown by the numerous provisions and institutions relating to a great variety of international relationships: alliances, arbitration, the tribunal of recuperators; *hospitium publicum*, naturalisation, extradition, immunity of ambassadors, procedure and formalities in the conclusion of treaties, conception of protectorates and territorial sovereignty; declaration of war and regular formalities connected therewith, right of asylum, sanction of pledged faith in peace or war, granting of safe-conducts, regulation of the treatment of the conquered enemy and captured property, the burial of the dead, truces, armistices, ransom and exchange of prisoners, the doctrine of postliminium, the position of hostages. In the later period of the history of Rome many of these provisions, especially those comprised in the fetial law, were frequently disregarded; but this does not destroy the fact that they had been developed by the Romans, and at certain periods pretty consistently applied by them in a legal spirit. The system—rudimentary as it was—left by Rome contributed not a little to the foundations of modern international law.

Modern international law.

The analogies furnished by ancient society cannot be pursued farther here; we pass hurriedly on, therefore, to the development of the modern law of nations.¹ The opportunity came with the break-up of the Roman Empire into independent States, but a period of darkness immediately followed, little favourable to the evolution of legal principles. Alike in Eastern and Western Europe men were waging desperate wars, the bloody records of which were to be the authorities of Ayala and Gentilis. These two writers appeared almost together towards the close of the sixteenth century; their views are often confused and sometimes absurd; they are deficient alike in the sense of proportion and the faculty of discrimination, but their publications none the less mark an immense advance in international morality. Now for the first time it was boldly affirmed that the conduct of States should be controlled by legal rules. The code was a ruthless one, but the alternative was complete lawlessness. Immeasurably greater than these two writers on the constructive and critical side was their successor, Hugo Grotius,² who was born in 1583, the year after Ayala's work was published. It would be hard to mention any writer in any field of literature who has more profoundly influenced the course of human history. Grotius was not a narrow specialist Law theology, Politics, scholarship—all at different times engaged his marvellously facile pen; but the publication of his famous work, *De Jure Belli et Pactis* (1625), showed that a clear and original thinker was devoting his great intellect and unrivalled learning to the infant science of international law. It may be imagined that Grotius and his predecessors did not find ready-made the principles on which their science was to rest. No doubt there were precedents, but they were mostly of a kind to be evaded, and a treatise on international law, which derived its rules of war from the belligerent records of the preceding centuries, would have been a qualified blessing to humanity.

Law of Nature.

The labours of Ayala, of Gentilis, and of Grotius, could never have produced results so great had they not been associated with a conception which has, perhaps, caused more loose thinking than any other in the history of thought—that of the law of Nature. In its origin this phrase denoted simply those universally received rules of morality which deal with the external actions of men.³ In this sense the

¹ For a convenient historical outline, see H. Wheaton, *History of the Law of Nations* (New York, 1845); T. A. Walker, *History of the Law of Nations* (Cambridge, 1899).

² See *Great Jurists of the World*, pp. 169-85 (article by Sir W. Rattigan); A. White, *Seven Great Statesmen*, etc. (New York, 1910), pp. 54-110.

³ Cf. Sir T. E. Holland, *Elements of Jurisprudence* (Oxford, 1916), pp. 31 seq.; and Sir H. S. Maine, *Ancient Law* (ed. Sir F. Pollock, London, 1906), chaps. iii. and iv.

See J. Austin, *Lectures on Jurisprudence* (London, 1869), vol. i. lect. i.

occasional contrast between natural law and positive law is familiar enough in Greek tragedy and elsewhere. Many things are shocking to morality which it is not convenient to pronounce illegal. Conversely many laws may be broken, for instance such as deal with *mala prohibita* rather than *mala per se*, without any violation of the moral law. None but a sensitive conscience will be shocked because a friend rides his bicycle on the pavement in a lonely place where the road is bad. The modern use of the expression "law of Nature" does not differ greatly from the earliest "By the ethical school I mean," says a recent writer, "... those authors who throw their main strength in investigating the universal moral and social conditions of government and laws, or at any rate civilised government and laws and expounding what such government and laws, are, or ought to be, so far as determined by conformity to these condition. This is the nearest account I can give in few words of what is implied in modern usage by the terms law of Nature, droit naturel, or naturrecht."¹ To this account it must perhaps be added that "law of Nature" in modern usage expresses those rules of morality by which the outward acts of man are tested, whether their area be co-extensive with or larger than that of positive law. But it was neither in its earlier nor its modern use that the law of Nature exercised an influence so profound over international law.

To understand that influence, a brief reference must be made to the law of Nature as it figured in the Stoic philosophy. In the Cosmogony of Zene, the law of Nature indicated the physical rules which determined the dependence of the universe upon the

Cf. also the description of natural v given by Grotius with the passage following it from Aristotle:

Grotius, i. i, 10: Jus naturale est dictatum recto rationis indicans actui alicui ex ejus convenientia aut disconvenientia cum ipsa natura rationali [ac sociali], inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari aut præcipi. (Natural law is the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational [and social] nature [of man], has in it a moral turpitude or a moral necessity; and consequently that such act is forbidden or commanded by God, the author of Nature.)

Arist., Nic. Eth., v. 10:

Τὸ θὲ πολιτικὸν δικάζει τὸ μὲν φυσικὸν ἐστὶ τὸ θὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τῆς αἰτίας ἔχον δύναμιν, καὶ οὐ τῷ δοκεῖν ἢ μὴ, νομικὸν δὲ ὃ ἐξ ἀρχῆς μὲν οὐδὲν διαφέρει οὕτως ἢ ἀλλῶς, ὅταν δὲ θῶνται διαφέρει. (Civil justice is partly natural and partly conventional: that is natural which possesses the same validity everywhere, and does not depend on being deliberately adopted or not; while that is conventional which in the first instance does not matter whether it assumes one form or another, it matters only when it has been laid down.)

¹ Sir P. Bollock, *History of Science of Politics*, p. 110.

evolution of *πρώτη* or primitive substance.¹ When Stoicism became a fashionable creed in Rome, the popular mind was most vividly impressed by the simplicity which distinguished its votaries in an age of growing luxury. Soon arose a picture, ideally attractive, of a natural state of society to which the artificiality of a perverse age had been happily unknown. The society was conceived of as controlled by rules of transcendent because spontaneous justice, and to these rules the familiar description "law of Nature" was applied.

*Jus gentium
and jus
civile.*

Under another name this law of Nature was to play an incalculable part in the development of the law of Rome. The exclusive jealousy of the foreigner, which is so characteristic of ancient societies, had closed the door of the *jus civile*, or native Roman law, to alien residents. To adjust disputes when one of the parties was an alien, the Praetor had pieced together a body of rules drawn collatively from the communities which lined the Mediterranean seaboard. To these rules was given, by reference to their source, the name *jus gentium*, or law of nations. In its origin it was despised as an inferior system having no part in the ceremonious observances which distinguished the indigenous code. In fact, it soon became the source from which a wealth of equitable principle was obliquely infused into the Roman system, through the sympathetic medium of the Praetor's edict. It was inevitable that sooner or later Roman common sense should apply the standard of convenience to the two distinct streams of which Roman jurisprudence was to be the splendid confluence; but the process was no doubt hastened by the increasing vogue of Stoic simplicity. It would be too long to recount here the various steps which preceded the recognition that the *jus civile* fell far short of the "natural" standard which its cosmopolitan rival seldom failed to satisfy.² It is sufficient to say that by the time of Justinian the law of Nature and the law of nations were commonly identified. We are now in a position to understand the part which these conceptions played in the success of Grotius. He addressed an audience which demanded nothing more than a stable principle, on which to construct the jural relations of States. To readers full of the mediaeval respect for authority, the voice of Grotius would have been the voice of one crying in the wilderness, if he had prescribed or forbidden conduct by outspoken reference to the standard of moral right and moral wrong. But the matter assumed a different aspect when rules, which recom-

¹Cf. Verg., *Æn.*, vi. 724:

Principio caelum ac terras camposque liquentes,
Lucentemque globum Lunae Titaniaque astra
Spiritus intus alit, totamque infusa per artus
Mens agitat molem, et magno se corpora miscet.

² Maine, *Ancient Law* (ed. Pollock, 1906), pp. 59 seq. See also Moyle, *Justinian*, ed. 3, Introduction, p. 36.

mended themselves by a novel humanity, were further affiliated on the respectable authority of Nature's law. To this result the later Roman identification of the law of Nature and the law of nations materially contributed. The subject of Grotius' treatise was commonly and conveniently described as the law of nations; if then the law of nations was the law of Nature, it followed that the relations of States must be governed by the laws of Nature. Through this loophole men gradually infused into the practice of war the restraining influence of a humaner morality. In another way the confusion between *jus gentium* and the dawning science produced results of far-reaching importance. It led to the wholesale introduction into international law of the highly refined conceptions of Roman jurisprudence. As Sir Henry Maine¹ has expressed it, "Setting aside the conventional or treaty law of nations, it is surprising how large a part of the system is made up of pure Roman law. Wherever there is a doctrine of the jurisconsults affirmed by them to be in harmony with the *jus gentium*, the publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctly Roman origin."

The danger is manifest enough of basing international law on a body of rules so little determinable as the precepts of Nature.² Between the moral and the immoral there is a shadowy border-line—a debatable land—which has long been the battlefield of ethical writers. If men are not agreed on the points which natural law allows or disallows, there will be as many standards of law as there are commentators. This confusion has thrown much undeserved discredit upon international law. Many writers in dealing with concrete matters of controversy have appealed to the law of Nature in the terms appropriate to an English barrister who hands up to the court a recent decision in the House of Lords. A French writer,³ for example, applies the "natural" standard to one triviality after another with complacent regularity, and thus reinforced makes short work of terrestrial precedents. So abused, the law of Nature becomes a subtle and disingenuous pretext for dogmatism.

It may be asked, What is the real relation of the so-called law of Nature to the international law of to-day? A study of diplomatic correspondence almost suggests the rule, "When no other argument

Law of
Nature in
modern
times.

¹ *Ancient Law* (ed. Pollock, 1906), p. 100.

² To the "natural" school of jurists belong Puffendorf, *De jure naturæ et gentium* (1672); Thomasius, *Fundamenta juris naturæ et gentium* (1705); Burlamaqui, *Principes de droit naturel et politique* (1747); Rutherford, *Institutes of Natural Law* (1754), and many other writers. See Oppenheim, i. § 55. A recent "naturalist" is J. Lorimer, *Institutes of the Law of Nations*, 2 vols. (Edinburgh, London, 1883-4)—he defines the law of nations as the "law of Nature realised in the relations of separate nations" (vol. i., pp. 1, 19).
³ Hautefeuille.

offers, try the 'law of Nature.'¹ On principle it would seem that the law of Nature is to international law exactly what it is to positive law. It cannot be cited to overrule the positive precepts of either, but these precepts will, if possible, be construed consistently with the moral law. The influence of natural law is intangible; it is, so to speak, "in the air," colouring the views we take of positive law, but never to be cited in its teeth. What then are the principal materials with which international law is concerned? They are to be found in the various precedents from which the general practice of States in their mutual dealings is deducible. It deals with that practice as it is, and not, at least primarily, as it ought to be. Blackstone's *Commentaries* is one thing; Beniham's *Theory of Legislation* is another. There have been too many Bentham's in the history of international literature, and their failure to distinguish between what is and what ought to be has tended to discredit their real services.²

The analysts
and interna-
tional law.

The present chapter seems the most convenient place to consider how far the practice of nations is properly described as legal. Is international law law at all? Lord Salisbury observed that "it can be enforced by no tribunal, and therefore to apply to it the phrase 'law' is to some extent misleading."³ Austin, in his *Province of jurisprudence Determined*, laid it down that international law rests merely on the support of public opinion, and cannot therefore be properly called law. The English analytical school, of which Austin was the first and the greatest, is irretrievably committed to this doctrine. Putting on one side Austin's questionable inclusion in his scheme of the law of God, we find that he conceives of positive law as a command addressed to a political inferior by a political sovereign superior, acting as such, and followed by a sanction in the event of disobedience. This conception clearly excludes international law. It is proposed to consider how far the exclusion is academic, and how far it is supported by essential differences.

Meaning of
"law."

The answer to these questions depends on the legitimate scope of the term "law." If the significance of this term be examined, two main characteristics strike the attention: (i.) the uniformity of law; (ii.) the compulsoriness of law. The use of the word has, so to speak, bifurcated, according as the attention has lingered on one or the other aspect. It is used to denote on the one hand the unvarying sequence of natural phenomena, and on the other hand the positive laws peremptorily imposed by a Sovereign

¹For example, in the Anglo-American controversy (1823-6), as to the navigation of the St. Lawrence, the United States appealed to the "general principles of the law of Nature".

²Cf Lord Salisbury's remark reported in *The Times* of 26 July, 1897: "International law . . . depends generally on the prejudices of the writers of text-books."
Loc.cit.

upon his subjects. By the expressions "law of refraction" and "law of gravitation" nothing is conveyed, as professor Holland has well expressed it, but that rays are refracted and objects do gravitate. These latter uses are metaphorical and therefore unobjectionable.

With international law the case stands otherwise. Either it does possess the essential characteristics of law, or it does not ; if it does not, the very closeness of its resemblance thereto, the very legal complexion of its rules, makes it imperative to notice the chasm between them. It is by no means clear that the objections of Austin can be dismissed as pedantic. They are objections of an essentially practical kind. Take away from the meaning of "law" its sanction—the evil in which society involves the lawbreaker—and you leave little that is characteristic of the word.

What is the sanction of international law ? That there is some punishment for the wrongdoer is clear, unless the wrong is done to a nation too weak to resist, or too little interested to make it worth while to incur the trouble of resistance. There is always a heavy penalty in money and in human life and suffering involved even in a successful war. When wars were lightly entered upon for personal or dynastic reasons, this consideration exercised but little restraining influence; but in proportion as the issues of peace and war pass from the hands of irresponsible individuals into those of responsible Governments, and wars become more completely national and more destructive to trade and widespread in their effects, so will the fear of them operate to keep nations within the bounds of recognised international rules on an ever-growing class of subjects. The punishment of a nation which defies international law is vastly greater than that of an individual who breaks a moral though not a legal command; and with the development of the tendency, which has become very marked in the past few years, for nations to agree upon codes of rules of international law, an increasing number of those rules will pass into a region where in validity they will be scarcely distinguishable from the precepts of the strictest Austinian law, owing mainly to the growing reluctance to face a war whenever a legal or quasi-legal decision offers a method of avoiding it without loss of prestige. If, for instance, the Hague Convention of 1907 establishing an International Prize Court, and the Declaration of London, which covered, with two or three important exceptions, the whole field of the relation of belligerents to neutral trade, had been ratified, the decisions of the proposed court would soon have become in practice as binding as the command of an Austinian political superior with a police force at his back. That court would in fact be a political superior established by the nations over themselves with a power (within a strictly

International law
as law
proper.

Sanction of
international
law.

limited area) to command, which from the very nature of the case will be equivalent to a power to enforce,

Difference between international law and law proper.

But though this may be in practice the case, yet in principle the commands of an International Prize Court would be backed by nothing more binding than the force of opinion and the voluntary acquiescence of the nations concerned; while in all matters not coming within its agreed jurisdiction, international law can make no pretence to regulate the occasions on which recourse may be had to war, the litigation of States. The result is strangely paradoxical. As between Nation A and Nation B international law declares A bound to do a certain act. A refuses: it has broken the law. War follows in which A is victorious. So far as international law is concerned the nation is now justified in its refusal. Such a practice is almost anarchical, and no analogies, however striking or numerous, between international law and law proper can blind us to the impassable gulf which divides them. Nor has the absence of a superior able to enforce obedience to law failed to exercise a weakening influence on the stability of international rules.¹

Treaties and obligations.

An attentive study of European history suggests the conclusion that respect for irksome international obligations has been commonly coincident with the lack of material strength to evade them. The Russian denunciation of the Treaty of Paris is an instance in point. In 1856 Russia undertook by that treaty not to maintain a fleet in the Black Sea. In 1870, while the hands of Europe were tied by the Franco-Prussian War, she published a circular repudiating her obligation. England protested, at the time, and a Declaration of London (January 1871) solemnly affirmed the inviolability of treaties. Russia, in the words of Hall, "as the reward of submission to law was given what she had affected to take."² Her acquiescence in the Declaration is sometimes cited as a success for the authority of international law: it is to be hoped that its principles will not be exposed to many such Pyrrhic victories. A most damaging blow was struck by one of the greatest European statesmen of the nineteenth century, and international law will not soon recover from the cynical contempt with which Prince Bismarck was never tired of bespattering it. The action of Austria, too, in annexing Bosnia and Herzegovina in 1908,³ if it was not quite so flagrant as that of Russia in 1870, suggested nevertheless that the enunciation of the inviolability of treaties, though useful as an idea for the guidance of international conduct, cannot always be trusted to be of practical effect

¹ See p. 14, *infra*, as to effect of provisions for sanctions in the Covenant of the League of Nations.

² *International Law* (8th ed., 1924), p. 412.

³ See p. 143, *infra*, where this case is dealt with in more detail.

ITS NATU

It is not easy to see in the analogies which international and municipal law any reason for opinions. They have been well summarised by points out that international rules have been discuss appropriate to jurisprudence, and not by those of m This is no doubt true, but a practical explanation sugges inconvenience of submitting every international dispute posed absolute standard of right and wrong would be in Diplomatic correspondence is lengthy enough, without th upon diplomatists the duty of solving the nicest questions of abs morality. Hence the view, not that international law is a comple entity, if only it could be found, but that its rules have been gradually and doubtfully collected from the varying practice of States. The method of inquiry involved by this theory is the patient examination of precedents—an examination which inevitably assumes a legal form. In the same passage Sir F. Pollock points qut that there is an international morality distinct from and compatible with inter-national law in the usual sense. We are not sure that this argument means more than that those who first sought to impose horal obligations upon States saw that there were ideals of conduct too exalted for international acceptance. Like practical men, they exacted the highest standard for which obedience was to be hoped, and distinguished what lay beyond as admirable, but not obligatory. In other words, the difference between international law and international morality is a difference of degree and not of kind, and it may be doubted whether the judgment of publicists would be severe or strongly adverse upon a nation which took up arms to avenge an admitted outrage on international morality.

It may be conceded that "the proper scope of the term 'law' transcends the limits of the more perfect examples of 'law' "²; it may even be doubtfully admitted that the word, at its vanishing point, may be used to describe the usages of a community when a legalised self-help is the only redress for wrong; but such observances become clearly non-legal if the lawbreaker and the injured party are equally entitled to pray violence in aid, and if success is retrospectively allowed to determine the justice of their original quarrel.

It is, of course, in no way inconsistent with the views here set forth that certain branches of international law, e.g. the laws of contraband, are treated as binding in municipal tribunals. The reason is that they have been adopted into the municipal law of the State which administers them. In England this adoption may be due

¹ *Oxford Lectures and Other Discourses* (London, 1890), pp. 18 seq.

² Hall, 8th ed., p. 14.

NATIONAL LAW

ure,¹ or to the judges who indirectly effect

as made the following observations on the nature, rules: "We are not called upon to consider here are more nearly analogous to the law administered justice within a State, or to purely moral rules, or to customs and observances in an imperfectly organised society,] have not fully acquired the character of law, but are on the verge of becoming law."³ The analogy last suggested is no doubt a very exact one, but it must always be remembered that international law may have attained to a perfect development of type, and may therefore be an inchoate law never destined to reach maturity.

It could only become perfect law if the general body of States comprised a tribunal sitting to decide disputes by reference to established principles, and able to enforce their awards on recalcitrant members of the international family. It would then become law without ceasing to be international. It was hoped that the Hague Conference of 1907 might result in the establishment of a court clothed with the first but not with the second of the above attributes; and the institution of such Conferences naturally directed attention to the possibility of an age of peace. Serious thinkers, not daring to hope that the future will differ materially from the past, while human character and human motives remain unchanged, gave little encouragement to the more ambitious of the Russian proposals which led up to the first Hague Conference. The charge of cynicism sits lightly upon those who sorrowfully believe in the inevitableness of war, for such a view is consistent with a very sincere detestation of its horrors. Before the outbreak of the Great War 1914 there was a tendency in various quarters, particularly among those whose occupations happen to be pacific,⁴ to exaggerate the other side of the picture.

¹ 7 Anne, c. 12.

² Cf. on the question what rules of international law will be treated as binding by municipal courts, *Cook v. Sprigg* (1899), A. C. 572; *West Rand Central Gold Mining Co. v. Rex* (1905), 2 K. B. 391. And see p. 18, *infra*.

³ *Jurisprudence*, p. 13.

⁴ Thus T. D. Woolsey, a very humane writer, cheerfully observes (*Introduction to International Law*, ed. 5, p. 184): "To States, by the divine constitution of society, belong the obligations of protecting themselves and their people, as well as the right of redress, and even perhaps that of punishment. To resist injury, to obtain justice, to give wholesome lessons to wrongdoers for the future, are prerogatives deputed by the Divine King of the world to organised society, which, when exercised aright, cultivate the moral character and raise the tone of judging throughout mankind." The passage is well known from Mr. Gladstone's Midlothian speech, 17 March, 1880: "However deplorable wars may be, they are among the necessities of our condition; and there are times when justice, when faith, when the welfare of mankind require a man not to shrink from the responsibility of undertaking them. And if you

Their views receive little encouragement from men who have seen war face to face. It is a curious commentary on the psychological materials to which our modern peacemakers are driven, that their strongest argument is drawn from the growing destructiveness of modern weapons.¹

The conclusion of the Great War, which had been waged with such unprecedented intensity, found the exhausted Allied nations and their statesmen, who had widely advertised it as a "War to end War," ready to consider plans to ensure future peace, better in design and more ambitious in scope than could have been sensibly discussed at the Hague Conferences. Provisions to this end were eventually agreed and incorporated in all the Treaties of Peace and are to be found in those parts of the Treaties, and those parts only, which consist of the Covenant of the League of Nations. The League will be considered later, but the possible effect of the "sanction clauses" of the Covenant on the nature of international law and its progress from inchoation to maturity falls to be considered at this stage.

The Covenant contains comprehensive provisions for the pacific settlement of disputes between the fifty-five States members of the League. Each member is pledged to submit any dispute likely to lead to rupture between it and another member to inquiry by the Council, or to arbitration before an agreed tribunal, or to judicial settlement by the Permanent Court of International Justice. The member concerned is bound to accept the verdict of the Permanent Court, the award of the arbitrators, or the unanimous finding of the Council, as the case may be, and is pledged not to go to war with any member complying with the decision given. (Articles 12, 13 and 15.) Disregard of these provisions lays the offending member open to the application of sanctions in accordance with the provisions of Article 16:

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-undertake war, so also you are often obliged to undertake measures which may lead to war." The reader will remember numerous pronouncements of a similar character that were made at various periods during the Great War.

¹ Cf. J. S. Bloch, *La Guerre*, 6 vols. Trans from the Russian (Paris, 1898).

breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the Covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to prevent the Covenants of the League.

Effect of
sanction
clauses in
international
law.

This Article, which *prima facie* provides a wide sphere of international law with a coercive power such as it has never hitherto possessed, is to the jurist the most significant part of the Covenant. Now the Covenant of the League is a treaty between its members, and its preamble contains a pious declaration by the signatories of an intention to promote "a scrupulous respect for all treaty obligations"; it must be presumed that the signatory State (it is to be observed that no member of the League has been coerced into membership) intended to honour the provisions of the Covenant, including Article 16. The inherent defects of the sanction clauses and the almost insuperable difficulties in their application in certain circumstances must be acknowledged and considered, but after making allowance for these limitations, it still remains that the inclusion of Article 16 in a treaty ratified or executed by fifty-five States marks an important change in the character of general international law,¹ in that, as between these fifty-five States, it provides a sanction for the specific provisions for the pacific settlement of disputes, and, generally, for the sanctity of treaties. The change is not complete; indeed it cannot be until the League is all-embracing in its membership and unrestricted in its sphere of action.² Yet a change it clearly is. The wrongdoer can now be distinguished as the State

¹ The term "general international law" is employed in the sense, in which it is used by Oppenheim, of that contained in a law-making treaty between the majority of States, including leading Powers. "General international law has a tendency to become universal." Oppenheim, i. § 18.

² See *infra*, Chap. 111A.

that resorts to war in disregard of the provisions of the Covenant. Punishment follows—not, as once it was, the penalty of having to wage a war that in its result might justify the wrongdoer but at the least an economic boycott which if rigorously applied would be a decisive weapon against any highly developed modern State. The possibility of the application of such measures should be more effective than the fear of offending international public opinion in securing a higher regard for the principles of international law and, by compelling, nations to travel more frequently in the track of those principles, it should materially contribute to their clearer definition. But however high the hopes that inspired the framers of the Covenant, it must be acknowledged that "the enforcement of any such sanction, must ultimately depends on the support of an educated public opinion,"¹ which has not so far been put to the test.

The measures outlined in the Article have not been in any instance put into practice. The only claim for their efficacy is that in 1921 when Jugo-Slav troops invaded Albania, the prospect of the imposition of sanctions which was being considered by the Council produced from Jugo-Slavia explicit promises to respect the Albanian frontier. Serious doubts exist whether the sanction clauses would operate automatically as provided or could be² effectively put into operation, particularly as their effect upon States which are not members of the League would inevitably be to raise a crop of international problems and complications for the garnering of which the Covenant does not provide. These doubts and difficulties have led to many discussions on the Article in the Assembly of the League and in various Commissions set up by the League. No agreement has been reached as to amendment, and the result has been a tendency to seek within the terms of the Article limitations of its own apparently all-extensive character. In a collective note from Belgium, Great Britain, France, Italy, Poland and Czecho-Slovakia to Germany accompanying the Final Protocol of the Locarno Conference, 1925, the signatories agreed that, in so far as they were concerned, the obligations resulting from Article 16 on the members of the League "must be understood to mean that each State member of the League is bound to co-operate loyally and effectively in support of the Covenant and in resistance to any act of aggression to an extent which is compatible with its military situation, and takes its geographical position into account."³

Sanction
clauses in
practice.

A further limitation seems to be implied from the interpretation adopted by Germany in the Note addressed to the Union of Socialist

¹ Hall, 8th ed., p. 15. n.

² An amendment to limit the automatic operation of the economic boycott has been proposed, but has not received sufficient ratifications to bring it into effect.

³ *The Times*, 20 October, 1925.

Soviet Republics at the signing of the German-Soviet Treaty of April 1926. The Note considers the effect on Articles 16 and 17 in the event of Germany becoming a member of the League, and observes "that the question whether the Union of Socialist Soviet Republics is the aggressor in the event of a conflict with a third State can only be determined with binding force for Germany, with that State's own consent; and that, therefore, an accusation in this sense settled by another Power against the Union of Socialist Soviet Republics and regarded by Germany as unjustified, would not oblige Germany to take part in measures of any kind instituted on the authority of Article 16."¹

Treaty of Washington A further but considerably less ambitious attempt to provide international rules with definite sanctions was made in the Treaty of Washington (1922) between the British Empire, France, Italy, Japan and the United States. The Treaty provides that belligerent submarines shall be subject to the same rules that govern surface warships in visit, search and capture.

Violation of these rules by any person in the service of the signatory Powers is declared to be an act of piracy punishable by the civil or military authorities of any Power within the jurisdiction of which the pirate may be found. All other nations are invited to adhere to these provisions which for the first time enable neutral States without going to war to punish a breach of the laws of war committed by one belligerent against another. The Treaty thus endeavours to remove from the sanctions of the laws of war the fetal defects which the Great War made so patent

The question has been often discussed and differently answered, how far civilised States consider the admitted rules of international law to be binding upon their own tribunals in cases not covered by the municipal law.² So far as this country is concerned, the statute Anne, c. 12, is expressed to "declare" not to "enact," the privileges of ambassadors, and the preamble recites an insult "contrary to the law of nations." A judgment of Lord Mansfield³ contains an interesting observation on this point: "I remember a case before Lord Talb of *Buvot v. Barbert* in which Lord Talbot declared a clear opinion that the law of nations in its full extent was part of the law of England, and that the law of nations was to be collected from the practice of different nations and the authority of writers. And

¹ *The times* 27 April, 1926.

² cf. T. F Holland, *Studies in International Law* (Oxford, 1898), pp. 176 seq.; J. Weslake, in *Law Quarterly Review*, vol. xxii. (1906), pp. 14-26; reprinted in his *Collected Papers* (Cambridge, 1914), pp. 498 seq; W. W. Willoughby, *American Journal of International Law*, vol. ii., pp. 357 seq.

³ *Triquet v. 27th* (1764), 3 Burr. 1478.

accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, etc, there being no English writers of eminence on the subject I was counsel in the case and have a full note of it I remember, too, Lord Hardwicke's declaring his opinion to the same effect"¹

Other English authorities in the eighteenth century and in the earlier part of the nineteenth are similarly in favour of the view that international law forms part of the law of England, so that English courts are bound to take cognisance of it and apply it in a proper case whether or not the English law provides them with an express warrant²

The generous verbal tributes to international law, which are so familiar, are not reinforced by practice on this point, and the opposite conclusion forcibly stated in 1876, by Cockburn, C.J., in *Reg. V. Keyn*,³ is difficult to refute: "And when in support of this position . . . the statements of the writers on international law are relied on, the question may well be asked, Upon what authority are these statements founded? When and in what manner have the nations who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given. For even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilised nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding the law must have received the assent of the nations who are to be bound by it. . . . Nor in my opinion would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply without an Act of Parliament what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the Legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law: but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on."⁴

To the same effect Lush, J.,⁴ observed: "International law . . .

¹ Cf. *Heathfield v. Chilton* (1767), 4 Burr. 2015.

² Blackstone, *Commentaries* (1765), iv. 67; Lord Ellenborough, in *Wolff v. Oxholm* (1817), 6 M. & S. 92; Lord Stowell, in *The Maria* (1799), 1 C. Rob. 350; *The Recovery* (1807), 6 C. Rob. 348.

³ (*The Franconia*), L. R. 2 Ex. D. 202, 203. ⁴ L. R. 2 Ex. D., at p. 239.

cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament"

An intermediate view was expressed by Lord Alverstone, C.J., in the case of the *West Rand Central Gold Mining Co. v. The King*¹: "It is quite true that whatever has received the common assent of civilised nations must have received the assent of our country and that to which we have assented, along with other nations in general, may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient." 1

This would appear to recognise that a rule of international law will, without municipal legislation, be enforced in a municipal court if it can be proved from history and not from text-books; but the dictum was not essential to the decision of the case.

Probably the British practice is accurately stated in the two following propositions:

- (i.) International law is not administered by municipal tribunals unless it has been adopted by the State Legislature, and such adoption will not be presumed.
- (ii.) Municipal law will, where possible, be so construed in doubtful cases as not to conflict with the rules of international law.

In "municipal tribunals" there are not, for the purpose of the above remarks, included national prize courts. These, though they may be bound by positive enactments of the Legislature, administer a law deduced from international practice and agreement which need not necessarily have been endowed with any legislative authority.²

In the United States the doctrine that international law is part of her own national law has been recognised for more than a century. In 1804 Marshall C.J., declared that "an Act of Congress should

¹ (1905), 2 K. B. 391.

² As to the relation of prize courts to the municipal law of their country, see *infra*, p. 28.

never be construed to violate the law of nations if any other possible construction remains"¹; and a few years later (1815), he held that the law of nations constituted "part of the law of the land."²

Similarly, in 1871 the American court observed: "No single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilised countries. It is of force, not because it is prescribed by any superior power, but because it has been generally accepted as a rule of conduct."³

Again, in 1899 the Supreme Court of the United States,⁴ declaring the exemption from belligerent capture of coast fishing-vessels peacefully pursuing their ostensible calling, in accordance with an inveterate usage of civilised peoples and despite the absence of express treaty, proclamation or municipal law, observed (Gray, J., delivering the judgment of the majority of the court): "International law is a part of our law, and must be ascertained and admitted by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilised nations."⁵

We may summarise briefly the views expressed in this chapter Summary. as to the real nature of international law: It consists of rules to control relations which have a legal rather than a moral character; its treaties and controversies have assumed a legal guise, encouraged by a general willingness to increase their apparent obligatoriness, but it is habitually deficient in that coercive side of the term law, which is above all others essential and characteristic.⁶ All civilised nations agree that they are bound by its principles, and in the majority of cases find it convenient to observe them. On the other hand, these principles are not infrequently violated, and breaches may be consecrated by adding successful violence to the original offence. In reality the sources of its strength are three:

- (i.) A regard—which in a moral community often flickers but seldom entirely dies—for national reputation as affected by international public opinion.

¹ *The Charming Betsey* (1804), 2 Cranch, 64, at p. 118.

² *The Nereide* (1815), 9 Cranch, 383, at p. 423.

³ *The Scotia* (1871), 14 Wallace, 170, at pp. 187, 188.

⁴ *The Paquete Habana* and *The Lola* (1899), 175 U. S. 677, at p. 700.

⁵ This statement was a reproduction of a passage in the judgment delivered in *Hilton v. Guyot* (1894), 159 U. S. 113, at p. 163.

⁶ See p. 14, *supra*, where the effect of the "sanction clauses" of the Covenant of the League of Nations is considered.

- (ii.) An unwillingness to incur the risk of war for any but a paramount national interest
- (iii.) The realisation by each nation that the convenience of settled rules is cheaply purchased, in the majority of cases, by the habit of individual compliance.

It remains to be seen what actual accession of strength, of a more tangible kind than the above, certain of its rules have acquired by virtue of Article 16 of the Covenant of the League of Nations.

PART I

SOURCES OF INTERNATIONAL LAW; INTERNATIONAL PERSONS; AND STATE REPRESENTATIVES

CHAPTER I

SOURCES OF INTERNATIONAL LAW

THE name "International Law," so far as its use in English is Name. concerned, is due to Jeremy Bentham. In a well-known passage he observes: "The word 'international,' it must be acknowledged, is a new one, though it is hoped sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the law of nations: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The Chancellor d'Aguesseau has already made, I find, a similar remark: he says that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens*,"¹

This terminological innovation was already, in a Latin form—*jus inter gentes*—adopted in the sixteenth century by the Spanish Dominican theologian and jurist, Franciscus a Victoria²; this usage was followed, and its greater appropriateness was emphasised, by the distinguished English civilian, Richard Zouche, in the next century.⁸ The other early writers on the law of nations invariably made use of the less definite and less precise expression, *jus gentium*.

International Law is to be carefully distinguished from the body of rules variously known as Conflict of Laws, Private International Law, and Comity of Nations. These rules form part of the private law of every civilised nation, and determine the appropriate *jus* and the appropriate *forum* in disputes between persons of different

¹ Bentham, *Introduction to the Principles of Morals and Legislation* (1789), xvii, 25, n.

² (1480-1546). *Relectiones theologicae* (Lyons, 1557). See the article on him by C. Phillipson, in *Journal of Comparative Legislation* (London, July 1915).

⁸ *Juris et judicii fecialis sive juris inter gentes et quastiojnum de eodem explicatio* (Oxford, 1650). See the article on him by C. Phillipson, in *Great Jurists of the World*, pp. 220 seq.

nationalities or different domiciles, as the case may be. They are in no way concerned with the reciprocal legal relations of States.

It was pointed out in the introductory chapter that, by a comparatively modern development in the history of nations, codes are being drawn up which, like the Hague Conventions of 1899 and 1907, the Declaration of London of 1909, and the International Air Convention of 1919, are partly declaratory of existing practice, so far as it can be ascertained, and partly agreements enunciating new law; and even should such codes fail to be ratified, they will probably be treated as carrying great authority by all the nations whose delegates shared in their drafting, unless the failure to ratify implies a specific repudiation. It was suggested that, in all matters not dealt with by such codes, the rules of international law are not a perfect system, existing somewhere in the clouds and intuitively determinable, but are generalisations inductively drawn from the practice of civilised States in their mutual dealings. The adoption of this view effects an immense simplification in the study of international law; when once the *a priori* method is laid aside, the occasions for obscurity become infinitely fewer, and the science at least rests upon a firm historical basis. To decide whether a given practice is legal or illegal, an examination of precedents is necessary, of a kind very familiar to all lawyers. If authority pronounces itself in favour of a particular practice, a writer who disapproves of it must content himself with advocating a change.

We may, with the late Professor Westlake,¹ admit "reason" as a source of international law, in so far as by "reason" is meant the discovery of principles from precedents, the application of these principles to new cases, and, it may be, the propounding of new rules to meet the changing conditions of modern life; but international law will never acquire the strength sufficient to carry it through a period of strain unless authority is made to exclude individual opinion almost as decisively as it does in our English system. To underrate the influence of the great jurists would be a proof of inattention or ignorance; but aggressive States are little likely to soothe the suggestions of ambition by admonitions drawn from Grotius, Puffendorf, Vattel, Heffter, or other international jurists, unless the practice of rival nations has lent them in additional semblance of authority. If these views are well founded, the sources² of international law ought

¹ Westlake, *International Law* (Cambridge), 1910, part i., p. 15.

² It is submitted that the above use of the term "source" of law is the most correct and analogous. The Roman expression was *fons juris*, and the metaphor was responsible for a like ambiguity in Latin usage. In both popular and strict language the source of a legal rule is the author of its legal character. Thus in England the only source of law is the Crown and the two Chambers acting harmoniously, political speculation and the science of legislation are

not to be very difficult to discover. They will first be sought in such formal agreements as have been drawn up by international Conferences of statesmen and jurists, and where these fail, it is hardly too much to say that the sole source of law is national practice. But several media of proof are admissible to establish this practices and two qualifications are necessary. Recent practice is more binding than that Which is older, and, where nations differ, the value of competing precedents must be determined by reference to the number and importance of the States adhering to each, and their relative interest in the subject in question. Rules of maritime law, for instance, must be mainly sought in the practice of the leading maritime States.

The following are the *chief* agencies by which the rules of international law are commonly ascertained:

- (i) The writings of jurists.
- (ii) International treaties.
- (iii.) Opinions invited by their own Governments from experts in international practice.
- (iv.) Declarations of law made by tribunals of international arbitration.
- (v.) Decisions of prize courts and similar tribunals,
- (vi.) Private instructions given by individual States to their armed forces, and to diplomatic representatives.

These may be considered in order.

1. WRITINGS OF JURISTS

The writing of such men as Ayala, Gentilis, Grotius, Puffendorf, | Bynkersboek, Vattel and G. F. de Martens have undoubtedly contributed greatly to the development of rule controlling the intercourse of States, and it is important to notice exactly how their influence has been exerted. In some cases, by minute historical investigation, these great jurists have influenced practice by recalling it to the channel of an almost-forgotten precedent. In others they have openly advocated changes which, by their inherent reasonableness, have afterwards procured acceptance for themselves. Here, in an indirect and circuitous sense, works of writers give birth to law, just as the persuasive tongue of a diplomatist may cause the adoption

the "sources" whence spring the *ideas* by which the "source of law" is excited into activity. (Cf., however, Austin, lect. xxviii.) Some modern writers make use of the expression "evidences of international law," and classify under this heading the various sources of the law of nations hereinafter set out. (Cf. T. A. Walker, *The Science of International Law* (London, 1893), chap. 2; cf. the principles by which the Permanent Court of International Justice guided: Art. 38 of the Statute of the Court, p. 175, *infra*.)

or abandonment of an international practice; but the real source of **the law**, the decisive criterion of its existence, is not the argument of the book or the speech, but the imprimatur practically supplied to international adoption. It is no "doubt true that these writers have been repeatedly cited in English courts (as well as in foreign), and that their opinions have often been judicially considered: the explanation is to be found in the presumption, inevitably drawn by English lawyers, that such authorities may be relied upon to supply a trustworthy statement of existing practice. They are cited as much as Blackstone and Coke are cited, not to make legal rules, but to prove their existence, and to construe them in a doubtful case. The passage of Chancellor Kent¹ is well known in which he affirms that "no civilised nation that does not arrogantly set all law and justies at defiance will venture to disregard the uniform sense of the established writers in international law." This view was accepted in 'the recent American case, *The Paquete Habana*,² where, however, Gray, J., added that the works of such writers are consulted by courts of justice, not for their speculations as to what the law ought to be, but for trustworthy evidence of what the law really is. Similarly, in *Reg. v. Keyn*,³ Lord Coleridge emphasised the importance of the writings of jurists as evidence of prevailing international law and usage; and Cockburn, C. J., held that the opinions of such writers could not make law apart from the assent of civilised nations. In *Macartney v. Garbutt*,⁴ Matthew, J., deciding the question of exemption in the case of a subject who had unreservedly been received as a member of a legation from a foreign State, was guided by the opinions expressed in the productions of leading authors. It is universally conceded, however, as Lord Alverstone, C.J., observed,⁵ that "the views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilised nations is enlarged." But it is quite certain that no conclusions resting upon *a priori* reasoning, and unsupported by international practice, ever have commanded the "uniform sense" of such writers. Their unanimity will usually coincide with a reasonable unanimity, or at least a preponderating weight, of international precedent.

¹*Commentaries on American Law*, i, 18. (This passage was quoted with approval by Mr. Justice Gray, in delivering the opinion of the Supreme Court of the United States in *The Paquete Habana*; *The Lola* (1899), 175 U. S. 677.)

²(1899), 175 U. S. 677, 700. See also *Hilton v. Guyot* (1894), 159 U. S. 113, 163, 214.

³(1876), L. R. 2 Exch. Div. 63, at pp. 154, 159.

⁴(1890), 24 Q. B. D. 368, at p. 369.

⁵*West Rand Central Gold Mining Co. v. Rex* (1905), L. R. 2 K. B. 391, at p. 40a.

II. TREATIES

We are here concerned not generally with the conventional law of nations, but with treaties as evidentiary of legal rules. For this purpose a broad classification of treaties may be usefully made into:

- (a) Treaties which purport to be declaratory of existing law, or formative of new law (the latter may be conveniently termed law-making treaties);
- (b) Non-declaratory treaties.

(a) *Declaratory Treaties*

The value of such agreements is very high, though it will naturally vary with the influence and number of the nations who are co-signatories. If a majority of the civilised Powers formally and deliberately sanction a principle, its legal character becomes definitively binding upon those who assent to the treaty, and it may be, by effluxion of time, upon other nations also.¹ The Congress of Vienna in 1815, the Declaration of Paris in 1856 (in which the signatory parties proposed to introduce "fixed principles" in international relationships), the Geneva Conventions of 1864 and 1906, the Declaration of London of 1871,² the Treaty of Washington of the same year, the Berlin Congress of 1885, the Hague Peace Conferences of 1899 and 1907, and the Declaration of London of 1909, the Peace Treaties³ after the Great War, the International Air Convention of 1919, the Treaties of Washington of 1921, all belong to or resulted in the class of agreement under consideration. A declaratory treaty, which is largely adopted by influential States, will hardly be resisted for long by an isolated non-signatory, and even where the treaty is avowedly formative of new law, convenience, public opinion, and the authority of its sponsors are likely insensibly to induce acceptance.

(b) *Non-declaratory Treaties*

Under this head may be quite conveniently included all conventions between individual Powers, or a number of Powers falling short of a concert, to affect particularly the relations of the signatory Powers. It has been often observed that such treaties ordinarily

*The Declaration of Paris was respected during the Spanish-American War (1898) by both belligerents, though they were non-signatory Powers. All civilised States have tacitly acquiesced in the Suez Canal Convention of 1888, and in the Hay-Pauncefote Treaty of 1901 regulating the navigation and control of the Panama Canal.

¹ See *supra* p. 10.

² The Treaties of Versailles (1919) with Germany, of St. Germain (1919) with Austria, of Neuilly (1919) with Bulgaria, of Trianon (1919) with Hungary, and of Lausanne (1923) with Turkey.

INTERNATIONAL LAW

possess very little evidentiary value; indeed, they are less likely to show what the law is than what the law is not, for nations, like individuals, are unlikely to stipulate expressly for objects of which the law itself assures them. If two nations agree by treaty that a particular article shall be contraband, there is *prima facie* reason for supposing the commodity to be innocent by the common law of nations. Bynkershoek¹ has grafted a reasonable qualification upon the severe common sense of this view. He points out that when a long succession of treaties between the great civilised States has stipulated for a modification of the common law, so that such a modification has in practice become almost universal, there comes a time when the original rule perishes from inanition and is replaced by its successor. The exact moment of change may be difficult to determine, but illustrations of the completed process could be readily multiplied.

III. OPINIONS or JURISTS IN ANSWER TO THEIR OWN GOVERNMENTS

The value of such opinions as evidence of international law is clearly somewhat one-sided. At most they can only bind the country which elicits them, and even then, if the point of submission be genuinely doubtful, the obligation is mainly conscientious. Still there are occasions when such opinions may be usefully employed by an opponent in reliance on a principle which in English law is called estoppel. A civilised nation could scarcely act in the teeth of its own law advisers. In this country the opinions of the law officers of the Crown in international disputes certainly supply a weighty indication of English practice, and if foreign countries associate themselves with such doctrines in a more overt manner, a general rule springs up, the obligation of which Great Britain could hardly disregard.

iv. TRIBUNALS OF INTERNATIONAL ARBITRATION

In the nineteenth century about thirty considerable disputes were settled by means of arbitration tribunals.² The importance which the judgments in such cases might be expected to possess has been sometimes lessened by a previous agreement on the legal points involved, leaving only the facts to be dealt with in the submission. Thus in the Geneva Arbitration the United States insisted upon a preliminary statement of the principles which were to guide the

¹ *Quaestiones juris publici*, lib. i. c. 14, § 69.

² For the effect of international arbitration on international law, see Phillipson, *Studies in International Law* (London, 1908), pp. 1-49.

arbitrators in their consideration of the facts. Where a reference is unlimited, and the tribunal impressive, the moral weight of its decision will no doubt be considerable; third parties, of course, are in no way bound by its conclusions, and in at least one case a party to the submission has repudiated the decision.¹

v. PRIZE COURTS

Prize courts are often called international courts, and the name is justified in so far that the law administered by such tribunals is not municipal but international. They are, however, the creatures of positive municipal law, and their decisions are binding, not through any international sanction, but because the court is seised, in the legal phrase, of the subject in dispute, and can make practically effective the jurisdiction committed to it by its own positive law. These courts are set up by belligerents to try disputes between their own Governments and subjects and the Governments and subjects of other States. Their decisions supply very valuable evidence of international practice, and by comparing the judgments of the prize courts of different countries on similar points, one is often enabled to arrive at positive conclusions of international law.

The functions of such courts were well described by Sir W. Scott in *The Maria*². " In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me: namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral, and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm³ —to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit

Functions of
prize courts.

¹ In 1863 the United States rejected a hostile award on the British-American boundary question. It is clear, however, that the Hague Peace Conference, and, still more, the League of Nations, have extended the scope of international arbitration, as will be shown in the chapter on International Arbitration.

² (1799) 1 C. Rob., at p. 349. Cf. *The Recovery* (1807), 6 C. Rob. 341. 348; *The Ltucade* (1855), Spinks, 213; *The Ostes* (1856), 5 Moo. P. C. 150.

* The neutral litigant was of Swedish nationality.

to belong to Great Britain in the same character. If therefore I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question. . . ."

Law admini-
stered by
price courts.

In 1916, in *The Zamora*, the Privy Council said that "the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. . . . A court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement."¹ In 1915, in *The Elida*, the Imperial Supreme Prize Court in Berlin observed in the course of its judgment: "The prize courts, when judging of the legality of prize actions, can take general international principles only into account when the Prize Regulations contain no instructions and, therefore, tacitly refer to the principles of international law."²

It has been observed that the authority of prize courts rests upon municipal law.³ In *The Zamora* the Privy Council observed: "It cannot, of course, be disputed that a Prize Court, like any other court, is bound by the legislative enactments of its own sovereign state. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court, in giving effect to such provisions, would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court, as an interpreter of the law of nations, would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by

¹ *The Zamora* (1916), 2 A. C. 77, at p. 89. Similarly, in *The Odessa* (1916), A. C. 145, at p. 154.

² *The Elida* (1915). Amer. Journ. of Int. Law. vol. x. (1916), p. 917.

³ Oppenheim, i. § 21a and ii. § 434, holds that the trial of captured vessels is purely a municipal matter—prize courts applying only the law of their country. In the American case, *Thirty Hogsheads of Sugar v. Boyle* (1815), 9 Cranch, 191, 198, Marshall, C. J., observed: "The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country and will be considered in adopting the rule which is to prevail in this."

the Executive Orders of the King in Council."¹ The power of dictating the grounds upon which their decision shall proceed is logically involved in this fact; it was assumed by England and France in the Napoleonic wars, and is assumed by some nations at the present day.² The practice is unfortunate, for international law is thereby menaced on its strongest side.

With the proposed establishment of the International Court of Appeal, provided for by the Hague Conference of 1907, we deal fully elsewhere: it is only necessary to point out here that its decisions (as well as those of the projected Permanent Court of Arbitration) would transcend in authority those of any national court, and form a body of case law which no nation, save in the most exceptional circumstances, would be likely to disregard. The decisions of the Permanent Court of International Justice do not over-ride those of municipal tribunals and, by Article 59 of the Statute of the Court, are to have no binding force except as between the parties and with regard to the particular case. As the Court must respect and already tends to follow its own decisions this provision will not altogether prevent the growth of a body of international case law.³

VI. INSTRUCTIONS ISSUED BY STATES TO THEIR ARMED FORCES, DIPLOMATIC AGENTS, ETC.

The practice of issuing manuals for the guidance of officers in the field was first adopted by the United States, towards the close of the American War of Secession. The Conference of Brussels (1874) was followed by a multiplication of such manuals, and instructions of this kind are now issued by Great Britain, France, Germany, and most other civilised countries. In 1899 the representatives of the Powers attending the Hague Conference agreed to embody in their official instructions to their forces the provisions of the Convention then arrived at on the laws and customs of land warfare.⁴ It is clear that the direct authority of a single ma i may

¹ *The Zamora* (1916), 2 A. C. 77, at pp. 90, 91. And see *The Alvina*, 34 T. L. R. 199; *The Stigstad* (1919), A. C. 279; *The Leonora* (1919), A. C. 974.

² See Sir E. (now Earl) Grey in *The Times*, 8 April, 1909.

³ See p. 176, *infra*.

⁴ The present British manual was drawn up by Colonel Edmonds and Professor Oppenheim. The German official manual, *Kriegsbrfuch im Land" kriege*, issued in 1902 (recently translated into English by Professor Morgan), has deservedly been subjected to severe criticism, on the ground that many of the Hague regulations are therein harshly construed, and are incompatible with the spirit and object of the said Convention. The carrying out of the instructions of the German manual—not to mention other violations of war law—by the German forces in the Great War, called forth the unanimous condemnation of the civilised world.

be of inconsiderable value, but if a rule is unanimously, or even generally, affirmed in these private instructions, it is very reasonable to suppose that it has made its way into international law. The result is highly satisfactory. It is above all things desirable that the rules of war should be ascertainable, and a collation of the manuals of usage makes it possible to state with confidence many general rules on belligerent practice.¹

¹ But in the recent *Bundesraih* controversy with Germany (1899), Lord Salisbury declined to be bound by the English Admiralty regulations. (See *Parliamentary Papers* (1900), *Africa*, No. 1.)

CHAPTER II

INTERNATIONAL STATUS OR PERSONS IN INTERNATIONAL LAW

STATES and States alone enjoy a *locus standi* in the law of nations; they are the only wearers of international personality. This fact has been sometimes obscured by the occasions on which one State finds itself face to face with the individual citizens of another, and is permitted to assume jurisdiction over them of a quasi-penal character, for acts not in themselves illegal. The practice is exceptional, and will be considered in its place. A clear distinction, too, must be drawn between States and their Sovereigns or Governments. The Holy Alliance in 1820¹ attempted to set up particular types of Governments as international entities, and agreements between States is agreements between their rulers; but the theory was repudiated by Lord Castlereagh in 1821, and it is contrary to the generally accepted principles of international law. Subjects of international law.

The diplomatic representatives of States in foreign countries are not themselves subjects of international law, and, as Professor Holland has noticed,² it is misleading to describe them as international persons. But at the same time they undoubtedly derive a reflected personality from their principals, and by this reflection their legal position is generally affected. Under these circumstances the present chapter may be conveniently followed by a brief description of the privileges and duties of diplomatic agents.

A State within the meaning of international law may be described International States. is a permanently organised society, belonging to the family of nations, represented by a Government authorised to bind it, independent in outward relations, and possessing fixed territories. In detail, every society claiming admission to the law of nations must satisfy the following requirements:

- (i.) It must be represented by a Government which receives *a de facto* allegiance from its subjects, Characteristics of a State.
- (ii.) It must be a sovereign independent State,
- (iii.) It must exhibit reasonable promise of durability.

¹ See *infra*, p. 82.

² *Elements of Jurisprudence* (Oxford, 1916), p. 594.

- (iv.) It must possess definite territories,
- (v.) It must be recognised as a member of the family of nations.¹

It is proposed to examine the various elements attributed above to international personality.

Existence of
1 Govern-
ment.

(i) The society must be represented by a Government which receives a *de facto* allegiance from its subjects, and recognition of it as an international State may properly be postponed, owing to internal instability, as formerly in the case of Chile,² or while the issue of an armed revolt is still in doubt. The necessity for this requirement will be readily seen. The stability, and indeed the existence, of international relations would come to an end if negotiations with a Government were liable to be interrupted by assumptions of direct control on the part of its subjects. With the refinements of *de jure* claims international law is in no way concerned. For reasons which will appear later it is, or should be, completely indifferent to the political character which the constitution of a particular country bears. Revolutionary committees, absolute monarchs, constitutional assemblies—all these are treated alike by the practice of nations, provided that they appear to rest upon a stable basis. The reservation is necessary, and is only an application of the caution, so familiar in private law, that negotiations are unsafe with an imperfectly accredited agent. But there may be a society under a *de facto* Government which is nevertheless not an independent State, as, for, instance, where a territory is occupied by military force against the authority of a previously established Government. The Confederate States in these circumstances were conceded the rights of belligerency but not of international independence.³ Such a Government lacks the element of durability which we shall see to be necessary.

Sovereign
independ-
ence.

(ii) The society must be a sovereign independent State, that is to say, its internal control of all persons and things within its territory must be complete and exclusive, and its external relations must be independent of the control of any other society. This requirement

¹ States undistinguished by the above marks are in theory beyond the pale of international law. If civilised nations observe its rules in their dealings with barbarians, it is pursuant to the rule *legibus solvit legibus vivimus*. The English contention on the subject of dum-dum bullets supplies a curious illustration of this fact. The retention of the bullet was defended because it was found necessary to check the onslaughts of savage enemies. The legitimacy of the plea may be admitted on moral as well as legal grounds, if an equally effective and less barbarous check is unknown.

² Hall, 8th ed., p. 107. Internal instability was one reason for delay in the recognition of the U.S.S.R. (Union of Socialist Soviet Republics, otherwise Soviet Russia).

³ Oppenheim, i. § 74. *Thorington v. Smith* (1868), 8 Wallace, pp. 8-xi.

is fundamental in modern international practice.¹ It is, however, in no way essential to the conception of jural relations between States; it was little in harmony with the hierarchical bias of mediaeval feudalism, to which the idea of dependence upon a superior was more familiar than that of independent equality. As Hall² truly says: "If indeed a law had been formed upon the basis of the ideas prevalent during the Middle Ages, the notion of the absolute independence of States would have been excluded from it . . . it must have involved either a solidification of the superiority of the empire or legislation at the hands of the Pope." The ground of this requirement of sovereign independence is substantially the same as that of the requirement of *de facto* allegiance to a Government: the object of both is to secure finality and permanence of obligation, to which the least degree of dependence upon a superior would be fatal. Speaking generally, therefore, there can be no degrees of independence. A State is either an independent unit or it is not, and there is no half-way house; though States in a position of imperfect independence may, like individuals, enter into relations of which international law is bound to take cognisance.

As the form of a State's government is irrelevant, so also is it irrelevant to consider the means by which it attained independence. International law has, or ought to have, no concern with the moral conduct of those who are responsible for its foundation.

The relations between States are of many varying degrees. Two or more States may be so closely united that the supreme power for all purposes, both foreign and domestic, is in one body, as in the case of England, Scotland, and Ireland; and this is known as an incorporate union. If for domestic purposes the States exist as separate entities, their union is sometimes described as real, the instances given being formerly Sweden and Norway,³ and later Austria and

Unions of
States.

¹ Cf. per Lord Finlay in *Duff Development Co. v. Kelantan Government* (1924), A. C. 797: "It is obvious that for sovereignty there must be a certain amount of independence, but it is not necessary for sovereignty that there should be complete independence. It is quite consistent with sovereignty that the Sovereign may in certain respects be dependent upon another Power; the control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or treaties which limit the powers of the Sovereign even in internal affairs without entailing the loss of the position of a sovereign Power." Lord Finlay is a judge of the Permanent Court of International Justice and the quotation indicates a modern tendency, large domains of sovereignty have been signed away in advance by many States in the Covenant of the League, Minority Treaties, etc., and this is forcing a gradual recognition of the statement in the text that the complete sovereign independence of States is not an essential of their jural relationship.

² 8th ed., p. 18.

³ Sweden and Norway were separated by the Treaty of Karlstad, 1905; and Austria and Hungary by the Treaty of St. Germain, 1919.

Hungary; but whether the union in any given case is incorporate, real, federal, or "permanent personal"¹ is a question of nomenclature of no very great importance. Such distinction as there is between "real" and "federal" union is, perhaps, most properly described by the late Professor Westlake as lying "not in the closeness of the international connection existing between the States united, but in the origin of that connection, the term federal being used to denote that a treaty is the origin of a connection identical in its international aspect with that which would be unhesitatingly called real if it arose from succession to a throne, or from internal constitutional change."² Even the union of the United States of America, usually described as federal, is declared by Westlake³ to be incorporate, and only federal by way of reminiscence.

Suzerainty.

Of States in a position of dependence, a distinction must be drawn between those under suzerainty and those under protection. A State under suzerainty is one which being part of the suzerain State has acquired certain of the attributes of international independence⁴: the presumption being that in all other respects it remains dependent. Its subjects are the subjects of the suzerain and it is at war if the suzerain is at war. Its position, in fact, does not differ in international theory from that of an individual State in a federal system.

Since the dissolution of the Holy Roman Empire in 1806, States under suzerainty have become rare, and have been chiefly to be found in the Turkish Empire, where Moldavia, Wallachia⁵ and Serbia, in 1836, at the Treaty of Paris, succeeded in throwing off practically the whole of the authority of the Porte before they were declared by the Treaty of Berlin in 1878 to be independent States.⁸

Korea.

An instance is, however, to be found in the case of Korea,⁷ which was under the suzerainty of China, till the denial of China's claim by Japan and the Chino-Japanese War of 1894-5. After that date Korea was recognised as an independent State by the Treaty of Shimonoseki in 1895, and by an agreement between Japan and Great Britain and a declaration by Russia in 1902. This recognition was, however, of an illusory character, as Russia shortly afterwards

¹The term applied by Twiss to Austria-Hungary after the Pragmatic Sanction of 1723, which provided that the two States should be under one monarch subject to rules of succession by which they could never be separated.

²Westlake, part i., p. 35.

³*Ibid.*, p. 36.

⁴Hall, 8th ed., p. 32.

⁵In 1861 Moldavia and Wallachia were formed into one principality, viz. Rumania.

⁷Sir T. E. Holland, *European Concert in the Eastern Question* (Oxford, 1895), pp. 251-3, 297-303.

⁸See Smith and Sibley, *International Law as interpreted during the Russo-Japanese War*, 2nd ed., p. 19.

placed troops in the country and established what was in effect a protectorate (of which Japan had a nominal share), and the complicated character of the situation was one of the main causes of the Russo-Japanese war, at the beginning of which Japan, while ostensibly guaranteeing Korea's independence, in effect seized the country by force, and stipulated for power to make it the theatre of military operations. But the position of Korea during this period was too abnormal and too temporary to justify any classification according to the ordinary rules of international law, and the final annexation of the country by Japan in 1910 made little if any substantial alteration in its situation.

The international position of Egypt was for a long time curious. Egypt. Nominally under the suzerainty of the Porte, it had in fact become a part of the British Empire; and the permanence of the British occupation was placed beyond doubt. Egypt of late possessed hardly a single element of international character, and neither the outward deference paid to European susceptibilities nor the shadow of control enjoyed by the international courts could disguise the real facts. The British position in the country was reinforced and more thoroughly regularised by the Anglo-French Agreement of April 1904, whereby France renounced her demand for the withdrawal of Great Britain. Later, other Powers formally recognised the occupation. Egypt continued, however, to retain an anomalous international status which was not definitely removed till the Great War. The following announcement was made by the Foreign Office, 17 December, 1914: "His Britannic Majesty's Principal Secretary of State for Foreign Affairs gives notice that, in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of His Majesty, and will henceforth constitute a British Protectorate. The suzerainty of Turkey over Egypt is thus terminated, and His Majesty's Government will adopt all measures necessary for the defence of Egypt and the protection of its inhabitants and interests." Abbas Hilmi Pasha, the Khedive, was deposed, and Prince Hussein Kamel Pasha, the eldest living prince of the family of Mehemet Ali, was put in his place with the title of Sultan of Egypt.

The British Protectorate received during the Great War the tacit acquiescence of the Allied States. The treaties of peace with Germany, Austria, Bulgaria and Hungary contain an express recognition by the ex-enemy States and an implied recognition by the Allied signatories.¹ Thus the consent was obtained of all Powers interested in Egypt, except that of Turkey, which was withheld until a further change in Egypt's position had taken place. In March

¹ Treaty of Versailles, Art. 147; Treaty of St. Germain, Art. 102; Treaty of Neuilly, Art. 63; Treaty of Trianon, Art. 86.

1922 the British Government determined its protectorate and Egypt was declared to be a sovereign independent State subject only to certain reservations for the safeguarding of British interests. The matters reserved within the absolute discretion of the British Government are: (a) the security of the communications of the British Empire in Egypt; (b) the defence of Egypt against all foreign aggression and all foreign interference; (c) the protection of foreign interests and of minorities; (d) the Sudan, which is to remain under the condominium of Great Britain and Egypt. Following this declaration the Sultan issued a Proclamation in which he announced the independence and sovereignty of Egypt and assumed the title of "King of Egypt." By the Treaty of Lausanne (1923) Turkey agreed to recognise the independence of Egypt with its limitations.

South
African
Republic.

Whether the relations between the late South African Republic and Great Britain could be properly described as those of "suzerainty" or not is a mixed question of history and political science with which we are not called upon to deal. It is, however, important to notice that facts which were not and could not be disputed were fatal to any claim by that Republic to international independence. A nation cannot indefinitely surrender the treaty-making power to another,¹ and at the same time retain its existence as a sovereign State.

Protector-
ates.

A protected State on the other hand is one which being *prima facie* independent has surrendered part of its rights to the protector; the presumption being that in all other respects it remains independent. Its subjects owe no allegiance to the protector, and it may be neutral while the protector is at war. The case of a protectorate sometimes raises nice questions; here it is evident that the view taken must depend on the degree of intimacy subsisting between the protecting and the protected States. A convenient evasion of the difficulty describes the position of the protected State as one of qualified or imperfect personality. During the Crimean War the Ionian Islands were under the protectorate of Great Britain. The case is a strong one, because the internal and external affairs of the islands were both controlled by this country, yet their neutrality was scrupulously respected throughout the war.² The explanation may be that the immunity from attack was conventional, for agreements were concluded by this country with Austria, Russia and Prussia, and that

Ionian
Islands.

¹ By the Convention of London in 1884, Art. 4, the Transvaal Republic agreed to make "no treaty with any State other than the Orange Free State, nor with any native tribe east or west of the Republic, without the approval of Great Britain." See *supra*, p. 33, n., 138.

* *The Ionian Ships* (1855), 2 Spinks, 212. Cf. Wheaton (ed. Phillipson), p. 54; W. Forsyth, *Cases and Opinions on Constitutional Law* (London, 1869), p. 472.

the effect of these conventions reacted upon the decisions of prize courts. It is certain that such a neutrality would not be respected for a moment if the protecting State derived any belligerent advantage from its occupation. It is not obvious that any characteristic attribute of personality survives to a State whose executive and foreign relations have passed into other hands, and it might be less misleading to note the claim to neutrality as exceptional, than to magnify a *scintilla juris* by such a description as imperfect personality. It may be further observed that if one of two belligerents were likely to derive any advantage from attacking a State, protected and controlled internally and externally by the other, it is not clear on what principle he would be bound to abstain from doing so; the protected State has made a surrender of all that is essential to national character, and the claim to respect an independence which has become purely nominal is little likely to impress practical statesmen.¹ Korea, for instance, as we have already pointed out, though at the time nominally an independent but in fact a protected State, was made a battleground during the Russo-Japanese War: a position entirely inconsistent with all theories of independence and neutrality.

The word "protectorate" is also used to describe those assumptions of limited control over, without actual occupation of, the territory of uncivilised tribes, which are a notable feature of the modern partition of Africa. With these protectorates, international law is Africa. concerned in that the claim of the protecting State is generally recognised as debarring other States from interference, as laying upon it a correlative responsibility for the security of the subjects of other States within the protected area, and as imposing on the subjects of other States the duty of submitting to the jurisdiction of the protecting State within that area²; and according to the German view, which will probably become universal, the native subjects of the protected area are to be treated, when temporarily in other territory, as the subjects of the protecting State.³ But the rules of law on this question are in a vague and indeterminate condition, and much will depend upon the circumstances of each particular case; and in many cases the control of the protecting State involves so large an interference with the internal affairs as well as the external relations of the native State as to amount practically to occupation. A conference of the

¹ Cf. *The Cherokee Nation v. State of Georgia* (1821), 5 Peters, 1.

² Hall, 8th ed., p. 150; Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894), p. 184 [reprinted in his *Collected Papers* (Cambridge, 1914)]; *International Law*, part i., pp. 126, 127; and cf. The Foreign Jurisdiction Act, 1890-1, which is believed, with good reason, to be consistent with the exercise of jurisdiction over all persons in protected areas: a jurisdiction which was assumed by British Orders in Council in 1891, 1893 and 1894.

³ Hall, 8th ed., p. 152, n.; and cf. nationality of inhabitants of mandated territories.

powers at Berlin, in 1884-5, agreed that the assumption of a protectorate in Africa should be notified to the other Powers.¹ Since then the continent has been almost completely staked out by the colonising Powers and the problem of notification has largely given way to that of demarcation of boundaries. In the Convention of 1919,² which was signed by the British Empire, Belgium, France, Italy, Japan, Portugal and the United States, and which as between these Powers abrogates the General Act of 1885, the requirement of notification is omitted. This Convention, which dealt generally with commerce in protected areas, and two other Conventions signed at the same time dealing with Traffic in Arms and in Liquor,³ indicate a modern tendency to move the centre of discussion and agreement from the question of non-interference to a consideration of the rights and duties *inter se* of the protecting and protected States.

A State may be under the protection of another State without formally surrendering any of its control over foreign policy⁵ and without therefore becoming in the proper sense of the term a protectorate. Such was the position of San Marino, which was successfully under the protection of the Pope and of Italy,⁴ and in the same category is the little principality of Monaco.⁵

India.

To describe as protectorates the native States of the Indian Empire seems to be a misuse of the term.⁶ In theory independent, these States are in fact subject to an ultimate jurisdiction on the part of the British Crown, and are for all practical purposes part of the British Empire and therefore not within the purview of international law. In 1891 the Indian Government declared that "the principles of international law have no bearing upon the relations" between itself and the native States under the suzerainty of the Queen-Empress.⁷

Danzig.

By Articles 102-4 of the Treaty of Versailles Danzig becomes a Free City under the protection of the League of Nations. But there is no protectorate without a protecting State—which the League in its nature cannot be. So its duties are exercised by placing the foreign relations of the Free City and the protection of its citizens abroad in the hands of Poland, and by keeping a resident High

¹ Art. 34 of the General Act of the African Conference of Berlin.

² Treaty Series, 1919, No. 18.

³ *Ibid.*, Nos. 12 and 19. These are discussed at p. 100, *infra*.

⁴ Westlake, part i., p. 23.

⁵ By a treaty between Monaco and France (1918), France guarantees the political independence and territorial integrity of Monaco, and Monaco agrees to arrange its internal economy in conformity with that of France. See Hall, 8th ed., p. 30, n.

⁶ See Sir W. Lee-Warner, *The Native States of India* (1910); Westlake, *Chapters*, etc., chap. x.; in *Collected Papers*, pp. 194 *seq.*

⁷ As to the position of their rulers in relation to the British courts of law, see *Statham v. Statham and the Gaekwar of Baroda*, (1912), P. 92.

Commissioner who acts on behalf of the League and is mostly exercised in mediating between Poland and Danzig in their frequent disputes. The Commissioner's rulings are subject to appeal to the Council of the League.

It would be difficult to define the exact status of the industrial Saar Basin. area between Lorraine and Germany known as the Saar Basin. By the Treaty of Versailles Germany relinquishes its sovereignty over it, but the German nationality of its inhabitants is to be unaffected. For fifteen years it is to be governed by a commission of five chosen by and responsible to the League of Nations. On a plebiscite taken at the end of that period the League will decide whether the territory is to remain under a commission, return to Germany, or be ceded to France.

As a consequence of the Great War certain territories ceased to be under the sovereignty of the defeated States. By Article 22 of the Covenant they are placed under the guardianship of the League of Nations exercised by a mandate granted by the League to advanced nations willing to accept it. The, mandatory system, "a new and progressive principle in International law,"¹ will be fully discussed later; here we consider only those mandated territories which closely resemble States under protection or suzerainty. They are "certain communities formerly belonging to the Turkish Empire which have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory."² Under this classification fell Mesopotamia, Palestine and Syria. The mandate for Palestine is allocated to Great Britain and the Draft Mandate embodying the terms of the guardianship was approved by the Council of the League in July 1922. France has the mandate for Syria with Lebanon and its Draft Mandate was approved at the same time. It was intended that Mesopotamia, should be a mandate with Great Britain as mandatory; but before the terms of the mandate were settled the people of Mesopotamia, in August 1921, elected Emir Feisal as king and he assumed the title of King of Iraq. Great Britain accepted the position, recognised Emir Feisal, and negotiated with Iraq in October 1922 a Treaty of Alliance which had for its object the observance and execution of the principles which a mandate would have secured. Upon an undertaking by Great Britain to assume responsibility for the fulfilment of the Treaty by Iraq, to render an annual report to the Council, to modify the Treaty only after obtaining the consent of the Council

Class "A"
Mandated
Territories-

¹ Oppenheim, i. § 167 t. ² Art. 22, para, 4, of the Covenant.

and to submit disputes with any other member of the League arising out of the Treaty to the Permanent Court of International Justice, the Council of the League in September 1924 approved the Treaty supplemented by the undertakings as giving effect to the provisions of Article 22 of the Covenant.¹

Protectorate and suzerainty are conceptions which lack exact juristic precision²; but the distinction drawn above³ provides for dependent States a logical test based on their trend away from or towards independence. The position of Palestine and Syria is that they were integral portions of the Turkish Empire (which has renounced all right or title to them),⁴ they have become, administratively, partially dependent now upon an appointed mandatory State, but they are acknowledged—in the terms of Article 22 of the Covenant—to be entitled to provisional recognition of independence; and the history of Iraq may be an accelerated example of their development. By the terms of the Mandate for Palestine, "His Britannic Majesty shall have the right to exercise as Mandatory all the powers inherent in the government of a sovereign State save as they may be limited by the terms of the present Mandate." If then we exclude the novel responsibility of the mandatory State to the League of Nations, the status of Palestine and Syria resembles very closely that of States under suzerainty.

Personal
unions and
federal systems.

In the case of a personal union, such as that which subsisted between Great Britain and Hanover from 1714 to 1837, the States so connected "are properly regarded as wholly independent persons who merely happen to employ the same agent for a particular class of purposes, and who are in no way bound by, or responsible for, each other's acts."⁵ International law therefore takes cognisance of them as separate States and disregards their union.

In the case of a federal system, on the other hand, international law takes cognisance only of the union and disregards the separate States. Here the constituent States of the federation have surrendered to a central authority the entire control of their foreign relations; they thus form a *Bundesstaat*, of which the most notable examples are the United States of America and Switzerland.⁶

Confederations.

In a confederation or *Staatenbund* the constituent States have surrendered to the central authority only a part of the control of their foreign relations; the great example of this kind of union being the German Bund, which existed from 1815 to 1866, in which various States retained to themselves certain rights of receiving and accrediting ministers and of making treaties and alliances.⁷ The

¹ Cmd. 2317. ² Oppenheim, i. § 92. ³ *Supra*, pp. 34, 36.

⁴ Art. 16 of Treaty of Lausanne (1923). ⁵ Hall, 8th ed., p. 24.

⁶ See Oppenheim, i. § 89. ⁷ *Ibid.*, i. § 88.

distinction between a *Bundesstaat* and a *Staatenbund* is often very narrow; the latter, as in the case of the Swiss Confederation, sometimes prepares the way for and shades off into the former; and Germany as an Empire, though for all practical purposes a *Bundesstaat*, nevertheless retained, in certain diplomatic rights belonging to some of its States, faint traces of the character of a *Staatenbund*. But these traces vanished in the Constitution of Weimar (1919), which declared the *Deutsches Reich* to be a republic, and reserved all control of foreign affairs, including the sole right to send or receive diplomatic envoys, to the central authority (Articles 45 and 78).

At the other end of the scale are those unions of independent States which have merely by temporary and revocable conventions submitted to a partial limitation of their freedom of action. The ruling analogy is that of an ordinary alliance, such as the Triple Alliance, which, being freely contracted between sovereign States, does nothing to impair their sovereignty. Whether any particular union is of this kind or limits and qualifies sovereignty is in each case a question of fact.

The self-governing Dominions of the British Empire occupy in international law a position which is difficult to define. We can no longer continue to ignore Canada, Australia, New Zealand and South Africa as mere colonial portions of Great Britain possessing no trace of international personality. Before the Great War they bore faint traces of individuality in that they had their own coinage and postage stamps, they flew as their own flag a modified British ensign, they were members of international unions such as the Universal Postal Union; further, they had been granted the right to make treaties independently with foreign States on minor matters such as tariffs, and certain treaties concluded by Great Britain for the Empire contained clauses exempting the Dominions from any obligation thereunder until ratified by their legislative bodies.¹ It was generally considered that these marks of recognition, although they created anomalies, did not alter the position of the Dominions in the eyes of international law whatever might have been the effect on the constitution of the Empire. But the Great War brought about a change which was marked—when the Dominions were separately represented at the Peace Conferences in 1919, and emphasised when they became original members of the League of Nations with separate representation in the Assembly of the League. In May 1920 Canada was given the right to accredit to the United States a representative who was to be appointed by the King on the advice of the Canadian Government, and whose duties were to deal with questions between the Crown and the United States affecting Canada and to take

The self-governing Dominions.

¹ See p. 138, *infra*, as to relation of treaty-making power to sovereignty.

charge of the British Embassy in the absence of the British Ambassador. Canada has, so far, not availed itself of the right. The Irish Free State, which was created in 1921 by a grant of self-government on a Dominion basis to Southern Ireland, forthwith exercised the right of separate diplomatic representation by becoming a member of the League of Nations and by appointing a Minister Plenipotentiary to represent the interests of the Irish Free State in Washington.

Membership of the League of Nations involving a right in the Assembly to vote, if they should so choose, against Great Britain indicates clearly that the Dominions have acquired some degree of international personality; but it would be pedantic to limit recognition of their separate status solely to the extent required by the proceedings of the League. The practice has been for some time established of consulting each Dominion on matters specially concerning itself and on all important questions affecting the Empire, but it was not easy to say how far the right to consultation included or had been elevated to a share in decision.

Imperial
Conference,
1926.

Without settling anything in the nature of a written Constitution for the British Empire, many questions of doubt have been removed by the resolutions on inter-Imperial relations adopted by the Imperial Conference at London in November 1926.¹ The kernel of the resolutions lies in the definition of the position and mutual relations of Great Britain and the Dominions.

"They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

This equality is further emphasised by the express statement that neither Great Britain nor the Dominions can be committed to the acceptance of active obligations except with the definite assent of their own Governments. This is the governing consideration in the general conduct of foreign affairs, and means in effect that all the self-governing Dominions possess a right to initiate and to conduct negotiations, and to conclude agreements with foreign Powers. But it is incumbent upon any of the Governments of the Empire which contemplates negotiating a treaty to consider its effects upon the other Governments and to inform those that are likely to be interested. Its liberty to conclude a suggested treaty is limited by two factors: (i.) if the treaty commits another Government to any active obligations the assent of that Government must be obtained; (ii.) the treaty may arouse adverse comments from another

¹ *The Times*, 22 Nov. 1926.

Government; the negotiating Government may only proceed in the absence of these objections. No provisions are laid down for smoothing over the objections: they will presumably be matter for negotiation between the parts of the Empire concerned.

But the principles of equality now fully recognised for the first time in relation to the status of Great Britain and the Dominions "do not universally extend to function." In the conduct of foreign affairs generally, as in matters of military and naval responsibility, the greater burden remains and must continue to remain on the shoulders of the Government of Great Britain. This burden will only be lifted when the Dominions assume complete responsibility for their own diplomatic and consular representation following the example of the Irish Free State at Washington—or, better, when they take their full share in the control and maintenance of general representation.

It has been accepted in this work that the rules of international law are to be drawn from the practice of States in their mutual dealings. In furtherance of this view we must examine how foreign nations have accepted the relations *inter se* of the members of the British Commonwealth of Nations; for Great Britain and the Dominions cannot between themselves decide the positions that they are to occupy in international law. It has already been stated that they are separately represented in the League of Nations; likewise, in conferences of a technical character, it has been usual for all parts of the Empire which desire to participate to be represented by separate delegations. But what should be the rule for a conference of a political character summoned by a foreign Government? It must depend upon the invitation issued by the foreign Government and upon the special circumstances of each individual case. Where a part of the Empire desires to protect its particular interests, especially in view of active obligations which the results of the Conference may impose upon it, the Resolutions of 1926 set out the methods by which this may be attained:

- (a) By means of a common plenipotentiary or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating.
- (b) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the conference. This was the form of representation employed at the Washington Disarmament Conference of 1921.
- (c) By separate delegations representing each part of the Empire participating in the Conference. If, as a result of consultation, this third method is desired, an effort

must be made to ensure that the form of invitation from the convening Government will make this method of representation possible.

By these methods the British Empire will be able in any negotiations to present to the world at large the form which it has defined for itself.

There are many points of similarity between the self-governing Dominions and the members of a *Staatenbund*¹ but the comparison cannot usefully be pressed; the history of international law provides no precedent for the type of union that exists between Great Britain and the Dominions. In international law as in constitutional law the British Empire defies definition.¹

(iii) The society must exhibit reasonable promise of durability.

Promise of
durability.

The promise of durable existence must obviously precede international recognition; and such recognition, though not necessary to establish the sovereignty of a State in relation to its own subjects,² is necessary before its international sovereignty is complete. The question when such recognition ought to take place becomes pressing when a new State is called into existence. Such new birth usually takes place in one of four ways:

Birth of
States.

1. Previously uninhabited districts are colonised, and a political society is organised in them.
2. Associations of men originally non-political change their character, and form themselves into a State.
3. A State hitherto dependent or semi-dependent is recognised as independent, or its independence is guaranteed by the other members of the family of nations.
4. A people hitherto dependent on another asserts its independence by a successful revolt.

Instances of the first mode will occur at once; the cases of the Congo Free State and the Barbary States will illustrate the second; and for the third Poland and the somewhat doubtful illustration of Korea (before its annexation by Japan) may be given, and the equally doubtful instances which will be mentioned later in the paragraph on neutralisation.³ There is, however, no reason in principle why a completely sovereign State should not come into being in this way, and the Congo Free State may perhaps be quoted as an instance of this kind of birth, besides being referred to under the second heading.⁴

¹ See Oppenheim, i. §§ 94a, 94b; Hall, 8th ed., pp. 34, 35; Lawrence, 7th ed., p. 63; and for a fuller consideration of the whole topic, A. B. Keith, *War Government of the Dominions*. These must be read subject to the Resolutions of the Imperial Conferences of 1923 and 1926, particularly the latter.

² *M'Ilvaine v. Cox's Lessee* (1808), 4 Cranch, 212. See *infra*, p. 49.

⁴ As to the origin of the Congo Free State, see an article by J. S. Reeves, in *Amer. Journ. of Int. Law* (1909), vol. iii., pp. 99 *seq.*

It was a phenomenon to which it is difficult to find a parallel in history. Composed of individual citizens of various States, with the King of the Belgians at its head, the International Association of the Congo was dependent upon no State. It secured concessions and occupied territory, and within six years from its formation in 1879 it had obtained recognition as an independent Government from all the important nations of the world. In 1884-5 a number of conventions and declarations were established whereby the boundaries of the new international person—designated the Congo Free State—were delineated, and its independence was formally recognised by the representatives of the various States participating in the West African Conference, held at Berlin (1884-5).¹ In 1888 the King of the Belgians (Leopold II.) became its Sovereign, the Belgian Parliament taking particular care that between it and Belgium there should be nothing more than a personal union; and from that time the Congo Free State was in effect part of his private domain. In 1889 he made a will bequeathing it to Belgium (thereby violating a rule laid down by some writers that a king may not dispose of his kingdom),² and the question of its annexation during his life, first raised in 1895, was not settled till 1908, when the country was taken over by Belgium.³ From all inquiry into the moral conduct of this remarkable State international law is fortunately relieved. It may be added that Great Britain and the United States refused to recognise the annexation by Belgium, unless a guarantee were given for the better treatment of the natives of the territory; but Germany objected to such refusal, on the ground that it implied a claim to interfere in the internal affairs of an independent State.⁴

It is in the fourth case that international difficulties have been most seriously felt. The gulf between the declaration of independence and its vindication is often considerable: at what point may the claim to national existence be recognised by a genuinely indifferent neutral? The principle is as clear as its application is sometimes difficult. The definitiveness of a new accession to the family of nations may be recognised by neutrals when it has become reasonably evident that the attempt to subdue the revolt is doomed to permanent failure. The recognition of the American Colonies by France in 1778 was an unfriendly act, inasmuch as the issue of the attempt to subdue them was still highly doubtful; on the other hand, the caution which

¹ The "General Act of the Conference of Berlin concerning the Congo" was signed by fourteen States.

² Cf. Hall, 8th ed., pp. III, 112.

³ See *Annual Register*, 1908, p. 342.

⁴ The present position of the Congo is regulated by the Convention of 1919, which as between the parties thereto abrogates the Final Act of 1885. See p. 38, *supra*. By tacit consent the Convention will doubtless be universally accepted.

the United States and Great Britain showed in admitting the claims of the revolting Spanish-American colonies, in the early part of the last century, furnishes an instructive instance of correct deliberativeness. The recognition may take place formally by treaty, or informally by the interchange of diplomatic representatives.¹

A clear distinction must be drawn between the recognition of independence and the recognition of belligerency. The latter may take place at a much earlier period than the former; indeed, so soon as the insurgents are found to be carrying on what is, in fact, a war which affects the interests of the recognising Power. Great Britain recognised the belligerency of the Confederate States little more than a month after the outbreak of hostilities. The United States have claimed that this was unjustifiable; but the existence of a state of war had already been in effect admitted by a declaration of blockade by the Northern States, and it is now generally conceded that the action taken by the British Government was correct.²

(iv) The society must possess fixed territories which must be reasonably large in extent.

Possession
of definite
territory.

The framework of international law was formed at a time when men's minds were dominated by territorial ideas, and practice has grafted no exception on the above requirement. A nomadic people could offer no security for the fulfilment of its obligations, and in fact there would be little temptation to form contracts with it.

It is immaterial that the territory varies in extent from time to time, so long as such variation does not affect the power of a State to fulfil its international obligations. The expansion of Sardinia into the kingdom of Italy was not regarded as affecting existing treaties³; and a reduction in size, so long as an essential part remains, will not obliterate a State's identity, though it may affect, of course, its power to carry out the terms of certain classes of treaties, such as those of guarantee or alliance. That the territories must be reasonably large is obvious. A community like the Pitcairn Islanders⁴ may be quite civilised and may be left in the enjoyment of a peaceful independence, because it is not worth while to trouble them; but they can hardly be treated as an international State. Moreover, principalities like Monaco⁵ and Lichtenstein, and small republics like San Marino⁶ (38 square miles) and Andorra (175 square miles) are independent

¹ Cf. Sir W. Harcourt, *Letters of Historicus*, Nos. i., ii. and iii.

² Hall, 8th ed., pp. 43-6.

³ *Ibid.*, p. 21, n.

⁴ They are now, in fact, incorporated in the British Empire.

⁵ See *supra*, p. 38, n.

⁶ San Marino is now a protectorate under Italy, and Andorra is under the joint protection of France and Spain (Oppenheim, i. § 93).

communities and enjoy in a certain measure the status of international personality, but they cannot be considered as members of the family of nations; they were not invited to send representatives to the Hague Peace Conferences, 1899 and 1907.

(v.) The society must be a member of the family of nations. Membership of society of nations.
 (It is difficult to indicate with precision the circumstances under which such admission takes place in the case of a nation formerly barbarous. One important requisite is that a State shall be under a system of law which gives to strangers and natives a reasonable approach to equality of treatment. The assimilation of European ideas, the growth of humane habits, the frank attempt to break down the barriers of exclusion, all these will insensibly prepare the way. Japan has fully established her claim to be recognised as a subject of international law. She acceded to the Geneva Convention in 1886; European nations have abandoned their extra-territorial privileges in her territory; she has attained to a high standard of conduct in warfare, from which she has only once fallen away¹; she was a party to all the Conventions of the Second Peace Conference of 1907; her procedure at the Conference of London in 1908-9 was based upon a view of international law which was marked by profound and careful study and a lofty sense of humanity; and since her war with Russia she has taken her place beyond question among the greater Powers. In the case of China there is more doubt, for it is not yet proved to what extent her troops can be brought to obey the rules of civilised war. In 1899, though summoned to the Peace Conference, she did not sign the Convention relative to the laws and customs of land warfare; but eight years later all hesitation in that respect had disappeared, and she was a party to all the Conventions of 1907. Precipitancy in admission is to be deprecated, and it is food for reflection that the Treaty of Paris in 1856 admitted Turkey to share in the advantages of the system of Europe, even though the Capitulations which exempted foreigners from Turkish jurisdiction were allowed to remain in force. Afghanistan is admittedly a fully sovereign State; but by reason of the fact that it is not yet considered to be within the pale of civilisation, it has not hitherto been recognised as a member of the international community.)

In international as in municipal law the subjects are conceived of as equal. The equality of all citizens before the law is axiomatic in civilised systems, and the doctrine has received much verbal allegiance from statesmen on the larger stage of international relations. Theory of equality.

¹ In 1894 Japanese troops indulged in a five days' massacre of all Chinese men, women and children in Port Arthur; but conduct hardly less disgraceful was proved against European troops during the advance upon Peking in 1900.

Sir Henry Maine¹ traces its origin to the old confusion between *jus gentium* and *jus naturae*. If the society of nations is governed by natural law, the elements which compose it must be absolutely equal. Men under the sceptre of Nature are all equal, and accordingly commonwealths are equal if the international state be one of Nature. "The proposition that independent communities, however different in size and power, are all equal in the view of the law of nations, has largely contributed to the happiness of mankind, though it is constantly threatened by the political tendencies of each successive age."²

The influence for good which Sir H. Maine attributes to the theory of equality is a striking instance of the effect of idealism on the world's history. Nothing can be more certain than that the theory, in municipal law truistic, is, when applied to the position of States, inept and misleading. When we affirm that in England all men are equal before the law, we mean that the meanest peasant may litigate on equal terms with a powerful nobleman; what place can such a theory have in a system of self-redress? Can it be said without absurdity to a small State injured by a great one, "Your cause is just; be not concerned at the poverty of your resources; in international disputes all States are equal; war, however, is the only litigation we know, and equality ends when you enter its court"?

The fiction has no doubt reacted upon international sentiment, and in this way prevented much wrongful aggression; but it must be noted that it has little correspondence with the facts of international life, and that in the rough-and-ready practice of nations suit *in forma pauperis* is not a hopeful procedure. The kingdom of Greece having been created in 1832, by England, France and Russia, with the assent of Austria and Prussia, could hardly claim any real equality with its creators; and all its history up to 1914 was moulded by them even to the extent of their prohibiting it, by a pacific blockade, from making war³ and dictating to it terms of peace.⁴ Turkey was repeatedly compelled to submit to the dictation of the Conceive of Europe, which has long assumed a general superintendence over the destinies of the whole continent⁵; while, on the continent of America, the United States, with the Monroe doctrine as her chief weapon, has taken up a somewhat similar position, without, however, interfering overmuch in the quarrels of the various South American States.

¹ *Ancient Law* (ed. Pollock, 1906), pp. 103 seq.

² *Ibid.*, pp. 103-4.

in 1886. ..

³ In 1897, at the end of the war between Greece and Turkey.

⁴ Cf. Lawrence 7th ed., pp. 246, 247; and Oppenheim, i. § 116. In consequence of the Great War, Austria, Germany and Russia ceased to be great Powers. Germany and Russia are returning to their position, but Austria has been so dismembered that its recovery is improbable.

However this may be, the doctrine of equality—inapplicable as it is when self-redress is the means of seeking reparation for injuries suffered—has frequently been applied in practice, when redress has been sought before a court of arbitration. In such cases the arbitrators were bound in the interests of justice and equity to regard the contending States as equal and to pronounce in favour of the one that had right, and not strength, on its side. Furthermore, the doctrine of equality receives full application before the Permanent Court of International Justice.

Again, there is a negative aspect of the doctrine of equality which is recognised by modern international law, viz. that relating to the sovereignty and independence of States, and therefore to the duty of non-interference with their internal affairs. The cases of intervention that have occurred have been due to the desire to regulate external relationships, e.g. in the case of Turkey and Greece. This sense of equality has been thus described by Marshall, C.J., nearly a century ago: "Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates, for itself, but its legislation can operate for itself alone."¹

The constitution of the League of Nations reflects the endeavour of its framers to reconcile the hard fact of the obvious disparity in influence between powerful States and their insignificant neighbours with the theory of the equality of them all before the law. The former consideration operates to give Great Britain, Germany, France, Italy and Japan permanent seats on the Council of the League; the latter leads to the rule which gives each member of the League a single vote at meetings of the Assembly.

The state of neutralisation illustrates an abnormality of type in international character which may most conveniently be considered here. A neutralised nation is one which is prohibited indefinitely, or for a considerable period, from carrying on war except in its own defence, and from entering into such political engagements with other States as might endanger its neutrality in the event of war; in return its neutrality or the inviolability of its territory is guaranteed by the great Powers. It is, so to speak, bound over to keep the peace; and the undertaking is not regarded as impairing its sovereignty. The prohibition must proceed from the general body of nations, for a particular State cannot of its own accord cut itself adrift from the ordinary incidents of international character.² Neutralisation is easily

¹ *The Antelope* (1825), 10 Wheaton, 66, at p. 122.

² The Congo State, in 1885, added to the anomalies of its position by declaring itself to be perpetually neutral; but it may be said, perhaps, that the situation was made regular by the assent of the Powers expressed in Art. 10

distinguished from neutrality. It is normally permanent, general and involuntary, whereas neutrality is temporary, particular and voluntary. Neutralisation necessarily involves neutrality, but neutrality does not necessarily involve neutralisation.

The three instances of neutralisation usually cited are those of Switzerland, Belgium and Luxemburg. In 1815 Great Britain, Austria, France, Prussia and Russia asserted the perpetual neutrality of Switzerland, and pledged themselves to maintain the integrity of its territories. In the Treaties of 1831 and 1839 the same Powers asserted the independence and neutrality of Belgium. Both countries have scrupulously observed the conditions of their peculiar position, and no attempt was made to violate the independence of either, until in 1914 Germany, disregarding her obligations, violated the neutrality of Belgium by a deliberate invasion of her territory.¹ It is noticed by Lawrence² that Belgium was not permitted to assent to the neutralisation of Luxemburg in 1867, on the ground that such assent involved the assumption of responsibilities inconsistent with her own international limitations. A practical question is suggested by the dispute between Prince Bismarck and the inhabitants of Luxemburg during the Franco-Prussian War, who were accused by him of affording to France assistance which was inconsistent with neutrality: what is the remedy against a neutralised State for a refusal to redress international injuries? In strictness the aggrieved party should lay his complaint before the guaranteeing Powers and request them to procure satisfaction; in practice he would probably take this, course, reserving a claim to act for himself if satisfaction were not forthcoming. If the occasion called peremptorily for immediate redress, it can hardly be doubted that a powerful nation would take the law into its own hands.³ Belgium ceased to be permanently neutralised by the provisions of Articles 31 and 40 of the Treaty of Versailles by which Germany consented to the abrogation of the Treaties of 1839, and undertook to observe any new arrangements that might be adopted with regard to the status of Belgium.⁴

Neutralisation of thing? other than States.

This operation of neutralisation can be applied to things other than States. In 1888 the Suez Canal was by a general agreement, viz. the Treaty of Constantinople, declared to be open at all times of the Final Act of the Conference of 1885. This Article is not repeated in the Convention of 1919, which contains no reference to the neutrality of the Congo (Westlake, *International Law*, part I., p. 30).

¹ See J. W. Garner, in *Amer. Journ. of Int. Law*, vol. ix. (1915), pp. 72 seq. 7th ed., p. 594.

² Bismarck threatened to disregard the neutrality of Luxemburg on the occasion referred to in the text.

³ That the effect of the Treaty of Versailles is to deneutralise Belgium is accepted by Oppenheim, i. § 99, and P. H. Winfield, the editor of Lawrence, 7th ed., p. 593; but this view has been controverted (Hall, 8th ed., p. 398, n., and B. Y. I. L. (1924), p. 235).

to all vessels, but so that no acts of hostility were to be committed in it, or within three miles of either end of it; with a prohibition against the blockade of either end of it, and against the presence of any belligerent vessel in its harbours for more than twenty-four hours.¹ The Panama Canal was neutralised (internationalised) on a somewhat similar basis by the Hay-Pauncefote Treaty, 1901, and the Dardanelles, the Sea of Marmora and the Bosphorus by the Straits Convention signed with the Treaty of Lausanne, 1923.

How persons may be neutralised will be seen when we deal with the provisions of the Geneva Convention of 1864.

Further, attempts have been made to neutralise a part only of a State, with what effect in practice remains yet to be seen. In 1815, at the second Peace of Paris, it was agreed that a part of Savoy,² which then belonged to Sardinia, should "form a part of the neutrality of Switzerland," Sardinia, if at war, being bound to evacuate the country and leave it to be garrisoned by neutral Swiss troops. On the transfer of Savoy from Sardinia to France in 1860, no definite agreement of all the Powers was arrived at, but France in a vague way admitted a similar obligation; though it is with good reason doubted whether a State at war with France would be willing to treat as neutral, and therefore exempt from invasion, a territory which supplied France with troops and money. In the Franco-German War there was no evacuation by France of Savoyard territory; and no question on the subject arose,³ and no question can now arise since Savoy was deneutralised by the Treaty of Versailles (Article 435).

What seems a more effective attempt at sectional neutralisation has been made in the case of the Åland Islands. They, with Finland, were ceded by Sweden to Russia in 1809. Finland became an independent State in 1918, but the inhabitants of the islands, who were mostly Swedish, clamoured to be placed under the sovereignty of Sweden. The ensuing dispute between Sweden and Finland was

¹ *British State Papers, Egypt*, No. 2 (1889). In some respects, however, "internationalisation" is a more appropriate term than "neutralisation" to describe the status of the Suez Canal. Cf. Lord Cromer, *Modern Egypt* (London, 1908), vol. ii., p. 384.

In 1915 it was held by the Prize Court, sitting at Alexandria, that the Suez Canal Convention does not protect from capture vessels using the ports of the canal not for purposes of passage, but as places of refuge: *The Gutenfels* (1916), 2 A. C. 112; *The Barenfels* (1915). 1 B. & C. P. C. 122; *The Pindos* (1916), 2 A. C. 193. If a prize stays beyond the twenty-four hours, that fact is not cognisable by the Prize Court as a ground for the release of the prize: *The Sudmark* (1917). A. C. 620.

² Lawrence, 7th ed., pp. 595-7.

³ Corfu and Paxos were similarly neutralised when the Ionian Islands were transferred to Greece in 1864. The neutrality of Corfu was violated in 1916, when the Serbian General Headquarters were established there by the French troops (Lawrence, 7th ed., p. 597). Cf. Holland, *European Concert in the Eastern Question*, pp. 45 seq.

brought before the League of Nations by Great Britain acting under Article 11 of the Covenant. The Council referred the matter to an impartial commission and accepted its findings, which were embodied in a Convention signed by the disputants at Geneva in October 1921. By its terms the islands remain under the sovereignty of Finland; they are to enjoy some degree of autonomy with a guarantee for the preservation of the Swedish language; and they are to be permanently demilitarised and neutralised.

Chartered
companies.

From what has been said above, it will be clear that, strictly speaking, chartered companies have no claim whatever to international status.¹ The facts perhaps are hardly so clear as the theory. These great corporations have played a part so extraordinary in the history of the world, they have exercised jurisdiction of so high a kind, and with such immunity from supervision, that it is impossible to put them on one side with the observation that they are merely trading companies, and that their character is therefore extraneous to the subject of international law. A juster, and certainly a more convenient, view, is to conceive of a chartered company of the normal type as enjoying a delegation of sovereign power over a defined area. The terms of the delegation concern only the company, and the nation whence the authority proceeds. It is sufficient to third parties to know that a political act of the company is *prima facie* the act of the country to which it belongs, and that redress may be sought from that country for wrongs done by the company.² So much seems to be involved in general principle. A nation cannot commit political functions to associations of its citizens, and then disclaim responsibility for their abuse. The degree of satisfaction is very likely to vary according to the position of the injured party, but it is hardly credible that a first-class Power injured by a chartered company would acquiesce in a lower degree of satisfaction from the accrediting State than if the latter had directly been the aggressor. The temptation to employ chartered companies is obviously great. The administration of the East India Company was stained by much that was discreditable, but it none the less rendered splendid service to this country, and perhaps in the long run to humanity as well. Yet the objections must not be overlooked. Many of the defects in company government pilloried by the noble eloquence of Fox and Burke were no doubt particular and accidental, but some of them are permanently inherent in the system. Government by chartered company necessarily subordinates the social organism of the district under control

¹ Among modern corporations possessing a status more or less analogous to that formerly held by the East India Company we may mention the following: the North Borneo Company, incorporated by Royal Charter in 1881; the British East Africa Company, 1888.

² Cf. *The Secretary of State for India v. Sahaba* (1859), 13 Moo. P. C. 22.

to trading considerations. In no other branch of English public law would a Government be tolerated which avowedly existed for purposes of exploitation. It is undoubtedly true that pioneer work of incalculable value has been done by such companies in the past, and occasions may recur when their employment is the least of competing evils, but imperial and economical tastes are not gracefully associated, and the era of chartered companies should at most be a phase in the work of reclamation.

Till 1870 the Papacy possessed temporal sovereignty, in addition The Papacy. to its spiritual authority over the Roman Catholic Church, and therefore was invested with international personality. In that year an Italian army occupied Rome, which became the capital of the kingdom of Italy; and so the temporal status of the Papacy disappeared with the dissolution of the Papal States. The Law of Guarantees, enacted by the Italian Parliament in 1871, regulated the position of the Pope, and assured him various high privileges and immunities. Certain States dispatch to him and receive from him envoys, who enjoy many rights conferred on ambassadors, but possess the character of ecclesiastical officials rather than that of diplomatic representatives. He is entitled to enter into concordats with foreign States, but they are not treaties within the meaning of international law. Being deprived both of territory and temporal subjects, he is divested of international personality, and therefore possesses no international rights and is not subject to international obligations (other than those of an ecclesiastical nature established by the concordats). He was not invited to send representatives to such international assemblies as the Hague Conferences of 1899 and 1907. Having regard, however, to the fact that many States regard the Pope as possessing various privileges incidental to sovereignty, his international status is therefore somewhat anomalous.¹ But the Law of Guarantees only secured his position when Italy was at peace and made no provision to meet the case when Italy should be a belligerent. It was uncertain what would be the position of envoys accredited to the Vatican by States at war with Italy or how military necessity might affect the absolute freedom of communication with the entire Roman Catholic world granted by the Law of Guarantees. The relevant events during the Great War leave these questions in uncertainty. When Italy declared war against the Central Powers in 1915 their representatives at the Vatican were given permission to remain by the Italian Government, but the Pope asked them to depart and a special method of communication was arranged through Switzerland.⁸

¹ Cf. Westlake, *Int. Law*, part i., pp. 37 seq.; Oppenheim, i. §§ 104 seq.; F. Despagnet, *Droit international public* (Paris, 1910), §§ 147 seq.) H. Bonfils, *Droit international* (Paris, 1912), §§ 370 seq.

⁸ Oppenheim, i. § 106a.

CHAPTER IIA

THE LEAGUE OF NATIONS

THE first chapter of each of the Treaties of Peace concluded after the Great War by the Allied nations with Germany, Austria, Hungary and Bulgaria is the Covenant of the League of Nations, which became an effective international instrument on 10 January, 1920, when Germany deposited its instrument of ratification of the Treaty of Versailles. The League thus called into being, although not new in its conception, is a novel subject of international law; but a discussion of the position it occupies thereunder will be postponed to a consideration of its constitution and functions.

Objects of the League.

According to the preamble to the Covenant the signatories of the treaties in which the Covenant is contained agree to it "in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another." In so far as the League aims at the promotion of international co-operation and the maintenance of international peace and embodies a general desire for the achievement of these two objects, it is but the logical outcome, on the one hand, of the closer physical contacts between nations and their increasing economic interdependence, and on the other of the emphasis laid by the havoc of the Great War on the imperative moral and economic necessity of reducing the possibility of a similar recurrence. The means adopted for the second of these two objects will be more appropriately considered in the chapter on "Arbitration, etc."

Members.

The members of the League may be enumerated in three divisions:

1. Allied signatories of the Peace Treaties who subsequently ratified their Treaties. These are Belgium, Bolivia, Brazil, the British Empire, Canada, Australia, South Africa, New Zealand, India, China, Cuba, France, Greece, Guatemala, Haiti, Honduras,

Italy, Japan, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Rumania, Serb-Croat-Slovene State (Jugo-Slavia), Siam, Czechoslovakia, Uruguay.

2. Neutral States which originally acceded to the Covenant of the League. These are Argentine, Chile, Colombia, Denmark, Holland, Norway, Paraguay, Persia, Salvador, Spain, Sweden, Switzerland, Venezuela.

3. It has always been the theory of the League that it should be all-embracing, and provision is made in Article 1 of the Covenant for admission to membership of any fully self-governing State, Dominion or Colony where such admission is agreed to by two-thirds of the Assembly of the League, and provided that the applicant State shall give effective guarantees of its sincere intention to observe its international obligations and to accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments. Under these provisions the following States have become members: Albania (1920), Austria (1920), Bulgaria (1920), Costa Rica (1920), Finland (1920), Luxemburg (1920), Estonia (1921), Latvia (1921), Lithuania (1921), Hungary (1922), Irish Free State (1923), Abyssinia (1923), San Domingo (1924), Germany (1926).

The serious omissions are two of the Great Powers—Russia and the United States; the less important exclusions are Afghanistan, Egypt, Mexico and Turkey; but apart from them the League includes every State of importance in the civilised world.

The Covenant provides for the circumstances in which a State may cease to be a member of the League. It may withdraw from the League provided it gives two years notice and has before the end of the period fulfilled all its international obligations under the Covenant and otherwise (Article 1). It automatically ceases to become a member if it dissents from an amendment of the Covenant duly effected (Article 26). It may be expelled for violating any clause of the Covenant (Article 16).

The League works through three main organs:—the Assembly, the Council, and the Secretariat; and several subsidiary organs:—Permanent Commissions, Technical Organisations; and two autonomous bodies:—the Permanent Court of International Justice and the International Labour Organisation.

The Assembly consists of representatives of the members, each of whom may have three representatives, but shall have only one ^{Assembly.} vote. The seat of the Assembly is at Geneva (Article 7), and at its first meeting in November 1920 it was resolved that it should reassemble annually on the first Monday in September. It has now

met seven times, and has begun to evolve its own procedure, which is that its work shall be divided among six committees¹ (on which every member is entitled to be represented), which consider their subjects in detail and report to the full Assembly, where the conclusions of the committees are usually accepted without amendment. The jurisdiction of the Assembly is wide; it may deal with any matter within the sphere of action of the League or affecting the peace of the world (Article 3).² But its power is severely limited by the requirement of unanimity for all its decisions, with the exception of those on some minor matters expressly provided for in the Covenant.³

The Council. The Council consists of representatives of the British Empire, Germany, France, Italy and Japan (who are permanent members), and of nine other members of the League selected by the Assembly. The Council has the power subject to a majority approval of the Assembly to appoint further permanent members and to increase the number to be selected by the Assembly (Article 4). The original number of non-permanent members was four, increased to six in 1922 and to nine in 1926. Before the last increase the rules for election were simple; all non-permanent members retired annually and re-election was a habit. But when the number was raised to nine the Assembly approved more elaborate rules designed to secure a better circulation of Council seats among the members of the Assembly.⁴ Each year the Assembly will elect three members to the Council to hold office for three years. At the end of their term members are not eligible for re-election for the ensuing three years, except when the request of a retiring member to seek re-election is acceded to by a two-thirds majority of the Assembly. This privilege

¹ The questions dealt with by the committees with slight variations from year to year are:

1. Legal and Constitutional questions.
2. The League's Technical organisations.
3. Disarmament.
4. The League's Budget.
5. Humanitarian questions.
6. Political questions.

¹ The main exception is that treaties of arbitration or regional understandings like the Monroe doctrine are not to be affected by the Covenant (Art. 21). But if a dispute involving the danger of war should arise it is still the friendly right of any member of the League to bring it to the notice of the Assembly (Art. II).

• Admission of new members requires a two-thirds majority (Art. 1); approval of an increase in the number of permanent and non-permanent members on the Council (Art. 4), approval of the appointment by the Council of the Secretary-General (Art. 6), ratification of amendments to the Covenant (Art. 26) and matters of procedure including appointment of special committees (Art. 5) require only a bare majority.

• *Monthly Summary of the League of Nations* (1926), p. 232.

of re-eligibility is not to be extended in favour of more than three members. To inaugurate this change from the previous procedure, temporary provisions were adopted to secure the retirement of three non-permanent members each year, commencing with the Assembly of 1927. In the result the Assembly of 1926 elected Poland, Chile and Rumania for three years; Colombia, Netherlands and China for two years; Belgium, Salvador and Czecho-Slovakia for one year. At the same time the privilege of re-eligibility was sought in advance by Poland and granted to it by the Assembly. These changes coincided with the admission of Germany to the League and to a permanent seat on the Council.

When the Council is considering any matter specially affecting a member of the League not already represented on the Council, that member is entitled to send a representative (Article 4). It is provided (Article 4) that the Council shall meet as occasion demands; in fact it meets at least four times a year and oftener when required, generally at Geneva. Like the Assembly, the Council may deal 'with any matter within the sphere of action of the League or affecting the peace of the world (Article 4). Its decisions must be unanimous (Article 5), except on matters of procedure and in reporting on a dispute referred to it, when a majority suffices.

The relations between the Council and the Assembly are somewhat vague and undefined and the analogy of Cabinet and Parliament is misleading and dangerous; but owing to its numerical convenience, its frequent meetings and the heavy proportion of Great Powers represented on it, the Council is developing into the executive and administrative organ of the League; "it has become evident that current business and pressing matters can be and have been dealt with by the Council."

To advise and assist the Council in technical matters a series of expert committees have been created and are known as the Leaguers "Technical Organisations." Two of these committees, the Permanent Advisory Commission on Armaments and the Permanent Mandates Commission, are definitely provided for in the Covenant (Articles 8, 9 and 22). Others—those for example on Finance and Economics, Transit, Drug Traffic—have been created to enable the League to deal with the objects set out in Article 23² of the Covenant. Others again—the Administrative Commissions for the Saar Basin and Danzig—have arisen as necessitated by tasks imposed

¹ Hall, 8th ed., p. 74.

² By this Article the members of the League agree to co-operate to secure humane conditions of labour, just treatment of natives, agreements with regard to the traffic in women and children, in opium and other dangerous drugs, and in arms and ammunition, freedom of communications and transit, and measures for the prevention and control of disease.

upon the League by the Treaty of Versailles. The names of these various commissions will serve to indicate to some extent the work of the League.

The Secretariat.

The permanent Secretariat is the most distinctive feature of the League; it is unique, an international Civil Service. It consists of a Secretary-General and such secretaries and staff as may be required. The first Secretary-General, Sir Eric Drummond, was named in the Treaty of Versailles; his successors will be appointed by the Council with the approval of the majority of the Assembly (Article 6). He appoints the secretaries and staff subject to the approval of the Council (Article 6). One duty of the Secretariat is specifically enjoined by the Covenant, namely registering and publishing all treaties entered into by any member of the League; but its most important work is that involved in the meetings and decisions of the Assembly, Council and the various Commissions. For all these bodies it prepares the agenda, keeps the minutes and undertakes the large amount of administrative work and correspondence involved by their decisions. The Secretariat is divided into departments the chief of which are: Legal, Political, Technical Organisations, Mandates, Minorities, Health, Social Questions, Armaments and Publicity.

International Labour Organisation.

All members of the League (and certain other States, e.g. Germany) are members of a permanent International Labour Organisation brought into existence by Articles 387-426 of the Treaty of Versailles. The constitution of the Labour Organisation resembles roughly that of the League. Corresponding to the Assembly of the League is the General Conference to which each State sends four delegates, two representing the Government, one the employers and one the workers. Corresponding to the Council of the League is the Governing Body which consists of twenty-four persons, twelve representing Governments, six employers and six the workers, elected by the General Conference. The aim of the Organisation is ⁴¹ to endeavour to secure and maintain fair and humane conditions of labour for men, women and children" (Article 23 of the Covenant). To this end the Organisation collects industrial information from all over the world and issues it in the form of valuable periodicals and reports. At its annual conferences it adopts Draft Conventions on industrial questions and by Article 405 of the Treaty of Versailles every State member of the Organisation is pledged to bring all Draft Conventions adopted before its legislative authority. There is, of course, no obligation to ratify. Down to the end of 1924 seventeen Conventions had been approved and 142 ratifications formally registered.

The expenses of the League, including its various commissions, the International Labour Organisation and the Permanent Court of International Justice are met out of the League Budget to which

all the members of the League contribute in the proportion decided by the Assembly from time to time.¹

Most of the activities of the League, as is inevitable, are developments of international movements that were in existence before its creation and these can best be considered in the field from which they grew: the conciliatory work of the Council and the Permanent Court of International Justice in connection with the amicable settlement of international differences, and the mandatory system as a special form of the relationship between a dominant State and territory under its control or protection. But in certain directions the League has given practical clothing to ideas which had hitherto only obtained bare expression in international agreements. Among such may be classed the protection of racial, linguistic and religious minorities.

In 1878 by the Treaty of Berlin the Great Powers recognised Bulgaria, Serbia, Montenegro and Rumania subject to the condition that these States would ensure civil and political liberty to their subjects irrespective of religious creeds; but the terms were of no avail when there existed differences of opinion among international lawyers as to the effect of violation² and when the jealousies of the Great Powers prevented any concerted action for the enforcement of the conditions. The treaties concluded after the Great War contain provisions by which the newly-created States of Czechoslovakia,³ Poland⁴ and Jugo-Slavia⁵ undertake to ensure to all their subjects the same civil and political privileges without distinction of race, language or religion. The same or similar "Minority Clauses," for they are inserted for the protection of minorities, are also included in treaties entered into by Rumania,⁶ Austria,⁷ Hungary,⁸ Bulgaria,⁹ Greece¹⁰ and Turkey,¹¹ and the obligations imposed by the clauses have been voluntarily accepted by Estonia, Latvia, Lithuania and Albania on their admission into the League of Nations. To meet the difficulty which rendered impotent the protection clauses of the Treaty of Berlin and to soften the restriction on a State's internal independence¹² entailed by the acceptance of the minority clauses it is provided that the stipulations regarding minorities "constitute an obligation of international concern and shall be placed under the guarantee of the League of Nations." The League discharges its duty by relegating the consideration of alleged breaches of these stipulations

¹ Art. 6 as amended in 1921.

² Cf. Oppenheim, i. § 73; Hall, 8th ed., p. 113.

³ Treaty of Versailles (Art. 86). ⁶ *Ibid.* (Art. 93).

⁴ Treaty of Trianon (Art. 44).

⁵ Treaty of St. Germain (Arts. 62-9). ⁸ Treaty of Trianon (Arts. 44-60).

⁹ Treaty of Neuilly (Arts. 49-57) ¹⁰ Treaty, 10 August, 1920.

¹¹ Treaty of Lausanne, 1923 (Arts. 37-43). ¹² See *infra*, p. 76.

to a special section of the League Secretariat, a sub-committee of the Council or finally to the Council any member of which has the right to draw the attention of the Council to breaches. Following consideration and if necessary the decision of legal questions by the Permanent Court of International Justice the Council endeavours to adjust matters by means of mediation.

The system of protection thus devised has advantages in that it grants the League an acknowledged right of intervention and a method of accomplishing it and in that it may remove the excuse by an outside power of intervention on behalf of oppressed minorities—a fruitful source of war but it can hardly be described as irresistibly effective. Its weakness may be a concealed blessing until some querulous minorities have learnt that as well as deserving the right to protection from majorities they also owe a duty to co-operate with majorities in the States to which they belong or have been assigned.¹

League's
work in
Austria and
Hungary.

The purposes for which the League was created, as expressed in the Covenant, are numerous, varied, far-reaching and in many cases idealistic. Whatever may be its fate in attaining its definite objectives, it does supply a world need for a permanently organised international body which can function as unexpected necessities arise. Its usefulness in this direction is borne out by the curious fact that it has been most spectacularly successful when dealing with two tasks for which the Covenant contained no provision: the financial rehabilitation and economic reconstruction of Austria and Hungary. These two portions of the Dual Monarchy were separated from each other and severely restricted in territory by the Treaties of Peace. With unsettled conditions, rapidly depreciating currency and unstable finance they were approaching economic ruin when they appealed to the League for assistance. The League raised substantial international loans on their behalf, laid down conditions for the employment and repayment of the loans and appointed officials responsible to the League to supervise measures of financial reconstruction. In the result Hungary has been restored to complete economic stability and Austria has been rendered financially stable.

Apart from its duties with regard to arbitration and the settlement of disputes the League's chief function lies in providing machinery for and developing international co-operation regarding matters of common interest in times of peace. To render the League more

¹ See Hall, 8th ed., pp. 61-4 and, more fully, I. L. Evans on the Protection of Minorities in B. Y. I. L.; 1923-4. Proposals to extend the scope of protection by increased facilities for presenting petitions to the Council and by the preparation of a general convention to govern the rights and duties of all members of the League in relation to their minorities have been rejected. League of Nations Monthly Summary (1925), p. 322.

complete in this direction the Covenant provides that by agreement to the parties thereto all international bureaux already established by general treaties shall be placed under the direction of the League and all such bureaux or commissions for the regulation of matters of international interest constituted after the creation of the League shall be placed under its direction. In dealing with these tasks the League by the universality of its Assembly, the executive character of its Council and the continuity of its Secretariat is well equipped and the work involved in them opens out a prospect of development for international law. It may be doubted whether the expansion of the field of international co-operation does not restrict the area of possibility of armed conflict more effectively if less obtrusively than Utopian schemes for the outlawry of war.

The Covenant is not final; indeed it would have been fatal if a treaty of such compromise had been. Amendments are to take effect when ratified by the members represented in the Council and a majority of those on the Assembly. Any member may signify its dissent from the amendment but in that case it shall forfeit its membership (Article 26).¹

Such being the constitution and function of the League what is its character according to International Law? It certainly enjoys a *locus standi* in the law of nations; does it wear an international personality?² It possesses many rights as a rule only exercised by sovereign independent States. For instance, its officials when engaged on business of the League enjoy diplomatic privileges and immunities; it governs through a Commission the Saar Basin, a territory not under the sovereignty of any State; it exercises a protectorate over the Free City of Danzig; it can interfere in the internal affairs of a number of smaller States³ for the protection of minorities; by the recommendation of the Council it can interfere in the external affairs of a State which breaks the Covenant. But as it owns no territory and governs no citizens directly it is clearly not a State. Further it defies inclusion in any of the recognised classifications of the varying degrees of relations between States.⁴ Its permanent organs and their extensive functions make it far wider in scope than an alliance. It is not a *Staatenbund*,⁵ for its organs possess no authority over its members as the need for unanimity in the decisions of Council

Status of the League.

¹ An amendment to this Article at present awaits ratification. It will then provide that amendments shall be voted by a three-quarters majority of the Assembly which shall include all members of the Council and shall take effect if ratified within twenty-two months by members of the League represented on the Council and a majority of those on the Assembly.

² See *supra*, p. 31.

³ See p. 59.

⁴ See pp. 33 *et seq.*

• See *supra*, p. 40.

and Assembly demonstrates; the provisions for withdrawal from membership preclude its classification as a *Bundestaat*.¹ The League of Nations is, then, a union of a kind which has never before been in existence, an international person *sui generis*, nothing other than the organised Family of Nations.²

¹*Ibid.*

²Oppenheim, i. § 167c. Lawrence (ed. Winfield), p. 77, follows this view; but Hall (ed. Pearce Higgins), p. 32, prefers to classify the League as a confederation of a special type, and this view is developed by P. E. Corbett in B. Y. I. L. (1924), pp. 119-48. The bibliography of the League is extensive, but a complete list has been compiled by the Library of the Secretariat and published as a Supplement to the Monthly Summary, February 1926. Two authoritative treatises may be mentioned: Sir Frederick Pollock, *The League of Nations* (2nd ed., London, 1922), and Walther Schucking, *Die Satzung des Völkerbundes, kommentiert von Walther Schucking und Hans Wehberg* (Berlin, 1924).

CHAPTER IV

THE REPRESENTATIVES OF STATES IN FOREIGN COUNTRIES

THIS subject is generally considered under the head of international State rights: an arrangement supported by a supposed right of legation. The claim appears somewhat academic; in theory one State could hardly insist that another should accredit ambassadors to it, or receive them from it. No doubt the withdrawal of an ambassador usually precedes an outbreak of war; but antecedent differences and not the withdrawal are the *causæ causantes* of the war, and instances have occurred of an ambassador being withdrawn (as when Sir Henry Bulwer was withdrawn from Madrid in 1848) without more serious consequences than a temporary suspension of diplomatic relations. On the other hand, no two States could in practice permanently refuse to interchange representatives in time of peace; such intercourse is imperatively demanded by mutual convenience.

It is only in exceptional cases and for special reasons that a State can justly decline to receive an ambassador, as being a *persona non grata* on personal or political grounds. There may be personal objections to him, as in the case of the Duke of Buckingham, whom the French Court refused to receive when sent by Charles I.,¹ because he had posed, during a prior visit to the court, as a lover of the queen²; or he may have expressed views on the affairs of the nation to whom he is accredited, which make him liable to a suspicion of political partisanship, or otherwise unacceptable, as in the cases of Mr. Keiley and Italy,³ and of Mr. Blair and China. The former had in a public speech expressed strong views against the destruction of the temporal power of the Papacy, and therefore could not be considered an acceptable representative by Italy, which had effected this destruction; the latter was believed to have expressed views very hostile to the presence of Chinese in America.⁴ States may also refuse to receive an ambassador from a State of whose sovereignty there is any doubt; and

¹ Cf. also the case of Cardinal Pole (Woolsey, *International Law*, 5th ed., p. 135).

² See S. R. Gardiner, *England under the Duke of Buckingham and Charles I.*, vol. i., pp. 182, 183, 329.

³ J. B. Moore, *Digest of International Law*, 8 vols. (Washington, 1906), vol. iv., p. 480.

⁴ Moore, *Digest*, vol. iv., p. 484.

papal legates have been objected to by States that would not recognise the claim which their presence would imply of the sovereignty of the Pope.¹

Precedence. The precedence of diplomatic and other agents resident in foreign countries was determined by the protocols of the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818. It is as follows:

1. Ambassadors and papal legates or nuncios.²
2. Diplomatic ministers particularly accredited to Sovereigns.
3. Resident ministers accredited to Sovereigns.
4. Charge's d'affaires accredited to ministers for foreign affairs.
5. To the above list may be added those who discharge consular functions.⁸

Notwithstanding the nice gradations of this hierarchy, of which the ceremonial details need not concern us, a sufficient account of the subject can be given under the two heads of (1) Ambassadors; (2) Consuls.

(1) Ambassadors

The practice of sending ambassadors to reside at foreign courts seems to date from the Reformation, and the institution was regularised and more definitely organised after the famous Peace of Westphalia (1648), which marked an important turning-point in the history of Europe. Before that time they were looked upon with suspicion. The passage from Coke has been often cited, in which he says that Henry VII. of England was wise because he "would not in his time suffer Lieger ambassadors of any foreign king or prince within his realm, or he with them, but upon occasion used ambassadors."⁴ So Grotius⁵ affirms that a nation is not bound to receive resident embassies, for such are unknown to ancient practice; and the system clearly owes its existence to convenience and international courtesy rather than to any principle of law.

Inviolability.

It has long been an established rule of international law that ambassadors and their suites ordinarily possess the right of inviolability, or exemption from inquiry, restraint, molestation, or interference.⁶ Such right is retained by them in the event of their

¹ Hall, 8th ed., p. 356.

² It has already been pointed out that papal legates and nuncios have since 1870 lost their status of public ministers within the contemplation of international law.

³ For the classification of diplomatic agents, see Sir E. Satow, *A Guide to Diplomatic Practice*, 2 vols. (London, 1917), vol. i., pp. 229 seq.

⁴ Fourth Institute, chap. 26.

ii. 18, 3, cited by Wpolsky, § 89.

⁶ These privileges were held not to extend to an agent of the Soviet Government of Russia appointed under a trade agreement with the British Government. *Fenton Textile Association v. Krassin* (1922), 38 T. L. R. 259.

withdrawal or dismissal until their return to their own country; so that if a war should break out between two States, the ambassadors of the one accredited to the other must be allowed to depart without molesting them or inflicting any personal indignity on them.¹

Diplomatic privileges and immunities are extended to representatives of members of the League of Nations, to its officials when engaged on its business and to the members of the Permanent Court of International Justice. Buildings and other property occupied by the League or its officials or by representatives attending its meetings are declared inviolable.² The extent of the immunity is not defined; presumably it will vary with the practice of the State wherein it may be claimed.

It is often somewhat largely stated that an ambassador enjoys the privilege of extraterritoriality.³ By this is, or should be, meant, that though *de facto* resident in the country to which he is accredited, his position *de jure* is regulated on the supposition that he still resides in his own country. This is by no means in all respects the case. An ambassador, for instance, cannot exercise, or cause to be exercised, judicial functions in the country to which he is accredited, and it is more accurate to say that certain immunities from the jurisdiction of municipal courts are conceded to ambassadors by the practice of nations. These exemptions, it is to be noted, apply even if the ambassador is a subject of the State to which he is accredited, unless that State on receiving him has specifically reserved its rights over him,⁴ as it is entitled to do. They apply also, in general, to negotiators and representatives at a conference or congress, though such persons are not technically accredited to the State in which the meeting takes place.⁵ Such immunities⁶ may be considered under two heads:

- (a) Immunity from the criminal jurisdiction of the country to which the agent is accredited.
- (b) Immunity from the civil jurisdiction of the country to which he is accredited.

(a) Under no circumstances may an ambassador be tried for a criminal offence in the country to which he is accredited. The practice is well settled, and has been established in England since the case of Mendoza, the Spanish ambassador, who conspired to

¹ At the outbreak of the Great War the French and Russian ambassadors at Berlin were subjected to indignities and the German embassy at Petrograd was wrecked by a mob. See Garner, *International Law and the World War*, vol. i. §§ 27-33.

² Art. 7 of the Covenant, Art. 19 of the Statute of the Permanent Court.

³ Satow, *op. cit.*, vol. i., p. 240. P. W. Thornely in B. Y. I. L. (1926), p. 121.

⁴ *Macartney v. Garbutt* (1890), 24 Q. B. D. 368.

⁵ Westlake, part i., p. 275, and cf. Convention X I I. of 1907, Art. 13.

⁶ See Satow, *op. cit.*, pp. 242 seq.

dethrone Queen Elizabeth. Nor can he be arrested under ordinary criminal process¹; he may, however, be arrested by a high assertion of sovereign power for intriguing against the country in which his mission lies. Thus Count Gyllenborg, the Swedish ambassador in 1717, was detained for some time in an English prison for plotting against the Hanoverian dynasty.² The French Government in 1718 arrested Prince Cellamare, the Spanish ambassador, on a similar charge.³ The case of Pantaleon Sa⁴ is hardly consistent with modern practice. Sa was the brother of the Portuguese ambassador accredited to the Commonwealth; under outrageous circumstances he, or men acting under his direction, killed one person and wounded several others, and for this offence he was indicted, tried and executed.

The general view in later times is that the privileges of an ambassador are shared by his family living with him, and by his official and domestic suite⁵; though in England it has been claimed that a coachman of the United States minister is subject to the English courts if he commits an assault outside the embassy; and there can be little doubt that it is more convenient and in no way derogatory to an ambassador's rights to try such cases on the spot. Disputes on this point will usually be avoided by the ambassador giving his consent.

The correct course when an ambassador is suspected of criminal acts was indicated so long ago as 1584 in an opinion which Gentilis and Hotman were asked to give in Mendoza's case. He must be handed over to the authorities of his own country. The latter precedent was followed (1718) in the case of Cellamare, who was conducted to the frontier by a military escort.

The claim that an ambassador's house is a "city of refuge" to criminals, which would be strictly involved in the extraterritorial theory, has long been generally abandoned in practice.⁶

A diplomatic agent cannot be compelled to give evidence for the purposes of, or before, any court in the country of his sojourn; the

¹Case of the Dutch ambassador and the Landgrave of Hesse Cassel, 1763.

²C. de Martens, *Causes Celebres*, i. 101.

³*Ibid.*, i., pp. 139 seq.

⁴5 Howell, *State Trials*, 460; Sir R. Phillimore, *Commentaries upon International Law*, ii. 211.

⁵See *Parkinson v. Potter* (1885), 16 Q. B. D. 152.

⁶Cases of the Duke of Ripperda and of Springer: De Martens, *Causes Celebres*, i. 101; case of Mickilchenkoff (1867): Calvo, *Droit International*, vol. i. § 571; Oppenheim, i. § 390. In 1896 the British Government insisted on the release of a Chinese refugee, who had entered the residence of the Chinese ambassador in London, and was there detained with a view to his being sent back to China for trial. Cf. the case of Waddington (son of the Chilean envoy in Belgium), who killed the secretary of the legation (1906); the envoy having waived his privilege, Waddington was arrested, tried and acquitted: *Rev. gin, de dr. int. pub.* (1907), vol. xiv., pp. 159 seq. See also *supra*, p. 68.

immunity, however, is waived in a proper case,¹ and the refusal to do so has been held to justify a demand for the agent's recall.²

(b) With regard to civil jurisdiction, there seems to be a general agreement that an ambassador is exempt in respect of all his official or private contracts, and so much property, real or personal, as is "necessary to his dignity or comfort"³; but there is no fixed international agreement in cases where he engages in trade, or is a large property holder in the country of his sojourn, such cases, of course, being very rare. The English common law seems to have allowed no immunity from civil jurisdiction at all to ambassadors. There is a dictum in Coke against the claim, but the law apparently remained uncertain until 1708.

In that year the Czar's ambassador in London was arrested for a debt of £50.⁴ A criminal information was entered against those responsible for the arrest. While the point of law was still under consideration, the statute 7 Anne, c. 12 was passed. The Act, which was in form declaratory, provided by section 3, "That all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador . . . of any foreign prince . . . received as such by her Majesty, or the domestic servant of such ambassador . . . may be arrested or imprisoned, or his goods or chattels be distrained . . . shall be deemed utterly null and void." By section 4, attorneys suing such processes were made liable to punishment. Section 5 provides that the immunity of an ambassador's servants is forfeited by their occupation in trade. On this statute it has been held⁵ that a person claiming the benefit of this Act as domestic servant to a public minister must be really and *bona fide* the servant of such minister at the time of the arrest, and the matter in respect of which he claims immunity must be connected with such service.⁶ The privilege is that of the ambassador, not of the servant.⁷ This statute is a recognition of the principle, on which there is general agreement, of freedom from arrest and restraint, either of which might hamper an ambassador in the exercise of his diplomatic

Immunity
from civil
jurisdiction.

¹ The privilege was waived in 1880 by the Venezuelan minister to the United States, Senor Comancho, who was present at the assassination of President Garfield. Conformably to the instructions received from his Government, he appeared as a leading witness at the trial of the assassin.

² Halleck, *International Law* (ed. Sir G. S. Baker, 1908), vol. i., pp. 359. 360; Moore, *Digest*, vol. iv. § 662. Thus in 1856 the Dutch minister to the United States having declined with the concurrence of his Government to give evidence in a case of homicide committed in his presence, the American Government considered the refusal as an act of discourtesy and hence requested his recall.

³ Westlake, part i., p. 277.

⁵ *Fisher v. Begres* (1832), 2 C. & M. 240.

⁶ *Novetto v. Toogood* (1823), 1 B. & C. 554.

⁷ *Fisher v. Begres* (1832), 2 C. & M. 240.

⁴ Phillimore, ii. 228.

functions, and it has been interpreted as meaning that not only can execution not issue, but an ambassador cannot be sued against his will,¹ and the Statute of Limitations does not begin to run against his creditors so long as he holds his office.² An ambassador who sues as a plaintiff thereby submits to the jurisdiction of the court, presumably in so far as his personal liberty, and his property held in virtue of his office are not affected; and he becomes liable to plead to a counter claim or cross action, but will not be compelled to give security for costs.³ Unlike a Sovereign, however, he is bound by the police and administrative regulations,⁴ and it would seem that any real property which he owns in his private capacity is subject to the jurisdiction of the State in which it is situate.

Ambassador's house.

It is clear that to describe an ambassador's house⁵ as part of the territory of his country is inaccurate, for a criminal who commits a crime or takes refuge there, can be surrendered without the formal process of extradition. The right of asylum is practically obsolete in Europe, Greece and Spain being the only countries in which it has been exercised of late years⁶; but it has by no means disappeared in the South American Republics. Whether the embassy can be entered by the local authorities without the ambassador's permission is a matter of doubt, and the practice of nations has varied. England has claimed the right to enter for the purpose of arresting an offender,⁷ and all that can be said with confidence is that entry and search are justifiable in those extreme cases which justify an ambassador's arrest. The ambassador, his house and his official property, and in most cases all goods imported for his use,⁸ are free from the payment of all taxes, rates,⁹ or duties.

Foreign practice.

The United States Congress in 1890 passed an Act of a similar scope¹⁰ to that of the Statute of Anne, and continental practice has

¹ *Magdalena Steam Navigation Company v. Martin* (1859), 2 E. & E. 94. See also *Parkinson v. Potter* (1885), 16 Q. B. D. 152.

² *Musurus Bey v. Gadbani* (1894), 2 Q. B. 352. Cf. *In re Republic of Bolivia Exploration Syndicate, Ltd.* (1914), 1 Ch. 139. See also *In re Francisco Suarez, Deceased, Suarez v. Suarez* (1918), 1 Ch. 176, where it was held that a minister accredited to this country by a foreign State, who has submitted to the jurisdiction of an English court down to judgment, and against whom judgment has been pronounced, is entitled under sect. 3 of the Diplomatic Privileges Act, 1708, when leave to issue execution is applied for, to assert and obtain immunity from process by way of execution.

³ *Duke de Montellano v. Christian* (1816), 5 M. & S. 503.

⁴ See P. L. Pradier-Fodere, *Cours de droit diplomatique*, 2 vols. (Paris, 1881), vol. ii. 112-16; Moore, *Digest*, vol. iv. § 669.

⁵ As to the immunities of the residence of a diplomatic agent, see Satow, *op. cit.*, vol. i., pp. 282 *seq.*

⁶ In 1862 and in 1873 respectively. ⁷ Hall, 8th ed., pp. 231, 232.

⁸ Within limits. Oppenheim, i. § 394.

⁹ *Parkinson v. Potter* (1885), 16 Q. B. 152; *Macartney v. Garbutt* (1890), 24 Q. B. D. 368.

¹⁰ Cf. *Dupont v. Pichon* (1805), 4 Dall. 321.

been almost uniformly favourable to the claim in its most generous form, though there is a substantial body of opinion in favour of the principle that an ambassador is subject to the jurisdiction of the country to the extent of his property other than property held in his official capacity, and particularly if he actually engages in trade.

Ambassadors do not enjoy exceptional privileges to the same extent at the hands of third States¹ or enemies. There is in a vague way a right of passage through the territory of friendly powers, which has however not always proved a protection from arrest for civil liabilities or criminal offences. Those who have in the past denied such protection have acted on such a rule as was formulated by Bynkershoek: "Non vaere jus legationis nisi inter utrumque principem qui mittit legatos et ad quem missi sunt."² But later practice has leaned in favour of a relaxation of this rule to the advantage of diplomatic personages, on condition of their good behaviour and innocent passage through the territory of a third State. Thus it has been declared by an American Court,³ that an ambassador in such circumstances was not only immune from arrest in the case of civil liabilities, but also exempt from all civil process sought to be instituted against him in a friendly country through which he was passing on his way to the scene of his mission. A similar view was adopted by an English Court,⁴ which refused to allow service of a writ out of England on the minister of a friendly State accredited to a foreign country; Manisty, J., was of the opinion that the privilege attaching to diplomatic agents would be violated by compelling an ambassador accredited to a foreign country to appear as a defendant in Great Britain.⁶

But a belligerent may undoubtedly intern the diplomatic agents of his enemy if found on his territory, even though they are on their way to a neutral State; he may not, however, take them from neutral territory or from a neutral vessel, as appeared in the *Trent* controversy.⁶ A well-known instance of arrest was that of Marshal Belleisle (1744), the French ambassador, while on his way through Hanover, during the Franco English war.⁷ A modern instance occurred in 1917. Herr von Heinrichs, previously German Secretary of Legation

¹ As to the position of diplomatic agents in regard to third States, see Satow, *op. cit.*, vol. i., pp. 317 seq.; Oppenheim, i. § 398; Hall, 8th ed., pp. 363-5.

² *De foro legatorum* (1720), c. ix. § 7; cf. Grotius, *De jure belli ac pads*, ii. 18, 5.

³ *Wilson v. Blanco* (1889), 56 N. Y. Sup. Ct. 582; Scott, *Cases*, p. 206; following *Holbrook v. Henderson* (1851), 4 Sand. S. C. 626.

⁴ *New Chile Gold Mining Co. v. Blanco* (1888), 4 T. L. R. 346.

⁵ The views of international jurists are not unanimous on the question; the majority are against absolute inviolability; cf. *Annuaire de l'Institut de Droit international*, vol. xiv., p. 239.

⁶ Cf. the Declaration of London (1909), Art. 47.

⁷ De Martens, *Causes Celebres*, i., p. 310.

fat Madrid touched at Cuba (which had declared war on Germany) on his way to take up similar duties in Mexico. On landing at Havana he was arrested and made prisoner of war.

The diplomatic agents of a neutral found on enemy territory must be treated with due regard for their inviolability, and, as a matter of international courtesy, their communication with their own Government should not be interrupted; but it is doubtful whether their rights are such as to override an "evident military necessity." During the Franco-Prussian war, the United States protested against the refusal of the Germans to allow her minister in Paris to send dispatches to London in a sealed bag, but admitted that a refusal might be justified if such necessity were proved.¹

Duties of
diplomatic
agents.

The duties which such agents owe to their own countries hardly concern us here, but are a branch of the public law of the State to which they belong. Ambassadors, however, are forbidden by rules which are most jealously enforced, from any association, direct or indirect, with the public affairs of the country to which they are accredited. Hall² collects the instances in which violations of this rule have been followed by a request to the accrediting State to recall, or in an extreme case by dismissal.

A well-known instance of dismissal occurred in 1888,³ when Lord sackville, the English ambassador at New York, was given his passport and required to leave the country within three days. Lord sackville had been asked to advise an unknown correspondent of English extraction and sympathies how to vote in the Presidential election of that year. He replied suggesting in a general way that the then Government was friendly to this country, whereas Mr. Cleveland's intentions were unascertainable. The letter may have been an indiscretion but, as Hail observes, "it was treated as an open and inter ation offence."⁴

In September, 1915, Dr. Dumba, the Austro-Hungarian ambassador in Washigton was recalled on the ground, first, that he had nosed plans his Government for instigating strikes in American factories product. munitions of war, and secondly that he had cloved an American citizen to carry official dispatches secretly to Austria through the lines of her enemies.⁵

¹ Hall, 8th ed., p.67.

² 8th ed., pp. 360,61.

³ *Parl. papers, united states*, No. 4 (1888), No. 1 (1889).

⁴ 8th ed., p.363, n.

⁵ *Amer. Journ. of In Law*, vol.ix. (1915), pp.935 seq.; Oppenheim, i. § 409.

(2) Consuls

The term international agent should mean one who is a link in a chain of communication between two States. In this sense a consul is not, as such, an international agent. He is an official of the country for which he acts intrusted with duties of a multifarious kind in a foreign country, and permitted by that country to discharge them within its borders. The permission involves certain privileges, the concession of which is somewhere along the border-line between courtesy and law. He has not, indeed, any immunity from the ordinary tribunals,¹ though their jurisdiction is asserted so as to inconvenience him as little as possible in the discharge of his duties. In the United States practice is similar,² though American policy has added considerably by treaty to the functions and immunities of the consular service.⁸

Consul not an international agent.

The liability of a consul to be arrested is inconvenient, and his sudden arrest might be very prejudicial to members of the State for which he acts. The point was considered in this country in the case of *Clarke v. Cretico*,⁴ when Mansfield, C.J., observed: "The office of consul is indeed widely different from that of an ambassador, but still the duties of it cannot be performed by a person in prison. . . . The words of the statute⁵ are: 'Ambassador or other public minister.' But a consul is certainly not a public minister. In *Viveash v. Becker*⁶ Lord Ellenborough summed up the matter as follows: 'Nobody is disposed to deny that a consul is entitled to privilege to a certain extent, such as for safe-conduct, and if that be violated the Sovereign has a right to complain of such violation. Then it is expressly laid down that he is not a public minister, and more than that, that he is not entitled to the *jus gentium*. And I cannot help thinking that the Act of Parliament which mentions only "ambassadors and public ministers," and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried.' It appears to me that a different construction would lead to enormous inconveniences, for there is a power of creating vice-consuls; and they too must have similar privileges."

Position of consuls.

The general force of these arguments is great; the practice is common of choosing consuls from among the natives of the particular

¹ *Viveash v. Becker* (1814), 3 M. & S. 284.

² *The Anne* (1818), 3 Wheat. 435.

³ See E. C. Stowell, *Consular Cases and Opinions* (Washington, 1909).

⁴ (1808), 1 Taunt. 106, 107.

⁵ 7 Anne, c. 12.

⁶ (1814), 3 M. & S. at p. 297.

country in which their services are required, and it would be intolerable that men so appointed should be protected from the jurisdiction of their own tribunals. But though he may not be "entitled to the *jus gentium*," e.g. the right of inviolability¹ and exemption from the local civil and criminal jurisdiction² which attach only to diplomatic persons, certain privileges are in practice conceded to a consul. He is allowed to place the arms of the country for which he acts over his house; he is immune from personal taxation, and from liability to jury service; soldiers may not be billeted upon him, and his house is inviolable in time of war. We are not here concerned with the modes in which consuls are appointed, but it must be noticed that they cannot enter upon their duties until authorised to do so by an exequatur issuing from the country in which their duties lie. An exequatur is a more or less formal authorisation to do, within the jurisdiction of the country granting it, the different acts incidental to consular authority.

Termination
of consular
authority.

The authority of a consul is terminated by an express revocation of the exequatur, and probably also by implication when his district is annexed to the territory of another State.³ A breach of duty on his part may bring about the withdrawal of the exequatur. The case of Mr. Bunch, in 1861, is an interesting illustration. The latter, British consul at Charleston, was instructed by his Government to ask the Confederate authorities whether they would observe the last three articles of the Declaration of Paris. Whereupon the United States requested his recall, on the ground that her law forbade any person, not specially appointed, to counsel, advise, etc., in any political correspondence with a foreign Government relating to disputes with the United States, and that the consul ought to have known of this law and to have notified his Government thereof before obeying its instructions. It was also contended that the appropriate agents to make known the wishes of a foreign Government were its diplomatic and not its consular officers. Accordingly, Mr. Bunch's exequatur was revoked.⁴

Duties of
consuls.

The duties of consuls are of a very various character, and can only be generally indicated. In the first place, as commercial agents, they are bound to succour tradesmen and sailors of the country by

¹ Personal inviolability is sometimes secured by means of special conventions between the States concerned.

² Cf. *R. v. Ahlers* (1915), 1 K. B. 616.

³ The latter point is not definitely settled; cf. Oppenheim, i. § 437, who holds that the authority *ipso facto* ceases in such a case.

⁴ Mr. Adams to Earl Russell, 21 Nov. 1861: *U.S. Diplomatic Correspondence*, 1862, p. 1. In August 1923 the British Government withdrew the exequatur of the United States consul at Newcastle-on-Tyne on the ground that he had abused his position for the purpose of deflecting trade from British to American ships.

which they are employed; more generally, its citizens are entitled to look to their consul for advice and countenance in any of the innumerable difficulties which spring up among foreign surroundings. Consultative duties are among the most useful of those which fall upon consuls, and much invaluable knowledge is derived from the commercial reports which they are in the habit of submitting periodically to their Governments. Still more important are certain administrative and judicial functions which they are permitted to discharge. These may be arranged under three heads in an ascending order of importance.

(i.) The verification of births, marriages and deaths, and the administration of intestate estates abroad among citizens of the country for which they act.

(ii.) The exercise, within the limits locally conceded to them, of a disciplinary jurisdiction over merchant sailors of the employing State, and the decision, as arbitrators appointed by consent, of commercial disputes among its citizens.

(iii.) In most non-Christian and partially civilised States the consuls of civilised Powers exercise by consent a very responsible jurisdiction. They are the judges, generally speaking, in all matters civil and criminal which concern their countrymen. The chief countries in which immunity from the local jurisdiction still survives are Siam and China.¹ In these countries the practice is to try offences committed by natives against foreigners in the local court, those committed by foreigners against natives in the consular court of the defendants, and in the court of the defendant's consul where the parties are foreigners of different nationality. The exemption from jurisdiction must be regarded as conventional where the country in which it is asserted is a member of the family of nations; as an extension of the national jurisdiction, comparable to that claimed on the high seas and in savage countries, when it is not. The mixed tribunals in Egypt were established in 1870 in the place of courts of this class; and their retention is largely due to political reasons.

In England this consular jurisdiction now rests on the Foreign Jurisdiction Act, 1890.² Sections 1, 2, 3 of that Act are as follows:

1. It is and shall be lawful for Her Majesty the Queen to

¹ In 1899 the extraterritorial consular jurisdiction was abolished in Japan, and in 1923 in Turkey by the Treaty of Lausanne. In the Treaties of Peace (1919) Germany and Austria relinquished all claim to consular jurisdiction in Siam. The limits of all such jurisdiction show a tendency to contract; at the Washington Conference, 1921, a resolution was passed in favour of taking steps to relinquish consular jurisdiction in China. The present condition of that unfortunate country has delayed and rendered difficult the task of implementing the resolution.

² 53 & 54 Vict. c. 37.

hold, exercise, and enjoy any jurisdiction which Her Majesty now has, or may at any time hereafter have, within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

2. Where a foreign country is not subject to any Government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall, by virtue of this Act, have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of the other provisions of this Act.
3. Every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.¹

Similar provisions for the regulation of American consular courts are contained in Acts of Congress passed in 1848, 1860 and 1870.²

It will be apparent that these judicial duties demand a high degree of knowledge and competence for their proper discharge; and it may be hoped that the tendency will grow for nations to engage at every important centre their own subjects in consular employment, excluding them at the same time from private trade. Under such conditions it would probably be found practicable to extend the immunities of consuls to the point rather prematurely assumed by Heffter,³ when he affirms that they enjoy "that inviolability of person which renders it possible for them to perform their consular duties without personal hindrance."

¹ For details as to organisation, etc., see Sir H. Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Oxford, 1902).

² For American practice, see F. E. Hinckley, *American Consular Jurisdiction in the Orient* (1906).

³ A. W. Heffter, *Le Droit international de l'Europe*, 4me ed. par F. H. Geffcken (Berlin and Paris, 1883), § 244.

PART II

THE RIGHTS AND OBLIGATIONS OF STATES IN TIME OF PEACE

WHEN we speak of a State as enjoying a right to do a certain act, we mean that the public opinion of other States will view the doing of that act with approval, or at least with acquiescence. Correlatively, a State lies under an obligation to do or forbear from a certain act when its omission to do, or non-forbearance from doing, that act will be viewed with disapproval and perhaps by an attempt to compel. Such rights and obligations are, of course, distinguishable from those of municipal law, which are enforced, if necessary, by the strong arm of society. In this limited sense of the words a consideration of the rights and obligations of States in peace, war and neutrality forms a convenient method of exhibiting the whole subject of international law.

CHAPTER I

INDEPENDENCE—INTERVENTION

THE statement that States have a right to their independence is elementary and need not be elaborated. The principle has been often violated, but its immense practical influence can hardly be overstated. The sentiment of nationality, which in our own time called into being the kingdoms of Italy and Greece, which combined with political considerations to effect the unification of Germany, and which continues to be asserted at the present day as emphatically as ever, depends on the assumption that men of one race should enjoy an independent Government of their own. From the history of the development of international law, Oppenheim deduces as one moral that "the principle of nationality is of such force that it is fruitless to try to stop its victory."¹ The principle was freely applied when the map of Europe was redrawn by the treaties of peace, 1919. It remains to be seen whether Hall was justified in his criticism

Nature of
independence.

that its logical application would involve disproportionate disturbance and could not be permanent.¹

It is less easy to state positively the constituent rights which, taken together, amount to independence. Hall has laid it down in general language² that "independence is the power of giving effect to the decisions of a will which is free, in so far as absence of restraint by other persons is concerned. The right of independence, therefore, in its largest extent, is a right possessed by a State to exercise its will without interference on the part of foreign States, in all matters and upon all occasions with reference to which it acts as an independent community." The last limitation is made necessary by the fact that "a State is capable of occupying the position of a private individual within foreign jurisdiction, as, for example, in the case of England, which holds shares in the Suez Canal Company."³ Lawrence⁴ defines independence as "the right of a State to manage all its affairs, whether external or internal, without control from other States." Both these definitions or descriptions are of a general character, and may require to be strictly modified in practice, but the essential conception is familiar, and therefore readily grasped. An independent State is entitled to live its own life in its own way, the sole judge within the law of its domestic government and its foreign policy. The particular form of government which it has chosen in the working out of its national destiny concerns itself and itself alone, for every independent State has the right of setting its own house in order. In asking how far these incidents are found at present in States claiming to be independent, it must be remembered that here, as elsewhere, authoritative international practice must be regarded, and not the repetitions of text-books. A consideration of the history of Europe and the American continents in the present century will make it clear that the rights to independence can only be claimed for many nominally independent communities with substantial qualifications.

Rights incident to independence.

Phillimore summarises the rights incident to independence as follows⁵:

1. The right to a free choice, settlement, and alteration of the internal constitution and government without the intermeddling of any foreign State.
2. The right to territorial inviolability, and the free use and enjoyment of property.
3. The rights of self-preservation, and this by the defence which prevents, as well as by that which repels, attack.

¹8th ed., p. 144, n.

³8th ed., p. 55, n.

²

⁴

8th ed., p. 55.

7th ed., p. 115.

⁵*International Law*, vol. i., p. 162.

4. The right to a free development of national resources by commerce.
5. The right of acquisition, whether original or derivative, both of territorial possessions and of rights.
6. The right to absolute and uncontrolled jurisdiction over all persons and things within, and in certain exceptional cases without, the limits of the territory.¹

The same writer derives from "membership of a universal community" of nations four other rights which may, at least as conveniently, be also referred to the principle of independence:

7. The right of a State to afford protection to her lawful subjects wheresoever situate.
8. The right to the recognition by foreign States of the national Government.
9. The right to external marks of honour and respect.
10. The right of entering into international covenants or treaties with foreign States.²

The points indicated in this summary afford a fair account of the rights involved in independence. It is in fact an abstract right limited firstly by the maxim, *Sic utere tuo ut alienum non ladas*; secondly, by the existence of similar rights in other nations; and thirdly, by the possibility that it may come into conflict with a competing principle to which it is bound to give way. The right to territorial inviolability involves the right of a State to prevent any other State from exercising any jurisdiction within its territory.

A breach of this right was alleged in the case of Savarkar,³ an Indian, who was being conveyed under arrest in a British ship to India to take his trial for abetment of murder. The prisoner escaped while the vessel was at Marseilles and was rearrested on French territory, and the case came before the Hague Arbitration Court, who, by their judgment, delivered on 24 February, 1911, found that the French police had been warned of his being brought to Marseilles; that he was arrested by a French officer and taken back to the vessel by that officer and three persons who had come on shore from the vessel; that no force or fraud had been employed by anybody from the vessel to obtain possession of him; and that, though an

¹As to restrictions on the internal independence of several European States imposed upon, or agreed to by them in treaties containing clauses for the protection of minorities and the supervision over the execution of the clauses exercised by the League of Nations, see *infra*, p. 59.

²*International Law*, vol. i., p. 163.

³See *The Times*, 25 Feb. 1911; *Amer. Journ. of Int. Law*, vol. v. (1911), pp. 520-3; G. G. Wilson, *The Hague Arbitration Cases* (Boston and London, 1915). PP. 230 *seq.*

irregularity had been committed in delivering up a prisoner without extradition proceedings, there was in the circumstances no violation of French sovereignty, and nothing establishing any obligation on the part of Great Britain to deliver up the prisoner. The decision, by its negative findings, illustrates the positive rule that, apart from waiver of the right, no nation may exercise criminal jurisdiction or arrest or confine any person in the territory of another nation.¹

Intervention.

The right to violate the independence of a nation is known as the right of intervention, and a consideration of the occasions when intervention is permissible will most usefully illustrate the inroads which practice has made upon independence.²

"Neither," says Lord Bacon,³ "is the opinion of some of the schoolmen to be received that a war cannot justly be made but upon a precedent injury or provocation; for there is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war." "No Government," said Chateaubriand in the French Chamber (1823) on the occasion of the Spanish war, "has a right to interfere in the affairs of another Government, except in the case where the security and immediate interests of the first Government are compromised."⁴ This is the principle upon which intervention must ultimately depend. Where "there is a just fear of an imminent danger," or, rather more strongly, where the vital interests of a State are gravely menaced, the paramount principle of self-preservation comes into play. If a neighbouring country swells its armaments to a degree not to be reconciled with the simple aim of self-defence, if the preparations from the nature of the case can only be directed against one object, the community menaced may strike at its own time, without awaiting further provocation. International law is at its weakest, and its writers are least convincing, on the subject of intervention: the main reason for this being perhaps because the question appertains more to the sphere of politics than to that of the law of nations,—for in several topics of international law, jurisprudence and politics are very closely related. The maxim,

¹ The decision has provoked a good deal of controversy, and has been condemned by several writers; see Oppenheim, i., p. 510, note 1, where various references are given.

² It has been argued that the law relating to intervention would be simplified if it were accepted that the term is used in three distinct senses which may be classified as: (1) internal, where it consists of interference between disputing sections of the community in another State; (2) punitive, where it is a measure of redress falling short of war; (3) external, where one State interferes in the relations, generally the hostile relations, of other States without the consent of all or any of them (P. H. Winfield in B. Y. I. L. (1922-3), pp. 130-49).

³ *Essay on Empire*.

⁴ *Moniteur*, 15 Feb. 1823; Alison, *History of Europe*, chap. xii. § 41.

Nemo potest iudex esse in re sua, has no place in the law of nations, and the interested nation itself decides on the extent of provocation, and the imminence of peril. Under these circumstances it is not surprising that the line between policy and law is slightly drawn, so that high-handed acts of aggression have been able to masquerade under the name of intervention. The danger of a rule is apparent which would permit one nation to interfere in the concerns of another in order to prevent the wrongful intervention of a third, being itself the only judge of the likelihood of such intervention and of its moral or legal justifications. It seems possible to base upon the modern practice of nations a simple and more exclusive statement of the occasions on which intervention is permissible. It may be defended on two occasions only:

1. When it is made necessary by self-preservation.
2. When it is undertaken by the general body of Powers.

(1) Westlake,¹ taking as his text a passage from Rivier,² argues Self-preservation. at some length against the suggestion that the right of self-preservation overrides in all cases the duty to respect the rights of others, and entitles a State to do violence to another State whose conduct has been innocent of all wrong. He points out that even an individual is not in English law allowed "to ward off danger from himself by transferring it to an innocent person"; and that even if an individual had such a right, it would not follow that the same thing could be said of a State. "Patriotism should not allow us to forget that even our own good, and still less that of the world, does not always and imperatively require the maintenance of our State, still less its maintenance in its actual limits and with undiminished resources."³

It can hardly be said, however, that a State would never be justified in violating the sovereignty of another State, unless that other had actually done, or threatened to do, it harm. Westlake himself approves of the action of Great Britain who, in 1807, when there was an imminent danger of Napoleon and the Czar compelling the Danish fleet to join them against her, called upon Denmark, a friendly nation, to surrender her fleet till the war was over, and on her refusing, captured that fleet by force. It is true that Westlake justifies his approval of the course taken by an attempt to bring the case within the rule that a State may defend itself against another which threatens to attack it. "The principle," he says, "that the legal rights of a State are not to be violated without its own fault, is

¹ Part i., pp. 309 seq.; and cf. Hall, 8th ed., p. 322: "In the last resort almost the whole of the duties of States are subordinated to the right of self-preservation."

² *Principes du Droit des Gens* (Paris, 1896), t. i., pp. 277-8.

³ Westlake, part i., p. 312.

not really infringed, for when a State is unable of itself to prevent a hostile use being made of its territory or its resources, it ought to allow proper measures of self-protection to be taken by the State against which the hostile use is impending, or else must be deemed to intend that use as the necessary consequence of refusing the permission. It is a principle of jurisprudence that every one is presumed to intend the necessary consequences of his actions." But that is equivalent to saying that Denmark was morally to blame for not being a Power strong enough to resist France and Russia; for how otherwise was she under any moral obligation to hand over her fleet to Great Britain, and how on her refusal to do so did she become a State in fault against whom Great Britain was entitled to take so extreme a step? It is surely better to admit that there may be circumstances in which, in self-defence, a State is entitled to violate the sovereignty of another, even though that other is in no way in fault; and to insist only that such violation shall be accompanied by the minimum of injury, and be justified by the most urgent necessity. The simple fact was, that in view of the forces against her, Great Britain had every reason to fear invasion and possible conquest if the Danish fleet were brought into operation; and the real defence of her action is, that she only intended to sequester the Danish fleet, and pledged herself to restore it when the danger was over. The question is one of the degree of injury done rather than of the moral delinquency, actual or constructive, of the injured State. The Danish incident was an extreme case; it would hardly be argued that any imaginable danger would have justified Great Britain in conquering and annexing Denmark, or even in capturing her fleet, without a previous offer of restitution or compensation.¹

But the rule so laid down and so safeguarded (we call it a rule, though it is in fact an exception to the rule of the inviolability of State sovereignty) will satisfactorily cover all those cases where a State "intervenes" by violation of the sovereignty of another State, which is not, except by a rather strained application of a legal presumption, guilty of any actual or threatened attack. Such cases usually involve little more than a sentimental injury to the State which suffers from the intervention. One of the best known occurred towards the end of the year 1837. During the Canadian insurrection, the American steamer, the *Caroline*, which was used by the insurgents and their American adherents for purposes of military transport

¹ The British action has been disapproved of by continental writers generally, but defended by Anglo-American publicists. One of the most eminent naval writers of modern times, who by reason of his American nationality would not be prejudiced in regard to the proceeding, has justified it: A. T. Mahan, *Influence of Sea Power upon the French Revolution* (Boston, 1892), vol. II, p. 277.

and invasion, was seized by Canadian forces and set adrift over the Niagara Falls, with the loss of only two lives. This act within American territory was followed by a controversy between the two Governments, which lasted some five years. Great Britain claimed justification on the ground of self-defence; but the main difficulty was to determine when the necessity of self-defence could be said to be valid and operative. In the course of the negotiations, however, Daniel Webster, Secretary of State, formulated a rule,¹ whose applicability was accepted by Lord Ashburton: viz. that in order to justify the act of the Canadian authorities England must show a "necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation," and also that the said authorities "did nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it." These conditions were proved to have been fulfilled, and the matter was settled amicably.² It may be added that the rule enunciated by Webster would, however, be more acceptable if the words "and no moment for deliberation" were omitted, because they import an excessively stringent condition in the circumstances. Somewhat similar had been the action of the United States in 1817, when the Spanish *Amelia Island* was seized by Spanish insurgents. Spain was unable to prevent them from becoming a danger to the United States, and the latter thereupon occupied the island. Under the same heading may be classed those cases where a State violates the flag of a friendly nation at sea, when that flag is being used by individuals to cover a hostile enterprise. Spain, in 1873, seized the *Virginus*, a vessel fraudulently registered in the United States, but belonging to and used by Cuban insurgents; and whatever may be said of the summary execution of those on board, there was nothing to complain of in the arrest.³

While, therefore, it must probably be admitted that the invasion of the sovereignty of a non-offending and friendly State is in extreme circumstances permissible, it will be generally agreed that intervention should so far as possible be exercised only against a State which itself threatens danger to the intervening State. Two outstanding instances of intervention occurred during the Great War: that of Germany in Belgium and that of the Allied Powers in Greece. British writers unannously condemn the first but they find difficulty in justifying the second.⁴ In both there are disputable elements and

Cases of intervention.

¹Mr. Webster to Mr. Fox, 24 April, 1841.

²See *Parl. Papers* (1843), vol. lxi., pp. 46-51; J. B. Moore, *International Arbitrations*, etc. (Washington, 1898), vol. iii., pp. 2419 seq.

³*Parl. Papers* (1874), vol. lxxvi.; Cobbett, *Cases*, vol. i. (1909), pp. 165 seq.; Moore, *Digest*, vol. ii., pp. 895 seq.

⁴E.g. Oppenheim, i. § 135; Hall, 8th ed., p. 346, n.; and Lawrence, 7th ed., p. 122.

a full consideration of the facts upon which a judgment should be based would be outside the scope of this book. A third instance might be added, the intervention of the Allied Powers in Russia in 1919-20. But in this case the legal aspect is so overclouded with policy and politics that British jurists with quiet unanimity have avoided giving expression to their views.

Self-preservation should mean self-defence. Every claim to intervene on this ground must be judged on its own particular facts. Great Britain in 1804 was justified in attacking Spain on discovering that that country was about to join France and was preparing for war. Austria in 1813 was justified in joining Russia and Prussia against Napoleon, when the movement of his troops showed an intention to intimidate her by force. To deal uncontroversially with highly controverted facts, the truth is elementary that Great Britain would have been legally justified in intervening to prevent the further armament of the Dutch Republics, assuming that such armaments clearly exceeded the limits of proper self-defence.¹ Whether the possibilities opened up by the Jameson Raid, and the revolutionary schemes imputed to Johannesburg, raised the requirements of legitimate self-defence high enough to justify the extraordinary elaborateness of the Boer armaments, is a question which different persons will no doubt answer differently. The principle at least is clear.

A further illustration may be drawn from the war in which this country became involved in consequence of the French Revolution. *Prima facie*, France in 1792 was as much entitled to enjoy an uninterrupted revolution as England in 1688. The legality of the intervention must stand or fall with the seriousness or otherwise of the apprehension that an aggressive propagandism of revolutionary principles was contemplated by the French Convention. No doubt the danger was exaggerated, but the *redaction* of 19 November, 1792, is still on record: "La Convention nationale declare qu'elle accordera secours a tous les peuples qui voudront recouvrir leur liberte et elle charge le pouvoir executif de donner des ordres aux generaux des armees francaises pour secourir les citoyens qui auraient ete ou qui seraient vexes pour la cause de la liberti." It is easy to say now that the menace was never more than verbal, but it must have appeared terrible enough to those who viewed with deepening apprehension the conceptions of *la liberte* which were growing in French favour.

The doctrine under consideration was pushed to entirely inadmissible lengths by the Holy Alliance, the pretensions of which are

¹ Cf. Bismarck's intimation to Lord Loftus, 13 July, 1870: "I am positively informed that France has been and is now arming. If this go on, we shall be compelled to ask the French Government for explanations" (Busch, *Our Chancellor*, vol. ii., p. 55).

of great historical interest, because out of them sprang by revulsion the Monroe Doctrine. The parties to this understanding were the rulers of Russia, Austria, Prussia and France. Setting aside the idealist tinge contributed by the dreamy mind of the Emperor Alexander, the objects of the Alliance as developed at the Congresses of Aix-la-Chapelle, Troppau and Laybach were clear enough. A circular issuing from Austria, Russia and Prussia alleged the existence of "a vast conspiracy against all established power, and against all the rights consecrated by that social order under which Europe had enjoyed so many centuries of glory and happiness." . . . "They regarded as disavowed by the principles which constitute the public right of Europe all pretended reform operated by revolt and open hostility." Lord Castlereagh's circular dispatch in reply¹ has been often referred to: Such principles, he said, "were adapted to give the great Powers of the European continent a perpetual pretext for interfering in the internal concerns of its different States . . . though no Government could be more prepared than the British Government was to uphold the right of any State or States to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another State, it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby. . . . The British Government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered that exceptions of this description never can, without the utmost danger, be so far reduced to rule as to be incorporated into . . . the institutes of the law of nations."

In 1823 the Powers to whom the dispatch was addressed had under consideration the propriety of helping Spain to subdue her rebellious South American colonies. Proposals were actually made to hold a congress to consider South American affairs. Canning, then Minister of Foreign Affairs, suggested to the American minister in London that any attempt by Europe to decide the fate of States so nearly connected with the United States by community of geographical and political interest as the South American Republics, ought to be most jealously watched. Out of this suggestion arose the celebrated Monroe Doctrine, which was embodied in the annual message to Congress of President Monroe on 2 December, 1823. It contained two distinct statements:

1. "It is a principle in which the rights and interests of the United States are involved that the American continents, by the free and independent condition which they have assumed and maintain

¹19 January, 1821: *Annual Register*, vol. lxii., p. 737.

The Monroe
Doctrine.

are henceforth not to be considered as subjects for colonisation by any European powers."

2. " With the existing colonies and dependencies of any European Power we have not interfered and we shall not interfere; but with the Governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principle acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European Power in any other light than as the manifestation of an unfriendly disposition towards the United States."¹ * i

This policy had already been expressed more tersely and more comprehensively by Jefferson in a letter written to Monroe, 24 October, 1823: "Our first maxim should be, never to entangle ourselves in the hroils Europe; our second, never to suffer Europe to intermeddle in cis- Atlantic affairs." The doctrine was extended in 1870 by President Grant, who declared that in future " no territory on this continent shall be regarded as a subject of transfer to a European Power." With some of the extravagant utterances of President Grant in favour of a cessation of relationships between Europe and America—a consummation impossible of achievement—we are not here concerned; we need only notice the attempts which have been made to treat the doctrine as a part of international law, and inquire how far they can be supported. Putting on one side the self-denying ordinance which precludes America from interference with European questions, two principles are contended for, which may be respectively termed: .

1. The non-colonisation principle;
- \ 2. The non-intervention principle.

It is material to notice that the assertion of each was elicited by particular circumstances: the first by a Russian attempt to acquire the North-West Territory, the second by the designs of the Holy Alliance. In 1895, however, in his message to Congress of 17 December, President Cleveland observed of the doctrine: " It may not have been admitted in so many words to the Code of International Law; but since in International Councils a nation is entitled to the rights belonging to it, if the enforcement of the Monroe Doctrine is something we may justly claim, it has its place in the Code of International Law as certainly and surely as if it were specifically mentioned." A more completely circular argument was never devised; and one of the leading American writers in international

¹ On the Monroe Doctrine, see Moore, *Digest*, vol. vi., chap. 20; J. B. Henderson, *American Diplomatic Questions* (New York, 1901).

law¹ has taken the other view strongly: "The declarations are only the opinion of the Administration of 1823, and have acquired no legal form or sanction." On the other hand, they have often been insisted upon by American statesmen, and have become more and more a settled principle of American policy.² In 1824, when a general negotiation was in progress between this country and the United States, the assertion by the latter of the non-colonisation principle was met by a refusal on the part of Canning, who represented this country, to proceed any further in the Anglo-American controversy with Russia. The English view was unequivocally placed on record that Great Britain considered the whole of the unoccupied parts of America as being open to her future settlements in like manner as heretofore.

It is, however, on its intervention side that the doctrine has attracted most attention. The American contention in the Venezuelan boundary dispute. negotiations in 1895 far exceeded the scope hitherto claimed by the most extensive commentators on President Monroe's message. A long-standing dispute between Great Britain and Venezuela as to the proper boundary between the Republic and British Guiana became acute in 1895. The British claims were finally affirmed in the form of an ultimatum. Venezuela, it need hardly be said, is a sovereign independent State. Under these circumstances appeared the message of President Cleveland. Its material portions were as follow: "The balance of power is justly a cause of jealous anxiety among Governments of the Old World, and a subject for our absolute non-interference. None the less is the observance of the Monroe Doctrine a vital concern for our people and their Government. . . . If an European Power, by an extension of its boundaries, takes possession of the territory of one of our neighbouring republics against its will and in derogation of its rights, it is difficult to see why, to that extent, such European Power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. . . . The dispute has reached such a stage as to make it now incumbent upon the United States to determine, with sufficient certainty for its justification, what is the true divisional line between the Republic of Venezuela and British Guiana. . . . I suggest that Congress make an adequate appropriation for the expenses of a commission, to be appointed by the Executive, which shall make the necessary investigation and report upon the matter with the least possible delay. When such report is made and accepted, it will, in my opinion, be the duty of the United States to resist, by every means

¹ R. H. Dana, note to Wheaton, *Int. Law*, 8th American edition (Boston, 1866), § 67, note 36.

* Strangely enough, the doctrine has never been directly affirmed by either the Senate or the House of Representatives.

in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands, or the exercise of governmental jurisdiction over any territory which, after investigation, we have determined of right to belong to Venezuela."

The actual dispute was settled by arbitration in 1899, for the greater part in favour of the British claim; but Venezuela was represented throughout the arbitration by the United States. The broad question of the right of the United States to dictate to European nations in their relations with South American States remained unsettled. If the claims then made are sanctioned by acquiescence so as to become a portion of international law, the doctrine of equality may be finally banished from our text-books, to be replaced by a legal hegemony on the part of the United States over the whole of the American continents. It is involved in the American claim that no European nation can exact redress from a South American Republic in the only manner in which a demand for redress is likely to be at all effective. Powerful European nations are not likely to acquiesce in a view which in effect concedes national character to these States while exonerating them from its correlative responsibilities. Nor is it to be supposed that the sane judgment of thoughtful Americans will insist on a view so extreme; it is, however, not impossible that political exigencies may in time compel the United States to declare a protectorate over the South American Republics. Such a step, whatever its political aspects, would at least clear the legal atmosphere, and would effectually meet the legitimate American aversion to a violent European irruption into the New World. Until such a change takes place, the lawyer may dismiss the doctrine with the comment that in its most moderate form it involves an enormous addition to the commonly received conception of the rights of self-preservation.

Primacy of
U.S. in
America.

It may be added that in 1901, when Great Britain, Germany and Italy sought to make Venezuela carry out her international obligations, the United States held aloof from the controversy. Referring thereto in his message to Congress, 3 December, President Roosevelt observed: "We do not guarantee any State against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American Power."¹ Early in the Great War it was reported that Ecuador and Colombia disregarded their neutrality by permitting Germany to use their wireless stations; whereupon Great Britain and France asked the United States to bring pressure to bear on the republics in order to secure the due fulfilment of their duties of neutrality, otherwise the Allies would have to take action themselves. This representation to

¹ Moore, *Digest*, vol. vi., p. 590.

the United States was thought to involve a recognition of the primacy of the United States on the American continent, and a generous acceptance of the Monroe Doctrine.¹

Special provision for the Monroe Doctrine was made in the Covenant of the League of Nations by Article 21: "Nothing in the Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace." There is general agreement that although the terms of the Article constitute an extensive acceptance of the doctrine, it does not thereby become a rule of international law. Such an acknowledgment in a treaty, signed or acceded to by the vast majority of civilised States, gives some degree of international character to what was purely a declaration of policy by the United States. What this international character is, is uncertain, and the vague description "regional understanding" does not resolve the doubt. Its elevation to a rule of international law awaits a clearer definition of its full effect upon the international relations of the South American Republics and a wider acknowledgment of its tendency "for securing the maintenance of peace."²

(2) It was stated that intervention was permissible, in the second place, when undertaken by the general body of civilised States in the interests of general order. This ground of intervention is often ignored by writers who acknowledge much more disputable justifications. No writer who derives his views of law from the practice of States, and not from theoretic reasoning, can refuse to admit it. It has been repeatedly asserted, and its exercise has not been questioned during the past century. The international birth of Greece in 1832 was the result of a European intervention in the affairs of Turkey; the petulant childhood of the kingdom thus called into existence was systematically regulated by the Concert of Europe, and under the same tutelage Greece has received periodic accessions of territory at the expense of Turkey. By a similar exercise of jurisdiction the independence of Belgium was extorted by the Great Powers in 1839 from the King of Holland; and in 1878 a conditional independence was bestowed upon Montenegro, Rumania and Serbia. On each of these occasions the act was clearly one of intervention; the jurisdiction is thus established in practice, and is not objectionable in theory. Unanimity of the Great Powers is the best guarantee against individual self-seeking.

¹ *The Times*, 14 Nov. 1914, p. 8.

² See Oppenheim, i. §§ 139, 140, and article by Pearce Higgins in B. Y. I. L. (1924), pp. 103-18.

Intervention
on grounds
of humanity.

- It is believed that the two grounds of intervention which have been considered are alone consistent with modern practice. It is sometimes suggested that on humanitarian grounds one nation is justified in intervening to prevent practices shocking to humanity
- (1) within the territory of another. The occasional benefits of such intervention would be outweighed by its liability to abuse. In theory no doubt it is regrettable that international law should prohibit, even by implication, the suppression of outrage, but in practice the number of national Don Quixotes is not found to be considerable, and thinkers of very different schools are content to distinguish between the moral standards applicable respectively to individuals and communities.¹ Sir William Harcourt² has described humanitarian intervention as a high act of national policy over and beyond law. This view is indecisive unless such acts are to be withdrawn from the purview of international law altogether, for their legal or illegal quality requires determination all the more imperatively that they have a "high political" character.

Intervention
on ground of
treaty or
law.

It is often stated that intervention depending upon a treaty right is permitted, but the claim is perhaps somewhat academic. If the arrangement is merely dynastic it cannot be supported, for the Sovereign who has exposed his country to an intervention intended to secure his dynasty, has clearly exceeded the limits of his competence as a national agent; if, on the other hand, one country has entitled another to intervene indefinitely in its domestic concerns, the derogation from independence would probably not consist with the retention of international character. But intervention conformably to the rights and obligations established by collective treaties of guarantee,³ and also for the purpose of safeguarding or vindicating general international law, is clearly defensible; indeed it becomes in such circumstances an infeasible duty.

Intervention
in civil war.

Intervention in a foreign civil war has been sometimes declared legal, but the case hardly requires separate consideration. If undertaken at the invitation of both parties, it is mediation by request and therefore unobjectionable; if at the invitation of one, then it is either an unjustifiable interference with an established Government or an equally unjustifiable attempt to dictate to a nation the form of government under which it shall be ruled, for Hall's observation is unanswerable: "... The fact that it has been necessary to call in

¹ Bismarck's cynical remark, that he placed the bones of a Pomeranian grenadier above all Armenia, had been often reprobated and is offensive in expression, but the general principle of which it was only a particular application is commonly acted upon by statesmen of every country, and even Mr. Bright strongly denounced the views of those who would make England the Knight-Errant of Nations.

² *Letters of Historicus* (London, 1863), p. 41.

³ See *infra*, pp. 139, 140.

foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the State."¹

The theory of the balance of power² has in the past frequently supplied an excuse, but seldom, if ever, a justification for intervention. At the beginning of the eighteenth century the prospect of a union between France and Spain was the cause of much fighting, and Napoleon III. relied upon the theory in his attempts, partly successful and partly unsuccessful, to increase the territory of France; but little has been heard of it in late years. The idea of preserving an "international equilibrium of forces" must always exercise a certain influence upon diplomacy, but the world, except in certain phases of popular discussion, has apparently abandoned the notion that a State may justly be attacked and punished for becoming too strong.

The question of peaceful intervention, has recently been brought into prominence by the rights possessed in that direction by the League of Nations under the Covenant³ and under treaties containing Minority Clauses⁴ and, generally, from its character as an organisation to achieve international peace. Jurists continue to disagree as to the exact scope of the right of intervention, but the tendency is towards agreement on the basis of the two clear grounds mentioned in the text,⁵ subject to this—that the creation by treaty of a definite organisation through which the general body of States will act and the endowment of that organisation with specific rights of intervention under certain treaties have tended to fuse two grounds hitherto considered distinct and not equally justifiable: (i.) when undertaken by the concert of Powers, and (ii.) when based upon treaty rights. Intervention by the general body of civilised States still continues, but not in its old form, that of action by the concert of Powers. For it is no longer conceivable that the Great Powers of Europe should claim, as such, any right to intervene in the affairs of other European States while there exists in the League of Nations a means to that end, specifically designed to meet the excuses which history has shown to be most commonly invoked to justify interference, accepted by almost all the States against which intervention might need to be directed, and demonstrably fairer and more effective in practice than the system of the concert of Powers.

¹ 8th ed., p. 347.

² This question is closely connected with that of the Concert of Europe, already referred to. For a full discussion of the whole subject, see C. Dupuis, *Le Principe d'équilibre et le Concert européen* (Paris, 1909).

³ Articles 11 and 15 (6).

See *infra*, p. 59.

⁵ Oppenheim, i. §§ 135-8; Hall, 8th ed., p. 344, n., and authorities there cited; and P. H. Winfield, B. Y. I. L., 1922-3. PP.130-49, and 1924. pp. 149-62.

Intervention
by League of
Nations.

CHAPTER II

PROPRIETARY AND QUASI-PROPRIETARY RIGHTS AND DUTIES

T H E rights and duties of nations considered as proprietors may be arranged under four heads:

1. Rights over land
2. Rights over water.
3. Rights over the air-space.
4. Rights over miscellaneous objects.

1. RIGHTS OVER LAND

A State may exercise control over land in a variety of degrees, directly as over an integral part of its dominions, or indirectly as over a protectorate or sphere of influence. In the two cases last mentioned it is a question of fact in each case whether the rights claimed are proprietary at all in their character. A State may acquire territory in a variety of ways, of which four are sufficiently important to be mentioned here. These are occupation, cession, conquest, and prescription.

Occupation. Occupation is a good root of title to territories altogether unoccupied or inhabited by savages, who, by a humorous fiction, are considered incapable of possessing territory¹ on the ground that they are not duly organised into a political community possessing the attributes of sovereignty and independence in accordance with the requirements of the law of nations. Occupation is distinguished from cession and conquest in that in the case of occupation the territory acquired is not subject to the Sovereign of another State, in cession the acquiring State receives territory from the ceding State as former owner by means usually of an amicable transaction, in conquest the acquiring State appropriates forcibly as a result of success in war territory belonging to the defeated country. The rules of occupa-

²It is better to state this proposition boldly than, like Phillimore (vol. i. chap. xii. § ccxlii., p. 286), to accept the argument, "The North American Indians would have been entitled to have excluded the British fur-traders from their hunting-grounds; and not having done so, the latter must be considered as having been admitted to a joint occupation of the territory, and thus to have become invested with a similar right of excluding strangers from such portions of the country as their own industrial operations pervade."

tion were borrowed wholesale from the very sensible provisions of Roman private law. Discovery of new territory—*territorium nullius*—by a private individual was generally held to confer a good title on the State to which he belonged. For a time the rule was not practically inconvenient, but the discovery of the New World subjected the doctrine to a strain which it was wholly unable to support. The rule which originally determined the right to a derelict article—*res nullius* in the streets of Rome was applied to the vast territories which each year's maritime adventure was disclosing to the nations of the world. Spain and Portugal, relying partly on papal bulls and partly on discovery, claimed the right to divide between themselves the hitherto undiscovered areas of the world. Henry V I I . of England laid claim to a share, respecting in theory the rights of prior discoverers.

These pretensions produced a reaction until in our days " prior discovery, though still held in considerable respect, is not universally held to give an exclusive title." ¹ Unless followed up by settlement, discovery " is only so far useful that it gives additional value to acts in themselves doubtful or inadequate." ² Private individuals, bearing no commission from their Government, are not capable of legal occupation ³; but acts of control done and continuing to be done by such persons, if ratified by their Governments, may be retrospectively validated. Further, the State act of occupation or of ratification must be of a public nature, so that due warning may be given to other States. ⁴ The underlying principle is that occupation to be valid must be reasonably effective, having regard to the circumstances of the particular case. Formal annexation, without more, is not therefore a root of title, though the fact of such previous occupation may lend a different colour to later acts which, if they stood alone, would be indifferent or indecisive. These conclusions have been stated with sound common sense by Hall ⁵: " It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions

¹ Sir H. S. Maine, *International Law* (London, 1888), p. 66.

² Hall, 8th ed., p. 126.

• The United States in the Oregon dispute based a claim on an unratified discovery and occupation by private individuals. This was not admitted by Great Britain, and the question was settled by the Treaty of Washington (1846), followed by an arbitration before the German Emperor, 1872. See Wheaton (ed. Phillipson), pp. 276-81; Moore, *Digest*, vol. i. §§ 80, 81, 104; vol. v. § 835; Sir T. Twiss, *The Oregon Question* (London, 1846).

⁴ Cf. *The Fama* (1804), 5 C. Rob. 106, 115, 116; Westlake, part i., p. 100. The Institute of International Law, in its Project relating to the occupation of territory (1888), agreed that public notification should be an essential condition of real occupation: see *Annuaire de l'Institut de Droit International*, vol. x. p. 201.

⁵ 8th ed., p. 127.

on the spot, a good title has always been held to have been acquired as against a State making settlements within such time as allowing for accidental circumstances, or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title."

Area of
occupation.

It is clearly important to define the area over which a geographically partial act of occupation may be allowed to extend. In the early days of American colonisation, extravagant pretensions were put forward by both England and France, and the view is alleged (though probably wrongly) to have been held in this country that occupation of the coast carried with it the whole continent to the Pacific Ocean.¹ A more reasonable rule is generally adopted, that occupation of a coast shall comprehend the interior as far as the watershed of the river flowing into the sea at the point of occupation; laterally such occupation embraces the tributaries of such rivers, and the territory covered by them.² Even these principles, however, may lead to extravagant results, particularly in the case of rivers like the Mississippi, and disputes on the subject have usually ended, like the Oregon dispute, in compromise. A claim to the "hinterland" of a coast settlement may probably be admitted if the region claimed can only be reached by transit through the occupied coast; if that region is accessible from another direction then, in the words of Westlake, "it can only be within moderate limits of space and for a moderate duration of time proportioned to the urgency of the need of protection for trade and settlement in the interior, that a sphere of interest radiating from the nearest coast will properly command international respect."³ It may be supposed that the area within which the doctrines above stated can be practically applied is rapidly lessening, although in recent times the opening up of the African continent has brought them into prominence. The future lines of African colonisation have now been generally determined by agreement, but useful illustrations of the principles of occupation may still be drawn from the Oregon territory dispute between this country and the United States in 1844,⁴ the Louisiana dispute between the latter country

¹ There was no limit specified in the English colonial grants, and the early settlers seem to have met French aggression with indefinite claims to the interior.

² This principle was stated at the Louisiana negotiation in 1804. See Sir Travers Twiss, *Law of Nations, Time of Peace* (Oxford, 1884), §§ 125, 126; Phillimore, vol. i. § 238.

³ Part i., p. 116.

⁴ *Pari. Papers*, iii., 1846, Oregon Correspondence; Twiss, *Oregon Question*, chap. iv.; Hall, 8th ed., p. 134; Wheaton (ed. Phillipson), pp. 276 seq.; Moore, *Digest*, vol. i. § 80; vol. v. § 835.

PROPRIETARY RIGHTS AND DUTIES 93

and Spain in 1803,¹ the Venezuelan boundary dispute between Great Britain and Venezuela in 1895-9,² and the Alaska boundary dispute between Great Britain and the United States referred to arbitration in 1903.³

Islands in the sea present questions of less difficulty. Here, again, Islands. much depends upon the facts, the size of the island and the nature of the occupation; but occupation of one part is more easily presumed to be occupation of the whole. *Prima facie* an island belongs to the nation within whose territorial waters it lies, but the presumption may be rebutted on proof of an adverse root of title. Islands which are formed by "alluvium and increment" from the soil of a coast belong naturally to the state which owns that coast.⁴

Occupation can only come into play when there is a *res nullius* *Res nullius.* to be occupied,⁵ but the requirement is of course satisfied when territories, previously occupied by a civilised country, are definitively relinquished. In the Santa Lucia negotiation between this country and France in 1763, it was admitted that abandonment for ten years may be treated as definitive. The Delagoa Bay dispute between this country and Portugal in 1875 established the principle that, when the power to control is never lost, occasional acts of sovereignty are sufficient to keep alive a title by occupation.

The question of African colonisation was considered at the African occupation. Berlin Conference in 1885, and an agreement arrived at by all the Great Powers, including the United States. The signatory Powers bound themselves to acquire no land and assume no protectorates on the coast of Africa without notifying one another of their intentions; and they formally laid down the principle that occupation

¹ *British and Foreign State Papers*, 1817-18. Hall, 8th ed., p. 132.

² Cf. Hall, 8th ed., p. 136; Moore, *Digest*, vol. i. § 88; vol. v. § 966.

³ *British and Foreign State Papers*, vol. xii. (1824-5), vol. Ivii. (1866-7), vol. lxxxiv. (1891-2), vol. lxxxvi. (1893-4), vol. xcvi. (1902-3); Cobbett, *Cases*, vol. i., pp. 96 seq.

⁴ *The Anna* (1805), 5 C. Rob. 373. Followed by the Privy Council: *Secretary of State for India v. Sri Raja Chellikani Rama Rao* (1916), 85 L. J. P. C. 222; 32 T. L. R. 652.

⁵ It is doubtful whether the polar regions can be acquired by occupation, inasmuch as permanent settlement there is practically impossible; regions of moving ice can scarcely be regarded as territory. Cf. *Amer. Journ. of Int. Law*, vol. iii. (1909), pp. 928 seq.; vol. iv. (1910), pp. 265 seq. Spitzbergen was until recently regarded as *terra nullius*. A conference in 1914 between representatives of interested States failed to reach an agreement that would prevent the island falling under the domination of any one Power. The question was solved in 1920 by a treaty signed at Paris by Great Britain, France, Italy, Denmark, Holland, Norway, Sweden, Japan and the United States recognising the sovereignty of Norway over the island subject to equality of commercial treatment for the nationals of the contracting Powers. See A. J. I. L. (1920), w., p. 232. It is suggested that the subsoil beneath the bed of non-territorial sea is *res nullius*, a proposition of practical importance in the event of a Channel Tunnel being bored. See Oppenheim, i. §§ 287c, 287d.

must be effective by recognising "the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights and, as the case may be, freedom of trade and transit under the conditions agreed upon."¹

Conquest.

Conquest is by some writers used synonymously with effective military occupation²; in that case the possession of the occupant is only *de facto* and provisional. If conquest is identified with subjugation and annexation, then the possession of the annexing State becomes *de jure* and definitive. Several modern writers³ deny that conquest is a legitimate means of acquiring territory, but however undesirable such a title may be, it must be admitted that, having regard to numerous examples of international practice and to the fact that modern international law does not as yet contain a provision to the contrary, it is juridically valid.⁴ Protests may be made, and have frequently been made, by defeated States and by third States against this mode of acquiring territory; but until an international agreement is reached as against conquest, subjugation and forcible annexation, the title to such acquisition is legally valid, be it ever so reprehensible on the ground of morality. The pronouncement of one of the most eminent American judges, Chief Justice Marshall, may be recalled: "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinion of individuals may be respecting the original justice of the claim which has been successfully asserted."⁵ Very rarely have third States refused to recognise a new sovereignty asserted over effectively annexed territory.⁶

Cession.

Cession is a formal mode of acquiring territory by a purely voluntary transfer, or by—what may be called—a *quasi-voluntary* transfer effected in a treaty of peace. From the point of view of the effects of the transfer on the resulting rights and liabilities of the parties concerned, existing international law assimilates the latter kind to the former. Voluntary cessions may be made by way of gift, or sale (e.g. the purchase by the United States of Louisiana, Florida,

¹ General Act of the Berlin Conference, Arts. 34, 35. *Parl. Papers, Africa*, No. 4, 1885. The "conditions agreed upon" referred to the Congo Basin. The requirement of notification is omitted from the Convention of 1919 which, as between the parties to it (Great Britain, France, Italy, Portugal, Japan and the United States), abrogates the General Act of 1885. The Convention is one of three which impose extensive duties on Powers in occupation of African territory. *Infra*, p. 100.

² Cf. Oppenheim, i. § 236; ii. § 264.

³ E.g. Bonfils, § 535; Despagnet, § 863.

⁴ Oppenheim, i. § 238; Hall, 8th ed., p. 680.

⁵ *Johnson v. McIntosh* (1823), 8 Wheat. 543, at p. 588; Scott, *Cases*, p. 71.

⁶ See also *infra*, p. 296.

PROPRIETARY RIGHTS AND DUTIES 95

Alaska¹), or exchange (e.g. Heligoland ceded to Germany in 1890 for East African territory handed over to Great Britain).²

The old Roman plea for prescription *ne dominia rerum diutius in incerto essent* applies in the abstract with equal force to international law, and the majority of writers are agreed that international rights may be acquired and lost by lapse of time. The doubts, however, suggested by G. F. de Martens,³ Kluber,⁴ Heffter⁵ and others, as to whether the doctrine of prescription is applicable at all in international law, cannot be dismissed as entirely fanciful. In municipal systems the prescriptive acquisition of rights is ordinarily regulated by the maxim, *fraus omnia vitiai*, and so guarded, the limitation which ownership undergoes for its own protection does not come into conflict with the general conscience. In international law such a reservation has no place, and a fraudulent root of title is as good as another where time has consecrated the original offence.

It may be gravely doubted, however, whether in practice nations will submit to rules which bear hardly on their material interests, and which are easily evaded by reason of their vagueness. The difficulty is increased by the failure of international law to supply positively a generally applicable period of prescription. The provision that rights may be acquired by enjoyment for a period, "whereof the memory of man runneth not to the contrary," implicitly requires that it shall be determined how deep are the roots that bind human memory to the past. To say "rights may be prescriptively acquired," the precise period of prescription is uncertain," is merely to recommend academically acquiescence in the *status quo*. It is, however, useful to observe that in some degree every civilised nation must ultimately fall back upon a prescriptive root of title. The recognition of the fact is often obscurely made, yet to its influence may be traced that instinctive reverence for "accomplished facts," which, as a force making for tranquillity, is of incalculable international importance.

As a recent example of international practice we may recall the Treaty of Washington (1897), entered into for the settlement by arbitration of the Anglo-Venezuelan boundary dispute, which prescribed the following rule, among others, for the guidance of the tribunal: "Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement

¹ And of the islands of St. Thomas, St. John and St. Croix in the West Indies from Denmark in 1916 for the sum of 25,000,000 dollars.

² For the incidents and effects of cession, see *infra*, pp. 297 seq.

³ *Precis du droit des gens modernes* (Paris, 864), §§ 70, 71.

⁴ *Le droit des gens modernes de l'Europe* (Paris, 1831), § 6.

Droit international, § 12.

thereof, sufficient to constitute adverse holding or to make title by prescription."¹

As a judicial authority in support of this view, a case that came before the Judicial Committee of the Privy Council may be referred to.² Lord Blackburn, delivering the judgment of the Court, held that Conception Bay in Newfoundland must be regarded as having become by prescription part of British territory, on the ground that Great Britain had, in point of fact, long exercised dominion over it, and that the claim of the British Government had been acquiesced in by other States so as to show that the bay had for a long time been in the exclusive occupation of Great Britain.

Eminent
domain and
ownership.

The nature of the rights involved in international ownership, or the *dominium eminens* of the State, which is not identical with the property of the State, is of a somewhat peculiar character. The right of eminent domain is a necessary corollary of the possession of territorial sovereignty. As Portalis said, *imperium* belongs to the sovereign head of the State, property belongs to its citizens. But as between two distinct communities, ownership may be described well enough in Austin's well-known words: "The right over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration. Such a right, though difficult to define positively, is familiar and intelligible enough in its general features. Greater difficulties beset the attempt to determine exactly the legal position where the claims are less exclusive: it is at this point that serious problems, already noticed from a slightly different point of view, are raised by the extensions of territory variously described as portectorates, spheres of influence, chartered company territory, and lease hold territory. It has been suggested already that a protected State controlled internally and externally by the protecting Power has in fact become a part of its dominions, differing from the rest merely in that possession of a more likely prospect of future emancipation.

Spheres of
influence.

A sphere of influence or interest is the phrase vaguely used to describe an area which the Power enjoying it wishes to possess but is not prepared immediately to occupy.³ It may be created by the unilateral act of one State or by agreement between two or more; and when created by agreement, the claim is frequently made that it must be respected even by those who have not been parties. Great Britain and Germany in 1836 agreed to draw a line in the Western Pacific and to refrain from interference with each other on either

¹ Moore, *Digest*, vol. i., p. 29 §7.

² *The Direct United States Cable Co. v. The Anglo-American Telegraph Co* (1877), 2 App. Cas. 394.

* Some writers regard the establishing of spheres of influence as incompatible with the principles of occupation: cf. Bonfils, § 561; Despagnet, § 396.

side of it. Germany in 1890 and the Congo State in 1894, by agreements with Great Britain, recognised a British sphere of influence extending to "the western watershed of the basin of the Upper Nile" ¹ and in the negotiations which followed the Fashoda incident in 1898, Great Britain set up a case of acquiescence, after notice, on the part of France, but the matter was settled by a further delimitation of spheres of influence between Great Britain and France, without any decisive conclusion on principle being arrived at. To proclaim a sphere of influence is in fact to say "hands off" to possible competitors. No powerful State would allow foreign interference within the area of a sphere of influence, and the attempt to interfere would probably be treated as a *casus belli*; in these circumstances it is both convenient and accurate to include such spheres among the territorial belongings of a State. A further development of the tendency to assume vague and indefinite rights over areas of territory not occupied by the State which claims the rights, is to be found in the agreements made between China on the one hand and Great Britain, France and Japan on the other, in 1897 and 1898, by which China agreed not to alienate certain parts of her territory; each Power thereby establishing a sort of prior claim in the event of the breaking-up of the Chinese Empire.

A modern concession to international sensitiveness is to be found in the "leasehold interests" which the delicacy of continental diplomacy has introduced in the Far East, and for which precedents are to be found in the dealings between Great Britain and Zanzibar and Great Britain and the Congo State. The political advantage of such "leases" (which some writers have described as "disguised cessions") is to be found in the easy graduation of the assimilative process, but their legal importance is not considerable. At a given moment, authority and jurisdiction are resident either with the Power which grants, or with that which receives, the lease. In the first case concessions of unusual scope and vagueness, but fully consistent with a continuance of the prior ownership, have been conventionally made; in the second there has been an actual transfer of territory from one Power to the other. A rough but usually sufficient test is the incidence of responsibility to foreign Powers. If a European country obtains a "lease" from China, fortifies its acquisition, and undertakes responsibility within its limits, no devices of nomenclature can disguise the change which has been covertly effected.

The Covenant of the League of Nations is responsible for adding yet another to the degrees of relationship that international law recognises may exist between States and their dependent territories. At the close of the Great War large tracts of territory formerly

¹ Westlake, part i., p. 132; Hertslet, *Map of Africa by Treaty*, p. 642.

under the sovereignty of the defeated States ceased to be controlled by them: Germany lost her colonies and Turkey the outlying portions of her empire. To solve the difficulties that arose in disposing of the territories a novel principle was introduced into international law by Article 22 of the covenant. Building on the hypothesis that the inhabitants of these territories are not sufficiently advanced to look after themselves and that their development is a "sacred trust of civilisation," the tutelage of such peoples is entrusted to advanced nations to be exercised by them as mandatories on behalf of the League.¹ The character of the mandates is to vary according to circumstances such as the stage of development of the people, the position of the territory and its economic conditions, and the Article provides for three distinct types of mandate, usually designated "A," "B" and "C." Class "A," consisting of territories formerly part of the Turkish Empire which are sufficiently advanced to obtain a provisional recognition of independence, have already been considered.²

"B"
Mandates.

Class "B" covers territories such as parts of Central Africa inhabited by peoples which "are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League." In this class Great Britain has a mandate over part of German East Africa, part of Togoland and the Cameroons, France over part of Togoland and the Cameroons and Belgium over part of German East Africa.

"C"
Mandates.

Class "C" comprises "territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral parts of its territory, subject to safeguards in the interests of the indigenous population." Of these territories South-West Africa has been allocated to the Union of South Africa; former German possessions in the

¹ It has been suggested that this conception of Mandates contains three ideas known to private law: the *mandatum* of Roman Law, the duty of a tutor to his ward, and a vague idea of trusteeship (P. H. Winfield, editor of Lawrence, 7th ed., p. 81).

²*Supra*, p. 39.

PROPRIETARY RIGHTS AND DUTIES 99

Pacific south of the Equator (except Nauru and Samoa) to Australia, Nauru to Great Britain, Samoa to New Zealand; former German possessions north of the Equator to Japan.

The terms of the mandate for each territory are prepared by the Mandatory and submitted for approval to the League. Failing approval the Council of the League defines the terms of the trusteeship in each case. When the mandate has been undertaken it is the duty of the Mandatory to report annually on each mandated territory to the Council and this report is examined by a Permanent Mandates Commission of the League which advises the Council on all matters relating to the observance of the mandates. It is also the duty of this commission to consider petitions from individuals and communities in the mandated territories, but only when these petitions have been forwarded through the mandatory Power which generally transmits its own observations at the same time.

The question as to the sovereignty of the mandated territory raises difficulties. It may lie in the League of Nations, in the mandatory State or in the mandated territory. With regard to the "A" territories their close similarity to protected States¹ would suggest a solution; but failing a decision by the League or perhaps the Permanent Court of International Justice the "B" and "C" territories may have to await the happening of some crucial event, such as a Mandatory being at war, before its juristic position can be unquestionably defined. The Council of the League decided on 23 April, 1923, that the grant of a mandate does not *ipso facto* invest the inhabitants of the mandated territory with the nationality of the Mandatory. On the other hand the Supreme Court of South Africa has held that an inhabitant of the mandated territory of South-West Africa can be guilty of high treason against the Union Government as Mandatory.²

Approval of the system of mandates has not been unanimous. It has been condemned as disguised annexation, a more delicately conceived concession than leasehold Interests to a growing international sensitiveness about crude appropriation, and it is a fact that allocation of mandates has been exercised by the Allied Powers and only in favour of Allied Powers and that the controlling power of the Permanent Commission is not very strong. But the fact that international public opinion has reached the stage unfavourable to outright annexation indicates an advance in the treatment of subject races, an advance practically embodied in a novel scheme which will be as effective or ineffective as the League on which it is based.

¹ See *supra*, p. 40.

² *Jacobus Christian v. R.*, reported in B. Y. I. L. (1925), p. 211.

Three
African
Conventions:
(1) General.

Further examples of increased international concern for the welfare of the inhabitants of colonised territories are to be found in three Conventions signed in 1919. The first,¹ made between Great Britain, France, Italy, Portugal, Japan and the United States, lays upon each occupying State a duty to maintain an authority and police forces sufficient to protect persons, property and trade in the regions subject to its jurisdiction. It also provides for the protection and encouragement of religious, scientific and charitable institutions without distinction of race or creed, and for the suppression of the slave trade. In all the territories covered by the Convention there is to be for the nationals of the contracting States equal protection of life and property, freedom of trade and transport, inland and on the coast, and freedom of navigation on the Congo and Niger rivers.

(2) Liquor
Traffic.

A second Convention² signed by the same parties as the first prohibits the importation, distribution, sale and possession of "trade spirits" over the whole of Africa excepting Algiers, Tunis, Morocco, Libya, Egypt and the Union of South Africa. It imposes a heavy minimum duty on the importation into the prescribed area of all distilled beverages not prohibited and forbids the manufacture of these beverages throughout the area, except in the Italian colonies. Reports as to the manufacture or importation of liquors are to be sent annually to a Central International Office placed under the control of the League of Nations.

(3) Arms
Traffic.

The third Convention³ deals with trade in arms and ammunition, and the parties to it are the same as those to the first two Conventions with the addition of Belgium, Bolivia, China, Cuba, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Nicaragua, Panama, Peru, Poland, Rumania, the Serb-Croat-Slovene State, Siam and Czechoslovakia. The export of certain arms and ammunition from any of the signatory States is prohibited except under licence to be granted only to meet the requirement of Governments. There are further and more stringent restrictions on the export of all arms to any part of Africa (except Algeria, Libya and the Union of South Africa), or to Transcaucasia, Persia, Gwadar, the Arabian Peninsula, Turkey in Asia as it was in 1914 or to a maritime zone including the Red Sea, the Gulf of Aden, the Persian Gulf and the Sea of Oman, and elaborate provisions are laid down to enable the contracting parties to carry out the necessary supervision on land and sea. Annual reports and data are to be sent to the Central International Office which has been mentioned above.

By the treaties of peace, Germany, Austria, Bulgaria and Hungary are bound to accept the arrangements contained in the Conventions. Certain provisions are common to all three; they are

¹ Treaty Series, 1919, No. 18. ² *Ibid.*, No. 19. ³ *Ibid.*, No. 12.

to be revised at certain dates in the future; they can be acceded to by other States being members of the League of Nations; disputes arising under them are to be settled in accordance with the provisions contained in the Covenant of the League. They have not yet been ratified by all the parties, but their provisions indicate a distinct advance over those of the Berlin Act of 1885 and the Brussels Act of 1890 in the treatment of subject races in backward countries under process of economic development by civilised nations. "The effective working of these treaties should ensure a great improvement in the position of the inhabitants of the areas dealt with."¹

2. RIGHTS OVER WATER

The high sea is free and common to all mankind for navigation The ocean. and innocent use. It is an international highway that cannot be appropriated or subjected to the exclusive sovereignty or jurisdiction of any State, apart from certain rights of jurisdiction possessed by every State in respect of its own vessels, pirates, foreign vessels committing certain kinds of offences, and in case of war a belligerent's right to visit and search suspected neutral vessels. For many centuries, however, the ocean was generally admitted to be a possible subject of national appropriation. The character of the pretensions put forward was well stated by Cockburn, C.J.²:

"... From an early period the kings of England, possessing more ships than their opposite neighbours, and being thence able to sweep the channel, asserted the right of sovereignty over the narrow seas, as appears from the commissions issued in the fourteenth century, of which examples are given in the Fourth Institute, in the chapter on the Court of Admiralty, and others are to be found in Selden's *Mare Clausum*, Book 2. At a later period still more extravagant pretensions were advanced. Selden does not scruple to assert the sovereignty of the King of England over the sea as far as the shores of Norway, in which he is upheld by Lord Hale in his treatise, 'De jure maris' Hargrave's *Law Tracts*, p. 10.

"In the reign of Charles I I. Sir Leoline Jenkins, then the Judge of the Court of Admiralty, in a charge to the grand jury at an Admiralty Sessions at the Old Bailey, not only asserted the King's sovereignty within the four seas, and that it was his right and province 'to keep the public peace on these seas'—that is, as Sir Leoline expounds it, 'to preserve his subjects and allies in their possessions and properties upon these seas, and in all freedom and security to pass to and fro on them, upon their lawful occasions,' but extended this authority and jurisdiction of the King:

¹ Hall, 8th ed., p. 158.

² *R. v. Keyn (The Franconia)* (1876), 2 Ex. D. 63, at pp. 174-5.

"To preserve the public peace and to maintain the freedom and security of navigation all the world over, so that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part of the South or other seas, but that if the peace of God and the King be violated upon any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of His Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and terminer as this is, in such country, liberty, or place as His Majesty shall please to direct—so long an arm hath God by the Laws given to his vice-regent the King."

"To be sure, this learned civilian, as regards these distant seas admits that other Sovereigns have a concurrent jurisdiction, which, however, he by no means concedes to them in these so-called British seas. In these the refusal by a foreign ship to strike the flag and lower the topsail to a King's ship he treats as amounting to piracy.

"Venice, in like manner, laid claim to the Adriatic, Genoa to the Ligurian Sea, Denmark to a portion of the North Sea. The Portuguese claimed to bar the ocean route to India and the Indian seas to the rest of the world, while Spain made the like assertion with reference to the West."

Extravagant
claims.

The claim was sometimes pushed to practical consequences. Thus, in 1636, England compelled the Dutch to pay 30,000 for the privilege of fishing in the German Ocean, and more than one war between England and Holland sprang from the refusal of the Dutch to lower their flag in recognition of the maritime sovereignty of the former country. Until 1805 British naval officers were instructed by the Admiralty regulation to compel foreign ships to "Strike their topsail and take in their flag" within the king's seas, which were declared to extend to Cape Finisterre. But, as Cockburn, C.J., expressed it, "these vain and extravagant pretensions have long since given way to the influence of reason and common sense. and the American attempt to revive them at one stage of the Alaska Territory dispute was not seriously pressed. The American claims to an extent of water 1500 miles by 900 were, ironically enough, derived from a Russian ukase, the revocation of which the United

¹ R. v. Keyn, p. 175. As lately, however, as 1837, Captain Furneaux, R.N., in his *History of Treaties*, observes (Preface, xiii): "The limits of the British jurisdiction on the seas extend generally from Cape Stadelard in Norway to Cape Finisterre. . . . In having permitted a silence in most of her treaties at the termination of the late war. . . on the question of nations navigating unconditionally in the British seas, England has evinced a spirit of moderation, and proved that she does not contend for a vexatious exercise of power." The writer judiciously adds: "It is to be hoped the blessings of peace may long permit us to regard these questions as of no vital importance to the interests of Great Britain."

States had been instrumental in procuring. The arbitration tribunal, which gave its decision in 1893, made short work of the attempt to extend the territorial jurisdiction of Alaska. *Nemo dat quod non habet* and the Emperor Alexander I. could not pass on to the United States jurisdiction which he himself had illegally assumed.

It may now be stated quite generally that the sea lies open to Territorial the unimpeded navigation of all, but that an exclusive jurisdiction sea. may be asserted by each country over that portion of it which is closely adjacent to its own territory—this portion of the sea having been variously designated territorial, littoral, marginal, or jurisdictional.¹ All vessels enjoy the right of innocent passage through "the territorial sea,"² subject to the right of belligerent States to prescribe regulations for such passage or prohibit it altogether for reasons of self-defence, and subject to the right of neutrals to regulate the passage of the warships of belligerents.³ The precise extent of the area covered by such a qualification as territorial, littoral, etc., was not unnaturally a source of contention among the earlier Sovereigns and jurists, whose claims were not infrequently based on artificial or fantastic measures. Albericus Gentilis allowed one hundred miles from shore, Valin as far as the lead line could find bottom, while Baldus and Bodin⁴ were content with sixty miles. The principle already indicated by Grotius⁵ was clearly stated by Bynkershoek, "potestatem terrae finiri ubi finitur armorum vis"—land control ends with the range of weapons. Control over the sea, he says, extends "quousque tormenta exploduntur " ⁶—as far as the range, of offensive weapons, which is the extent of effective protection.. and this range appears to have then been roughly about three nautical miles. The same writer, therefore, proposed the three-mile limit, which has since been generally adopted. Thus it has been accepted in numerous recent international conventions and municipal Acts, e.g. the Russian Prize Regulations (1869), the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), French Regulations (1888), North Sea Fisheries Convention (1882), Suez Canal Convention (1888), Behring Sea Convention (1893), etc. It is, however, material to notice that the limit was in the first place appointed in reliance upon data which are no longer applicable; *cessante legis ratione cessat et*

¹ Cf. Bonfils, *Droit international*, § 491.

² This is the most important, if not the only, international servitude. The list of international servitudes given by some writers and the theory expounded by them are for the most part untenable. See the dissenting judgment of Schucking in *The Wimbledon*, P. C. I. J., Series A, No. 1.

³ For regulations of this kind see *Rev. gin. de droit int. pub.* (Paris), vol. xx., p. 20.

⁴ *La Republique* (Paris, 1577), i.c.10.p.170.

⁵ *De jure belli ac pacis*, lib.ii. c. 3, §§ 13, 14.

⁶ *De dominio maris*, c. 2.

ipsa Iex, and it is contended that it is reasonable to extend the area of control coincidentally with the increasing range of artillery. In 1806 the American Government suggested to Great Britain a six-mile limit, but refused in 1863 to recognise such a range proposed by Spain in regard to Cuba; and in 1864 the United States suggested a five-mile limit to England.¹ The latter, however, has consistently been in favour of the three-mile limit; though for revenue and health purposes she and other countries (e.g. France and United States) have extended the jurisdictional zone beyond that limit.² Again, the *Traite des Prises Maritimes*,³ published in 1855, lays it down that the *portee du canon* is the proper limit of territorial waters, and in 1894 the Institute of International Law unanimously recommended that the limit be six miles, if the range of cannon-shot did not go beyond this.⁴ When the question came up for consideration in 1910 at the Newfoundland Fisheries Arbitration the three-mile limit was prescribed by treaty and therefore no questions as to its reasonableness arose.

The development of artillery during the Great War, culminating in the invention of guns with a range of over fifty miles, must be held to have exploded the possibility of a universal settlement of the problem on the basis of the *portee du canon*, and the tendency is to revert to the old-fashioned three-mile limit. The extent of a State's territorial sea became recently a matter of practical importance to the United States of America. As a result of the National Prohibition Act the manufacture of intoxicating liquors within, and the importation thereof into the United States became illegal. The demand for alcoholic beverages survived this legislation and smuggling became so extensive that, in order to have a freer hand in its repression, the United States in June 1922 proposed a treaty giving a right of search to a limit of twelve miles. Great Britain would not assent, but agreement was reached and incorporated in a treaty signed at Washington in January 1924.⁵ The United States was given a right to board, and examine the papers of, any suspected British vessel to a distance from the coast that could be traversed by the vessel in one hour. In return for this concession alcoholic beverages on board British vessels in the ports and territorial waters of the United States were exempted from confiscation provided they remained under seal and unladen. By Article 1 of the treaty, "the

¹ Moore, *Digest*, vol. i. §§ 146, 152.

² E.g. the British Hovering Act of 1736, 1784, now superseded by the Customs Consolidation Act, 1876; the American Acts of 1797, 1799, and 1807. As to Great Britain, see Sir F. T. Piggott, *Nationality*, etc. (London, 1907), vol. ii., pp. 40 seq.; for the United States, see Moore, *Digest*, vol. i., p. 726; for France, see Pradier-Fodere, *Droit international*, vol. ii. § 173.

³ By A. de Pistoye et C. Duverdy (Paris, 1855), vol. i., p. 94.

⁴ *Annuaire*, vol. xiii., p. 329. ⁵ Cmd. 2063.

High Contracting parties declare that it is their firm intention to uphold the principle that three miles extending from the coastline outwards and measured from low-water mark constitute THE PROPER LIMITS OF TERRITORIAL WATER." The United States has concluded similar treaties with Germany and Sweden.¹

With regard to bays and gulfs, in theory their character as territorial or free is a matter of measurement, the material point being their width at the mouth; but by ancient usage certain bays or gulfs, such as those of Conception² in Newfoundland (British), Chesapeake, Delaware and Cape Cod Bay³ (American), and Cancale (French), have a national character, though far wider than six miles at their entrance.⁴ In a case before the Privy Council⁵ in 1877, Lord Blackburn, delivering the judgment of the Court, pointed out that the authority of the English common law on the subject was slender and vague: thus Coke and Hale said that branches of the sea "might" be deemed to be within the body of the adjoining country where a man may reasonably "discerne" between shores. He referred to a case decided in 1859,⁶ where it was held that the whole of the inland sea between the counties of Glamorgan and Somerset was to be regarded as belonging to the counties by whose shores its several parts were respectively bounded; and whether a branch of the sea was to be treated as part of the adjoining territory was determinable by established usage. With regard to the law of nations, said Lord Blackburn, it was universally agreed that harbours, estuaries and land-locked bays belong to the country of the State possessing the shores round them; but there was no agreement as to the meaning of "bay" for this purpose. Various views had been expressed by writers, e.g. defensibility from the shore, the range of one cannon-shot from shore to shore (or three miles), a cannon-shot from each shore (or six miles), an arbitrary distance of ten miles, and so on; so that there is no agreement on the question.

¹ See B. Y. I. L. (1924), p. 187.

² *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), L. R. 2 A. C. 394.

³ Moore, *Digest*, vol. i., pp. 735 seq. See the case of *The Grange* (1793), *Opinions of U.S. Att.-Gen.*, vol. i., p. 32; and *The Alleganean* (1885), Scott, *Cases*, p. 143.

⁴ The International Court of the Central American Republics in the case of *San Salvador v. Nicaragua* held that the Gulf of Fonseca was a closed sea and thus part of the territories of San Salvador, Honduras and Nicaragua. A. J. I. L. (1917), xi., pp. 700-17.

⁵ *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), 2 A. C. 394. Cf. *A.-G. for British Columbia v. A.-G. for Canada* [1914], A. C. 153, at p. 174; *The Lokken* (1918), *The Times*, 27 July, 1918.

⁶ *R. v. Cunningham* (1859), Bell, Cr. Cas. 86; followed in *The Fagerness*, *The Times*, 9 June, 1926.

King's
Chambers.

A somewhat extensive claim has been made, though its validity is doubtful, in respect to those portions of the sea which form the ports, harbours, bays, and mouths of rivers of any State where the tide ebbs and flows; thus under the name of the King's Chambers this country has claimed jurisdiction over the water enclosed between straight lines drawn from headland to headland, but it is believed that such claims have now been renounced. A similar claim, but one proportionately more imposing, was put forward by Chancellor Kent¹ on behalf of the United States: "Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, for beyond the reach of cannon-shot, as cruising ground for belligerent purposes."²

With this view, however, may be compared the opinion expressed by an American Secretary of State in 1875, in a dispatch to this country: "We have always understood and asserted that pursuant to public law no nation can rightfully claim jurisdiction beyond a marine league from its coast."

In the Newfoundland Fisheries Arbitration of 1910 between Great Britain and the United States,³ it was decided by the Hague Tribunal that the three-mile limit was to be measured in the case of a bay from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay; but as this finding was recognised to be so vague as to leave the door open to disputes in practice, a number of bays in New Brunswick, Nova Scotia and Newfoundland were specifically dealt with in detail, and it was suggested that in other cases the line should be

¹ *Commentaries on American Law* (ed. 1844), vol. i., p. 29.

• With regard to such statements as this, a recent American writer aptly says: "The vague and shadowy claims to jurisdiction for domestic purposes over large portions of the Atlantic Ocean and Gulf of Mexico sometimes made by American publicists in behalf of the United States have been taken too seriously by continental authorities." A. S. Hershey, *The Essentials of Public International Law* (New York, 1912), p. 201, n. See the Liquor Treaty of 1924 between Great Britain and the United States, *supra*, p. 124.

³ G. G. Wilson, *The Hague Arbitration Cases* (Boston and London, 1915), p. 134.

drawn across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles. This ten-mile rule had been adopted by Great Britain as the test whether the fishing was reserved to nationals in treaties with France and Germany and in the North Sea Convention, and had been proposed by her in the course of negotiations with the United States.¹

Lakes and land-locked seas not directly communicating with the ocean and wholly surrounded by the land territory of a single State form part of the dimensions of that State. But if two or more States border on such a sea or lake, then it would follow from the general principle appertaining to the high sea that all the adjacent States possess equal rights of navigation thereon and rights of jurisdiction in their respective territorial zones. Some authorities, indeed, have maintained that such a sea or lake belongs, subject to special conventions providing otherwise, to the various littoral States in proportional parts, the boundary lines running through the centre. But this view is less acceptable, owing to the inevitable inconveniences that would arise in practice. An example of a special arrangement by treaty is found in the case of the Caspian Sea: by the treaties of Gulistan (1813) and Tourkmantchai (1828) between Russia and Persia, it was placed under the control of Russia, which alone became entitled to maintain warships on it.

An inland sea connected with the main ocean by a navigable channel or strait cannot, in principle, be regarded as a closed sea, unless all its shores and both sides of the channel or strait belong to the same Sovereign, e.g. the Sea of Azof. Where there are several littoral States, navigation—at all events of a commercial character—should be free to all; and the State within whose jurisdiction fall the shores of the communicating channel ought not to interfere with navigation, except to impose reasonable rules applied equally to all with a view to regulating access and facilitating the orderly passage. The exclusion of vessels from the channel might well come into conflict with the rights of independence and self-preservation of the various riparian States. In actual practice these rules are observed, and it is probable that they have now become part of customary international law, though several jurists have expressed a doubt on the point. Further, where the communicating channel is of considerable breadth—the limit of which, however, has not been fixed, some writers saying six miles, others holding when it is beyond the power of the possessor to control it effectively by shore batteries—then the sea in question must be considered an open sea free to all.²

¹ See pp. 164-8, *infra*.

² See Oppenheim, i. § 194.

The Baltic
Sea.

The Baltic Sea has always been held to be an open sea under the law of nations, although the Northern Powers have sometimes claimed the right to exclude therefrom the warships of belligerents. The neutrality of the Baltic was stipulated in treaties between those Powers, e.g. in 1653 between Denmark and Sweden, in 1759 and 1760 between these countries and Russia; and in 1780 the Declaration of Armed Neutrality was signed by the same Powers (subsequently joined by others), who claimed that the Baltic Sea was a closed sea, and bound themselves to defend it and its coasts from all "hostilities, piracy and violence." But in each case acquiescence in such a restrictive rule on the part of the other Powers was only temporary and had regard to a particular war; so that the rule could not and did not acquire general applicability. Moreover, the Treaty of Copenhagen, 1857, and other treaties consequent thereon, impliedly recognised that the Baltic Sea was a *mare liberum*.

The Black

The Black Sea was formerly regarded as a Turkish lake, because it lay, together with the channels of communication, entirely within Turkish territory. After Russia had extended her empire to the shores of the Euxine and her new position had been recognised by Turkey in various treaties—notably in that of Kutchuk-Kainardj, 1774—the status of the Black Sea was changed. By the Treaty of Paris, 1856, the Black Sea was neutralised, that is, merchantmen alone continued to enjoy the right of access, the entrance by warships (except certain light armed vessels for police purposes) being expressly prohibited. Russia, finding this restriction obnoxious and intolerable—it was certainly inconsistent with the dictates of justice and equity—denounced the objectionable provisions of the treaty in 1870, which were expunged by the Treaty of London, 1871.

Hudson Bay.

The Hudson Bay lies wholly within Canadian territory, and possesses some of the characteristics of an inland sea; but its entrance is fifty miles wide. The claims of the Canadian Government to exclusive sovereignty and jurisdiction over it are contested in the United States, on the ground that the great width of its entrance prevents it from occupying the position of a territorial sea, and that under treaty rights and long-established usage American fishermen enjoy the right of fishing therein.¹

Straits.

Subject to special treaties regulating certain straits, the following rules are considered to be applicable to straits in general:

(a) Where a strait communicates with a closed sea, and both of its shores as well as that sea belong to one Power alone, whose shore batteries can effectively control it, then such strait forms part of the

¹ See an article by P. J. McGrath, in *Fortnightly Review*, Jan. 1908; and by T. W. Balch, in *Amer. Journ. of Int. Law*, vol. vi. (1912), pp. 409 seq.

territorial dominions of that Power, which is therefore entitled to exclude foreign warships from it at all times. But in the interests of peaceful international commerce, the right of innocent passage should be conferred on foreign merchantmen.

(b) If a strait leads to an *open* sea, and both of its shores belong to one State, the latter may adopt all necessary measures for its own safety and so is entitled, when it becomes a belligerent, to exclude foreign warships from and forbid the transport of foreign troops through that strait.

(c) If a strait more than six miles wide lies between the territories of different States, each State is entitled to exercise the rights of sovereignty and jurisdiction over its own territorial waters in the strait, that is, to a distance of three marine miles below the low-water mark. If the strait is less than six miles wide, each State may exercise such rights to the line running through the mid-channel.

(d) Where a right of innocent passage exists, an adjacent State has no right to impose tolls, with the exception of reasonable charges necessary for the maintenance of buoys, lighthouses, pilots, etc.

An exception to the last principle was, till 1857, found in the case of the Belts and the Sound, over which Denmark had for a long time exercised sovereignty. Owing, however, to the increasing recognition of freedom of navigation, and to the discontent of nations whose vessels were often unduly detained through the exaction of tolls, an arrangement was made by the Treaty of Copenhagen, 1857, between the chief maritime Powers of Europe and Denmark, whereby the latter was to cease levying these tolls, but was to continue to maintain buoys and lighthouses, and superintend the pilotage, imposing the same dues therefor on foreign as on Danish vessels; and the rate of transit charges was fixed. In return, the other Powers paid Denmark an indemnity, which was divided among the contracting parties in certain proportions. Similar conventions were soon afterwards made with other European Powers, and (in 1858) with the United States.

As to the Straits of Magellan, there was a long-standing dispute between the adjoining States, Chile and the Argentine Republic, each of which claimed exclusive sovereignty. In 1879, however, the United States intimated that such claims would not be acquiesced in; and in 1881 a settlement was arrived at by the Treaty of Buenos Ayres, which limited the jurisdiction of both riparian States. Article V. provided: "Magellan's Straits are neutralised for ever, and free navigation is guaranteed to the flag of all nations." (It may be added that the term "internationalisation" is more appropriate than "neutralisation" to describe the status of these straits as well as of Suez Canal and Panama Canal.) Further, the contracting parties

The Sound
and the
Belts.

Straits of
Magellan.

bound themselves not to construct fortifications and military works on the banks of the straits.

Straits of
Gibraltar.

With regard to the Straits of Gibraltar, the Anglo-French Agreement, 8 April, 1904, respecting Egypt and Morocco, declared (Article VII.): "In order to secure the *free passage* of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou. This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean."

The Bosporus and
the Dardanelles.

The Bosporus and the Dardanelles have been the subject of varying international arrangements. While the Turkish Empire included all the land surrounding the Black Sea and on each side of the Straits, they were strictly territorial waters from which all foreign shipping could be excluded. When Russia acquired some territory on the shore of the Black Sea, Turkey was obliged to allow passage through the Straits to foreign merchantmen but claimed the right to exclude warships. The obligation and the right were acknowledged by Turkey and Great Britain by treaty in 1809 and by the other Powers of Europe in 1841. The rule was relaxed by the Treaty of Paris, 1856, to admit the passage of light cruisers in the service of foreign embassies at Constantinople, and by the Treaty of London, 1871, to allow war vessels of friendly Powers to enter at the sultan's request to enforce the terms of the treaty of 1856. These rules were unsatisfactory and were thrice violated: in 1904 by Russia which sent two disguised war vessels through the Straits, in 1912 when Turkey, then at war with Italy, mined the Straits and held up neutral shipping, and in 1914 when Turkey, then neutral, allowed two German cruisers to enter the Sea of Marmora.

Straits
Convention,
1923.

A new regime has been established by the Straits Convention, 1923, signed by Great Britain, France, Italy, Japan, Bulgaria, Greece, Rumania, the Serb-Croat-Slovene State and Turkey. Its provisions may be summarised as follows:

(a) In time of peace there is to be complete freedom of navigation and passage for the merchant vessels and non-military aircraft of all nations; the same freedom is accorded to vessels and aircraft of war subject to a limitation that the naval force sent by any one State through the Straits shall not exceed that of the most powerful fleet of the littoral States of the Black Sea at the time of passage.

(b) In time of war when Turkey is neutral the same freedom as in (a) is allowed to vessels of commerce and war. But the restriction as to naval forces dispatched to the Black Sea is not to apply to belligerents, and no act of war is allowed in the Straits.

PROPRIETARY RIGHTS AND DUTIES 111

(c) In time of war when Turkey is a belligerent, no measures that Turkey may take to prevent enemy ships from using the Straits are to interfere with the freedom of navigation of neutral merchant and war vessels unless they are engaged in carriage of contraband, troops or enemy nationals. Turkey is to have a right to visit and search and to compel aircraft to land at specified places.

(d) The islands of Samothrace, Lemnos, Imbros, Tenedos, Rabbit Islands and all islands in the Sea of Marmora (except the island of Emir Ali Adasi) and certain zones on both sides of the Straits are to be demilitarised.

(e) A Straits Commission is constituted, consisting of representatives of the signatory Powers and Russia, and presided over by the Turkish representative. The Commission works under the auspices of the League of Nations, and its duties are to supervise the working of the Convention. It renders an annual report to the League.

In case of any danger that freedom of passage or the demilitarised zones may be imperilled, "the High Contracting Parties, and in any case France, Great Britain, Italy and Japan acting in conjunction, will meet any violation, attack, act of war or threat of war, by all the means that the Council of the League may decide for this purpose."

The rules applicable to interoceanic canals ought, in principle, to follow those relating to straits, conformably to the fundamental principles that have been set forth above. Accordingly such canals as are waterways for international traffic should be open—subject to special treaty stipulations to the contrary—not only to the merchantmen, but also to the warships of all nations for the purpose of innocent passage, with no more than those restrictions which apply to straits. In order, however, to defray the cost of construction and maintenance, reasonable tolls may be imposed. These principles (added to various other provisions) have been expressly incorporated in the international conventions relating to the Suez Canal and the Panama Canal.

As to the Suez Canal, the Treaty of Constantinople, 1888 (usually designated the Suez Canal Convention), lays down the following rules: (1) The canal is open in time of war, as in time of peace, to all vessels, either merchantmen or warships, belonging either to neutral States or to belligerents. (2) No acts of hostility may be committed within the canal or its ports of access, or in the sea to a distance of three marine miles from either end of it. (3) The entrances to the canal may not be blockaded. (4) No permanent fortifications may be erected. (5) The warships of a belligerent may not revictual or take on stores in the canal, embark or disembark troops, or stay in the canal or ports of access more than twenty-four hours, except in

case of necessity as provided; the same provisions being applicable to prizes. (6) If vessels of different belligerents are in the canal or ports of access at the same time, a period of twenty-four hours is to elapse between the departure of any vessel belonging to one belligerent and that of any vessel belonging to his adversary. (7) Warships may not be stationed inside the canal; but each Power, not being a belligerent, may station two warships in the ports of Suez or Port Said.¹

Panama
Canal.

The provisions relating to the Panama Canal, as adopted in the Hay-Pauncefote Treaty of 1901 between Great Britain and the United States, are in substantial agreement with those stipulated for the Suez Canal. There is one noteworthy difference, however—the erection of fortifications is not prohibited in the treaty of 1901; so that the United States is not debarred under this arrangement from constructing such works—indeed, in the treaty of 1903 with Panama, this right is expressly recognised.²

Kiel Canal.

By the provisions of the Treaty of Versailles (Articles 380-6) the Kiel Canal has ceased to be an internal and national waterway and has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of the vessels of all nations. Germany has undertaken to keep the canal open on a footing of equality to all vessels, of commerce or of war, belonging to nations at peace with her. She is obliged to maintain the canal in good condition and free of impediments to navigation, and she may levy upon vessels using the canal such charges as will cover the reasonable expenses of maintenance and improvement.

The question of Germany's right, in pursuance of her neutrality regulations, to refuse passage through the canal to a vessel carrying war material came before the Permanent Court of International Justice in 1923 in the case of *The Wimbledon*. The Court said in the course of its judgment: "When an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie."³

Rivers.

In deciding on the ownership of rivers which divide two States, various rules have been adopted. The oldest method, derived from the Roman law, was to take the middle line of the water; a later method was to take the course of the strongest current (the *Thalweg*,

¹ The Suez Canal Convention is revived by the Treaty of Lausanne (1923), subject to the provisions of the treaty (Art. 109). Oppenheim, i. § 183.

² See Oppenheim, i. § 184.

³ P. C. I. J., Series A, No. 1. And see *infra*, p. 178, where the case is more fully discussed.

or "downway")¹; and in some cases, either by convention or prescriptive right, one State is entitled to the whole river.²

A difficulty has been sometimes felt in dealing with those rivers whose waters flow over the territory of more than one country. The riparian inhabitants of a stream which disembogues itself into the sea in foreign territory are deeply concerned to maintain an open passage; and this interest, combining with a general perception that wantonly to deny such passage was an unfriendly act, has introduced some confusion into the law. Under Roman law³ navigable rivers were deemed to be public property, so that everybody enjoyed the right to pass freely over them, to use their banks (*jus littoris*) for anchoring vessels, lading and unlading cargo, etc.—a right that could not be restricted by the claims of private property. But such a disposition was not a rule of the law of nations. Grotius⁴ himself and many of his most eminent successors failed to distinguish between the obligations of comity and of law, and based the right of free navigation on the principle of "natural right." Vattel⁵ recognises a right, but calls it "imperfect"; a not very happy way of saying that, in his opinion, free river transit should be enforceable upon all nations, but in fact is not. The right of innocent passage has been several times alleged by American diplomats.

In 1783, in a dispute with Spain over the closing of the Mississippi, the freedom of rivers to "riparian inhabitants was declared to be a sentiment written in deep character in the heart of man," a reference to authority which recalls the older appeals to the law of Nature. In the St. Lawrence dispute between the United States and this country in 1824, the same claims were supported by similar arguments. ** The right of the upper inhabitants to the full use of a stream rests upon the same imperious want as that of the lower, upon the same inherent necessity of participating in the benefit of the flowing element."⁶ Similarly, in 1792 the French Convention, considering the status of the Scheldt which had been closed by the Treaty of Munster, 1648, declared that "river courses are the common and inalienable property of all the countries through which they flow; that a nation cannot, without injustice, claim the exclusive right of occupying the channel of a river and prevent the neighbouring countries situated

¹ In the case of *Iowa v. Illinois* (1893), 147 U. S. 1, the expression "middle of the Mississippi River" was interpreted as the "middle of the main channel" or "thread of the stream."

² Westlake, part i., pp. 144, 145.

³ *Instit.*, lib. i. t. i. §§ 1-5.

⁴ *De jure belli ac pacis*, lib. ii. c. 2, § 13.

⁵ *Droit des gens*, liv. ii. §§ 104 seq., 129. Cf. Puffendorf, *De jure naturæ et gentium*, lib. iii. c. 3, § 8.

⁶ *British and Foreign State Papers*, 1830-31, pp. 1065-75; cf. Hall, 8th ed., p. 165.

on its upper waters from enjoying the same advantage." These somewhat rhetorical statements are hardly supported by either theory or practice; on the face of it the claim is exceptional, and an undischarged onus rests upon those who affirm it; in practice it has not been admitted, and the right of transit has been ordinarily secured by convention.

Freedom on
particular
rivers.

The parties to the Treaty of Paris in 1814 declared the Rhine free,¹ and expressed a hope that all rivers traversing different States should be free to the world, but the Congress of Vienna in the following year used language which apparently restricted this freedom to freedom of commerce, not of navigation, among the co-riparian States, not the nations of the world; though the wider construction was put upon it by the Treaty of Paris in 1856, which applied the principles of the Congress of Vienna to the Danube, and declared that no toll should be levied which was founded solely upon the fact of the navigation of the river, and no duty upon the goods on board the vessels, and that apart from police and quarantine regulations (which were to impose as little hindrance as possible) no obstacle should be opposed to free navigation.² The establishment of a European commission (which possesses many attributes of international personality) for the purpose of carrying out the regulations respecting the Danube is an important landmark in the development of international association and organisation. In 1831 the freedom of the Scheldt, which had been established by a decree of the French Convention in 1792, was reaffirmed by the treaty of separation between Belgium and Holland. The Treaty of San Lorenzo el Real in 1795 finally opened the whole of the Mississippi to American navigation after a long dispute with Spain, which claimed exclusive rights for a considerable distance above the river's mouth³; but this river is now entirely in the territory of the United States. The St. Lawrence controversy, already referred to, was settled in 1854 by a treaty between this country and the United States, under which the American Government purchased the freedom of the St. Lawrence by throwing open Lake Michigan to English commerce, and by the Treaty of Washington in 1871 this river was declared to be forever free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations not inconsistent with the privilege of free navigation.⁴ With regard to African rivers, by the General Act of the Berlin Conference, 1885, the navigation of the Congo and the Niger was declared free to the

¹ Cf. Oppenheim, i. § 178; Hall, 8th ed., p. 165.

² Westlake, part i., p. 152.

³ Lawrence, 7th ed., pp. 196, 197.

⁴ Wheaton, 5th ed., pp. 315-20.

commerce of all nations, except for the transport of articles destined for a belligerent and regarded as contraband of war, and this provision was re-enacted with amendments in the Convention of 1919.¹

The treaties of peace of 1919, in reviewing the position of the important commercial rivers of Europe, considerably advanced the application of the principles of free navigation. The existing Danube Commission which controlled the mouth of the river was re-constituted, membership being limited to representatives of Great Britain, Italy, France and Rumania, and the remainder of the Danube system was placed under the control of an International Commission. Subject to certain conditions in the Treaty of Versailles (Articles 354-62) the navigation of the Rhine and Moselle continue to be governed by the terms of the Convention of Mannheim of 1868. Certain rivers are declared to be international, and among these are parts of the Elbe, Moldau, Oder, Niemen, Danube, Morava, Thaya, Vistula, Pruth and the projected Rhine-Danube canal. Navigation on these waterways is free to the vessels of all Powers on a footing of equality and without any charges other than those which will fairly cover the cost of maintaining and improving the waterways for the purposes of navigation. These provisions are to apply not only to vessels but to passengers and goods as well. Where no special organisation exists for the purpose, the duty of maintaining the channel is cast on the riparian States. Disputes with regard to interpretation of these provisions are to be referred to the Permanent Court of International Justice.² These arrangements were, however, declared to be provisional pending the conclusion of a general convention which was to specify the rivers and waterways to be declared "international" and provide a general regime to control them. Germany and Austria have, by their treaties of peace, agreed in advance to accede to it. A Conference, summoned by the League of Nations, met at Barcelona in March 1921. Agreement was reached in the preparation of Regulations for creating a Commission on Communications and Transit and for organising further general conferences. But the chief result of the Conference was the preparation of two Conventions and Statutes and a Declaration which were signed by the representatives of many of the forty-four States present. The first Convention and Statute relates to freedom of transit by rail or water when the points of departure and destination are outside the territory of the State through which the route taken lies. The second Convention and Statute guarantees freedom of navigation for vessels of all nations on "waterways of international concern." In these two Conventions the broad statements made above are qualified by many exceptions and subject to various conditions.

¹ *Supra*, p. 100.

² Oppenheim, i. § 178.

Annexed to the second Convention is a Protocol by which the signatories promise each other on condition of reciprocity equality of treatment on all navigable waters. Finally the Conference agreed to a Declaration granting the right to fly a flag to States having no sea-coast. When the Conventions have received sufficient ratifications they will constitute law-making treaties of the first importance in international law and to commerce between States.¹

3. RIGHTS OVER THE AIR-SPACE

Aircraft.

The development of the science of aeronautics has raised new problems in international law.

The practicality of flight by aircraft demonstrated before the Great War suggested many new problems to international lawyers. The chief question was as to the extent of a State's control over the air-space above its territory²; there are three main schools of thought. One view is that the air-space above a State is as much part of that State's territory as its land: *cuius est solum eius est usque ad caelum*. Another is, that the air is free for the passage of all foreign aircraft subject to the rights of the subjacent State to make regulations for its own safety. According to the third view a State has complete sovereignty over its air-space subject to a servitude of free passage for foreign aircraft. The British Government by its Aerial Navigation Acts, 1911³ and 1913,⁴ showed that it accepted the doctrine of complete sovereignty. By these Acts a Secretary of State was given power to exclude all foreign aircraft and to make regulations for their admission. A Conference, at which a large number of States were represented, was convened at Paris in 1910: but owing to the divergence of views on principles and the then uncertainty as to the direction of development of aerial navigation it failed to reach any agreement. In fact no accepted international rules were formulated until the representatives of the Allied and Associated Powers, assembled at Paris for the Peace Conference in 1919, drafted a Convention for the Regulation of Aerial Navigation.⁵ Ratifications have been deposited on behalf of Belgium, Bolivia, the British Empire, Czecho-Slovakia, France, Greece, Italy, Portugal, the Serb-Croat-Slovene State, Siam and Japan; Bulgaria, Uruguay and Persia have adhered.

Air Convention, 1919.

The Convention affirms the principle that every State has complete and exclusive sovereignty over the air-space above its territory

¹ See Hall, 8th ed., pp. 174, 175; B. Y. I. L. (1921), p. 174.

² Much has been written on the question; a complete bibliography will be found in Oppenheim, 3rd ed., i., p. 352.

³ 1 & 2 Geo. V. c. 4. ⁴ 2 & 3 Geo. V. c. 22. ⁵ Cmd. 670.

and territorial waters (Article 1), but it provides for freedom of innocent passage over the territory of contracting States to the aircraft of the other parties to the Convention provided they conform to the conditions laid down (Article 2). States may delimit prohibited areas over which flight may be forbidden for military reasons (Article 3).

All aircraft must be registered and can only be registered in the country of which the owner is a national. They must bear marks of nationality and registration as well as the name and residence of the owner. Copies of national registers must be transmitted every month to the International Commission for Air Navigation (Articles 6-10).

Every private aircraft engaged in international navigation must carry certificates of registration, of airworthiness, certificates and licences of officers and crew, list of passengers, bills of lading, log-books, and special licence when the vessel is fitted with wireless equipment (Articles 19-25). Contracting States have the right to reserve to their own nationals the service of air-routes between points in their own territory (Article 16) and to prescribe routes to aircraft flying over without landing or to compel them to break the journey and land, at specified places; they may also fix aerodromes on which aircraft flying to their territory shall be required to land (Article 15). Each contracting State with regard to its own aircraft undertakes to adopt measures to ensure that the rules of navigation are complied with and to punish offenders; with regard to foreign aircraft, it has a right to visit and to verify documents (Articles 21 and 25). Provision is made for equal facilities at the public aerodromes of the contracting States, for assistance in landing particularly in case of distress, and for the application of maritime salvage rules to aircraft wrecked at sea (Articles 22-4).

State aircraft are (1) military aircraft, defined as those "commanded by a person in military service detailed for the purpose," and (2) non-military aircraft, employed exclusively on State service such as posts, customs and police. Military aircraft shall not fly over or land on the territory of another contracting State without special authorisation. When this has been granted the military aircraft shall in principle be granted the privileges generally accorded to foreign ships of war.¹ State non-military aircraft are not in any case to receive such privileges, and the conditions on which they may cross frontiers are to be the subject of special arrangements between the States affected (Articles 30-3).

The Convention provides for the establishment of an International Commission for Air Navigation as a permanent commission

¹ See *supra*, p. 128.

under the direction of the League of Nations and composed of representatives of the contracting States. The Allied Powers, the British Empire, France, Italy, Japan and the United States are given a majority of votes. The duties of the Commission are to collect, collate and distribute information concerning aerial navigation, to publish air maps, to amend and in case of dispute to interpret the technical annexes to the Convention, and to receive or make proposals for amending the Convention. Every proposed amendment to the Convention must receive the votes of two-thirds of the States represented on the Commission, but it cannot become effective until formally adopted by the contracting States (Articles 34 and 37). Disputes as to the interpretation of the Convention are to be referred to the Permanent Court of International Justice (Article 37).

Objections
to the
Convention.

Two provisions in the Convention were found to be objectionable to the States which might otherwise have ratified or adhered. The first was Article 5 which bound the contracting States to forbid passage over their territory to all aircraft of non-contracting countries. Most States have signed an amendment adding the words: "unless it has concluded a special convention with the State in which it is registered. The stipulation of such special convention must not infringe the rights of the contracting parties to the present convention and must conform to the rules laid down by the said convention and its annexes." The second objection was to the predominant voting power on the Commission given to the Allied Powers by Article 34. An amendment on the basis of "one State one vote" with a proviso that any majority for amendment must include three of the Allied Powers has been signed by most of the contracting States.

The Convention on Aerial Navigation opens for international law the gate to a new field which may in time produce as large and as varied a crop as the legal fruits of maritime activity. However, apart from the fact that it has not been generally accepted, the Convention leaves a wide area untouched. It applies only to the conditions of peace and leaves unaffected the freedom of action of the contracting states as belligerents or as neutrals. Even for times of peace it contains no provisions for the essentially different conditions that apply to night flying and day flying, no regulations applicable to forced landings and their consequences, and no rules for jurisdiction over acts committed on board aircraft in flight and producing legal consequences. The existence of a permanent international organ will be of great advantage in the solution of these and further problems.¹

Wireless.

Another question connected with the air arises out of the development of wireless telegraphy and telephony. Has the State the right

¹See Oppenheim, i. § 197a; Hall, 8th ed., pp. 205-10; Lawrence, 7th ed., pp. 143-5.

to obstruct the passage of wireless waves over its territory? So far no guiding principles have been adopted and, in spite of the increasing use of wireless for purposes of communication, broadcasting and direction-finding, the only international agreement affecting the subject is the International Radiotelegraphic Convention of Berlin, 1906, as amended by the Convention of London, 1912. By their provisions it was agreed that all coast stations and ships, and all ships, must communicate with each other irrespective of the system of radio-telegraphy employed and that all coast stations must be in efficient communication with their inland telegraphic system. Special stipulations are inserted with regard to calls of distress at sea; they shall be given absolute priority and are to be immediately acted upon.¹

4. RIGHTS OVER MISCELLANEOUS OBJECTS

Under this head must be shortly considered the rights which States possess over property which is not situated within the territory, whether or not such property is within the jurisdiction of another State. In this class fall all vessels, public and private, which are outside the territorial waters of the country whose flag they fly. Jurisdictional rights over ships will require treatment elsewhere, but it is convenient to notice in this place the general character of such vessels.

Public vessels are all vessels in the exclusive employment of the State whether such employment be permanent or occasional. The public character of the vessel must be established by such a commission to the commander as will be recognised in his own country. The production of his commission by the commanding officer is sufficient evidence of the character of his vessel, and in practice his word is usually accepted. When the United States Government protested against the reception of the *Sumter* in Curacao Harbour, the Dutch Government attempted to evade responsibility by the contention that "le gouverneur neerlandais devait se contenter de la parole du commandant couchée par écrit."² An affirmation by a Government that a particular vessel is a public ship of the State is of course conclusive. Thus in *The Parlement Beige*,³ Brett, L.J., delivering the judgment of the court, observed: "The ship has been declared by the Sovereign of Belgium, by the usual means, to be in his possession as Sovereign, and to be a public vessel of the State. It seems very difficult to say that any court can inquire, by contentious testimony, whether that declaration is or is not correct. To submit

¹ See Oppenheim, i. § 287a; Hall, 8th ed., pp. 210-11.

² Ortolan, *Diplomatie de la Mer*, i. 183; Hall, 8th ed., p. 213.

³ (1878), 5 P. D. at p. 219.

to such an inquiry before the court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange*.¹ Whether the ship is a public ship used for national purposes seems to come within the same rule."

Private
ships.

A private ship, to make good its claim to nationality, must have conformed to the rules imposed by the State to which it claims to belong. Such rules will ordinarily deal with the flag under which it sails, or the nationality and domicile of its owners. The question may be reserved for a later chapter.

¹ (1812), 7 Cranch, 116.

CHAPTER III

RIGHTS AND DUTIES INCIDENT TO JURISDICTION

THE subjects which require treatment under the head of jurisdiction are arranged in the following order:

1. Jurisdiction within the territory.
2. Exemptions from the above jurisdiction.
3. Jurisdiction outside the territory.

1. JURISDICTION WITHIN THE TERRITORY

A State enjoys rights of jurisdiction in varying degrees over (1) its natural-born subjects, until such persons have changed their nationality in a manner recognised by its laws; (2) naturalised subjects; (3) aliens resident in, or passing through, its territory.

Normally, of course, a child is born in the country to which its parents belong, and no question can arise as to its nationality. Where, however, it is born in a country in which its parents are aliens, two different views are possible. According to the first, which was at one time almost universally held, territorial considerations were paramount, and the child's nationality was determined by the place of its birth (*jus soli*); according to the second the decisive criterion was the nationality of the father (*jus sanguinis*), and the place of birth was treated as accidental. A rigid adherence to the earlier view would have involved the conclusion that a child born in France of an English mother on her way to Switzerland was a French subject, while the later would have made it possible to impress as British subjects naturalised American citizens of British extraction to the third or fourth generation. Both the territorial principle, and that which depended upon parentage, were, in fact, incapable of extreme logical application. It is not surprising to find that under these circumstances national practice varied.

By the English common law all persons born on English soil or on board English ships of war even when in foreign harbours, or on board any English ship at sea, were British subjects, and statutory additions thereto declared the children and paternal grandchildren of natural-born subjects¹ to be themselves British subjects wherever

¹ Cf. 7 Anne, c. 5; 4 George I I . c. 21; 13 George I I I . c. 21.

born. And such nationality could not be affected by naturalisation elsewhere. In the language of Blackstone: " It is a principle of universal law that the natural-born subject of one prince cannot by any act of his own—no not by swearing allegiance to another—put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another, but it is his own act that brings him into these straits and difficulties of owing service to two masters; and it is unreasonable that by such voluntary act of his own he should be able at pleasure to unloose those bands by which he is connected to his natural prince." ¹

Statute law has made great inroads upon this doctrine, but it still represents the general rule in England.

Natural-born British subjects are defined by the British Nationality and Status of Aliens Acts, 1914-22, by which the following persons shall be deemed to be natural-born British subjects:

- (a) Any person born within His Majesty's dominions and allegiance; and
- (b) any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject and who fulfils any of the following conditions, that is to say, if either—
 - (i.) his father was born within His Majesty's allegiance; or
 - (ii.) his father was a person to whom a certificate of naturalisation had been granted; or
 - (iii.) his father had become a British subject by reason of any acquisition of territory; or
 - (iv.) his father was at the time of that person's birth in the service of the Crown; or
 - (v.) his birth was registered at a British consulate within one year after its occurrence. (But nationality thus acquired is lost by making a declaration of alienage or by failing, on attaining majority, to make a declaration of retention of British nationality.);
- (c) any person born on board a British ship whether in foreign territorial waters or not.²

Foreign
practice.

The American view was similar, with an exception, however, in the case of the children of aliens whose residence is merely transient;

¹ *Commentaries*, vol. i., p. 369; cf. also the judgment delivered by Coleridge, C.J., in *Isaacson v. Durant* (1886), L. R. 17 Q. B. D. 58.

² 4 & 5 Geo. V. c. 17, sec. 1 (1); 12 & 13 Geo. V. c. 44, sec. 1.

though an Act of Congress passed in 1855 declared that the children of American fathers born abroad should themselves be American subjects. In Sweden, children of aliens born in Sweden become Swedish if they are domiciled in the country till the age of twenty-two. Austria, Germany, Denmark, Greece, Norway and Switzerland determine national character by reference to the father's nationality. Russian practice appears to be similar, with the addition that all persons born and bred on Russian soil are entitled to claim Russian nationality whatever their parentage. In Italy, the principle of free choice by the children of aliens prevails; but they are Italian subjects when the father has been domiciled in the country for ten years, unless they elect to the contrary. In France, as Hall expresses it,¹ "the law has been so modified by recent enactments² that its only apparent principle seems to be supplied by a desire to ascribe French national character to as large a number of persons as possible." Pursuantly to this object it is provided that every child (including any of foreign parentage) born in France is to be deemed a French citizen, unless he has made a declaration of alienage in the year following the attainment of his majority. The children of French parents born abroad are French citizens unless naturalised elsewhere. Illegitimate children, by the law of almost all States, follow the nationality of their mother; but in English law in this case the place of birth is the criterion. The nationality of a married woman is almost universally the nationality of her husband.³ Most States now provide that the children of aliens born in their territories may retain their nationality by making a declaration of alienage on or after attaining majority, a provision which meets the most serious inconveniences of the territorial theory.

The opinion, however, which bases allegiance upon parentage, especially when combined with the view cited from Blackstone that the individual cannot at will dissolve his national ties, may still give rise to controversy. Although the practice is becoming general for each State to prescribe the conditions under which its own citizens are at liberty to change their nationality, circumstances are still conceivable under which the same person may owe allegiance to more than one State according to the laws of each. The war between this country and the United States in 1812 sprang from the British

¹ 8th ed., p. 278.

² The laws of 26 June, 1889, and 23 July, 1893.

³ Fresh complexities have been introduced in the United States by an Act of Congress of 1922 which provides (1) that a woman shall not acquire citizenship of the United States by reason only of her marriage to a citizen or of her husband becoming a citizen by naturalisation, and (2) that a woman shall not lose her American citizenship by reason only of her marriage to an alien unless her husband is ineligible for citizenship, in which case she loses her nationality and cannot regain it during the continuance of the marriage.

attempt to impress Englishmen naturalised in the United States. Claims similar in character, though not in extent, were put forward till late in this century, when the English law was changed by the Naturalisation Act of 1870, and it was at last formally recognised that a British subject naturalised abroad ceased to be of British nationality.¹

Expatriation.

The conflict was between those who affirm a "right of expatriation," and those who maintained with Blackstone the doctrine of indissoluble allegiance: *nemo potest exuere patriam* (no man can divest himself of his nationality). American statesmen have at different times taken different views. On at least one occasion the doctrine of inalienable allegiance has been affirmed by the Supreme Court, but in 1868 an Act of Congress declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." This resolution is hardly consistent with the most authoritative practice. Many States recognise the claims of the *patria originis* by the refusal to naturalise except where the consent of that country has been given; it is, moreover, the general practice among European nations to impose conditions on the act of expatriation, a practice not to be reconciled with the existence of the absolute right alleged.² finally a study of recent controversies suggests that expatriation made without permission would not be held in any country to protect a person naturalised elsewhere from the consequence of obligations incurred previously to naturalisation. If these considerations are well founded, each State has the right of determining the conditions under which its citizens shall be at liberty to leave it. Occasions of controversy are not likely to occur in future, unless the person naturalised has failed to comply with these conditions, and in such a case the country of adoption is not entitled to intervene between its new subject and his country of origin.

Naturalised subjects.

The naturalisation laws of each State naturally vary in details, and particularly in the length of previous residence required.³ In a work of this scope it is not possible to give an account of the rules which obtain in foreign systems, but a short statement of the effect of the British Nationality and Status of Aliens Act, 1914⁴ (which is a consolidating and amending Act), may usefully be added. Section 1 defines a natural-born British subject, sections 2-9 deal with the naturalisation of aliens, sections 10-12 with the national

¹ But a British subject may not become naturalised during a war, in an enemy State: the act of becoming so naturalised is an act of treason (*R. v. Lynch* (1903). 1 K. B. 444).

² Hall, 8th ed., pp. 282 seq.

³ See *Parl. Papers, Misc.*, No. 3, 1893. ⁴ 4 & 5 Geo. V. c. 17.

status of married women and infant children, sections 13-16 with the loss of British nationality, sections 17—18 with the status of aliens, sections 19-24 with procedure and evidence, and sections 25-8 with supplemental matters.

A certificate of naturalisation may be granted to an alien who applies for it, if he has resided in His Majesty's dominions or has served the Crown for five years (subject to certain qualifications), if he is of good character and has an adequate knowledge of English, and he intends to continue his residence or service; the certificate will not take effect unless he takes the oath of allegiance (section 2).

The Governments of British possessions are empowered to grant certificates of Imperial naturalisation (section 8). Self-governing dominions may adopt the provisions relating to the naturalisation of aliens (section 9).

The wife of a British subject is a British subject, the wife of an alien is an alien; but the wife of a British subject who loses his nationality may by making a declaration retain her British nationality (section 10).

A woman who, having been a British subject, has become an alien by marriage does not cease to be an alien merely because of the death of her husband or the dissolution of her marriage; and a woman who, having been an alien, has become a British subject by marriage does not cease to be a British subject merely because of the death of her husband or the dissolution of her marriage (section 11).

An infant child of a British subject who loses his nationality ceases to be a British subject, unless the child does not thereupon become by the law of another country naturalised therein; ** provided that where a widow who is a British subject marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British subject, whether he is residing outside His Majesty's dominions or not. Any child who has so ceased to be a British subject may, within one year after attaining his majority, make a declaration that he wishes to resume British nationality, and shall thereupon again become a British subject" (section 12).

A British subject loses his nationality by foreign naturalisation (section 13).

" Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign State a subject also of that State, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject. Any person who though born out of His Majesty's dominions is a natural-born British subject

may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject" (section 14).

Naturalised subjects are empowered to divest themselves of their status in certain cases (section 15).

"Where any British subject ceases to be a British subject, he shall not thereby be discharged from any obligation, duty or liability in respect of any act done before he ceased to be a British subject" (section 16).

The Act of 1914 has been followed by two amending Acts: an Act of 1918¹ mainly devoted to provisions governing revocation of naturalisation certificates and the effect of revocation, but also containing several minor amendments of the earlier Act; an Act of 1922² which gives an amended definition of natural-born British subjects.⁸

Aliens domiciled in or passing through the territory.

The legal effects of domicile assume importance in connection with the rules of war. It is sufficient here to notice that the nature of the jurisdiction which may be asserted over persons domiciled in a foreign country by the Government of that country differs only in degree, and not in character, from that which is exercisable over aliens passing through the territory.⁴ Both alike are *subditi temporarily* and are subject to taxation and amenable to the criminal jurisdiction for acts committed within its area. They are not liable to military service, except perhaps in defence of the country against uncivilised enemies, or such service as is necessary for the maintenance of social order, and is of the nature of police service.⁵ So recently as 1897, an attempt was made by Belgium to compel aliens to serve in the civic guard, but this was abandoned in deference to protests from other Powers. On principle this immunity ought not to be affected, in the case of domiciled persons, by an expression of intention to become citizens of the State in which they reside. It seems, however, to have been admitted in the negotiations between this country and the United States in 1863 that resident foreigners who had made known such an intention might be subjected to the obligation of military service as an alternative to leaving the country within a reasonable period. No right to protection, as against the country of allegiance, or indeed as against third Powers, can be based upon a residence which falls short of naturalisation; and the American claim in the case of Martin Koszta, that a domiciled foreigner, who had made

¹ 8 & 9 Geo. V. c. 38. ² 12 & 13 Geo. V. c. 44. ³ *Supra*, p. 122.

⁴ An alien has no legal right to enter British territory: *Musgrove v. Chun Teong Toy* (1891), A. C. 272. The admission of aliens is regulated by the Aliens Restriction Acts, 1914 and 1919 (4 & 5 Geo. V. c. 12, and 9 & 10 Geo. V. c. 92), and Orders in Council made thereunder.

⁵ See Hall, 8th ed., p. 260.

a statutory declaration of intention to become a citizen of the United States, was entitled to the same protection as a fully naturalised person, was consistent neither with principle nor with authority.¹ The action of the United States was defended by an untenable claim that domicile confers national character; but Westlake suggests that it may be justified on the ground put forward in a dispatch by Mr. Bayard on 5 August, 1855. "The criterion . . . with respect to aliens who have declared but not lawfully perfected their intention to become citizens of the United States, is very simple. When the party after such declaration evidences his intent to perfect the process of naturalisation by continued residence in the United States as required by law, this Government holds that it has a right to remonstrate against any act of the Government of original allegiance whereby the perfection of his American citizenship may be prevented by force, and original jurisdiction over the individual reasserted."² The principle was admitted not to be applicable to the case of a man who, having declared his intention of obtaining American nationality, immediately established a commercial domicile in the country of original allegiance.³

2. EXEMPTIONS FROM THE ABOVE JURISDICTION

International comity and convenience have given rise to several exemptions from the jurisdictional rights above described. Thus a foreign Sovereign and his suite are not amenable to the jurisdiction of a State in the territory of which they may happen to be. As Lord Langdale expressed it in *Duke of Brunswick v. King of Hanover*⁴: "There are reasons for the immunities of sovereign princes at least as strong if not much stronger than any which have been advanced for the immunities of ambassadors." So Vattel⁵: "S'il est venu en voyageur, sa dignité seule, et ce qui est du à la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute juridiction."⁶ This exemption is complete⁷; it covers not only all civil and criminal jurisdiction, but all payment of taxes, and even all police regulations. The only remedy against a foreign Sovereign if he breaks the law is to expel him. On the other hand (though opinion on this point is

¹ This case is fully discussed by E. M. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), §§ 250, 251.

² Westlake, part I., p. 207.

⁴ (1844), 6 Beav. at p. 50.

⁶ Cited in the judgment in *The Parlement Beige* (1878), 5 P. D. at p. 206.

⁷ See *De Haber v. The Queen of Portugal* (1851), 20 L. J. Q. B. 488; *Mighell v. Sultan of Johore* (1894), 1 Q. B. 149.

³ *Ibid.*, p. 208.

⁵ Lib. iv. c. 7, 8, 108.

not unanimous¹), he may not exercise any jurisdiction of his own, even between members of his own suite, in foreign territory; nor can he grant asylum to a person not a member of his suite. If, however, he applies to the local courts, he thereby submits to their jurisdiction and may be met by a counterclaim.² If he holds property, he may be subject to the extent of that property to the jurisdiction of the country in which it is situated; and, if he, though a Sovereign in one country, is a subject in another, he probably cannot claim exemption from his liabilities in the latter capacity.³

Foreign
forces and
public
vessels.

The immunities of diplomatic agents have been already considered,⁴ and by way of final exception may be mentioned the privileges conceded by the practice of nations to armed forces and public vessels of foreign Powers while within the State territory. Occasions for the concession to the former are naturally rare, but the freedom from jurisdiction has been repeatedly affirmed.⁵ In the case of public vessels, practice has varied greatly though the law is now well settled in favour of the immunity.

At the end of the eighteenth century the United States claimed the right to board a foreign war vessel (British) and remove from it American subjects⁶; and though Great Britain protested in that case, the British view as expressed by Lord Stowell in 1820⁷ seems to have been much to the same effect. But opinion was by no means unanimous, and the luminous judgment of Marshall, C.J., in the American case, *The Exchange v. M'Faddon*⁸ (1812), had much to do with the consolidation of the doctrine of immunity: "[A public armed ship] constitutes a part of the military force of her nation; acts under the immediate and direct command of the Sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and dignity. The implied licence therefore under which such vessel enters a friendly port may reasonably be construed, and, it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the Sovereign within whose territory

¹ Hall, 8th ed., p. 221, n.

² In view of the decision of the House of Lords in *Duff Development Co. v. Government of Kelantan*, the statement in the text must be qualified; neither consent to arbitration nor an application to the court to set the award aside is a submission to the jurisdiction. The question whether a foreign Sovereign who submits to judgment thereby submits to execution thereunder upon its property in this country was left open. See also *South African Republic v. La Compagnie Franco-Beige, etc.* (1897), 2 Ch. 487; (1898), 1 Ch. 190. Cf. *Statham v. Statham and the Gaekwar of Baroda* (1912), P. 92.

³ Hall, 8th ed., p. 221.

See p. 65, *supra*.

⁵ The question of immunity of military forces stationed abroad was involved in the Casablanca arbitration case, 1909; see *infra*, p. 164.

⁶ Hall, 8th ed., p. 239,

Ibid., p. 241.

Cranch, 116.

she claims the rights of hospitality. . . . Certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign Sovereign entering a port open for their reception."¹

In the case of *The Sitka* (a Russian public vessel captured during the Crimean War, 1855, by a British cruiser and brought into San Francisco with a prize crew on board), the American view had so far hardened that even the doubtful doctrine was confidently asserted that a foreign public ship is part of the territory of her State²; and Great Britain has steadily upheld in theory the right of asylum on British warships, while conceding that it ought not to be granted to ordinary criminals.³ The more important European States appear to insist upon the principle of extritoriality. The immunity, it is to be noted, applies to all public vessels, whether ships of war or not⁴; and it does not apply to the officers or crew if they leave the ship.⁵

The extension of immunity to vessels owned by States and engaged in trade has recently come in question before the English courts, in *The Porto Alexandre*⁶ in which the Court of Appeal, while appreciating the commercial difficulties that might arise, felt bound to follow *The Parlement Beige*.⁷ Lord Justice Scrutton said: "No one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many States are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities many trading affairs will become difficult."⁸ Freedom from arrest has been upheld in the case of a vessel privately owned but in the service of a State.⁹

In the case of private vessels it may be taken as a general principle that no such immunity from the local jurisdiction exists; but it is a common practice for the local courts not to take cognisance of matters happening on board, affecting only the internal discipline of the ship and its crew and not disturbing the peace of the port. But it cannot be said that there is any rule of international law establishing this exception.¹⁰

Foreign.
private
vessels.

¹ 7 Cranch, at p. 144.

² *Opinions of Attorneys-General of the U.S.*, vol. vii., p. 122.

³ Hall, 8th ed., p. 243.

⁴ Cf. *The Parlement Beige* (1880), L. R. 5 P. D. 197; Westlake, part i., p. 265.

⁵ Westlake, p. 267; Hall, 8th ed., p. 249; cf. Oppenheim, i. § 451.

⁶ (1920), P. 30. See also *The Gagara* (1919), P. 95.

⁷ *Ubi supra*.

⁸ At p. 38.

⁹ *The Messicano* (1916), 32 T. L. R. 519. See Hall, 8th ed., p. 248, n.; Oppenheim, 3rd ed., i., p. 614, n.; A. D. McNair, B. Y. I. L. (1921-2), p. 57; and Matsunami, *Immunity of State Ships* (London, 1924).

¹⁰ Westlake, pp. 271, 272; Hall, 8th ed., p. 253; Oppenheim, i. § 189.

3. JURISDICTION WITHOUT THE TERRITORY

Subjects
abroad.

This jurisdiction may be conveniently considered under the following heads:

- (i.) Jurisdiction over persons in foreign countries,
- (ii.) Jurisdiction over public ships wherever situate,
- (iii.) Jurisdiction over private ships on the high seas
- (iv.) Jurisdiction over pirates.

(i.) *Jurisdiction over Persons in Foreign Countries*

The jurisdiction over subjects resident in Eastern countries has been already described,¹ and depends entirely upon convention. Jurisdiction is also claimed by most States over offences against their municipal laws committed by their subjects in foreign countries. By the English common law and by American law crime was, as it is technically expressed, "local," i.e. justiciable only where committed,² but a long succession of English and American statutes has added to the list of offences committed abroad for which criminals of these countries may be called to account by the courts of their own countries. Treasfry,³ murder or manslaughter,⁴ and bigamy⁵ are the principal offences which have been so dealt with in England.⁶ It need hardly be said that the jurisdiction can only be made effective if the offender re-enters the country of his allegiance, for no nation can arrest any person upon the territory of another.⁷

Fugitive
criminals-
extradition

Connected with the subject now under discussion is that of extradition, or the recovery for justice of criminals who have fled to a foreign country to escape from the consequences of their crimes. It is impossible to allege, as so many jurists have done, that there exists, apart from treaty, a common law right to demand the extradition of criminals.⁸ Had such a right existed, there would have been no occasion for the great number of treaties by which it has been expressly secured,⁹ though it may perhaps be admitted, in the words of

¹ See p. 73, *supra*.

² See *MacLeod v. Attorney-General for New South Wales* (1891), A. C. 455; *Cobbett, Cases*, vol. i., p. 212; *Cutting's Case* (1886), *Moore, Digest*, vol. ii. §§ 200-2; *Cobbett, Cases*, vol. i., p. 220.

³ 35 Hen. VIII. c. 2.

⁴ 24 & 25 Vict. c. 100, sec. 9.

⁵ 24 & 25 Vict. c. 100, sec. 57. Cf. *Earl Russell's Case* (1901), A. C. 446; *Cobbett, Cases*, vol. i., p. 217.

⁶ For a full list see Stephen, *Digest of Criminal Procedure*, pp. 3 seq.

⁷ See p. 77, *supra*.

⁸ Oppenheim, i. § 327, and Hall, 8th ed., p. 68, and other authorities there cited take the same view as that given in the text. It was on this ground that Holland in January 1920 refused to extradite the German ex-Emperor Wilhelm II. at the demand of the Allied Powers.

⁹ Heffter, *Das europäische Völkerrecht*, § 63.

Westlake, that " this general adoption of the treaty method does not imply that a State would be held free to make its territory a shelter for fugitives from justice, and thereby a nuisance to its neighbours." ¹

Lord Russell of Killowen ² based the law of extradition " upon the broad principle that it is to the interest of civilised communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice." In most countries special legislation is necessary in order that an extradition treaty can be put into effect. As Lord Brougham said in the House of Lords in 1842 when the *Creole* case was under discussion: "What right existed, under the municipal law of this country, to seize and deliver up criminals taking refuge there? What right had the Government to detain, still less to deliver them up? Whatever right one nation had against another nation—even by treaty which would give the strongest right—there was by the municipal law of the nation no power to execute the obligation of the treaty." ³

A full account of extradition practice would far exceed the scope of this work, but the English rules may be briefly stated, to illustrate the principles involved. The right to deliver up criminals, or recover them, as the case maybe, depends municipally upon a number of statutes.⁴ Internationally it is secured by some sixty treaties with about forty foreign countries, comprehending almost all the graver offences. The first condition precedent to extradition is a requisition from a diplomatic representative of the State seeking it, made in respect of one of certain specified " extradition crimes," to the list of which bribery has recently been added. This requisition is addressed to a Secretary of State, whose duty it is to determine whether the crime in question is of a political nature. Section 3 (1) of the Act of 1870 provides that "a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habea corpus*, or to the Secretary of State, that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character." The meaning of this qualification was much discussed in *In re Castioni*.⁵ Denman. ., ⁶ observed: " The

¹ Westlake, part i., p. 253. ² *In re Arton* (1896), 1 Q. B. at p. 111.

³ W. Forsyth, *Cases and Opinions in Constitutional Law* (London, 1869), P. 369; cf. Kent, *Commentaries* (ed. 8), §§ 39-42; *Opinions of U.S. Att.-Gen.*, vol. iv., p. 98.

⁴ 33 & 34 Vict. c. 52, 36 & 37 Vict. c.60, 58 & 59 Vict. c. 33, and 6 Ed. VII. c. 15 (which added bribery to the list of extradition crimes).

⁵ (1891), 1 Q. B. 149.

⁶ *loc. cit.* at p. 159.

question is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he was taking part." Hawkins, J.,¹ cited with approval the observations contained in Stephen's *History of the Criminal Law*²: "I think therefore that the expression in the Extradition Act ought to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances." Stress, however, was laid by the court upon the fact that a crime committed in the course of "a political disturbance" is not necessarily political in character: and it has also been decided³ that an anarchist crime is not political, for to constitute that character "there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other."

The alleged criminal may be arrested either on a warrant issued by a police magistrate on receipt of an order from the Secretary of State, and on such evidence as would justify the issue of a warrant if the crime had been committed in England, or by a police magistrate or justice of the peace on such information or complaint and on such evidence as would justify its issue if the crime had been committed within his jurisdiction: in the latter case a report is at once made to the Secretary of State, who may order the warrant to be cancelled, or may send to the police magistrate before whom the prisoner is brought an order signifying that a requisition has been made for his surrender. If the Secretary of State decides that the offence is political,⁴ he may refuse to send any order, or may at any time order the accused to be discharged, or the prisoner may, by proceedings on a writ of *habeas corpus*, obtain his release on that ground. The prisoner is committed to prison to await extradition if there is evidence which would in an English case justify his committal for trial; but he is not to be surrendered for a period of at least fifteen days after committal, and if he is not surrendered within two months, a judge of the High Court has power to order his discharge. It is to be noted, too, that he is not to be surrendered unless provision is made by the law of the State claiming him, or by arrangement, that he shall not be detained or tried for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender

¹ *loc. cit.*, p. 165.

² Vol. ii., pp. 70, 71.

³ *In re Meunier* (1894), 2 Q. B. at p. 419.

⁴ There is no consensus of opinion as to when an offence is purely or primarily political; a widely prevailing view is that expressed by the Institute of International Law, *Annuaire*, vol. xii., p. 182, Arts. 13-15; trans. by Westlake, *Int. Law*, part i., pp. 256, 257. See Oppenheim, i. §§ 333-40.

is grounded, unless in the meanwhile he has been restored or had an opportunity of returning to British territory.¹

(it.) *Jurisdiction over Public Ships*

This question has been already dealt with from the point of view Public ships of the State into whose territory the public ship of another State comes, and the exemption of such ship from the local jurisdiction involves as its correlative the exclusive sovereignty of the State of its allegiance. By the fiction of "exterritoriality," public ships are, so to speak, detached fragments of the country to which they belong, carrying with them its privileges and immune from alien jurisdiction. But there is serious doubt as to the value of any such fiction,² though it gives a fair idea of the immunities which public ships enjoy, and may be safely employed to describe existing facts, if not as a basis for deductive reasoning. If a foreign public ship disturbs the peace of the port which grants it hospitality, it may undoubtedly be required to depart; but it is in itself inviolable. Any interference with it is now generally agreed to be an act of war, and satisfaction for any wrong which it commits must be obtained by diplomatic action against the Government by which it is commissioned or employed.

(iii.) *Jurisdiction over Merchant Ships*

Every State possesses jurisdiction over its merchant vessels and Merchant their crews and all persons upon them, whether subjects or not, ships. while upon the high seas, for the reason that there is no other authority possessing a higher claim. Here the facts fall far short of the fiction of exterritoriality, for the jurisdiction of origin gives way in case of conflict as soon as the vessel arrives within the territorial waters of another State, and for an offence committed by or on board her in territorial waters, she can be pursued into and seized or boarded upon the open seas, if the pursuit began when she was in territorial waters or had only just left them.³ It was even argued by the United States in the Behring Sea Arbitration (1893) that a State has a jurisdiction for an indefinite distance beyond its territorial waters for purposes of self-protection, a jurisdiction not limited to cases of emergency; but the contention was not supported by precedent and was not accepted as valid.⁴ If, however, the local jurisdiction is not asserted,

¹ As to the practice of the United States and other countries, see Wheaton, 5th ed., pp. 191 seq.

² Cf. Hall, 8th ed., p. 307.

³

Hall, 8th ed., p. 305.

⁴ *Ibid.*, and p. 321, n. As to the extended jurisdiction over British vessels suspected of smuggling granted to the United States by the Liquor Treaty of 1924, see *supra*, p. 104.

the State to which the vessel belongs may properly exercise its concurrent jurisdiction.

The earliest statutes in this country on the subject of Admiralty jurisdiction are 3 Rich. II. c. 3, and 15 Hen. VIII. c. 15, and the English view was well expressed by Bovill, C.J.¹: "When our vessels go into foreign countries, we have the right, even if we are not bound, to make such laws as to prevent disturbances in foreign' ports, and it is the right of every nation which sends ships to foreign countries to make such laws and regulations. . . . The place where, the vessel was lying was in a navigable river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows, and where great ships lie and hover. What difference is there between such a place and the high seas? The cases clearly show that the Admiralty has jurisdiction in such a place; if so, the case stands precisely the same as if the offence had been committed upon the high seas." In that case the British Court exercised jurisdiction thought the offence had been committed in French territorial waters.

(iv.) Jurisdiction over Pirates

Pirates are sometimes described as *hostes humani generis*, a description which is, however, not entirely accurate, as the term pirate is applied to those who commit acts of war against one State only, without themselves deriving authority from any State. In this case other States do not as a rule interfere unless directly affected; but, in general, pirates are justiciable, as Sir L. Jenkins puts it, "being reputed out of the protection of all laws and privileges . . . in what parts soever they are found."² Sir Charles Hedges, Judge of the High Court of Admiralty, in his charge to the grand jury in 1696,³ gave the following definition of piracy: "piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral, hath jurisdiction, this is robbery and piracy." This definition, which has been cited with approval in the Privy Council,⁴ was made with particular reference to the law of England, and it must be carefully noticed that the municipal policy of a particular State may treat as piratical acts (e.g. the slave trade) which do not bear that complexion

¹ *R. v. Anderson* (1868), L. R. 1 C. C. R. 166.

² *Works*, vol. ii., p. 714.

³ *R. v. Dawson* (1696), 13 St. Tr. 654.

⁴ *Attorney-General for Hong-Kong v. Kwok-a-Sing* (1873), L. R. 5 P. C. 199. Various definitions were examined in *The Republic of Bolivia v. Indemnity Mutual Marine Insur. Co.* [1909], 1 K. B. 785.

by the law of nations. Piracy in international law is commonly defined by writers as the offence of deoredating on the seas¹ without beings authorised by any sovereign state, or with commissions from different Sovereigns at war with each other.² But both this definition and that of Sir Charles Hedges are too narrow, in that they imply that an animus fruandi is essential; whereas the essential characteristic of piracy is that the acts complained of are done without the authority of a sovereign State or a politically organised society, and for private ends, and "robbery" or "depredation" is not necessarily an ingredient of the offence. As Sir L. Jenkins has it³: "The law distinguishes between a pirate who is a highwayman and sets up for robbing, either having no commission at all or else hath two or three, and a lawful man of war that exceeds his commission." The definition given above makes it impossible to treat as pirates the bearers of letters of marque. A tendency has been shown from time to time to extend the definition so as to comprehend such persons, but however objectionable the practice of issuing privateer commissions to foreigners was (for privateering has been abolished by the Declaration of Paris, 1856), the bearers were clearly not pirates, insomuch as they had behind them a politically organised and responsible society.

The doctrine above set forth was much discussed in the case of *The Huascar*. In 1877, in the course of a revolution in Peru, the crew of the *Huascar* seized the vessel and committed acts of violence on some British steamers. The Peruvian Government by decree repudiated all responsibility for the acts of the ship. Under these circumstances the British commander in the Pacific, regarding the acts of the *Huascar* as piratical, engaged her in an indecisive encounter. The Peruvian Government then made a demand for satisfaction on the untenable ground that the acts of the *Huascar* did not amount to piracy. Piratical in the vulgar sense they certainly were not, but they were most clearly so within the meaning of international law. So far from there being a responsible, there was not even a belligerent society behind the vessel. She stood completely alone.⁴

The treaty signed at Washington, 1922, between Great Britain, France, Italy, Japan and the United States has created a new class of offenders who may be treated as pirates even though they are in the service of a sovereign State and are acting under orders. They are all those who violate the rules laid down by the Convention for

¹ Bynkershoek adds "or land" (*Qust. jur. pub.*, lib. i. c. xvii.). The extension is reasonable when the acts are performed by persons descending on the land from the sea.

² Wheaton (ed. Phillipson), p. 204. Cf. the various authorities that are cited in the American case, *United States v. Smith* (1820), 5 Wheaton, 157.

³ Works, vol. ii., p. 714; cited Wheaton, *loc. cit.*, p. 205, n.

⁴ *Parí, Papers, Peru*, No. 1, 1877.

belligerent submarines, rules designed to prevent in future wars the infliction upon merchant shipping of the ruthless policy pursued in the Great War by Germany. The Convention lays down that every offender against its provisions " shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any power within the jurisdiction of which he may be found." 1

1 Cmd. 1627.

CHAPTER IV

THE TREATY LAW OF NATIONS

TREATIES form the contract law of States, and it is in dealing with their enforcement and duration that international law most conspicuously fails.¹ In the absence of a supreme authority capable of developing a system of law and enforcing its decrees, all rules are of the nature of suggestions for the guidance of conduct; and while nations are so careful as they are at present to reserve their right of action on questions concerning their "honour and vital interests" in all general submissions to arbitration, the rules applicable to treaties of the more important kind, which do not merely deal with points of detail, must remain largely in the region of "pious aspirations."

Treaties and
contracts
compared.

The analogy between contracts between States and contracts between individuals is useful; but if the purpose is to state the law as it is, this analogy must not be pressed too far. At the outset, on the question of consent, there is a marked distinction to be drawn; for whereas municipal law will not hold valid a contract obtained by force, many of the most important treaties of the world are the result of the exercise of force, or the threat of it, upon a nation which has no alternative but surrender. To treat force, therefore, as invalidating a treaty would be to strike at the root of every treaty made at the conclusion of a war; but this, of course, does not apply when the force is exercised on the person of the negotiator of the treaty. To introduce, for example, an armed force into the conference chamber with the object of terrorising a negotiator into submission would obviously invalidate the agreement extorted from him.² The kind of duress that nullifies an engagement is thus differentiated by Phillimore from the use of legitimate force that has no such effect:

¹Thus Woolsey (5th ed., p. 170), who certainly does not underrate the influence of international law, observes: "A combination to commit injustice, . . . for example, to conquer and appropriate an independent country, as Poland, is a crime which no formalities of treaty can sanction. This rule, it is true, is not one of much practical application to the concerns of nations, for, beforehand, most of the iniquities of nations are varnished over by some justifying plea, and the only tribunal in the case is the moral indignation of mankind, while after the crime has triumphed, mankind accepts the new order of things rather than have a state of perpetual war."

• Cf. J. C. Bluntschli, *Das moderne Völkerrecht*, § 704.

" The resignation of his crown and kingdom, extorted by Napoleon from Ferdinand VII. at Bayonne, whither he had decoyed that monarch and his family, was clearly—the duress and condition of the party abdicating being considered—invalid; but the resignation of Napoleon at Fontainebleau was not extorted by treachery or duress, but was the consequence of defeat in open legitimate war." ¹ A certain amount of fraud, again, may be permissible; a nation need not disclose the weak spots in its own armour. " Some latitude must be allowed in negotiating treaties of peace to the right of misleading an adversary which is incident to war." ² The boundary of permissible deceit will not on all occasions be easy to draw; but the use, for instance, of forged documents will clearly lie outside it.

Further on the question of how long a treaty remains binding the analogy of the municipal law of contracts is, as we shall see, hardly a safe guide; though possibly the claim which States make to disregard a treaty if the circumstances have changed may be supported by reference to those cases in municipal law, such as bankruptcy and the disappearance of the subject-matter of the contract, in which provision is made for the release of the parties otherwise than by mutual consent; and it must always be remembered that in municipal law the breach of a contract is condoned on payment of damages, and that the enforcement of specific performance is an exceptional measure applied only to contracts of a particular kind.

Power to
make
treaties.

The right to make treaties is an inherent element of national independence, and is perhaps the most decisive test of the existence of sovereignty. Its absence, for instance, from the powers enjoyed by the former Transvaal Republic under the Convention of London of 1884, was of far more importance in determining the international position of that republic than the presence or absence of the word "suzerainty." From the point of view of international law it is immaterial where the treaty-making power resides—whether it be in a monarch, or a president of a republic, or a senate, or a representative body, etc., is a question determinable by the constitutional law of the particular contracting State concerned; other nations are entitled only to demand from those with whom they contract a *de facto* capacity to bind the society which they assume to represent. A treaty entered into by a party who is not invested with the necessary power, or who acts in excess of the power conferred upon him, may be considered null and void. The power may be general, as when it is exercised by the ministry of foreign affairs or some national assembly; or it may be special, as when it is exercised for obviously

¹ *Commentaries upon Int. Law*, vol. ii. § 49; referring to T. A. Schmalz, *Das europ&ische V&olkerrecht* (Berlin, 1817), pp. 53, 54.

² Westlake, part i., p. 290.

limited purposes by a military officer, and it will be for the other party to the treaty to see that it contracts with a properly authorised agent.

No very valuable classification of treaties can, from the nature of the case, be given, for such instruments range over the whole variety of international relations.¹ A broad distinction is drawn, however, and will be discussed later, between such as produce their effect once for all, and are then, so to speak, exhausted, e.g. a treaty of cession, a boundary treaty; and such as purport to regulate the relations of the parties for a definite or indefinite period, e.g. extradition treaties, alliances, commercial treaties, treaties of guarantee. The former are sometimes described as "transitory," "dispositive," or "executed" conventions, the latter as "executory" conventions. Many other classifications have been suggested; e.g. real and personal; political and economic, (or social); general and special, and so on. But these divisions are neither logical nor useful. It is important, however, to distinguish treaties between two or more States amounting to no more than private arrangements or bargains, from treaties concluded by a considerable number of the leading States of the world for the purpose of adding new provisions to existing international law; the latter class may conveniently be described as law-making treaties, examples of which are the Hague Conventions, the Declaration of Paris, 1856, the Covenant of the League of Nations.

Treaties of guarantee form an important species requiring special mention. Such treaties are sometimes difficult to construe, especially when the guarantee is jointly made by several Powers. Acts in themselves contrary to accepted principles of international law have sometimes been defended as having been done under a treaty of guarantee; but in judging the legal quality of such acts it must never be forgotten that a treaty between A and B can in no circumstances entitle either as against C to do acts which are not otherwise permissible. So far as C is concerned, the treaty is *res inter alios acta*; and in case of war say between A and C, B cannot plead the treaty as justifying breaches of neutrality.² Treaties of guarantee are of two kinds: collective or joint guarantee; and joint and several (or individual) guarantee. Of a collective guarantee a well-known instance was the treaty by which the Great Powers in 1867 asserted the perpetual neutrality of Luxemburg. It has been much disputed whether, if the other parties to such a guarantee decline to intervene on occasion, a single signatory is released from his obligations. Lord Derby, in 1867, answered this question affirmatively in a controversy which

¹ See Hall, 8th ed., p. 418, n.

² Cf. the question of the supply of troops by a neutral to a belligerent, which is dealt with later, p. 304.

arose as to the English obligations under the Treaty of Luxemburg: *' In the event of a violation of neutrality all the Powers who have signed the treaty may be called upon for collective action. No one of these Powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability." Hall² criticises this view on the ground that " a guarantee is meaningless if it does no more than provide for common action under circumstances in which the guaranteeing Powers would act together apart from treaty, or for a right of single action . . . as a matter of policy." It seems a sufficient answer to the objection that States may normally be expected to abide by their undertakings, and therefore a joint guarantee will ordinarily secure concerted action pursuant to its terms, though the circumstances are no longer such that "the guaranteeing Powers would act together apart from treaty." On principle Lord Derby's contention is unanswerable. If a State undertakes a duty in concert with others, on what principle is it committed to an isolated performance? It was never pledged to such action, and its unassisted resources may fall far short of the occasion.

Joint and
several
obligation.

On the other hand, a guarantee may be joint and several whereby a guaranteeing State would be obliged, if necessary, to act alone if its co-guarantors refused to fulfil their obligations. Examples of such treaties of guarantee are those of 1831 and 1839 which established the permanent neutrality of Belgium, the Convention of Paris, 15 April, 1856, between Great Britain, France and Austria, ensuring the independence and integrity of the Ottoman Empire. In 1867 Lord Clarendon thus differentiated the case of Belgium from that of Luxemburg: " If we had undertaken the same guarantee in the case of Luxemburg as we did in the case of Belgium, we should, in my opinion, have incurred an additional and very serious responsibility. I look upon our guarantee in the case of Belgium as an individual guarantee, and have always so regarded it; but this is a collective guarantee. No one of the Powers, therefore, can be called upon to take single action, even in the improbable case of any difficulty arising." ⁸ The view of Lord Clarendon and Lord Derby was affirmed by Sir Edward (now Viscount) Grey in 1914, on the occasion of Germany's violation of the neutrality of Belgium and Luxemburg.⁴ Owing to the different obligations imposed by the two kinds of guarantee, the greatest care should be exercised by the negotiators to formulate their agreement in clear, precise and unambiguous terms. The draftsmanship, for example, of the Belgian guarantee is lamentably defective.

¹ Hansard, third ser., clxxxvii., 1922.

⁸ Hansard, third ser., clxxxviii., p. 151.

⁴ See *Parl. Papers, Misc.*, No. 10 (1915), pp. 105, 235.

² 8th ed., p. 402.

No **form** has been prescribed as essential to the validity of treaties, **Form and ratification.** though, for reasons which need not be set forth, it is the practice to embody them in formal instruments. They are usually signed by plenipotentiaries of the Powers interested, but are in no case binding until they have been ratified. The rule was settled in this form as early as the time of Bynkershoek,¹ with the single exception that in his view ratification was unnecessary when the patent of authority contained full and detailed instructions. Later authorities recognise no exception at all to the rule.

It is less easy to say under what circumstances ratification may **Refusal to properly be refused by the Powers represented.** Wheaton² recognises **ratify.** the following cases:

- (i.) Where the representative has exceeded or deviated from his instructions.
- (ii.) Where events occurring between signature and ratification have made it impossible to fulfil the treaty stipulations.
- (iii.) Where the parties have been labouring under a mutual error, which error is discovered before ratification.
- (iv.) Where the circumstances have changed upon which the treaty in terms is made to depend.

The later view seems to be even more indulgent. In many countries the treaty-making body of the State is distinct from the executive; treaties may often necessitate legislative change in the municipal law of the contracting parties³; and in such cases the fullest right of withholding ratification exists.⁴ It may be doubted whether the tendency is not drifting towards the recognition of an absolute right of refusing to ratify. The view of Grotius,⁵ which has reappeared so often in the pages of his successors, was coloured by the misleading analogy of agency in municipal law. It follows from the immensity of the interests involved, and the infinitely complex personality of the parties, that the negotiations between plenipotentiaries are more nearly akin to the *pourparlers* of a contract than to its formation.

For States members of the League of Nations another condition **Registration.** precedent requires to be satisfied before a treaty comes into force.

¹ *Quaest. jur. pub.*, lib. ii. c. vii.

² 5th ed., pp. 363, 364.

³ Cf, for instance, Convention XII. of the Hague Conference of 1907 relative to the establishment of an International Prize Court.

⁴ It was exercised by the Senate of the United States which refused to ratify the Treaty of Versailles.

⁵ *De jur. bel. ac pac.*, lib. ii. c. 15.

Article 18 of the Covenant provides that every treaty or international engagement entered into by any member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.¹

Interpreta-
tion of
treaties.

The text-books contain minute rules of construction for the interpretation of ambiguous passages.² The value and authority of such statements are inconsiderable. Treaties are to be interpreted like other documents upon broad principles of common sense, and refined rules of construction are of little importance when no authoritative tribunal can enforce them. The common-sense view was, well stated by Erie, C.J., in an English case³: "We are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words, and from the context, the true intent and meaning of the contracting parties who are independent States."
]

Commence-
ment of
treaty
obligations.

As soon as ratification of a treaty has taken place, its obligatory effect is carried retrospectively to the time of signature. As Mr. Justice Davis in an American decision⁴ expressed it: "It is undoubtedly true, as a principle of international law, that as respects the rights of either Government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect confirming the treaty from its date." But it does not follow that this principle is to be so applied as to invalidate private rights which have accrued in the period between the signature and the ratification. Private individuals are not bound to assume that the ratifying authority will ratify.

Binding
force and
termination
of treaties.

Treaties obviously terminate (as in the case of private contracts) when a fixed time limit expires, or their specified object is accomplished; they may be extinguished by the consent of the contracting parties, or by the non-performance of certain essential conditions. But to determine, apart from these and the like circumstances, the period when treaty obligations cease to bind gives rise to difficulties;

¹ Over a thousand have been registered. They are published periodically by the League in a Treaty Series. The Treaty between the British Government and the Irish Provisional Government establishing the Irish Free State was not registered by Great Britain.

² E.g. Hall, 8th ed., pp. 390 *seq.*, gives four rules but concludes (p. 395, n.): "There is no place for the refinements of the courts in the rough jurisprudence of nations."

³ *Marry at v. Wilson* (1799), 1 Bos. & Pull, at p. 439.

⁴ *Haver v. Yaker* (1869), 9 Wallace, at p. 34; cf. *U.S. v. Arredondo* (1832), 6 Peters, 735, and cf. Westlake, *International Law*, part i, pp. 291, 292.

and it is somewhat unfortunate that the most authoritative statement on this point cannot be confidently accepted. The following proposition was affirmed by the Declaration of London in 1871: "The plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Russia, and of Turkey, assembled to-day¹ in conference, recognise that it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement." But at the moment of this declaration the Powers concerned were engaged in acquiescing in a flagrant violation of the principle enunciated; for Russia, forbidden by the Treaty of Paris of 1856 to maintain a fleet in the Black Sea, had seized upon the opportunity afforded by the Franco-German war to declare herself released from the restriction so imposed, without consulting any of the other parties to the treaty. It was not politically expedient at the time to resist by force the Russian claim; and the declaration above quoted was an effort to restore the somewhat damaged authority of the general principle of the binding effect of treaties. That it was not a very successful effort was shown by the events of the autumn of 1908. Austria was a party to the Declaration of London. By the Treaty of Berlin of 1878, Bosnia and Herzegovina, while remaining under the suzerainty of the Sultan of Turkey, were placed under Austrian occupation and control. In 1908, Russia was exhausted by her war with Japan and by internal troubles, and Turkey had but recently come through the revolution which deposed Abdul Hamid and placed the Young Turks in a position of somewhat precarious power. Bulgaria having seized the line of the Oriental Railway Company, proclaimed her independence from Turkey on 5 October, and Austria, two days later, with only one day's warning to France and England, converted her occupation of Bosnia and Herzegovina into annexation, on the plea that those countries wished for constitutional institutions, and that the grant of such could more conveniently be made if the anomaly of Turkish suzerainty were removed. Turkey was indignant and boycotted Austrian goods. Serbia and Montenegro, fearing absorption in their turn, clamoured for war, while the signatory Powers of the Treaty of Berlin insisted upon a Conference, and did their best to restrain the Serbian indignation. In January of the following year (1909), however, Turkey accepted £2,200,000 in compensation. Russia, acting, it is with good reason believed, under the influence of Germany, shortly afterwards recognised the annexation, and Great Britain persuaded Serbia to give way. A Conference was no longer necessary, and the Powers agreed to amend the treaty

¹17 January, 1871.

and legalise the action of Austria. That the treaty had been set at naught there can be little question; but as the two provinces were already practically in Austrian hands, the actual change effected was of little moment; and the case, though undoubtedly serious from the point of view of international law, was hardly so serious as the case of Russia and the Black Sea in 1870.¹

Both in theory and in view of subsequent events, it may be gravely doubted whether a standard so inelastic as that set up by the Declaration of 1871 does not involve an impossible strain on the respect conceded to international law. No temporal limits of any kind are assigned by the declaration to the duration of treaty obligations, and the refusal of one party to release another may in theory perpetuate an obligation which had its origin in wholly different conditions. Wheaton² treats the Declaration as elementary, and observes: "It is melancholy to think that the most civilised Powers of the world should have considered it necessary to put forward such a declaration in the year 1871."³ This view seems to rest on a confusion between the moral and legal aspects of the case. Carefully observing this distinction we may lay down the following propositions:

- i. No independent Government can indefinitely and for all time bind its successors by treaty, for the community so shackled would no longer be completely independent. It should follow therefore that every State becomes legally entitled to repudiate a treaty of indefinite obligation as soon as the conditions which preceded its formation have undergone substantial modification,⁴—in other words, the *conditione rebus sic stantibus* is necessarily implied.⁶
2. If the obligation is temporary" and definite. or if" the circumstances under which it was made are not materially changed, the breach of it is legally wrongful.

¹ *Supra*, p. 10.

²

5th ed., pp. 110, 111.

³ The preamble to the Covenant of the League of Nations gives it as one of the League's objects, "to achieve international peace and security by a scrupulous respect for all treaty obligations."

* It is no objection to this view that the other contracting party is entitled to go to war to enforce his treaty right. It is a conspicuous weakness of international law that A may be entitled in law to declare war against B for acts which B is entitled in law to do. For instance, if a given community is forcibly annexed, it is clearly, and at any time, entitled to attempt to reconquer its independence. The Power annexing is equally entitled to make good its annexation by force.

The rule in the text may be, as Hall objects, dangerously lax, but it is believed to correspond with the facts of national practice. At least it avoids the *reductio ad absurdum* to which the Declaration of London leads. If that Declaration is well-founded, why are treaties of indefinite duration so often confirmed and renewed?

⁵ For an examination of the implied condition, *rebus sic stantibus*, see Oppenheim, i. § 539.

It is difficult, however, to avoid the conclusion that in the present state of opinion, the validity of a treaty depends to an unfortunately large extent upon the power at the moment of the parties to it, and the political importance of the interests which may induce the one party to violate, and the other to insist upon the maintenance of, its terms. The only satisfactory means for securing the observance of treaty obligations, or for exacting reparation for their unjustifiable breach, or for effecting their extinction altogether, is by the judgment of an International Court, which will be so constituted by the nations of the world that its decree may be effectively enforced.

The designers of the Covenant of the League of Nations recognised that, as has been emphasised above, the structure of international law was deficient in that it contained no accepted plan for securing the reconsideration of treaties. The only method to which agreement could be obtained was embodied in Article 19 which provides that the Assembly may from time to time advise the reconsideration by members of the League of treaties which have become inapplicable. As the Assembly consists of the representatives of over fifty States and can only act when it is unanimous, this method is hardly likely to prove efficacious. It has not, so far, been called into use. As a large political body the Assembly is not so well fitted for the task as a smaller and judicial body, particularly with regard to investigation of the circumstances which might be urged by a State to have rendered a particular treaty inapplicable. But the Article marks an international acknowledgment that the resolute power of the doctrine *rebus sic stantibus* requires definition.

Reconsideration of treaties by the League.

On the question of the effect of war upon treaty obligations it is impossible to lay down any general rule.¹ If it is said that the outbreak of war abrogates or suspends all treaties between the parties, so many obvious and so many possible exceptions at once appear that the rule seems hardly worth enunciating, even as a starting-point for discussion. Clearly those treaties must remain in force which were concluded expressly with a view to war; such as the rules of the Hague Conventions for the regulation of belligerent action, or the convention between Great Britain and France as to postal service in time of war. "Transitory conventions" too (i.e. treaties which produce their consequences once for all as "opposed to treaties which impose continuing obligations) are often described as "perpetual," or unaffected by supervening incidents, including war. A belligerent entering a territory ceded in the past to his adversary, clearly enters as a military occupant and not as a Sovereign; the United States if at war with Great Britain would not be thrown back to the position

Effect of war upon treaty obligations.

¹ See Oppenheim, ii. § 99.

of a revolutionary which she occupied before the recognition of her independence in 1783. And it is not only treaties of cession and the like which have this characteristic of permanence. States may make conventions as to the private rights of their respective subjects, as when the United States and Great Britain in 1794 gave to each other's subjects the right to hold and transmit land; where the rights were held not to have been interrupted by war, though the treaty was not expressly revived on the conclusion of peace in 1815. As Leach, M.R., said¹: "The relations which had subsisted between Great Britain and the United States, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and, the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should . . . not depend upon the continuance of a state of peace." In an American case,² a similar judgment was pronounced: "There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. . . . Treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties or new and repugnant stipulations are made, they revive in their operation at the return of peace." There are also numerous decisions delivered in continental courts to the same effect.³

It may sometimes be a nice question whether a treaty is "transitory" or not; and we may instance the dispute between Great Britain and the United States on the question of the Newfoundland fisheries at the beginning of last century.⁴ Great Britain in 1783 had allowed to the inhabitants of the United States the right of fishing in British territorial waters in Newfoundland and Canada. At the peace in 1815 the right was not expressly revived. Great Britain contended that it rested solely on convention, and on con-

¹ *Sutton v. Sutton* (1830), 1 Russ. & Mylne, 675.

² *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven and Wheeler* (1823), 8 Wheaton, 464; Scott, *Cases*, p. 428.

³ For example, *Featherstonhaugh v. Boffi* (1854), decided by the Cour de Cassation; see R. Jacomet, *La Guerre et les traités* (Paris, 1909), pp. 87 seq., 169 seq.

* See Hall, 8th ed., p. 117; Westlake, *Int. Law*, part ii. (1913), p. 33.

vention of a kind which was abrogated by war; the United States not only claimed that it was an integral part of the partition of the territory, but even, apparently, that quite apart from convention, the right belonged to the inhabitants of the United States, because they had previously enjoyed it while British subjects. The American claim was abandoned in the treaty of 1818, and the fishing rights granted by that treaty were recognised to depend upon contract.¹

Again, treaties affecting the rights of third parties, or to which other Powers than the belligerents are parties, cannot be said to be abrogated, or even suspended by war, except in so far as the war causes, for the time being, difficulties or impossibility of performance. In such case the principle seems clear, and it does not matter whether the treaty is of a "transitory" nature or otherwise. The case of the Russo-Dutch loan, 1854, may be recalled. By a treaty of 1815 between Great Britain, Russia and Holland, Great Britain agreed to pay half of a loan that had been made by Holland to Russia, in consideration of being allowed to retain certain Dutch possessions she acquired during the war. When the Crimean War broke out, a proposal was made in Parliament that Great Britain should repudiate the debt remaining, on the ground that Russia had infringed the arrangements of the Congress of Vienna. But the proposal was rejected as being inconsistent with national honour, and the interest on the debt was paid throughout the war to the agents of the Russian Government.²

But on the whole question it is impossible to lay down rules of any but the most general kind; for international practice has varied very much. After the Crimean War, fresh treaties of commerce were concluded. After the Franco-German War, some treaties were revived, some annulled, and others were left unmentioned. After the Russo-Japanese War, no treaties were confirmed or revived at all. After the Turco-Italian War, the Treaty of Lausanne, 1912, renewed all the treaties, conventions and engagements of every kind existing before the war, subject to the subsequent establishment of a commercial treaty on the basis of European public law (i.e. leaving Turkey full economic independence and the right to renounce the capitulations concerned). After the Balkan Wars, the Treaty of Constantinople, 1913, between Turkey and Bulgaria, renewed for one year the old commercial and consular conventions, after which they were to be revised; the Treaty of Athens, 1913, between Turkey and Greece, restored in full force all the treaties, conventions,

¹ The subsequent history of the question will be referred to in the chapter on arbitration, pp. 149 *seq.*

² Hansard, *Pari. Debates*, 3rd series, vol. cxxxv. 1096; Cobbett, *Cases*, vol. ii., p. 38.

etc., that bound the two countries before the war; moreover both these treaties confirmed the provisions of the Treaty of London, 30 May, 1913, which were not abrogated by them. After the Great War the treaties of peace revived a number of multilateral treaties of an economic or technical character, in some cases introducing new clauses. With regard to bilateral treaties each of the Allied States was empowered to revive such of its treaties with the ex-enemy States as it wished. E.g. Treaty of Versailles, Arts. 282-95. See Hall, 8th ed., p. 456.

CHAPTER V

AMICABLE SETTLEMENT OF INTERNATIONAL DIFFERENCES— INTERNATIONAL ARBITRATION

MANY differences between States have in the past been settled in a pacific manner not only by means of negotiations, mediation and good offices, but also by arbitration.¹ In 1794, under the Anglo-American treaty, various questions were made referable to arbitrators. After the Napoleonic wars international arbitration made great strides; and peace associations warmly advocated it. From about the middle of the nineteenth century States began to conclude general arbitration treaties, for settling differences arising out of commerce, navigation, etc.; and compromise clauses were not infrequently inserted in political conventions and peace treaties. During the century many important cases were thus decided relating not only to commercial matters, but also to the delimitation of boundaries, territorial waters, the rights and obligations of neutrality, the seizure of vessels and cargoes, the nature of contraband goods, the effects of declaration of war, questions relating to slavery, and so on. Some of the more famous of these cases are the Florida Bonds dispute (Great Britain and the United States), the Delagoa Bay case, 1875 (between Great Britain and Portugal), the *Alabama* case, 1872² (Great Britain and the United States), the Behring Sea case, 1893, the British-Venezuelan boundary dispute, etc.³

Earlier cases of arbitration.

In the summer of 1898 Tsar Nicholas II. issued an invitation to the States of the world to send delegates to a Conference for considering the means of checking the growing military and naval armaments and promoting peace. Twenty-six States—twenty European, four Asiatic and two American—accepted the invitation, and were represented at the International Peace Conference which sat at the Hague from 18 May to 29 July, 1899. Among the important

The Hague Peace Conference.

¹ On the subject of arbitration the following, among other works, may be consulted by the student: W. E. Darby, *International Tribunals* (London, 1904); J. B. Moore, *History of the International Arbitrations to which the United States has been a Party*, 6 vols. (Washington, 1899); A. de Lapradelle et N. Politis, *Recueil des arbitrages international* (Paris, 1905, etc.); C. H. Gosswiler, *L'Arbitrage international avant 1914 et apres 1919* (Geneva, 1923)

² See *infra*, p. 311.

³ See *supra*, pp. 85, 86; Hall, 8th ed., p. 136.

Conventions established, there was the "Convention for the pacific settlement of international disputes."

"As regards myself," said M. de Staal, in his closing speech as president of the Conference, "I who have reached the term of my career, and the downward slope of life, consider it as a supreme consolation to have seen the opening of new perspectives for the good of humanity, and to have been able to cast my eyes into the brightness of the future."¹ M. de Staal spoke with a generous enthusiasm natural in one who had presided with dignity and success over a Congress in which many nations and many conflicting interests were represented. Perhaps the most clear-sighted estimate which appeared of the work of the Conference was that which was made by Mr. Holls, the American representative, in an interview with *The Times* correspondent.² Mr. Holls pointed out that any one who was naive enough to expect disarmament, or the establishment of an international supreme court, with an international police force to enforce its decrees, would undoubtedly be disappointed; and the result of the Second Conference has done nothing to modify this view. He added that the proposed treaty of arbitration was the best attainable result in the present state of public opinion all over the world. "The formulating of the ideas of mediation and good offices, of arbitration, of international commissions of inquiry, and of procedure before courts of arbitration, is in itself a work of no small importance, . . . It will not prevent war where the question at issue is of such grave importance that the Government can, with the **full** approval of public opinion, disregard all the machinery which we have provided for its peaceful adjustment."

**Proposal for
limitation of
armaments.**

A proposal for the limitation of armaments appeared in the forefront of the programme of the Conference of 1899, but in the final act of this Conference it had sunk to a resolution that the restriction of military charges was extremely desirable, and to a "wish"³ that the Governments, taking into consideration the proposals made at the Conference, might examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets. From the programme of 1907 (when forty-four States were represented), the subject had disappeared entirely, though the British Government was anxious that it should, at the least, be discussed⁴; but the Conference reaffirmed with emphasis the resolution of 1899, and in the course of its deliberations the British Government offered to communicate its naval programme as a basis for discussion each year to any Power which would return the compliment—a proposition which was approved by the United

¹ See *The Times*, 1 Aug. 1899. I Aug., p. 8.

• *VOBU 4* of 1899.

* *Pari. Papers, Misc.*, No. 1 (1908), p. 12.

States, France, Spain and Russia, but did not lead to any practical result.¹ The difficulties of the problem have proved insuperable; and it may be conjectured with some confidence that whatever positive influence for good the Conferences may gain will be exercised in the manner indicated by Mr. Holls. Their highest utility will be found in the work of familiarising men's minds with the idea of arbitration in international matters, and with the imperative quality of the laws of war. As to the former, the value of the existence of a tribunal of inquiry was clearly demonstrated during the North Sea crisis of 1904. As to the latter, soldiers and jurists are alike agreed that the influence of the laws of war has infinitely relieved the horrors of the operations of war, without impairing the efficiency of those operations for crushing the armed resistance of the enemy; and their reassertion upon the authority of a great international council, formally representative of the armed forces of the world, marks an occasion of the highest significance. The agitation provoked by the use of expanding bullets in the Boer War illustrates the reality of what the Duc de Broglie called the moral effect of the Conference. The Dutch Republics were not represented at it, and the English representative did not sign the declaration proscribing the use of dum-dum bullets. It was, nevertheless, assumed by both belligerents that the employment of such bullets was an offence against international usage.

The Peace Conferences—to attempt a general summary of their results—disappointed the excessive hopefulfulness of those who foresaw in their convocation the beginning of

General results of Peace Conferences.

The Parliament of Man, the Federation of the World,

and repeated the quotation till it began to nauseate; but they rose far above "the cheap wit and shallow philosophy" of those who predicted an unrelieved failure. The mere assembly of such Congresses, the harmonious progress of their deliberations and the weighty reserve of their pronouncements, marked the advent of a stage in international history which was calculated to reduce the occasions of war, and to mitigate the horror of unpreventable struggles.

The chief practical achievement of these Conferences was undoubtedly the establishment of a permanent machinery for dealing with international disputes. Such an institution was the logical and natural outcome of a tendency which had been gathering force for over a century to resort to arbitration as an alternative to war. That any arbitration has its limitations when the court has no power to enforce its award is obvious. It rests with the losing party to decide whether it will accept the award or not; and though it may be laid down that a decision may be disregarded "when the tribunal has

Limits of arbitration.

¹ *Pari. Papers*, Misc., No. 1 (1908), p. 12.

clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal,"¹ the cases will be rare indeed in which the right to disobey will be clear beyond dispute. But behind the award there is always the sanctity (for what it may be worth) of an international treaty; and international public opinion will always have a restraining effect, and can seldom be entirely disregarded. Losing parties have, on the whole, honourably observed their obligations in the numerous arbitrations which have taken place during the past century; the action of the United States in 1831² providing the only notable instance of a refusal to accept an award, while the settlement of the *Alabama* matter, of the Venezuelan boundary question, of the North Sea incident and of the Newfoundland Fisheries dispute, give reason to hope that the sphere of arbitration need not be confined to cases "where the matter at stake is unimportant and the questions involved are rather pure questions of fact than of law or mixed fact and law."³ Any objections which may be raised against the *Alabama* award cannot be laid at the door of the principle of arbitration; the fault there rested not with the arbitration, but with the Treaty of Washington, which laid down the law by which the arbitrators were bound.⁴

Recovery of
contract
debts by
force.

Before dealing with the general provisions of the Hague Conventions on arbitration, it is necessary to refer to one particular point in which an attempt was made to reduce the possibility of war. In 1902 Great Britain, Germany and Italy having claims on behalf of their subjects against Venezuela on bonds and contracts, and for damages for injury, called upon that country to submit to arbitration, and receiving no satisfactory reply, seized the Venezuelan fleet and bombarded and blockaded several ports.⁵ Dr. Drago, the Foreign Minister of the Argentine Republic, thereupon enunciated the doctrine which is associated with his name, "that a public debt cannot give rise to the right of intervention and much less to the occupation of the soil of any American nation by any European power." He prayed in aid the Monroe Doctrine⁶; but the United States did not respond wholeheartedly to the appeal. President Roosevelt in his presidential address in 1905, deprecated the enforcement of contractual debts by arms, and stated that it was contrary to the policy of the United States, but would not bind that country to do more than endeavour to bring about an arrangement when other

¹ Hall, 8th ed., p. 420. ² *Ibid.*, p. 425, n. ³ *Ibid.*, p. 421.

⁴ See p. 311, *infra*.

⁵ Pearce Higgins, *The Hague Peace Conferences*, pp. 184 seq.

• See p. 83, *supra*.

countries were attempting to collect a just debt from an American State. The practice had in the past been uncertain; and Lord Palmerston, in 1848,¹ dealing with claims by British subjects who were holders of public bonds of foreign States, had claimed that it was clearly the right of any Government "to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the Government of another country," and that it was entirely a matter of discretion whether such action should be taken or not, and whether it should be followed by the employment of force. The Drago doctrine specifically referred to "public debts," as distinct from ordinary contract debts; inability to obtain payment of the latter through the courts of the debtor's country being presumably due to a defect in the administration of justice, for which the Government of that country is responsible. The non-payment of a public debt, it was in effect urged, stands in a different category. The Government is, of course, responsible, but such non-payment, being seriously against the interest of the debtor country, implies and brings with it such financial and political disturbance, that a small debtor nation ought not to be left at the mercy of intervention and occupation at such a time.² It was also pointed out that the creditor lends the money knowing, and on terms which take account of, the risks. The reasons, however, for the distinction seem inconclusive.

At the Conference in 1907 there was a general willingness to come to some arrangement on the subject, as well in the interest of the creditor as in that of the debtor; for the cost of the forcible collection of a debt is often extravagantly out of proportion to the amount at stake. The Convention finally took the following form:

"The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals (*nationaux*). This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration or, after accepting the offer, renders the settlement of the *compromis*³ impossible, or, after the arbitration, fails to comply with the award."⁴

The above-mentioned distinction between public loans and contract debts does not appear in this, though insisted upon in a reservation made by the Argentine Republic⁵; and a proposal (made

¹ Hall, 8th ed., p. 334, n. 4

³ See p. 158, *infra*.

⁵ *Pari. Papers, Misc.*, No. 4 (1908), p. 424.

* Pearce Higgins, p. 187.

Art. 1 of Convention II. of 1907.

by Chile¹) to include claims for damages for tort was not accepted. Certain States desired an insistence upon the creditor's first exhausting the legal remedies available in the debtor country²; and Venezuela, whose position had raised the whole question, together with Nicaragua, Colombia, Uruguay and Ecuador, demanded that no recourse to force should be allowed at all in the case of differences arising from pecuniary claims.³ In fact, the general result was, that the States for whose benefit the Convention was presumably drafted either abstained from voting, or put in reservations which entirely altered its character; but it may be taken that all the greater Powers will consider themselves bound by it, as there is not the provision, usual in these conventions, that it is only applicable as between the signatory parties, and when occasion arises, there is little doubt that any small Power will, when pressed for payment of a debt, hasten to claim it as authoritative.

The Convention (No. I I . of 1907) was ratified by Great Britain in November 1909.

Pacific
settlement
of inter-
national
disputes.

At the Conference in 1899 there was drawn up the Convention for the Pacific Settlement of International Disputes, which was in 1907 enlarged and amended, chiefly in respect of certain matters of procedure on which experience had shown amendment to be necessary.⁴

Mediation.

The Convention begins with an undertaking by the parties to use their best efforts to ensure the pacific settlement of international differences⁵ and to have recourse when possible to the good offices or mediation of friendly Powers⁶; while the offer of such mediation is declared expedient and desirable, and not to be regarded as an unfriendly act.⁷ A few necessarily vague Articles define the duties of the mediator and make clear the purely advisory character of his position⁸; and a special form of mediation⁹ is recommended, by which the States at variance are to choose each a second State, and the States so chosen are, for the space of not more than thirty days, to

¹ *Parl. Papers, Misc.*, No. 4 (1908), p. 424.

² *Ibid.*, pp. 424-7.

Ibid., pp. 426-7.

⁴ Convention I. of 1899 and 1907. The provisions of these Conventions are left in detail as in previous editions of this work. They have lost almost all active importance as existing law, though there may still be occasions when they can be called into use, but they are retained as a significant milestone on the road of international peace, and as forming an instructive comparison with the corresponding provisions governing the Permanent Court of International Justice.

⁵ Art. 1 (the references throughout are to the 1907 Convention).

⁶ On mediation and good offices generally, see Sir E. Satow, *Diplomatic Practice*, vol. ii., pp. 289 seq.

⁷ Arts. 2, 3.

⁸ Arts. 4-7.

⁹ This is due to the suggestion of one of the American delegates, Mr. F. W. Holls; see his work *The Peace Conference at the Hague* (New York, 1900), pp. 187 seq.

endeavour to settle the dispute, while the States at variance stand aside and cease from all direct communication with each other.¹

After these preliminaries, provision is made for International Commissions of Inquiry. "In disputes of an international nature, involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the contracting powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation,"² Such Commissions are to be constituted by special agreement between the parties defining the facts to be examined, the formation and powers of the Commission, its place of meeting, the language to be used and any other conditions agreed upon; the place of sitting to be the Hague if not otherwise fixed.³ A number of detailed provisions, based largely on the experience gained at the North Sea Inquiry, were recommended⁴ as to the appointment of commissioners, agents, counsel and secretariat, the pleadings and procedure, the calling of witnesses and the taking of evidence upon commission; the continental rule that witnesses are to be examined by the president and not by counsel for the parties being adopted, a suggestion in favour of the English system not being pressed.⁵ Speeches by counsel, though not forbidden, are not regarded as necessary. The proceedings are to be private, unless the Commission, with the consent of the parties, decides otherwise; this being thought preferable to a provision that the proceedings are public, with power to hear *in camera*.⁶ The decision is by a majority of votes; and it is specifically explained that the report, being limited to a finding of fact, has in no way the character of an arbitral award, but leaves the parties entire freedom as to the effect to be given to the finding.⁷

In settling the terms of these Articles, great caution was shown to use no words suggesting compulsion. It was, for instance, only "deemed expedient and desirable," not "agreed," that Commissions of Inquiry be instituted,⁸ and the Russian delegate, while suggesting the alteration, was emphatic in his recognition of the permissive character of the convention. Similarly a Russian amendment, which would have provided that after the decision of the Commission "the

¹ Art. 8.

²

Art. 9.

³ Arts. 10, 11.

⁴ Care was taken to leave everything permissive, *Parl. Papers, Misc.*, No. 4 (1908), p. 309.

⁵ *Ibid.*, pp. 313-14.

⁶ *Ibid.*, p. 314.

⁷ Arts. 12-36.

^a See *Parl. Papers, Misc.*, No. 4 (1908), p. 305. Russia and Holland desired the word "agreed."

Powers at variance are free to conclude a friendly arrangement, or to have recourse to the Permanent Court of Arbitration,"¹ and, by implication, would have forbidden war once the parties had gone before the Commission, was rejected, as being likely to restrict seriously the recourse to such Commissions.

There is, of course, nothing to prevent two Powers from adopting different rules from those proposed, or from extending the area of the inquiry or the powers of the Commission.² In the one case in which such a Commission has proved its value, the matter in issue, the firing upon the British fishing fleet by Russian warships in the North Sea in October 1904, was distinctly a dispute involving "honour and vital interests"; and it was referred to the commissioners to determine where the responsibility lay, and the degree of blame affecting the nationals of Great Britain and Russia, or of other countries, in case their responsibility should be ascertained by the inquiry; the "other countries" referring, of course, to Japan, who was alleged by Russia to have concealed torpedo-boats in the fishing fleet.³ An attempt was made by Russia in 1907 to include in the Convention a power to decide upon responsibility, in addition to mere questions of fact⁴; but it was thought wiser to leave this to the disputant Powers, and not to do anything to obliterate the clear distinction between the functions of the Commission of Inquiry and of a Court of Arbitration.

Arbitration. "International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award."⁵ The general principles being thus stated, the Conference in 1907 discussed at great length the possibility of making arbitration, in some cases at any rate, obligatory.⁶

Compulsory arbitration. The principle of compulsory arbitration met with a universal and warm approval; a large majority of the States represented were prepared to agree upon a list of subjects of what were vaguely described as "a juridical order," or disputes as to the interpretation of treaties, with the reservation, as a rule, of "vital interests" or "national honour"; but a strong minority led by Germany and Austria objected to anything in the nature of a universal treaty of compulsory arbitration, and preferred to reserve each case to be dealt with by a separate treaty as it arose. It was urged that a list was unnecessary, for almost all the items in the various lists proposed

¹ See *Parl. Papers, Misc.*, No. 4 (1908), p. 315. ²*Ibid.*, p. 305.

³ Pearce Higgins, pp. 167-8; and see p. 163, *infra*.

⁴*Parl. Papers, Misc.*, No. 4 (1908), p. 305.

⁵*Parl. Papers, Misc.*, No. 4 (1908), pp. 351-423.

⁶ Art. 37.

were of such a nature as to be extremely unlikely to lead in any event to war; and there was a marked reluctance to surrender in advance, and without consideration of the particular circumstances of each case, that independence which is one of the chief attributes of sovereignty. There being no chance of unanimity, the Conference fell back upon a restatement of the position which had been reached in 1899¹: "In questions of a juridical nature, and especially in the interpretation or application of International Conventions, arbitration is recognised by the contracting powers as the most effective and, at the same time, as the most equitable means of settling disputes which have not been settled by diplomatic methods." To this was added: "Consequently, it would be desirable that, in disputes on the above-mentioned questions, the contracting powers should, in that case, have recourse to arbitration, in so far as the circumstances permit"; and compulsory arbitration was only referred to in an Article² in which the Powers reserved "the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider possible to submit to it."

The rules of 1899, which established a Permanent Court of Arbitration (which will be referred to as the Court of Arbitration to avoid confusion with the later Permanent Court of International Justice), were in 1907 reaffirmed, amended and extended. The Powers undertook to maintain the court, accessible at all times, and competent for all arbitrations,³ at the Hague.⁴ Provision was made for an international registry attached to the court, which keeps all documents and records,⁵ and the staff of which is at the disposal of the Powers for the use of any special board of arbitration.⁶ Each Power selects four jurists as members of the court, who serve for six years, with power to be reappointed.⁷ When an arbitration has been decided upon, the tribunal is chosen from this list by agreement, and may consist of one arbitrator or more,⁸ and in default of agreement, each party appoints two arbitrators (of whom only one may be its national, or chosen from among the persons appointed by it as members of the court), who choose an umpire; and in case of disagreement as to the choice of the umpire, he is, if certain other methods prescribed have failed, to be chosen by lot.⁹ Diplomatic privileges and immunities are extended to the members of the tribunal in the performance of their duties.¹⁰ The International Bureau is placed under the control of the Permanent Administrative Council,

¹ Art. 16 of Convention I. of 1899; and Art. 38 of Convention I. of 1907.

² Art. 19 of Convention I. of 1899; and Art. 40 of Convention I. of 1907.

³ Arts. 41, 42.

⁴ Art. 43.

⁵ * Art. 43.

⁶ Art. 47.

⁷ Art. 44.

⁸ Art. 55.

⁹ * Art. 45.

¹⁰ Art. 46.

composed of the diplomatic representatives of the Powers at the Hague and the Netherlands Minister for Foreign Affairs, who settle all rules and questions of procedure and administration.¹ Subject to any agreement to the contrary between the parties,² the proceedings begin with a *compromis* a document defining the subject of the dispute, the time allowed for appointing arbitrators, the form or order, and time for delivery of, pleadings, the amount to be deposited in advance to defray expenses, and all other matters, such as the language to be used³; and this *compromis* may be settled by the court if the parties agree to that course. It may also be settled by the court on the application of one of the parties, when all attempts to come to an agreement by the methods of diplomacy have failed; but only in the case of: " (i) A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the court. Recourse cannot, however, be had to the court if the other party declares that, in its opinion, the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question; (2) A dispute arising from contract debts, claimed from one power by another power as due to its subjects or citizens, and for the settlement of which the offer of arbitration has been accepted. This provision is not applicable if the acceptance is subject to the condition that the *compromis* shall be settled in some other way."⁴ The tribunal for the purpose of settling the *compromis* in such a case is to be chosen as the arbitration tribunal is chosen in default of agreement.⁵ When a Sovereign or Chief of a State is chosen as arbitrator, the procedure is settled by him.⁶ The question of the language to be used, if not settled by the *compromis* is to be settled by the tribunal.⁷ The tribunal determines its own competence by interpreting the *compromis*, and the other documents which may be adduced.⁸ The parties are entitled to employ special agents and counsel, but a member of the Permanent Court may not act as such except on behalf of the Power which has appointed him a member⁹—a compromise between unrestricted freedom on the part of members to practise before the court, and total prohibition, which was arrived at *in* consideration of a dispute that arose on the subject during the Venezuela arbitration in 1904.¹⁰ Provision is made for pleadings and

¹ Art. 49.
⁴ Art. 53.
⁷ Art. 61.
 • Art. 62.

²
 53.
 61.

Art. 57.
⁶ Art. 54.

⁸ Art. 52.
 Art. 56.

⁸ Art. 73; and see Pearce Higgins, p. 176.
¹⁰ Pearce Higgins, p. 175.

oral arguments; and the time fixed by the *compromis* for delivery of pleadings may be extended by agreement, or by order of the tribunal when justice so requires.¹ The hearing is not public, unless it be so decided by the tribunal, with the assent of the parties.² Certain directions are laid down for the conduct of the hearing, as to the admission of fresh documents,³ the power of the court to call for documents⁴ and explanations,⁵ the power of agents and counsel to raise objections and points, on which the decisions of the tribunal are final, and cannot form the subject of subsequent discussion⁶; and it was found desirable to enact that questions and remarks made by the tribunal during argument are not binding on the tribunal or on any member thereof.⁷ The tribunal prescribes the conduct of the case⁸ and for the service of all notices by the tribunal in the territory of a third contracting Power, and in the case of all steps taken in order to procure evidence, the tribunal must apply direct to the Government of that Power, and requests for this purpose are to be complied with, so far as the means which the Power applied to possesses under its own laws allow, and they cannot be rejected unless the Power in question considers them likely to impair its sovereign rights or safety.⁹ The tribunal deliberates in secret, and its deliberations remain secret, all questions being decided by a majority.¹⁰ The award states the reasons on which it is based; but is only signed by the President and the Registrar or Secretary, and no dissenting judgments are given; this being an important amendment of the corresponding Article of 1899 (Article 52), which provided for records of dissent and signature by each member. Disputes as to the interpretation or execution of the award are, in default of agreement to the contrary, to be referred to the same tribunal.¹² The *compromis* may reserve a right to demand a revision of the award, and in default of agreement to the contrary, the request for revision must be addressed to the same tribunal. Revision can only take place "on the ground of the discovery of some new fact which is calculated to exercise a decisive influence upon the award, and which, at the time when the discussion was closed, was unknown to the tribunal, and to the party demanding revision."¹³ When there is a question as to the interpretation of a Convention of which other Powers are signatories, such other Powers must be notified, and are entitled to intervene; and the award is only binding on the parties to the proceedings, including such other Powers as do in fact intervene.¹⁴ Each party pays its own expenses, and an equal share of the expenses of the tribunal.¹⁵

¹ Art. 63.

²

Art. 66.

³ Arts. 67, 68.

«Art. 69.

⁵ Arts. 69, 72, 75.

«Art. 71.

⁷ Art. 72.

⁸ Art. 74.

• Art. 76.

Art. 78.

" Art. 79.

¹² Art. 82.

¹³ Art. 83.

" Art. 84.

¹⁵ Art. 85.

It was also recognised by the contracting Powers as a duty, if a serious dispute threatens to break out between two or more of them, to remind the disputants that the Hague Court is open to them, such reminder to be regarded as in the nature of good offices; and it was provided that in case of dispute one of the disputants may always address to the International Bureau a declaration that it would be ready to submit the dispute to arbitration.¹

Summary
procedure.

There was further added in 1907 a series of articles² providing a summary procedure (additional to the procedure set out above) for the settlement of disputes in cases of a technical nature in which the parties desire not to be restricted to choosing arbitrators from the members of the Court of Arbitration; the proceedings being conducted entirely in writing, unless the parties ask that witnesses and experts be called, or the tribunal requires oral explanations.

Proposed
Judicial
Arbitration
Court.

In addition to adopting the above rules, the Conference of 1907 recorded the following *voeu*³: "The Conference recommends the signatory Powers to adopt the annexed draft Convention for the creation of a Judicial Arbitration Court, and to bring it into force as soon as an agreement shall have been reached respecting the selection of the judges and the constitution of the court."

The draft Convention referred to provided for the constitution (without derogation from the Court of Arbitration) of a court of judges, representing the various juridical systems of the world⁴ and chosen if possible from the members of the Court of Arbitration. The appointments were to be for twelve years⁵; and the court was to elect annually by ballot three judges to form a special delegation, and three more to replace them if they were unable to act.⁶ To secure impartiality, an oath was to be required,⁷ and it was provided that no judge should act judicially in any case in which he had taken part in the decision of a National Tribunal, of a Tribunal of Arbitration, or of a Commission of Inquiry, or had figured as counsel or advocate for one of the parties; and it was further provided that a judge cannot act as agent or advocate before the Judicial Arbitration Court or the Court of Arbitration, or a Special Arbitration Tribunal or a Commission of Inquiry, nor act therein for one of the parties in any capacity whatsoever, so long as his appointment lasts.⁸ Each judge was to receive a salary of 6000 Netherlands florins (about £500) per annum, with an allowance of 100 florins a day while sitting⁹; and the court was to sit once a year and then dispose of all the cases on the agenda.¹⁰ The delegation was, with the assent

¹ Art. 48.

²

Arts. 86-90.

³ Final Act of 1907, *Voëu* I. {*Misc.*, No. 6 (1908), Cd. 4175, p. 15}.

⁴ *Misc.*, No. 6 (1908), p. 128, Art. 1.

⁵ Art. 3.

⁶ Art. 6.

⁷ Art. 5.

⁸ Art. 7.

⁹ Art. 9.

¹⁰ Art. 14.

of the parties, to be empowered to decide arbitrations in accordance with the summary procedure provided for by Articles 86-97 of Convention I., or to hold an inquiry after the nature of the Commissions of Inquiry provided for by the same Convention; the judges who had acted on the Inquiry not being thereby debarred from acting as judges, if the case was subsequently submitted to the arbitration of the court or the delegation.¹ Power was given to the delegation to settle the *compromis* with the consent of the parties and, in certain cases, on the application of one party.² The procedure was in general to be that laid down in Convention I.³ and the court was only to be open to the contracting Powers,⁴ who were to bear the general expenses, the costs of the trial being borne by the disputants.

But in this draft Convention no provision was made for the actual constitution of the court, and it was by reason of the differences of opinion on this point that the Conference failed to arrive at any decision more conclusive than the "wish" set out above. The object of this special court was explained in the Report to the Conference by the Commission by which the question was discussed.⁵ It was of the essence of the Court of Arbitration set up by Convention I., that on each particular occasion the judges were arbitrators chosen, it is true, from a limited number, but chosen by the parties; and much stress was laid upon the importance to a nation of keeping control over the appointment of the persons by whose decision it was to be bound. But it was hoped that in relation to questions of a purely legal or "juridical" nature, States might be willing to submit their differences to a court of judges more properly to be described as "permanent," appointed without reference to any particular dispute, sitting at regular periods, and prepared to apply to the cases brought before them something like a consistent body of law. The Permanent Court of Arbitration was not in fact permanent, for it had to be constituted for each occasion, and lacked the important element of continuity. It was also expensive, and between 1899 and 1907 it had heard only four cases. America put forward a scheme which in its rough outlines was substantially the same as that ultimately adopted in the draft Convention⁶; and it was of the essence of this scheme that recourse to the new court should be purely permissive. The court was also to have an appellate jurisdiction to hear appeals from other tribunals, and particularly to examine the conclusions of Commissions of Inquiry and special arbitration tribunals. Russia suggested a small permanent committee, chosen from a larger panel of judges⁷; Germany approved heartily of the general principle,

¹ Art. 18. * Art. 19. ³ Art. 22. * Art. 21.
⁵ *Misc.*, No. 4 (1908), Cd. 4081, pp. 257 *seq.*; and see Pearce Higgins, p. 509.
 • *Misc.*, No. 4 (1908), p. 260. *Ibid.*, p. 261.

as did Great Britain and other and smaller States; but some of these latter at an early period made reservations as to the constitution of the court. The American proposal was subsequently withdrawn, and in its place was substituted a scheme drawn up by Germany, America and Great Britain which, after a few modifications, became the draft Convention summarised above. But the insistence of the smaller States upon the absolute equality in all respects of all nations, and the refusal of the larger to admit this claim, made agreement impossible.¹

Cases
decided
under the
Convention.

Before considering the constitution and history of the Permanent Court of International Justice, the latest and strongest development in the means for impartial and pacific settlement of differences between States, it will be useful to add a short summary of the cases which have been dealt with by the tribunals thus set up in 1899.

The Rous
Fund of the
Californias.

The first case was that of "The Pious Fund of the Californias,"² in which the Court of Arbitration, in 1902, decided in favour of the United States against Mexico, in a dispute concerning the interest of part of an old Roman Catholic charitable fund. The fund was originally given in trust for the benefit of the Californias, and was administered by Mexico. In 1848, part of the territory in question was ceded by Mexico to the United States; and the Roman Catholic Church in the ceded portion claimed its share of the proceeds of the fund. In 1878 an award had been made, on a reference to the British Minister at Washington as umpire, in favour of the claimants, and the amount was paid up to the year 1868; and the United States, on behalf of the Church, claimed payment of the interest as from that date, contending, *inter alia*, that the matter was *res judicata*—a contention which was upheld.

The Vene-
zuelan debts.

In February 1904 the court decided a question of the right to preferential treatment of Great Britain, Germany and Italy as creditors of Venezuela, over her other creditors, including Belgium, Spain and France. The debts were admitted, and by agreement a proportion of certain customs revenues had been appropriated to meet them. The decision was in favour of the three former Powers, who had, in 1902, taken active steps to secure payment by blockading the Venezuelan ports.³

The
Japanese
house tax.

In 1904 and 1905, Great Britain, France and Germany claimed as against Japan that certain lands granted to them under perpetual leases were free of all charges and taxes, whereas Japan claimed the

¹ See *Pari. Papers, Misc.*, No. 4 (1908), Cd. 4081, p. 60; and Pearce Higgins, pp. 514-17.

² *British and Foreign State Papers*, vol. xcv. (1901-2); Moore, *Int. Arbitration*, vol. ii., p. 1349 seq.; Cobbett, *Cases*, vol. i., pp. 23 seq.; G. G. Wilson, *The Hague Arbitration Cases* (Boston and London, 1915) .pp. 1 seq.

³ See p. 189, *infra*; and Wilson, *op. cit.*, pp. 12 seq.

right to levy a tax upon the buildings erected thereon.¹ The decision of the Court of Arbitration in this case went against Japan, and was to the effect that the said leases confer an immunity on all the lands and on all the buildings thereon from "all imposts, taxes, charges, contributions or conditions whatsoever other than those expressly stipulated in the leases in question."

In 1904 and 1905 a dispute came before the court between France and Great Britain in relation to the issue by France to subjects of the Sultan of Muscat of authority to fly the French flag, and as to the privileges of persons so authorised²; and the decision was in favour of the power to grant such authority, but subject to important limitations, substantially conceding the British case. The Muscat dhow.

All the above cases were decided by arbitrators chosen in accordance with the Convention setting up the Court of Arbitration; and they were on points of minor importance, dealing in two out of the four cases merely with money claims. By a curious and unexpected turn of events, the first really serious question, which might reasonably be said to involve "honour and vital interests," came before and was settled by the International Commission of Inquiry, whose scope had been so carefully limited and distinguished from that of an arbitration court. In October 1904 the Russian Baltic Fleet, on its way to the East, fired upon the Hull fishing fleet off the Dogger Bank, sank one vessel, killed two men and wounded several others; the explanation put forward being that Japanese torpedo-boats were concealed among the fishing vessels. Great Britain prepared to take action, and made immediate and urgent representations to the Russian Government, which, without admitting its commander to be in the wrong, expressed regret; and within the week the incident was referred to an International Commission under the rules of the Convention of 1899. The main question of fact was as to the presence of Japanese torpedo-boats; and by the Convention signed at St. Petersburg on 25 November, 1904, the two Powers agreed "to entrust to an International Commission of Inquiry, assembled conformably to Arts. 9 to 14 of the Hague Convention of July 29, 1899, for the pacific settlement of international disputes, the task of elucidating, by means of an impartial and conscientious investigation, the question of fact connected with the incident which occurred during the night of October 21-22, 1904, in the North Sea, on which occasion the firing of the guns of the Russian fleet caused the loss of a boat and the death of two persons belonging to a British fishing fleet, as well as damages to other boats of the fleet and injuries to the crews of some of those boats." The Commission was composed of five naval officers, one British, one Russian, two chosen by France and the United The North Sea incident

¹ Wilson, *op. cit.*, pp. 40 seq.

² *Ibid.*, pp. 64 seq.

States and one by the Emperor of Austria; and the terms of reference extended beyond the mere question of fact: "The Commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the questions as to where the responsibility lies, and the degree of blame attaching to the subjects of the two high contracting parties, or to the subjects of other countries, in the event of their responsibility being established by the inquiry." On 26 February, 1905, the Commission issued its report, finding that no Japanese torpedo-boat was present, and that the Russian admiral was not justified in firing; and the Russian Government paid compensation, amounting to £65,000, the Board of Trade Inquiry having assessed the damages at £60,000.¹ It is to be noted, however, that the Russian member of the Commission dissented from the award.

The Casablanca case.

On 25 September, 1908, six soldiers (three of whom were Germans) of the French Foreign Legion at Morocco deserted at Casablanca and placed themselves under the protection of the local German consul, who intended to put them on board a German vessel. On their way to the vessel they were forcibly taken from the agents of Germany by the French. The German Government claimed that it had exclusive jurisdiction over its three subjects in Morocco, demanded their surrender, and admitted that its consul was not entitled to grant his protection to non-German subjects. France, however, maintained that the deserters of German nationality did not cease to be amenable to her exclusive military jurisdiction. As the two Powers failed to settle their conflicting contentions by diplomatic means, they agreed, 10 November, 1908, to submit them to arbitration. By the award, 22 May, 1909, the Hague Court held that the German consulate wrongfully attempted to embark on a German vessel the deserters from the French Foreign Legion who were not of German nationality, that it had not the right to grant its protection to the deserters of German nationality, and that it was wrong for the French military authorities to disregard the protection exercised over these deserters in the name of the German consulate.²

Maritime frontier between Norway and Sweden.

By a convention concluded on 14 March, 1908, Norway and Sweden agreed to settle, by means of arbitration, differences relating to the maritime boundary between the two countries. The award was given on 23 October, 1909, indicating the line of demarcation.³

The North Atlantic coast fisheries.

The Court of Arbitration had before it in September 1910 a question with regard to the right of fishing round the coasts of Canada

¹ Pearce Higgins, pp. 167-9; Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed., p. 481, where the text of the Report of the Commission is set out.³

² Wilson, *op. cit.*, pp. 82 seq.

Ibid., pp. 102 seq.

and Newfoundland, which **had** been a matter of contention between Great Britain and Canada on the one hand, and the United States on the other, for over a century, and had at times brought these countries to the verge of war.¹ By the treaty of peace of 1783, Great Britain granted to the United States, then admitted to be independent, the right of fishing on the banks and coasts of Newfoundland, in the Gulf of St. Lawrence, and on the "coasts, bays and creeks" of all other British North American territory, but with no right of drying and curing fish on the Newfoundland shores.² There followed, after the war of 1812, the dispute to which reference has already been made,³ as to whether this right did or not survive the war—a dispute which was settled by a treaty of 1818. By that treaty liberty was granted to the inhabitants of the United States for ever, in common with the subjects of Great Britain, to fish on certain defined parts of the coast of Newfoundland, on the shores of the Magdalen Islands, and on the coasts, bays, harbours and creeks from a spot on the southern coast of Labrador, through the straits of Belleisle, and thence northward indefinitely, but subject to the rights of the Hudson Bay Company. In return, the United States renounced for ever the right of fishing within three marine miles of all the rest of the coast of British North America. Out of the terms of this treaty several questions arose, which were the subject of long and dangerous disputes. The United States claimed a right to take fish by persons other than their "inhabitants"; refused to pay dues for fog alarms and stations; denied that their ships were bound, on entering Canadian territorial waters, to enter and clear at custom-houses; and claimed that all laws and regulations for the fisheries must be made jointly, and not by Great Britain or Canada alone. Further, by the treaty the United States had the right to fish on the coasts of Newfoundland, and on "the coasts, bays, harbours and creeks" of Labrador; and Great Britain contended that the difference in wording prevented the United States from fishing in the bays, harbours and creeks of Newfoundland. Finally, the broad question was raised as to the meaning of the three-mile limit in relation to bays and gulfs; the United States maintaining that the line followed the sinuosities of the coast, as against the British contention that British jurisdiction extended three miles seaward from a line drawn between the outer headlands of a bay or gulf however wide.

After a good deal of negotiation and various adjustments, the matter was eventually referred to the Court of Arbitration at the

¹ See *Cobbett, Cases*, vol. i., pp. 153 *seq.*, and the references there cited; *Wilson, op. cit.*, pp. 184 *seq.*

² Cf. *Wheaton* (5th ed.), pp. 287, 288, 369.

³ *Supra*, p. 146; *Wheaton* (5th ed.), pp. 288, 370 *seq.*

Hague, which sat during June, July and August 1910 . Seven questions were put before the court, and the general result of the award was as follows: The right of Great Britain (including Canada and Newfoundland) to make regulations without the consent of the United States as to the exercise of the liberty to take fish referred to in Article 1 of the treaty of 1818, in the form of municipal laws, ordinances or rules, is inherent in the sovereignty of Great Britain, but must be exercised subject to the limits laid down in the treaty, in that the regulations must be made *bona fide* and not in violation of the treaty; and regulations comply with this test which are (1) appropriate or necessary for the protection and preservation of the fisheries or (2) desirable or necessary on grounds of public order and morals, without unnecessarily interfering with the fishery itself; and, in both cases, equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class. The question of the reasonableness of particular regulations was left for the decision of a special tribunal of experts, or Permanent Mixed Fishery Commission, before which all objections made in future by the United States were to be laid.

On the second point it was decided that the inhabitants of the United States, while exercising their rights under the treaty, were entitled to employ as members of the fishing crews of their vessels persons not inhabitants of the United States; the persons so employed, however, to derive no benefit or immunity from the treaty. On the third question it was decided that the requirement that an American fishing vessel should report is not unreasonable, but only if there is a reasonably convenient opportunity afforded to report in person or by telegraph, at a custom-house or to a customs official; that the exercise of the fishing liberty by the inhabitants of the United States should not be subject to the purely commercial formalities of report, entry and clearance at a custom-house, or to light, harbour or other dues not imposed on Newfoundland fishermen. In the words of the recommendation accompanying the answer to Question III., "to impose such dues on American fishermen only would constitute an unfair discrimination between them and Newfoundland fishermen, and one inconsistent with the liberty granted to American fishermen to take fish, etc., in common with the subjects of his Britannic Majesty." The fourth point was somewhat similar; and it was decided that it was not permissible to impose restrictions upon American fishermen making the exercise of the privileges granted to them by the treaty to enter certain bays or harbours for shelter, repairs, wood and water conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses, or any similar conditions. But it was declared to be reasonable, in

order to prevent the abuse of these privileges, which were declared to be accorded by Great Britain on the grounds of hospitality and humanity, that the American fishermen entering such bays for any of such purposes and remaining more than forty-eight hours should be required, if thought necessary by Great Britain or the Colonial Government, to report, either in person or by telegraph, to a custom-house or to a customs official, if reasonably convenient opportunity for such report is afforded.

The fifth point raised wider issues and resulted in a decision which, while limited, of course, to the facts of the case, may form an international precedent of very considerable importance. The question was, "What is a bay within the meaning of the treaty?" The decision was very general in its terms: "In case of bays, three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast." But it was recognised that for practical purposes this rule was unfortunately vague; and the court made certain specific recommendations. "Considering, moreover, that in treaties with France, with the North German Confederation and the German Empire, and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles' width should be considered as those wherein the fishing is reserved to nationals; and that in the course of the negotiations between Great Britain and the United States a similar rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts; and that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers," it was therefore recommended that as a general rule "the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles" ¹; while in a number of specified bays the line was drawn by the court, as a rule, from one lighthouse to another, on the general principle that "where the configuration of the coast and the local climatic conditions are such that foreign fishermen, when within the geographic headlands, might reasonably and *bona fide* believe

¹This rule, found in the North Sea Fishery Convention of 1882, was suggested in the first draft of the Convention relative to Automatic Submarine Contact Mines (Convention VIII. of 1907). See Pearce Higgins, *The Hague Peace Conferences*, p. 333.

themselves on the high seas, the limits of exclusion shall be drawn in each case between the headlands specified as being those at and within which such fishermen might be reasonably expected to recognise the bay under average conditions." From these rules two bays were expressly excluded, the Bay of Fundy and Conception Bay, and the right of innocent passage through the Gut of Canso which is not disputed.¹ The Bay of Fundy had been decided, on an arbitration under a Convention of 1853 between Great Britain and America, to be not a British bay within the meaning of fishery treaties between the two countries, it being very large and partly bordered by the State of Maine²; while Conception Bay was held to be British by the Privy Council in *The Direct United States Cable Co. Ltd. v. The Anglo-American Telegraph Co. Ltd.*³ a decision in which the United States had acquiesced.

On the sixth point it was decided that under the treaty the inhabitants of the United States were entitled to fish in the bays, creeks and harbours of the treaty coasts of Newfoundland and the Magdalen Islands, as they were in the bays, creeks and harbours of Labrador. On the seventh point it was decided that the inhabitants of the United States, whose vessels resort to the treaty coasts for the purposes of exercising the liberties of fishing, are entitled to have for those vessels, when duly authorised by the United States on that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally; provided, however, that the liberty of fishing and the commercial privileges are not exercised concurrently.

The Orinoco
Steamship
Company.

Under an agreement entered into between the United States and Venezuela, 13 February, 1909, the contracting parties consented "to resort to the conciliatory means of arbitration . . . recognised by the entire civilised world as the only satisfactory means of terminating international disputes" for adjusting certain contending claims. The award of the court was pronounced on 25 October, 1910.

The Savar-
kar case.

The Savarkar case, which was decided on 24 February, 1911, conformably to an arbitration agreement between Great Britain and France, 25 October, 1910, has already been referred to.⁴

The Cane-
varo claim.

On 25 April, 1910, the Governments of Italy and Peru concluded an agreement, deciding to submit to the Court of Arbitration a dispute arising out of a claim made by the former, in the name of three of its subjects, for the payment of the sum of forty-three thousand

¹ Cf. Westlake, part i., p. 197.

² See *Direct United States Cable Co. Ltd. v. Anglo-American Telegraph Co. Ltd.* (1877), L. R. 2 A. C. 394, at p. 408.

³ *Ibid.*

* See p. 77, *supra*.

one hundred and forty pounds sterling and its legal interest demanded from the Peruvian Government. On 23 May, 1912, the tribunal gave its award in favour of Italy, to the effect that the sum found to be due should be delivered to the Italian Legation at Lima on 31 July, 1912.

Under the definitive treaty of peace between Russia and Turkey signed at Constantinople on 27 January/8 February, 1879, it was stipulated that Turkey should pay Russia a certain indemnity, including a specified maximum sum representing the claims of Russian subjects and institutions in Turkey for damages suffered during the war. A disagreement having arisen as to the dates of payment and the interest demanded, an agreement was entered into at Constantinople on 4 August, 1910—that is, more than thirty years after the war—for submitting the dispute, which diplomatic negotiation had failed to adjust, to the Hague Court of Arbitration. On 11 November, 1912, the tribunal delivered its award, in which, after setting forth an elaborate statement of fact and of law (reinforced by numerous authorities), it was held "that in principle the Imperial Ottoman Government was liable to the Imperial Russian Government for moratory indemnities from 31 December, 1890/12 January, 1891, the date of the receipt of an explicit and regular demand for payment; but that, in fact, the benefit from this demand for payment having lapsed for the Imperial Russian Government as a result of the subsequent renunciation by its embassy at Constantinople, the Imperial Ottoman Government is not now held to pay interest-damages by reason of the dates on which the payments of the indemnities were made."¹

Interest on
Turkish in-
demnities
due to
Russian
subjects.

. During the Turco-Italian War, the *Manouba*, a French steamer plying between Marseilles and Tunis, was stopped in the Mediterranean by an Italian cruiser, 16 January, 1912, and twenty-nine Ottoman passengers were arrested and made prisoners on the ground that they were Ottoman officers proceeding to the theatre of war. France having made a protest against this action, the prisoners were delivered to the French consul at Cagliari, who was to prevent those prisoners who belonged to the fighting forces from sailing from a French port to Tunis or to the scene of military operations; and on 6 March, 1912, the parties entered into an agreement to refer the case to the Hague Court of Arbitration, Italy claiming that her action was taken conformably to the provision of Article 47 of the Declaration of London, 1909. On 6 May, 1913, the court made its award, declaring that the Italian naval authorities were not within their rights in capturing the French mail steamer and in taking her to Cagliari, but that when once she was captured and

The
Manouba.

¹ Wilson, *op. cit.*, pp. 260 seq.

taken into port they were within their rights in temporarily and conditionally sequestering her in order to compel her captain to deliver up the twenty-nine Turkish passengers; and it was held that Italy should pay France four thousand francs for losses and damages suffered by the individuals interested in the vessel and her voyage, by reason of the capture and the taking into port.¹

The
Carthage.

Another case decided by the court at the same time as the preceding case was that of the *Carthage* a French steamer that was captured by an Italian cruiser and taken into port on the ground that she had on board an aeroplane destined for Tunis. The French Government protested against the capture, inasmuch as the destination was neutral, and aeroplanes are by Article 24 of the Declaration of London conditional contraband. The parties accordingly submitted to the Hague tribunal the following questions for determination: (1) Were the Italian naval authorities within their rights in proceeding as they did to the capture and temporary seizure of the French mail steamer *Carthage*? (2) What pecuniary or other consequences ought to follow from the decision given upon the preceding question? The first question was answered in the negative, and therefore the answer to the second question was that Italy should pay France the sum of 160,000 francs, the amount of the losses and damages suffered by the private parties interested in the vessel and her voyage.²

The
Tavignano.

The French steamer, *Tavignano*, having been seized by an Italian torpedo boat, 25 January, 1912, and two Tunisian mahones, *Kamouna* and *Gaulois*, having been fired at by another Italian torpedo boat, the French Government protested, whereupon the parties agreed, 15 April, 1912, to submit to an International Commission of Inquiry the questions raised, and to transmit the finding to the arbitral tribunal charged to determine the two previously cited cases, in order that a decision might be pronounced upon the questions of law. The Commission of Inquiry (consisting of two French naval officers, two Italian, and one—as president—British) made its report on 23 July, 1912; but on 2 May, 1913, the tribunal was notified that an arrangement had been reached between the parties, so that the case was withdrawn.³

Timor
boundaries.

A dispute having arisen between the Netherlands and Portugal relative to the execution of the convention concluded between them at the Hague, 1 October, 1904, as to the delimitation of Dutch and Portuguese possessions in the island of Timor, an agreement to arbitrate was entered into on 3 April, 1913, and the award was given on 25 June, 1914.⁴

¹ Wilson, *op. cit.*, pp. 326 seq.

² *Ibid.*, p. 372.

³

Ibid., pp. 352 seq.

Ibid., pp. 374 seq.

Only one case has been decided by the court in recent years. In 1921 Norway and the United States failed to agree as to the payment of compensation for the requisition in August 1917 of certain ships under construction which were the property of Norwegian nationals, and the dispute was referred to a tribunal constituted in accordance with the Hague Conventions. The main question was the amount of compensation, which the United States contended should be limited to the value of the property taken at the date of requisition, about \$2,700,000, but which Norway assessed at over \$13,000,000 on a basis of value plus interest and loss of profit. The tribunal by a majority decided substantially in favour of Norway and awarded over \$12,000,000. The American arbitrator carried his dissent to the extent of refusing to attend the pronouncement of the award, but the United States executed the terms of the decision while at the same time recording its refusal to accept the award as possessing any authoritative character as a precedent.¹

¹B. Y. I. L. (1923-4). P-159.

CHAPTER VI

THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND CONCILIATION AND ARBITRATION BY THE COUNCIL OF THE LEAGUE¹

Defects of
arbitration.

THE results of the Conferences of 1899 and 1907 marked a great advance in the methods of pacific settlement of international disputes, but still left much to be desired (as the Conference of 1907 recognised). Certainly there was created a permanent machinery ready to bring a Court of Arbitration into being at any moment, but this did not deserve the title of Permanent Court of Arbitration; the adjective indicated the hopes of the Conference of 1907 which were expressed in more definite form in the draft Convention for a Judicial Arbitration Court.² The Convention remained a draft because the Conference failed to reach an agreement on the method of appointing judges and no Permanent Judicial Court was founded, in fact no judicial court of any kind. The only provision for the settlement of disputes was by way of arbitration, which always suffers from one inherent defect when viewed from the standpoint of the development of international law: it tends to be a decision on the merits rather than on the law, a decision which is well adapted to the demands of a particular and momentary situation rather than one which is based on reasons which possess a general value apart from the particular case. Clearly if systematised methods for the pacific settlement of disputes were to contribute to the advancement of international law from being a branch of law so imperfect, so incomplete, so difficult to transform, there was need for a tribunal that would be both permanent and judicial. The establishment of a permanent world organisation—the League of Nations—and the enhanced credit acquired in recent years by arbitration in general and, more parti-

¹ Previous editions have contained a more detailed survey of international tribunals and the cases decided by them than is usually found in works on international law. This treatment has been followed with the Permanent Court, which in four years has adjudicated on more matters than came before the Hague tribunals in fourteen. Yet in the recent edition of a famous work the Court is dismissed with less space than the one case of the *Virginius*, and the editor of another apparently considers it of the same importance as consuls but of less significance by half than seal-fishing in the Behring Sea.

² *Supra*, p. 160.

COURT OF INTERNATIONAL JUSTICE 173

cularly, international justice, made possible the creation of the Permanent Court of International Justice.¹

Article 14 of the Covenant of the League of Nations runs: "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any disputes of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

The Council called a committee of jurists to its assistance and the committee duly submitted a draft scheme, which with some recommendations for amendment was passed on by the Council to the First Assembly (1920). Before the Second Assembly (1921) the scheme, as finally settled, had been accepted by a majority of the members of the League, and during that Assembly the Court was duly constituted by the appointment of judges. The Court was formally opened on 15 February, 1922, and held its first ordinary session on 15 June, 1922, in the Peace Palace at the Hague.

The scheme provided for by Article 14 of the Covenant is contained in the "Statute for the Permanent Court of International Justice,"² the charter of the Court. The Court consists of fifteen members: eleven judges and four deputy-judges. These numbers may be increased to a total of fifteen judges and six deputy-judges. This will allow the Court to expand as membership of the League increases.

The method of electing judges is complicated. Lists of candidates are drawn up by the national groups in the Hague Court of Arbitration and,³ in cases where a member of the League is not represented in the Hague Court, by national groups appointed under the same conditions as apply to appointments to the Hague Court. Before making nominations each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law and its National Academies, and national sections of International Academies devoted to the study of Law. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. A list of the persons thus nominated is submitted by the Secretary-General to the Assembly and to the Council, which

¹ See the inaugural address of M. Huber, the second President of the Permanent Court, 12 January, 1925: *League of Nations Monthly Summary*, (1925), pp. 3, 4.

² *The Permanent Court of International Justice; Statute and Rules* (Sijthoff, Leiden).

³ » Art. 44 of Hague Convention, 1907, p. 157. *supra*.

proceed independently of one another to elect firstly the judges and then the deputy-judges. The electors are enjoined by the Statute to bear in mind that judges should be of high moral character and should possess the qualifications required in their respective countries for appointment to the highest judicial offices or be jurisconsults of recognised competence in international law, and should be elected regardless of nationality so that the whole body should represent the main forms of civilisation and the principal legal systems of the world. Candidates who receive an absolute majority of votes in the Assembly and in the Council are considered elected subject to the proviso that not more than one national of any country shall be elected. Should more than one obtain the necessary votes the position falls to the eldest. In the event of this system reaching a deadlock and one or more seats remaining to be filled, supplementary provisions contained in Article 12 are called into play.

Tenure of
judges.

Each member of the Court is elected for nine years, may be re-elected, but cannot be dismissed unless in the unanimous opinion of the other members he has ceased to fulfil the conditions demanded of his office. When engaged on the business of the Court the members enjoy diplomatic privileges and immunities. Their salaries are paid by the League of Nations.

The Court elects its President, Vice-President and Registrar, of whom the President and Registrar are obliged to reside at the seat of the Court, which is established in the Peace Palace at the Hague.¹

Sittings.

For its ordinary business the Court holds an annual session commencing on 15 June and continuing until its list has been disposed of. To meet cases of urgency, the President has power to summon an extraordinary session whenever necessary. The full Court of eleven judges sits except when it is expressly provided otherwise, and the number is kept at eleven by calling where necessary on the deputy-judges; but if eleven are not available the Court may sit with a quorum of nine. Provision is made for ensuring that there shall always be on the bench one judge of the nationality of each of the litigant states. A chamber of three of the judges of the Court is formed annually to hear and determine by summary procedure cases requiring dispatch where the contesting parties require their case to be so disposed of.

¹The judges are: Huber (Switzerland), Weiss (France), Altamira (Spain), Anzilotti (Italy), Pessoa (Brazil), de Bustamente (Cuba), Finlay (Great Britain), Loder (Holland), Moore (United States), Nyholm (Denmark), Oda (Japan). Deputy-judges: Beichmann (Norway), Negulesco (Rumania), Hai (China), Yovanovitch (Serbia). Registrar: Hammarskjöld (Sweden). Deputy-registrar: Ruggie (Switzerland). Huber and Weiss are respectively President and Vice-President for 1925-8.

COURT OF INTERNATIONAL JUSTICE 175

Part XII. (Ports, Waterways and Railways) of the Treaty of Versailles deals with international co-operation in matters of transit and communication; Part XIII. (Labour) created the International Labour Office and made provision for conferences and conventions for the improvement of labour conditions. Both these sections of the Treaty of Versailles and the corresponding sections in the other peace treaties contain provisions for the reference of differences arising thereunder to the Permanent Court, and a special procedure for dealing with these cases is laid down in the Statute of the Court. For labour cases a special chamber of five judges is appointed every three years, and if the parties so demand cases will be heard and determined by this chamber, assisted on all occasions by four technical assessors. Cases relating to transit and communications are, if the parties think fit, heard and determined by a special chamber similarly constituted and assisted, if the parties so desire or the Court so decides, by four technical assessors.

Special
tribunal for
technical
cases.

Only States members of the League of Nations can be parties before the Court; individuals cannot appear before it as litigants. But when the subject of a State has been injured by acts contrary to international law committed by another State from whom he has been unable to obtain satisfaction through the ordinary channels, the former State has a right to take up the case of its subject, and to resort to diplomatic action or international judicial proceedings on his behalf, and in the eyes of the international tribunal before which proceedings are taken the State is the sole claimant.¹

Locus standi.

The Court is open to the members of the League and to States mentioned in the Annex to the Covenant; and to any other States subject to conditions which the Council was empowered to lay down and which were settled by a resolution of the Council on 17 May, 1922. The conditions are: (1) an acceptance of the jurisdiction of the Court, (2) an undertaking to carry out its decisions, and (3) an undertaking not to resort to war against a State complying therewith.

The substantive portion of the Statute of the Court concludes with Article 38, which lays down the principles by which the Court is to be guided in reaching its decisions. They are:

Law applied
by the Court.

1. International conventions whether general or particular, establishing rules expressly recognised by the contesting States.
2. International custom, as evidence of a general practice accepted as law.
3. The general principles of law recognised by civilised nations.

¹ *The Mavromatis Palestine Concessions*, P. C. I. J., Series A, No. 2, p. 12; but see dissenting judgment of Lord Finlay, pp. 38 seq.

4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

The application of judicial decisions is to be subject to Article 59, which provides that a decision of the Court shall have no binding force except as between the parties and in respect of the particular case.¹ Power is reserved to the Court to decide a case *ex aquo et bono* if the parties so agree.

Procedure. The remainder of the Statute deals with Procedure: exchange of pleadings (known as case, counter-case and reply) with papers and documents in support followed by oral evidence and argument by counsel or agents in open Court. The parties may demand or the Court may decide to exclude the public. The official languages are English and French; but the Court may authorise the use of any other language. Questions are decided by a majority of the judges present at the hearing, the President or his deputy having a casting vote. A helpful provision for the development of international law lays down that judgments shall state the reasons on which they are based. The final Article of the Statute which provides that as a general rule each party shall bear its own costs is not likely to exercise on States any such deterrent influence as a similar provision might effect on individuals in domestic litigation.

Jurisdiction. The Court has no general compulsory jurisdiction; a State which is party to an international dispute has no right to summon the other party before the Court except in cases where the other party has bound itself by treaty to submit to the Court that particular dispute or disputes of a class to which the particular dispute belongs. The Court itself determines the limits of its own jurisdiction.²

Nevertheless the jurisdiction of the Court is increasingly extensive and may be classified thus:

1. By consent, i.e. where the Court by agreement between the parties takes the place of what would otherwise be an *ad hoc* tribunal. This may arise by implication where an application to the Court by one party to a dispute is not opposed by the other.³

2. Under Article 12 of the Covenant, whereby members of the League agree to refer all disputes arising between them and likely to lead to a rupture to inquiry by the Council, to arbitration or to judicial settlement. In the event of the parties choosing the last

¹ In spite of this provision the Court is certain to respect its own decisions. In its Advisory Opinion, No. 10, the Court referred to its judgment in the case of *The Wimbledon*, and in its Opinion on the Treaty of Lausanne (No. 13) to the principles enunciated in Opinions Nos. 8 and 9.

² See *Mavromatis Jerusalem Concessions*, P. C. I. J., Series A, No. 2.

³ *Interpretation of Treaty of Neuilly* (Annex), P. C. I. J., Series A, No. 4.

COURT OF INTERNATIONAL JUSTICE 177

alternative the dispute will presumably come before the Court as the only international judicial tribunal.

3. Under the "Optional Clause." The committee of jurists¹ who prepared the original draft of the Statutes of the Court included a provision which would give the Court over well-defined classes of disputes compulsory jurisdiction as between all members of the League. ^{"Optional Clause."}

These were disputes concerning:

- (a) The interpretation of a treaty.
- (b) Any question of international law.
- (c) The existence of any fact which if established would constitute a breach of an international obligation.
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

The Council, however, did not recommend the Assembly to accept the clause in that form, but proposed that there should be substituted for it a clause which members of the League could adopt by declaring that they would recognise as compulsory *ipso facto* and without special agreement, in relation to any other member accepting the same obligation, the jurisdiction of the Court in the classes of disputes mentioned above. This is the famous "Optional Clause," otherwise Article 36, para. 2, of the Statutes of the Court, which is in force between eighteen members, and has been signed by twenty-four, including one Great Power, France. The other signatories are Austria, Belgium, Brazil, Bulgaria, China, Costa Rica, Denmark, Dominican Republic, Estonia, Finland, Haiti, Latvia, Liberia, Lithuania, Luxemburg, Netherlands, Norway, Panama, Portugal, San Salvador, Sweden, Switzerland and Uruguay.¹ Several of these signatures are subject to reservations, the most general being the condition of reciprocity. In several cases the undertaking is limited to a period of five years which in most instances determines in 1927.

4. Under treaties and conventions containing specific provisions for referring disputes to the Court. In addition to the treaties of peace there are about a hundred other international agreements affecting the jurisdiction of the Court.² Thirty of these were concluded or published between June 1924 and June 1925. The substitution of the Permanent Court of International Justice for the Hague Court of Arbitration in the renewal of the Arbitration Conventions between Great Britain and Sweden³ and Great Britain

¹ The proposal that Great Britain should accept the Optional Clause is discussed at length by Prof. Baker in B. Y. I. L. (1925). PP- 68-110.

² P. C. I. J., Series D, No. 4; and Series E, No. 1, pp. 357 seq-

³ Treaty Series, 1925, No. 28.

and Norway¹ illustrates how the Court in obtaining extended jurisdiction is absorbing the work of the earlier tribunals.

5. Under Article 14 of the Covenant, which empowers the Court to give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly. So far only the Council has made use of this procedure, but it has done so frequently, either on its own initiative or at the instigation of a State or international organisation. It is in this connection that the Court has been more extensively employed.

The permanent character of the Court of International Justice gives to its judgments and opinions an even greater importance than attaches to the decisions of the tribunals established in 1899. But it would be beyond the scope of this book to give more than a summary of the cases, which may be found fully reported, the judgments in Series A, the opinions in Series B, and a summary of both in Series E of the publications of the Court.

Judgments:
The
Wimbledon.

The first international dispute to come before the Court was the case of *The Wimbledon*. She was a British vessel, chartered by a French company. In 1921, while carrying munitions consigned to Poland, then in a state of war with Russia, she made to sail through the Kiel Canal. In the exercise of her declared neutrality Germany refused passage, and eventually the vessel proceeded by another route. Through diplomatic channels France pressed Germany for damages for delay and deviation, but the suggestion of Germany that the dispute came within a class referable by the Treaty of Versailles to the Court was accepted, and France jointly with other States interested in the due execution of the treaty sued Germany before the Court for a declaration that denial of passage to *The Wimbledon* was in violation of Article 380 of the Treaty of Versailles and for damages.

The Article runs:

"The Kiel canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality." The damages claimed were the loss sustained by eleven days' detention and two days' deviation and interest thereon from March 1921. The case was argued before a full Court at its 1923 session, and in August of that year judgment, by a majority of nine judges,² was given for the plaintiff for the amount claimed with interest from the date of judgment.

The Court held that the terms of the Article were categorical and that if any modifications arising out of Germany's position as a neutral were intended they would have been expressed. An analogy

¹ Treaty Series, 1925, No. 30.

² Loder, Weiss, Finlay, Nyholm, Moore, de Bustamante, Altamira, Oda and Wang.

COURT OF INTERNATIONAL JUSTICE 179

was drawn with the Suez and Panama Canals, where the neutrality of the riparian Sovereign was not compromised by the passage of belligerent war vessels or of belligerent or neutral merchant ships carrying contraband. Germany had contended that a denial of her right to regulate her position as a neutral was incompatible with her position as a sovereign State. The Court in its judgment agreed that the Article involved an undoubted limitation of sovereignty; but it was a limitation and not an abandonment, or at least no greater abandonment than was involved in any undertaking by a sovereign State to refrain from doing what it otherwise would be entitled to do. The joint dissenting judgment of the judges Anzilotti and Huber was founded on the view that the Article only contemplated normal, i.e. peace, conditions, and the canal was not neutralised in the same sense as the Suez and Panama Canals, which were governed in the event of war and as a guarantee against belligerent action by special provisions which were absent in the case of the Kiel Canal. The German judge, Schiaking (added to the Court in accordance with Article 31 of its Statute), dissented on the ground that Article 380 created over the canal an international servitude which must be restrictively construed and cannot override such vital interests of the servient State as the right to observe a strict neutrality.¹

In the case of the *Mavromatis Concessions*, Greece instituted proceedings against Great Britain, the mandatory power over Palestine, on behalf of a Greek subject who, it was alleged, had suffered loss by interference with concessions held by him in Jerusalem and Jaffa. Great Britain entered a plea to the jurisdiction. The judgment of the Court, given in August 1924 by a majority of seven judges against five,² maintained the competence of the Court with regard to the Jerusalem concession and reserved the matter for further consideration on the merits. Points of general interest in the decision are that the Court will define "the limits of its jurisdiction; that although a dispute may originate in an injury to a private interest a State may step in, define the dispute by diplomatic negotiations,³ assert its right as a State to ensure that the rules of international law are respected as regards its subjects, and prosecute the case before an international tribunal in the eyes of which the State is the sole claimant."⁴

Proceedings on the merits of the question reserved were conducted at an extraordinary session in January 1925, and judgment was given in March 1925, in which the validity of the Greek subject's concession was upheld and the grant of an overriding concession

¹ P. C. I. J., Series A, No. 1.

² Loder, Weiss, Nyholm, Altamira, Anzilotti, Huber and Caloyanni (Greek national judge). The dissentients were Finlay, Moore, de Bustamante, Oda and Pessoa.

³ This is a condition precedent.

* P. C. I. J., Series A, No. 2.

to another holder by the mandatory power was determined to be invalid. The claim for damages was dismissed as Greece failed to prove that any damage had in fact resulted.¹

Interpreta-
tion of
Treaty of
Neuilly.

In September 1924 the Court, sitting as a Chamber for Summary Procedure,² decided a dispute between Greece and Bulgaria concerning the interpretation of a paragraph in the Treaty of Neuilly. In the course of its judgment the Court adopted the general principle of interpretation that a definitive obligation imposed on a contracting party by one section in a treaty cannot be extended by reference to a paragraph in another section dealing with a different subject matter.³ Relying on Article 60 of the Statute,⁴ Greece applied to the Court to interpret its judgment, but in a judgment given in March 1925 the Court declined on the ground that the interpretation requested would have taken the Court beyond the scope of the matters submitted in the original case.⁵

German
claims in
Upper
Silesia.

The sixth judgment given by the Court was on a preliminary objection to the jurisdiction raised by Poland in a case introduced by Germany concerning certain German interests in Polish Upper Silesia. The objection was overruled, the Polish national judge alone dissenting. The case decides that where a State in pursuing a course of conduct (in this instance expropriation of private property) has omitted to comply with the provisions of a treaty which alone confers jurisdiction on the Court over disputes arising thereunder, and which the Court holds ought to have been applied, such omission does not exclude the jurisdiction of the Court arising from the treaty. A defendant cannot be heard to rely on his own wrongdoing. To determine, in such circumstances, whether the defendant State has wrongfully failed to comply with provisions binding on it, the Court will consider so much of the merits of the case as may be necessary to establish or reject its jurisdiction, but without, by so doing, in any way prejudging the issues which may arise out of the same facts at the subsequent hearing on the merits. The Court also rejected a plea of *lis pendens* based on private actions proceeding in municipal tribunals.⁶

Advisory
Opinions.

Equally important from the point of view of international law are the Advisory Opinions which the Council of the League has called upon the Court to give. These will be briefly considered.

The first Advisory Opinion settled a difficulty experienced by Holland in selecting a workers' representative for the International Labour Office; the second decided that the competence of the Inter-

¹ P. C. I. J., Series A, No. 5.

² *Supra*, p. 174.

³ P. C. I. J., Series A, No. 3.

⁴ "In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

⁵ P. C. I. J., Series A, No. 4.

Ibid., No. 6.

national Labour Office extended to the conditions affecting workers in agriculture; the third, that methods of production, in themselves, were alien to its sphere of activity. These opinions were given in 1922.¹ The fourth opinion was given in consequence of a dispute between Great Britain and France arising out of an objection by the former State to a decree issued by the French Government affecting the nationality of persons born in Tunis, a protectorate of France. The question was submitted to the Council of the League, which requested the Court to decide whether the dispute arose out of a matter solely within the domestic jurisdiction of France and was thus outside the arbitral jurisdiction of the Council.² In an opinion of February 1923 the Court took the view that exclusive State jurisdiction extends to all matters not in principle regulated by international law. A dispute arising out of a matter *prima facie* within domestic jurisdiction is not removed from that domain because international engagements are invoked or because one of the parties brings the dispute before the League of Nations. On the other hand international obligations may restrict the discretion of a State within that domain; and such the Court held was the case in the matter before it. The Council was therefore competent to deal with the dispute; but before it could do so France amended its decree to the satisfaction of Great Britain.³

The Court refused to give an opinion bearing on a dispute between Finland, a member of the League, and Russia, a non-member which was not obliged to consent, nor had voluntarily consented, to submit settlement of the dispute to the League.⁴

The sixth and seventh opinions concerned disputes between Germany and Poland. Germany complained that certain harsh measures taken by the Polish Government against some of the Germany minority in Poland were contrary to the Polish Minority Treaty. The facts were not in dispute, but Poland claimed to be justified on its interpretation of the treaty. In each case the Court unanimously rejected the Polish interpretation.⁵

In its next two opinions the Court was called upon to adjudicate upon the finality of the delimitation of frontiers between Poland and Czecho-Slovakia and between Albania and the Serb-Croat-Slovene State.⁶

A Convention was concluded between Greece and Turkey in 1923 providing for an exchange of Greek and Turkish populations

Græco-Turkish exchange of populations

¹ P. C. I. J., Series B, Nos. 1, 2 and 3.

² Art. 15 (8) of Covenant; and see article by Prof. Brierly in B. Y. I. L. (1925), p. 8.

³ P. C. I. J., Series B, No. 4.

Ibid., No. 5.

P. C. I. J., Series A, Nos. 6 and 7 (1923).

⁶ *Ibid.*, No. 8 (1923) and No. 9 (1924).

and for the setting up of a Mixed Commission. From its provisions for exchange there were exempted, *inter alia*, all Greeks established in Constantinople before 30 October, 1918. The dispute turned on the meaning of "established," and the Turkish contention that it indicated a status under Turkish law determinable by the Turkish courts and not the Mixed Commission was rejected. It is worthy of note that in disposing of an argument advanced by Turkey that such a decision would give the Convention precedence over national legislation and thus infringe her sovereign rights the Court referred to its judgment in the case of *The Wimbledon*.¹ Perhaps this is a germ of international case law.

Danzig
letter-boxes.

In 1925 the Free City of Danzig objected to Polish letter-boxes set up in the city by Poland, which claimed a right to do so under the Treaty of Versailles and a Convention concluded in 1920 between Danzig and Poland. In accordance with the procedure laid down by the Treaty and the Convention the High Commissioner of Danzig had given certain decisions affecting the Polish postal service in the Free City, and one of the questions considered by the Court was the extent of the application of the doctrine of *res judicata*. The Court held that the principles enunciated by it in its Opinions numbered 8 and 9 in regard to the finality of decisions under international law applied to any final decision given by the High Commissioner under the Treaty and the Convention. But the decisions in fact given did not cover the points in dispute, and so the doctrine of *res judicata* did not apply.²

Mosul
dispute.

The first question of real international seriousness and importance on which the opinion of the Court was sought arose out of the Treaty of Lausanne between Great Britain and Turkey. Article 3, section 2 of the Treaty provided that in the event of no agreement being reached by the signatories in regard to the determination of the frontier between Turkey and Iraq the dispute should be referred to the Council of the League of Nations. The parties failed to agree and the Council became seised of the dispute. A commission was appointed, investigated the *locus in quo* and presented its report and conclusions. These were submitted to a Committee of the Council, which proceeded to consider them, assisted by notes and memoranda from the parties and the oral arguments of their representatives. Certain preliminary questions were raised, and the Committee resolved to request the Council to submit the two most important for the opinion of the Court. The questions were: (1) What is the character of the decision to be taken by the Council in virtue of Article 3, section 2 of the Treaty of Lausanne—is it an arbitral award, a recommendation, or a simple mediation? (2) Must the

¹P. C. I. J., Series B, No. 10.

• *Ibid.*, No. 11.

decision be unanimous or may it be taken by a majority? May the representatives of the interested parties take part in the vote?

Unsettled conditions in the disputed territory rendered an immediate decision necessary, and the Court met in extraordinary session in October 1925 and delivered its opinion a month later.

To the first question the answer of the Court, without binding itself to the nomenclature therein suggested, was that the parties intended by the provision for recourse to the Council to assure a definitive and binding solution to the dispute, and that the "decision to be taken" by the Council in virtue of that provision would be binding on the parties and would constitute a definitive determination of the frontier between Iraq and Turkey.

In arriving at a conclusion on the second point the Court held that although the dispute was not submitted to the Council under a clause of the Covenant, the nature of the Council must be considered with reference to the organisation and functions conferred on it by the Covenant. There, the rule of unanimity was explicitly laid down subject only to express exceptions, not relevant in the present case, and its application was confirmed in this instance by certain clauses in the Treaty of Lausanne. The strict rule of unanimity was, however, subject to one qualification, specifically provided in several clauses in the Covenant and necessarily implied in the present case: although the disputants were entitled to share in the deliberations of the Council and to take part in the voting, their votes would not affect the required unanimity.

The dispute was concluded by an award of the Council in December 1925 allocating to Iraq almost the whole territory claimed by Great Britain on its behalf, subject to the one condition that Great Britain would prolong its Treaty of Alliance with Iraq for twenty-five years or until the admission of Iraq into the League during that period.

By the terms of the Covenant, members of the League are bound to submit all disputes between them likely to lead to a rupture to one of three forms of pacific settlement: judicial decision by the Permanent Court, arbitration, or inquiry by the Council. The first method has been dealt with, the second calls for no further treatment, but the third, and most important, alternative now requires to be considered. Its importance arises from the fact that all disputes between members of the League not submitted to arbitration or judicial settlement must be submitted to the Council. Submission is effected by a notice of the existence of a dispute, given by any party to it, to the Secretary-General, upon whom is then cast the burden of making all necessary arrangements. The Council is then seised of the dispute and must proceed to inquire into and consider

Pacific
settlement
by the
Council.

the question, unless it finds that the dispute arises out of a matter which by international law lies solely within the domestic jurisdiction of a party to the dispute, or unless, on its own initiative or at the request of either party, it refers the dispute to the Assembly. After investigating and considering the matter in dispute the Council's first duty is to mediate—to endeavour to effect a settlement by consent. If it fails to do so it must then publish in the form of a report the facts of the dispute and the terms of settlement which it considers just, and this report may be made unanimously or by a majority vote. A report unanimously agreed to by all the members of the Council, other than the representatives of parties to the dispute, and accepted by one party, carries with it the benefit of a definite undertaking by all the members of the League that they will not resort to war against the compliant party. A majority report leaves the parties at liberty, after three months' delay, to resort to any measures they may think fit.

It is in connection with disputes referred in accordance with the foregoing provisions that the Council has in several cases sought the assistance of the Permanent Court of International Justice by a request for an Advisory Opinion. These have already been summarised, and a perusal of the Mosul dispute between Great Britain and Turkey will suffice to indicate how the Permanent Court can be employed to assist and to supplement the work of the Council as an arbitral tribunal.

All disputes that come before the Council do not give rise to problems requiring legal elucidation, and it is necessary to add an example of the methods pursued in settling political questions. The best and most successful is provided by the frontier affray between Greece and Bulgaria.

Graeco-
Bulgar
Frontier
incident.

On 19 October, 1925, shots were exchanged between Bulgarian and Greek sentries on the frontier. These developed into prolonged firing, movements of troops and preparation for serious hostilities. Bulgaria invoked the provisions of the Covenant¹ and on 23 October appealed to the League through the Secretary-General, who convened an extraordinary session of the Council to meet on the 26th. At this meeting the Council decided that Greece and Bulgaria within twenty-four hours should give unconditional orders for the cessation of hostilities and the withdrawal of troops, and within sixty hours should ensure that all troops were within their national frontiers. These directions were complied with to the satisfaction of neutral military officials who had been dispatched to the scene of the conflict. Then the Council, having heard the arguments of the representatives of the parties, appointed a Commission of Inquiry to proceed to the

¹ Art9. 10 and 11.

Graeco-Bulgar frontier, to establish the facts which would enable responsibility to be fixed, and to submit any suggestions as to measures which might prevent the recurrence of such incidents. Within three weeks the Commission delivered its report determining the responsibilities, fixing the sum of 30,000,000 levas as the damage to be paid by Greece and recommending a series of military and political measures for the reorganisation of the frontier. The report was adopted by the Council at its session in December 1925 it was accepted and its terms executed by the parties. Thus the machinery of the League, the promptitude with which it was set in motion, and the assent of the parties brought to a close incidents which immediately threatened the peace of the Balkans.¹

¹ See the remarks of Sir Austen Chamberlain, *League of Nations Monthly Summary*, October 1925, p. 261. The course of events is fully described, *ibid.*, pp. 256-62, and the Report of the Commission, *ibid.*, December 1925, pp. 327-31.

PART III

BELLIGERENCY, OR THE RIGHTS AND DUTIES OF STATES IN TIME OF WAR

CHAPTER I

PREBELLIGERENT ACTS; COMMENCEMENT OF WAR AND ITS EFFECTS

THE arbitrament of war is final—the *ultima ratio*—in the disputes of nations, and the points previously in issue *transeunt in remjudicatam* (are merged in the decision). War may be defined as "the state or condition of Governments contending by force,"¹ and in ascertaining whether such a state or condition exists, the intention of the parties or either of them must be looked at. The mere commission of certain acts of force, hostility or unfriendliness is not sufficient. There are, for instance, certain acts warlike in their essence but traditionally held to fall short of war, to which a nation may resort when provoked under circumstances of too little moment to call for a declaration of war. It is always open to the Power affected by such acts to treat their commission as an act of war; if it does not elect to do so, the peace is deemed to remain unbroken. The most familiar among them are retorsions, reprisals, and pacific blockades.

Definition
of war.

Forcible
redress short

Retorsion is the return in kind of acts which fall short of hostility but are marked by unfriendliness. Thus differentiation of tariff may be met by acts of retorsion on the part of the State injuriously affected.

Retorsion.

Reprisals² form the appropriate reply to particular acts of wrong, which the injured party is determined to resist unless satisfaction is given. In a passage³ which has been often quoted, Vattel says: "Reprisals are resorted to between two States to procure justice for themselves where it is not otherwise obtainable. If a nation has seized what belongs to another, if it refuses to pay a debt, to repair injury, or make proper satisfaction therefor, the State injured may seize something belonging to the other and use it for its own advantage till it has obtained the amount of its damage with interest, or it may

Reprisals.

¹ Westlake, part ii. (1913), p. 1.

² This form of reprisals is to be distinguished from the reprisals adopted by a belligerent during the continuance of actual warfare.

³ *Droit des gens*, liv. ii. § 342.

retain it as a pledge until the wrongdoer has rendered full satisfaction. The property so seized is kept as long as the hope of obtaining satisfaction remains; when it disappears confiscation ensues and reprisals have accomplished their object."

Embargo.

Embargo or sequestration is a familiar application of the above principle. A good illustration of this was the action of Great Britain in 1839, when she captured and laid an embargo upon Sicilian vessels, because the Two Sicilies had granted a sulphur monopoly in violation of a commercial treaty; the Sicilian Government retaliating by a counter-embargo. Of a somewhat similar nature (though approximating rather to pacific blockade) was the Don Pacifico incident in 1849, still remembered as the occasion of Lord Palmerston's famous *civis Romanus sum* speech. Don Pacifico, by birth in Gibraltar, had acquired British nationality; during his residence in Athens, his house was plundered by a mob with the countenance, it appeared, of some Greek soldiers. He claimed over £21,000, and the British Government, declining the jurisdiction of the native tribunals, demanded compensation. Meeting with a refusal, they instructed the British fleet to Sequester all Greek ships found at sea. The commissioners to whom the claim was finally referred reduced the claim to £150.¹ Obviously the right of reprisal was in this case exercised by Great Britain with excessive rigour. (We may mention here that the sixth Convention of the Hague says that "it is desirable" that the vessels of a belligerent in the port of the adversary at the outbreak of war should be permitted to leave.²) Again, in 1895, Great Britain seized the port of Corinto, in Nicaragua, and collected the customs duties there, until reparation was made for injuries that had been inflicted on British subjects. Similarly, in 1901, France seized the custom-house at Mitylene until certain claims of French subjects were satisfied. In 1908 Holland took possession of two Venezuelan gunboats for the purpose of enacting restitution for various grievances.

Reprisals may be defended on the ground that they form a convenient mode of procuring redress without necessarily involving war. The real character of such acts depends upon the conduct of the State at which they are directed. If it is induced to give the required satisfaction the reprisal ceases; if it refuses, "the retroactive effect . . . impresses the direct hostile character upon the original seizure; . . . it is no longer an equivocal act."³

Pacific blockade.

The character of pacific blockade⁴ has often been confusedly

¹ *Parl. Papers*, 1851; Phillimore, *Commentaries*, vol. iii. § 23.

² See *infra*, p. 199.

³ Per Lord Stowell in *The Boedes Lust* (1804), 5 C. Rob. at p. 246.

⁴ On pacific blockade, see Westlake, article in his *Collected Papers* (1914), pp. 572 *seq.*; A. E. Hogan, *Pacific Blockade* (Oxford, 1908).

stated, and practice has not always been consistent. The name itself is somewhat misleading. As between the powers at issue such a blockade involves, as some forms of reprisal do, acts of constraint essentially non-pacific; but the view is now generally accepted that third Powers may enter and leave the blockaded ports at pleasure. A state of war would be inconsistent with such a liberty, and from this point of view the blockade may be called pacific.

In the earlier instances of such blockade, it is true, the ships of third Powers were sometimes confiscated (e.g. by France when blockading Mexican ports in 1838¹), and sequestration without ultimate confiscation was frequent. In 1884 France blockaded Formosa and claimed to be entitled to capture and condemn the vessels of third Powers while at the same time using Hong-Kong as a coaling station. This led to a declaration from Great Britain that "the contention . . . that a pacific blockade confers on the blockading Power the right to capture and condemn the ships of third nations for a breach of such a blockade, is in conflict with well-established principles of international law."² In principle this declaration was unanswerable; unless it was directed against sequestration as well as condemnation, in which case it was hardly supported by international practice. Great Britain followed it up by treating the situation as a state of war, and forbidding the coaling of French vessels at British ports. The blockade of Venezuela by Great Britain and Germany in 1902 was of an ambiguous character. Great Britain instructed her fleet to seize and hand over to a prize court vessels of other nations than Venezuela, and in a proclamation at Trinidad a state of war was recognised. The German fleet actually bombarded Venezuelan ports. In the final settlement between Great Britain and Venezuela it was recognised that it might reasonably be contended that there was a state of war; but neither of the blockading Powers in fact confiscated any vessels either belonging to Venezuela or any other Power.³ "Pacific" is a word of doubtful application to the blockade of Crete by the European Powers in 1897, for there, too, the blockading forces fired on the inhabitants. It may also be doubted whether the blockade of Greece by Great Britain and France, 1916-17, satisfied the requirements of this form of constraint; foreign neutral ships were allowed four days to depart and became presumably liable to capture thereafter.⁴

¹ Westlake, part ii., p. 12.

• Lord Granville to M. Waddington, 11 Nov. 1884: *Parl. Papers, France*, No. 1, 1885; Westlake, part ii., p. 14.

² Westlake, part ii., p. 15.

⁴ This blockade may be considered merely as an incident in the intervention claimed to be exercised by Great Britain and France in virtue of treaty rights. See Oppenheim, i. § 135.

INTERNATIONAL LAW

Legality
questioned.

The legality of this form of blockade has been repeatedly questioned, and we may refer to the frank admission by Lord Palmerston in 1846.¹ "The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of the Plata has been from first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas; but blockade is a belligerent right, and unless you are at war with a State, you have no right to prevent ships of other States from communicating with the ports of that State—nay, you cannot prevent your own merchants' ships from doing so." Whether Palmerston was right as to the control of the executive over merchant vessels in its relation to foreign powers is not so clear as he appears to have imagined²; nor is it by any means certain that the right to interfere with the vessels of third parties will never again be asserted. But such a right cannot be defended on principle, whatever justification it may receive from precedent, and, indeed, the whole institution of pacific blockade is an anomaly, and its main, if not only, justification is that it has often been effective in securing its object without bloodshed.³

Rules of
Institute of
International Law.

Owing to the difference of opinion and practice in regard to pacific blockade, it is of interest to note the principles formulated by the Institute of International Law in 1887⁴:

- (1) Ships under a foreign flag may enter freely despite the existence of the blockade.
- (2) The pacific blockade must be officially declared and notified, and maintained by an adequate force.
- (3) The ships of the blockaded Power that do not respect the blockade may be sequestered; and when the blockade is at an end they must be restored to their owners with their cargoes, but without indemnity on any ground.

Declaration
of war.

For a considerable time it was thought in theory—even then there was no unanimity of opinion⁵—to be necessary that the out-

¹ Quoted in Hall, 8th ed., p. 440. ² See Westlake, part ii., p. 13.

³ The occupation of Corfu, a Grecian island, by Italy in August 1923 gave rise to the question whether coercive measures falling short of war, exercised by one member of the League against another, were consistent with the provisions of the Covenant. A body of international jurists, to whom the matter was referred and whose opinion the Council of the League unanimously adopted, considered that such measures might or might not be consistent with the provisions of the Covenant; but that it was for the Council, when the dispute had been submitted to it, to decide immediately, having regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or withdrawal of such measures. See B. Y. I. L. (1924), p. 180.

⁴ *Annuaire de l'Institut de droit int.*, vol. ix. (1887), p. 300.

⁵ Cf. *The Eliza Ann* (1813), 1 Dods. 244.

break of war should be preceded by a solemn declaration. This theory, probably a survival of the mediaeval custom, was very frequently disregarded in practice, there being either no declaration at all, or a declaration at some date, sooner or later, after the first act of hostility.¹ It has been calculated² that out of about a hundred and twenty wars that took place between 1700 and 1872 there were only some ten cases in which a formal declaration was made before an overt commencement of hostilities. However this may be, it became customary in the latter part of the nineteenth century to issue a manifesto announcing the outbreak of war. Thus, the Crimean War was preceded by formal declarations; similarly in the case of the Franco-German War in 1870, the Spanish-American War in 1898, and the Boer War in 1899. In 1904 Russia complained because the formal declaration from Japan came two days later than the first attack.³ There has been, therefore, a growing tendency of late, before the agreement at the Hague in 1907, to respect the old theory. It must be remembered, of course, that the occurrence of a state of war imposes serious duties upon neutrals. Belligerents are vitally concerned in the discharge of these duties; and responsibility for their exercise can only arise after due notification to neutral Powers that a state of war exists. In order to give such notice, States declaring war usually publish within their own territory and send to neutrals a manifesto giving notice of the outbreak of hostilities. But such a proceeding cannot be taken as an admission of any obligation to warn the enemy of the coming attack.

At the Hague Peace Conference in 1907 a Convention⁴ was drawn up, the preamble of which recited the importance of the principle that hostilities should not commence without previous warning, and that neutrals should without delay be notified of the existence of a state of war; and the contracting Powers recognised " that hostilities between them must not commence without a previous and explicit warning in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war " ⁵; and that " the existence of a state of war must be notified to the neutral Powers without delay, and shall not be held to affect

¹ Hall, 8th ed., pp. 444 seq.; Pearce Higgins, *The Hague Peace Conferences*, p. 202.

² Major-Gen. J. F. Maurice, *Hostilities without Declaration of War* (London, 1883).

³ Cf. *Revue generale de droit international public* (Paris, 1904), pp. 134, ¹49; Cobbett, *Cases*, vol. ii., pp. 1 seq.

⁴ No. III. of 1907.

⁵ Art. 1. It appears that German forces invaded French territory on 2 Aug. 1914, before their Government made a formal declaration of war: *Parl. Papers*, Misc., No. 10 (1915), p. 234. On the other hand, Germany imputed prior hostile acts to French troops, *ibid.*, p. 240.

them until after the receipt of a notification, which may, however, be given by telegraph." ¹ The absence or non-receipt of such notification, however, is not to be taken as a justification of breaches of neutrality committed with knowledge in fact of the existence of a state of war.² Surprise attacks are still possible; for it was not found practicable to lay down any rule requiring the lapse of even the shortest time between the notification and the first act of hostility; though it may probably be taken that an attack without previous negotiations or any apparent ground of quarrel will be always regarded as an outrage.³ (This Convention (No. 1111. of 1907) was ratified on behalf of Great Britain in November 1909.) In the Turco-Italian War in 1911, and in the Great War in 1914,⁴ the rules of the Hague Convention were observed by the belligerents.

Persons
affected by
war.

The commencement of war produces immediate results of far-reaching consequence to the citizens of the States involved. The right to recover debts from, and the liability to be sued by, enemy subjects are suspended during the war⁵ (but revive on the conclusion of peace⁶), and contracts with them are immediately dissolved or suspended, among dissolved contracts being partnerships.⁷ New contracts are forbidden⁸ and, speaking generally, intercourse between the individuals of belligerent States is only permitted under exceptional circumstances.

This practice flows logically from the view that the subjects of an enemy State are themselves enemies, a view which found its extreme expression in the ancient formula, "courir sus aux ennemis," which was an instruction to all loyal subjects to kill, capture and pillage all subjects of the enemy State. Certain theorists have committed themselves to the doctrine that the non-combatant individuals of belligerent communities are not affected by enemy character. Thus Rousseau, in a well-known passage, said⁹: "La guerre n'est point une relation d'homme a homme, mais une relation d'etat a

¹ Art. 2.

²

Art. 2.

³ Pearce Higgins, p. 203; Oppenheim, ii. § 96.

⁴ See Phillipson, *Int. Law and the Great War*, pp. 53 seq. But see n. 5, p. 191.

⁵ At the Hague, in 1907, an Article (23^a of the Regulations) was adopted which appeared to change the law in this respect, and there is still a difference of opinion as to its interpretation. See *infra*, p. 222.

⁶ *Ex parte Boussmaker* (1806), 13 Ves. 71; Scott, *Cases*, 494. Cf. Arts. 299 (a) and 300 (a) of the Treaty of Versailles and the corresponding provisions in the other peace treaties.

⁷ *Griswold v. Waddington* (1819), 16 Johnson, 438; *Hugh Stevenson & Sons v. Aktiengesellschaft far Cartonnagen Industrie* (1918), A. C. 239; *Rodriguez v. Speyer Bros.* (1919), A. C. 59.

⁸ *The Hoop* (1799), 1 C. Rob. 196; Scott, *Cases*, 521; *Ex parte Boussmaker*, *supra*.

⁹ *Contrat social*, liv. 1, chap. iv.

etat . . . chaque *etat* ne peut avoir pour ennemis que d'autres etats, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport"

It is sufficient to say of this view that it has little correspondence with the actual practice of nations. If it were well founded, acts done without question in almost every war, against both the persons and properties of civilians, would be illegal. The English view hereon was stated clearly enough by Willes, J., in *Esposito v. Bowden*¹: "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal."² Subjects of a State allied to Great Britain are under the same obligations to Great Britain in regard to intercourse with the enemy as British subjects are.³

During the Great War the rules of the common law were considerably amplified by statutes, Orders in Council, and proclamations designed to close every possible loophole for trade with the enemy; and a Custodian for enemy property was appointed to collect all moneys and other forms of property which otherwise might have made their way to and in some way benefited enemies. Similar steps were taken by all the belligerents. Germany, however, was less rigorous in her measures against trading with the enemy—an attitude which reflected either her view, before the war, that the outbreak of war does not *ipso facto* prohibit trading between the belligerents, or her less favourable economic position as hostilities progressed. In any event the exact measures taken are matters of municipal legislation falling outside the sphere of international law,⁴ but within that sphere three important developments in English law deserve attention. The first concerns the position of corporations, the second the restriction of enemy trade in neutral countries, and the third the procedural capacity of enemies.

How far enemy character attaches to a corporation, a legal entity distinct from its members, has in some cases presented difficulties. It is clearly enemy if it is incorporated and carries on business in an enemy country. During the Great War by Proclamation Great Britain attached enemy character to companies wherever incorporated, carrying on business in enemy country. The House of Lords went

¹ (1857), 7 E. & B. at p. 779.

² See also *The Panariellos* (1915), 31 T. L. R. 326; affirmed (1916), 32 T. L. R. 459.

³ *Ibid.*

⁴ For the measures taken by Great Britain see A. D. McNair, *Legal Effects of War*.

a step further in holding that although the character of individual shareholders could not affect the character of the company, yet a company assumed enemy character if its agents, or persons in *de facto* control of its affairs, were resident in an enemy country, or, wherever resident, were adhering to the enemy or taking instruction from or acting under the control of enemies.¹

Enemy
trade in
neutral
countries

In spite of sweeping provisions against trading with the enemy contained in the earlier statutes and orders of 1914 and 1915 it was soon realised that mere restriction of direct trading with enemy countries was not sufficient. The Trading with the Enemy (Extension of Powers) Act, 1915,² authorised His Majesty to issue Proclamations prohibiting all persons resident in the United Kingdom from trading with any persons in neutral countries "whenever by reason of the enemy nationality or enemy association of such persons it appears expedient for His Majesty so to do." Black Lists were issued containing the names of a large number of foreign firms and persons with whom trade was prohibited. Further steps against enemy trade were taken in 1916, when joint action was taken by the Allied Powers, and France and Italy adopted lists of firms and companies controlled by or under the influence of enemies and prohibited their subjects from trading with them.³ These measures brought forth strong protests from the neutral States affected, especially from the United States, which, however, on becoming a belligerent adopted a similar policy.

Procedural
capacity
of enemies.

Considerable inroads have been made on the disabilities of enemy subjects to sue in English courts. Since *The Hoop* it has been settled that an enemy subject having a licence is not debarred from suing. This licence can be implied in favour of an enemy subject resident in Great Britain from compliance with a compulsory registration order,⁴ and internment as a civilian prisoner does not deprive an internee of his capacity to sue.⁵ It is probable, too, that enemy subjects resident in allied or neutral countries are entitled to resort to the courts.⁶ An enemy alien wherever resident may prosecute before the Prize Court any claim which is alleged to be based on "any protection, privilege or relief" under any of the Hague Conventions of 1907.⁷ An enemy can always be made defendant⁸ and can appeal against any decision given against him,⁹ and he may even be joined

¹ Oppenheim, ii. § 88a. France followed the same course, but the United States did not go so far.

² 5 & 6 Geo. V. c. 98.

* Hall, 8th ed., p. 463.

⁴ *Princess Thurn und Taxis v. Moffit* (1915), 1 Ch. 58.

⁵ *Shaffenius v. Goldberg* (1916), 1 K. B. 284.

⁶ *In re Mary, Duchess of Sutherland* (1915), 31 T. L. R. 394.

⁷ *The Mowe* (1915), P. 1.

⁸ *Robinson Co. v. Continental Insurance Co.* (1915), 1 K. B. 155.

⁹ *Porter v. Freudenberg* (1915), 1 K. B. 857.

as a nominal co-plaintiff.¹ In the result " the disability to sue during the Great War attached to non-resident alien enemies alone and not even to them in all cases." ²

The practice of " crippling the enemy's commerce " by capturing private property on the sea is generally admitted to be legitimate under the existing law of nations (though whether it ought to be permitted is a matter of controversy³); it is inconsistent with the doctrine which so many publicists have borrowed from Rousseau. At all events, whatever doctrine is maintained, the practice in the Great War of capturing and destroying private property at sea was carried to an extent that was unparalleled in the recorded history of the world. The commencement of war, then, puts an end to, non-hostile intercourse between subjects of the belligerent parties. In certain circumstances, however, it may be found undesirable to carry this doctrine to an extreme conclusion, and the convenience of belligerents has provided conditions under which such exceptional intercourse becomes permissible. By giving a passport, a belligerent Government authorises an enemy subject to travel generally in his territories. A safe-conduct is a licence, similarly given, to travel to a particular place for a particular purpose.⁴ A licence to trade is a permission by a belligerent State to its own subjects, or to enemy subjects, or both, to carry on a mutual trade notwithstanding the war in which they are engaged. Such licences are of course only effective in the courts of the issuing Power, and cannot in any way affect the other belligerent. It is strictly necessary that they should emanate from the sovereign Power, and, if they are issued by subordinates, the authority will be jealously scrutinised and will in no case be presumed.⁵

The general principle involved in the concession of licences to trade was well laid down by Lord Ellenborough in *Usparicha v. Noble*⁶: "The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalised for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the Crown. The Crown may exempt any persons and any branch of commerce in its discretion, from the disabilities and forfeitures

¹ *Rodriguez v. Speyer Bros.* (1919). 2. C. 59.

² *Oppenheim*, ii. § 100a.

See pp. 263 seq., *infra*.

⁴ The safe-conduct given by the British Government to Captain von Papen in 1915, when he withdrew from his post of military attache to the German Embassy at Washington, was not regarded as covering his luggage.

* *The Hope* (1813), 1 Dods. Ad. 226. • (1811), 13 East, 332, at p. 340.

arising out of a state of war; and its licence for such purpose ought to receive the most liberal construction. . . . For the purpose of this licensed act of trading (but to that extent only) the person licensed is to be regarded as virtually an adopted subject of the Crown of Great Britain; his trading, as far as the disabilities arising out of a state of war are concerned, is British trading." Any misdescription or misrepresentation in procuring the licence will invalidate it,¹ and no unnecessary deviation from the course is permitted.² The validity of a licence is destroyed if it is fraudulently altered.³

State debts. The rule as to the suspension of contractual relations during a war does not enable a State to repudiate its obligations to enemy subjects in respect of State debts.⁴ The action of Frederick the Great in 1753 in withholding payment of the interest upon the Silesian loan⁵ is not strictly in point. It was a case of reprisals by a neutral for captures of ships, the validity of which he disputed; but opinions on the operation were so unanimously adverse that the inviolability of the claim of a State's debtor has been treated ever since as beyond dispute. Indeed, any State which was suspected of being likely to question it would suffer heavily in the rate of interest it would have to pay.

Mediaeval statesmen showed no indulgence to resident enemies, and Grotius⁶ fully admitted that such persons might be treated as prisoners while the war lasted. He adds, however, that they ought to be released as soon as hostilities come to an end.⁷ For many centuries a common stipulation in commercial treaties provided that the subjects of the contracting Powers should have liberty to withdraw from each other's territories on the outbreak of war.⁸ Modern usage appears to have established the rule, that such persons, independently of treaty, must be allowed a reasonable period within which to with-

¹ *Klingender v. Bond* (1811), 14 East, 484.

² *The Emma* (1810), Edwards, 366.

³ *The Louise Charlotte de Guilderoni* (1813), 1 Dods. 308.

⁴ By the Trading with the Enemy Acts, 1914-18, a Custodian was appointed to whom was paid all dividends, interest and profits which would otherwise have been paid to enemies. This and similar conduct by other Allied States was confirmed and accepted by the ex-enemy States by the Treaty of Versailles (Art. 298, annex, (1) and (2)). No direct charge of confiscation or repudiation can be levied, for Germany undertakes to compensate her nationals for losses so suffered (Art. 297 (i)).

• Cf. De Martens, *Causes celebres*, vol. ii., p. 97; Sir E. Satow, *The Silesian Loan* (1915).

⁵ *De jure belli ac pacis*, I I I . ix. 4.

⁶ In his day, ordinary prisoners were not released as a matter of course.

• Cf. Bynkershoek, *Quaest. jur. pub.*, I. c. iii.

draw. The progressive principle was long ago stated by Vattel,¹ to the effect that the Sovereign who declares war cannot detain those subjects of the enemy who are within his dominions, and that he must allow a reasonable period for withdrawal, on the ground that his permission to enter the territory tacitly involved a promise to afford protection and liberty to return.

In this country *Magna Carta*, with admirable prudence, provided that enemy merchants found in England on the outbreak of war should be arrested without injury to person or property, until it was ascertained how English merchants were treated by the enemy. The conduct of France in arresting all British subjects in that country, on the outbreak of war in 1803, has been universally condemned, and it is significant that even Napoleon attempted to justify the step as a retaliation, thus tacitly admitting its illegality under ordinary conditions. His action appears the more outrageous when it is remembered that in 1756 England had given the singular permission to French subjects to continue their residence in this country, on the condition of good behaviour during the war between the two countries. A similar tolerance has been so often stipulated for in treaties, that expulsion is now considered a vexatious exercise of strict belligerent rights, unless the circumstances are in some way exceptional. Permission to remain involves permission to hold property and to carry on trade, so long as such trade is not with enemy subjects abroad; and the immunity of the private property of persons so remaining may now be taken to be extended to the private property of all enemy subjects whether they are in the country or not. Such immunity is in many cases secured by treaty; it was recognised by the British Courts so early as 1817,² though there are British and American decisions to the contrary; and it is a legitimate deduction from the modern principle of the immunity of private property on land which we shall see illustrated in relation to the laws of war. On the outbreak of the Crimean War, Russian merchants were not required to withdraw from England nor English from Russia. In 1870 Prussians resident in France were allowed to stay during good behaviour and *vice versa*. The permission to Prussians was afterwards cancelled under circumstances of exceptional difficulty, so far as the department of the Seine was concerned. In the Graeco-Turkish War, 1897, Greece allowed Turkish subjects to remain subject to good conduct, but Turkey called upon Greek subjects to withdraw—though the order was postponed from time to time, and the war ended before the time fixed had expired. In the Spanish-American War, 1898, the American Government authorised Spanish residents

¹ *Droit des gens*, liv. iii. chap. iv. § 63.

² *Wolff v. Oxholm* (1817), 6 M. & S. 92; and cf. Westlake, part, ii., p. 47.

to remain, but warned them that they were objects of suspicion. In the South African War, 1899, the majority of the British subjects were ordered to leave the Transvaal and Orange Free State within the space of forty-eight hours. In the Russo-Japanese War, 1904, Japan allowed Russian subjects to remain subject to good conduct and registration, and pointed out that such permission was merely an act of grace; Russia allowed Japanese subjects to remain in any part of her territory save her possessions in the Far East. In the Turco-Italian War, 1911, Turks were permitted to remain in Italy; but Turkey expelled Italians, except certain classes, eight months after the outbreak of the war.

Internment. The practice of nations in the Great War was not consistent. Most of the combatant States gave enemy subjects within their gates a certain time to depart, among these being Great Britain, France, Italy and the United States. On the other hand Germany and Austria at the outbreak of war detained all enemy subjects, subsequently releasing those of non-military age. The only country which resorted to a general measure of expulsion was Portugal which, on entering the war in 1916, interned all Germans of military age and expelled all others at fifteen days' notice.

The treatment of those enemy subjects allowed to remain varied from the severe restrictions culminating in a general internment¹ imposed by Great Britain, France and Germany, to the comparative freedom enjoyed by enemy aliens in the United States and the unfettered liberty allowed to them in Japan.

It had been generally considered a customary rule of international law that a reasonable time for withdrawal should be allowed to all enemy subjects, except males of military age. But if the detention of actual or potential members of the enemy forces is based on the fundamental right of a belligerent to decline to increase the fighting resources of an enemy, the conduct of the Great War, in demonstrating the importance to a belligerent State of man-power generally, allows the fair inference that, in the future, States may be expected on declaration of war to prevent the departure of all enemy aliens.²

Enemy merchant vessels in port at outbreak of war. The question of merchant vessels found at the outbreak of hostilities in enemy ports has received special treatment. It was the old custom to place an embargo upon these before war broke out, thereby condemning them as good prize in advance, under the name of "droits of admiralty."³ From about the middle of the nineteenth

¹ Internees have been held to be prisoners of war: *R. v. Superintendent of Vine St. Police Station* (1916), 1 K. B. 268.

• See Oppenheim, ii. § 100; and Lawrence, 7th ed., pp. 369-71.

• Hall, 8th ed., p. 442; Pearce Higgins, p. 300; Westlake, part ii., p. 42.

century, however—a period in which several important departures from old international practice were made—it became customary to allow them a certain length of time for loading or unloading and clearing. Thus, in the Crimean War, the merchantmen of Russia and Turkey were allowed to leave each other's ports, and England and France gave Russian vessels six weeks' grace, Russia bestowing a similar exemption. The same practice was adopted in subsequent wars, including the Austro-Prussian War, 1866, the Franco-German War, 1870, the Russo-Turkish War, 1877, the Spanish-American War, 1898—a month being granted by the United States and the immunity interpreted by the American courts as extending to merchantmen that had left port before the outbreak of war¹—and the Russo-Japanese War, 1904.

At the Hague Conference in 1907, the modern practice was embodied in a Convention² which, however, imposed no obligation to grant days of grace, and did not specify the time which should be allowed. It was agreed that "when a merchant ship³ belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port,⁴ it is desirable that it should be allowed to depart freely either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination, or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant⁵ that hostilities have broken out."⁶ This was merely a recognition of the existing practice; it was a step in advance to declare that vessels and cargo unable to leave within the time allowed should not be confiscated but merely detained during the war, or requisitioned on payment of compensation.⁷ The principle of exemption was extended to vessels

¹ See *The Buena Ventura* (1899), 175 U.S. 388. Cf. *The Panama* (1899), 175 U.S. 535; *The Pedro* (1899), 175 U.S. 354.

² No. VI. of 1907. It was ratified by Great Britain in November 1909.

³ In *The Germania* (1915), P. 5, it was held that this provision is applicable only to merchant ships, i.e. to vessels engaged in commerce; hence a German yacht detained in a British port on the outbreak of war is confiscable; affirmed by the Privy Council (1917). A. C. 375.

⁴ In *The Mowe* (1915), P. 1, and *The Belgia* (1916), 2 A. C. 183, it was held that the word "port" in the Article does not mean fiscal port, but must be interpreted in its usual and limited popular or commercial sense as a place where ships usually come to load or unload.

⁵ A vessel that is fitted with wireless installation and is within a reasonable distance of communications is presumed to possess knowledge of important current international events, but the presumption is rebuttable: *The Gutenfels* (1916), 2 A. C. 112.

⁶ Art. 1.

⁷ Art. 2. In *The Gutenfels*; *The Barenfeh*; *The Derfflinger* (1916), 2 A. C. 112, the Privy Council held that if the course provided by Art. 1 as "desirable" be

Enemy merchant vessels on the high sea ignorant of hostilities, which left their last port of departure before the commencement of the war and are encountered on the high seas while ignorant of the outbreak of hostilities¹; these, too, are only to be detained, and if they are requisitioned or destroyed compensation must be paid and provision must be made for the safety of persons and papers on board. The same exemption was applied to enemy cargo on such ships.² But Germany and Russia declined to agree to these last Articles (i.e. 3 and 4), considering that they imposed too heavy a burden upon States which did not possess naval stations to which such vessels could conveniently be taken³; and the United States objected to the Convention, which she held to be of a retrogressive character—the clause making ignorance of the outbreak of the war a condition of exemption was also deprecated.⁴ Finally, it was agreed that the Convention should not refer to ships "whose construction indicates that they are destined to be transformed into warships"⁶; but as to what ships are of this character there are likely to arise several nice questions of fact: questions which, in view of the permissive character of the whole Convention, are not likely to be definitely settled.

Practice during the Great War.

Apart from the uncertainty naturally generated by a Convention which merely expressed that the departure of merchant ships at the outbreak of war would be "desirable," Article 6 specifically provided that the Convention should only be applicable to a war in which all the belligerents were parties to it. In the Great War neither Serbia, Italy nor the United States came within this category. Days of grace were, however, offered by Great Britain, France, Belgium, Germany and Austria, and became effective, except as between Great Britain and Germany, Germany's offer of days of grace to all merchant vessels on grounds of reciprocity being met on the part of Great Britain with a restricted counter-offer to which no reply was received. But it was held by the Judicial Committee of the Privy Council in *The Blonde*⁶ that Great Britain by frequent recognition of the Convention had waived the right to rely on the non-fulfilment of the condition in Article 6, and that therefore German ships in British ports at the outbreak of war, which were not dealt with by the Treaty of Versailles, could not be detained as prize.

Several decisions defining the terms of the Convention were given during the Great War by the Prize Courts of England, France not adopted, Art. 2 does not apply to vessels in the position referred to in Art. 1, and is not obligatory.

¹ Art. 3. The application of this Article was considered in *The Mowe* (1915), P. 1.

² Art. 4.

³

Pearce Higgins, p. 304.

⁴ Cf. J. B. Scott, *The Hague Peace Conferences*, 2 vols. (Baltimore, 1909), vol. ii., p. 568.

• Art. 5.

⁶

(1922). 1 A. C. 313.

and Germany. It was held in England that the expression "merchant ships" did not apply to tugs and lighters used in a port¹; nor to pleasure yachts,² but the German Prize Courts adopted the opposite view on the ground that the Convention applied to all private ships.³ To enjoy the benefit of Article I the vessel must be inside a port and the term "port" has been construed in its ordinary mercantile sense,⁴ but it does not extend to cover the roadstead leading to it.⁵ In applying Article 3 there is a presumption that a vessel fitted with a wireless installation and within reasonable distance of communication possesses knowledge of important international events, but this presumption may be rebutted.⁶ This Article was reserved by Germany in its ratification of the Convention, and so German vessels at sea on the outbreak of war became liable to seizure.⁷

The right to declare war or conclude peace is inherent in every independent State; and as soon as the one or the other is established it is incumbent on third States to recognise the fact. Thus in case of war neutrals are bound to recognise the status of belligerency of the adversaries, and are therefore obliged to observe certain newly created obligations incidental to their own status of neutrality. But on the outbreak of rebellion or of revolutionary disturbance in a foreign country, a difficult question often confronts foreign Governments. It becomes necessary to decide whether the hostilities are of such a character as to justify them in conceding to the revolting faction the status of belligerents. Recognition of belligerency will naturally long precede recognition of independence, and its justification must depend upon quite different grounds. The right to treat insurgents as belligerent persons is based on the material interests of the foreign Government, which may be gravely compromised by equivocal disturbances. Following this principle as a guide, it becomes necessary to distinguish between cases when the civil hostilities are confined to land, and those when they extend to the sea. In the first case the neutral has little to gain by an early recognition of belligerency; in the second, such a recognition need not be delayed a moment after it has become clear that an organised struggle is in progress. Either there is a war in such a case or there is not; if there is, it may properly

Recognition
of belliger-
ency.

¹ *H.M. Procurator in Egypt v. Deutsches Kohlen Depot Gesellschaft* (1919). A. C. 291.

² *The Germania* (1915), P. 5.

³ *The Primavera*, *Journal du droit international* (1917), xlv., p. 1804.

⁴ *The Mowe* (1915), P. 1; and in Germany *The Fenix*, *Zeitschrift für international Recht* (1915), ix., p. 103.

⁵ *The Belgia* (1916), 2 A. C. 183.

⁶ *The Gutenfels* (1916), 2 A. C. 112.

⁷ On the whole subject see an article by A. Pearce Higgins in B. Y. I. L. (1922-3), pp. 55-78.

be recognised, if there is not, blockades, contraband restrictions and the right of search are alike illegitimate. It may therefore be laid down that as soon as an organised rebellion has reached such proportions as to involve demands upon third States which can only be supported upon the hypothesis that a state of war exists, the recognition of such a state becomes immediately legal.

Revolutionary hostilities,

This question was much discussed on the outbreak of the American Civil War in April 1861. The belligerency of the Confederate States was recognised by Great Britain on 14 May, and the recognition was bitterly resented by the United States Government. It is not easy to understand the American contention, in view of the fact that on 19 April a blockade of the seven States had been declared by President Lincoln, involving an essentially warlike interference with the rights of neutral commerce. The course adopted by the British Government was the only proper course to be followed in the circumstances, and the leading maritime States acted similarly.

In a series of prize decisions the true view was stated by the Supreme Court of the United States 1: " It is not the less a civil war with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in war, according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist, unless there be two belligerent parties. . . . As soon as the news of the attack on Fort Sumter, and the organisation of a Government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality * recognising hostilities as existing between the Government of the United States of America and *certain States* styling themselves the Confederate States of America.' This was immediately followed by similar declarations or silent acquiescence by other nations."

Furthermore, the President of the United States, in his annual message to Congress in 1869, observed: " A nation is its own judge when to accord the rights of belligerency, either to a people struggling to free themselves from a government they believe to be oppressive, or to independent nations at war with each other." ²

Adopting the American dictum, which had reference to neutral States, a belligerent State may, *a fortiori*, grant a recognition of belligerency to subjects of the enemy who under the control of an executive

¹ *The Prize Cases* (1862), 2 Black, 665; Scott, *Cases*, p. 475, at p. 478.

² See *Parl. Papers, N. America*, 1872 (No. 2), p. 17.

Government and by means of an organised army are endeavouring to establish their independence. This was the case in 1918 when the Czecho-Slovaks having rebelled against Austria and having established a National Council as their supreme political body were recognised by Great Britain, France, Italy and the United States "as an allied nation," their army "as an allied and belligerent army," and their National Council "as a *de facto* belligerent Government." 1 Such recognition, while it regulates the relations between the declared allies and anticipates some of the terms of peace in the event of their victory, cannot in law compel the enemy States to treat members of the rebel armies as anything other than traitors.²

¹ Proclamation dated 13 August, 1918.

² Oppenheim, ii. § 76a. Lawrence (7th ed., p. 331) suggests recognition of a condition midway between belligerency and lawless violence, a condition of insurgency, which the learned editor of the 7th edition considers might apply to the case of the Czecho-Slovaks.

CHAPTER II

QUALIFICATIONS OF LAWFUL BELLIGERENTS

Earlier
practice.

UNDER earlier practice the civilian population of an invaded country was subject to the same kind of treatment as was applicable to the armed forces; the conduct of belligerents varied with the character and mood of commanders and with the discipline of the armies under them. Councils, theologians, philosophers and jurists frequently urged substantial relaxations; thus it was urged that ecclesiastics, merchants, farmers, shepherds and all peaceful inhabitants should be immune from attack, and that the women and children of even infidel countries should not be subjected to violence. In the Thirty Years' War the conduct of the belligerents was characterised by unmitigated ferocity; barbarities and wholesale slaughter were resorted to without compunction. The actual practice fell far behind the prevailing doctrines. But the theory of jurists in the end exerted a great influence on the progressive development of international practice. What with the teaching of writers like Grotius, barbarous excesses in warfare came to be repugnant to the conscience of men; and after standing armies were established and military organisation and discipline improved, various mitigations began to be introduced. Thus the distinction between the liabilities of armed forces and those of the non-combatant population was more regularly recognised; and by the beginning of the eighteenth century it had become a generally accepted principle that the civilian inhabitants of a belligerent country were to be immune from deliberate attack on the part of the enemy so long as they did not participate in the fighting. Next, thanks to the advocacy of writers, and notably to the persuasive eloquence of Rousseau, the doctrine spread that war is primarily a relation between Sovereigns and Governments, and not necessarily between their respective subjects in their private capacity.

This progressive doctrine was applied, more or less thoroughly, in the wars of the nineteenth century. Wellington refrained, in his various campaigns, from making direct war on non-combatants. In the American Civil War, McLellan and Lee were at pains to order their men to respect the persons, property and honour of the civil population belonging to the enemy. In 1866 Prince Frederick

QUALIFICATIONS OF BELLIGERENTS 205

Charles proclaimed, when he invaded Saxony, that his warlike operations were directed against the Government and not against the people at large. Similarly the King of Prussia made the following announcement, August 1870, in the Franco-Prussian War: "I make war against French soldiers, not against French citizens. The latter will therefore continue to enjoy security for their persons and property, so long as they themselves shall not, by hostile attempts against the German troops, deprive me of the right of affording them my protection." Instructions of the same character were issued in the Chino-Japanese War, 1895, and in the Russo-Japanese War, 1904. And in the South African War, first General Buller and then Lord Roberts issued proclamations promising security to non-combatants if they refrained from participating in the military operations.¹

Unfortunately the manner in which the Great War was conducted has shown beyond doubt that the progressive doctrine of the distinction between armed forces and the civilian population is in danger of disappearing. The effect of this tendency on the hitherto accepted principles of international law has yet to be appreciated, and it is significant that in the years after the war there has been no attempt to formulate amended rules to meet the changes brought about by the recent developments of modern land warfare. The important causes, as noted by the late Professor Oppenheim, are:

1. The spread of conscription and the organised employment of a nation's man-power—of its men and women—to release able-bodied men for the fighting forces, to make munitions, and to maintain essential services.
2. The employment of airships and aeroplanes for bombing not only troops and military fortifications but also vital lines of communication and transport, factories and bridges outside the theatre of war—a mode of violence which it would be vain to consider illegal, and which cannot but result, especially when conducted at night, in injury to the civil population.²
3. The inability of democratic Governments to conduct war without the active support of the electorate they represent.
4. The importance of the "economic front," of placing economic pressure on the enemy by crippling his industry, by interfering with the highly developed

¹ See J. M. Spaight, *War Rights on Land* (London, 1911), pp. 35 seq., and the references there given.

² Rules for aerial warfare have been drafted by an international commission appointed by the Washington Conference, 1922, but they are incomplete and have not been adopted. See *infra*, p. 226.

international communications on which commerce is so largely dependent and thus bringing privation on his whole population.¹

The rules now in force trace their origin to a Conference of military representatives of European Powers and Brazil, who met at St. Petersburg in 1868. Four important international documents, subsequently established, provide a fairly complete code for the guidance of combatants in land warfare—the unratiſed Declaration of Brussels of 1874, the Second Convention of the Peace Conference of 1899, the Fourth Convention of the Peace Conference of 1907, and the Geneva Convention of 1906. The United States had led the way by drawing up a series of rules in 1863, which were adopted (except in so far as they dealt with the question of levies *en masse*) by Germany in 1870²; and the Conference of the Powers at Brussels in 1874 drew up a Declaration in that year which was, however, never ratified, Great Britain and Germany in particular declining to accept it at the time, though it subsequently became the basis of the Conventions agreed upon at the Hague. But even in 1899 and 1907 there was no unanimity, chiefly owing to the difficulties arising on the question of the conditions under which combatants may be recognised and treated as belligerents, and the result was that the actual Regulations were set out as annexes to the Conventions, the contracting parties only agreeing to issue instructions to their forces in conformity with these Regulations, without expressly binding themselves to accept them in their entirety.³

The Hague
rules.

They are "general rules of conduct for belligerents in their relations with each other and with populations"; though it is to be noted that a certain binding force is recognised in them by the provision of the Convention of 1907 (which supersedes that of 1899⁴), that belligerent parties violating the Regulations shall make compensation "if the case demands." It must also be remembered that the mere absence of a specific prohibition is not to be taken as justifying any particular act or practice. In the preambles to both Conventions (1899 and 1907) it was laid down that "it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war can be issued, the High Contracting Parties think

¹ Oppenheim, ii. § 57a.

² Pearce Higgins, *The Hague Peace Conferences*, p. 256; Hall, 8th ed., p. 614.

³ Convention I I. of 1899, Art. 1 and Convention IV. of 1907, Art. 1, *Parl. Papers, Misc.*, No. 1 (1899), pp. 56-8. Convention IV. of 1907 was ratified on behalf of Great Britain in November 1909.

⁴ Art. 4.

QUALIFICATIONS OF BELLIGERENTS 207

it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience." The Convention has been signed, with occasional reservations, by all the Powers except China, Spain and Nicaragua.

The Swiss Government summoned a Conference at Geneva in 1864, which drew up a code of rules relating to the treatment of the wounded, and those in charge of them, in land warfare. A second Conference in 1868 drew up further rules by way of addition and explanation, and applying the principles of 1864 to naval warfare. These, though generally acted upon, were never ratified. A more complete code became desirable, and at the Hague in 1899 it was left to the Swiss Government to summon a further Conference, which met in 1906 and drew up the code (dealing with land warfare) of that year; and the same principles were adapted to naval warfare at the Hague in 1899 (Convention I I I.) and 1907 (Convention X.).

Both within and without the regular armed forces of the belligerents it is of great importance to determine the limits of combatant character. The Declaration of Brussels and the Hague Conventions lay it down that "the armed forces of the belligerent parties may consist of combatants and non-combatants." Combatants are entitled to some privileges; non-combatants to others; and a belligerent is entitled to require securities that enemy individuals shall not be able to pass at pleasure from one class to the other. Non-combatants within the armed forces include chaplains, the medical and hospital staff¹ including those exclusively engaged in the collection, transport and treatment of the wounded), the *personnel* of voluntary aid societies duly authorised and notified, all of whom are, by the Geneva Convention of 1906, not to be treated as prisoners of war, but are to be respected and protected in all circumstances, even though they are armed and use their arms in self-defence, or in defence of the sick and wounded. If captured by the enemy, they are to continue to carry on their duties under his direction (Article 12), and to be sent home when their services are no longer indispensable, and they are (except in the case of voluntary aid societies) to be paid on the same basis as persons of the same rank employed by the enemy (Article 13).

Non-combatants with the armed forces.

Other non-combatants with the army, such as commissariat employees, contractors, telegraphists and the like,² may be made prisoners of war if the enemy think fit to detain them, and have a

¹ Geneva Convention, 1906, Arts. 6, 9, 10, II *et seq.*

² Hall, 8th ed., p. 485. Hague Convention, 1907 (No. IV.), Art. 13.

right to be treated as such ; and newspaper correspondents are included in this category, though they will probably only be detained for special reasons.¹

Sailors on
enemy
merchant-
men.

Sailors, of whatever nationality, on board the enemy's merchant* ships were till recently regarded as liable to capture as prisoners of war, on the ground of the assistance they might give in naval operations. The point was disputed by Germany in 1870 with no very good reason, but may now be regarded as settled by the Hague Convention (No. XL) of 1907, by which it was agreed² that on the capture of an enemy merchant ship, which is taking no part in the hostilities, neutral sailors cannot be made prisoners, nor neutral officers if they promise in writing not to serve on an enemy ship during the war, the promise being only required from the officers; while enemy officers and crew are to enjoy the same exemption on giving a written undertaking not to engage, for the like period, in any service connected with the operations of the war, whether on land or sea. This Convention (No. X I . of 1907) was ratified on behalf of Great Britain in November 1909.

Who are
lawful com-
batants.

So far we have dealt with the right of non-combatants either to be treated as prisoners of war or be released. More difficult has been the settlement, if indeed it can be said to be yet settled of the question of the right of combatants to be treated as prisoners of war, instead of being shot or otherwise punished, as violators of the rules which must be observed by belligerents. The Hague Conventions of 1899 and 1907 repeated Article 9 of the Declaration of Brussels (1874) on this point:

" The laws, rights and duties of war are applicable not merely to armies, but also to militia and volunteer corps satisfying the following conditions:

1. That of having at their head a person responsible for those under him.
2. That of wearing an irremovable and characteristic badge of a kind to be recognised at a distance.
3. That of openly carrying arms.
4. That of conforming in their operations to the laws and customs of war."³

Guerilla
troops.

The more exacting claim has been sometimes made that combatants shall wear a uniform distinguishable at rifle range. The question

¹Hall, 8th ed., p. 485, n.

²Arts. 5, 6, 7 and 8 of Convention X I . of 1907.

³*Parl. Papers, Misc.*, No. 1 (1899): "Reglement concernant les lois et coutumes de la guerre sur terre," sect. i. chap. i. art. x. *Misc.*, No. 6 (1908) p. 50 (Convention No. IV . of 1907).

QUALIFICATIONS OF BELLIGERENTS 309

arose in the Franco-Prussian War, in connection with the *francs-tireurs*, who took up arms on behalf of France. Germany refused to recognise them as combatants on the ground that they wore no badge irremovable and distinguishable at rifle range. The claim is reasonable that the badge shall be of such a kind that a man may not suddenly convert himself by its removal from a combatant to a peaceful farmer, but to demand a badge distinguishable at rifle range is, as Hall expresses it,¹ to require not merely a uniform but a conspicuous one. The tolerance at present conceded to guerilla troops is a bare one, and is less likely to be extended than curtailed. Thus a Prussian notice published at Vendresse in the Franco-Prussian War, declared that any person wearing plain clothes and fighting without Government authority would be liable to ten years' imprisonment, or, in an aggravated case, to execution. Section 4, Article 82 of the American instructions issued in 1863 contains the following provision upon this point:

Men, or squads of men, who commit hostilities . . . without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."

A somewhat similar class of question arises in the so-called levies *en masse* of an invaded population. Spontaneous risings of this kind on the part of the threatened population are as old as war itself, and no law can presume to abolish them any more than it can abolish the right of self-defence—a fundamental and inalienable right of all animate beings. Noteworthy examples of levies *en masse* occurred in Russia (1700) on the approach of Charles X I I . , in Prussia (1807) during the Napoleonic wars, in Spain (1808-12), in Russia (1812), in Prussia (1813); and, coming nearer to our own time, in the Boer War, and also at Niou-tsia-toun in the Russo-Japanese War.

Both at the Brussels and Hague Conferences a conflict of opinion disclosed itself on this question between the larger and smaller continental Powers. The former showed a disposition to exact a more stringent degree of conformity to the formalities of combatant character than the smaller Powers held to be consistent with the desperate nature of the crisis. Article 10 of the Declaration of Brussels was finally adopted with one alteration at the Hague in 1899 and 1907:

"The population of an unoccupied territory, which, on the

¹8th ed., p. 618.

approach of an enemy, takes up arms spontaneously to resist the invading force, without having had time to organise itself conformably to Article 1,¹ will be treated as belligerent, if it carries arms openly² and respects the laws and customs of war."

The British delegate, in 1899, was anxious to move an additional Article to this effect: "Nothing in this chapter shall be considered as tending to diminish or suppress the right which belongs to the population of an invaded country to patriotically oppose the most energetic resistance to their invaders by every legitimate means."³ But M. de Martens substituted a somewhat vague pronouncement, which was received with acclamation, to the effect that "unforeseen cases were not to be left to the arbitrary judgment of military commanders, but were to be placed under the safeguard of the law of nations, the law of humanity, and the requirements of the public conscience."

It is clear that in the case of levies *en masse* it is not reasonable to require either a uniform or an explicit State authorisation. As to the uniform, Wellington wrote to Massena in 1810, in reference to the Portuguese Ordenanza: "Il parait que vous exigez que ceux qui jouiront des droits de la guerre soient revetus d'un uniforme; mais vous devez vous souvenir que vous-même avez augmenté* la gloire de l'armée française en commandant des soldats qui n'avaient pas d'uniforme."⁴ On the question of authorisation, the provisions of Article 1 of the Annexes to the Conventions of 1899 and 1907 must be considered as a disallowance of the German requisition made in 1871, that "every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier, by showing that he has been called out and borne in the lists of a military organised corps, by an order emanating from the legal authority, and addressed to him personally." The German official manual of the laws of war on land—*Kriegsbrauch im Landkriege* (issued in 1902 in accordance with the Hague requirements) demands, in the case of levies *en masse*, not only that arms should be carried openly and the laws and usages of war respected, but also that they should possess the additional qualifications necessary for the organised military forces.

Coloured and
semi-
civilised
troops.

The legality of the introduction of coloured and semi-civilised troops⁵ into a war between nations belonging to the white and civilised race depends on their compliance with the requirements laid down for belligerent status. If it is certain or highly probable

¹ Already quoted p. 208, *supra*,

² These words were added in 1907.

³ *Parl. Papers, Misc.*, No. 1 (1899), p. 161.

⁴ *Wellington Despatches*, vi. 464.

⁵ See J. M. Spaight, *War Rights on Land* (London, 1911), pp. 65 seq.

QUALIFICATIONS OF BELLIGERENTS 211

that semi-civilised or savage troops will not remain amenable to military discipline, and that they will get out of hand and act contrary to the recognised laws and usages of war, their employment is clearly unlawful. Whatever, then, may be urged on grounds of policy against the employment of coloured soldiers, the practice is permissible under international law.¹

The naval forces of maritime Powers comprise two classes of Naval combatant status. vessels: first, fighting vessels ("vaisseaux de combat"), including battleships, cruisers, torpedo-boats, destroyers and submarines; and secondly, auxiliary vessels ("vaisseaux auxiliaires"), including transports, colliers, supply ships, repairing ships, dispatch boats, etc. At the Hague Conference, 1907, one of the British delegates brought forward a classification of this kind, and proposed that the auxiliary vessels should be recognised as possessing the same belligerent status as the duly commissioned fighting ships. To this plan objection was promptly made that it was inconsistent with the principles of "un-neutral service." Though this distinction is not sanctioned by international law, it nevertheless exists as a fact. Generally, then, it may be said that all properly authorised vessels belonging to or temporarily acquired by the State are legitimate combatants.

Privateers are vessels belonging to private individuals, which Privateers. formerly received a combatant licence from the Sovereign. The nature of the rights enjoyed by privateers over captured property was well stated by Marshall, C.J., in *The Dos Hermanos*: "It is the settled law of the United States that all captures made by non-commissioned captors are made for the Government; and since the provisions in the Prize Acts as to the distribution of prize proceeds are confined to public and private armed vessels cruising under a regular commission, the only claim which can be sustained by the captors in cases like the present must be in the nature of salvage for bringing in and preserving the property." The practice of privateering was adopted in the Napoleonic wars; and it was recognised generally that the whole system encouraged abuse and misconduct, so that in course of time public opinion turned against it. A notable departure was made in the case of the Crimean War, 1854, by Great Britain and France, who agreed to discontinue the issue of letters of marque to private owners. On the resumption of peace, the Declaration of Paris, 1856, was signed whereby privateering may no longer be practised by the signatory Powers when at war with one another. The United States, Spain, Mexico, Venezuela, Bolivia and Uruguay

¹ During the Spanish-American War the United States employed coloured cavalry regiments in Cuba, and in the Great War Indian regiments served with the British forces in France. Oppenheim, ii. § 82.

² (1817), 2 Wheaton, 76.

did not assent to the prohibition, the Power first named basing its refusal on the convenience of privateers to a State without a powerful navy, as long as the right of capturing private property on the seas survives: an amendment exempting private property from such capture having been rejected. In the American Civil War of 1861, the President was authorised by Congress to issue letters of marque, but he did not make use of the authority thus granted to him. The Confederates offered licences to foreign vessels, but they were not accepted, owing to the restrictive legislation of the Maritime Powers and the threat of the United States to treat privateers as pirates. In the Spanish-American War, 1898, the United States declared her intention to accept the Declaration of Paris; but Spain claimed the right to issue letters of marque, though she did not put the claim into practice. The United States acted thus in accordance with a definitely proclaimed policy, Spain without prejudice to her right to issue letters of marque if she so desired.¹ However, at the Hague Conference in 1907, both Spain and Mexico proclaimed their adhesion to the Declaration of Paris,² as Japan had done in 1886; so that privateering may be said to have been, in fact, abolished.

The Declaration of Paris may now be regarded as part of international law and as possessing binding force generally, though a few States have not yet formally signified their adhesion to it. In the Great War of 1914, proposals were made in certain quarters that the practice of privateering should be resumed for various reasons; but none of the belligerents paid any attention to such suggestions. Moreover, so far as Great Britain is concerned, in a case that came before the Prize Court³ soon after the commencement of hostilities, the President declared that the Court would deem the Declaration of Paris to be part of international law and to possess binding force.

Volunteer
navies.

Germany in 1870, and Russia in 1878, proposed to encourage "volunteer navies," which would have reintroduced, under a less offensive name, some of the characteristic evils of privateering. In the German case the vessels were to be under naval discipline and the officers and crew were to enter the navy temporarily, and wear its uniform; in the Russian case the vessels were to be under the command of naval officers and the crews subject to naval discipline. It is to be regretted that Great Britain, when appealed to by France on the earlier occasion, upheld a distinction between this system and privateering,⁴ subtle enough to annihilate, if generally adopted, and unless accompanied by careful restrictions, the beneficial results of

¹ Holland, *Letters on War and Neutrality*, p. 122.

² *Parl. Papers, Misc.*, No. 4 (1908), p. 48; *La Deuxieme Conference internationale de la paix*, t. i. (*Actes et documents*), p. 234.

* *The Marie Glaeser* (1914), P. 218.

⁴ *Parl. Papers, Franco-German War*, No. 1 (1871), p. 22.

QUALIFICATIONS OF BELLIGERENTS 213

the Declaration of Paris. The Russian scheme was in fact carried out by the formation of a "volunteer navy," with a Government subsidy and under the command of naval officers; and in 1904, during the Russo-Japanese War, two vessels of this fleet, the *Peterburg* and *Smolensky* passed through the Bosphorus and Suez Canal as merchant vessels, and in breach of a specific undertaking given officially to Turkey, made captures as war vessels in the Red Sea.¹ The seizure of the *Malacca*, of the Peninsular and Oriental Line, by the *Peterburg*, on the ground that she carried contraband, called forth a strong protest from Great Britain, which led to that vessel's immediate release, and an agreement by Russia to restore all vessels captured by the two alleged cruisers. Their passage through the Bosphorus was in itself a breach of the Treaties of Paris, 1856, London, 1871, and Berlin, 1878, which was aggravated by their assumption of a false character; and the case, while raising the whole question of the permissibility of "volunteer navies," also raised the question of the conversion of merchant vessels into ships of war, which engaged the attention of the delegates to the Second Peace Conference of 1907 and the Conference of London in 1908.² The most important point of all—whether the conversion can take place on the high seas—was left, as we shall see, undecided; but that merchant vessels can be used as war vessels is generally admitted, and rules regulating such use were agreed upon at the Hague in 1907.³ Great Britain, France and the United States⁴ all have arrangements with mail-steamship companies whereby the companies' vessels are at the disposal of the Government on the outbreak of war, and it is conceived that no doubt can arise, if such vessels are under complete Government control as units of the regular navy and are not employed for the purpose of private gain. The employment of the *Peterburg* and *Smolensk* may, so far as this aspect of the case is concerned, have been defensible, as they were the property of a patriotic association, presumably not intent upon private gain, were under the command of a duly commissioned officer, and were manned by crews under naval discipline; and it may have been Russia's misfortune rather than her fault that they did not operate with her regular fleet, and got so far out of hand that the services of British cruisers were called in in order to convey to them the order to desist.⁵ But in all the circumstances, it is by

¹ Hall, 8th ed., pp. 624, 625; Pearce Higgins, *The Hague Peace Conferences*, p. 314.

² See *infra*, p. 214.

³ See *ibid.*

⁴ Pearce Higgins, *The Hague Peace Conferences*, p. 314.

⁵ Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed., p. 46.

no means clear that they were not privateers within the meaning of the Declaration of Paris.

Conversion
of merchant
vessels into
war vessels
on the high
seas.

The chief question on which the Hague Conference of 1907, and after it the London Naval Conference¹ of 1908--9, found themselves unable to come to any agreement, was that of the conversion of merchant vessels into war vessels upon the high seas. It is of course an essential condition of the right of any belligerent vessel to interfere in any way with any neutral, that it must be an authorised and properly commissioned public ship of war. If a State is able to send out what is to all appearances a merchant vessel, and to turn her into a warship during her voyage, a dangerous facility is given to her master to seize enemy or neutral ships without warning; and she will, while ostensibly a merchant vessel, enjoy the advantage of coaling, provisioning and taking refuge in neutral ports, which as a warship she could not claim. In fact her position is analogous to that of a person who is not a recognised combatant in land war.

British case law throws no light upon this question and there has been no uniformity of national practice. A private vessel could, till privateering was abolished by the Declaration of Paris, lawfully seize enemy property, but might be treated as a pirate if she attacked the property of neutrals. The granting of commissions or letters of marque to private ships was an attempt to legalise the operations of such vessels which, in spite of protests, was generally recognised as effective; and the complete conversion of a private vessel into a war vessel could not in principle be made the subject of objection. The whole question was raised in an acute form in 1904 by the exploits of the *Peterburg* and *Smolensk*, to which reference has already been made; and the Second Peace Conference in 1907 dealt to some extent with the question in Convention VII.,² in which it was agreed that a vessel so converted must be under the direct authority, immediate control and responsibility of the Power to which it belongs,³ must bear the external marks which distinguish a warship of its nationality,⁴ must be in command of a person in the State service, duly commissioned, and figuring in the list of officers of the fleet,⁵ must be manned by a crew subject to military discipline⁶ and must observe the laws and customs of war⁷; and that a belligerent must announce such conversion as soon as possible in the list of its warships.⁸ These regulations were framed to control the capricious exercise of the right of conversion, and they establish a sufficiently clear

¹ See *infra*, p. 339.

² Cd. 1175, p. 74. This Convention was ratified by Great Britain in November 1909.

³ Art. 1.

⁴ Art. 4.

⁷ Art.

¹ Art. 2.

5.

⁵ Art.

² Art.

3.

6.

QUALIFICATIONS OF BELLIGERENTS 215

distinction between the vessel which complies with them and the privateer as generally understood} but it was found impossible to come to any agreement that a vessel may not be so converted on the high seas.

In the memoranda drawn up by the Powers represented at the Conference of London,¹ the difference of opinion was marked. There was no material on which there could be framed any proposition based on recognised rules. The British Government could only rely on the general principle that "any further limitation to the security of peaceful commerce or of the freedom of neutral vessels to navigate the seas is opposed to the general interests of nations, while the exercise of belligerent force against neutrals in the manner indicated . . . would almost inevitably lead to friction, with the attendant danger of bringing other nations into the arena of war "; and on this they urged " that units of the fighting force of a belligerent should not be created except within the jurisdiction of that power." In default of agreement on this, it was suggested that, by way of compromise, the right of conversion on the high seas should be restricted to vessels specifically and publicly designated in advance as suitable for the purpose, and entered on the navy lists; and that such vessels should be subjected while in neutral ports to the same treatment as warships. The United States, Japan, the Netherlands and Spain supported the British contention; France and Russia claimed the unfettered right of conversion; Germany, while claiming the right, suggested as a restriction that there should be no reconversion during the war; Italy, while supporting the British view, tried to effect a compromise; and Austria-Hungary in an argumentative memorandum suggested that there should be some restrictions, the prohibition, for instance, of reconversion and the insistence upon a special armament and speed, and upon special notification. The discussion took much the same form in 1909 as in 1907; the claim to an unrestricted right was firmly maintained, and the question was of necessity left entirely open.

So the position remains after the Great War in which converted merchantmen were extensively employed. The practice of the nations followed broadly the contentions advanced by them at the Conferences already referred to. Great Britain, France and Italy converted a number of merchantmen according to the conditions of Convention VII. of the Hague Conference of 1907. At least one vessel, the German ship *Cap Trafalgar*, was converted on the high seas and, as a result, Great Britain, which had always strenuously opposed the right to such conversion, warned the United States Government that it would be held responsible for all damage done to British

¹ *Parl. Papers, Misc.*, No. 5 (1909), Cd. 4555, pp. 108-11.

shipping by vessels which left American ports as merchantmen and became converted at sea into men-of-war.¹

Defensively-armed merchantmen.

A distinction is to be drawn between converted merchantmen, which may participate in all the lawful operations of warfare, and defensively-armed merchantmen,² which are not commissioned vessels and may not engage in hostilities except in case of self-defence.³ The British practice of arming merchant ships for defensive purposes dates from the time of Charles I. During the Napoleonic wars the merchantmen of belligerents and neutrals alike carried guns, and their right to defend themselves in case of attack was recognised by the British, French and American Prize Courts.⁴ The trading vessels of the East India Company and of the Hudson Bay Company carried armament, and in the middle of the nineteenth century ships engaged in the opium trade similarly protected themselves. The practice then seems to have fallen into disuse, but was revived quite recently, and notably by Great Britain, whose announcement was made in 1913.

Objection was taken, however, in some countries, especially in Germany, where it was held that such measures of self-defence were illegal and rendered the crew liable to be treated as "criminals." But the German Prize Regulations, 3 August, 1914, whilst impliedly recognising the arming for self-defence, left the position ambiguous: (1) "The exercise of the right of visit, search and capture, as well as every attack on the part of an armed merchant ship upon a German or neutral merchant ship is considered an act of piracy. . . ." (2) "If an armed merchant vessel offers armed resistance against measures taken under the law of prize," the enemy Government is liable for damage and injury, the crew are to be treated as prisoners of war, and the passengers are to be set free, unless they have shared in the resistance, when they become liable to the penalties of martial law. Here, Article (1) does not discriminate between an unprovoked attack and an attack in self-defence. However this may be, many States have formally recognised the legality of arming merchant

¹ Garner, *International Law and the World War*, i. § 245; Oppenheim, ii. § 84.

² See A. Pearce Higgins, *Defensively-armed Merchant Ships and Submarine Warfare* (London, 1917); and the same author's *Armed Merchant Ships*, in *Amer. Journ. of Int. Law*, vol. viii. (1914), pp. 705 seq.

³ An Order in Council of 2 March, 1915, awarded prize bounty for the destruction of "armed ships" of the enemy; and the Prize Court decided that this expression referred only to a fighting unit of the fleet, i.e. a ship commissioned and armed for offensive action in naval warfare: *H.M. Submarine E. 14* (1920), A. C. 403.

⁴ Cf. *Several Dutch Schuyts* (1805), 6 C. Rob. 48; *Le Pigou* (or *Pegou*) (1800), Pistoye et Duverdy, *Prises Maritimes*, vol. ii., p. 51; *The Nereide* (1815), 9 Cranch, 388.

QUALIFICATIONS OF BELLIGERENTS 217

ships as a defensive measure.¹ Such vessels have not the status of combatants, and so must not exercise the rights of warships, and, reciprocally, may not be treated as combatants. They are not privateers, in that they have not received letters of marque or other licence to participate in offensive operations; they are not pirates, in that they do not commit unprovoked acts of violence or acts of depredation *animo furandi* or *lucri causa*. But if an armed merchantman offers resistance to capture and engages the enemy warship, she places herself *ipso facto* in the position of a combatant and becomes liable to the treatment of a combatant.²

Where attacks on merchantmen are being systematically conducted by submarines with the intention *spurlos zu versenken* after an attack without warning, or to condemn the crews to the open seas in boats in any weather (and this was the manner in which Germany conducted her submarine campaign from 1915 to 1918), the only possible course of defence open to a merchant vessel is to shoot or ram enemy submarines at sight. The execution of Captain Fryatt after trial by a German tribunal for attempting to ram his vessel *The Brussels* into a German submarine cannot be justified on any legal grounds.

¹ During the Great War all neutral countries, except Holland, issued regulations under which defensively-armed merchantmen were allowed to use their ports as if they were unarmed. See A. Pearce Higgins, *op. cit.*, pp. 16 *seq.*; Hall, 8th ed., p. 629.

² See further as to right to resist capture: Smith, *The Destruction of Merchant Ships under International Law* (1917), pp. 17-21; Oppenheim, ii. § 85; Hall, 8th ed., pp. 628-9.

CHAPTER III

HOSTILITIES—LIMITS OF PERMISSIBLE VIOLENCE

Funda-
mental
principle.

N O T every mode or instrument of violence is permitted by the laws of war. The general principle must always be observed that only such violence is permissible as is reasonably proportionate to the object to be attained, namely, the breaking down of the armed resistance of the enemy. The preamble of the Declaration of St. Petersburg in 1868 recognised "that the only legitimate end which States should aim at in war is the weakening of the military forces of the enemy, and to this end it is sufficient to put out of action the largest possible number of men; and that this end would be exceeded by the use of arms which would uselessly aggravate the sufferings of men put out of action, or would render their death inevitable."

Specific
prohibitions.

The rules on this point, as at present agreed in principle, are set out in Articles 22 to 28 of the Annex to Convention IV. of 1907, which expanded and amended the provisions of the Declaration of Brussels and of the Convention of 1899, and was ratified on behalf of Great Britain in November 1909.¹ After laying it down that the choice of means of injuring the enemy is not unlimited,² the rules particularly forbid the following acts³:

- (a) The use of poison or poisoned weapons.
- (b) The treacherous killing or wounding of individuals belonging to the enemy nation or army.
- (c) The killing or wounding of an enemy who has surrendered at discretion, having thrown down his arms, or possessing no longer the means of defending himself.
- (d) The declaration that no quarter will be given.

¹When considering the provisions of Convention IV. and of the other Hague Conventions of 1907 in the light of the events of 1914-18, it must be borne in mind that the Convention had not been ratified by all the belligerents in the Great War and that it is therefore extremely doubtful whether it was binding upon them except to the extent that it codified recognised international practice. See Garner, *International Law and the World War*, i. §§ 16-18. The Convention of 1899 was, however, in force.

²Art. 22.

³Art. 23.

- (e) The use of arms, projectiles or substances likely to cause unnecessary suffering.
- (f) The abuse of flags of truce, of the national flag, or of military badges and uniforms belonging to the enemy, as well as of the badges peculiar to the Geneva Convention.
- (g) Any destruction or seizure of enemy property not imperatively called for by military necessities.
- (h) The declaration that rights, and rights of action, of nationals of the enemy are extinguished, suspended or unenforceable in courts of law.
- (i) The forcing by a belligerent of the nationals of the enemy to take part in operations of war directed against their country, even in cases where they may have been in his (the belligerent's) service before the outbreak of the war.

Further, it was laid down by Article 44 that a belligerent might not compel the population of occupied territory to give information about the army of the other belligerent or his means of defence; though in Article 24, which expressly recognised "ruses of war" as legitimate, it was also declared permissible to use the means necessary to obtain information about the enemy and the country, and Article 52 provided that neither requisitions in kind nor services could be demanded from communes or inhabitants "except for the needs of the army of occupation," and then only in proportion to the resources of the country, and of such a nature as not to imply for the population the necessity of taking part in operations of war against their country.

Of the above provisions (a) to (g) were a repetition of the rules of the Brussels Conference and the Convention of 1899; and the prohibitions contained in special Conventions (e.g. the Declaration of St. Petersburg of 1868, which forbade the use of any projectile of a weight below 400 grammes [about 14 oz.], which is either explosive or charged with fulminating or inflammatory matter) were incorporated by reference. Rule (A), however, and Article 44 represent important innovations.

The permissibility of the use of the dum-dum bullet (mark IV. Expanding pattern), which has a small cylindrical cavity in the head, over which the hard metal envelope is turned down, was much discussed at the Hague in 1899. Explosive bullets have been discontinued since the Declaration of St. Petersburg, 1868; but the representatives of Great Britain in 1899 refused to concur in an agreement which would have required all bullets to be cased in hard envelopes. The Conference drew up a Declaration¹ in favour of abstention from

¹Declaration III. of 1899.

the use of bullets " which expand or flatten easily in the human body, such as bullets with a hard envelope, which does not entirely cover the case, or is pierced with incisions." But Lord Lansdowne instructed Sir Julian Pauncefote to inform the Conference that the Chitral campaign of 1895 had demonstrated the insufficiency of a hard envelope for stopping a rush in savage warfare. On this ground, and contending that the dum-dum bullet did not inflict unnecessary suffering, the British Government (and with them the United States) refused to sign this Declaration; but the objection was, so far as Great Britain was concerned, based only on the argument from savage warfare, as the bullet was not used by that country in the Boer War, and its use occasionally by the Boers formed the subject of strong protests. However, in 1907, Great Britain and Portugal intimated their accession to the Declaration, and of the larger Powers only the United States has not yet assented to it,¹ though she was willing to agree to the prohibition of bullets inflicting unnecessarily cruel wounds, or exceeding the limit necessary for placing a man *hors de combat*.²

Use of
poison.

The use of poisoned weapons was always regarded as an outrageous practice fit only for uncivilised tribes; and many ancient codes contain emphatic injunctions on the point. The employment of poison in general being forbidden by modern customary law as well as by the Hague rules, it follows that the poisoning of wells³ and the deliberate spreading of contagious diseases are equally illegal.

Poison gas.

The Conference of 1899 adopted a Declaration⁴ against the use of projectiles which have for their sole object the diffusing of asphyxiating or deleterious gases. Great Britain withheld assent (only because the Conference was not unanimous), but acceded to the Declaration in 1907; while the United States continued to be dissentient on the ground that not enough was known as to the effect of such projectiles for it to be possible to decide whether they were more or less humane than other methods of warfare. During the wars of the latter half of the nineteenth century—the Crimean War, the American Civil War and the Franco-German War—suggestions were made in regard to the employment of poisonous gases, but they were in no case adopted. No direct provision relating to this method of destruction was incorporated in the Convention of 1907 but Article 23 prohibits, *inter alia*, the use of poison,

¹ Pearce Higgins, p. 496.

² See *Amer. Journ. of Int. Law*, vol. ii. (1908), p. 77.

³ During the campaign in German West Africa in 1915 the retreating Germans poisoned several wells with arsenic or infected them with disease, and attempted to justify this conduct on the ground that instructions had been issued to post warning notices on the affected wells. See Cmd. 8306.

⁴ Declaration II. of 1899.

poisoned weapons, and all arms, projectiles or substances likely to cause unnecessary suffering. During the Great War Germany was the first to use poison gases, generally a mixture of phosgene and chlorine, which brought upon those inhaling it either a painful death or, more generally, intense pain and suffering. The Allied Powers retaliated in kind, and before the end of the war scientists on both sides had a free hand in the development of gas warfare. This led to the devising of more frightful mixtures; but less violent methods were also used, such as lachrymatory gases, and before the close of hostilities it was stated that a gas had been invented which would cause temporary and harmless unconsciousness. The gases were either released from cylinders, to be carried to the enemy lines by favourable winds, or were enclosed in shells fired by artillery. The latter method, a later development also originated by the Central Powers, was clearly in contravention of the Declaration of 1899. With regard to the former it is doubtful whether it lies within the evil contemplated by the provision in the Convention of 1907¹ against "poison or poisoned weapons," but it has been generally condemned as "likely to cause unnecessary suffering." This condemnation may perhaps apply to the more dangerous gases, but it is difficult to appreciate the logic of those who extend it to gases causing temporary blindness or unconsciousness, while high explosives are, and cannot but remain, a legal and far more destructive weapon of war. This view did not prevail at the Washington Conference, 1922, and the Powers there assembled—Great Britain, France, Italy, Japan and the United States—signed a treaty² by which they agreed as between themselves to prohibit the use in war of every kind of gas, asphyxiating, poisonous or otherwise, and all analogous liquids; all other civilised nations were invited to adhere. The treaty describes the practice of employing gas as having been justly condemned by the general opinion of the civilised world and prohibited by treaties to which the majority of civilised Powers were parties. It has not yet been ratified.

The Great War also witnessed the introduction by Germany, *Flammenwerfer*, of a novel engine of destruction, the *Flammenwerfer*. This was an instrument for projecting a jet of liquid fire of such heat as to be fatal to those within its range. It was not very extensively employed and does not seem to have met with any great measure of condemnation, which could only have been based, if at all, on the ground of causing unnecessary injury.

It is obvious, then, that the instruments and methods permissible in war are limited; and the plea of "military necessity" may not

¹ See *supra*, p. 218, n., as to whether this Convention was in force.

² Treaty of Washington (No. 2), Art. 5. Cmd. 1627.

override them. Occasionally military necessity is mentioned in the Hague rules, but only by way of exception—for these rules were designed to prevent a belligerent from having recourse at discretion to such a plea and from indulging in unrestrained conduct. The private instructions of a Government to its armed forces must conform to the object and spirit of these rules. It was controverted during the war of 1914-18 that the German Manual, *Kriegsbrauch im Landkriege*, complied with the accepted principles governing land warfare in that its instructions implied an acceptance of a maxim extensively though not unanimously advocated by German writers, "Kriegsraison geht vor Kriegsmanier" (Necessity in war overrides the manner of warfare). Oppenheim demonstrates the error into which they fell in their failure to appreciate the difference between the usages of war and the law of the war, and the hardening of the former into the latter: "*Kriegsraison geht vor Kriegsmanier* but not *vor Kriegsrecht*."¹

Questionable
value of laws
of war.

Carried to its conclusion, the application of the maxim as advocated would involve the result that in case of extreme necessity all the laws of war could be ignored, and with the belligerent himself a judge of that necessity the laws of war would soon cease to exist. Such an eventuality would not necessarily be entirely evil in its results; it would lead to no more frightfulness than the dictates of humanity and the requirement of the public conscience would allow (and it may be doubted whether the rules of international law relating to warfare possess any stronger restraining power) and it would at the same time free international law of its laborious and often futile efforts to govern the relation of States under abnormal and unnatural conditions which it cannot control. The elaboration of this thesis would be an unwieldy digression, and it must be left with the admission that it is not generally acknowledged; agreement goes no further than an admission that the Hague rules require redrafting and amendment. It is noticeable, however, that there has been no attempt to call a post-war Hague Conference to consider the laws of war and that the League of Nations has not concerned itself with any task of a similar character.

Rights of
action.

The rule against the restriction of rights of action as set out in Article 23 (h) of Convention IV. of 1907 was proposed by Germany² as an extension of the inviolability of enemy property to incorporeal property, and it was unanimously adopted; but it is

¹ Oppenheim, ii. § 69; and see Westlake, *Collected Papers*, pp. 243, 244. For an examination of German military view see Introduction of J. H. Morgan to his translation of *Kriegsbrauch im Landkriege* (London, 1915).

² Pearce Higgins, p. 263.

not at all certain what it means. Germany appears to understand it as a complete reversal of the hitherto established principle that the outbreak of war results in the extinction or suspension of all rights of action between the belligerent States¹ and their respective subjects. This is the meaning which the words, on the face of them, bear; but it is remarkable that so startling an innovation in the law of international obligations should be thus found sandwiched in the middle of a series of instructions to commanders in the field. Professor Holland,² with good reason, doubts whether, in spite of the ratification of the Convention (which, as we have already pointed out, did not bind the signatories to accept specifically each of the Articles, but only to issue instructions in conformity with them to their armed forces), this rule can be taken to have made this substantial alteration in the law; and in the courts of Great Britain, at any rate, it probably could not be carried into effect without municipal legislation.

The alternative interpretation of the rule treats it merely as an instruction to an invading commander that he is not to refuse redress to enemy subjects when they bring well-founded complaints against the conduct of his troops, and an instruction to the invading State that it is not, in any courts it may set up in the occupied territory, to disregard, in favour of its own subjects, the rights of enemy subjects. Read in this way the rule is more in harmony with those which it accompanies; but such an interpretation narrows down the application of the words in a way which can only be justified by a general reference to the subject-matter of the whole Article. International documents are, it is true, construed with a freedom from technical rules which the judges in a British court do not enjoy; but this seems an extreme case of disregard of the primary meaning of words—unless it be a case (as it probably is) of extremely careless and defective drafting.

Of these alternative interpretations the more reasonable one, having regard to the context, is the second mentioned above. In view of the long-established rule of English common law relative to the interdiction of commercial relationships with the enemy, the British delegates at the Hague could not possibly have accepted the first interpretation, which seems to have been adopted on the Continent. The Foreign Office has more than once (e.g. in 1911) declared that the said Article 23 (*h*) appertains only to the obligations of an invading State; and this view was also adopted in the United States.³ The question came before the Court of Appeal in

¹ See p. 192, *supra*.

² *The Laws of War on Land*, p. 44.

³ See *Amer. Journ. of Int. Law*, vol. ii. (1908), p. 70.

1915, which likewise held that the provision referred only to the conduct of a commander in the field and in occupied territory.¹

Compulsion
applied to
population.

The provisions with regard to the compulsion which may be applied to an invaded population also leave room for doubt, and were only arrived at after much difference of opinion. Article 36 of the Declaration of Brussels only prohibited compulsion on the population to take part in military operations against its own country, and this provision was repeated in the Convention of 1899 (Article 44). In 1907, the discussion centred round the forced employment of the inhabitants as guides.² Austria and Russia insisted that such an operation was permissible, but met with strong opposition from France, Belgium, Holland and Switzerland. The ultimate decision was to forbid such employment, but the Convention was only signed by Germany, Austria, Japan and Russia subject to a reservation as to Article 44.

The general effect of the provisions on this point may be stated thus: The means may be employed which are necessary to obtain information about the enemy and the country (Article 24); but among such means must not be included the compulsion of enemy subjects to take part in operations of war directed against their country (Article 23); and the furnishing of information about the army of the other belligerent or his means of defence is to be regarded as "taking part in an operation of war" for this purpose (Article 44). Subject to this restriction, forced services may be demanded from the inhabitants, if they are necessary for the army of occupation (Article 52).

Germany objected to Article 44, on the ground that it was unnecessary to specify a particular kind of "operation of war," which was sufficiently covered by the more general terms of Article 23. That the other dissentient Powers recognised that Article 23 did include the forced employment of guides among the prohibited operations seem clear by the Austrian attempt to restrict that clause to a prohibition against compelling the inhabitants to take part in the operations of war "as combatants"; and by assenting to that Article without the addition of these two words they may, strictly speaking, be taken to have acquiesced in the principle that such forced employment of guides is not permissible.

The unsatisfactory vagueness of the prohibition contained in Article 24 and of the right expressed in Article 52 was demonstrated during the Great War. During their occupation of Belgium the

¹ *Porter v. Freudenberg, etc.* [1915], 1 K. B. 857; 31 T. L. R. 162; and see Oppenheim, ii. § 100a and notes, *ibid.*
Pearce Higgins, pp. 265 seq.

Germans compelled the Belgians to work the Belgian railways for all purposes including the transportation of troops, and it is a moot point whether carriage of troops is included in the term "operations of war." Among the forced services demanded of the inhabitants of Belgium by the Germans, and of Galicia by the Russians, was the building of trenches and fortifications in the rear of the fighting line, and this does not appear to contravene the provisions of Article 52. But it was a harsh extension of its terms which the Germans claimed when they deported thousands of Belgian and French men and women to Germany and compelled them to work there.¹

The practice of sieges and bombardments is regulated as follows: Sieges and bombardments.

Towns, villages, dwelling-houses and buildings may neither be attacked nor bombarded by any means whatever, unless they are defended.²

The officer in command of attacking troops, before beginning to bombard, except in cases of assault, should do all that he can to warn the authorities.³

In sieges and bombardments everything possible should be done to spare buildings devoted to worship, art, science and charity, historic monuments,⁴ hospitals and the resorts of the sick and wounded, so long as they are not used at the same time for military purposes,⁵ such buildings to be indicated to the besieger by conspicuous and distinctive marks.⁶

A town even when taken by storm may not be handed over to pillagers.⁷

The words "by any means whatever" (in Article 25 referring to bombardments) were added in 1907, to cover the case of bombardment from balloons. The whole question of balloon attacks was fully discussed in 1899, when a Declaration⁸ was adopted (but only for a period of five years, which expired in 1905) prohibiting the discharges of projectiles or explosives from balloons or by other new and analogous methods. In 1907 the question was raised again. It was then clear that balloons in warfare for purposes other than reconnoitring were a practical possibility. The Declaration was renewed, but only for a period extending to the termination of the Third Peace Conference; it was ratified by Great Britain in November 1909, but as Germany, France, Italy, Russia, Spain and Japan all refused to sign it, it was obviously of little, if any, value. It was only on the prohibition of such a method of attack on un-defended towns that it was possible to arrive at unanimity. With

¹ Oppenheim, ii. § 170.

⁴ Added in 1907.

⁷ Art. 28.

² ⁵

Art. 25.

Art. 27.

Declaration I. of 1899.

³ ⁶

Art. 26.

Added in 1907.

the developments of aerial navigation it became fairly clear that no Power was likely to bind itself not to take advantage of the new science to the full, except with the limitation above stated.

Undefended
places.

The agreement to extend immunity to undefended places was an advance on the views previously accepted, but it is doubtful whether the Convention in which it is contained was binding during the Great War; it is certain that it failed to stand the test of the war, in the course of which the belligerents levelled against each other numerous charges of unlawful bombardment.¹ In the result the classification of towns and villages into "defended" and "undefended" must be regarded as obsolete. No further attempt has been made to define the limits of land bombardment, but the apparent scope of such limits may be inferred from the rules which have been suggested in regard to aerial bombardment.

Aerial
bombard-
ment in
the Great
War.

The war of 1914-18 gave a tremendous impetus to the young science of aerial navigation, and it had not long been in progress before air vessels were extensively employed in naval and military operations—for reconnoitring and for direct attack on naval and military objectives. Eventually the increased power and speed of new machines made it possible for these attacks to be extended against objectives behind the war areas, such as lines of communication, military camps, depots and bases, and munition factories. Germany was credited with having carried out aerial bombardment, e.g. on London, for the sole purpose of terrorising the non-combatant population, her defence being that she always had definite military objectives in view. The Allied Powers resorted to reprisals directed mainly against towns in the Rhineland.

Report of
Commission
on rules of
aerial
warfare.

The Convention regulating aerial navigation which was signed at Paris in 1919 expressly provided that it should not affect the freedom of action of the contracting States either as belligerents or neutrals.² The Conference of Washington in 1922 appointed a Commission on which Great Britain, France, Italy, Japan, Holland and the United States were represented, to consider the rules of aerial warfare, and a Report was issued in 1923.³ The recommendations imply that a sharp distinction should be drawn between belligerent and non-belligerent air vessels; the qualifications for belligerent aircraft of a commission by the State and the wearing of distinctive uniform by the crew are reinforced by provisions prohibiting the use of false external marks, and prohibiting any other aircraft from engaging in hostilities, or being armed even in self-defence. Tracer explosive and incendiary projectiles may be used by and against aircraft. A problem of much concern during the Great War to

¹ Oppenheim, ii. § 155. ² Art. 31. Cmd. 670.
³ 1924. Cmd. 2201.

those engaged in air fighting is solved by a prohibition forbidding attack against airmen descending by parachute.

The most important of the Commission's recommendations are those concerning aerial bombardment, which is declared to be legitimate only when directed at a military objective. In addition to a definition of military objective as an object of which the destruction or injury would constitute a distinct military advantage to the belligerent, the suggested rules enumerate the permissible objectives; they are: military forces, military works, military establishments or depots, factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies, and lines of communication or transportation used for military purposes. But these objectives are to be spared if they are so situated that they cannot be bombarded without an indiscriminate bombardment of civilian population. Towns and buildings which lie in the immediate area of the operations of land forces, and with regard to which a presumption of sufficient military concentration may reasonably exist, are also declared legitimate objects of bombardment. Outside the theatre of war the bombardment of towns and buildings is prohibited; so is any bombardment directed for the purpose of terrorising the civilian population, of damaging private non-military property, or of enforcing compliance with requisitions or with demands for contributions.

Suggested
rules of
aerial bom-
bardment.

The proposed rules for regulating bombardment have been criticised for their liberality; it is open to doubt whether if accepted they would secure obedience in future wars waged more extensively from the air than was considered possible in 1918 at the close of the Great War. The recommendations include many other proposals, such as provisions for enemy and neutral aircraft and the duties of neutral States, but as no step has been taken, or is in contemplation, to secure their international acceptance they need not be further discussed.

A controversy of much gravity was raised some time ago as to the propriety of holding to ransom and, failing payment, of bombarding the undefended coast towns of an enemy. The provisions as to bombardment already quoted relate, it must be noted, only to operations on land. In an article,¹ which became sufficiently notorious to attract the diplomatic attention of the British Government, M. le Contre-amiral Aube advocated a maritime policy for his own country which suggested alarming possibilities for the future. His argument had the merit of simplicity. War may be defined as the appeal of right against violence denying that right; it follows that the paramount aim of war is to injure the enemy in every possible way. The

Bombard-
ment of
coast towns

¹ *Revue des Deux Mondes* (1882), pp. 314-46.

nerves of war are wealth; consequently everything which strikes at the enemy's wealth, and still more at the sources of that wealth, becomes not merely legitimate, but obligatory. So we must expect in the future to see armed squadrons turn their powers of attack and destruction against coast towns, whether or not they be fortified, whether or not they be defended; they will burn them, destroy them, or at least hold them mercilessly to ransom.

Hall¹ adds the significant facts that Admiral Aube was appointed Minister of Marine soon after the publication of this article, that he gave orders for a class of vessels specially suited to carry out the designs recommended in it, and that in 1878 the Russian fleet at Vladivostock was about to sail for Australia, with the intention of holding the undefended coast towns to ransom. Further, during the British naval manoeuvres of 1888 the attacking fleet purported to bombard, and to levy contributions upon, various places along the coast; and though Professor Holland protested strongly in *The Times*,² a considerable body of high naval authority took up the position that such a proceeding was perfectly justified, and a committee of admirals reported in its favour in 1889. The reasons given, apart from the frank anarchy of one officer, who stated that "the talk about international law is all nonsense," seemed to be chiefly based on the feeling that other nations would adopt every possible means in war of weakening Great Britain, and that the bombardment of coast towns would be the most efficacious method to be found. If this was the fear, it was hardly wise for Great Britain to provide other nations with a valuable precedent to be used against her. Wellington in 1844 had described such a method of warfare as "disclaimed by the civilised portions of mankind."³ It is contended⁴ that the bombardment of places occupied by non-combatants is on the same level of illegality as devastation, that it is proposed to "introduce for the first time into modern maritime hostilities a practice which has been abandoned as brutal in hostilities on land," and that the analogy of contributions on land affords no sort of justification for the enforcement of ransom by a hostile squadron. Such contributions "are a totally different matter from demanding a sum of money or negotiable promises to pay, under penalty of destruction, from a place in which [the belligerent] is not, which he probably dare not enter, which he cannot hold even temporarily, and where consequently he is unable to seize and carry away."

It may at once be admitted that the practice of bombarding

¹8th ed. p. 515.

²*Letters to "The Times" upon War and Neutrality*, pp. 73 seq.

³*Ibid.*, p. 79.

⁴Hall, 8th ed., pp. 516-18.

undefended towns would be the occasion of much suffering to persons upon whom the incidence of belligerent pressure has been generally deemed illegitimate; nor can it be denied that a very grave accession to the inhumanities of war would be involved in its recognition. It may also be properly pointed out that before acts of this kind are done, States are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth. Such arguments are indeed likely to be more effective than others based upon the attribution to non-combatant property of an absolute right to immunity from capture or destruction. The contention that such property is immune is equally destructive of the claim to capture or destroy enemy private property on board enemy merchant vessels. Admiral Aube points out that in the American Civil War Confederate cruisers destroyed in a single month ¹ 239 American vessels with an aggregate tonnage of 104,000, and value of 15,000,000 dollars. In cases where resistance was offered, it is reasonable to imagine that "devastation and the slaughter of non-combatants" were not wanting to reinforce the persuasiveness of the summons to lie-to. Illustrations of this kind bring into curious relief the artificiality of much international practice. The most effective mode in which to meet Admiral Aube's suggestions is surely to say simply that the mode of belligerency advocated has never been practised or sanctioned, that it is strikingly inhumane, and would afford good ground for serious reprisals.

It is hardly convincing to distinguish between the ransom which Admiral Aube recommends, and the contributions which are undoubtedly legal in land warfare, on the ground that "ability to seize, and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment, are indissolubly mixed up with the right to levy contributions." ² Hall is driven to admit that contributions may be exacted by a squadron which is prepared to enforce payment by landing a force; in other words, a ransom may be extorted at the barrel of a revolver which is denied to the cannon. "A levy of money," he continues, ³ "made in any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right." Might it not be argued with equal force that a contribution is a ransom from destruction? Certainly destruction would follow sharply, where an attempt to resist the levying of a contribution coincided with ability to pay it. Similarly it might be argued that if contributions are permissible, they are permissible because there is a right to destroy. The answer is that there may in

Ransom and
contributions.

¹ May 1864.

² Hall, 8th ed., p. 518.

• *Ibid.*

the abstract exist the right to destroy upon refusal to pay the contribution, without there existing an absolute right to destroy, of which contribution or ransom is a mitigation. But, however unconvincing it may be from the logical point of view, this distinction between ransom and contribution has been incorporated in the agreement which has ultimately been reached on the subject. The Hague Conference of 1899 did nothing but express a "wish" that the whole question be referred to a subsequent conference. The United States in her Naval War Code of 1900¹ prohibited the bombardment of unfortified and undefended places, "except when such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in ports, or unless reasonable requisitions for provisions and supplies essential at the same time to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given"; and bombardment for non-payment of ransom is specifically forbidden.

Undefended
places.

In 1907, at the Hague, a substantial agreement was arrived at between the great majority of the Powers represented, and was embodied in Convention IX. The bombardment by naval forces of undefended ports, towns, villages or buildings was forbidden²; but this general prohibition was very materially qualified by exceptions. In the first place, there was no unanimity on the point as to what is meant by "undefended." Are floating mines a "defence"? On the face of it the answer would seem to be in the affirmative, a view which was taken by Great Britain, France, Germany, Japan and Spain,³ all of which Powers declined to agree to a clause which was inserted to the effect that the mere fact of automatic submarine contact mines being anchored off the harbour shall not be a justification for bombardment.⁴ If a belligerent refrains from bombarding, he is entitled to immunity from danger, so far as the port or place which he so respects is concerned; even as in land warfare he does not kill or capture the civil population because, and only so long as, they are harmless. But it is obvious that nice questions may arise whose decision can only be left to the discretion of the belligerent commander. It will often be difficult to say exactly what place is protected by mines, for mines laid for the protection of a naval base may cover an area which includes several innocent coast towns. The objection to the clause referred to above will probably not be taken as involving a claim to direct a fire upon the residential parts of Southampton, or upon the Isle of Wight, merely because a line of mines at sea is laid for the defence of Portsmouth. The question is one which can only be decided upon the circumstances of each

¹ See Pearce Higgins, p. 353.

³ See Pearce Higgins, p. 354.

²

Art. 1.

⁴ Art. 1.

case; and it can only be hoped that the belligerent in such a case will bear in mind and apply by analogy the rule which directs him, in bombarding military works and establishments which are part of a town, to do as little harm as possible to the rest of the town.¹ But it certainly seems not unreasonable to reserve power to bombard a purely civilian town which, having all the appearance of harmlessness, is nevertheless surrounded with mines; and this reservation will have done good if it produces greater caution in the use of such mines, which were proved in the Russo-Japanese War, and more particularly in the Great War, to involve great danger to neutral shipping. The whole question of their use formed the subject, is we shall see, of a Convention in 1907.²

The prohibition against bombardment does not, of course, Military apply to military works, military or naval establishments, depots of arms or material of war, workshops or plant, suitable for use for the needs of the fleet or army, and ships of war in the port. Such things may be destroyed after a summons to the local authorities and a reasonable interval giving an opportunity to the local authorities to destroy them themselves; and if there is no time for such summons and delay, care must be taken to do as little injury as possible to the town, though the belligerent is not to be held responsible for unavoidable damage done in the course of a permissible bombardment of this kind.³ The word "plant" ("installations") was used as being sufficiently vague to cover railway depots, floating docks, coal depots and other things reasonably likely to be of use in war.⁴

A further and most important exception was made, which Requisitions. embodies the distinction already referred to between "ransom" and "requisitions." After due notice a belligerent may bombard undefended ports, etc., if, after summons, the local authorities decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question. Such requisitions are to be proportionate to the resources of the place, shall only be demanded in the name of the commander of the naval force, and shall as far as possible be paid for in ready money; and if that is not possible, receipts are to be given⁵; but bombardment merely on account of the refusal to pay money contributions is forbidden.⁶ The word "ransom" was not used, lest it should lead to an inference that in principle the exaction of ransom was permissible.⁷

These provisions, again, are necessarily vague, and can hardly be regarded as anything more than an expression of a hope that a belligerent commander will do his best to comply with them. He

¹ Art. 2.

⁴ Pearce Higgins, p. 355.

²

⁵ See *infra*, p. 233.

⁶ Art. 3.

Pearce Higgins, p. 356.

³

Art. 2.

Art. 4.

cannot ascertain, save in the most rough-and-ready way, what are the resources of the place, and he alone can be the judge of what supplies are necessary for the immediate use of his force; but the inculcation of the rule that he cannot demand money contributions, and that he can only demand supplies for that portion of the fleet which is before the place in question, may not unreasonably be expected to exercise a restraining influence.

Protected
buildings.

The Convention concludes with provisions similar to those laid down for land warfare, for the protection in all bombardments of buildings devoted to public worship, art, science or charitable purposes, historic monuments and hospitals (all of which are to be indicated by a special sign), for due warning, where military exigencies permit of such warning, and for the prevention of pillage.¹

In the Turco-Italian War of 1912 the Convention was in force, and Turkey protested that its terms had been violated by the Italian navy when, in shelling Turkish gunboats lying at Beirut, they caused serious damage to the port, and killed or injured many non-combatants. If, as the Italian admiral reported, the bombardment was directed solely at the warships and the damage was incidental and unintentional, there was no disregard of the Convention. The belligerents in the Great War had not all ratified the Convention, and it was therefore probably not legally binding. But its terms were largely declaratory of existing law, and the acts of the German navy in bombarding towns on the English coast were contrary to accepted international practice except in so far as the bombarded towns contained military objectives.

Submarine
mines.

The question of the use of submarine mines is of exceptional importance because the interests of neutrals are directly affected. China, at the Hague in 1907, estimated that from five to six hundred Chinese subjects had been killed by the mines with which the seas were scattered during the Russo-Japanese War.² The Institute of International Law considered the question in 1906, and adopted rules³ prohibiting the placing of anchored or floating mines in the high seas, and prohibiting belligerents from placing mines in their own waters or those of the enemy which were liable on displacement to be a danger to navigation outside such waters. This latter rule was to apply to neutrals who might place in their waters any mechanical contrivances for the safeguarding of their own neutrality; and neutrals were to be forbidden to place such in the passage of straits leading to the open sea. In all cases notification to neutral commerce was to be obligatory, and the State violating these rules was to be responsible for any damage done.

¹ Arts. 5, 6, 7. ² Pearce Higgins, p. 329. ³ *Ibid.*, p. 332.

At the Hague Conference of 1907¹ there was much difference of opinion on the subject. Great Britain was anxious for the total prohibition of automatic submarine contact mines which are unanchored or which do not become harmless on breaking from their moorings; for the total prohibition of the employment of such mines for the purposes of commercial blockades; and for the restriction of the right of laying mines to the territorial waters of the belligerents, with an extension to ten miles (subject to proper warning to neutrals) in the case of the defence of military ports, having at least one large graving-dock, and provided with the equipment necessary for the construction and repair of ships of war, and in which a staff of workmen paid by the State to construct and repair ships of war is maintained in time of peace. There was, however, an unwillingness on the part of States with small navies (e.g. Italy) to give up the right to use unanchored mines, though it was agreed that they ought to be so constructed as to become harmless after a short time; and there was also an objection, particularly on the part of Germany, to the restriction of the right of laying mines to territorial waters. Finally, after much discussion, a Convention² was drawn up, which was signed, subject to many reservations; Great Britain in particular declaring that it could not be taken as conclusive, or as more than a first step towards the provision of adequate guarantees for the protection of the undoubted rights of neutral shipping. The Convention was ratified on behalf of Great Britain in November 1909, with the reservation of the right to treat as unlawful certain acts, even if not prohibited by it.

By its preamble the Convention is admittedly merely provisional "until such time as it may be found possible to formulate rules on the subject, which shall insure to the interests involved all the guarantees desirable." The laying of unanchored automatic contact mines was forbidden, unless they are so constructed as to become harmless one hour at most after those who laid them have lost control over them.³ This was objected to by Germany; she was, however, willing to forbid the use of unanchored mines altogether for five years, an offer which was not accepted by a sufficient majority. It was also forbidden to lay anchored mines which do not become harmless as soon as they have broken loose from their moorings, or to use torpedoes which do not become harmless when they have missed their mark.⁴ But the whole effect of these restrictions was weakened by a subsequent provision that Powers which do not own perfected mines of the description referred to, and which consequently could not at present carry out the rules, undertake to convert the

The Hague
Conference.

The Mines
Convention.

¹ Pearce Higgins, pp. 328 *seq.*

³ Art. 1 (1).

Art.

²

No. VIII. of 1907.

1 (2) and (3).

materiel of their mines as soon as possible, so as to bring it into conformity with these requirements. Great Britain attempted, but without success, to procure the insertion of a time limit.

Various efforts were made to limit the area within which mines may be laid, but nothing could be agreed upon except that "the laying of automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial shipping, is forbidden"¹; and to this Germany objected on the very good ground that it means nothing, as the belligerent who lays the mines will invariably declare that he has some other object in view. There is practically nothing, therefore, in the Convention to prohibit blockade by mine; which is probably a violation of the rule that a blockade, to be valid, must be effective, and substitutes immediate destruction without inquiry, in the place of capture, as the penalty for blockade-running.² An attempt was made to procure the prohibition of the employment of anchored mines except for defence and coast protection, but this also failed to secure sufficient support. It was further provided that, when anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping; and belligerents undertook to do their utmost to render these mines harmless after the lapse of a limited time, and, should they cease to be under observation, to notify the danger-zones as soon as military exigencies permit, by a notice to mariners and neutral Governments.³ The same rules were laid down for neutrals who laid mines off their coasts,⁴ and each power undertook to do its best, at the close of a war, to remove the mines it had laid.⁵

On behalf of Great Britain, Sir Ernest Satow pointed out⁶ that the Convention imposed no restriction as to the placing of anchored mines, "which consequently may be laid wherever the belligerent chooses: in his own waters for self-defence, in the waters of the enemy as a means of attack, or, lastly, on the high seas, so that neutral navigation will inevitably run great risks in time of naval war, and may be exposed to many a disaster." In fact, the only substantial result of the Conference is the prohibition of the use of floating mines or anchored mines, which may break loose, unless they are so constructed as to become harmless within a very short time; and this will only be substantial if States refrain from availing themselves of the very large loophole provided by Article 6.

In view of these considerations, Great Britain, as has already been stated, reserved the right to treat as unlawful acts not prohibited

¹ Art. 2.

² As to the practice in the Great War, see *infra*, pp. 392, 393.

³ Art. 3.

⁴ Art.

⁵ Art.

⁶

⁶ *Parl. Papers, Misc.*, No. 4 (1908), p. 54; and see Pearce Higgins, pp. 340-5.

by the Convention; and the Convention itself contained an agreement¹ to reopen the whole question six months before the expiration of the period of seven years for which it was to remain in force, in the event of the question not having been taken up and settled by the Third Peace Conference.

It could be readily appreciated that the Convention was inadequate to meet the conditions of a future war, and the Institute of International Law devoted much attention to the subject at its meetings in 1910 and 1911 and eventually framed more comprehensive suggestions. But it remained for the Great War to show that the provisions of the Convention were not only inadequate but futile.

Soon after the outset of hostilities some of the belligerents sowed mines along trade routes, Germany in the North Sea, Russia in the Baltic and France in the Adriatic, while Great Britain notified certain sea areas as mined zones from which all shipping was warned but which had clear tracks for neutral vessels. These first steps in an interference with neutral shipping on an unprecedented scale were claimed by all the belligerents to be in the nature of reprisals.² Whether they were legitimate reprisals or a stern extension of naval warfare, the measures taken by the belligerents as the war proceeded became applied to wider and still wider areas. Germany declared the waters surrounding Great Britain, including the whole of the English Channel, to be a war zone from which shipping of every kind was excluded under penalty of destruction. Great Britain and France retorted with the notification of more extensive mine fields which eventually were wide enough to prevent any ocean ships from reaching Germany. This end was the more adequately secured by an Order in Council decreeing condemnation of all neutral vessels which failed to comply with British instructions regarding passage through the mine fields. The legality of these measures will be considered in connection with the law of blockade. The German reply was to extend her declared war zones to include eventually the whole Eastern Atlantic from Gibraltar to Iceland, and the Eastern Mediterranean, and to attempt to enforce her declarations by conducting therein an unlimited submarine campaign directed with reckless impartiality against belligerent and neutral.

Use of mines
in the Great
War.

Not unnaturally the neutral Powers who suffered in ships or in trade for these measures made ceaseless complaint, but without avail—after the entry of the United States all the great naval Powers were engaged in prosecuting them. English writers on international

¹ Art. 12.

² See Orders in Council, 11 March, 1915, 10 January, 1917, and 16 February, 1917, empowering the adoption of measures of retaliation. The validity of Orders prescribing the measures was upheld in *The Stigstad* (1919). A. C. 279.

law are agreed that there can be little question as to the legality of the indiscriminate German submarine warfare, particularly as regards its operation against neutral shipping, but the delimitation of war zones by belligerents, one of the alleged justifications for the submarine campaign, must be considered.

Maritime
war zones.

At one time it might safely be asserted that when war was being waged neutral ships possessed complete liberty of movement over non-territorial waters, subject only to the inconvenience of visit and search and the restrictions of blockade; even a naval engagement in the days when they were fought at close quarters involved no inconvenience to trade. With modern developments the actual or potential sphere of hostilities increased in area and in danger to neutral shipping, and it was therefore argued that for their own defence and for the safety of neutrals, belligerents were entitled to declare certain sea areas barred. Japan in the Russo-Japanese War and the United States in 1917 issued orders restricting and regulating navigation in certain zones, none of which, however, extended for more than ten nautical miles from the coast. The argument for the far wider rights claimed and exercised by Great Britain in this connection in establishing war zones over enormous areas of the high seas were summarised by the Judicial Committee of the Privy Council in *The Stigstad*.¹ "The seas are the highway of all and it is incidental to the very nature of maritime war that neutrals, in using that highway, may suffer inconvenience from the exercise of their concurrent rights by those who have to wage war upon it. Of this fundamental fact the right of blockade is only an example." The rules relating to contraband, blockade and unneutral service, although separately developed branches of international law, "may also be treated, as in fact they are, as illustrations of the broad rule that belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed." The measures taken may also be considered under the head of reprisals, which according to international law are legal, although they inflict loss upon neutrals, provided that neutrals are not subject to more inconvenience or prejudice than is reasonably necessary under the circumstances. "To say that retaliation is invalid as against neutrals, except within the old limits of blockade, contraband, and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect" The measures taken by the Allied Powers to restrict

¹ (1918), A. C. at p. 288.

neutral trade resulted in the main only in monetary loss, while the German submarine campaign produced as well great loss of life; but the justification of the former expressed in general terms bears a strangely similar sound to some of the arguments adduced for the legality of the latter.¹

In ancient times prisoners taken in war were liable to be put to death in cold blood, or to be enslaved. Later the practice of ransom was introduced, which, in the feudal wars of the middle ages, proved to be a source of enrichment to commanders, who were empowered to dispose of their captives as they thought fit. Those who were not ransomed were not infrequently subjected to cruel treatment. Gradually relaxations were introduced, thanks to the influence of chivalry, the Church and jurists, as well as to the growing conception of the personality of the State. Arrangements were then made between the belligerent States themselves for the ransom of their respective captives, or for effecting an exchange. In the seventeenth century we find treaties fixing a scale of value. Perhaps the latest instance is that of 1780 between England and France: an English admiral or a French marshal was estimated to be worth sixty men, lower ranks were assessed in proportion, and a man was reckoned to be worth one pound sterling.² For a long time there were no generally accepted rules regulating the position and fate of prisoners of war; and it is only recently that regulations were definitely established.

The provisions of the Brussels Declaration, 1874, were adopted, with modifications and additions, by the Hague Conference of 1899³; and the rules of the latter were again accepted, with certain alterations, by the Hague Conference of 1907, whose Convention⁴ is therefore the existing law on the subject.

It is laid down that they are in the power of the hostile Government, and not of any individual or corps; that they must be humanely treated, and that all their personal belongings, except arms, horses and military papers, remain their property.⁵ They may be interned in a town, fortress, camp or any other locality, and are bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety,⁶ and only while the circumstances which necessitate their confinement continue to exist,⁷ confinement being more stringent than internment. The State may utilise the labour of prisoners of war other than officers⁸ (who, however, are

¹ On the whole question of mines and war zones, see Hall, 8th ed., pp. 638-643, references *ibid.*, p. 640, n.; and Oppenheim, ii. § 182a.

² See Manning, *Law of Nations*, book iv. chap. viii.

³ Annex to Convention I I. Convention IV., Arts. 4-20.

⁴ Art. 4. Art. 5. These last words were added in 1907.

⁵ Added in 1907. But before this rule was made the Japanese had already refrained from imposing forced labour on Russian officers in 1904-5: cf.

in proper cases to be allowed full pay, which must be repaid by their Government),¹ according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations, and they are to be paid for such work (if it is in the public service) according to the scale in force for soldiers doing similar work, or, if there is no such scale fixed, at rates proportional to the work done.² Whether prisoners may, under this provision, be employed in the construction of fortifications distant from the scene of hostilities is a controverted question. The better view is that they may not be so employed; for the scene of operations may at any time be transferred to the locality of their work, which might be utilised against their own country, and they might moreover be compelled to participate there in operations against the State to which they owe allegiance. Services of a neutral character may be imposed, e.g. those relating to military hospitals and ambulances. Different kinds of out-of-door labour of a civilian character are the most suitable. The wages of prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.³

The Government into whose hands prisoners of war have fallen is bound to maintain them. Failing a special agreement between the belligerents, they shall be treated as regards food, quarters and clothing on the same footing as the troops of the Government which has captured them.⁴ Prisoners of war shall be subject to the laws, regulations and orders in force in the army of the State into whose hands they have fallen. Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary. Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment for the previous flight.⁶

Every prisoner of war, if questioned, is bound to declare his true name and rank, and, if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of his class.⁶

Prisoners may be set at liberty on parole if the laws of their country authorise it, and in such a case they are bound, on their personal honour, scrupulously to fulfil the engagements they have contracted, and their own Government may not require or accept

N. Ariga, *La Guerre russo-japonaise au point de vue de droit international* (Paris, 1907), p. 114. Naval officers are not explicitly included in the Hague Regulations; but in 1907 the *vœu* was expressed that the regulations in land warfare should be as far as possible applied to naval warfare.

¹ Art. 17.

⁴ Art. 7.

²

⁵

Added in 1907.

Art. 8.

⁶

³

Art. 6.

Art. 9.

from them any service contrary to the parole given.¹ A prisoner of war cannot be forced to accept his liberty on parole; similarly the hostile Government is not obliged to assent to the prisoner's request to be set at liberty on parole.²

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.³

Provision is also made for the institution of an information bureau for the purpose of answering all inquiries about prisoners, collecting and forwarding objects of personal use, valuables and letters, etc.⁴ Special provision is made for facilitating the work of relief societies,⁵ for the admission free of duty of gifts and relief in kind,⁶ and for the free exercise by prisoners of their religion⁷ and of their right of making wills.⁸

The complaints brought against Germany for her treatment of British prisoners during the Great War are well known in this country, and it may be doubted whether the conditions to which they were subjected were wholly unavoidable or excusable. But it would be unprofitable to consider the complaints in this volume without at the same time weighing those brought by Germany against other Allied Powers. Great Britain fully observed the terms of the Hague Regulations, but the manner of their observance by some of the belligerents disappointed the hopes of the Hague Conference. The Regulations require to be amplified and amended; if uniformity and decent consideration are required, in future it would seem desirable to bring the treatment of prisoners under some form of neutral control.⁹

These rules have no application to captured spies. Of spies, Spies. Vattel¹⁰ says: "[They] are generally condemned to capital punishment, and not unjustly. . . . For this reason a man of honour, who would not expose himself to die by the hands of the common executioner, ever declines serving as a spy. He considers it beneath him, as it seldom can be done without some kind of treachery." This view has received the sanction of both writers and soldiers, but it is difficult to defend upon satisfactory grounds. Stratagems and ruses are universally practised in war, and it is not easy to see that

¹ Art. 10.

² Art. I I . The punishment for breach of parole is death. ³ Art. 13.

⁴ Art. 14. With regard to the working of the British information bureau during the Great War, see R. F. Roxburgh, *The Prisoners of War Information Bureau in London* (London, 1915).

⁵ Art. 15.

⁶ Art. 16.

⁷ Art. 18.

⁸ Art. 19.

⁹ See Hall, 8th ed., p. 489, n.; Oppenheim, ii. § 131a.

¹⁰ *Droit des gens*, liv. iii. chap. x. § 179.

spying, unless aggravated by dishonouring circumstances in no way essential to it, is morally more culpable. The distastefulness of the employment, and its lack of distinction, together with the distressing nature of the penalty risked, call for remarkable valour and constancy in the spy. Lord Wolseley has recognised the reasonableness of the view in the following observations: "As a nation we are brought up to feel it a disgrace even to succeed by falsehood. The word 'spy' conveys something as repulsive as 'slave.' We keep hammering along with the conviction that 'honesty is the best policy,' and that truth always wins in the long-run. These sentiments do well for a copybook, but a man who acts upon them had better sheathe his sword for ever."¹

Who is a spy. A spy was defined in 1899 and 1907² as a person who, acting clandestinely or on false pretences, gathers, or seeks to gather, information in the zone of operations of a belligerent with the intention of communicating it to the adverse party. Soldiers, not disguised, who have penetrated into the zone of operations of the enemy with this object, are not to be treated as spies; nor are soldiers, or civilians, openly carrying out their mission, charged with conveying dispatches for their own or the enemy's army, nor persons sent in balloons to convey dispatches, or to maintain communication between the various parts of an army or territory. A spy cannot be punished without trial³ and cannot be treated as a spy if captured after he has rejoined his own army.

War treason. As one of the necessary elements of espionage in the sense contemplated by international law is the commission of the act within the zone of belligerent operations, a person caught spying outside that zone may not be charged with espionage, though his conduct may be regarded by the captor as a serious offence—sometimes designated a "war crime" or "war treason" in imitation of the German terminology. Under the present law Major Andre could not have been convicted of espionage, as he was not seeking information. Having been sent by General Sir Henry Clinton to Benedict Arnold, an American commandant, to negotiate the surrender of a certain fortress to the British forces, 1780, he put on civilian clothes and, by means of a false passport given to him by Arnold, was to pass through the American lines. He was, however, captured, and tried at Washington by a court-martial whose verdict was that "agreeably to the laws and usages of nations he ought to suffer death"; and he was hanged, 2 October, 1780. Reference may be made to a recent instance—that of one Lody, a German subject,

¹ If the objection to spying is a moral one, the part played by those who employ him would appear to be less respectable than that of the spy himself. The latter at least puts his own neck into danger.

² Art. 29 of Annex to Convention I I. of 1899, and IV. of 1907.

³ Art. 30.

who was charged, 30 October, 1914, before a General Court-Martial in London, with attempting to communicate information to the German authorities. As the offence was committed in Edinburgh and Dublin—places outside the zone of belligerent operations—it was not described as espionage, but as a "war crime" or "war treason." The accused was found guilty, condemned to death, and shot.

That the sick or wounded should not be ill-treated has long been a recognised rule of warfare. From time to time measures were adopted to alleviate their sufferings; sometimes religious bodies voluntarily undertook to perform such tasks, sometimes conventions *ad hoc* were concluded between belligerents. A step in advance was taken in the eighteenth century, when combatant States began to tend the enemy's wounded apart from treaty arrangements. Further, about the middle of the nineteenth century a movement was inaugurated in several European countries for establishing an international medical and sanitary organisation. In 1863 a semi-official Conference was held at Geneva, where it was proposed to set up aid societies, to neutralise the medical services under a distinctive emblem. The following year the Swiss Government invited delegates from all the leading States to meet in formal Conference at Geneva. The result was the Geneva Convention, which was in the first place signed by the representatives of sixteen States, and was subsequently accepted by other countries. Treatment of wounded*

This Convention¹ did much to ameliorate the condition of the sick and wounded; and a supplementary Conference at Geneva in 1868 drew up a Convention in part amending that of 1864, and in part extending its principles to naval warfare, which was in fact never ratified. At the Hague, in 1899, the Swiss Government was requested to call a Conference to revise these rules, and at Geneva, in 1906, a further Convention was drawn up and ratified by a number of Powers, but not by all those who had acceded to the Convention of 1864. Of the more important Powers Austria, Germany, Great Britain, Italy, Japan, Russia, Spain, the United States and Turkey are at present bound by the Convention of 1906; while China, France, Greece, Holland, Norway and Sweden are still subject to that of 1864.

By the Convention of 1906, the sick and wounded are to be taken care of without distinction of nationality, but a belligerent when compelled to abandon his own sick and wounded must, so far as military exigencies permit, leave with them a portion of his medical *personnel* and material.² The sick and wounded are prisoners of

¹ Pearce Higgins, pp. 12, 35.

²

Art. 1.

war.¹ Provision is made for a proper search of the field of battle, for protection against pillage and maltreatment,² and for the exchange of information as to the wounded and dead. It is left to the discretion of the military authorities to appeal to the charitable zeal of the inhabitants to assist in the task of collecting and taking care of the wounded.³ Medical units (*les formations sanitaires mobiles*) and the establishments of the medical service (*les établissements fixes du service de santi*) are protected,⁴ together with their *personnel* and guards, and all persons engaged exclusively in the collection, transport and treatment of the wounded and the sick⁵; as also is the *personnel* of duly-recognised and notified voluntary aid societies.⁶ The medical staff if captured by the enemy are not prisoners, but must continue to carry on their duties under his direction,⁷ receiving the usual pay and retaining their material, subject to the necessities of the enemy, who is to restore anything he may borrow.⁶ Convoys of evacuation are similarly protected,⁹ and provision is made for the use and observance of the "red cross"¹⁰ (the red cross¹¹ on a white ground being the distinctive device adopted as a compliment to Switzerland, and formed by reversing the Swiss colours). Great Britain was unable to agree to the prohibition of the use of this emblem "either in time of peace or war, except to protect or to indicate the medical units, etc., protected by the Convention,"¹² or to the undertaking to legislate or propose legislation for the enforcement of this prohibition,¹³ provisions which were specially directed against the use of the red cross as a trade-mark. The objection to these provisions was not based on principle but on practical difficulties.

The signatory Powers undertook to instruct their troops in the provisions of the Convention, and to bring these provisions to the notice of the civil population,¹⁴ and to take such measures as should be necessary for the repression of pillage, and of the maltreatment of the sick and wounded; and the Convention ended with a *vœu* that if the cases and circumstances permit, the contracting Powers will submit to the Court of Arbitration at the Hague any differences which may in time of peace arise between them relative to the interpretation of the Convention. To this, however, Great Britain and Japan refused to assent.

¹ Art. 2.

² Art. 5.

4.

³

Art. 5.

⁴ Cf. p. 207, *supra*.

Arts. 6, 7, 8, 9.

⁶

Art. 10.

⁷ Art. 12. During the Great War this Article was interpreted differently by the British and German Governments; see *Parl. Papers, Misc.*, No. 8 (1915). Pp. 59-63.

⁸ Arts. 13, 14.

⁹ Art.

17.

¹⁰ Arts. 18-23.

¹¹ Turkey and Persia have not adopted this emblem, though the Convention makes it clear that it has no religious significance: the former uses the Red Crescent, and the latter the Lion and Sun.

¹² Art. 23.

¹³

Arts. 27, 28.

¹⁴

Art. 26.

An attempt was made in 1868, as we have seen,¹ to apply these Hospital principles to naval warfare, but it was not till 1899 that anything definite was done. In that year there was drawn up at the Hague a Convention on the subject, and this, with certain alterations made in 1907² (due chiefly to the intervening Geneva Convention of 1906), is now accepted with a few reservations by all the powers present at the Conference of 1907; though the Convention (No. X. of 1907) has not yet been ratified by Great Britain.

By this Convention, hospital ships under a belligerent's control and duly notified are declared free from capture and from the restrictions applicable to warships calling at neutral ports; and that whether they are equipped by the State, or by private individuals or societies whether of belligerent or neutral nationality.³ They must afford relief without distinction of nationality, and must not be used for any military purpose, or hamper the movements of the combatants; and the belligerents have the right of control and search.⁴ They are to be distinguished by being painted white, with a horizontal band of green if equipped by the State, or of red if equipped by private charity, and must fly the red cross and their national flag, with, if they are neutral, the flag of the belligerent under whose control they act.⁵ The question of protection at night presented difficulties, as any arrangement of lights would lend itself too easily to fraud,⁶ and any compulsory carrying of lights would seriously hamper the fleet which was attended by the hospital ships; so the Conference had to be content with a general instruction that hospital ships "must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain."⁷ The use of the signs, in peace or war, for any other purpose is prohibited,⁸ but to this Great Britain was unable to agree, for the same reason as was the ground of her refusal to assent to the similar provision in the Geneva Convention of 1906.⁹

Provision is made for the protection of the sick bays in the event of a fight on board a vessel¹⁰; but their inviolability, and that of hospital ships generally, is lost if they are made use of to commit acts harmful to the enemy,¹¹ but not merely by reason of the fact

¹ See p. 207, *supra*. ² Convention I I I. of 1899, and X. of 1907.

³ Arts. 1, 2 and 3. ⁴ Art. 4. ⁵ Art. 5.

⁶ See Pearce Higgins, p. 384. In the Russo-Japanese War Japan declined on this ground to accept distinctive lights.

⁷ Art. 5. ⁸ Art. 6. ⁹ See p. 242, *supra*. ¹⁰ Art. 7.

¹¹ Art. 8. Cf. the case of the *Orel* (or *A ryot*), a Russian hospital ship that was condemned in 1905 by the Japanese Prize Court for having carried able-bodied prisoners and material for military use, and for having performed reconnoitring services (Takahashi, *Int. Law applied to the Russo-Japanese War* (1908), pp. 620 *seq.*; 2 R. & J. Pr. Cas. 354). The *Kaisserie*, a Turkish

that their staff is armed or wireless telegraphy apparatus is on board.¹ Neutral vessels may be appealed to to take on board and nurse the sick and wounded, and if they do so, whether of their own accord or in response to such appeal, they are to enjoy "special protection and certain immunities,"² according to circumstances. In any case, the mere fact of having the sick and wounded on board is not to subject them to capture, though it cannot in itself confer upon them immunities for other breaches of neutrality which they may be committing or have committed.³ The staff, religious and medical, are protected as in land warfare,⁴ and soldiers, sailors and persons attached officially to the fleets or armies when wounded are to be respected and taken care of by the captors.⁵

These provisions were sadly violated during the Great War, not only in isolated cases such as the Franco-Russian hospital ship *Portugal* and the Austrian *Elektra*, but by a deliberate policy pursued by Germany. On the ground of alleged serious violations of Convention X. by Great Britain and France, Germany declared in January 1917 that she would allow no enemy hospital ship in the English Channel or parts of the North Sea or, subsequently, parts of the Mediterranean. The charges were repudiated, and the repudiation might have been checked by exercising the right of visit and search allowed by Article 4, but Germany preferred to carry out her declared policy, and many British hospital ships were sunk.⁶

Sick,
wounded, or
shipwrecked
on neutral
vessel.

Some difficulty was caused by the question of the right of a belligerent to seize wounded, sick or shipwrecked enemy subjects who have been picked up by, and are found on board, a neutral vessel. The right was denied by Great Britain in 1864, when a British yacht had picked up survivors from the *Alabama* off Cherbourg. No agreement on the point was arrived at in 1899; but in 1907 it was provided⁷ that any belligerent warship may demand the surrender of the wounded, sick or shipwrecked who are on board military hospital ships, hospital ships belonging to relief societies or private individuals, merchant ships, yachts and boats of whatever nationality. There was some difference of opinion as to whether

vessel, was condemned by the Italian Prize Court (1913) on the ground that she acted as a military transport.

Similarly, the *Ophelia*, purporting to be a German hospital ship, was condemned in 1915 by the British Prize Court, on the ground that she was not constructed, adapted or used for the special and sole purpose of affording aid to the sick and wounded, and that she was adapted and used as a signalling ship for military purposes ((1916), 2 A. C. 206).

¹ Art. 8. The Privy Council held in *The Ophelia*, *op. cit.*, that the permission to have wireless telegraphy apparatus on board does not justify sending messages by a secret code; and if such messages are sent, a record of them should be kept to prove their innocent character.

² Art. 9.

³ Art.

⁴ 7.

⁵ Art.

⁶ 10.

⁷ 5.

Art. 11.

⁶ See Oppenheim, ii. § 205a.

⁷ Art. 12. See Pearce Higgins, pp. 387 *seq.*

this was a new rule or a mere restatement of an old rule, France claiming (in opposition to the view of the British Government) that the right flowed naturally from the right of visit and search and capture, and that, strictly speaking, the mere fact of having enemy combatants on board rendered a neutral vessel liable to confiscation for "unneutral service." Great Britain did not accept the new rule in its entirety, but subject to the reservation that it should apply "only to the case of combatants rescued during or after a naval engagement in which they have taken part"¹; thereby maintaining the objection to the theory that it is "unneutral service" to pick up men in distress, while conceding within limits the reasonableness of the new rule.

It was also provided that the wounded, sick or shipwrecked picked up by a neutral warship must be so far as possible prevented from taking part in further operations of war.² Japan, in 1904, had claimed their surrender in such circumstances.³ The new rule treats them as they are treated when they are landed on neutral territory;⁴ It is to be noted, however, that when landed on neutral territory by a neutral merchant vessel, which has not met or given any undertaking to an enemy warship, they are probably not subject to any such restriction on their future conduct.⁵ If the word "landed" (*debarque*) in the foregoing provision be interpreted strictly, it is by no means impossible to hold that men who swim to the neutral shore or escape from a wreck are excluded from the provision.⁶ Further, the shipwrecked, wounded or sick when captured are prisoners of war; and provision is made for a proper search for them after an engagement⁷ and the exchange of information with regard to them between the belligerents,⁸ as in the case of war on land, and for the instruction of the forces in, and the notification to the public of, the terms of the Convention.⁹

¹ *Parl. Papers, Misc.*, No. 6 (1908), p. 148.

² Art. 13. In accordance with this provision, the crew of the British submarine *E 17*, who were rescued by a Dutch warship, were interned in Holland.

Similarly, the survivors of the German warship *Cap Trafalgar* (1914), landed in the Argentine by a German auxiliary collier, and those of the British warship *India* (1915), landed in Norway by a British armed trawler, were interned.

³ Pearce Higgins, p. 390.

⁴

Art. 15.

⁵ The survivors of the British warships *Cressy*, *Hogue* and *Aboukir* (1914), and of the German warship *Elbing* (1916), who were landed in Holland by neutral merchantmen, were released.

⁶ Practice during the Great War leaves the interpretation doubtful. Survivors of the British warships *India* and *Lord Alverstone* landed in Norway by their own boats were interned. In similar circumstances Spain detained the survivors of the British transport *Woodfield* but released a German prize crew which reached Spain in one of the prize vessel's boats. Greece released the survivors of the *Ramazan*, a British troopship. Oppenheim, ii. § 348.

⁷ Art. 16.

Art. 17.

Art. 20.

Hospital
ships and
port dues.

At a Conference at the Hague, in 1904,¹ a number of Powers (including Germany, Austria, the United States, Japan, Russia, France, Spain and Italy) agreed to exempt hospital ships in time of war from all State taxes and dues levied in their ports. This Convention was accepted by twenty-five States; but Great Britain, though favourably disposed, declined to take part in the Conference, owing to the fact that these dues are levied by various authorities in her ports and legislation would be necessary to carry out the new provisions.

Flags of
truce.

The Declaration of Brussels and the Hague Conventions set out briefly the undisputed law with regard to flags of truce, capitulations and armistices.² The inviolability of the bearer of the flag and of those who accompany him is guaranteed,³ but the enemy commander is not bound to receive him in all circumstances⁴ or (and this, though not expressly stated in the Convention, is hardly open to dispute) to cease fire at once, though the bearer must not be intentionally injured. All necessary precautions may be taken to prevent the bearer from obtaining information under the protection of the flag, and he may be temporarily detained if guilty of such a breach of confidence⁵; and the inviolability is lost on positive and incontestable proof that he has taken advantage of his privilege to provoke or commit an act of treachery.⁶ In this latter case it would appear that he is liable to be treated as a spy, and a distinction is drawn between treachery and obtaining information, which may in practice be somewhat difficult to observe. But it is, no doubt, wise to provide that only the strictest proof of something more than a mere attempt to obtain information shall justify the severest penalty; for only thus can the position of the flag-bearer be removed from the region of hasty misunderstandings and hasty reprisals.

Capitula-
tions.

Of capitulations or agreements for conditional surrender, all that was laid down was that they must take into account the rules of military honour and be scrupulously observed.⁷ Their conditions and circumstances may be infinitely varied, and points may arise as to the authority of those who enter into them, according to the nature of the terms granted and accepted. The case of the capitulation of El Arish in 1800⁸ illustrates the necessity, in certain cases, for ratification by the State and by a superior commander.

Armistices
or truces.

Similarly, on the question of armistices or truces, only provisions of a very vague character were agreed upon. An armistice is described as suspending military operations by mutual agreement between the belligerent parties, and if its duration is not defined, the belligerents

¹ Pearce Higgins, p. 392.

³ Art. 32.

⁶ Art. 34.

²

Art. 35.

⁷

See Convention IV. of 1907.

33.

Art. 33.

⁸

Hall, 8th ed. p. 667.

may resume operations at any time, provided always that the enemy is warned within the time agreed upon in accordance with the terms of the armistice.¹ An armistice may be general (suspending the entire military operations between the parties) or local (suspending the operations between certain portions of their armies and within a fixed area²); it must be officially notified in good time³; the relations with and between the populations in the theatre of war will be regulated by the terms of the armistice⁴; and any serious violation of the armistice gives the other party the right of denouncing it, and even, in case of urgency, of resuming hostilities at once,⁵ unless the breach is by individuals acting on their own initiative, in which case the injured party has only the right of demanding the punishment of the offenders and compensation.⁶ The more important question of the things which may be done during an armistice is left untouched. In most cases, no doubt, this will be settled by the terms of the agreement⁷; and in default of agreement the principle to be applied will be the maintenance of the *status quo*, that is to say, neither belligerent can strengthen his position in any way which might have been prevented by the other had military operations continued.⁸ The supply of provisions to a besieged place is usually, and should always be, dealt with by special stipulation; but the principle seems reasonable that such supply as is necessary for immediate consumption does not strengthen the besieged, but merely maintains them in their existing condition. This view, however, has not always been taken. Germany, for instance, in 1870, declined to act upon it when an armistice was granted to Paris; and any commander of a force which has nearly reduced the enemy by starvation may well contend that to let in any provisions at all is to supply the strength for a more prolonged resistance.

The authority to conclude armistices depends upon their purpose and extent, local commanders having power only in their own districts, and the authority of the State being necessary for a general armistice.⁹

¹ Art. 36.

² Art.

37.

³ Art.

38.

⁴ Art. 39. The English translation is so expressed; but the original French is "les rapports . . . avec les populations et entre elles," which seems to mean "the relations with the populations and between them (the belligerents)." The point is, however, of little importance.

⁵ Art. 40.

Art.

41.

Hostilities in the war of 1914-18 were brought to a close by armistices at different dates, the last and most important being the armistice agreement between Germany and the Allied Powers on 11 November, 1918. It was so framed as to amount to a virtual surrender on Germany's part, and compliance with its terms rendered any resumption of hostilities by her a naval and military impossibility. See A. J. I. L., xiii. (1919). Supplement, and Cmd. 9212.

⁸ See Hall, 8th ed., pp. 658-61.

⁹ Cf. Grotius, lib. iii. c. 22, § 8; Vattel, liv. iii. chap. 16, §§ 233-8.

Cartels.

Arrangements between belligerents with regard to such matters as the treatment of flags of truce, intercommunication during the war, whether by post, telegraph or otherwise, the treatment of the wounded, exchange of prisoners and the like, are usually contained in Conventions known as "cartels"; and "cartel ships" are ships employed in the carriage of exchanged prisoners and subject to special regulations ensuring that they shall be used in good faith for that object alone. Hence, if they engage in commercial traffic, carry dispatches or passengers, perform any hostile act, or abuse their position in any other way, they become liable to capture.¹ They are ordinarily immune, not only whilst carrying prisoners, but also whilst they are on their return voyage.²

¹ *The Venus* (1814), 4 C. Rob. 355; *La Rosine* (1800), 2 C. Rob. 372.

² *The Daifjie* (1800), 3 C. Rob. 139. Cf. *La Gloire* (1804), 5 C. Rob. 198.

CHAPTER IV

ENEMY PROPERTY ON LAND AND OCCUPATION OF ENEMY TERRITORY

MANY exceptions to the old rule, that every species of enemy property may be appropriated at all times and in all places, have been admitted in the more tolerant practice of modern warfare. The principle underlying such exemptions is not always logically applied, but it has produced practical results of great importance. It is well stated by Hall in the following passage¹: "Property can be appropriated, of which immediate use can be made for warlike purposes by the belligerent seizing it, or which, if it reached his enemy, would strengthen the latter either directly or indirectly; but, on the other hand, property not so capable of immediate or direct use, or so capable of strengthening the enemy, is insusceptible of appropriation." Seizable property.

By the Hague Conventions² it was laid down (so far as land warfare is concerned) that private property cannot be confiscated,³ and that pillage is expressly (*formellement*) forbidden.⁴ But all public movable property belonging to the enemy State is subject to capture, some kinds being liable to confiscation, and others (even if they belong to private persons) merely to sequestration:

" An army of occupation shall only take possession of cash, funds, and realisable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally all movable property belonging to the State which may be used for military operations. Apart from cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and in general all kinds of war material, may be seized, even if they belong to private individuals, but they must be restored and indemnities for them will be arranged at the conclusion of peace." ⁵

¹ 7th ed., p. 441.

² Convention IV. of 1907, amending Convention I I . of 1899.

³ Art. 46.

⁴ Art.

⁴⁷

• Art. 53.

The words "realisable securities" (*valeurs exigibles*) are purposely vague¹—in German they have been translated as "eintreibbare Forderungen," the broad meaning of which is suable claims. They may mean either documents payable to bearer, or documents payable to order, or constituting merely the evidence of contract debts. The former may undoubtedly be seized and realised; as to the latter there is a difference of opinion which the Conference did nothing to settle. But according to the better view, they can only be realised by an enemy into whose hands they have fallen, when his possessory claim has been converted by conquest into a definitively proprietary right.²

Exemptions. A very humane relaxation, and one universally recognised in modern warfare, is contained in the following provision:

"The property of local authorities, as well as that of institutions dedicated to public worship, charity, education, and to science and art, even when State property, shall be treated as private property. Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of proceedings."³

There can be little doubt that the public feeling of to-day would view with strong resentment any attempt to injure or remove valuable works of art, genius or taste belonging to an enemy. France in her revolutionary wars enriched the galleries of Paris by the Corinthian Horses, the Dying Gladiator, the Apollo Belvedere, the Venus and the Laocoon. In 1815, all pictures and other monuments of art which had been forcibly seized by Napoleon, or acquired by treaty, were returned to the places from which they had been respectively taken. The grounds on which such restitution was insisted on were explained by a Note delivered by the British minister, Lord Castlereagh, to the ministers of the other Allied Powers at Paris, on 11 September, 1815.⁴

It was contended that this act of expiatory justice was indefensible in view of Article I I . of the military convention of 3 July, 1815, under which the Allied armies had entered Paris. That article was as follows: "Les propriétés publiques, à l'exception de celles qui ont rapport à la guerre, soit qu'elles appartiennent au Gouvernement, soit qu'elles dependent de l'autorité municipale, seront respectées et les Puissances alliées n'interviendront en aucune manière dans leur administration et gestion."⁵ The surrounding circumstances,

¹ Holland, *The Laws of War on Land*, p. 57; Westlake, part ii., p. 113.

² Heffter, § 134; Phillimore, part. xii. chap. iv.; Hall, 8th ed. p. 503;

Westlake, part ii., pp. 113, 114.

³ Art. 56.

⁴ De Martens, *Nouveau Recueil*, vol. ii., p. 632.

⁵ Quoted by Halleck, 4th ed. vol. ii., pp. 80, 81.

however, bear out Wellington's reply: " I positively deny that this article referred at all to the museums or galleries of pictures." The conduct of the Allies was also strongly criticised by Sir Samuel Romilly¹ in the House of Commons on 20 February, 1816. He relied particularly upon the contention that many of the acts of restitution were wholly irrational in their effects. Thus Venice when plundered was Italian; in 1816, pursuant to the Treaty of Campo Formio, she had become Austrian. The answer to this objection is that the restitution was made not to the political authority, but to the locality. Whatever changes may take place in the political circumstances of the kingdom of Greece, every one will desire the preservation in their present position of the remains of the Acropolis.²

The immunities stated above have been hardly and gradually won, and it would probably be still held that they must give way to real belligerent necessity. In 1870, in the hope of bringing civilian pressure to bear upon the military authorities, the German forces bombarded Strasburg and destroyed the library, picture gallery, and part of the cathedral. The step, perhaps, was an extreme one, but behind the velvet scabbard of regulatory convention the presence of the sword is always discernible, and Lord Pauncefote, at the Peace Conference in 1899, was content to qualify the articles dealing with the conduct of war by the reservation, " saving the necessities of war,"³ and, as we have seen, the rules settled by the two Hague Conferences were purposely stated in the form of instructions for the guidance of troops, rather than of positive and obligatory enactment.

Destruction
of protected
buildings.

The question of submarine cables presents special features.⁴ It was raised at the Hague Conference of 1899, but without any result; it formed the subject of a series of rules drawn up by the Institute of International Law in 1902; and at the Hague in 1907, one Article was agreed upon, affecting only such cables in so far as they come within the power of an army occupying enemy territory.

Submarine
cables.

Such a cable may connect two neutral territories. In that case

¹ *Life of Romilly*, edited by his sons, vol. ii., p. 404.

² During the Great War Germany and Austria-Hungary followed the previous example of France and appropriated works of art from enemy territories occupied by them. Under the provisions of the treaties of peace (e.g. Treaty of Versailles, Art. 245) they were restored. Further to extend the parallel, Germany was obliged to return works of art taken from France in the war of 1870.

³ "This reservation, Sir J. Pauncefote desired to point out, must be implicitly applied to any and to every code or compact by which it may be attempted to regulate the infinite variety of circumstances and conditions which arise in war" (Memorandum of Sir J. Ardagh to Lord Salisbury, 5 July, 1899).

⁴ On submarine cables generally, see Oppenheim, ii. § 214, and the references there given.

it is beyond doubt inviolable.¹ It may connect the belligerent territories, or two parts of the territory of one belligerent. In that case it may be cut anywhere except in neutral territorial waters.² It may connect belligerent with neutral territory. This may, on principle, be cut in the territorial waters, or in the territory, of the belligerent, because, in the words of Westlake, "property durably affixed to the soil must share the fate of the soil."³ But the Hague Conference in 1907 made a concession to neutral interests by laying it down that such cables should not be seized or destroyed by an occupying force except in the case of absolute necessity, and that they must be restored, and indemnities for them arranged, at the conclusion of peace.⁴ Occupying armies, however, are likely to see an absolute necessity for seizing if not destroying the land ends of such cables whenever they can; and in any case, if the occupation be effective, they will have them under complete control. There is, in fact, no reason on principle why they should not be treated, as they are in this Article, on a par with the land telegraphs of the country.

But beyond this, there is the question of the right to cut such cables between neutral and belligerent territory in the open sea. A strong difference of opinion, which has never been settled, disclosed itself during the discussion of the subject by the Institute of International Law; which passed by a majority the rule that such a cable "cannot be cut in the open sea unless there is an effective blockade, and subject to the duty of re-establishing it within the shortest possible time."⁵ That it cannot be cut in neutral waters was agreed; and it is extremely doubtful whether even a blockade will be admitted to justify the cutting of it in the open sea. Such an operation may rightly be compared with the sinking of a neutral mail-boat, without visit or search, because it may conceivably be carrying hostile dispatches.⁶ But these considerations did not deter the belligerents in the Great War. Hostilities had but just begun when almost every cable connecting with Germany was cut by, and in some cases diverted to the use of, the Allied Powers. At the Peace Conference of 1919 the legality of this conduct was discussed and it was argued that enemy cables should be included in the range of property liable to capture at sea. No agreement was reached, but Germany by the terms of the Treaty of Versailles renounced all interest in the "captured" cables. Practice seems to decide "this absolutely unsettled branch of

¹ Westlake, part ii., p. 116. Rule 1 of the Institute of International Law, adopted in 1902 (*Annuaire*, vol. xix., p. 331; and set out in Pearce Higgins, p. 271, n.).

² *Ibid.*; Rule 2 of the Institute of International Law.

³ *Ibid.*, p. 117.

⁴ Art. 54.

⁵ Westlake, *ibid.*, p. 117. Rule 3 of the Institute of International Law.

⁶ *Ibid.*, p. 118.

law"¹ in favour of the right to cut, except in neutral territorial waters.

According to the earlier custom of warfare, the invasion of a belligerent's territory by the enemy's force was often followed immediately by pillage or destruction. Grotius points out that in his day the practice of plunder and confiscation on the part of an invader was considered legitimate; but none the less the opinion was held that no more should be taken from the invaded population than was absolutely essential for the occupying army. In the eighteenth century, commanders not infrequently adopted various disciplinary measures for the purpose of restraining the behaviour of their troops; and sometimes a more regularised system of requisitioning was substituted for lawless looting. But practices varied with the spirit of commanders and the discipline of armies; and self-help and indiscriminate destruction never fell into disuse. It was held that the military occupation of the enemy's territory *ipso facto* conferred all the rights of sovereignty on the invader. Writers, however, like Vattel, refused to accept this doctrine, and contended that occupation in itself gave only a provisional and limited status, and could not become territorial appropriation until the occupying belligerent had completely ousted the enemy from the country in question and had definitively acquired it by all the acts and formalities of conquest or by an express treaty of cession.² This principle came to be more and more insisted upon, and with the establishment of standing armies and the consequent improvement of military law and discipline the progressive movement was considerably facilitated. About the middle of the nineteenth century, Governments began to issue written instructions to their armies; and soon afterwards international conferences began to meet for the purpose of laying down certain rules by agreement.

Thus, the rights of an army in occupation of enemy territory were considered in the draft Articles of the Declaration of Brussels (1874), and more particularly at the Hague Conferences, 1899 and 1907; and a number of rules were agreed upon, some of which have been already dealt with under the heading of "Seizable Property."

Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established and in a position to assert itself.³ In other words, occupation, like blockade, to be valid must be effective; and the old doctrine that it is equivalent to an assumption of complete sovereignty has given place to the doctrine that any rights possessed by an invader are only a part of his right

¹ Oppenheim, ii. § 214, q.v. ² *Droit des gens*, liv. iii. §§ 197. 198.

³ Art. 42 of Convention IV. of 1907.

to do what is necessary to carry the war to a successful conclusion.¹ Under the old practice it was considered permissible to exact from the inhabitants an oath of allegiance, and to press them into the service of the invading army. But as the rights of occupation depend merely on the military exigencies of the invader, they are only provisional; the national character of the locality is not legally changed, and consequently the inhabitants do not owe the invader even temporary allegiance. Hence, to extract an oath of allegiance from them or compel them to perform military duties of any kind is unlawful. As to what is meant by the requirement that the occupation must be effective, there cannot but be some doubt²; but the new rule may at any rate be taken as an expression of disapproval of the doctrine of "presumptive occupation" prevalent during the Franco-German War, when Germany claimed to be in occupation of whole cantons, though doing little more than placarding a notice to that effect. The requirement does not mean that every square mile must be secured by vedettes, but that, from a military point of view, taking into consideration the nature of the country and the degree of mobility attainable, the control of the occupying force must be reasonably complete and diffusive.

The occupant's
authority and martial
law.

The authority of the legitimate power having *de facto* passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, so far as possible, public order and safety (*l'ordre et la vie publics*) while respecting, unless absolutely prevented, the laws in force in the country.³ It is to be noted, however, that the expression "public order and safety" scarcely represents the French original; for the words "*l'ordre et la vie publics*" imply also the entire social and commercial life of the community. If the occupant departs from the existing territorial law and from the prevailing rights and obligations of the citizens—and here Article 23 (*h*) already mentioned is of special importance—it will be for him to prove, in case a question subsequently arises, that his departure was imperatively demanded by military exigencies. Moreover, whatever judicial and administrative modifications he makes must be compatible with the rules of international law and with the dictates of equity and justice—the Hague Conventions frequently stipulate that in the absence of clear written or customary law the principles of equity and justice shall be observed. The law introduced by the

¹ Hall, 8th ed., pp. 553 seq. The decisions of courts both here and abroad are in accordance with these principles: cf. *The Fama* (1804), 5 C. Rob. 115; *The Gerasimo* (1857), 11 Moo. P. C. 88; *Villaseque's Case* (1818), Ortolan, i. 324. Somewhat different views, however, were adopted in certain American cases, e.g. *U.S. v. Rice* (1819), 4 Wheaton, 246; *Fleming v. Page* (1850), 9 Howard, 615.

² *Ibid.*, pp. 572 seq.

p3

Art. 43.

occupant in addition to, or as a substitute for, the local law, for the purpose of preserving order and ensuring his safety, constitutes his martial law. This is to be distinguished from the martial law proclaimed by the Sovereign (on the Continent the declaration is of a "state of siege" or "state of war") when a country is threatened with invasion or insurrection, and also from military law; these two kinds of law being branches of municipal law proper.¹ But martial law in the field or in occupied territory, though it may be composed of municipal dispositions, must not conflict with the established law of war and other provisions of the law of nations. Subject to this restriction, we may define it, in the words of an American judicial pronouncement, thus: "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is under his supreme control."² The Duke of Wellington described it in the House of Lords on one occasion³ as being "neither more nor less than the will of the general who commands the army." But he added that it is incumbent on the general to lay down the regulations and limits in conformity with which his will is to be carried out. And, as has been pointed out, these regulations and limits must be in harmony with the existing rules of international law. Hence the introduction and administration of martial law can never justify military oppression on the part of the occupant. The stringency of such law will depend on the peculiar circumstances of each case,⁴ e.g. on the degree, kind and imminence of danger to which the occupant is exposed, and on the conduct of the local inhabitants; but in no case is a commander entitled to disregard all considerations of honour and humanity, fairness and justice.⁵

Offences against this martial law are sometimes described as

¹ As to military law and martial law, see Hall, 8th ed., p. 560, n.

² *U.S. v. Diekelman* (1875), 92 U.S. 520.

³ Hansard, 3rd series, vol. cxv., p. 880.

⁴ It is in the light of this statement of the law that the conditions imposed by the Germans in 1914-18 on the inhabitants of the occupied territories of Belgium and France, and by the Russians in 1916 in Galicia, deserve to be considered. At the hands of international lawyers they cannot now be dismissed in a sweeping phrase of all-embracing condemnation. Certain fairly clear instances, such as the compulsory conversion of the University of Ghent into a Flemish institution, and Russian interference with the curriculum of the schools in Lemberg, were unlawful; but for an exhaustive list of the offences alleged to have been committed by Germany, reference should be made to Nys, *L'Occupation de guerre* (1919), which deals with Belgium, and to *he Journal officiel*, 18 April, 1917, and 23 November, 1918, which deal with the occupied portions of France. The German case is set out in *Zeitschrift für Internationales Recht*, xxviii. (1919-20), pp. 287 *seq.* An indictment against the Russians in Galicia will be found *ibid.*, xxvi. (1916), pp. 427 *seq.* See Garner, *International Law and the World War*, ii. chap. xxv.; and Oppenheim, ii. §§ 169-72 and notes thereto.

⁵ Cf. Bluntschli, *Völkerrecht*, §§ 542, 543, 546, 548.

"war crimes"—"war treason" ("Kriegsverrath") is the favourite word of the Germans. These offences are usually specified in the proclamations issued by the occupant.¹

Under recent practice the occupant has not infrequently retained the services of the local judges and public functionaries (other than political officials) for the general judicial and administrative work of the locality, in so far as it did not clash with his own interests for the time being. But he is not bound to retain them, nor is he entitled to compel them to remain in their posts. Thus, in the Franco-German War, 1870-1, the French municipal officials in the localities occupied by the Germans were permitted to retain their office if they were willing to do so, but the Government officials refused to remain in office. Similarly, in the Great War, the German occupying commanders in Belgium usually allowed local authorities and judges to continue to exercise their functions.² The courts delivered and executed judgments in the name of the King of the Belgians until 1918, when the Belgian judges, as a protest against the removal of some of their number, suspended their sittings and were replaced by Germans.

As a rule, the occupant's acts and the consequences of the law administered by him are legally binding, and may not, if affecting private persons and vested rights, be abrogated by the succeeding Government, i.e. the Government that manages eventually to expel the occupant by force, or replaces him at the treaty of peace. But this rule does not necessarily apply to acts that exceed the occupant's powers (e.g. alienation of the domains of the State or the Sovereign), to sentences for "war treason" and "war crimes," to acts of a political character, and to those that operate beyond the period of occupation. For all unlawful acts performed by the occupant the succeeding Government is entitled to reparation.

Compulsory information.

The various rules expressly laid down in the Hague Convention are in harmony with the above general principles.

Any compulsion of the population of occupied territory to furnish information about the army of the other belligerent or about his means of defence is forbidden.³ This rule is an extension of Article 23 (i), which prohibited the compulsion of enemy subjects to participate in the "operations of war" against their own country.

¹ For examples in the Anglo-Boer War, see *Papers Relative to Martial Law in South Africa* (Cd. 981); in the Russo-Japanese War, see Ariga, *op. cit.*, pp. 379 seq.; in the Great War, see references in note 4, *supra*, p. 255.

² After the British occupation of the German island of Samoa in August 1915, the existing officials were given the opportunity to remain at their posts, and most of them did: *Parl. Papers* (1915), Cd. 7972.

³ Art. 44. This Article has already been dealt with in its relation to Art. 23. See *supra*, p. 224.

It has been doubted¹ whether the employment of forced guides is illegitimate under these provisions. But to give information about the position of the enemy and his vulnerable places is surely of no less consequence than to level a gun at him; it obviously comes within the meaning of "operations of war"; therefore to compel local inhabitants to act as guides to the occupying army is unlawful.

Any pressure on the population of occupied territory to take the oath to the hostile power is prohibited.² But this rule does not forbid an occupant to demand an oath of fidelity—not an oath of allegiance in the proper sense of the term—from such officials as are willing to remain in office, provided the oath relates to the period of effective occupation and to duties which they may be rightfully called upon to fulfil. The administration of an oath of neutrality, however, is not illegal, inasmuch as it would not thrust new obligations on the inhabitants during the occupation. An oath of this character was administered in the Anglo-Boer War by both belligerents.³

Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property may not be confiscated.⁴ But this prohibition must be taken to be without prejudice to the right to confiscate by way of punishment or under stress of military necessity⁵: "by the prohibition of confiscation it is only meant that private property cannot by any regulation of the invader be taken from its owner for no other reason than that he is an enemy." Pillage is formally prohibited.⁶

If, in the territory occupied, the occupant collects the taxes, dues and tolls imposed for the benefit of the State, he shall do it as far as possible in accordance with the rules in existence and the assessment in force, and will, in consequence, be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.⁷ If, besides the taxes mentioned in the preceding Article, the occupant levies other money contributions in the occupied territory, this can only be for the needs of the army or the administration of such territory,⁸

¹ Cf. Holland, *Laws of War on Land* (1908), p. 53. ² Art. 45.

³ Cf. *Proclamations of F.M. Lord Roberts* (Cd. 426), p. 23; Spaight, *op. cit.* p. 372.

⁴ Art. 46. ⁵ Westlake, part ii., p. 103.

⁶ Art. 47. Oppenheim (ii. § 143) emphasises that the rules in Arts. 46 and 47 must be subject to certain exceptions demanded and justified by the necessities of war. "Men and horses must be fed; men must protect themselves against the weather." But immediate military necessity could not justify the Germans in confiscating Belgian cattle and machinery for removal to Germany, nor the Russians in taking similar steps with Austrian property in Lemberg (*ibid.*, § 143a). By Art. 244 of the Treaty of Versailles Germany undertakes to make specific restitution, where possible, or otherwise to pay compensation.

Art. 48.

Art. 49.

It is clear that these provisions do not confer an express right on the occupant to collect the taxes, nor do they prohibit him from so doing. They only say that if he resolves to collect them, he must observe the restrictions specified. The words "imposed for the benefit of the State" exclude imposts incidental to local government, which, however, the occupying commander may superintend in order to ensure that they are not utilised for hostile purposes. If any surplus remains after the due appropriation of the national revenue, it may be used for his own essential requirements. He may not impose new taxes or demand payment before it is due; but he need not adopt the previously existing mode of collection, if the officials of the former Government have fled or refuse to serve. If the ordinary national revenue is inadequate, he may resort to contributions and requisitions.

General
penalty.

No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.¹

Reprisals in
the nature of
general
penalty.

Much discussion has centred on this provision in its relation to the general law of reprisals. By it, offences by individuals against an occupying power fall into two categories: those from which a responsibility on the part of the community may be presumed and for which a general penalty may be inflicted, and those which give rise to no such presumption and for which the occupant can inflict no punishment except on the individuals concerned, if he can lay hands on them. Reprisals for illegal warlike acts by an occupant of hostile territory would usually be in the nature of general penalties, and it has been argued that the effect of the Article is to exclude the right to resort to reprisals for offences falling under the second category. Is it reasonable to assume that the military powers who signed the Convention intended to limit their power of punishing, for offences against their forces and their authority committed by individuals in occupied territory, to such of the individuals as their own police work, operating among a hostile population, might succeed in tracing? It seems safer to conclude with Oppenheim that the provision "does not at all prevent reprisals by an occupant in case acts of illegitimate warfare are committed by enemy individuals not belonging to the armed forces, although in practice innocent individuals are thereby punished for illegal acts for which they are neither legally nor morally responsible."²

No contribution shall be collected except under a written order

¹ Art. 50.

² Oppenheim, ii. § 170. For a diametrically opposite view, see Lawrence. 7th ed., pp. 427-30. Collective fines were frequently imposed by the Germans during their occupation of Belgium. Louvain was burnt by them as a reprisal because unknown individuals, it was alleged, fired on the German troops.

and on the responsibility of a commander-in-chief. This collection shall only take place, as far as possible, in accordance with the rules in existence, and the assessment of taxes in force. For every contribution a receipt shall be given to the payer.¹

Neither requisitions in kind nor services may be demanded from communes or inhabitants, except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the commander in the locality occupied. The supplies in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged and the payment of the amount due shall be made as soon as possible.²

The occupying State shall only be regarded as administrator and usufructuary of the public buildings, real property, forests and agricultural works belonging to the hostile State, and situated in the occupied territory. It must protect the capital of these properties, and administer it according to the rules of usufruct.³

An important point to be noted is the distinction maintained between taxes, contributions, fines and requisitions. The right of the occupant to levy the country's taxes is not admitted, though it is assumed that he will probably do so, and these taxes must be used for the expenses of local administration. Anything taken over and above the amount of the existing taxes is described as a "contribution," and must be proportionate to the needs of the army if not actually required for administration of the country; in other words, the invaded territory must not be made to pay indefinitely large sums to provide the invader with means for carrying on the war. This, however, is not to affect the power to inflict fines for offences, if the persons fined can reasonably be held responsible for the offence. Finally, requisitions in kind and services may take the place of contributions, but they must be limited to the necessities of the army of occupation and the resources of the locality; and it would seem to follow that this latter limitation also applies to contributions. The question of payment for these requisitions and services is in effect left to the invader, who will probably decide it on grounds of policy. It cannot be laid down as a rule either of principle or practice that either he, or the Government of the invaded country, is under any liability to pay; and the giving of a receipt is nothing more than a record of the transaction which will furnish a basis of calculation, whatever the ultimate settlement may be.⁴

¹ Art. 51.

² Art.

52.

³

Art. 55.

⁴ See Westlake, part i i, pp. 107 seq.; Holland, *The Laws of War on Land*,

Ransom.

From this recognition of the right to contributions, requisitions and services, it would logically follow that a "ransom" may be exacted from a locality as the price of immunity from invasion. On this point the Hague Conventions are silent; but the right seems to be established, though it has been rarely exercised, and presumably the ransom must bear some proportion to the loss which such contributions and the like would inflict upon the district.

Law and policy.

The degree in which the strict rights conferred by military occupation are enforced may be determined in practice by political considerations. When the war is one of conquest, it is important to the belligerent that he should not exasperate to desperation a people over whom he aspires to rule peacefully; if, on the other hand, the occupation is certain to be temporary, greater indifference may be expected to the resentment of the inhabitants.

Devastation.

It has been much discussed how far a belligerent is entitled to lay waste the territory of his enemy. It need hardly be said that devastation was a familiar incident of mediaeval warfare. It was felt, however, at a relatively early period that the practice could only be justified by the strictest military necessity. Thus Evelyn in his *Memoirs*¹ says in 1694: "Lord Berkeley burnt Dieppe and Havre in revenge for the defeat at Brest. This manner of levying war was begun by the French, and is exceedingly ruinous, especially falling on the poorer people, and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge." Nearly a century later Vattel speaks with much greater certainty. Such acts are "dreadful extremities when a nation is driven to them, barbarous and unspeakable excesses when done without necessity."² It must be observed that even now occasions might easily arise sufficient to excuse devastation. The act of de Vendôme in cutting the dykes and flooding the country from Ghent to Ostend in order to cut Marlborough's communications was clearly within his belligerent rights.

The permissibility of a particular act may be determined by reference to two admitted principles which Professor Westlake³ has well stated for a more general purpose:

(1) Everything is prohibited which is not of a nature to contribute to success in the military operation concerned. (2) Even when a thing does not fall under any absolute prohibition, it may only be done in the circumstances, and in the measure, in which it may reasonably be expected to contribute to the success of the (military operation) concerned.

¹ iii. 335, cited by Hall, 8th ed., p. 643, n.

² Liv. iii. chap. ix. § 167.

³ *Chapters on the Principles of International Law*, p. 236.

At the Hague¹ the general prohibition of the destruction of enemy property was qualified by the words "unless such destruction be imperatively demanded by the necessities of war." The German Manual expresses the rule by stating that no damage must be inflicted, not even the most trivial, that is not demanded by military necessity; and every damage, even the greatest, is permissible if it be demanded by belligerent operations or if it is a consequence of the due prosecution thereof.² In any case, however, there can be no doubt that to destroy for the mere purpose of inflicting pecuniary loss is illegitimate; allegations of military necessity can never justify what is in fact gratuitous ravage. "Necessity must be rationally construed. It must not be potential or prospective; it must, in order to operate as a justification, be direct and immediate."³

Reprisals and retorsion we have already dealt with in so far as Reprisals. they are pre-belligerent acts; but they may also be employed by way of punishment for breaches of the rules of war. The only reference to punishment in the Hague Conventions is, as we have seen,⁴ in the words "a belligerent party which violates the provisions of the said regulations, shall, if the case demands, be liable to make compensation"; and as no reference is made to reprisals, we are thrown back upon the general principle which applies to the whole of these regulations that "in cases not included in the Regulations, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience."⁵

Reprisals and retorsion, being as a rule the punishment of one man for the offence of another, are justly regarded as only a last resort in cases of absolute necessity.⁶ They may be carried out by a breach of the same rule as the offender has broken, or of a different rule⁷; the punishment must be proportionate to the offence; and in general they should not be inconsistent with the fundamental principles of justice and humanity.⁸ As Professor Westlake says, they

¹ Art. 23 (g).

² This interpretation of the rule would justify the extreme measures of devastation over part of Northern France in March 1917 whereby the Germans effectively covered their retreat to the "Hindenburg Line" and retarded the subsequent Allied advance. The measures then taken have been condemned by recent writers, but "the measure of permissible devastation is to be found in the strict necessities of war" (Hall, 8th ed., p. 645), and the necessities of trench warfare are not those of open warfare.

³ Wheaton, 5th ed., p. 506.

⁴ See p. 197, Art. 3 of Convention IV. of 1907.

⁵ Preamble to Convention I. of 1899, and IV. of 1907.

⁶ Hall, 8th ed., p. 496.

⁷ Westlake, part ii., pp. 123 seq.

⁸ Cf. the rules of the Institute of International Law drawn up at Oxford, 1880, Arts. 85, 86: in *Annuaire*, vol. v., p. 174.

must be justified as punishment only, and not on any such ground as that the breach by one party of the laws of war releases the other from his obligations.¹

Hostages.

The practice of taking hostages is another point not dealt with in the Hague Conventions, and it cannot therefore be treated as forbidden. They have been in practice seized either to ensure the payment of contributions and the like, or to secure the maintenance of order. It is agreed in principle that their lives are inviolable; though this did not prevent the Germans in 1870 (and, for a short time, the British in South Africa²) from putting them on trains, in order to discourage the habit of train or bridge wrecking.³ But this practice is virtually as unjustifiable as compelling inhabitants to serve as a shield to a marching column or to the firing line. Moreover, it is important to note that members of belligerent forces, even if proceeding singly, may lawfully wreck the enemy's trains and destroy bridges; accordingly arrested hostages would in such cases be made to suffer for the permissible acts of combatants. Though no specific provisions as to hostages are contained in written instruments, there can be no doubt that their arbitrary arrest, and the irrational presumption of vicarious responsibility as well as recourse to general terrorism, are contrary to "the laws of humanity and the requirements of the public conscience" that are often emphasised in the Hague Conventions.

¹ Westlake, p. 126. For examples of reprisals during the Great War, see *supra*, p. 235, and *infra*, p. 394. See also *The Stigstad* (1919), A. C. 279.

² Cf. *Parl. Papers, Proclamations issued by F.M. Lord Roberts in South Africa* (Cd. 426), 1900, p. 11.

³ Hall, 8th ed., pp. 565, 566.

CHAPTER V

ENEMY PROPERTY ON THE SEA

THE private property of the enemy taken at sea is generally liable to capture and confiscation. Continental and American writers have long sought to extend the comparative immunities of enemy property on land to this case also. "Il est à désirer," said Napoleon, "qu'un temps vienne, où les mêmes idées libérées s'étendent sur la guerre de mer et que les armées navales de deux puissances puissent se battre sans donner lieu à la confiscation des navires marchands, et sans faire constituer prisonniers de guerre de simples matelots de commerce."¹ The United States in 1823 urged the adoption of the principle of exemption, and in 1856 offered to give up privateering if the following provision were added to the Declaration of Paris: "And the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband." Austria and Italy acted on this principle during their war in 1866; and Prussia in 1870 announced her intention of adopting it, but finding France unwilling to agree, did not follow up her announcement. It is not seriously pretended that the existing law of nations forbids such capture; but it is claimed that "the immunity would be universally recognised as another restraining and humanising influence imposed by modern civilisation upon the art of war."² This proposition may be fully admitted without in any way exhausting the controversy.

The real question at issue is whether the effect of maritime capture upon the event of hostilities is sufficiently direct and decisive to bring it within the protection of recognised principles. To argue that private property is immune on land and should therefore be immune on the sea, is misleading. Maritime capture is marked by little of the bloodshed and violence which are inseparable from such seizure on land; the objects of capture are almost always directly contributory to the enemy's strength, and, by means of insurance, the loss is distributed among the whole community. Any ship may

¹ *Memoires*, t. iii. chap. vi., cited Halleck, vol. ii. (1908), p. 97.

² The American Secretary of State to Baron Geiolt in 1870, cited by Hall, 8th ed., p. 529.

become an instrument of war, if not for actual fighting, at any rate for purposes of transport or invasion. Unlike the owner of property on land, the owner of property on the sea has ventured it, knowing the risk and in the hope of gain; and even in the case of property on land it is inaccurate to say that there is immunity from capture, for in the words of Wheaton ¹; "An invader on land can levy contributions or a war indemnity from a vanquished country, he can occupy part of its territory and appropriate its rates and taxes, and by these and other methods he can enfeeble the enemy and terminate the war. But in a maritime war, a belligerent has none of these resources, and his main instrument of coercion is crippling the enemy's commerce. If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small fleet or with none at all. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation." To which may be added that the confiscation of property on the sea is accompanied and regulated by an inquiry with all the forms of law, such as never takes place in the case of requisitions and contributions on land.

The right of capture may therefore be defended as a means of reducing the enemy and as a measure of military necessity; nor can it reasonably be attacked as inhumane. It is indeed less open to this charge than many other measures the legality of which is undisputed.

The history² of the question before the war of 1914-18 did nothing to throw any doubt upon the right, whatever may have been done in the way of inclining opinion towards an admission of the desirability of a change in the law. The United States, as we have seen, had long been in favour of the change, and the great body of opinion among continental jurists agreed with the American view, which was again put forward at the Hague in 1899. The Conference, however, did not consider itself empowered to deal with the question, and expressed a "wish" that it be referred to a subsequent Conference.³ The United States brought the proposal forward again in 1907.⁴ Certain alternatives were suggested—sequestration instead of capture, exemption on a certificate from the State that the

Recent
history.

¹ 5th ed., pp. 569, 570. This passage must now be read subject to the rules agreed to at the Hague; see *supra*, p. 254.

² Cf. Lawrence, *Principles*, 7th ed., pp. 481 *seq.*; Hall, 8th ed., pp. 528 *seq.*; Mr. Justice Kennedy, *The Exemption of Private Property at Sea from Capture in Time of War* (a paper read before the International Law Association, Oct. 1906) (London, 1906); H. Wehberg, *Capture in War on Land and Sea* (London,

³ *Væu* 5 of 1899.

⁴ For the deliberations at the Hague, see *Parl. Papers, Misc.*, No. 1 (1908), p. 187; the official report, *La Deuxième Conférence*, i. 245; iii. 746-812.

vessel would not be used as a warship, and the abolition of the system of prize money—but no agreement was possible, mainly by reason of the opposition of Great Britain,¹ though France, Japan and Russia were among the States which took the same view. Great Britain was, however, prepared to agree to the total abolition of the right of capturing contraband, but on this no approach to unanimity was possible.² The "wish" of 1899 was replaced by a much vaguer wish "that the preparation of regulations relative to the laws and customs of naval war should figure in the programme of the next Conference, and that in any case the Powers may apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land." As private property can hardly be said to be exempt on land, even legislation by analogy would not exempt it on the sea; and some difficulty would be experienced in finding analogies to contributions and requisitions.

It is of course a different question and one not properly within the scope of this book, whether the interest of a particular country is best secured by the retention or abolition of the practice. But as the opposition of Great Britain was undoubtedly the great obstacle to a change, it is well worth considering how far this country gains by the existing practice. The main arguments on the one side and the other, as adduced before the Great War, may be briefly summarised as follows: In favour of the change³ it has been urged (apart from the argument based on humanity):

(1) That the pressure which can be put upon a continental enemy by destroying his sea-borne commerce is of comparatively little importance now that the development of railway systems enables him to trade and get his supplies overland, and the Declaration of Paris enables him to ship his goods with safety in neutral vessels, except in the case of contraband, and that this argument will be stronger still if the Declaration of London is ratified and the doctrine of continuous voyage in relation to conditional contraband is abolished.⁴

(2) That experience has shown that the loss inflicted even under the present system, while a hardship to private individuals, was so small in proportion to a nation's total overseas trade as to involve very slight pressure upon that nation as a whole, whereas to Great Britain, if she lost command of the sea, it would probably be fatal.

(3) That Great Britain, depending to an enormous extent upon imported supplies, and earning enormous profits by her carrying

¹ The British view is stated in *Parl. Papers, Misc.*, No. 1 (1908), p. 15.

² See part iv. chap. iv., *infra*.

³ Cf. Sir J. Macdonell, *Some Plain Reasons for Immunity*, etc. (London, 1910).

⁴ See part iv. chap. iv., *infra*, especially pp. 353 seq.

trade, would stand to gain in a corresponding degree if those supplies and that trade could remain uninterrupted by the operations of enemy cruisers.¹

(4) That the effect of capture in bringing pressure to bear which will reduce the enemy to submission is much modified by the system of insurance.

(5) That all neutrals will gain by the freedom from the inconvenience, delay and loss occasioned by the capture, and, in many cases, destruction of enemy vessels in which their goods are carried.

(6) That the result of the present system would be the transfer to neutral shipowners of the greater part of Great Britain's carrying trade, which once lost would never, or only after a long interval, come back; and

(7) That the proposed immunity would be an important step towards an agreement for the reduction of naval armaments, one of the main justifications put forward for large navies being the defence of the mercantile marine.

Arguments
against
immunity.

Against the proposed change it is urged:

(1) That exemption leads logically to the abolition of commercial blockade, and that unless such blockade is abolished, there will be constant disputes, resulting in the Power which alleges itself to be aggrieved falling back upon the old principle of indiscriminate capture²; though this argument would lose some of its strength if the rules of the Declaration of London as to blockade were ratified and honourably observed.³

(2) That it is by her navy alone that Great Britain can bring pressure to bear upon a continental enemy; that it is only by capturing or driving from the sea all enemy merchant vessels that such pressure can be made effective, and that by giving up this right, Great Britain, in the words of Lord Palmerston, "would be inflicting a fatal blow upon her naval power and would be guilty of an act of political suicide."

(3) That there will be little consolation to a nation whose mercantile marine is paralysed in the fact that it has neutrals to rely upon, and that its supplies can, at great inconvenience and great expense, be brought by train, even if the train service is equal to the task.

(4) That the risk to Great Britain of losing her carrying trade to neutral rivals is comparatively slight; for the British trade is so large that neutrals could not possibly undertake it, and the genuine

¹ See Sir Robert Reid's (now Lord Loreburn) letter to *The Times*, 14 October, 1905; reprinted, with introduction and notes by F. W. Hirst (1906).

² See Sir Edward Grey's instructions to the British delegates in 1907, *Parl. Papers*, Misc., No. 1 (1908), p. 15; and Hall, 8th ed., p. 534.

³ See part iv. chap. v., *infra*, pp. 372 *seq*

sale of British ships to neutral buyers on so large a scale would be impossible, even if the validity of such sales were recognised by the enemy, which is doubtful; and in any case the ships so transferred would be taken in for adjudication, so that the enterprise, to the neutral, would not be worth the trouble and expense, even though he succeeded in establishing the *bona fides* of the transfer.

(5) That the risk to British trade is greatly over-estimated: the Commission of Food Supply in Time of War in 1905¹ reported that so long as Great Britain retained command of the sea there was no reasonable probability of a serious interference with her food supplies, though undoubtedly the price would rise. It is pointed out by opponents of the change that in any event this would probably happen, so long as the doctrines of contraband and blockade are liable to be strained, as they probably would be, by any Power in a war against Great Britain; while, if Great Britain lost command of the sea, it is difficult to imagine a victorious enemy standing by and allowing her trade to go on and her food supplies to come in as if nothing had happened. It is true that the rules as to blockade and contraband are fairly definite and generally accepted; but it is necessary to guard not only against operations permitted by, but also against violations of, international law.² It is urged, too, that under modern conditions a repetition of the exploits of the *Alabama* is highly improbable; steam warships cannot remain at sea for the length of time necessary, but must be within a short distance of a coaling station, and are therefore more easy to locate and attack; they cannot with the same facility as sailing ships spare men for prize crews (though they may, without violating any rule of international law, destroy their enemy prizes³ if they can find room on board for the captured crew); and their prey, being themselves for the most part steamships, can, with the assistance of wireless telegraphy, more easily avoid them. Even the *Alabama* with all her advantages—her steam power being assisted by sail—only made prizes at the rate of three per month; "and the enormous moral effect which she (and the other Confederate cruisers) caused, would have been comparatively insignificant against a steam trade."⁴

(6) That while the change would relieve those nations which have only a single coast-line to defend, it would do little to lighten the burden of the naval defence of the British Empire; though against this it must be remembered that it might render unnecessary excessive building against building by other Powers.

¹ Cd. 2643, p. 59.

² See *The Report of the Commission on the Supply of Food and Raw Material in Time of War*, pp. 25, 26.

³ See part iv. chap. ix., *infra*, pp. 420 seq.

⁴ *The Report of the Commission on Supply*, etc., pp. 28, 29.

An extreme view taken in certain quarters is that the provision in the Declaration of Paris that the neutral flag covers enemy goods was from the British point of view a mistake, and ought to be repudiated: a proposition which savours of international hooliganism, and is not likely to be seriously entertained in any responsible quarter. It would, among other things, involve the repudiation by all other Powers of the rule against privateering and the rule against paper blockade, for the four rules of the Declaration were expressly agreed to be indivisible.¹

It is obvious, then, that the question of policy is one of serious difficulty, and underlying the opposition to the change there is, unfortunately, but it may be, justifiably, a doubt as to the security that in case of war the new rule of immunity would be observed by an enemy who succeeded in obtaining the command of the sea. In the event of a disaster of that kind, it would probably in practice be found to matter little whether private property were agreed to be exempt from capture or not; and it will be for experts to decide whether the advantages which would accrue from the change before that disaster took place would not be worth having, even though under the strain of extreme necessity the protection afforded by immunity from capture should prove illusory.²

Effect of the
Great War
on question
of immunity.

The arguments thus advanced were based upon the assumption that in future wars the practice with regard to contraband and blockade would follow that of previous wars. None of the protagonists seems to have anticipated that war would develop into a contest between nations whose whole man-power would be armed or organised for war, or that ships and their cargoes would become as important as battalions for the continuance of hostilities. It remained for the Great War to demonstrate the importance and indeed the necessity of commerce to a belligerent. It is well known that one of the greatest difficulties experienced by Great Britain was the submarine attack on her merchant fleet which reduced its numbers faster than they could be replaced, and this by itself would seem to strengthen from the British side the argument for exemption of merchant ships from attack. But it is also equally true that one of the most important factors, if not the most important, in bringing the war to conclusion was the Allied victory on the "economic front," i.e. the ability of

¹ See *infra*, p. 412.

² See on the subject, Hall, 8th ed., pp. 533, 534; Westlake, part ii., pp. 147 *seq.*; Cobbett, *Cases*, vol. ii. (1913), pp. 134 *seq.*; a useful summary of the arguments for the existing principle in A. Latin, *Effects of War on Property* (1909), p. 117; and a paper (published by the Eighty Club) written by the Right Hon. Arthur Cohen, K.C. *Sea Law and Sea Power* (London, 1910), by T. Gibson Bowles, contains a vigorous statement of the case against exemption. See also the references given *supra*, pp. 264, n. 2; and in Oppenheim, 3rd ed., ii., p. 254, n.

the Allied Powers to prevent Germany's access to the war materials and food which were so necessary to the prosecution of hostilities. This was accomplished by a development of the doctrines of blockade and contraband which will be considered in the chapters devoted to those subjects. Such arguments as that the loss inflicted on a continental nation by restricting its overseas trade would be comparatively small have been completely falsified, and it would be idle to contend that the blow was softened by the cushion of insurance, for no system of insurance could compensate for the loss of vital raw materials.

In the present state of international public opinion there seems no possibility of agreement for the abolition of the right to seize private property at sea, and no restriction of the right can be in contemplation until the law of contraband and blockade has emerged from the uncertainty with which the events of the Great War have clouded it. All that can be done is to consider the practice of nations up to the present and to admit that it is "impossible to forecast the future of the movement for the immunity of private enemy property from capture at sea or of the laws of sea warfare in general,"¹ since "there are hardly any accepted principles from which discussion could even begin."²

According to the British view the right to take enemy property as prize is not limited to capture on the high seas. The Judicial Committee of the Privy Council said in *The Roumanian*³: "Enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during hostilities, were always and still are liable to be seized as prize, either on the high seas or in the ports or harbours of the realm."

This extension of the right is denied in Germany, and a decision to that effect was given by the Imperial Supreme Court during the Great War.⁴

The question of the destruction of prizes involves consideration not only of the rights of belligerents but of the rights of neutrals. of prizes. It was fully dealt with by the Naval Conference of London in 1908-9, and an examination of it will be more conveniently made in the chapters relating to neutrality, in which the results of that Conference are set out.⁵

¹ Oppenheim, ii. § 179. See also *ibid.*, §§ 173-9; Lawrence, 7th ed., pp. 486-8; H. S. Quigley, *The Immunity of Private Property from Capture at Sea* (1918); A. J. I. L., xi. (1917), pp. 22-45; xiii. (1919), pp. 60-78.

² Sir Erie Richards, *British Prize Courts and the War*: B. Y. I. L. (1920-1), p. 13.

³ (1916), 1 A. C. 124 at p. 126. Enemy ships in a British port at the outbreak of war may be detained but not confiscated: *The Blonde* (1922), 1 A. C. 313.

⁴ *Prenzlau's Fabrikwerke v. Transatlantische G Merversicherungsgesellschaft* (31 Jan. 1917).

⁵ See part iv. chap ix., *infra*, pp. 420 seq.

Exemptions
from capture.
Free ships
free goods.

There are certain special exceptions to the rule that enemy property may be seized.

Private non-contraband property belonging to the enemy and carried in neutral ships is now immune from capture. (But the carriage of goods in a vessel belonging to a subject of the captor Government does not confer immunity.)¹ The conditions of the immunity will be dealt with under the head of Neutrality.

The immunity of cartel ships² and of hospital ships³ has already been mentioned.

Vessels
charged with
religious
missions, etc.

A custom of long standing, which exempted vessels charged with religious, scientific or philanthropic missions, was embodied in Article 4 of Convention XL of 1907. The immunity is, of course, subject to the condition that the vessels in question will strictly observe their innocent character, and refrain from aiding the belligerent or participating in military or naval operations. It is usual for such vessels to obtain a safe-conduct from the enemy Government, though the Convention does not require it. In 1801, during the war between England and France, Flinders, intending to circumnavigate Australia, obtained a safe-conduct from the French Government. At Sydney he exchanged his vessel, the *Investigator*, which had been found unseaworthy, for the *Cumberland*. But in 1803 the latter was seized and he and his crew were made prisoners of war at Port Louis in Mauritius (then a French colony), on the ground that she was not the vessel to which a safe-conduct had been granted, and that she had entered Port Louis in suspicious circumstances. Flinders was released on parole in 1810; and in the same year the British took Mauritius and recaptured the vessel.⁴ A case that occurred in 1915 illustrates the application of Article 4. The *Paklat*, a German steamer, which had been ordered by the Governor of Tsing-tao to take the women and children from there to Tientsin before the siege of Tsing-tao began, was seized by British cruisers. Germany held that the vessel was entrusted with a humanitarian mission, and hence was free from capture. But Sir Edward Grey (as he then was) replied that the Article did not apply to the case in question, which was made clear in the official report of the Hague Conference: "In the view of His Majesty's Government the

¹ *The Miramichi* (1915), P. 71; *The Roumanjan* (1916), 1 A. C. 124. See *infra*, p. 408. See *supra*, p. 248. See *supra*, p. 243.

² See M. Flinders, *Voyage to Terra Australis*, vol. ii. chaps. iii, seq.

³ Cf. Sub-Annex 10 to Protocol of the Seventh Plenary Meeting. On 15 April, 1915, the Hong-Kong Prize Court decided that an enemy vessel conveying women and children fugitives from an enemy naval and military base, a blockade of which is expected, is not "employed on a philanthropic mission" within the meaning of Art. 4 of Convention XL: *The Paklat* (1915), 1 B. A. C., P. C. 515.

conveyance of women and children from a fortress which was about to be besieged (an action which would have the effect of increasing the power of resistance of the fortress) cannot be regarded as a philanthropic mission within the meaning of the Article; and it would indeed appear that the *Paklat* might more properly be considered as being employed on a service connected with the operations of war." Sir Edward Grey added that the protest was all the more astonishing in that a German submarine torpedoed, without notice, the French vessel *Amiral Gauteaume*, which was taking refugees to England.

By Article 3 of the same Convention a similar immunity was granted to vessels exclusively used in coast fisheries, and to "small boats engaged in local trade,"¹ as well as to their rigging, tackle and cargo; the exemption ceasing from the moment that they take any part whatever in hostilities. The contracting Powers bound themselves not to profit from the harmless character of these vessels by employing them for military uses, while preserving their peaceful appearance. The previous practice with regard to coast fishing vessels (deep-sea fishers were never regarded as exempt) had been uncertain, Great Britain² granting the exemption, as a rule, as a matter of grace, and withholding it when, as in 1800, they were employed by the French as fire vessels and privateers.³ It may be noted as matter for criticism that no definition of "coast fisheries" or "small boats engaged in local trade" was attempted; and, indeed, a certain vagueness on these points was inevitable. No doubt the expression "coast fisheries" applies not merely to the coasts of the fishermen's own country, but to any coast where they are permitted to pursue their industry. On the other hand, "small boats engaged in local trade" cannot be said to include coasting steamers. In 1914 the *Berlin*,⁴ a German sailing cutter, carrying a cargo of fish and materials for curing, was seized by a British cruiser some 500 miles from her home port and about 80 miles from the coast of Scotland. Her condemnation was demanded on the ground of her size and her distance from the coast. The President of the Prize Court said, in the course of his judgment, that it had become an established rule in the last hundred years to exempt from capture fishing vessels engaged in their industry near the coast—not necessarily in territorial

¹ In 1915 the Prize Court sitting at Alexandria pointed out that, apart from the Convention, there is no customary rule of international law that protects from capture small coasting vessels engaged in general local trade: *The Maria* (1915). 1 B. & C. P. C. 259.

² Also the United States; see *The Paquete Habana* (1899). 175 U.S. Rep. 677.

³ Hall, 8th ed., pp. 535 seq.; Pearce Higgins, *The Hague Peace Conferences*, p. 403; Westlake, part ii., pp. 155 seq. The expression does not cover harbour tugs and lighters: *H.M. Procurator-General for Egypt v. Deutsches Kohlen Dept Gesellschaft* (1919). A. C. 291.

⁴ *The Berlin* (1914), P. 265.

waters—if they honestly followed their ostensible employment. But the *Berlin* did not conform to this requirement: her size, equipment and voyage showed she was a deep-sea fishing vessel, engaged in a commercial enterprise forming part of the enemy trade; and therefore both she and her cargo were condemned.

Postal correspondence.

More important was the rule laid down with regard to postal correspondence.¹ Formerly, States sometimes concluded special conventions conferring immunity on each other's mail boats in time of war; with the proviso, however, that the contracting parties could renounce their engagement by giving notice. It was thus generally felt that a more definite and lasting provision was necessary for the protection of overseas correspondence. Accordingly at the Hague Conference it was agreed, on the motion of Germany, that "the postal correspondence of neutrals or belligerents, whatever its official or private character,"² found on board a neutral or enemy ship on the high seas is inviolable.³ If the ship is detained, the correspondence is forwarded by the captor with the least possible delay." Correspondence with a blockaded port was excepted; and it was provided that "the inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of naval war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible."⁴ This immunity is conferred only on correspondence found on vessels at sea, and not on that found on vessels that voluntarily enter a belligerent port—for such entrance subjects them to the local jurisdiction.⁵

The importance of a punctual and uninterrupted postal service to neutrals and to the non-combatant members of belligerent States has long been recognised as giving to mail boats and their mails a claim to special treatment. The subject comes in the main more properly under the head of "Unneutral Service"⁶; but it is important to note here that the immunity from capture or search generally allowed to mail bags on neutral vessels is extended to those found even on enemy vessels, and it is not even laid down as a condition that the vessel must be a regular mail boat. Probably only regular

¹ Convention XI. of 1907, Arts. 1 and 2; ratified by Great Britain, Nov. 1909.

² This is the official translation: but the French original is "quel que soit son caractère officiel ou privé", which would seem to be more properly translated "whatever its character, official or private," or "whether its character be official or private."

³ This immunity does not apply to parcels forwarded by parcel post, nor to negotiable instruments and securities representing money. See *infra*, p. 274.

⁴ Art. 2. ⁵ Cf. *U.S. v. Diekelman* (1875), 92 U.S. Rep. 520.

⁶ See part iv. chap. vi, *infra*, pp. 396 seq.

postal correspondence was intended; it can hardly be supposed that the intention was to exempt official correspondence specially put on board an enemy vessel not accustomed to carrying letters. Such a vessel would probably be held guilty of "unneutral service."

The privilege granted even to official correspondence is very wide. It is, on the face of it, somewhat remarkable that a belligerent must allow to pass, or (if the ship is detained) actually forward,¹ correspondence to or from his enemy's Government departments. The German delegate, in supporting his proposal, argued that it was hardly possible that belligerents, having telegraphs and wireless telegraphy at their disposal, would use the ordinary mails for official military communications; so that the disadvantage to a belligerent of being forbidden to open, examine and delay mail bags would be slight, compared with the consequent advantage to neutrals and non-combatants in securing a regular and punctual service. It may be added that, owing to the ease with which dispatches may be made to bear the appearance of private letters, or carried by individuals, and any attempt to seize them evaded, the right of seizing them is in practice of little if any value. Great Britain has already treaties with the United States and France protecting the mail steamers of the contracting Powers in case of war between them, and, in fact, the immunity was granted during the Spanish-American War and the Boer War.² It is clear, then, that immunity to all mails was intended as being called for by the balance of convenience, for otherwise every mail bag would be searched; though if a belligerent sends, by one of his own, or a neutral, mail boat, military dispatches which are, on the capture of the vessel (if his own), or its search (if neutral), discovered and seized without any interference with or delay to the vessel's ordinary mails, he will have little, if any, ground for complaint.

The Conference was not able to exempt from visit and search the mail boats themselves. If of belligerent nationality, they are still liable to capture; if neutral, they are still liable to visit and search, but their liability is reduced to the narrowest possible limits.

As many of the belligerent States were not parties to the Hague Convention X L, it may be doubted whether it possessed any legal force during the Great War. But decisions turning upon the interpretation of Article I were given by English and German Prize Courts, and both tribunals decided that parcels did not come within the term "postal correspondence" and that the parcel post was

Restriction
of postal
immunity.

¹ He must, it would seem, make his own arrangements for forwarding it: a rule which was not observed by the *Smolensk* which, in 1904, took mails out of a German vessel and then stopped a P. & O. vessel and put them on board her for conveyance to their destination. There can be no right to stop a neutral vessel for any such purpose (see Pearce Higgins, p. 402).

² See Pearce Higgins, p. 401.

part of the cargo and subject to seizure as such.¹ In *The Noordam*² the Judicial Committee of the Privy Council, while refusing to define "postal correspondence," suggested a definition by a contrast between "vehicles of information" and "documents the value of the contents of which does not lie in what they tell the reader." Bonds and coupons were clearly not within the definition and could not claim the protection of the Article.

In *The Tubantia*³ Sir S. T. Evans condemned as contraband several thousands of postal parcels containing rubber in course of post to Germany by neutral mail, and suggested that dishonest use of neutral mails would involve a loss of the exemption allowed by the Article. As hostilities progressed the exemption became negligible in scope. In consequence of the employment of neutral mails for dispatching contraband goods, securities and propaganda documents, the Allied Powers regularly stopped mail boats sailing to and from neutral countries in touch with the Central Powers and examined the mails, parcel and letter. This led to remonstrance from neutral States and diplomatic correspondence with the United States, but no definite agreement was reached as to the correct principle to apply. It is certain that the immunity of postal correspondence is not as wide as was imagined at the Hague Conference and probably extends only to such correspondence as a belligerent considers harmless to his interests.⁴

Changes of nationality.

It is often important to determine the ownership of property captured at sea, for its nationality, and therefore its liability to capture, is involved therein. Usually in peace the master of the ship is treated as the agent of the consignee, so that the property vests in the consignee on delivery to the master; but the goods may be shipped at the consignor's risk, and in that case the ownership during the voyage remains in him. During or just before war, however, there cannot be the same freedom of contract. Lord Stowell, in *The Packet de Bilbao*,⁵ said: "In times of profound peace, when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting that the whole risk should fall on the consignor till the goods came into the possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not. . . . In time of war this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, when it suited the

¹ *The Tubantia* (1916), 32 T. L. R. 329; *The Bjorn*, Hamburg Prize Court (30 Oct. 1915).

² (1920), A. C. 904.

³

Supra.

⁴ See Hall, 8th ed., pp. 826-9; Oppenheim, ii. § 191.

⁵ (1799), 2 C. Rob. 133.

purpose of protection. . . . [The captor] having all the rights that belong to his enemy, is authorised to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board during a time of war must be presumed to know the rule."

The beginning of the voyage is the critical date, whether the enemy is the consignee or the consignor. In *The Josephine*¹ it was held that silver consigned by an enemy shipper to his agent in Hamburg, for the purpose of meeting drafts of a correspondent in America, without any letter of advice putting it out of his control, must be treated as the property of the shipper. In *The Miramichi*, decided during the Great War, goods were shipped by a neutral seller to an enemy buyer on a British vessel, before the outbreak of the war, though not in anticipation of it, and were seized on their way to the enemy. It was held that the test for condemnation was as to whether the property in the goods had at the time of seizure passed to the enemy; but, as the buyers had refused to accept the necessary documents, the ownership was not transferred to them, so that the goods were ordered to be restored to the sellers.²

The courts of the captor do not recognise claims against captured vessels or cargoes which would have been effective as against the original owners. In our legal phrase, the goods are acquired free from equities. Thus in *The Marianna*³ it was held that a claim cannot in a Prize Court be founded upon a lien on freight for the payment of the purchase price of a vessel. Similarly, in *The Tobago*,⁴ it was held that bottomry⁵ on an enemy's ship is not an interest that can support a claim in a Prize Court on behalf of the bond-holder. And during the Great War it was held in *The Marie Glaeser* that the various classes of claimants—shareholders, mortgagees and persons claiming for brokerage and necessities—had no rights in the Prize Court in respect of the vessel.⁶

Claims against captured vessels.

Property which has been purchased by a neutral in good faith becomes of course neutral; and, save in the case of ships, little difficulty can arise on the point. But with ships the matter is more complicated. Enemy goods are not liable to capture unless found in an enemy

Transfer of ships.

¹ (1801), 4 C. Rob. 25.

² *The Mivamichi* (1915), P. 71. Cf. *The Parchim* (1918), A. C. 157 (the Privy Council approving the decision in the latter case, and following the same rule adopted by the Council in *The Odessa* (1916), 1 A. C. 145).

³ (1805), 6 C. Rob. 24.

(1804), 5 C. Rob. 218.

⁵ "Bottomry is a species of mortgage or hypothecation of a ship, by which her keel or bottom is pledged (*partem pro toto*) as a security for the repayment of a sum of money" (Wharton, *Law Lexicon*).

⁶ *The Marie Glaeser* (1914), P. 218; *The Odessa* (1916), 1 A. C. 145; *The Fenix*, German Superior Court of Prize, Berlin (17 Dec. 1914)- Cf. *The Aina* (1854), Spinks, 8; *The Carlos F. Roses* (1899), 177 U.S. Rep. 655. See further *infra*, p. 285.

vessel; but an enemy vessel is liable to capture in all circumstances. There is, therefore, a strong temptation to the subjects of a belligerent State to make a colourable transfer of their shipping to neutrals during or in contemplation of a war; and against this evasion of the liability to capture it is admitted that belligerents have a right to protect themselves. The old French rule was that any sale of a ship by an enemy subject to a neutral was invalid if made after, and if the buyer could have had knowledge of, the outbreak of war; and this principle was maintained by France in the Memorandum laid by her before the Conference of London,¹ but was then abandoned in favour of rules more in accordance with those followed by Great Britain.

British
cases.

Great Britain being more largely interested in shipbuilding and ship-selling has always laid stress upon the argument that the trade in ships is like any other trade; and that the assignment of a ship to a neutral (other than a ship of war²) is not in principle invalid merely because it takes place during or in contemplation of a war. In *The Ariel*³ it was held that "the sale of a ship, absolutely and *bona fide*, by an enemy to a neutral, *imminente bello* or even *flagrante bello* is not illegal," nor is such a vessel necessarily condemned, even though part of the purchase money remains unpaid. But as Lord Stowell observed in *The Sechs Geschwistern*,⁴ the circumstances will be jealously examined: "The rule which this country has been content to apply is that property so transferred must be *bona fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether." ⁵

Such an assignment is, by British decisions, invalid if made in a blockaded port,⁶ or in the course of a voyage, before the ship has actually been delivered to the neutral buyer⁷; and the ship is liable to condemnation if there are grounds for suspicion not satisfactorily explained, such, for instance, as the absence of documentary evidence

¹ For details as to this Conference, see part iv. chap. iii., *infra*, p. 336. The rules agreed to by it as to transfer of vessels may conveniently be dealt with here. It must, however, be remembered that the Declaration of London was not ratified, and is not *per se* binding.

² *The Baltica* (1857), 11 Moore, P. C. 141; *The Minerva* (1807), 6 C. Rob. 396. (1857), 11 Moore, P. C. 119. Cf. also *The Baltica*, *supra*; in which case, though the vessel was sold *in transitu*, the *transitus* had ceased and the vessel had come into the hands of the purchaser before she was captured. Cf. also *The Benedict* (1855), Spinks, 314; *The Minerva* (1807), 6 C. Rob. 396. (1801), 4 C. Rob. 100.

³ Cited in *The Ariel* (*ubi supra*) at p. 132.

⁴ *The General Hamilton* (1805), 6 C. Rob. 62.

⁷ *The Baltica* (1857), 11 Moore, P. C. 141; *The Danckebaar Africaan* (1798), 1 C. Rob. 112; *The Vrow Margaret ha* (1799), 1 C. Rob. 336; *The Jan Frederick* (1804), 5 C. Rob. 128.

of transfer on board, the retention of control or power of revocation by the transferor, or the like.¹

In the Memoranda presented by the Powers at the Conference of London, Russia and Germany took the French view, and the Netherlands was in favour of unrestricted permission to transfer even in the course of a war; while the rest of the Powers put forward with variations the British principle, which was the mean between these two extremes. An agreement was, however, reached, which was embodied in the following Articles of the unratified Declaration of London.

"The transfer of an enemy vessel to a neutral flag effected before the outbreak of hostilities is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted. Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid, if it is unconditional, complete and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages." (Article 55.)

"The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void, unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"There is however an absolute presumption that a transfer is void: —

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or to recover the vessel is reserved to the vendor.

¹ *The Vigilantia* (1798), 1 C. Rob? 1; *The Endraught* (1798), 1 C. Rob. 19; *The Welvaart* (1799), 1 C. Rob. 122; *The Juffrouw Anna* (1799), 1 C. Rob. 124; *The Noydt Gedacht* (1799), 2 C. Rob. 137, n.; *The Jemmy* (1801), 4 C. Rob. 31; *The Soqlasie* (1854), Spinks, 105; *The Ernst Merck* (1854), Spinks, 99; *The Ariel* (1857), 11 Moore, P. C. 119; *The Christine* (1854), Spinks, 82; *The St. Tudno* (1916), P. 291.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled." (Article 56.)

The history and effect of the Declaration of London in which these provisions were contained will be more particularly considered in relation to the principles of contraband and blockade. But, as will be found repeated in the chapters relating to those topics, it must be stated here that the Declaration was unratified up to the outbreak of war in 1914, was adopted in modified form by Great Britain by Order in Council and was eventually abandoned in 1916. During the term of Great Britain's adherence several of its provisions fell to be judicially considered, among them Article 56. This was considered and followed in *The Tommi*,¹ in which the President, Sir S. T. Evans, held that the absence of any arrangement for the payment of purchase money or the completion of sale was sufficient evidence that the transfer was not valid and had been made in order to avoid the consequences of war. Then came the decision of the Judicial Committee of the Privy Council in the leading case of *The Zamora*,² that the law administered by British Courts of Prize could not be varied by Orders in Council and that therefore those parts only of the Declaration were binding which expressed existing international law. Thus in a later case involving the transfer of an enemy vessel to a neutral flag, the Courts had to determine to what extent the above Articles were declaratory of recognised principles, and the Privy Council decided that Article 56 was in all probability a compromise between English and continental views and, as such, not an authority to be followed by British Prize Courts. In any event the Privy Council dismissed the contention that the effect of the Article was to place upon a claimant of a captured vessel the burden of proving that the transfer was made for some purpose other than that of evading capture, and held that the Article applied only to colourable or fictitious transfers devised by both parties to the transaction.³

Enemy
character.

In connection with this branch of the subject, it is important to consider the rules by which it is to be determined whether goods or ships have an enemy or a neutral character. By the Declaration of Paris the "neutral flag covers enemy goods with the exception of contraband of war," and "neutral goods, with the exception of contraband of war, are not liable to capture on board an enemy ship." So far, therefore, as goods are concerned, the question only arises when they are found on board an enemy ship.

¹ (1914), P. 251. ² (1916), 2 A. C. 77, See *supra*, p. 28.

³ *The Edna* (1921), 1 A. G., p. 747.

The case of ships is comparatively simple, and at the Conference of ships. Of ships.
of London the principle was agreed to without difficulty and embodied in Article 57:

- " Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.¹
- " The case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of, and is in nowise affected by, this rule."²

By the last paragraph of this Article all questions connected with the Rule of the war of 1756,³ which we deal with elsewhere, were expressly reserved, there being no unanimity on the subject at the Conference; and the result of the first paragraph was to establish a simple rule that a vessel's nationality is determined by the flag she is entitled to fly under the municipal laws of the country whose flag it is, but that such flag will not protect her if she has violated the rules against transfer to a neutral flag which are contained in Articles 55 and 56.⁴ The Article was considered by the Prize Court in *The Tommi*⁵ and the rule was adopted in its simplicity, so that an enemy vessel, even though she had been validly transferred from enemy hands, was held liable to capture so long as she remained entitled to fly an enemy flag. In the course of its judgment the Prize Court expressed the view that it was preferable to rely exclusively upon the test laid down by the Article and to discard all considerations connected with the personal status of the owner. This was in the early days of the war of 1914-18. In *The St. Tudno*⁶ it was held that it was the duty of the Prize Court to look beyond the nominal ownership and to ascertain the real owners of a vessel which was registered as a British ship, owned by a British company and entitled to fly the British flag. In 1916 Great Britain's adherence to the Declaration was withdrawn, and thereafter the Article ceased

¹ Various questions as to what flag a vessel is entitled to fly were considered by the French Prize Court in a case decided during the Great War: *The Solveig* (1915), *Journal officiel*, 12 Nov. 1915. It is generally admitted that a merchantman may make use of the flag of a foreign State in order to avoid capture; it is expressly recognised by Great Britain in the Merchant Shipping Act. 1894, s. 69. Cf. the discussion between the British and the American Governments in 1915 in regard to the assumption by the *Lusitania* of the flag of the United States: *Parl. Papers, Misc.*, No. 6 (1915), p. 20. In *The Hamborn* (1919), A. C. 993, a vessel under the Dutch flag, but German-owned, was condemned.

² This Article was abrogated by Great Britain during the Great War by the Order in Council of 20 October, 1915, so that her Prize Courts were bound to apply the previously established rules. Cf. *The Proton* (1916), 2 P. C. 107.

³ See *infra*, p. 332.

⁴ See *supra*, p. 277. Cf. *The Tommi*; *The Rothersand* (1914). P. 251.

⁵ (1914), P. 251. ⁶ (1916), P. 291.

to provide a criterion of enemy character. It transpires from the decision of the Judicial Committee of the Privy Council in *The Proton*¹ that as regards Article 57 the withdrawal was unnecessary, since it prescribed and altered the law to be administered in a Court of Prize by confining the test of neutral or enemy character to a single circumstance and was thus, according to the rule in *The Zamora*² not binding upon the court. The old rules of international law were to be applied and the truth as to the vessel's character determined by a consideration of all the relevant circumstances.³

Enemy-character of goods.

Commercial domicile.

In the case of merchandise more difficulty arises. The British Courts had held that the determining factor was the domicile of the owner, domicile being established by proof of such circumstances as show an intention to make a place the place of residence for an indefinite period.⁴ There were certain subsidiary rules applied: a commercial enemy domicile, for instance, was held to be established if the transactions in question originated in a house of trade established in an enemy country, but only in respect of those transactions,⁵ and such commercial domicile could be terminated by a *bona fide* abandonment⁶; and where one of two partners had an enemy domicile, his share only of the partnership property was held to be enemy property.⁷ Eventually enemy commercial domicile⁸ was attached to all persons carrying on business in enemy countries; but the converse did not apply, and the property of an enemy residing in a hostile State but carrying on business in a neutral country was held liable to capture.⁹ A neutral might be held, too, to have an enemy domicile if the circumstances were such that his association in trade with the enemy was exceptionally close: if, for instance, he traded under a concession or monopoly granted by the enemy¹⁰;

¹ (1918), A. C. 578.

²

(1916), 2 A. C. 77. See *supra*, p. 28.

³ Cf. German Ordinance, 16 July, 1917: "A neutral vessel is to be regarded as an enemy vessel if it is owned wholly or for the greater part by enemy subjects." And French cases: *The Colonia*, *Journal officiel*, 15 June, 1915; *The Bon Voyage*, *ibid.*, 7 July, 1916.

⁴ *The Harmony* (1800), 2 C. Rob. 322; *The Postilion* (1779), Hay and Marriott, 245. Cf. *The Hypatia* (1916), P. 36 (goods of enemy partnership firm in neutral State; "sufficient residence" of the partners or some of them in the country where the business is carried on, or where the house of trade is situated, is necessary to establish commercial domicile).

⁵ *The Jonge Klassina* (1804), 5 C. Rob. 297, at p. 302; *The Portland* (1800), 3 C. Rob. 43.

⁶ *The Indian Chief* (1801), 3 C. Rob. 12.

⁷ *The Citto* (1800), 3 C. Rob. 38; *The Harmony* (1800), 2 C. Rob. 322. Cf. *The Manningtry* (1915), 1 P. C. 497.

⁸ See *supra*, p. 193, where commercial enemy character is more fully treated.

⁹ *The Clan Grant* (1915), 31 T. L. R. 321. See also *The Flamenco* (1915), 32 T. L. R. 53; *The Hypatia* (1917), P. 36.

¹⁰ *The Freundschaft* (1819), 4 Wheaton, 105; *The Anna Catharina* (1802), 4 C. Rob. at p. 119. Cf. decrees published by the French and Italian Governments in 1918 declaring as liable to capture neutral ships navigating with a pass from the enemy: Hall, 8th ed., p. 597, n.

a neutral might by virtue of his associations with or interest in a house of business trading in an enemy country acquire an enemy commercial domicile which, though it did not affect his property generally, would affect his property or interest in the business with an enemy character.¹ The property of an enemy subject domiciled in an enemy country and possessing a house of trade in a neutral country is considered to be enemy property; and if such property belongs to a partnership it is presumed, failing evidence to the contrary, to be divided proportionately between the partners, and the share of the partner with an enemy domicile is liable to condemnation.²

Goods consigned to a duly incorporated British company, to which the property has passed, are not liable to condemnation merely on the ground that the directors and shareholders of the company are enemy subjects or domiciled in enemy territory.³

An enemy subject resident in an Eastern country in which his Government exercises extraterritorial jurisdiction does not acquire there a trade domicile for purposes of war, inasmuch as he remains subject to the jurisdiction of his own Government.⁴

An enemy subject who has acquired a trade domicile in a neutral country loses that domicile if, on the outbreak of war, he leaves the neutral country for another neutral country, in the absence of evidence that his departure is merely temporary.⁵

To this principle of domicile must be added the further rules of the British Courts, that the produce of land in the enemy territory is enemy property, though the owner of the land may be a neutral.⁶ Produce of enemy territory.

¹ *The Anglo-Mexican* (1918), A. C. 422.

² *The Clan Grant* (1915), 31 T. L. R. 321. Cf. *The Eumæus* (1915), 108 L. T. 362. Where captured goods are the property of a partnership consisting of enemy and British or neutral partners, the shares of the British or neutral partners can be confiscated if they have taken no steps after the outbreak of war to put an end to their connection with the enemy partner: *The Manningtry* (1916), P. 329; *The Anglo-Mexican* (1918), A. C. 422.

³ *The Poona* (1915), 1 P. C. 275.

⁴ *The Eumæus* (1915), 108 L. T. 362; and see *The Derfflinger* (1915), 114 L. T. 593. The question of acquiring a domicile in a non-Christian country has been considered in various earlier cases, e.g. *Re Tootal's Trusts* (1883), 23 Ch. D. 532, 534; *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431, 441 (approving the latter); *Abdallah v. Richards* (1888), 4 T. L. R. 622: the *animus manendi* was not sufficient, unless supported by an identification with the civil society and manner of life of the country. The American Courts did not require the latter condition (cf. *Mather v. Cunningham* (1909), 74 Atlantic Reporter, 809), and the House of Lords has now held that this condition is not necessary to establish at least a hybrid domicile, e.g. *Anglo-Egyptian*, in an Eastern country where foreigners are subject to special jurisdiction: *Casdagli v. Casdagli* (1919), A. C. 145.

⁵ *The Flamenco*, *The Orduna* (1915), 1 B. & C. P. C. 509.

⁶ *The Phoenix* (1803), 5 C. Rob. 20; *The Vrow Anna Catharina* (1806), 5 C. Rob. 161, at p. 167; *The Clan Grant* (1915), 31 T. L. R. 321.

Enemy
goods on
British
ships.

Nationality
of occupied
territory.

Further, enemy goods on British ships, either on board at the outbreak of war or loaded during the hostilities, are seizable as prize on the high seas or in British ports and harbours.¹

In relation to the above cases, a question sometimes arises as to the nationality of territory occupied by a belligerent during a war. The general rule which has been followed in the English cases is that mere military occupation does not change the character of a place; before this can happen it should, "either by cession or conquest or some other means . . . either permanently or temporarily be incorporated with and form part of the dominions of the invader."² But there are degrees in the nature of an occupation. In the case of *The Gerasimo*, Moldavia was a neutral country occupied by Russia, expressly and avowedly, for purely temporary purposes; while the American Court, when the island of Santa Cruz was captured by the British, treated it as having thereby become British,³ as an acquisition not necessarily permanent, but for all belligerent and commercial purposes part of the domain of the captor. In 1916 the Privy Council held that when territory is militarily occupied by a belligerent, the fact that it is under his control and that he can use it for the purposes of the war outweighs all considerations founded on the bare legal ownership of the soil; hence the British occupation of Egypt made Port Said an enemy port so far as Germany was concerned.⁴

The principle of domicile was also adopted by the United States, Spain, the Netherlands and Japan; but in accordance with their traditional policy, Germany, Austria, France,⁵ Italy and Russia⁶ insisted at the Conference of London on the principle of nationality, and no agreement could be reached.

Declaration
of London as
to goods on
enemy
vessel.

The rules laid down, by the unratified Declaration, on the subject of the enemy or neutral character of goods suffered from this important defect that, while the character of the goods was said to be determined by the character of the owner, no assistance was given in determining the character of the owner.

¹ *The Roumanian* (1916), 1 A. C. 124.

² *The Gerasimo* (1857), 11 Moore, P. C. 88, at p. 96; Westlake, part ii., p. 168.

³ *The Thirty Hogsheads of Sugar (Bentzon v. Boyle)* (1815), 9 Cranch, pp. 191, 195; Westlake, part ii., p. 169; Hall, 8th ed. p. 604.

⁴ *The Gutenfels* (1916), 2 A. C. 112. Although the proclamations relating to trading with the enemy extended to territory in hostile occupation as to enemy territory, a company incorporated in Belgium but carrying on its whole business in London was held not to be an enemy within the meaning of the proclamations: *Societe anonyme beige des Mines d' Aljustrel* (Portugal) v. *Anglo-Belgian Agency* (1915), 31 T. L. R. 634.

⁵ France, in 1870, in her instructions to naval commanders seemed to admit the principle of commercial domicile where goods were concerned; but her courts did not modify their policy accordingly: Westlake, part ii., p. 163.

⁶ Cf. *Parl Papers*, Misc., No. 5 (1909).

"The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner." (Article 58.)

"In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods." (Article 59.)

The latter Article amounted to no more than a statement of the previously existing rule.¹ The principle that might have to be adopted by an International Prize Court was left in doubt, the division of opinion at the Conference as between the criteria of nationality and domicile being so balanced. As a result of the Great War the test of domicile has certainly gained ground, and French law, once in direct conflict,² became in some respects similar to the British.⁸ The present state of general international law on the point is uncertain; it may be doubted whether the criterion of domicile gained ground of its own strength or under the pressure of a war-time necessity which decreed that in order to restrict enemy commerce, enemy character had to be given as wide a meaning as possible.

By Article 60 of the Declaration it was provided that:

Transfer in transitu.

"Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

"If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognised legal right to recover the goods, they regain their neutral character."

This provision expressed but a portion of the rules relating to transfer *in transitu*, which apply to enemy goods in the vessels of the captor State and its allies and of neutral States, as well as to goods in enemy vessels. The provision is essential to belligerents owing to the ease with which all enemy goods on the sea at the time of the outbreak of war could be at once transferred to neutrals; and it is necessary in the case of those systems of municipal law, such as the English,⁴ according to which the mere contract may operate as a transfer of property. The rule is sufficiently wide to ensure the avoidance

¹ Cf. *The Josephine* (1801), 4 C. Rob. 25; *The Frances* (1814), 8 Cranch, 354; *The Carlos F. Roses* (1899), 177 U.S. 655.

² *Le Hardy v. La Voltigeante* (1799), Pistoye et Duverdy, *Traite des Prises Maritimes* (Paris, 1859), vol. i., p. 321; F. Snow, *Cases* (1893), p. 337.

³ *The Colonia*, *Journal officiel*, 15 June, 1915. See article by M. M. Lewis in B. Y. I. L. (1923-4), p. 60.

⁴ E.g. Sale of Goods Act, 1893, sec. 17.

not only of transfers made during the time of war but also those executed in contemplation of it.¹ But for these prohibitions "all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect."² The conduct of the Great War gave the rule added vigour and it was expressed by the Judicial Committee of the Privy Council in 1920³ in definite terms: "The rule against recognising transfers of enemy goods while at sea, if unaccompanied by actual delivery and transfer of possession, is so well established and is now so ancient that its authority cannot be questioned." The application of the rule during the years 1914-18 was not as frequent as might be supposed. The extension of contraband to include almost all merchandise which might directly or indirectly reach the enemy rendered it unnecessary to decide whether transfer of goods within that broad category had taken place. The rule, again, only applies to genuine documentary transfers in pursuance of which rights have been acquired by the transference which in courts other than Prize Courts would be valid and enforceable,⁴ and in a large number of cases the transactions were palpably sham.

It was thought that changes in commercial practice since the Napoleonic Wars, the wide employment of documents of title to sell and effectively to transfer the property in goods upon ships afloat, would have effected some mitigation of the rule, and this was suggested by Sir S. T. Evans in *The Southfield*⁵ and by Lord Sterndale in *The Rena*.⁶ But in *The Kronprinzessin*, etc.,⁷ the Judicial Committee of the Privy Council definitely refused to extend any tenderness to the rule on the ground that its application might be inconsistent with the smooth and regular working of modern commerce.

The rule does not apply to shipments which, from the circumstances or the course of dealing with the shipping documents, are such as to be an actual delivery to the neutral consignee, e.g. where goods are shipped under an f.o.b. contract including freight and insurance, or c.i.f., payment against documents at the port of loading, and payment is made and documents handed over before the ship sails.⁸

Transfers made by an enemy in contemplation of war can be avoided by a captor even though the property has passed to the neutral buyer, but it must be established that the seller in making the transfer

¹ *The Jan Frederick* (1804), 5 C. Rob. 133.

² *The Vrow Margaretha* (1799), 1 C. Rob. at p. 338; Hall, 8th ed., p. 601; Westlake, part ii., p. 173. See also *The United States* (1917), p. 30.

³ *The Kronprinzessin*, etc. (1920), 1 A. C. at p. 499.

⁴ *Ibid.*

⁵ Referred to (192 r), A. C. at p. 506. ⁷ *Ubi supra*.

• This and two other examples will be found in *The Dirigo*, etc. (1920), p. 425.

was attempting to defeat the rights of belligerent captors.¹ If the transfer was made in pursuance of a pre-war contract it rebuts the presumption arising from a general apprehension of hostilities.² On the other hand, where a neutral has contracted to sell goods to an enemy and the goods are shipped in peace-time without any anticipation of hostilities, their liability to be seized arises only if according to the law of sale the property in the goods has passed to the enemy.³

In the investigation of the ownership of captured property as vested at the commencement of the voyage, the Prize Court will disregard equitable liens on enemy property, and relegations of risk to neutral consignors.⁴ In the *Marie Glaeser*, a vessel captured by the British at the beginning of the Great War, three classes of claimants (British and neutral) were concerned, viz. shareholders, mortgagees and persons claiming for brokerage and necessities. In the course of his judgment, the President observed that under the old practice the fate of a captured vessel depended on her flag; and a shareholder was bound thereby. Further, maritime liens are disregarded by the Court. Claims under mortgages are not sustainable⁵; they are no more valid against the rights of captors than are bottomry bonds or other maritime liens. Such is the practice adopted also by the Prize Courts of the United States,⁶ France⁷ and Japan.⁸ Only the outward character of the vessel is to be considered both by the captor and by the Prize Court, and rights created by private agreement are not recognised.⁹

Neutral claims on captured vessels.

Similarly, enemy liens on neutral property are disregarded; they are not deemed to impress such an enemy character on ship or cargo as to make them confiscable.¹⁰

¹ *The Southfoeld*, *ubi supra*.

² *The Daksa* (1917), A. C. 386, which also decides the following curious point: A British cruiser captured an Austrian vessel part of whose cargo had been transferred *in transitu* by its German owners in apprehension of war with France and Russia but with no anticipation of hostilities between Great Britain and Germany. The transfer was held to be valid against Great Britain as it was not in fraud of her belligerent rights.

³ *The Atlas* (1801), 3 C. Rob. 299; *The Miramichi* (1914), P. 71.

⁴ *The Josephine* (1801), 4 C. Rob. 75; *The Tobago* (1804), 5 C. Rob. 218; *The Marianna* (1805), 6 C. Rob. 24.

⁵ *The Aina* (1854), Spinks, 8.

⁶ *The Hampton* (1866), 5 Wallace, 372; *The Carlos F. Roses* (1899), 177 U.S. 655.

⁷ Cf. *Le Turner* (1870), Barboux, *Jurisprudence du conseil des prises*, 1870-1, P. 76.

⁸ *The Nigretia* (1905), Takahashi, p. 552; 2 R. & J. Pr. Cas. 201; *The Russia* (1904), Takahashi, p. 557.

⁹ *The Marie Glaeser* (1914), P. 218. A decision to the same effect was given by the German Superior Court of Prize, Berlin, in *The Fenix*, 17 December,

¹⁰ *The Ariel* (1857), 11 Moore, P. C. 119; *The Odessa* (1916), 1 A. C. 145. Similarly in the French Prize Court: *The Colonia* (1915), *Journal officiel*,

Ransombills. A captured vessel may buy her freedom on the terms of a "ransom bill," which protects her from further capture; the due payment of the ransom being enforced by taking a hostage who must (according to the British practice), in order to obtain his liberty, compel the owners to perform the terms of the bill. It is questionable whether the captor, being an enemy, has in the British Courts a direct right of action on the bill¹; other countries, however, usually allow him to sue. In Great Britain the practice of ransoming may be forbidden by Order in Council.² In the United States there is no legislative act forbidding the transaction. In France it was permitted during the Franco-German War in case of imperative necessity. There is no recent example.

15 June, 1915. The captor's right also supersedes claims for necessities: *The Tergestea* (1915), 31 T. L. R. 180; and for pilotage dues: *The Hanna Larsen*, *The Times*, 12 September, 1914.

¹ Cf. *Ricord v. Bettenham* (1765), 3 Burr. 1734; *The Hoop* (1799). 1 C. Rob. 201.

² Naval Prize Act, 1864, sec. 45; see Westlake, part ii., pp. 181, 182; Hall, 8th ed., p. 549. By the Naval Prize Bill (sec. 40) (in the main a consolidating bill) laid before Parliament in 1910, and rejected, power to prohibit or allow ransoming by Order in Council was retained.

CHAPTER VI

POSTLIMINIUM; SALVAGE—CONCLUSION OF WAR

1. POSTLIMINIUM; SALVAGE

IN Roman law the right of postliminium was the right which could be alleged by escaped prisoners entitling them to resume their legal status, as if they had never been away from home. "Postliminium fingit eum qui captus est in civitate semper fuisse" (postliminium depends upon the fiction that a prisoner has never left his own State). It also applied to recaptured immovables and certain movables, e.g. trained horses, pack-mules, transport vessels. It did not apply to other booty; or to deserters, those who surrendered through cowardice or were formally surrendered to the enemy, and those who preferred to reside with the enemy.

Origin of term.

From our point of view, the imposing title, and indeed the fiction itself, are hardly required in international law to express the fact that the rights of an owner are suspended, not destroyed, by occupation or capture, and revive when the suspending circumstance ceases to be operative. The doctrine implied that the control of the invader or captor depended only on provisional possession and not on permanent appropriation. The return of captured territory and other property to the former owners might be effected in the following ways¹: (1) Voluntary evacuation by the enemy and reoccupation by the ousted Sovereign; (2) reconquest by the latter; (3) reconquest by a third State, followed by restoration to the ousted Sovereign; (4) successful levy *en masse* (which is, however, closely related to No. (2)); (5) in case of property, recapture by the former owner or abandonment by the captor; (6) restoration of the occupied or conquered territory and captured property by a treaty of peace. Thus, if a ship has been captured and is recaptured, postliminium, subject to the obligation to pay salvage, comes to the aid of the original owner. The Roman doctrine has bequeathed to the law of nations little beyond the *damnosa hereditas* of a pretentious title; the re-entry into rights of ownership does not depend upon the fiction that they have never been interrupted, for it is conditioned upon a recognition of liabilities legally contracted by the other

Restoration of captured property.

¹ Cf. Oppenheim, ii. § 281.

belligerent during the period of interruption. The modern doctrine has no application except during hostilities, for every treaty of peace, unless the contrary is explicitly stated, is tacitly based on the principle of *uti possidetis* (keeping what one has at the time), as opposed to the principle of *status quo ante helium* (keeping what one had before the war broke out). Private property upon land not being a proper subject for capture, postliminium is generally limited in its effect to the national territory and to captured vessels.

A controversy which arose in 1871 illustrates the meaning of the doctrine.¹ During the Prussian occupation of France, the Prussian Government entered into contracts with certain persons for the sale of some public French forests. The price was paid by the purchasers in advance. When the Prussian occupation ceased, they claimed to be entitled to finish cutting down the trees for which they had already paid. This view was not accepted by the French authorities, and was negated by an Article in the additional Convention of December 1871. The French rights revived by postliminium the moment the Prussian occupation came to an end. France was bound by all executed contracts, and generally by the *status quo*, but, in view of the revival of her sovereignty, was not bound to acquiesce in acts which amounted to an executory derogation therefrom, and were, in addition, acts of "waste," which violated the now accepted principle (embodied in Article 55 of the Hague Regulations) that an occupying State must act as the usufructuary only of the forests and other real property in occupied territory.²

Salvage

When captured ships are recaptured by the owner's fellow-countrymen or allies, they are not held by the recaptor as original prize, but revert to the prior owner, subject to his obligation to pay salvage. This subject is strictly municipal in its character, except in so far as the rights of allies and neutrals may be concerned, but a brief explanation of the principles and rules of salvage may be usefully added to this chapter. Bynkershoek quotes the old *Consolato del Mare*, the earliest of mediaeval maritime codes, to the effect that restitution was only due, if the ship was recaptured before removal to a safe place (*infra præsidia*); if, on the other hand, it had been so removed, since the plenary ownership had passed to the enemy, recapture absolutely transferred both ship and cargo to the recaptor. According to the ancient laws of England,³ Scotland⁴ and France,⁶ the same practice obtained, and the title of the original owner was

¹ For the case of the Elector of Hesse-Cassel, as bearing on this question, see *infra*, p. 296.

² See *supra*, p. 259.

³ See Crompton, *Court d'Admiraltie d'Angleterre*, p. 91.

⁴ Lord Stair's *Decisions*, vol. ii., p. 507.

⁵ Valin, *Comment, sur l'ordonnance*, liv. iii. tit. 9, art. 8.

obliterated. An English Ordinance of 1649, issuing from the Long Parliament, directed restitution of recaptured vessels to British subjects upon payment of salvage, without regard to intervening dealings other than adoption into the public service of the captors, a principle which was also adopted in naval prize acts in 1786 and 1864.¹ The *Consolato del Mare*, as we have mentioned, required that the recapture should take place before the vessel had been removed to "a safe place," a requisition sometimes known as the *Infra prasidia* rule; other authorities adopted a time limit of twenty-four hours, in order to extinguish the owner's title, a test spoken of by Valin² as the common law of Europe.

A very interesting judgment of Lord Mansfield's in *Goss v. Withers*³ suggests that neither of these tests was ever accepted in the English Prize Courts: "I have taken the trouble to inform myself of the practice of the Court of Admiralty in England before any Act of Parliament commanded restitution, or fixed the rate of salvage; and I have talked with Sir George Lee, who has examined the books of the Court of Admiralty, and informs me that they held the property not changed, so as to bar the owner, in favour of a vendee or recaptor, till there had been a sentence of condemnation; and that, in the reign of King Charles I I., Sir Richard Floyd gave a solemn judgment upon the point, and decreed restitution of a ship retaken by a privateer, after she had been fourteen weeks in the enemy's possession, because she had not been condemned."

The judgment of Sir W. Scott in *The Flad Oyen*⁴ was to the same effect, and, so far as British Prize Courts are concerned, the rule may be clearly stated that no neutral may safely buy a British vessel in the enemy's hands until she has been formally condemned in a competent court. As between British subjects, not even condemnation can extinguish the title of the original owner in the event of recapture; his ownership revives by virtue of postliminium in every case except when his ship has been converted into a public vessel of the capturing Power.

The amount of salvage payable varies in different countries. In England the ordinary rule is one-eighth of the ship's value⁵; in Amount of salvage.

¹ See Sir W. Scott's judgment in *The Ceylon* (1811), 1 Dodson, Adm. at pp. 117, 118; see also Westlake, part ii., pp. 179, 180. The Naval Prize Bill of 1910 (which was rejected) adopted the same principle (sec. 30).

² Valin, *Comment, sur l'ordonnance*, liv. iii. tit. 9, art. 8.

³ (1759), 2 Burr. 694.

⁴ (1799), 1 C. Rob. 135.

⁵ See the Naval Prize Act, 1864 (sec. 40). The Greek steamship *Pontoporos* was captured by the German cruiser *Emden* and recaptured by H.M.S. *Yarmouth*; Sir S. T. Evans awarded the recaptors as prize salvage one-sixth of the vessel's value: (1916), P. 100. But in the case of the *Svanfos*, which was rescued by a British submarine when about to be sunk by a German submarine, Hill, J., awarded a small sum representing about one-hundredth of the ship's value: (1919), P. 189.

the United States one-eighth, if the recapture was due to a public ship, one-sixth, if to a privateer. French law directs restitution on payment of one-thirtieth of the value in case of recapture by a public vessel, if such recapture takes place within twenty-four hours of the original seizure; after that period the proportion payable rises to one-tenth. In Denmark the amount claimable from the original owner is one-third, in Sweden one-half, in Spain and Portugal one-eighth.

2. CONCLUSION OF WAR

Modes of
terminating
war.

A war may be brought to an end in three ways:

- (1) By the reciprocal intermission of hostilities, without any definite understanding being arrived at between the contending parties;
- (2) by the conquest and subjugation of one of the belligerents by the other, so that the former being reduced to impotence is compelled to submit to the will of the latter;
- (3) by a bilateral arrangement embodied in a treaty of peace, whether the honours of war be equal or unequal.

Of the first mode there are but few examples: in 1716, the war between Sweden and Poland; in 1720, the war between Spain and France; in 1801, that between Russia and Persia; in 1825, the Spanish colonial campaign; in 1867, the war between France and Mexico. Such procedure obviously involves serious difficulties, affecting both the belligerents and third States; in the case of the former the relationships between the Governments and their subjects remain uncertain, in the case of the latter there is no definite time limit for the observance of the obligations of neutrality. Of the second mode of ending war, examples are more numerous; the arrangement effected between conqueror and conquered is not a treaty of peace proper; it represents usually the terms of surrender and absorption. It is, however, the almost invariable practice to restore a state of peace and determine its conditions by an armistice followed by a formal treaty of peace.

reaty of
peace.

The effect of a treaty of peace is entirely to extinguish the subject of dispute between the contracting parties. In practice a specific renunciation of the object in controversy is frequently required from the defeated party; but whether it be particularly inserted or not, the text-books lay down the academic proposition that recourse to arms is not again permissible for the same object. Thus Vattel says: " The effect of the treaty of peace is to put an end to the war,

and to abolish the subject of it. It leaves the contracting parties no right to commit any acts of hostility on account either of the subject itself which had given rise to the war, or of anything that was done during its continuance; wherefore they cannot lawfully take up arms again for the same subject. Accordingly, in such treaties the contracting parties reciprocally engage to preserve perpetual peace; which is not to be understood as if they promised never to make war on each other for any cause whatever. The peace in question relates to the war which it terminates, and it is in reality perpetual, inasmuch as it does not allow them to revive the same war by taking up arms again for the same subject which had originally given birth to it." ¹ Lord Stowell, too, observed: "A treaty of peace is an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war." ² In many treaties a stipulation is found that the peace thus re-established shall be "perpetual": e.g. in the First Peace of Paris, 30 May, 1814; in the treaties of Paris, 1856; Zurich, 1859; Prague, 1866; Vienna, 1866; London, 30 May, 1913. It is omitted, however, from most of the peace treaties of the last half-century.

A treaty of peace will naturally provide for the settlement of outstanding territorial disputes between the signatory parties, but on all points where it is silent the principle of *uti possidetis* comes into play. Consistently with that principle, except in so far as the treaty itself contains other provisions, both parties keep what they hold when the instrument is drawn up.

The restoration of peace revives all private rights between the subjects of the belligerents in so far as they have been suspended but not entirely abrogated by the war³; further, it makes ransom bills and the contracts of prisoners of war immediately actionable.

The operation of a treaty of peace, especially with regard to the discontinuance in general of hostile relations, commences at the moment of signature, unless, of course, it is otherwise expressly agreed; and apart from such express stipulation, it cannot strictly be said to come into effect as a whole until the exchange of ratifications. Nice questions have sometimes arisen as to the responsibility of subjects for belligerent acts done after the treaty has been signed, but before they are affected with notice of its conclusion. For such intermediate acts it is now agreed that there is no criminal liability. On the question of civil liability Lord Stowell expressed the reasonable view in *The Mentor*⁴: ". . . If an act of mischief was done by the king's officers, through ignorance, in a place where no act of

¹ *Droit des gens*, liv. iv. chap. ii. § 19.

² *The Eliza Ann* (1813), 1 Dpdson, 244, at p. 249.

³ See *supra*, p. 192.

(1799), 1 C. Rob. 179, at p. 182.

hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility, . . . If the officer acted through ignorance, his own Government must protect him; for it is the duty of Governments, if they put a certain district within the king's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through the ignorance of those persons, they are to be borne harmless at the expense of the Government whose duty it was to have given that notice,"

Another interesting case on this question is *The John*.¹ Under the Treaty of Ghent, 24 December, 1814, between Great Britain and the United States, the respective forces were to be ordered on the ratification (which was effected 17 February, 1815) to cease all hostilities, and all "vessels and effects" captured by either side after the dates specified were to be restored. The *John*, an American vessel, was captured after the expiration of the period, both captor and prize being ignorant of the conclusion of peace. The prize, however, whilst in the possession of the captor, was soon afterwards lost through an act of God. The owners then sued for compensation. The alleged mismanagement of the ship by the captor not having been proved, Lord Stowell held that the only point to consider was the question of capture out of due time: the captor was not personally liable for the loss, inasmuch as he was ignorant of the conclusion of the treaty and he was in *bona fide* possession of the prize; but a liability might attach elsewhere (this being a point which the court was not then asked to decide). Subsequently, the United States claimed compensation from Great Britain; and the claim was, together with others, referred in 1853 to a Joint Commission, which held, conformably to the decisions in the above cases, that a want of due diligence in notifying the cessation of hostilities gave an injured party a right to indemnity, and that, in order to prevent disputes as to what was due diligence, the practice was adopted of specifying certain periods for the cessation of hostile acts. In these circumstances the British Government was held responsible.²

Notice of Questions have arisen, too, as to the nature of the notice which imposes upon a commander the obligation to cease from hostilities, and it is reasonable that he should be affected only with notice from his own Government. On this principle the French Court in 1803 condemned as good prize the *Swineherd* (designated *Le Porcher*

¹ (1818), 2 Dodson, 336.

² J. B. Moore, *International Arbitrations* (Washington, 1898), vol. iv., p. 3793.

in the French report),¹ captured by a vessel which had received no official notification of the conclusion of peace (viz. the Peace of Amiens, 27 March, 1802). It is true that in this case the time fixed by the treaty of peace for the suspension of hostilities in the area affected had not expired; but the case was undoubtedly an instance of hardship caused by the strict application of the rule. However this may be, in the case of *The Nymph*, heard by the same court a few days later, it was held that the capture was invalid, because it was proved that, though it had been effected before the expiration of the specified period, the captor had sufficient knowledge of the establishment of peace, which had been communicated to him by the British authorities. The French advocate-general observed that the receipt of news of the peace from the enemy, implying that he has ceased offensive operations, demands a cessation of hostilities on the part of the other side; to take advantage of the safety, consequent on such communication, and continue the offensive is an act of perfidy and disloyalty and a stain on the French name.²

Where no date is fixed for the discontinuance of hostilities, all captures effected after the conclusion of peace must be restored as soon as that fact becomes known.³

A prize that has been captured during the war, and recaptured after the establishment of peace and in ignorance thereof, should be restored to the captor; for neither the proprietary rights of the captor (that is, where the vessel had been duly condemned) nor his possessory rights (where the vessel had not yet been condemned) may be forcibly interfered with after peace is restored and notified.⁴

Whether a Prize Court may, after the conclusion of peace, adjudicate on vessels that were captured during the war, is, in the absence of an express provision to the contrary,⁵ rather uncertain. There are cases in which an affirmative answer has been given.⁶ Thus the *Ceres*, a vessel under Dutch flag bound for England, was captured by the French before the establishment of peace, and was brought before the Prize Court on 16 May, 1814, when peace had already been concluded. The Conseil d'Etat supported the condemnation, on the ground that it is for the court to consider only the rules and circumstances existing at the time of the capture and not those existing at the time of adjudication. It would seem, however,

Adjudication after peace.

¹ Pistoye et Duverdy, *Traite des prises maritimes*, vol. i., p. 152.

² Pistoye et Duverdy, vol. i., p. 155.

³ Cf. *Bain v. Speedwell* (1784), 2 Dallas, 40.

⁴ Cf. *The Schoone Sophie* (1805), 6 C. Rob. 138.

⁵ For examples of such express provisions, see the treaties of Zurich, 1859, Vienna, 1864, and Frankfort, 1871, whereby captured vessels that were not yet condemned at the restoration of peace were to be returned to the owners.

⁶ Pistoye et Duverdy, vol. i., p. 145.

that a contrary conclusion is, on principle, justifiable, inasmuch as the adjudication by a Prize Court partakes of the character of a hostile act, as it is the essential complement of the capture. In 1896 the question was raised again in the case of the war between Italy and Abyssinia. The *Doelwijk*, a Dutch vessel (i.e. neutral), having been seized by an Italian cruiser for carrying contraband, the Italian Prize Court held, 8 December, 1896, that it was competent to investigate the legitimacy of the capture; but it refrained from decreeing condemnation, on the ground that peace had in the meantime been declared, and that a sentence of condemnation would be an act contrary to the resumption of pacific relations, as it would thereby impose on another's property a limitation no longer justified by the necessity of legitimate defence.¹

This view of the Italian Court was not adopted, however, by the Japanese Prize Courts in 1905, which held that captures—either from the enemy or from a neutral—made during the war may be adjudicated upon, and a decree of condemnation may be pronounced²; nor was it followed by the British or the French Prize Courts, which continued to adjudicate upon captures, made during the hostilities of 1914-18 and those effected after the Armistice of November 1918, up to the signing of the treaty of peace, 1919.³

Indemnity
clause.

In every treaty of peace is implied, or expressly set forth, an indemnity clause extinguishing all claims for damage done in war, or springing from warlike operations. "I will not take upon myself to say," said Lord Stowell,⁴ "that a treaty of peace puts an end to all questions of property between the subjects of the States entering into the treaty; perhaps it may be more strictly correct to say that it quiets all titles of possession arising out of the war only. At the same time, when a treaty of peace has been concluded, the revival of any grievances arising before the war comes with a very ill grace, and is by no means to be encouraged."

Various
articles of a
peace treaty.

The clauses of a peace treaty may be conveniently divided into three classes:

¹ Cf. the judgment, in a French translation, given in *Archives diplomatiques* (Paris), Jan. 1897, PP. 81 seq.) *Journ. du droit int. prive* (Paris), vol. xxiv., pp. 850 seq.

² Cf. *The Australia* (1906), 2 R. & J. P. Cas. 373; *The Montara* (1906), 2 R. & J. P. Cas. 403.

³ Several are reported in L. R. (1920), P. Although hostilities between the Allied Powers and Germany were effectively discontinued by the Armistice Agreement of 11 November, 1918, the Allied blockade of Germany remained in full force until the treaty of peace, 1919; a Norwegian vessel carrying "contraband" to Germany on 6 March, 1919, was captured by a British warship and condemned: *The Rannveig* (1922), 1 A. C. 97.

⁴ In *The Molly* (1814), 1 Dodson, 395.

- (1) General—those relating directly to the cessation of hostilities and the establishment of peace, and regulating matters which the war itself has brought into existence;
- (2) special—those relating to the essential points at issue, for which the war was begun, so that they embody what may be described as the price of peace;
- (3) miscellaneous—those relating to matters that are peculiar to this or that treaty, though in many cases they may logically be classified under (1) or (2).

The general clauses, which are found in every treaty of peace and are frequently drawn up in like terms, comprise the following subjects: the cessation of hostilities and the resumption of peace, together with the date of operation; the evacuation of territory under military occupation; the restoration of property captured or regulation conformably to the principle of *uti possidetis*; the restoration of prisoners of war; the granting of an amnesty to those who were compromised during the war through certain acts; the revival or abrogation of treaties existing before the war. The special articles that are found in nearly all treaties relate on the one hand to the payment of a war indemnity, and on the other to the cession of territory. Amongst the miscellaneous articles may be mentioned the following: those relating to demobilisation, destruction of fortresses, the tombs of the fallen; the regulation of communications, waters, navigation, fishery, customs, treatment of shipping, the rights of subjects of one party expelled during the war by the other party from the latter's territory, compensation to subjects for losses caused by military operations or during military occupation, the establishment of new States, etc. Besides the main instrument, there are further instruments, some of which are signed on the same day as the main instrument, and others are drawn up and signed subsequently, which embody "additional" or "separate" articles and secret articles. The former are generally supplementary to the principal treaty, providing for the various details regarding the due performance of the clauses of the main instrument. Secret articles are such additional articles as are intended to be kept secret as between the contracting parties, in the interests of public policy or State exigencies.

Where territory is ceded, many important questions arise as to State succession. In this respect the guiding principles governing the position of the ceding State and the cessionary State may be expressed, conveniently if not quite strictly, by the civil law maxims: "res transit cum suo onere," and "nemo plus juris ad alium transferre potest quam ipse habet." The rights and obligations of the cessionary State with regard to the territory it acquires relate to a great variety

Cession of
territory and
State
succession.

of questions, e.g. the nationality and allegiance of the ceding State's subjects and other inhabitants belonging to the ceded territory; existing treaties appertaining to this territory; its public law and administration; property; debts; concessions; private law and private rights, etc. International law and practice furnish no definite rules for the determination of these and similar problems; so that a solution must be expressly arrived at by agreement between the parties concerned. One point, however, is pretty well established, viz. that a new nationality and allegiance should not be imposed on the inhabitants of ceded territory against their will, and that they should be allowed to exercise their option. This principle was followed by the treaties of peace, 1919, by which large tracts of territory in Europe became the subject of changed sovereignty. The treaties provided that the occupants of the ceded districts should acquire the nationality of the State to which they were ceded, except in the case of persons over eighteen who might exercise a right given by the treaties to opt for their original nationality. The exercise of that right by a person operated to retain the original nationality for his wife and his children under eighteen, and entailed an obligation to leave the ceded territory.¹ It is beyond the scope of this book to go fully into this question, and the other matters relating to State Succession. Certain points, however, which apply to cession proper will be referred to presently in reference to the annexation of territory incidental to conquest.

Conquest.

Conquest is the permanent absorption of all or part of the territory of a defeated enemy. A title resting upon conquest is not complete until the conqueror has satisfied two requirements. In the first place, he must possess the material strength to make his conquest good, and in the second, he must have, and exhibit, the intention of appropriation. The rights of an occupier naturally fall far short of those conceded to conquest, and it is sometimes difficult to determine when the one has definitively passed into the other.

Case of Hesse-Cassel.

The leading case on this point is known as the case of Hesse-Cassel.² In 1806 the Elector of Hesse-Cassel was driven from his electorate by Napoleon, and remained excluded for eight years. For a year after his expulsion Napoleon governed Hesse-Cassel under military law, and then incorporated it in the kingdom of Westphalia. Jerome Bonaparte was placed on the throne of this newly created kingdom, and his succession was recognised by the treaties of Tilsit (1807) and Schonbrunn (1809). Prior to his expulsion the Elector

¹ See Hall, 8th ed., p. 688.

² Phillimore, *Commentaries*, vol. iii. §§ 568-74, pp. 841 seq.; Cobbett, *Cases*, vol. ii. (1913), pp. 248 seq.

had lent money on mortgage to one Count von Hahn; the latter had received a discharge in full from Napoleon on payment of part of the money advanced. On his return the Elector instituted proceedings against the estate of his debtor, who had died in the meantime, thus raising the whole question of the validity of Napoleon's acts. If Napoleon had effected a definitive conquest of Hesse-Cassel, the acts sought to be set aside were well within his legal rights. The Elector had joined the Prussian forces, and was therefore in arms against the lawfully constituted authorities of his country. This circumstance justified confiscation of his private property within the dominion, while the conqueror succeeded to all public property by a species of universal succession. The question was therefore one of fact, and was carried from the Mecklenburg Court to the Universities of Kiel and Breslau, and thence by way of appeal to a further University. This ultimate tribunal declined to recognise the Elector's claim on the grounds that Napoleon's conquest had been definitive, that the Elector had been treated by the treaties of Tilsit and Schonbrunn as "politically extinct," and that his restoration was not a continuation of his former rule, but a Government beginning *de novo*, and inheriting only what was left by its legal predecessor.

When a State absorbs by conquest a part or the whole of another State, its position with regard to the liabilities of the conquered State is a matter of some difficulty. From the opinions expressed by writers on international law, it is possible to draw up a few general rules, which no doubt afford some guidance as to what in equity ought to be done; but international practice on the subject hardly provides anything which can be called a rule of law.

Effects of
conquest
upon lia-
bilities.

It may be laid down roughly, in the first place, that the conqueror succeeds to all the assets of a ceded or conquered territory. From the maxims "*res transit cum suo onere*" and "*nemo plus juris transferre potest quam ipse habet*," it would naturally follow that such assets must be taken subject to the liabilities attached to them; and we consequently find it stated that a ceded province is taken by the conqueror subject to the debts charged upon it or upon its resources.¹ It is also suggested that in such case the conqueror ought to take over a proportionate part of the general liabilities of the conquered State; and there are a few instances in which such liability has been taken over, but only by virtue of special conventions which negative the existence of any obligation apart from convention.²

¹ Cf. Hall, 8th ed., pp. 114, 121; Westlake, part i., pp. 68 seq.; Oppenheim, i. §§ 82, 216, and references there cited; Phillimore, vol. i. (2nd ed.), p. 336; Rivier, *Principes du droit des gens*, vol. i., p. 70; and cf. an article in the *Law Quarterly Review*, vol. xvii., p. 392, by Professor Westlake.

² Hall, 8th ed., p. 121, n.

As, when a conquered State is wholly absorbed, all its liabilities must be said to be charged upon its resources, it would follow, logically, that the conqueror takes the territory subject to such liabilities; and this is the view of Hall¹ and Westlake,² the latter suggesting that the liability must be limited to the value of the assets received, if and in so far as such limitation is practicable; but he is of opinion that "there seems no reason why the general debt of an extinguished State should fare better, in point of the future security for it, than the local debt of a transferred province."³ To these authorities may be added the dictum of James, V.C., in *U.S.A. v. McRae*⁴: "I apprehend it to be the clear, public, universal law that any Government which *de facto* succeeds to any other Government—whether by revolution or restoration, conquest or reconquest—succeeds to all the public property . . . and to all rights in respect of the public property of the displaced power. . . . But this right . . . can only be enforced in the same way and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed and displaced, and was itself seeking to enforce it."

War debts.

But it is generally admitted, by way of exception to the general rule, that the conqueror cannot be held liable for debts incurred by the conquered State for the purpose of carrying on the war, for no State can be assumed to undertake responsibility for acts directed against itself; nor is the reasonableness of the rule itself entirely free from doubt, for, as was pointed out by the Lord Chief Justice in *West Rand Central Gold Mining Company v. The King*⁵: "A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another power, may have been brought about by the very state of insolvency to which the country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent State?"

General debt.

In the history of international relations there is little to be found which affords any guidance on the question. By agreement, as we have mentioned, a part of the general debt of the conquered State has sometimes been taken over; and the United States has, in the course of negotiations, more than once insisted that the conqueror takes the place of the conquered and is subject to his liabilities.⁶ Her conduct was perhaps consistent with this attitude when, on absorbing Texas (1845), she specifically disclaimed any general

¹ 8th ed., p. 123.

² (1869), L. R. 8 Eq. 69, at p. 75.

³ Cf. Westlake, part 1., pp. 62, 63, 75.

Part i., p. 77.

⁴ *Ibid.* (1905), 2 K. B. 391, at p. 403.

⁵ *Ibid.*

⁶ (1905), 2 K. B. 391, at p. 403.

liability, thereby, it may be, admitting liability in default of a specific disclaimer¹; and when, in 1898, she gave as a reason for refusing to undertake the debts of Cuba the fact that they were not created by Cuba itself or incurred for its benefit, but were created by Spain for her own purposes and mainly for maintaining a Spanish army on the island.² The Italian Courts in 1877 laid it down that, in the case of the cession of a part of a State's territory, the transferee is liable to debts contracted in relation to the ceded territory³; and there is authority to be found in English cases for the same proposition.⁴ But whether the doctrine can be described as a rule of international law or not, it will clearly not be held to be a rule of such clearness and general acceptance as to be entitled to recognition in an English municipal court at the present day. Halleck points out that there may be rights recognised in international law which nevertheless require legislation to bring them under the protection of the municipal law: "a refusal to pass the necessary remedial acts . . . would be a violation of the obligations imposed . . . by the law of nations,"⁵ but the remedy can only be enforced by diplomacy. This is the explanation of the cases of *Cook v. Sprigg*⁶ and *The West Rand Central Gold Mining Company v. The King*,¹ In the former case the distinction is clearly drawn: "According to the well-known rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation." In the latter case this "well-known rule" had, in the judgment of the court, become no rule at all; for not only did the court decide that a municipal court has not authority to enforce such a rule, unless directed by legislation so to do, but that there was no principle of international law rendering the conqueror liable to the debts of the conquered incurred before the war. Guided in the main by the former of these two cases, the Commissioners who, in 1900 and 1901, inquired into the concessions granted by the Transvaal Government before the Boer War, declared that "it is clear that a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing State refuses to recognise them,"⁸ a dictum which, while undeniably correct in its statement of the position of an English court, can hardly be said to be of much authority when the question arises, in an international dispute, whether the annexing State was right or wrong in its refusal.

¹ Cf. Westlake, p. 77. ² Moore, *Digest*, vol. i., pp. 356 seq.

³ Westlake, part i., p. 80.

⁴ E.g. *United States of America v. McRae* (1869), L. R. 8 Eq. 69, at p. 75.

⁵ Halleck, 4th ed., vol. ii., p. 530. ⁶ (1899), A. C. 572, 578.

⁷ (1905), 2 K. B. 391. ⁸ *Parl. Papers* (1901), Cd. 623, p. 7.

Recent
practice.

States to which by the Treaty of Versailles certain parts of German territory were ceded assumed liability for a proportion of the German pre-war national debt and of public debt of the German State from which the territory was taken, as determined according to certain provisions of the treaty. Exceptions were made in favour of France in the case of any proportion attributable to Alsace-Lorraine, and in favour of Poland in the case of that part of the German debt which was incurred for the German colonisation of Poland.

The Treaty of Lausanne, 1923, divided the public debt of Turkey between Turkey, the Balkan States which acquired parts of Turkish territory in 1913, the mandated territories of Syria, Palestine and Iraq, and the States to which certain Turkish islands were ceded by the treaty.

The case of Austria-Hungary, which was dismembered and divided into several succession States and which ceded portions of territory to other States, was more complicated. The Treaty of St Germain divided the pre-war public debt of the Dual Monarchy between the succession States and the States which acquired Austro-Hungarian territory, in proportions to be determined by the Reparations Commission set up by the treaty. But all these States were exempt from liability for the Austro-Hungarian war debt. This overwhelming burden for the new Austria was lightened by a provision that neither the succession States nor their nationals were to have recourse against her in respect of war-debt bonds held by them.¹

Effects of
conquest
upon
persons.

The complete conquest of a country has the effect legally of converting the inhabitants of the conquered country into citizens of the conqueror's State, unless, perhaps, they leave the conquered territory or, being out of it, remain out of it except for a temporary purpose.² Where a country cedes a portion of its territory to a conqueror, the position is somewhat different, for in that case the cession is an act of the ceding State, by which its subjects are presumptively bound³; but it is usual to stipulate that the inhabitants of the portion ceded shall be at liberty to retain their nationality of origin on condition that they leave the territory ceded.⁴ But it is not settled beyond question, either in the case of conquest or of cession, that the subject has the right, by leaving the country, of retaining his old nationality; and in the American case of *United States v. Repentigny*,⁵ it was laid down by Mr. Justice Nelson on behalf of the Supreme Court:

¹ Oppenheim, i. §§ 83, 84; Hall, 8th ed., p. 122, n.

² Westlake, part i., p. 70.

Hall, 8th ed., p. 686.

³ Such provisions appear in the treaties of peace, 1919.

⁵ (1866), 5 Wallace, 211, at p. 260.

(1) That on a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious Sovereign, deprive themselves of protection and security to their property, except so far as it may be secured by treaty.

(2) When on such a conquest it was provided by treaty that the former inhabitants, who wished to adhere in allegiance to their vanquished Sovereign, might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

A question which also arises at the close of hostilities concerns War crimes. the punishment of offenders who have been guilty of war crimes. From Oppenheim's definition of war crimes as "hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders,"¹ it is clear that such offences may be, and generally have been, dealt with during hostilities, and some writers insist that they can only be justiciable in the course of hostilities and that for them there can be inflicted no punishment extending beyond the duration of the war.² But the attempt in the Treaty of Versailles to deal with war crimes alleged to have been committed by the defeated Germans has given another turn to this difficult topic. Article 227 contained a public arraignment of the German ex-Emperor William II. "for a supreme offence against international morality and the sanctity of treaties." The flight of the ex-Kaiser to Holland and the refusal of the Dutch Government to surrender him to the Allied Powers left unanswered the interesting problems of the tribunal by which he would have been tried, the law to which he would have been held answerable and the punishment which conviction would entail. Further Articles of the treaty bound Germany to recognise the right of the Allied Powers to prosecute Germans alleged to have violated the laws and customs of war. On presentation of a long list of accused, including some naval and military officers of high rank, Germany objected to their surrender and secured the acceptance of her suggestion that they should be tried by the German Supreme Court at Leipzig. The British Government instituted proceedings against seven persons; three were outside the jurisdiction, but of the remainder three were convicted and one acquitted.³ The acquittal of a submarine commander accused of sinking a hospital ship was secured on the ground that he had acted in obedience to superior orders, which was a complete defence according to both German law and international law.⁴

¹ Oppenheim, ii. § 251.

² Hall, 8th ed., p. 496.

³ *Parl. Papers* (1921), Cmd. 1450; C. Mullins, *The Leipzig Trials* (1921).

⁴ See Oppenheim, ii. § 253.

Defence of
orders of a
superior.

The defence of obedience to superior orders and the extent to which it avails is one of the many difficulties that arise in considering the punishment of war crimes. The broad proposition may be accepted without resolving the problems which arise when the alleged offence is an act done in obedience to superior orders to commit an obvious and flagrant breach of the laws of war,¹ or in obedience to orders issued to the commander in the field of operations by a superior command or by a civilian Government. No agreement has been reached as to the breaches of the rules of warfare which may be regarded as war crimes, and the accepted practice of allowing each belligerent to decide for himself and to punish according to the views of his own tribunals has only led to greater uncertainty. Added to this is the inequality and injustice which must follow when trial and punishment depends, during hostilities, upon the chance of capturing the offender, and after hostilities, is only inflicted upon members of the vanquished forces. The treaty signed at Washington in 1921 bestows upon neutrals the power to punish submarine commanders guilty of violations of the rules there agreed upon with regard to naval warfare, and in this connection specifically disallows the defence of "superior orders."² But this defence cannot be universally denied; soldiers and sailors cannot be expected to refuse obedience to the orders of their officers because they know them to be contrary to law, when they also know that disobedience means the penalty of death; nor can neutral Powers be entrusted to punish war crimes generally except by means of some tribunal established for the purpose. An International Court of Criminal Justice has often been suggested, and a *vœu* for the establishment of such a tribunal was expressed by the jurists who drafted the Statute of the Permanent Court of International Justice. This would have to be preceded by agreement as to the number and definition of war crimes and the limits of personal responsibility. In operation, the tribunal would have to be endorsed with complete jurisdiction and with power to adjudicate during war without waiting until the non-offending country had suffered injuries from isolated or organised violations. It is difficult to imagine that nations will accept the institution of a tribunal before which during the course of hostilities members of a General Staff or even of a Cabinet might be arraigned for the instigation of a policy alleged to be in contravention of the rules of warfare.⁸

¹ Contrast *English Manual of Military Law*, Art. 443, with Prof. Holland, *Laws of War on Land*, Art. 117.

* See *supra*, p. 16.

* On the whole topic, see Oppenheim, ii, §§ 251-7; Hall, 8th ed., pp. 495-91; Lawrence, 7th ed., pp. 543-7; A. J. I. L., xiv. (1920), p. 70; xv. (1921), p. 440; B. Y. I. L. (1922-3), p. 79; *Transactions of Grotius Society*, viii. (1923), p. xix.

PART IV

THE RIGHTS AND DUTIES OF NEUTRAL POWERS

CHAPTER I

GENERAL PRINCIPLES OF NEUTRALITY AS BETWEEN STATES

THE law of neutrality differs from other branches of international law in the comparative certainty with which its rules may be stated. Meaning of neutrality. Neutrality is the condition of States which stand aloof from a war between other "States; they may continue such pacific intercourse with the belligerents as will not consist in giving direct aid to either side in the prosecution of its hostilities. Thus the essential significance of neutrality lies in the negative attitude of holding aloof, and not in the positive attitude of offering impartial treatment to the adversaries. The outbreak of every war affords occasion for the exercise of neutral duties and the concession of neutral rights; belligerents are, as a rule, unwilling to add to their complications by the commission of acts which as between themselves and neutrals are of doubtful legality, and the decisions of their prize courts have, on the whole, been successful in evolving a body of harmonious and intelligible doctrine.

The Hague Conference of 1899 drew up four Articles on The Hague Conventions. two points relating to the position of neutrals, the internment of belligerents and the care of the wounded in neutral countries¹; and expressed a "wish"² that the question of the rights and duties of neutrals should be inserted in the programme of a future Conference. In 1907 the subject was considered at greater length, and two Conventions³ were, with certain reservations, agreed upon, limited in their scope and confined for the most part to the statement of hitherto accepted principles. Convention V. dealt with warfare on land, and Convention XIII. with warfare at sea.⁴

¹ Arts. 57-60 of the Annex to Convention II. of 1899.

² *Vœu* 2 of 1899.

Conventions V. and XIII. of 1907.

⁴ Neither of these Conventions has been ratified by Great Britain. Several other belligerents in the Great War had not ratified them, e.g. Italy, Serbia and Montenegro on the one side, and Turkey and Bulgaria on the other.

The development of opinion has tended to impose stricter obligations upon neutral Powers than were at one time required. It has long been admitted that a neutral is obliged to exhibit impartiality between belligerents, and that the latter are correlatively bound to abstain, in deference to the sovereignty of the neutral, from making any military use of his territory or his territorial waters. In the words of Convention V. of 1907 above referred to, "the territory of neutral Powers is inviolable,"¹ and—as a positive prohibition—"belligerents are forbidden to move across the territory of a neutral Power troops or convoys, either of munitions of war or supplies"²; and neutrals are bound to see that this rule is obeyed.⁸ The corresponding provisions of Convention XIII.⁴ in relation to naval war are that "belligerents are bound to respect the sovereign rights of neutral Powers, and to abstain in neutral territory or neutral waters from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality."⁵ Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.⁶ And the setting up of a prize court in neutral territory, or on a vessel in neutral waters, is a violation of neutrality.⁷

Supply of
troops and
ships—
former
usage.

Earlier usage, however, was content with a standard of impartiality which fell far short of later requirements. It was common for neutrals to supply troops to one of two belligerents, under a previous treaty, nor was the practice held to involve any deviation from neutrality, which was therefore regarded, in such circumstances, as imperfect, qualified or conventional neutrality, as distinguished from natural or perfect neutrality. A treaty of 1781 bound Denmark to supply certain troops to Russia in the event of war.⁸ In 1788 war broke out between Russia and Sweden. In pursuance of the pro-

¹Art. 1.

²Art.

2.

³

Art. 5.

⁴In *The Bangor* (1916), P. 181, it was held that this Convention was not intended to deal with any question as between belligerents, and did not affect the rule of international law as to capture in neutral waters, as between belligerents, where the neutral State did not intervene; hence on capture of a vessel flying the neutral flag for carrying supplies to the enemy warships, even if the capture be effected in neutral waters, neither an enemy nor a neutral acting the part of an enemy may demand the restoration of captured property on the ground of capture in neutral waters. See *infra*, p. 315.

⁵Art. 1 of Convention XIII.

⁶Art. 2. In March 1915 a British squadron brought about the destruction of the German cruiser *Dresden* in Chilian territorial waters, on the assumption that she was abusing Chilian neutrality and that the local authorities were powerless to effect her internment: *Parl. Papers, Misc.*, No. 9 (1915). In August 1915 a British submarine which had grounded in Danish territorial waters was fired upon by a German destroyer: Hall, 8th ed., p. 742.

⁷Art. 4.

See Cobbett, *Cases*, vol. ii., p. 302.

GENERAL PRINCIPLES OF NEUTRALITY 305

visions of the treaty, Denmark furnished the contingent promised, and defended her conduct in so doing by a declaration sent to Sweden. It ran as follows: " His Danish Majesty has ordered the undersigned to declare that, although he complies with the treaty between the courts of Petersburg and Copenhagen in furnishing the former with the number of ships and troops stipulated by several treaties, and particularly that of 1781, he yet considers himself in perfect amity and peace with his Swedish Majesty; which friendship shall not be interrupted, although the Swedish arms should prove victorious, either in repulsing, defeating or taking prisoners the Danish troops now in the Swedish territories, acting as Russian auxiliaries, under Russian flags. Nor does he conceive that his Swedish Majesty has the least ground to complain, so long as the Danish ships and troops now acting against Sweden do not exceed the number stipulated by treaty; and it is his earnest desire that all friendly and commercial intercourse between the two nations, and the good understanding between the courts of Stockholm and Copenhagen, remain inviolably as heretofore." The Swedish representative agreed to the proposal on grounds which were carefully stated to be merely politic, and added that the Danish contention " is a doctrine which his Swedish Majesty cannot altogether reconcile with the law of nations and rights of Sovereigns, and against which his Majesty has ordered [Baron de Sprengporten] to protest." ¹ The objection of Sweden was not to the lending of aid to Russia (that this was permissible owing to the treaty, so long as the Danish forces remained in Russian territory, was admitted), but to the invasion of Sweden by the Danish troops; and this objection, with the like reservation, was in effect supported by Great Britain and Prussia.

The justification of similar action by reference to a prior treaty was admitted by Great Britain in 1803 and 1804, and that nation acted on the same principle in 1826.² This is believed to supply the last occasion on which such assistance has been given by a neutral, and the practice may now be confidently pronounced extinct. The rendering of military aid by A to B, while the latter is at war with C, is essentially an unneutral act, and it is no answer to C's complaint that A was under contract to commit the act of illegality. Such an injury to C constitutes a *casus belli*, and the fact that it may be impolitic so to treat it is without bearing upon the legal question.

At the Hague in 1907 no specific prohibition of the supply of The Hague rule.
troops in land warfare was enacted; but in relation to naval warfare it was agreed that " the supply, in any manner, directly or indirectly, of warships, supplies, or war material of any kind whatever, by a

¹ *Annual Register* (1788), vol. xxx., pp. 292, 293.

² Westlake, part ii., p. 207!

neutral Power to a belligerent Power, is forbidden "¹; though "a neutral Power is not bound to prevent the export or transit, for either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet."²

**Neutral
money loans.**

It would be clearly a violation of neutrality for a neutral State to make a money loan to a belligerent, but the question is more open to doubt in cases where the loan issues from neutral individuals. Money is an ordinary commodity of trade, and, as will be seen later, the neutral right to trade remains, on principle, unaffected by war. According to the better view, if the transaction is merely a commercial one, providing for the *bona fide* payment of reasonable interest, it involves no derogation from neutrality calling for Government interference. To this effect were the opinions of the English law officers given in reply to Mr. Canning in 1823, in connection with the Greek War of Independence: "With respect to loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations, and the practice that has prevailed, that they would not be an infringement of neutrality." It has been decided in England³ and in America⁴ that it is illegal for individuals to raise money by way of loan to assist subjects of a foreign State, so as to enable them to prosecute a war against their own Government, while the latter is in amity with that of the lenders. Thus, in 1873, Mr. Gladstone pointed out in the House of Commons strong objections to the raising of a gratuitous loan in England for the Spanish Pretender, Don Carlos.⁵ In cases where the belligerent persons are independent Powers, the right of neutral individuals to make *bona fide* loans is well recognised in practice. Thus, in the Crimean War, Russia obtained money in Germany and Holland; in the Franco-German War, French and German loans were issued in London; in the Russo-Japanese War, 1904, Japan raised funds in England and Germany, and Russia in France and Germany.

Though neutral States are not bound to prevent their subjects from lending money to belligerents in the ordinary way of business, they have sometimes, in circumstances of grave difficulty, deemed it proper to impose restrictions, for the purpose of maintaining strictly the obligations of neutrality. Thus, soon after the commencement of the Great War, 1914, the Government of the United States declared that the advancing of "loans by American bankers to any foreign nation which is at war was inconsistent with the true spirit

¹ Art. 6 of Convention XIII.

²

Art. 7.

³ *Be Wutz v. Hendricks* (1824), 9 Moore, C. P. 586.

⁴ *Kennet v. Chambers* (1852), 14 Howard, 38.

⁵ *The Times*, 25 April, 1873.

GENERAL PRINCIPLES OF NEUTRALITY 307

of neutrality." This declaration was emphatically deprecated in America: it was agreed that a national loan would be illegitimate, but it was contended that loans by private citizens did not constitute an infringement of neutrality. The Secretary of State, however, observed: "... A war loan, if offered for popular subscription in the United States, would be taken up chiefly by those who are in sympathy with the belligerent seeking the loan. The result would be that great numbers of the American people might become more earnest partisans, having a material interest in the success of the belligerent whose bonds they hold"; and he added that, as the prohibition to enter into such transactions affected all the belligerents equally, it was in accordance with the fundamental principles of neutrality.¹ A neutral Government is, of course, empowered to impose such a prohibition; but if it does so it acts purely on grounds of policy, and not on grounds of international law and usage, which, as we have seen, do not forbid financial transactions on a business footing between belligerent Governments and the private individuals of neutral States. However this may be, not long afterwards the prohibition was withdrawn, and a great loan was raised in the United States on behalf of Great Britain.

At the Hague in 1907 it was laid down that a neutral individual (who is defined as the national of a State who is not taking part in the war²) cannot claim the benefit of his neutrality if he commits hostile acts against a belligerent, or acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties; but that in such a case he is not to be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.³ But he does not commit an act in favour of one of the belligerents by furnishing supplies or making loans to one of them, provided that he does not live in the territory belonging to or in the occupation of the other party, and that the supplies do not come from such territory; or by rendering services in matters of police or civil administration.⁴ These provisions were not accepted by Great Britain, France, Russia or Japan. They had originally formed part of a wider proposal made by Germany, which would have placed neutrals resident in a belligerent country in a far better position as regards freedom from services and contributions to the war than the nationals of the country; and this the States mentioned were not

¹ Communication made by Mr. Bryan, the United States Secretary of State, to the Chairman of the Senate Committee on Foreign Relations, published by the State Department, 24 January, 1915 (*The Times*, 26 Jan. 1915, P. ¹⁰).

² Art. 16 of Convention V. of 1907.

³ Art. 17.

⁴ Art. 18.

prepared to allow. But in principle there seems to be no objection to the rules laid down as to the furnishing of supplies and loans.¹

Foreign enlistment.

Volunteering on the part of neutral individuals for the service of belligerents has long been forbidden by municipal laws. In this country it was provided, as long ago as the reign of George I . . , that if any subject of Great Britain shall enlist himself in any foreign service without licence under the king's sign-manual, he shall be guilty of felony without benefit of clergy.² Such acts are, moreover, generally forbidden in terms by proclamations of neutrality issued on the outbreak of war. At the same time, it is held that isolated cases of disobedience are not imputable to a Government which has observed proper precautions. There is reason to believe that the number of foreigners who served with the Boer forces in the Boer War was considerable, but there was no disposition to see in that circumstance a derogation from the neutrality of the States to which they respectively belonged.

Use of neutral territory.

Under the same head as the last falls the prohibition imposed upon neutrals against allowing their territory to be used by a belligerent in a mode derogatory to the neutral sovereignty. Canning, in a speech delivered in 1823, referred to a memorable American precedent: " If I wished," said he, " for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793, complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality, and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel fitting out was seized, delivered over to the tribunals and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports for the purpose of cruising against English vessels was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain." ³

Jefferson's opinion was elicited by the extraordinary views of

¹See *Parl. Papers, Misc.*, No. 4 (1908), pp. 134-45; Westlake, part ii., p. 252; Pearce Higgins, *The Hague Conferences*, p. 293.

²9 Geo. I . c. 30, 29 Geo. II . c. 17; and cf. the Foreign Enlistment Act, 1870, secs. 4 and 7.

³Canning's speeches, vol. v., pp. 50, 51

GENERAL PRINCIPLES OF NEUTRALITY 309

belligerent right held by M. Genet, then French Minister in the United States. Besides the acts referred to in the above passage, complaint was made that he issued commissions to American citizens to fit out privateers and prey upon British commerce. Jefferson, in a note to the American ambassador in Paris, indicated the element of illegality with great propriety: "The right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign Power or person can levy men within its territory without its consent. . . . If the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments." ¹

The soundness of Jefferson's conclusion has never been seriously questioned, and the proposition is now elementary that a neutral may not permit a belligerent either to arm vessels or issue commissions within the neutral jurisdiction. The Convention of 1907 laid it down, in accordance with these principles, that "corps of combatants cannot be formed, nor recruiting offices opened, on the territory of a neutral Power, in the interest of the belligerents" ² and that "a neutral Power does not incur responsibility by the fact that persons cross the frontier singly in order to place themselves at the service of one of the belligerents." ³ The analogous rule in maritime warfare is to be found in the provision that "a neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations, which has been adapted entirely or partly within the said jurisdiction for use in war." ⁴

Fitting out
vessels.

It has not, however, always appeared equally clear whether the neutral may himself supply arms and military equipment to belligerents. Supply of war material, etc.

¹ *American State Papers*, i. 116; Moore, *Digest*, vol. vii. § 1293, pp. 880-1. Cf. Wolfius, *Jus gentium*, § 754, and Vattel, *Droit des gens*, I I I. c. ii. § 15; and cf. also the provision against the fitting out of expeditions contained in § 11 of the Foreign Enlistment Act, 1870.

² Art. 4 of Convention V. of 1907.

³

Art. 6.

⁴ Art. 8 of Convention XIII. of 1907. Submarines are included in the term vessel; hence the non-execution of the orders given in December 1914 by one of the belligerents to an American firm (*Amer. Journ. of Int. Law*, vol. ix. (1915), p. 177). As to aeroplanes and seaplanes, the American Secretary of State held in January 1915, in answer to the German representations, that the existing provisions of law did not apply to them (*ibid.*, vol. ix., Supplement, July, pp. 366 seq.).

The better opinion has been that such sales are inconsistent with neutral duty in cases where the neutral State is itself the vendor, and the point may probably be regarded as settled by Article 6 of Convention XIII. of 1907, quoted above.¹ The Swedish Government acted on this principle in 1825, and cancelled, in deference to a Spanish remonstrance, the sale of six frigates, which had been purchased mediately on behalf of the Mexican insurgents. Similarly, Great Britain, during the American Civil War, stopped the sale of her surplus warships, in order that they might not be acquired, indirectly, by either belligerent party.² During the Russo-Japanese War, the Argentine Government cancelled its offer to sell warships to a certain agent, when it ascertained that he, acting ostensibly for Turkey, was really acting for one of the belligerents.³ The case of neutral individuals who, unlike their Government, are traders in arms, is judged by a correspondingly different standard, a difference which was duly recognised in Article 7 of the same Convention. Traffic in arms is permitted to such persons, and is powerless to compromise the neutrality of their Government. Thus, in the Russo-Japanese War and in the recent Balkan Wars, large quantities of arms and ammunition were exported to the belligerents by German manufacturers. In the Great War munitions were supplied by American manufacturers to some of the belligerents; and when protests were made in certain quarters, Mr. Bryan, the United States Secretary of State, made the following statement in January 1915 to the Chairman of the Senate Committee on Foreign Relations: "There is no power in the Executive to prevent the sale of ammunition to belligerents. The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has *never* been the policy of this Government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighbouring American Republics, and then only when civil strife prevailed." He added that the Government endeavoured to secure equal treatment to all the belligerents.⁴ However, as the supply of arms to one belligerent is clearly injurious to the other, the latter is permitted to repress the traffic on his own behalf. This question belongs therefore to the subject of contraband.

Supply of
armed
vessels.

The dividing line between acts which the neutral Government is bound to restrain, and those in which its subjects are permitted to engage at their peril, is not always easy to determine. If such a

¹ See *supra*, p. 306.

² *Parl. Papers* (1873), *North America*, No. 2, p. 104.

³ Takahashi, *Int. Law applied to the Russo-Japanese War*, p. 486.

⁴ *The Times*, 26 Jan. 1915, p. 10.

GENERAL PRINCIPLES OF NEUTRALITY 311

Government is not bound to prevent its subjects from supplying guns to a belligerent, may it acquiesce in the preparation and sale of an armed vessel under the same circumstances? On principle, the cases are hardly distinguishable. "There is nothing," said Story, J., in *The Santissima Trinidad*,¹ "in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit. . . . It is apparent that though equipped as a vessel of war [the *Independencia*] was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality." The difficulty in particular cases is to determine whether the vessel in the circumstances under which it is sold amounts to an "expedition" which the neutral is bound to restrain, or is merely a contraband article.

The distinction was brought into great prominence at the time of the American Civil War in connection with the notorious *Alabama*.^{The Alabama case.} This vessel, which was evidently intended for warlike purposes, was launched at Liverpool on 15 May, 1862. The United States minister drew the attention of the British Government to the fact that the vessel was intended for the Confederate States, and demanded her arrest. A week later, the law officers of the Crown advised that "if sufficient evidence can be obtained to justify proceedings under the Foreign Enlistment Act, such proceedings should be taken as early as possible." The difficulty was that the provisions of the existing Foreign Enlistment Act (59 Geo. III. c. 69) were far from satisfactory. Their inadequacy was pointed out in *The Alexandra*² by the Court of Exchequer, when an opinion was expressed by Baron Bramwell that the material sections prohibited that equipment only of a vessel by a neutral which was itself such that by means of it the vessel could commit hostilities, and that no equipment which gave no means of attack and defence was within the section. The learned Baron added³: "I think that a vessel departing neither armed nor equipped so as to be capable of attack or defence is not a violation of international law, be its object what it may. . . . I am aware of the consequences if this is the law. A ship may sail from a port ready to receive a warlike equipment; that equipment may leave in another vessel and be transferred to her as soon as the neutral limit is passed or at some not remote port, and thus the spirit of international law may be violated, and the letter and spirit of the municipal law evaded." Similar views seem to have been taken by

¹ (1822), 7 Wheaton, 346.

² *Att.-Gen. v. Sillem* (1863), 2 H. & C. 431; cf. *The Mermaid* (1795). Bee. Am.
³ *Adm. Rep.* 69.
Ibid., at p. 542.

the English commissioners of customs in the *Alabama* case. They acted on the assumptions that a ship is *prima facie* a subject of innocent merchandise, that the neutral is only concerned to see that at the time of leaving the territory she is "incapable of attack and defence," and that the implements of attack and defence may follow separately from a different part of the neutral territory without a violation of it, provided that the junction does not take place till the neutral zone is crossed. The *Alabama* was allowed to leave for the Azores, where she met the *Bahama* and the *Agrippina*, also from England, from which she obtained crews and military supplies. The English authorities were ignorant of the connection between these vessels and the *Alabama*. The latter vessel received a commission as a Confederate cruiser, and the extent of the destruction which she afterwards wrought on the commerce of the enemy is well within living memory. The facts in connection with the *Florida* were very similar. The United States made a heavy claim against the British Government in respect of their alleged default, claiming, in addition to the damages directly occasioned by these vessels, indemnity for—(1) the increased rates of insurance in the United States made necessary by their depredations; (2) the transfer of the American carrying trade to England; (3) the prolongation of the war. After long negotiation it was agreed by the Treaty of Washington in 1871 that the questions at issue between the two countries should be submitted to arbitration. The arbitrators met at Geneva in the same year. In estimating the legal value of their findings, it must not be forgotten that their authority depended merely on the mandate of two individual nations, and that the terms of the reference imposed upon them standards of conduct into the legality of which they were not concerned to inquire. The rules by which their decision was to be guided were contained in Article 6 of the treaty, and ran as follows:

Rules of the
Treaty 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 against a Power with which it is at peace, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

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

"Thirdly, To exercise due diligence in its waters, **and** as to all

GENERAL PRINCIPLES OF NEUTRALITY 313

persons within the jurisdiction, to prevent any violation of the foregoing obligations and duties."

The Arbitration Tribunal, on this reference, condemned Great Britain to pay to the United States in respect of the damage done by the *Alabama*, the *Florida* and their tenders, the sum of \$15,500,000. The American claims in respect of indirect damage were rejected at an early stage. The three rules on which the award depended had merely a conventional authority¹ but the second rule was in effect adopted at the Hague in 1907: "Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries"²; and the first rule became Article 8 of Convention XIII., which has already been set out.³ The ambiguous phrase "due diligence" has disappeared, the words "a belligerent Government is bound to employ the means at its disposal to prevent the fitting out," etc., taking its place. It is not clear that the new phraseology is much less open to objection than the old; it is still vague and general, and leaves open to dispute such questions as, What were the means at the disposal of the neutral, and what is meant by "adapted entirely or partly, within the said jurisdiction, for use in war"?

The dividing line between legitimate and illegitimate commerce is very difficult to draw in particular cases, but the distinction of principle is less obscure. The export of weapons by neutral subjects is a legitimate branch of commerce, subjecting the goods to seizure as contraband, but in no case involving their Government; on the other hand, a neutral Government is bound to prevent its subjects from handing over a commissioned armed vessel to a belligerent within neutral territory, for to do so is to countenance an expedition.

A tendency has been shown to extend on this point belligerent requirements, and it is likely enough that a violation of the above rules will be held to have taken place where they are verbally observed, but broken in their spirit. An effect of this tendency may be found in the increasing stringency of municipal requirements,³ and a

¹ Art. 5 of Convention XIII. of 1907.

² See *supra*, p. 309.

³ The United States, Italy, Austria, Spain and Denmark forbid the equipment of armed vessels for a belligerent; and by section 8 of the Foreign Enlistment Act, 1870, any person commits an offence who (1) "builds or agrees to build, or causes to be built, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or (2) issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or (3) equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or (4) despatches or causes or allows to be despatched, any ship with intent

resolution of the Institute of International Law in 1875 supplies a further illustration.¹

Terceira
incident.

The well-known Terceira incident² illustrates the principle that a neutral must use reasonable diligence to prevent colourable violations of its neutrality when the several parts of a hostile expedition, each being in itself innocent, leave the jurisdiction separately and combine outside it. In 1827, during the civil war in Portugal between *Donna*, Maria and *Don* Miguel, Count Saldanha left England with four ships intended for the service of Donna Maria at Terceira, but bound ostensibly for Brazil. The expedition was unarmed, but military stores also clearing from this country had preceded it. It was intercepted by H.M.S. *Ranger* off Port Praya in Terceira and escorted back. The interference was entirely justifiable in essence, but its exercise in Portuguese sovereignty was itself open to criticism.

Neutral
rights.

The points which still require treatment in this chapter may be more conveniently dealt with under the correlative head of neutral rights, though the observation of Jefferson already quoted (and embodied in the Convention of 1907³) must not be lost sight of, that if a neutral Government enjoys as regards one of the belligerents a right, it is bound, as regards the other, to enforce it.

Hostilities
in neutral
waters.

Neutral States are then both entitled and bound to demand that the belligerents shall abstain from hostilities in their territory or their territorial waters,⁴ and it is not a hostile act in a neutral if he repels, even by force, an attack upon his neutrality.⁶ In 1863 an American man-of-war found and captured the Confederate vessel, *Chesapeake*, off Sambro, a harbour of Nova Scotia. The legality of the act was not seriously maintained, and the American reply to the English complaint could find no better plea in law than that the captain had acted "under the influence of a patriotic and commendable zeal to bring to punishment outlaws who had offended against the peace and dignity of both countries." In *The Anna*⁶ Lord Stowell directed restitution of a merchantman captured within three miles of some mud islands situate in the mouth of the Mississippi, but more than three miles

or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State."

¹ "L'Etat neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des Etats belligerents dans ses ports ou dans les parties de mer qui dependent de sa juridiction."

² Hansard, *Parl. Debates*, new series, vol. xxiii. 737; vol. xxiv. 126; Cobbett, *Cases*, vol. ii., p. 310.

³ Art. 5 of Convention V.

⁴ As to the attack on the German cruiser *Dresden* by a British squadron in Chilian territorial waters in March 1915, see *supra*, p. 304, n.

⁵ Art. 10.

(1805), 5 C. Rob. 373.

GENERAL PRINCIPLES OF NEUTRALITY 315

from the mainland. "I am of opinion," he observed,¹ "that the privateer has laid herself open to great reprehension. Captains must understand that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river, much less in the very river itself." But the capture of a prize in violation of neutrality is valid as between the belligerents themselves; it rests with the State whose neutrality has been violated to claim restitution,² or to question the validity of the capture. In pursuance of this rule Sir S. T. Evans condemned the *Bangor*,³ a Norwegian vessel captured in Chilean territorial waters while engaged in unneutral service (i.e. acting the part of an enemy) and held that Convention XIII., assuming it to be binding, had not modified the rule as to capture in neutral territorial waters, where the neutral Power did not intervene, in that its provisions⁴ were not intended to deal with questions between belligerents.

In 1907 it was agreed that if the prize is still within its jurisdiction, that State must employ the means at its disposal to release it, with its officers and crew, and to intern the prize crew; if it is not within the jurisdiction, the captor must, at the neutral's demand, release it.⁵ Whether the right of the neutral in such a case is overridden by condemnation, or by sale to an innocent third party, has been regarded as uncertain; but the better view is that it is not.⁶ It is not overridden by the loss of the vessel. In the case of *The Pellworm*⁷ the Dutch Government filed claims for four German vessels which had been captured within the territorial waters of Holland. Two of the ships had subsequently been sunk by hostile action. The Dutch Government was held entitled to the return of the two remaining afloat and to the appraised value of the two ships sunk, but not to damages or payment for use of the ships as the violation of neutral territorial waters was unintentional.

Bynkershoek⁸ suggested a qualification to the above rule against the exercise of hostilities in neutral waters, which has never prevailed, though it has been sometimes relied on. He expressed the opinion that the belligerent might legally push home to neutral

Pursuit in
neutral
waters.

¹ (1805), 5 C. Rob. 385e. ² Westlake, part ii., p. 228. ³ (1916), P-181.

⁴ Art. 1: "Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality."

Art. 2: "Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power constitutes a violation of neutrality and is strictly forbidden."

⁵ Art. 3 of Convention XIII.

⁶ Westlake, part ii., p. 228; and Hall, 8th ed., p. 745.

⁷ (1922), 1 A. C. 292. See also *The Dilsseldorf* (1920), A. C. 1034.

⁸ *Quaestiones juris publici*, i. 8.

waters a chase commenced in the open sea. He might finish his capture *dum fervet opus* (while the chase is hot). The alleged exception is unsupported by authority, though in *The Anna*¹ Lord Stowell was prepared to admit that it would be pardonable in a cruiser, which had summoned a vessel to stand by, to pursue that vessel if it fled to within three miles of uninhabited mud flats technically forming part of neutral territory. But the exception would be a dangerous precedent to admit, and it would not now be regarded as admissible. It may therefore be stated as a definite rule that to enter voluntarily into neutral territory for the purpose of engaging in hostilities is unlawful. "When the fact is established," observed Lord Stowell, "it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy."²

Indemnity.

A belligerent who has suffered from a violation of neutral territory by his enemy is entitled to demand that the neutral shall take such steps to procure an indemnity as he might reasonably be expected to adopt, having regard to the circumstances, in a case in which his own interests were involved.

Self-defence in neutral waters.

If a belligerent vessel captured in neutral waters was itself the first to open hostilities, it of course loses all claim upon the neutral for redress; if, being first attacked, it merely defends itself, the position is not so clear. In *The Anne*³ self-defence was apparently regarded as justifiable,⁴ and in the case of *The General Armstrong* (1814) it appears that the captured vessel was the first to fire, and, though having time to apply to the neutral for protection, it neglected to do so, and was held to have thereby released the neutral from all obligation. This case, therefore, quoted by Hall⁵ in support of the proposition that "a belligerent who, when attacked in neutral territory, elects to defend himself, instead of trusting for protection or redress to his host, by his own violation of sovereignty frees the neutral from responsibility," hardly supports that proposition; and the better view is that expressed by Westlake,⁶ that the threatened vessel must give the neutral, if possible, an opportunity of doing his duty either by force or by peaceful means. If there is no time for this, or the neutral disregards the appeal, it is hardly reasonable to expect the threatened vessel to submit quietly to capture.⁷

¹ (1805), 5 C. Rob. 373.

² *The Vrow Anna Catharina* (1806), 5 C. Rob. 15. Cf. *The Lokken* (1918), 34 T. L. R. 594.

³ (1818), 3 Wheaton, 435, 447.

⁴ And cf. Westlake, part ii., p. 232, where this view is taken.

⁵ 8th ed., p. 747. Cf. Oppenheim, ii. § 361.

⁶ Part ii., p. 232.

⁷ See also the case of *The Ryeshitelni* (1904), during the Russo-Japanese War, Takahashi, *op. cit.*, pp. 437 seq.; Smith and Sibley, *op. cit.*, pp. 116 seq.; Cobbett, *Cases*, vol. ii., pp. 295 seq.

GENERAL PRINCIPLES OF NEUTRALITY 317

A neutral is allowed, consistently with his continuing friendship towards both belligerents, to receive their troops or vessels within his territory in circumstances which ensure that the use of his hospitality will be unaggressive in its direct and indirect results. In these circumstances a French army sought and obtained shelter in Switzerland in 1871. Such reception is properly conditioned, in the case of land forces, upon an agreement by the fugitives to undergo disarmament in crossing the frontier, and internment within the neutral territory, as long as hostilities last. Right of asylum.

By the Convention of 1907 the neutral must intern such troops, so far as possible, at a distance from the theatre of war, and may keep them in camps or even confine them in fortresses or places appropriated to the purpose; he may at his discretion release the officers on parole not to leave the neutral territory without permission. He must (in default of a special Convention on the subject) furnish them with food, clothing and the relief which humanity dictates (being entitled to reimbursement at the conclusion of peace); and he may allow the sick or wounded to pass over his territory, provided that the trains bringing them carry neither *personnel* nor material of war, and must adopt towards them such measures of safety and control as may be necessary.¹ Wounded and sick brought into neutral territory by one of the belligerents, and belonging to the other, must be prevented by the neutral from taking further part in the operations of war; and the same duty devolves on the neutral with regard to wounded or sick of the other army who may be committed to his care. Generally, the Geneva Convention applies to the sick and wounded interned in neutral territory.²

In the case of maritime warfare, the requirements of neutral hospitality are less exacting, though recently there has been a tendency to approximate the rules on sea to those on land. It was fairly generally agreed, up to the time of the Russo-Japanese War, that a belligerent vessel might take refuge in a neutral harbour without any obligation to disarm; and might there repair and obtain supplies and coal sufficient to carry her to the nearest port in her own country. In the words of Hall³: "To disable a vessel, or to render her permanently immovable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious; its application is susceptible of much variation; and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, Belligerent ships in neutral ports.

¹ The Article is permissive. During the Great War permission was granted by Switzerland and Holland. But in 1915 the United States went so far as to refuse passage to Canadians who had served in the war and were returning home in uniform but discharged as unfit for further service.

² Arts. 11-15 of Convention V. of 1907. 8th ed., p. 749.

a tendency towards the enforcement of a harsher rule becomes more defined with each successive war." The principle that the vessel shall be enabled to reach the nearest port in her own country appears in the British Order in Council of 1862, with the addition that coal was only to be supplied to the same ship once in three months¹; and it was adopted by Great Britain during the Franco-German (1870-1), the Spanish-American (1898), and the Russo-Japanese War (1904). But a further step was taken by Great Britain in 1904, when, by the Declaration of the Governor of Malta,² a belligerent fleet proceeding to the seat of war, and belligerent vessels whose object was to intercept neutrals conveying contraband, were prohibited from coaling at all in British waters, unless in distress.

Vessels of
two belligerents
in a
neutral port.

The right of taking refuge in neutral ports was also subject to special conditions when vessels belonging to two belligerents happened to meet in the same neutral port. Early in the eighteenth century the practice sprang up of detaining a privateer for twenty-four hours after the departure of its enemy; while in the case of a regular warship it was a common custom to require the word of the commander that he would not attack an enemy vessel which had left the same port shortly before.³ The twenty-four hours' rule, however, became one of general application, and was to be found in treaties as well as in regulations and declarations.⁴ But it lent itself to abuse, as was illustrated by the *Tuscarora*, in 1861; which practically blockaded the *Nashville* in Southampton, by remaining under steam, leaving the harbour whenever the latter vessel showed signs of moving, and returning before the twenty-four hours had expired.⁶ This manoeuvre was met by the Order in Council of 1862, which required a belligerent war vessel to leave within twenty-four hours of arrival, "except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs"; in which latter cases she was to leave as soon as possible. This rule was subsequently adopted even by the United States, but was never accepted by Germany, France or Russia.⁶

¹ Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed., pp. 133, 134.

Ibid., p. 135.

³ Hall, 8th ed., p. 751; Smith and Sibley, *ibid.*, pp. 132, 133.

⁴ Cf. Westlake, part ii., p. 237.

⁵ Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed., p. 134; Hall, 8th ed., p. 752.

⁶ Pearce Higgins, *The Hague Peace Conferences*, p. 470. Professor Westlake points out (part ii., pp. 238, 239) that the British rule does not confer any right of asylum even for twenty-four hours, and that a neutral is left free by it to refuse such asylum altogether in the case where the belligerent vessel is in flight from its enemy; in which case internment for the rest of the war would be the proper course. The point, however, is not one of much practical importance; a vessel in such a condition would in very few cases be able or willing to leave in twenty-four hours, and if it stayed longer, its internment would naturally follow.

GENERAL PRINCIPLES OF NEUTRALITY 319

During the Russo-Japanese War there took place several events which appeared to be a great extension of the limits of neutral duty; but may have been merely illustrations of the principle that a vessel taking refuge in a neutral port must leave within twenty-four hours, or so soon after that period as possible. Several Russian vessels were dismantled and disarmed by neutrals; for instance, a gunboat, the *Mandjur*, a destroyer, the *Grosvoï*, and a cruiser, the *Askold*, at Shanghai; a cruiser, the *Diana*, at Saigon, and a battleship, the *Tsarevitch*, and some destroyers at Kiao-Chau. In most of the cases the crews were interned till the end of the war.¹ But that departure within a short period was allowed as an alternative to disarmament, is shown by the case of the *Novik*, which was allowed to leave Tsingtau after a stay of ten hours, and the option of departure or disarmament which was given to the cruisers, the *Aurora*, *Oleg* and *Zamtchug*, at Manilla, and to a transport, the *Lena*, at San Francisco; this vessel being ultimately, by agreement, disarmed. The Japanese carried the claim to have vessels in such circumstances disarmed so far as to enter a Chinese port and capture a Russian destroyer, the *Ryeshitelni*, lying there; but the neutrality of China was not treated very seriously by either belligerent. It is to be noted, too, that certain States (Norway, Sweden and Denmark) closed certain ports to belligerent warships altogether, except in cases of distress.²

At the Hague, in 1907, the whole question received very elaborate consideration, and a body of rules was agreed upon which, in substance, confirmed the legality of what had taken place during the Russo-Japanese War. The capture of the *Ryeshiteini* was, it is true, disapproved by the Article forbidding any act of hostility, including capture and search, in neutral waters³; and no other conclusion could well be reached on that point. But after laying stress upon the necessity for impartial treatment of the two belligerents (reserving, however, to a neutral the right to close its ports to a belligerent vessel which has failed to conform to its orders or regulations, or has violated neutrality⁴), the Conference agreed that "the neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents"⁵ and that "a neutral Power may allow belligerent warships to employ its licensed pilots."⁶ Whether a neutral may forbid the "innocent passage" of belligerent war vessels was left undecided, the general feeling being that such prohibition was lawful, if necessary for the maintenance of neutrality, except in the case of straits uniting two open seas.⁷ But the United

The Hague rule.

¹ Cf. Hall, 8th ed., p. 749; Smith and Sibley, *ibid.*, p. 136.

² Pearce Higgins, *The Hague Peace Conferences*, p. 460.

³ Art. 2 of Convention XIII. ⁴ Art. 9. ⁵ Art. 10. ⁶ Art. 11.

⁷ *Parl. Papers, Misc.*, No. 4 (1908), p. 240; and cf. Pearce Higgins, *ibid.*, p. 468.

States put in a general objection to Article 10, and Turkey and Japan declined to bind themselves to recognise an exception relative to straits between open seas.

Length of
stay.

There followed the more difficult question of the length of stay permitted in neutral ports.¹ After considerable difference of opinion the rules ultimately adopted were of the nature of a compromise, to the effect that unless a neutral made special provision to the contrary, belligerent warships were not to remain in neutral ports, roadsteads or territorial waters for more than twenty-four hours²; that the neutral must order the vessel to depart within that time, or such time as may be fixed by the local law,³ and that only damage or stress of weather could justify a more prolonged stay.⁴ An exception was made for the case of warships exclusively devoted to religious, scientific or philanthropic missions.⁵ The same compromise between a fixed rule and freedom of action to the neutral is seen in the provision that, in default of special dispositions to the contrary by the neutral, the maximum number of warships belonging to a belligerent which may be in a neutral port or roadstead shall be three.⁶ The existing practice is adopted in the rule that when warships of both belligerents are present together in a neutral port or roadstead, not less than twenty-four hours must elapse between the departure of the one and the departure of the other, the order of departure being determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible; and a belligerent warship was (as was suggested by the "Institut de Droit International" in 1898) forbidden to leave for twenty-four hours after the departure of a merchant ship flying the flag of its adversary.⁷ These provisions involve, of course, in certain cases exceptions to the rule against staying for more than twenty-four hours.

What war-
ships may do.

Further, an attempt was made to define the limits within which belligerent warships may take advantage of their stay. In neutral ports and roadsteads they may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any way to their fighting force; the decision as to what repairs are necessary being left to the local authorities.⁸ They may not use neutral ports, roadsteads or territorial waters for replenishing or increasing their supplies of war material or their armaments, or for completing their crews⁹; they may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.¹⁰ The question of coaling caused some difficulty; and the rule in its final

¹ As to recent regulations of States respecting the visits of men-of-war to foreign ports, see *Amer. Journ. of Int. Law*, vol. x₅ (1916), *Supp.*, pp. 121-78.

² Art. 12. ³ Art. 13. ⁴ Art. 14. ⁵ Art. 14. ⁶ Art. 15.

⁷ Art. 16. ⁸ Art. 17. ⁹ Art. 18. ¹⁰ Art. 19.

GENERAL PRINCIPLES OF NEUTRALITY 321

form did not meet with unanimous acceptance. It was provided first that such vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country, and this was in accord with the British view; but the Article proceeds: "They may, on the other hand, fill up their bunkers built to carry fuel, when they are in neutral countries which have adopted this mode of determining the amount of fuel to be supplied." This represented the German, French and Russian view. It was added that "if, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the duration of their permitted stay is extended by twenty-four hours."¹ Great Britain and Japan objected to the provision which enabled a belligerent vessel to obtain its full complement of coal, and refused to accept this Article; and the whole Convention has not been signed by the United States.² The rule which, as we have seen, was laid down by Great Britain in 1862,³ was adopted in the provision that a belligerent war vessel which has shipped fuel in a port belonging to a neutral Power may not replenish its supply within three months in a port of the same Power⁴; but this was not accepted by Germany.

Finally, it was agreed that if, notwithstanding a notification by a neutral Power, a belligerent warship does not leave a port where it is not entitled to remain, the neutral may take such measures as it considers necessary to render the ship incapable of putting to sea so long as the war lasts, and the commanding officer of the ship must facilitate the execution of such measures; that, when the ship is detained, the officers and crew are to be detained either in it, or in another vessel, or on land, and subject to such restrictions as may appear necessary, with power to release the officers on parole not to quit the neutral territory without leave⁵; that the neutral is bound to exercise such vigilance as the means at its disposal permit to prevent any violation of the provisions agreed upon⁶; and that the exercise by the neutral of the powers given by the present Convention are in no circumstances to be considered as an unfriendly act by a belligerent who has accepted the Articles relating thereto.⁷

Measures to be taken by neutral.

¹ Art. 19.

² See Pearce Higgins, *The Hague Peace Conferences*, p. 477.

³ See *supra*, p. 318.

Art. 20.

Art. 24.

⁴ Art. 25; and cf. rule 3 of the Treaty of Washington, *supra*, p. 312.

⁵ Art. 26. During the Great War, German warships and auxiliary cruisers were interned by various neutral States for not leaving within the twenty-four hours or other period fixed; e.g. by the United States, Norway, Sweden, Chile, Brazil (China interned the crews of all belligerent warships in Chinese ports at the outbreak of war in 1914). A list will be found in Hall, 8th ed., p. 749, n. Norway, Sweden, Spain and Holland forbade belligerent submarines to enter their territorial waters, except in case of distress. See *ibid.*, pp. 753, 754.

Prisoners in
neutral
territory.

It follows naturally from the exclusiveness of national sovereignty that if a belligerent brings his prisoners within neutral territory, they instantly recover their freedom. This fact was well expressed by an Austrian ordinance of 1803: ". . . aussitôt que . . . prisonniers [de guerre] auraient mis le pied sur le territoire d'un souverain neutre ou ami de leur gouvernement ils devront être regardés comme , libres, et toutes les autorités civiles et militaires leur devront, sous ce rapport, protection et assistance." By Convention V. of 1907, it was agreed that "a neutral Power which receives prisoners of war who have escaped shall leave them at liberty. If it allows them to remain in its territory, it may assign them a place of residence. The same rule is applicable to prisoners of war brought by troops taking refuge in the territory of a neutral Power " ¹; for when the captors are compelled to fly to neutral territory for safety, they clearly must be taken to have lost their right to retain their prisoners.

Prizes in
neutral
ports.

This principle, however, is not carried to its logical conclusion in the case of prizes taken by belligerents into neutral harbours. In these cases the title of the captor is not necessarily complete. Mere seizure of enemy property is not now regarded by the British Prize Courts as sufficient, even as against the enemy, for transferring the ownership thereof to the captor. Lord Mersey, delivering the judgment of the Privy Council in *The Odessa*, said: "Seizure does not, according to British prize law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted court of prize and the captor must then ask for and obtain its condemnation as prize. The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure, and to transfer it, as from that date, to the Sovereign or to his grantees." ² So far as the rights of other persons (e.g. recaptors) are concerned, ownership may, according to the views of some nations, but not Great Britain, which would look only to condemnation by a proper court, pass in accordance with the tests of twenty-four hours' possession or removal to a place of safe custody ³; and, in the case of neutral property, title can be only completed by the judgment of a competent prize court. The belligerent, therefore, on taking prizes into neutral ports, in certain cases, in Hall's words, "brings there property which does not yet belong to him; in other words, he continues the act of war through which it has come into his power." ⁴ The anomaly by which permission is granted to do this is noted by Phillimore. ⁵ "An attentive review of all the cases decided in the courts of England and the

¹ Art. 13. ² (1916), 1 A. C. at p. 153. See further, *infra*, p. 420.

³ Hall, 8th ed., pp. 542 seq. ⁴ *Ibid.*, p. 739. ⁵ *ibid.*, p. 739. iii. § 379.

GENERAL PRINCIPLES OF NEUTRALITY 323

North American United States during the last war (1793-1815), leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid." But neutrals have become very reluctant to grant the shelter of their harbours to belligerents' prizes, so that instances of this irregular practice are likely to be rare in the future; and the question was dealt with by Convention XIII. of 1907.

It was first agreed, as we have seen (and the point was beyond The Hague dispute), that a national prize court cannot be established by a belligerent on neutral territory, or on a vessel in neutral waters,¹ and that the neutrality of a Power is not affected by the mere passage of prizes belonging to belligerents through its territorial waters.² The general principle was then laid down that "a prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew, and to intern the prize crew."³ Release of the prize was also to follow in the case of one brought into a neutral port in circumstances other than those referred to.⁴ But to this rule an exception was made: "A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered, pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go on board the convoying ship. If the prize is not under convoy the prize crew are left at liberty."⁵ This Article, proposed with the object of reducing the danger of the destruction of prizes, was not agreed to by Great Britain and Japan on the ground that it made no reference to the fundamental distinction between enemy and neutral prizes, that its value in preventing the destruction of neutral prizes was doubtful, and that it placed too heavy a burden upon the neutral.⁶ It would also have given authority to the practice described by Phillimore as "irregular"; and Great Britain was unwilling to admit any relaxation of her rule that a neutral prize must be taken by the captor into one of his own ports or released.

¹Art. 4. ²Art. 10. ³Art. 21. ⁴Art. 22.

⁵Art. 23. As this Article was not accepted by the United States, the American Supreme Court ordered, March 1917, the release of the *Appam*, a British vessel that had been brought by a German captor into an American port: *Amer. Journ. of Int. Law*, April 1917, p. 443; Garner, *International Law and the World War*, ii. § 567.

⁶*Parl. Papers, Misc.*, No. 4 (1908), p. 252.

But this rule did not persuade the Judicial Committee of the Privy Council that it was bound or even had jurisdiction to release an enemy prize which, after being allowed by a neutral State to remain in a neutral port longer than was permitted by international law, had been condemned by a British Prize Court.¹ Even in the view of those States that accepted the Article, it remained entirely in the discretion of the neutral whether prizes were admitted in this way or not. And so during the Great War the Dutch Government regarded prizes, even after due condemnation, as belligerent vessels until they had been transferred to a neutral flag.²

Passage
through
neutral
territory.

Opinion has varied on the question whether a neutral may properly permit a belligerent army to pass through his territory. Such a permission was formerly held to be consistent with neutral duty, though later writers added the requirement that the right must be equally conceded to both belligerents. The qualification is not perhaps very reasonable, for it may very easily happen that a passage through neutral territory which is of importance to one belligerent offers no advantage whatever to the other. A belligerent will hardly demand leave to pass through such territory unless he hopes to derive some military advantage therefrom. It follows that the permission to do so is unneutral. Vattel's general statement³ of the duties of a neutral is accurate, with a single exception, and it is decisive upon the point: A neutral is bound not to give any assistance, except where there is a previous stipulation, nor of its own will to furnish troops, arms, ammunition or anything of direct use in war. He adds that to give assistance equally is absurd; a State cannot equally assist two enemies. The same things, the same number of troops, the like quantity of arms and of munitions furnished under different circumstances, are no longer equivalent succours.

This view has prevailed in later times, and Phillimore⁴ alone of modern writers supports the legality of conceding military passage. It will be noticed that Vattel makes a reservation in favour of the neutral when assistance is given pursuant to an existing treaty, and Hall notes that the question might still arise in Europe, for the railway from Constance to Basle, which leads from the interior of Germany to the Rhine, passes through the canton Schaffhausen, and Germany has a right of military passage over it.⁵ The question arose in the South African War. Sir Frederick Carrington was permitted to land at Beira in Portuguese territory with a British

¹ *The Sudmark* (1917), A. C. 620. And see *infra*, p. 425.

² *Parl. Papers, Misc.*, No. 12 (1918).

³ *Droit des gens*, liv. iii. chap 7, § 104. ⁴ *iii.* § 153,

⁵ There is now an alternative line which avoids Swiss territory.

GENERAL PRINCIPLES OF NEUTRALITY 335

force on its way to Rhodesia. It appears that the Transvaal Government protested against the concession, which was defended by the Portuguese ministry in the course of debate, on the ground that England had stipulated for the right of passage in existing treaties. On principle this line of defence does not appear to be satisfactory. As between one belligerent A and a neutral C, it is either illegal for C to give B, the other belligerent, a right of passage, or it is not. If it is not, *cadit questio*; if it is, how can C defend himself to A by the plea that he was under contract to perform an illegal act? ¹

When belligerent forces unlawfully enter neutral territory, and the neutral Government does not or cannot expel them, the other belligerent is justified in entering the neutral territory for the purpose of preventing the violation from operating to his disadvantage; in other words, he may enter only on clear grounds of self-defence and self-preservation.²

The Hague Conference, then, adopted the better view in the Article already referred to,³ which forbade the passage of troops or convoys across neutral territory.

States members of the League of Nations are subject to an obligation to allow the passage of troops across their territories in certain circumstances. By Article 16 (3) of the Covenant the members of the League agree: "that they will take the necessary steps to afford passage through their territory to the forces of any of the members of the League which are co-operating to protect the covenants of the League." This is not strictly a question affecting neutrality. The employment of force under Article 16 can only arise when a member of the League has resorted to war in disregard of those provisions of the Covenant that are designed to secure the pacific settlement of disputes, and any State going to war in such circumstances is deemed, by the provisions of the Article, to have committed an act of war against all other members of the League, i.e. against all the States who might be obliged in the course of hostilities to afford passage for troops.

It was also agreed that belligerents may not (and neutrals ought not to allow them to) erect on the territory of a neutral a wireless telegraphy station or any apparatus intended to serve as a means of communication with belligerent forces on land or sea, or make use

Wireless
telegraphy.

¹ Cf. *supra*, p. 305.

² Cf. the statement of Daniel Webster, American Secretary of State, in the case of *The Caroline* (1841), Moore, *Digest*, vol. ii. § 217: neutral territory may be entered when there is a "necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation." The last condition, however, as to no moment for deliberation, is much too stringent for practical purposes, and can scarcely be regarded as being indispensable.

* Art. 2 of Convention V.

of any installation of this kind established by them before the war on the territory of the neutral Power for an exclusively military end, and which has not been opened for the service of public correspondence.¹ But a neutral Power is not bound to forbid or restrain the use, for belligerents, of telegraph or telephone cables, or of wireless telegraphy apparatus, whether belonging to the neutral Power or to companies or private individuals,² and any prohibition or restraint it imposes must be applied uniformly to both belligerents.³ The importance of the agreement forbidding the erection of wireless telegraphy apparatus on neutral territory is emphasised by the fact that Russia during the siege of Port Arthur erected and used a station on Chinese territory, though obviously the violation of Chinese neutrality was as clear as if a body of troops had taken up a position there.⁴ In relation to maritime warfare, a similar provision was agreed upon: "Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries; in particular, they may not erect wireless telegraphy stations, or any apparatus for the purpose of communicating with the belligerent forces on land or sea."⁵

In November 1914, during the Great War, Great Britain and France having protested against the reported use by Germany of the wireless installations in Ecuador and Colombia, the Governments of the latter gave assurances that every effort was made to safeguard their neutrality and prevent the acts alleged. The United States ensured its neutrality in this respect by assuming control of all wireless stations within its territory and by preventing the dispatch of all cipher messages. The important neutral maritime States issued regulations prohibiting all merchant vessels from using their wireless installations in port. Violation, by a German vessel, of a Swedish law to this effect led to the sealing of the wireless apparatus on every German vessel in the ports of Sweden.⁶

Railway
material.

A question of difficulty arises in continental warfare with regard to neutral railway material found on belligerent territory. The Conference arrived at a somewhat vague compromise between the views of those who denied the belligerents' right of requisition at

¹ Arts 3, 5 of Convention V. of 1907.

² Art. 8. The Report of the Hague Committee observes that there is no contradiction between Art. 3 and Art. 8. Art. 3 "contemplates the installation of a station or an apparatus by the belligerent parties on the territory of the neutral State, or the use of a station or apparatus installed by them there during peace, for an exclusively military purpose and without being opened to the public. Art. 8, on the other hand, refers to an apparatus used for the public service, and administered either by the neutral State or by a company or individuals."

³ Art. 9.

⁴

Pearce Higgins, *The Hague Conferences*, p. 291.

⁵ Art. 5 of Convention XIII. of 1907.

⁶

Oppenheim, ii. § 356.

GENERAL PRINCIPLES OF NEUTRALITY 327

all, and those who claimed the right—sometimes designated the right of angary—subject to the payment of indemnity: "Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of companies or private persons, and recognisable as such, shall not be requisitioned or utilised by a belligerent, except in so far as is absolutely necessary. It shall be sent back as soon as possible to the country of origin. A neutral Power may likewise in case of necessity retain and utilise, to a corresponding extent, railway material coming from the territory of the belligerent Power. Compensation shall be paid on either side in proportion to the material used and to the period of usage."¹

"Necessity" is, of course, an elastic term; and it is not very easy to see how a neutral in time of peace will often be able to establish such necessity as would justify the seizure of the property of a friendly nation, or of its subjects, and there would seem to be a danger of such right of seizure degenerating into something very like reprisals; though its intention is merely to allow the neutral to fill up the place of the rolling-stock the belligerent has seized.²

The earlier right of angary—*jus angaria*—was a right claimed by "a belligerent deficient in vessels to lay an *embargo* on and seize neutral merchantmen in his harbours, and to compel them and their crews to transport troops, ammunition and provisions to certain places on payment of freight in advance."³ On the other hand, the modern right of angary "consists in the right of belligerents to make use of, or destroy in case of necessity, *for the purpose of offence and defence*, neutral property on their own or on enemy territory or on the open sea." "All sorts of neutral property, whether it consists of vessels or other means of transport, or arms, ammunition, provisions or other personal property, may be the object of the right of angary, provided the articles concerned are serviceable to military ends and wants."⁴

This right of angary was considered by the Privy Council in 1916, when the Crown claimed to requisition neutral property that was taken in prize and brought within the jurisdiction of the Prize Court.⁵ Lord Parker, delivering the judgment of the Court, dealt with the history of the question. He recalled the exercise of the right by Germany in the Franco-German War of 1870, when the German military authorities seized six British vessels and sank them in the Seine to prevent the approach of the enemy, and when they seized also Austrian rolling-stock and utilised it for the transport of troops and munitions of war. Bismarck justified the action on the

¹ Art. 19. ² *Parl. Papers, Misc.*, No. 4 (1908), p. 140.

³ Oppenheim, ii. § 364. *Ibid.*, p. 447.

⁵ *The Zatnora* (1916), 2 A. C. 77.

ground " that a pressing danger was at hand, and every other means of arresting it was wanting; the case was therefore one of necessity . . ." and he referred to the authority of Phillimore.¹ The latter admits the right only in case of "extreme necessity," and agrees with G. F. de Martens² and Gessner³; but Azuni⁴ thinks it may be exercised in case of necessity or public utility, i.e. when it is highly convenient to the belligerent Power—a view supported by Bluntschli,⁵ and by a British prize decision.⁶

Again, the power to requisition ships and goods of neutrals in the custody of the Prize Court pending adjudication was exercised by the United States in the Civil War of 1861.⁷

After distinguishing the right of pre-emption⁸ from the right of requisitioning the vessels or goods of neutrals, the judgment of their Lordships was expressed in the following terms: " A belligerent Power has by international law the right of requisitioning vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security; secondly, there must be a real question to be tried, so that it would be improper to order an immediate release; and thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable." ⁹

Further, in the early part of 1918, Great Britain and the United States legitimately had recourse to the right of angary in the case of property not in the custody of the Prize Court, by requisitioning a number of Dutch vessels that were in British and American ports.¹⁰

¹ Vol. iii. § 29, p. 50.

² *Law of Nations* (Eng. trans. 1802), book viii. chap. 6, § 7, p. 326.

³ *Droits des neutres* (2nd ed., Berlin, 1876), p. 154.

⁴ *Droit maritime de l'Europe*, vol. i. chap. 3, § 5.

⁵ *Droit international*, § 795 bis.

⁶ *The Curlew*; *The Magnet* (1812), Stewart, Vice-Admiralty Cases (Nova Scotia), 312.

⁷ As to goods, see *The Memphis* (1862), Blatch. 202; *The Ella Wartey* (1862), Blatch. 204; *The Stephen Hart* (1863), Blatch. 387. As to vessel, see *The Peterhoff* (1866), Blatch. 381; *The Antares* (1915), 31 T. L. R. 290.

⁸ See *infra*, p. 358.

⁹ *The Zamora* (1916), 2 A. C., at p. 106. A similar decision was pronounced by the Privy Council in *The Canton* (1917), A. C. 102, affirming the rule in *The Zamora*.

¹⁰ Cf. *Parl. Papers*, Misc., No. n (1918). It is unsettled whether neutral property on the open sea can be requisitioned by a belligerent. The right is admitted by Oppenheim (ii. § 365) but denied by Hall (8th ed., p. 906) and by Lord Parker, *obiter*, in his judgment in *The Zamora* (at p. 108). On the question of angary, see Oppenheim, ii. §§ 364-7; Hall, 8th ed., pp. 902-7, and references *ibid.*, p. 902, n.; C. L. I. Bullock in B. Y. I. L. (1922-3), p. 99.

CHAPTER II

BELLIGERENT GOVERNMENTS AND NEUTRAL INDIVIDUALS

THIS branch of international law has been produced by the General compromise between two irreconcilable principles, which may be generally stated as follows:

- (1) Neutrals are entitled to prosecute their trade during the continuance of war.
- (2) Belligerents are entitled, for military purposes, to exercise a quasi-penal surveillance over certain forms of such trade.¹

It is important to notice carefully the legal character of acts which are prohibited under this head. The simplest illustration is furnished by the trade in contraband goods. *Prima facie*, a neutral Power has as good a right to carry on its trade with each of two belligerents during war as it possessed before its outbreak. Its friendship towards both parties continues, and it has, in a general way, full liberty to profit by the rise in market prices which commonly follows upon the outbreak of war. It was, however, long ago recognised that an indiscriminating licence to neutral traders was hardly to be reconciled with belligerent necessity. A State which had gradually exhausted the military supplies of its opponent could not tolerate their unrestricted renewal at the hands of neutral traders. At this point the rights of neutrals have definitely given way before those of belligerents. It is not, however, accurate to state that contraband trading and the running of blockades are illegal acts. The prohibition is relative, not absolute. In no case do such acts compromise the neutral Government, and the latter is neither legally nor morally constrained to discourage its subjects from engaging in them.

The correct view was very clearly laid down by Lord Westbury²: "In the view of international law, the commerce of nations is

¹ Cf. the retaliatory Order in Council of 11 March, 1915, of which Art. 3 provided: "Every merchant vessel . . . on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port"; and in *The Stigstad* (1919), A. C. 279, it was held that this Order was not invalid by reason of the fact that it caused inconvenience to neutral shipowners, and if the Order is carried out in a reasonable and proper way, neutrals are not entitled to compensation. See also *The Zamora* (1916), 2 A. C. 77; *The Leonora and other vessels* (1918), 34 T. L. R. 366. But such an Order would not be justified otherwise than as a retaliatory measure.

² *Ex parte Chavasse, re Grazebrook* (1865), 34 L. J. N. S. (Bkcy.) 17, at p. 18.

perfectly *free* and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or to require a neutral Government to impose, any restrictions on the commerce of its subjects. The belligerent Power certainly acquires certain rights, which are given to it by international law. One of these is the right to arrest and capture, when found on the sea, the highroad of nations, any munitions of war which are . . . in the act of being transported in a neutral ship to its enemy. This right, which the laws of war give to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the Government of which he is a subject. The right of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral State of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful."

In the case of contraband carriage, the noxiousness springs from the nature of the merchandise, whereas a declaration of blockade entirely withdraws from trade a particular area, and applies indifferently to all kinds of goods. In both cases, however, the controlling principle is identical. The right of the belligerent to carry his operations to a successful issue is allowed to override the rights normally belonging to the status of neutrality. The concession was thought to be a bare one, and it was predicted that attempts to extend it would be jealously watched by neutrals. During the Great War neutrals did watch, but were impotent to avoid, an unprecedented extension of the rights claimed by belligerents. Later chapters will deal with this aspect of the relations between neutrals and belligerents. Here may be noticed the rise of two practices which were very familiar before the Great War, and at least one of which had established itself. The practices in question are that of commercial blockade and that which is known as the rule of war of 1756.

Commercial
blockade.

The varieties of blockade have led to much confusion. It has been seen¹ that a pacific or commercial blockade² is a pre-

¹ See *supra*, p. 188.

² For a summary of instances of this practice, see Wheaton (ed. Phillipson),

belligerent act conventionally held to fall short of war, and justifying (according to the pre-war view) no constraint except towards the power blockaded. It will be seen that a blockade proper was the blocking of a hostile harbour or seaboard by ships, *as a step in military operations* in order to prevent ingress or egress. If such a blockade was ineffective, it was known as a "paper blockade." It was commonly held that the very grave interference with neutral trade involved in a blockade could only be justified by the coincidence of military operations, of which it formed a proximate part. The peculiarity of a commercial blockade lies in the fact that it assumes to dislocate neutral trade without the plea of imminent belligerent necessity, and indeed *without being necessarily associated with military operations at all*. According to the view which has prevailed, the sole condition of the validity of a commercial blockade consists in the power of the blockading squadron to make it effective. As this practice is now to be treated as established, it is no longer possible to repeat the proposition that the neutral right to trade remains unaffected by war, except in so far as the trade is obstructive to belligerent operations. Hall's illustration is a very forcible one¹: "According to existing usage it would be legitimate, in a war between England and the United States, for the former Power to blockade the whole Californian coast while the only military operations were being conducted on the Atlantic seaboard and along the frontiers of Canada." Practice had so hardened before the Great War that the right of Great Britain and her allies to blockade the German North Sea coast was never questioned although military operations were *confined* to Belgium, Northern France and East Prussia, and the term "blockade" must now be considered as inclusive of its prodigious offspring, the "commercial blockade." The criticisms of the Allied blockade, which are dealt with elsewhere, were directed against the manner in which it was enforced.

The theoretic objection to such blockades was well stated in a circular² sent by Mr. Cass to the American representatives in Europe: "The investment of a place by sea and land, with a view to its reduction, preventing it from receiving supplies of men and materials necessary for its defence, is a legitimate mode of prosecuting hostilities, which cannot be objected to so long as war is recognised as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, *without any regard to ulterior military operations*, and with the real design of carrying on a war against

pp. 408, 409; and on the subject generally, see Westlake, *Collected Papers*, (1914), pp. 572 *seq.*; A. E. Hogan, *Pacific Blockade* (Oxford, 1908).

¹ 8th ed., p. 575.

² Quoted Cobden, *Speeches*, vol. ii., p. 288.

trade, and from its very nature against the trade of peaceful and friendly Powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or the opinions of modern times. To watch every creek and river and harbour upon an ocean frontier in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates if now first presented for consideration." Little weight can now be attached to these views. Mr. Cass wrote before the time when war came to be conducted upon a national scale that made interference with enemy trade one of the main objectives of the belligerents.

Rule of war
of 1756.

The right of neutrals to carry on all legitimately acquired trade was seriously threatened by what is known as the rule of war of 1756, a rule which, though it first came into prominence in that year, was supported by precedents of an earlier date.¹ In the eighteenth century European countries, by legislation upon the lines of the English navigation laws, were in the habit of restricting the commerce of their colonies to vessels of their own country. During the war against this country in 1756 the French became disabled, through their relative weakness upon the sea, from carrying on trade with their colonies. They then handed over the trade between the mother-country and her dependencies to Dutch vessels, but continued to exclude other neutral traders. The English prize courts thereupon condemned all Dutch vessels captured in the course of such traffic, on the ground that vessels so engaged had in fact passed into the merchant service of France.² The rule was extended in 1793 so as to prohibit all neutral trade with the colonies and coast towns of the enemy which had not been open before the war. The principle upon which the English decision proceeded was stated as follows by Lord Stowell in *The Immanuel*³: "Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding [colonies]? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended, they must fall to the belligerent of course—and if the belligerent chooses to direct his means

¹ Kent, *Commentaries on International-Law* (ed. by Abdy), 2nd ed., p. 205.

² Cf. *Berens v. Rucker* (1758), 1 W. Bl. 313; *Brymer v. Atkins* (1789), 1 H. Bl. 165.

³ (1799), 2 C. Rob., at p. 199.

to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it: he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, ' True it is you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress.' " ¹

On behalf of the United States, Mr. Monroe, in a letter to Lord Mulgrave of 23 September, 1805, insisted that neutrals were entitled to trade, with the exception of blockades and contraband, to and between all ports of the enemy, and in all articles, although the trade would not have been opened to them in time of peace. This view has upon the whole prevailed among American statesmen and jurists, though Chancellor Kent has intimated a different opinion. ²

The question is not free from difficulty, and the answer depends Various upon the familiar compromise between neutral and belligerent cases. rights. Phillimore ³ usefully distinguishes the following cases:

- (1) The carrying on by the neutral of the trade between the belligerent mother-country and the colonies.
- (2) The carrying on the coasting trade of the belligerent—such trade being confined in time of peace to the belligerent subjects.
- (3) The carrying on the trade by a neutral from a port in his own country to a port of the colony of the belligerent.
- (4) The carrying on by a neutral of a trade between the ports of the belligerent, but with a cargo from the neutral's own country.

In the first two cases the view seems reasonable that a neutral accepting a licence to trade in effect incorporates himself in the enemy fleet, and may fairly be treated as belligerent. As Mr. Justice Story expressed it: " The property is considered *pro hac vice* as enemy's property, as so completely identified with his interests as to acquire a hostile character." English lawyers will find little to criticise in the conclusion of the same high American authority on the general question. " The British," he continues, " have extended the doctrine to all intercourse with the colony, even from or to a neutral country, and herein it seems to me they have abused the rule. This, at present, appears to me to be the proper limits of the rule, as to the colonial

¹Cf. also *The Princessa* (1799), 2 C. Rob. 52; *The Jonge Thomas* (1801), 3 C. Rob. 233, n.; *The Anna Catherina* (1802), 4 C. Rob. 118; *The Rendsborg* (1802), 4 C. Rob. 121; *The Montara* (1906), 2 R. & J. P. Cas. 403.

²Kent, *Commentaries*, vol. i., pp. 90-2.

* *International Law*, vol. iii., p. 299.

trade [with the mother-country] and the coasting trade; and the rule of 1756 (as it was at that time applied) seems to me well founded; but its late extension is reprehensible." In fact, the extension with which Mr. Justice Story quarrels can only be defended on the assumption that the rights of neutrals are confined to trade which they possessed before the outbreak of war—an assumption quite impossible to reconcile with many facts which are not in question.¹

Continuous
voyage.

The British application of the rule in 1793 was rendered still more severe by what was known as the doctrine of continuous voyage. Orders in Council had so far relaxed as to allow the importation of the produce of the enemy's colonies into a neutral country, and its exportation thence is a neutral bottom. This led to colourable evasions by neutral shippers, and the question was much discussed by what evidence the *bona fides* of a transshipment was to be established. Lord Stowell held that the landing of the goods and the payment of duties in a neutral harbour was evidence enough of a *bona fide* importation: "If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient that the goods should be landed and the duties paid."²

The real issue in such cases was well shown in a short conversation between the Court and counsel in *The Polly*³: "Is it contended," said the Court, "that an American might not purchase articles of this nature [in Spain] and import them, *bona fide*, to America on his own account, and afterwards export them?" "It was answered, No; that was not contended; but that the truth and reality of the importation for his own account was the point in question; that all the circumstances in the case pointed to a near connection with Spanish interests; and that no proof was brought of the payment of the duties in America, nor that the transaction was in any way conducted like a *bona fide* importation for the American market.

In the later case of *The William*,⁴ the test was stated by the Court of Appeal to be more general "Let it be supposed," the judgment ran,⁵ "that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? . . . If the voyage

¹The extension of the rule in 1793 is condemned by Westlake, part ii., p. 295, and by Hall, 8th ed., p. 762.

²*The Polly* (1800), 2 C. Rob., at p. 369.

³*Ibid.*, at p. 365.

⁴(1806), 5 C. Rob., p. 385.

• *Ibid.*, at p. 395.

from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That these acts have been attended with trouble and expense cannot alter their quality or effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it."

The rule of war of 1756 will arise less frequently now that the colonial system of Europe has chosen the better part of unrestricted intercourse, but it would be very premature to suppose that it has disappeared from the existing rules of international law. Great Britain has from time to time refrained from enforcing it: the Manual of Naval Prize Law of 1888 stated that its general application was suspended, and that it would be applied only when special instructions were issued to that effect.¹ But the doctrine of continuous voyage became very prominent in the discussions at the Conference of London in 1908 and 1909, and the compromise on the subject which was then arrived at, and the subsequent development of the doctrine during the Great War, will be found fully set out later in the chapter on Contraband of War; but on the particular topic under consideration no agreement was reached, so that the question must be regarded as being an open one.²

¹ Art. 141.

² Cf. *Parl. Papers, Misc.*, No. 4 (1909), p. 100; and *Misc.*, No. 5 (1909), p. 247. See Pearce Higgins, *War and the Private Citizen* (1912), pp. 169 seq. The rule was adopted by Germany in its Prize Regulations of August 1914 (Art. 16a).

CHAPTER III

THE PROPOSED INTERNATIONAL PRIZE COURT AND THE DECLARATION OF LONDON

The proposed
International Prize
Court.

THE Second Peace Conference at the Hague in 1907 was marked by a new departure of the highest importance in the history of naval prize law. Hitherto, as we have seen, the only tribunal competent to pronounce a decision upon any question arising out of a capture in naval warfare has been a tribunal of the belligerent captor established in his territory and presided over by his judges: the sacred character of the right of sovereignty being held to override any inconvenience which might arise from the fact that the captor was a judge in his own cause, and there being no alternative tribunal which had a better claim to exercise jurisdiction. The belligerent, *in fact*, was merely given an opportunity of applying a more judicial mind to the hasty acts of his naval officers.

At the Second Peace Conference¹ an attempt was made to remedy this state of affairs by the establishment of an International Court of Appeal, to which neutrals, and in certain cases belligerents, might have recourse when dissatisfied with the decisions of the prize courts of the captor. The original jurisdiction of the national courts was of course preserved,² and also, where so provided by the municipal law, the jurisdiction of one, but not more than one, national court of appeal³: provided that the national court or courts delivered final judgment within two years from the date of the capture.⁴

Jurisdiction.

But after judgment by the national court of first instance or of appeal, or in default of final judgment within two years, it was provided that the case might be brought before an International Court:

"(1) When the judgment of the national prize courts affects the property of a neutral Power or individual; (2) when the judgment affects enemy property and relates to (a) cargo on board a neutral ship, (b) an enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim, (c) a claim based upon the allegation that the seizure

¹ *Parl. Papers, Misc.*, No. 6 (1908), Cd. 4175, p. 101.

² Convention XII. of 1907, Art. 2; Cd. 4175, p. 101.

³ *Ibid.*, Art. 6.

⁴ *Ibid.*

has been effected in violation, either of a conventional stipulation in force between the belligerent Powers, or of an enactment issued by the belligerent captor."¹

The neutral Power may appeal where neutral property or violation of neutral territory is concerned, the neutral individual (unless forbidden by his Government) where his own property is concerned, and the enemy subject where his own property is concerned, except in the case of alleged violation of neutral territory.² Who may appeal.

Where the question to be decided is covered by a treaty, the Court is directed to have regard to such treaty; and in other cases " the Court shall apply the rules of international law. If no generally recognised rule exists, the Court shall give judgment in accordance with the general principles of justice and equity." A failure to comply with the procedure prescribed by the belligerent captor may be disregarded if the Court is of opinion that its consequences are unjust and inequitable.³ What law to be applied.

The International Court was to be given power to order restitution, and to assess damages and compensation; and it was provided that there should be an appeal to it only as to damages in cases where the national court had declared the capture invalid.⁴ Remedy,

The Court was to consist of fifteen judges (nine constituting a quorum) and deputy judges, appointed for six years by the contracting Powers, and eligible for reappointment⁵: the judges appointed by Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia to be always summoned, and the judges and deputy judges appointed by the other Powers, who were numerous, to be summoned by rota,⁶ with a right in any belligerent to be represented in all cases in which his interests are concerned.⁷ Constitution of the Court.

Detailed provision was made as to procedure,⁸ place of sitting, staff and the like; and each party was to pay its own costs, while the losing party was to pay in addition the costs of the trial and one per cent, of the value of the subject-matter of the case as a contribution to the general expenses of the Court, the amount to be fixed in the judgment of the Court.⁹ An individual appealing was to give security for the sums he might be liable to pay.¹⁰

Finally it was agreed that the Convention should only apply as of right where the belligerent Powers were all parties to it, that only a contracting Power or a subject of a contracting Power should have the right to appeal,¹¹ and that the deposit of ratifications should take place so soon as the Powers ready to ratify furnished the necessary quorum of nine judges and nine deputy judges,¹² with leave to

¹ Art. 3.

⁵ Arts. 10, 11, 12.

⁹ Art. 46.

² Art. 4.

⁶ Art. 15.

¹⁰ Art. 46.

³ Art. 7.

⁷ Art. 16.

¹¹ Art. 51.

⁴ Art. 8.

⁸ Arts. 19 to 45.

¹² Art. 52.

other Powers to accede subsequently to the Convention. The Convention was to come into force six months from such deposit of ratifications¹; and was to continue in force for twelve years, with a tacit prolongation for six years if not denounced, denunciation being only operative in respect of the denouncing Power.²

Difficulties.

Certain difficulties have stood in the way of the ratification of this Convention. In Great Britain, parliamentary sanction is necessary, as it involves a limitation upon the jurisdiction of the courts and the absolute sovereignty of the Crown. This sanction would have been granted if the Naval Prize Bill of 1910 had become law. In the United States the difficulty is more serious, as the written constitution of that country precludes any right of appeal from the Supreme Court. The United States delegates, at the Conference of London to which we will shortly refer, invited the delegates to accept the principle "that as regards countries where such constitutional difficulties arose, all proceedings in the International Prize Court should be treated as a rehearing of the case *de novo* in the form of an action for compensation, whereby the validity of the judgments of the national courts would remain unaffected, whilst the duty of carrying out a decision of the International Court ordering payment of compensation would fall upon the Government concerned." On such a question the Conference of London had no authority; but to facilitate the adhesion of the United States to the Prize Court Convention, the delegates expressed a wish (*vœu*), by which they agreed to call the attention of their Governments to the advantage of giving power to States so situated to deposit their ratifications with a reservation "to the effect that resort to the International Prize Court, in respect of the decisions of their national tribunals, shall take the form of a direct claim for compensation, provided always that the effect of this reservation shall not be such as to impair the rights secured under the said Convention, either to individuals or to their Governments, and that the terms of the reservation shall form the subject of a subsequent understanding between the Powers signatory of that Convention." No such understanding has as yet been reached.

But apart from these questions of constitutional difficulty, the general acceptance of the Convention was delayed by the provision *already* referred to, that the International Prize Court was to apply the rule of international law, and if no generally recognised rule existed, should give judgment in accordance with the general principles of justice and equity.⁸

At the Conference at the Hague in 1907, a certain measure of agreement was arrived at on some questions relative to maritime

¹ Art.

54.

²

Art. 55.

³See

p. 337, *supra*.

war, but a large number of important questions were either not discussed, or, if discussed, revealed great divergencies of opinion. Several Powers intimated that unless such uncertainty could be removed, they would be unable to ratify the Convention, and in these circumstances a Conference of the chief maritime Powers (to whom was added the Netherlands) met in London in 1908, at the invitation of Great Britain, with the object of arriving, if possible, at an understanding as to the rules of international law applicable to all subjects which would come before the International Prize Court. This Conference was a more practical body than those assembled at the Hague, as its members were restricted to the Powers whose interests were mainly affected, and its procedure was organised on more business-like lines. The Powers represented drew up preliminary memoranda, intended to set out their views of the existing law; from these memoranda the principles on which there seemed to be some approach to a general agreement were extracted so far as possible, and set out as "bases of discussion"; and, as the result of prolonged discussion, a code of rules was drawn up of a more complete and elaborate character than anything hitherto attempted in the region of international law. This was embodied in the Declaration of London, the Articles of which are set out in the following chapters. These Articles are for the greater part an exposition of the law as then existing, though to some extent they constituted a declaration of new law. As they were the result in many cases of a compromise, concessions by one nation being conditional on concessions made by others, it was agreed¹ that they must be ratified, if at all, as a whole.

It will be seen that, though elaborate, they are not by any means an entirely complete code of naval prize law, and in their interpretation difficulties would sometimes arise as to whether particular rules were exclusive of, or might be supplemented by, national case law; but they marked a very important advance towards the establishment of a written code of international law. They were not, however, ratified by the Powers concerned, and there were constitutional difficulties, as we have seen, in the way of their ratification by the United States; but even if they had never been ratified, it was thought that the fact that they were the considered conclusions of a chosen body of the jurists, statesmen and sailors of the chief maritime countries of the world, would have given them an authority which could not in the future have been without influence upon the decisions of any international court or arbitrator. The possibility, however, was not to be overlooked that a refusal by any Power to ratify might lead to an abandonment of all concessions made, and a more determined insistence than ever by each Power upon its own point

¹ Art. 65.

of view. It is to be noted that the official commentary or report which accompanies the Articles of the Declaration was treated by continental practice as an authoritative explanation of its terms, and consequently would, in all probability, be so treated by an international court.¹

During the Great War, the Declaration of London was subjected to numerous modifications at the hands of the belligerents; so that henceforth it cannot—as an integral instrument or as a unified code—be regarded as possessing international authority, much less binding force. When such modifications were not expressly specified, the provisions of the Declaration were in some cases presumed to have been accepted and intended to be applied; in other cases, a contrary view was adopted, as, for example, by the British Prize Courts.² In the course of the present work its provisions have been set out to show their relation to pre-existing law and practice.

¹ See *Parl. Papers, Misc.*, No. 4 (1909), p. 94. There was some controversy on this point, but the statement in the text appears to be correct. It was the view taken by the British delegates, and is supported by the words of the Report itself. Moreover an Order in Council of 20 August, 1914, provided as follows: "The General Report of the Drafting Committee on the said Declaration . . . shall be considered by all Prize Courts as an authoritative statement of the meaning and intention of the said Declaration, and such Courts shall construe and interpret the provisions of the said Declaration by the light of the commentary given therein" (*Manual of Emergency Legislation* (1914), pp. 144, 145). This provision was accordingly acted upon by the Prize Court, in *The Sorfareren* (1915), 32 T. L. R. 108; and in *The Tommi* (1914), P. 251. An Order in Council of 29 October, 1914, however, repealed the provision of the preceding Order on this point.

² Cf. *The Hakan* (1918), A. C. 148; *The Louisiana* (1918), A. C. 461.

CHAPTER IV

THE LAW OF CONTRABAND¹

" IL est considere de l'aveu de toutes les nations de l'Europe," says Contraband G. F. de Martens,² " comme contraire a la neutrality de permettre trading. a nos sujets de transporter vers les ports de Tune ou des deux puissances belligerantes de certaines marchandises qu'on designe sous le nom de *contrebande de guerre*"³ The observation, for reasons which have been stated, requires qualification.⁴ It is not a breach of neutrality for a neutral State to permit such traffic, but the belligerent Government is left to confront, and exact reparation from, the offending neutral individual. Nor is the act of carrying contraband in itself illegal by English law, unless prohibited by proclamation or order in council⁵; and those States which have in fact prohibited the export of contraband, as the Netherlands and Brazil during the Spanish-American War, and Sweden during the Russo-Japanese War, are justly regarded as having shown an excess of caution which goes beyond neutral duty.⁶

Contraband property was defined in the British Memorandum Definition of drawn up for the purposes of the London Conference as "*neutral* contraband. property on board ship on the high seas or in the territorial waters of either belligerent which (1) is by nature capable of being used to assist in, and (2) is on its way to assist in, the naval or military operations of the enemy."

The official Report on the Declaration of London distinguished contraband goods from non-contraband thus: "The notion of

¹ The literature on the subject of contraband of war is now very extensive; a useful classification of authorities is to be found in H. R. Pike, *The Law of Contraband of War* (Oxford, 1915).

² *Precis du droit des gens* (ed. by C. Verge, Paris, 1858), liv. viii. chap. vii. § 318.

• The Papacy had in earlier ages forbidden trade with infidels in certain articles, e.g. weapons and munitions of war—"merces banno interdicts"; trade in such forbidden articles was said to be "contra bannum," hence the word "contraband."

⁴ See p. 329, *supra*; and cf. Ortolan, *Dip. de la mer*, ii. 199. " I l ne s'agit pas d'actes d'un gouvernement qui romprait la neutralite mais d'actes de particuliers qui exercent leur trafic."

⁵ *Ex parte Chavasse, in re Grazebrook* (1865), 34 L. J. N. S. (Bkcy.), 17; *The Helen* (1855), 1 A. & E. 1.

⁶ Westlake, *part ii.*, p. 299.

contraband connotes two elements: it concerns objects of a certain kind and with a certain destination. Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends: if they are destined for a neutral Government, no; if destined for an enemy Government, yes. The trade in certain articles is by no means generally forbidden during war; it is the trade with the enemy in these articles which is illicit, and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by international law."¹ Thus the necessary criteria are usefulness in war and enemy destination. It is more logical, however, to say that destination is not strictly an indispensable element in the definition of contraband, the essence of which is suitability for use in war; though a particular destination is a condition precedent to the exercise of the right of seizure and condemnation.

Classes of
merchandise.

Grotius² divided all articles which may be the subject of neutral trade into three classes:

1. Articles, such as arms, which are useful only for war.
2. Things which merely serve for pleasure, and have no warlike use.
3. Things *ancipitis usus*, i.e. which may be used equally for peace and war, e.g. money, provisions, ships and tackle.

It is clear, he observes, that articles falling under class (1) are contraband, and equally clear that those under (2) are innocent. It is under the third head that difficulties mainly arise. In such cases, he observes, "Distinguendus erit belli status" (the circumstances of the war must be taken into consideration). And to the same effect writes Heineccius³: "Sometimes things of the very smallest importance become all-important, if the enemy is distressed for the want of them, and unable to procure a supply from any other source."

The judgment of the court in *The Peterhof*,⁴ an American case, restated the Grotian arrangement: "A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes the first consists of articles manufactured, and primarily and ordinarily used, for military purposes in time of war; the second, of articles which

¹ *Parl. Papers, Misc.*, No. 4 (1909), pp. 33 seq.

² *Lib. iii. c. 1, §5.*

³ "Magnum sane aliquando momentum in bellis habent res minimi momenti, si hostis laboret inopia, nec verum istarum aliunde copia sit" (*De jur. prin. civ. com.*, § 12).

⁴ (1866), 5 Wall., p. 5&.

may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

A long series of treaties, declarations, proclamations and decrees¹ between and by the chief civilised nations of the world shows the gradual development of the practice as to contraband. There was a tendency in the earlier periods for Powers to take upon themselves the liability to restrain their own subjects from the traffic in prohibited goods.² The method adopted was almost always that of close enumeration rather than general definition of contraband articles, and the lists varied according to the interests at the time of the nations concerned, each belligerent being entitled to decide for himself what articles to ban.

The distinction between absolute contraband (i.e. property useful for war purposes which may be confiscated if on its way to enemy territory) and conditional contraband (i.e. property that may be confiscated only if destined for the armed forces of the enemy) is not at first clearly drawn, the attention of treaty-makers being concentrated upon drawing up lists of things which in no circumstances are to be supplied to enemies of the parties. It was recognised at an early period, and repeatedly laid down, that commerce with a place invested or blockaded stands on a different footing from trade in contraband; but the first instance of a distinction being suggested between destination to enemy country and destination to enemy armed forces is found in an American circular of 1777,³ in which the right to seize neutral vessels is limited to those "having on board soldiers, arms, munitions, provisions and other contraband intended for the British army and its warships," though it is not clear that such a distinction was clearly contemplated in this case, as the intention would no doubt be presumed if any enemy port were the destination in the case of soldiers, arms and munitions, and the position of provisions was doubtful, they having frequently been included in lists of absolute contraband.⁴

¹ Summarised by Atherley-Jones, *Commerce in War*, pp. 8-55.

² E.g. England, Spain and Burgundy in 1604, England and the Low Countries in 1625, England and Denmark in 1670.

* Atherley-Jones, *Commerce in War*, p. 23.

* Great Britain, in 1776, declared all ships trading to the American colonies lawful prize (Atherley-Jones, *ibid.*, p. 24).

Distinctions
made by
various
States.

There is a recognition of a similar distinction in a treaty of 1806,¹ between Great Britain and the United States, when tar and pitch were declared not contraband, unless going to a port of naval equipment, in which case they were to be not confiscated but subject to a right of pre-emption.

The distinction occurs again in a decree issued by the Peruvian Government in 1866,² by which coal was declared contraband if destined for the use of Spanish ships of war, and in a treaty made between the Argentine Republic and Peru in 1874, which specified as contraband " victuals destined for hostile troops or fleets."

In the war between Russia and Turkey in 1877, Russia included in her list of contraband " tous les objets destinés aux troupes de terre ou de mer." If " destinés " meant " destined for " and not " adapted for," this was a complete change of front on the part of that country, which had hitherto pursued the policy of restricting contraband to munitions of war, and a striking illustration of the effect produced upon a nation which having been neutral finds itself a belligerent.³ Even apart from this the list contained a number of articles classed as absolute contraband (such as spades), which went far beyond anything previously contemplated, and violated the principle, then generally accepted, that absolute contraband must be articles having only a warlike use.

France, when at war with China in 1885, found herself unable to resist a similar temptation. Her treaties up to the year 1856 had given evidence of a firm determination to restrict contraband to munitions of war, and to keep provisions on the free list; but in this year the French Government declared rice contraband if destined to Chinese ports. The British Government protested on the ground that, though provisions might be contraband if consigned to a fleet or to a part where a fleet might be lying, they were not absolute contraband; and the French Government defended its attitude by claiming that it is for the belligerent to decide the question of what is contraband, and by laying stress upon the importance of rice, not only to Chinese armies, but to the Chinese population.⁴

¹ Atherley-Jones, *Commerce in War*, p. 32.

² *Ibid.*, p. 42.

³ *Ibid.*, p. 44. The Great War produced even more striking illustrations.

⁴ *Ibid.*, p. 45. *Parl. Papers, Misc.*, No. 2, 1911, where the whole correspondence is set out. France quoted a statement by the Attorney-General in 1854 that one of the categories of contraband is "articles which may be of indirect use in war, by permitting a continuation of hostilities, such as provisions "; an official letter of Lord Malmesbury in 1859 warning British subjects "that if they convey for the use of either belligerent articles which are held to be contraband of war, and if their property be seized by either belligerent, Her Majesty's Government will not take upon itself to intervene on their behalf ... the prize court of the country which has made the seizure is competent to decide the case"; and a passage from a letter of "Historicus" (officially

In the British Manual of Naval Prize Law of 1888, the distinction was fully elaborated, naval stores being included in the list of absolute, and provisions, money, coals and horses in the list of conditional, contraband.

Spain, which had in 1866 declared coal contraband when it found it convenient to do so (with a proviso that the declaration was not to be taken for a precedent), claimed in 1898 the right of determining anything to be contraband. Russia, in 1900, included "in general, all other articles directly intended for war on land or sea, if they are being conveyed on behalf of, or are destined for, the enemy," adding the explanation,¹ that "by the expression 'destined for the enemy' is understood conveying to his fleet, to one of his ports, or even to a neutral port, if the latter is shown by clear and indisputable evidence to be simply an intermediate station on the way to the enemy, the latter being really the ultimate destination."

By the Japanese notification of 1904, during the war with Russia, two lists were set out: the first of goods intended solely for use in war and to be "regarded as contraband when passing through or destined for enemy's use"; the second, which included food, drink, horses, coal, gold and silver, and telegraph, telephone and railway materials, to be "regarded as contraband of war when destined for enemy's army or navy, or in such cases where, being goods arriving at enemy's territory, there is reason to believe they are intended for use of enemy's army or navy."

The Russian Government in the same war spread the net very wide indeed.² Their list of contraband included such articles *ancipitis usus* as barbed wire, harness, pots and pans, coal, naphtha, alcohol and every kind of fuel, telegraph, telephone and railroad materials, and "generally everything intended for warfare by sea or land, as well as rice, provisions and horses, beasts of burthen and others which may be used for a warlike purpose, if they are transported on behalf of, or are destined for, the enemy" ("pour le compte ou a destination de l'ennemi"). In addition, instructions to Russian commanders included "all kinds of grain, fish, fish products, beans, bean oil and oil-cakes," and also, specifically, cotton.

approved by the Attorney-General in 1870): "It is not for a neutral State to define what is or what is not contraband of war. It appertains alone to the prize court of the belligerent which has effected the capture to take cognisance of that question." The British reply admitted that it was for the belligerent prize court to decide the legality of seizures, but subject to ulterior diplomatic action if the court did not act in accordance with the principles of international law, and the protest against the treatment of rice as contraband was maintained. But the war ended shortly afterwards and the dispute went no farther; large shipments of rice having been in the meanwhile stopped through fear of capture.

¹ Atherley-Jones, *Commerce in War*, p. 47.

² *Ibid.*, pp. 47, 48.

The words used were, it is to be noted, "pour le compte ou a destination de l'ennemi"; which, if "l'ennemi" were strictly construed as meaning any enemy subject, would have in effect put everything into the list of absolute contraband. But in the cases of *The Arabia*¹ and *The Calchas*,² the Supreme Prize Court at St. Petersburg laid it down that "the articles enumerated in clause 10 of the said Article of the Imperial Order of 14 February, 1904, are deemed to be contraband of war only if carried on account of, or destined for, the enemy, i.e. when carried to the enemy Government, contractors, army, navy, fortresses or naval harbours, and not if carried for private individuals, subjects of the enemy country, and more especially neutral Governments or private individuals."

This interpretation of the word "enemy" in this connection is in accordance with the British rule as to conditional contraband³; and it is important, in view of certain doubts which have been expressed on a clause of the Declaration of London, which is dealt with later.

Thus the distinction between absolute and conditional contraband was very late in making its appearance in State documents; and in 1674 Sir Leoline Jenkins, in a case where Spain had seized British pitch and tar, declared it his opinion⁴ "that nothing ought to be judged contraband . . . but what is directly and immediately subservient to the use of war, except it be in the case of besieged places or of a general certification by Spain to all the world that they will condemn all the pitch and tar they meet with."

Decisions of
prize
courts.

But the British prize courts, from the latter part of the eighteenth century and particularly after the case of *The Jonge Margaretha*,⁵ consistently laid stress upon the distinction. In that case Sir W. Scott said: "But the most important distinction is whether the articles were intended for the ordinary uses of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval

¹ (1904), 1 R. & J. Pr. Cas. 42.

² *Ibid.* 118, at p. 143.

³ As interpreted before the Great War. See now *The Hakan* (1918), A. C. 148, considered *infra*, p. 362.

⁴ Wynne, *Life of Sir Leoline Jenkins*, vol. ii, p. 751.

⁵ (1798), 1 C. Rob. 188.

or military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place." ¹

The British rule was followed by the American Courts²; and the Russian Court, as we have seen, recognised the distinction in the case of *The Calchas*³ and *The Arabia*.⁴ In the Great War, however, it practically disappeared; e.g. conditional contraband was proved either to be subject to State control in Germany, or bound for a port of "naval or military equipment," all German ports being deemed to be of this character.

With regard to the question what articles are contraband, the practice had been conflicting and varied. We may, with Ortolan,⁵ put arms and munitions of war on one side as being always and at all times contraband. Treatment of various articles.

Horses have been specifically included in the list in treaties on a large number of occasions, being accounted absolute contraband, though clearly *ancipitis usus*; money has been more leniently dealt with, and on several occasions expressly excluded; ships have been occasionally included, though usually not mentioned; naval stores have been frequently excluded, though more often included, and, on two occasions, included as conditional contraband; and provisions, though included in some of the seventeenth-century treaties, and in an American Declaration of 1861, were repeatedly excluded in express terms, but treated by France in 1885 as absolute contraband.

National practice has varied often according to the exigencies of the moment. England, in the seventeenth century, declined on general principles to recognise pitch or tar as contraband, while claiming for a belligerent the right to draw up a list at the beginning of a war according to circumstances; but at the end of the eighteenth Practice of States: Great Britain.

¹ See also the following cases: *The Endraught* (1798), 1 C. Rob. 21; *The Haabet* (1800), 2 C. Rob., at p. 182; *The Neptunus* (1800), 3 C. Rob. 108; *The Edward* (1801), 4 C. Rob. 68; *The Nostra Signora di Begona* (1804), 5 C. Rob. 97; *The Charlotte* (1804), 5 C. Rob. 305; *The Zelden Rust* (1805), 6 C. Rob. 93. At one time there was a tendency to regard as excepted from the list of contraband articles which were the native produce of the country from which they came, or at the least to treat them as subject not to confiscation but to pre-emption, but this rule has for all practical purposes disappeared. See *The Staadt Embden* (1798), 1 C. Rob. 26; *The Jonge Margaret ha* (1798), 1 C. Rob. 188; *The Apollo* (1802), 4 C. Rob. 158; *The Jonge Pieter* (1801), 4 C. Rob. 83. See also *The Hahan* (1918), A. C. 148; *The Kim* (1915), P. 215.

² *The Commercen* (1816), 1 Wheat. 382; *Maissonnaire v. Keating* (1815), 2 Gall. 325; *The Peterhoff* (1866), 5 Wall. 28; *United States v. Diekelman* (1875), 92 U. S. Rep. 520; *The Benito Estenger* (1900), 176 U. S. Rep. 568; *The Juno* (1903), 38 Ct. Cl. (U.S.), 465; *The Bird* (1903), 38 Ct. Cl. (U.S.), 228.

³ (1904), 1 R. & J. Pr. Cas. 118.

⁴ *Ibid.*, 42. See p. 346, *supra*.

⁵ *Dip. de la mer*, vol. ii., p. 190.

century, being a belligerent, put naval stores such as tar, pitch, hemp and masts in the list of absolute contraband.¹ Horses she was treating as absolute contraband in treaties from 1656 to 1810, but in the Admiralty Manual of 1888 they appear as conditional only, along with money, telegraph and railway material and coals; and provisions, treated as absolute contraband in 1654 (in a treaty with Holland) and 1793, and thereafter on many occasions expressly declared to be free, have been dealt with as on principle included in the conditional list, in accordance with the judgment in *The forge Margaretha*.² In that case, cheeses sent by a Papenberg merchant from Amsterdam to Brest, where a considerable French fleet was stationed, were condemned by Sir W. Scott, who observed: "I take the modern established rule to be this, that generally provisions are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it."

British authorities, as has been seen, could be readily multiplied. In *The Ranger*,³ a cargo of biscuit and flour had been put on board an American ship from the public stores at Bordeaux, and was bound for Cadiz, though ostensibly documented for Villa Real in Portugal. Sir W. Scott condemned the vessel, and his judgment is noticeable as suggesting that a claim might legally be made to condemn all provisions, whether intended for military consumption or not: "This is a very gross attempt to abuse the instructions which were issued for the supply of provisions to Spain. It must always be remembered that this Government might have availed itself of the interior distress of the enemy's country as an instrument of war; it did not, however, but humanely permitted cargoes of grain to be carried, without molestation, for the relief of the necessities of famine under which Spain had for some time laboured. It was natural to expect that a grant made with so much liberality would have been used with the most delicate honour and good faith both by Spain and her allies."

Acting on this view of her rights, England had seized, in 1793, ail vessels bearing provisions which were destined for French ports; and a similar claim was made by France with regard to rice in the war with China in 1885. But such claims are not consistent with the admitted rights of neutrals. The interference with neutral trade is limited by belligerent necessity, and to impose the pressure of starvation upon a non-combatant population is not, according to modern ideas, a permissible operation of war, unless—as will be seen later—the Government of the enemy country assumes control

¹ *The Maria* (1799), 1 C. Rob., at p. 371a; *The Charlotte* (1804), 5 C. Rob. 305; Admiralty Manual, 1888.
² (1798), 1 C. Rob. 189.
³ (1805), 6 C. Rob. 125.

over the general supplies, for the purpose of allocating them primarily to the combatant sections of the population.

The United States, in her treaties, has been fairly consistent in regarding horses as absolute contraband, but less consistent in her treatment of naval stores, which have been more often excluded than included, though it has been frequently conceded that these and shipbuilding materials are contraband.¹ United States.

With regard to provisions, the United States joined the armed neutrality of 1780, which limited contraband strictly to munitions of war; but this was hardly an expression of the country's policy, for it was laid down in various cases² that provisions are conditional contraband, in spite of treaties which dealt with them as entirely free. In her war with Spain in 1898, the United States made provisions conditional contraband.

French treaties till the nineteenth century steadily included horses as absolute contraband, and then ceased to mention them; occasionally included naval stores, but more usually excepted them or left them unmentioned, and practically always put provisions on the free list. By French practice, ship timber and naval stores were not contraband,³ and a similar principle was adopted in 1859 and 1870 in regard to coal, which England in 1870 regarded as in the conditional list and Germany claimed to be absolute contraband. No belief in consistency, however, prevented France in 1885 from claiming to treat rice as absolute contraband, as already mentioned.

Prussia was one of the parties who joined the Armed Neutrality of 1780, and was at that time anxious for the strictest limitation of belligerent rights; but, as we have seen, her view had entirely changed in 1870 with regard to coal, and a prominent German jurist, Heineccius, in 1721,⁴ regarded naval stores and provisions of every kind as absolute contraband.

Russia, throughout her history, has consistently claimed that horses are always *free*, and her tendency was always towards a strict limitation of the list of contraband. She was the leading spirit in the Armed Neutralities; and she protested firmly in 1884 against the inclusion of coal. Nevertheless, in her war with Japan in 1904, in her list of contraband (no distinction being expressly made between absolute and conditional) were found coal, telegraph, telephone and railway materials, and "all objects intended for war by sea or land, including rice, provisions and horses," and in that war she claimed

¹ Woolsey, *International Law*, 5th ed., p. 332; Hall, 8th ed., p. 775

² *Maisonnaire v. Keating* (1815), 11 Gall. 335; *The Commercen* (1816), 1 Wheaton, 387; *The Benito Estenger* (1900), 176 U. S. Rep., at p. 573.

³ // *Volante* (1807), 1 Pistoye et Duverdy, 409; *La Minerve* (1801), *ibid.*, 410.

⁴ *De navibus ob vecturam vitætarum merciutn commissis* (1721), xiv.

to include raw cotton,¹ and declared provisions absolute contraband, till induced, by a protest from Great Britain, to place them in the conditional list. As we have seen, however, the distinction between absolute and conditional contraband was, in fact, recognised by the Russian Courts. Nor was Russia's attitude at the Conference of London at all in accord with her traditional anxiety to guard the rights of neutrals, for she proposed to include in the list of absolute contraband many articles which should be and were ultimately placed only on the conditional list.

In the case of *The Allanton* in 1904,² the Russian Prize Court condemned a British vessel proceeding with Japanese coal from Japan to British consignees in Singapore, the grounds of condemnation being irregularities in the papers, evidence of the previous conveyance of contraband to Japan, and "the chartering of the steamer for her last voyage by a Japanese trading company, and the fact that she was carrying a full cargo of coal, which would have been contraband of war if the real destination of the steamer had been a hostile port or squadron, and not Singapore." This decision, indefensible on any ground, was reversed by the Supreme Court at St. Petersburg, for the very proper reasons that there was nothing to prove that the cargo was intended for conveyance to an enemy port, and that neutral vessels cannot be confiscated merely because they have on a previous occasion carried contraband to the enemy; but it was held, on grounds of doubtful validity, that there had been sufficient cause for suspicion to justify detention.

The Hague Conference.

At the Second Peace Conference at the Hague in 1907, a proposal was made tentatively by Great Britain that contraband should be entirely abolished, but the suggestion was not received with sufficient favour to lead to there being any prospect of its adoption. More consideration was given to a proposal made by the United States, that the right of seizure for all but absolute contraband should be given up³; and the British Government went into the Conference at London in 1908 prepared, if it were found practicable, to make an agreement to that effect.⁴ Even on this, however, it was found impossible to arrive at anything approaching unanimity, and the suggestion was abandoned and attention concentrated upon an attempt to secure some reasonable degree of certainty as to what articles belonged to each class of contraband, and what were to be considered entirely free.

¹ See p. 345, *supra*.

² R. & J. Pr. Cas. 1, at p. 4.

³ This had been proposed in 1896 by the Institute of International Law.

⁴ They were supported in this by Austria, Spain and the Netherlands.

The results of this attempt were embodied in the Declaration of London, 1909, which, it must be repeated, remained unratified. After the commencement of hostilities in 1914 Great Britain by Orders in Council¹ adopted the Declaration, subject to certain modifications, notably in connection with conditional contraband and the doctrine of continuous voyage. As the war progressed the Declaration was found to be extremely unsatisfactory and, after further modifications, was eventually dropped altogether by the Maritime Rights Order in Council, 7 July, 1916. Even while the earlier Orders in Council were in force the Declaration, as adopted, was, according to the rule in *The Zamora*,² not binding upon the British Courts of Prize except in so far as it expressed existing international law or operated in abrogation of the rights of the Crown.

Similar treatment befel the Declaration at the hands of the other belligerents. At the outbreak of war Germany and Austria announced their complete adherence to the terms of the Declaration, while France and Russia followed with an intimation that they would conform with its provisions as far as might be practicable. The additions to and modifications of the provisions of the Declaration by Great Britain were paralleled by France and Russia, and followed, in the main, by Germany and Austria after protest against the changes initiated by the Allied Powers. Italy on entering the war also adopted the Declaration with modifications. When Great Britain finally withdrew its adherence, France simultaneously issued a Decree to the same effect.

Thus before the end of the war the Declaration had ceased to be an international instrument possessing binding force. But it is well to treat its provisions as indicating a certain stage to which international agreement or compromise had attained on the law of contraband and blockade in the light of naval belligerent practice as then understood or anticipated, and to consider with them the practice of belligerents in the Great War in relation to their subject-matter.

Faced with the confusion and uncertainty prevailing on the question of contraband, a committee of the Second Peace Conference drew up provisionally a list of articles to be considered absolute contraband, and this list was adopted by the Conference of London as the best available compromise between the views of those Powers who wished to enlarge it and of those who wished to limit it still further. Great Britain and Japan tried to secure the elimination from it of horses and mules; Germany and Russia desired to include railway, telegraph, telephone and aeronautical material. France, telegraph and aeronautical material; Russia, in addition to the above,

¹20 Aug. 1914, 29 Oct. 1914.

²(1916), 2. A. C. 77.

provisions of a character adapted to military consumption, gold and silver and paper money of every kind.

This list is set out in Article 22 of the Declaration:

" The following articles may, without notice (' de plein droit'), be treated as contraband of war under the name of absolute contraband:

1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
2. Projectiles, charges and cartridges of all kinds, and their distinctive component parts.
3. Powder and explosives specially prepared for use in war.
4. Gun mountings, limber-boxes, limbers, military waggons, field forges, and their distinctive component parts.
5. Clothing and equipment of a distinctively military character.
6. All kinds of harness of a distinctively military character.
7. Saddle, draught and pack animals suitable for use in war.
8. Articles of camp equipment and their distinctive component parts.
9. Armour plates.
10. Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.
11. Implements and apparatus designed exclusively for the manufacture or repair of arms, or war material for use on land or sea."

Power to
add to the
list.

The above list was recognised as practically including everything then known which could be described as exclusively adapted for use in war; and indeed it went further than this and included, notably in the case of horses and mules, things *ancipitis us us*. But in view of the possibility of further discoveries and inventions, several countries were anxious to retain a power of adding to the list; and the claim which, as we have seen, had been made by some belligerents, that a belligerent nation has the right to declare what it pleases to be contraband, is reflected, but with an important reservation, in Article 23:

"Articles ('les objets et materiaux') exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified. Such notification must be addressed to the Governments of other Powers, or to their

representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers."

Expression was given to this right by Sir S. T. Evans in *The Katwijk*¹: "It is within the power and function of the Crown to add to the list of contraband"; the right was extensively employed as experience in the Great War showed what numerous articles² were capable of use for "warlike purposes"—a term which eventually embraced almost the whole of the enemy's commercial activities. The consequent elimination of the boundaries between the three classes—absolute contraband, conditional contraband, and free goods—was inevitable. But although differences in effect disappeared, as will be seen, a verbal distinction was maintained.³

In case absolute contraband is seized when it is on its way to the enemy, a prize court "will not embark upon inquiries as to what will, or, to speak more strictly, what may, ultimately become of it. Such an inquiry would be a dangerous fetter to fasten upon belligerent captors."⁴

To justify condemnation, contraband goods must have an enemy destination; that is to say, a destination to the enemy's fleet, or to some place in territory belonging to or occupied by the enemy. During the American Civil War this rule was modified by the American courts in a manner which roused the most acute controversy. Acting upon a supposed analogy to Lord Stowell's doctrine of continuous voyage, which has been considered in connection with the rule of war of 1756,⁵ the American Supreme Court held in *The Bermuda*⁶:

Destination:
continuous
voyage.

- (1) That voyages from neutral ports with cargo intended for belligerent ports are not protected in respect of seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports.
- (2) That contraband is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect.
- (3) That ultimate destination alone justifies seizure of contraband.⁷

¹ (1916), P. 177, at p. 179. ² See p. 356, *infra*. ³ See p. 358, *infra*.

⁴ Per Sir S. T. Evans in *The Axel Johnson*; *The Drottning Sophia* (1917), P. 234, at p. 242.

⁵ See p. 332, *supra*.

⁶ (1865), 3 Wall. 514; cf. *The Springboh* (1866), 5 Wall. 1; *The Peterhoff* (1866), 5 Wall. 28.

⁷ Cf. *The Balio* (1917), P. 79 (goods seized on their way to a neutral country: alleged enemy destination after manufacture).

English interpretation
before the
Great War.

It followed from this decision that neutral traders could be arrested on mere suspicion of intention to convey contraband to the enemy. This claim, at one time, found no support in the English interpretation of the doctrine of continuous voyage. Indeed, in *The Imina*¹ Lord Stowell, the author of that doctrine, had explicitly held that the rule concerning contraband was that the articles must be taken in the actual prosecution of the voyage to an enemy's port. The American view, which was acted upon in the case of *The Hart*,² was made the subject of severe criticism, and Mr. Justice Nelson, himself a judge of the American Supreme Court at the time, admitted: "The truth is, that the feeling of the country was deep and strong against England, and the judges, as individual citizens, were no exception to that feeling."³

It is at the same time conceived that on principle the objection to the American doctrine rested in the extreme difficulty of proving to satisfaction an ultimate destination in cases where mediate calls in neutral ports were admittedly contemplated. This objection will not apply to cases where the intention to carry a cargo then on board to an enemy port is in fact established, or where it is clear that the cargo, though intended to be discharged at a neutral port, is to be conveyed thence by some other means of transport to an enemy destination. It is admitted that the evidence must be almost irresistibly strong,⁴ but assuming it to be so, it is not clear that the neutral has any ground of complaint. The case, in fact, falls within Lord Stowell's dictum in *The Imina*: "A voyage is none the less a voyage to an enemy's port that it is broken by calls on the way." It was on this principle that the British Government acted during the Boer War in 1899 and 1900 in the cases of the *Bundesrath*, the *Herzog* and the *General*, which were detained on the suspicion that they were carrying contraband and combatant persons who were destined for the Transvaal, though, as that country had no seaboard, their primary destination was of necessity a neutral port. There was not sufficient evidence to justify the bringing of those vessels before a court, and they were

¹ (1800), 3 C. Rob. 167. In *Hobbs v. Henning* (1865), 17 C. B. N. S. 791, a case arising out of the voyage of the *Peterhoff*, the Court of Common Pleas held, conformably to Stowell's view, that contraband goods belonging to a neutral are not seizable, except in the actual prosecution of a voyage to an enemy's port. But a few years later, in *Seymour v. The London and Provincial Marine Insur. Co.* (1872), 41 L. J. N. S. C. P. 192, another case arising out of the same voyage, it was held that the criterion of contraband was "the intention that the goods should in the course of the same transaction go on to the Confederate States," and that the profits should be obtained on delivery there.

² (1865), 3 Wall. 559.

³ Letter to Mr. Lawrence, 4 Aug. 1873, referred to by Sir Travers Twiss, in *Law Magazine and Review*, 4th ser., vol. iii., p. 31.

⁴ In applying the doctrine of continuous voyage to contraband in the Great War this condition was not stressed. See p. 365, *infra*.

released and compensation was paid by the British Government Germany insisted strongly that " according to the recognised principles of international law there cannot be contraband of war in trade between neutral ports "; and the British Government quoted Bluntschli in reply: " Si les navires ou marchandises ne sont expedies a destination d'un port neutre que pour mieux venir en aide a l'ennemi il y aura contrebande de guerre et la confiscation sera justified." ¹

Italy² in her Abyssinian campaign held and acted upon the English view; and indeed it is difficult to see by what other means the legitimate rights of a belligerent could be enforced in cases where the only approach to his enemy's country by sea is through neutral ports. The right for which Lord Salisbury in 1900 contended ought, no doubt, to be exercised in practice with extreme considerateness and care, but it is certain to be claimed by every belligerent who sees that munitions of war are reaching his opponent through neutral channels.

At the Conference of London, Great Britain, the United States, Russia, France, Italy and Japan were all in favour of this application of the doctrine of continuous voyage, but it was strongly objected to by Austria and by Germany, the latter country having fresh in its recollection its own recent protest during the South African War. In the course of the discussion, however, Germany modified her attitude,³ and insisted only upon its abolition in the case of conditional contraband as a condition precedent to her acceptance of the list of free goods which we deal with later; and the ultimate decision reached was in the nature of a compromise on this basis which, if it had been accepted, would have settled the limits of the application of the doctrine of continuous voyage to contraband.

In laying down the rule as to the destination of articles of absolute contraband, the doctrine of continuous voyage was expressly recognised in the following terms:

"Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land " (Article 30).

¹ For the correspondence between Great Britain and Germany on the subject, see *Parl. Papers, Africa* (1900), No. 1.

² See *The Doelwijk* (1896): the judgment of the Italian Court is given, in a French translation, in *Archives diplomatiques* (Paris), Jan. 1897, pp. 81 seq., and also in *Journal du droit international prive* (Paris), vol. xxiv., pp. 850 seq. The judgment is briefly set out in *Ruys v. Royal Exchange Assurance Co.* (1897), L. R. 2 Q. B. 135; 2 Com. Cas. 207. Cf. *Parl Papers, Misc.*, No. 5 (1909), Cd. 4555, p. 96.

³ *Misc.*, No. 5 (1909). Cd. 4555. P. 195.

Rule of the
Declaration
of London.

Conditional
contraband.

We shall see later how it was agreed in the unratified Declaration that the doctrine be abolished in the case of conditional contraband, except when the enemy has no seaboard.

There being no prospect of any agreement to abolish entirely the doctrine of conditional contraband, the Conference drew up a list of articles to be deemed to be included in that category. The general principle laid down by the majority of the Powers at the Conference was that the belligerent had the right of drawing up and the duty of publishing such a list on the outbreak of war; and it was a marked advance in the direction of certainty and the avoidance of disputes that such a list should be settled beforehand.

A list proposed by the British Government was adopted with certain modifications. It consisted of articles *ancipitis usus* which might without notice be treated as contraband of war; foodstuffs,¹ forage, clothing suitable for use in war, gold and silver, paper money (not including bills of exchange and cheques), railway material, telegraphic material, vehicles, sea-craft, balloons, flying machines, component parts of the four last enumerated, fuel, lubricants, explosives, barbed wire, horseshoes and shoeing materials, saddlery, field-glasses and nautical instruments.

A provision for extension of this list was inserted, similar to that made in the case of absolute contraband:

"Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in Article 23, paragraph 2 " (Article 25).

This gave expression to the view held with practical unanimity by the Powers that in certain circumstances almost any article might acquire a contraband character if its destination was the armed forces of a belligerent: and that the most that could be done was to ensure that articles other than those specified should not be treated as contraband without notice.

The use made by different Powers in the Great War of the power to add to the lists of absolute and conditional contraband provides a concrete example of the development which the law of contraband underwent at the hands of the belligerents.

Contraband
lists during
the Great
War.

On the declaration of war Great Britain issued lists of absolute and conditional contraband conformably to those of the Declaration² save that in the former were included aircraft of all kinds, and their

¹ The term includes coffee: *The Indianic* (1916), 2 B. & C. P. C. 255; and salted casings or sausage skins: *The Cometa*, *ibid.*, 306.

² Arts. 22, 24.

component parts. France and Russia issued similar lists, whilst Germany and Austria followed those of the Declaration. The war had been only a few weeks in progress when it was realised that owing to new conditions further and continuing changes would be necessitated. A proclamation of 21 September, 1914, added to the list of conditional contraband unwrought copper, lead, glycerine, ferrochrome, iron ore, rubber, and hides and skins (not including dressed leather), and thus the provisions of the Declaration concerning contraband articles were virtually abandoned, for the list of articles which were in no circumstances to be declared contraband (Article 23) included metallic ores, hides and rubber. On 29 October new lists were issued increasing largely the number of articles of absolute contraband, e.g. iron, nickel, copper, lead, aluminium, motor vehicles and their component parts, motor tyres, rubber, mineral oils and motor spirit (except lubricating oils), sulphuric acid, range finders, barbed wire and implements for fixing and cutting the same. Similar lists were afterwards adopted by France and Russia. Germany added to the list of conditional contraband (by decrees of 18 October, 23 November and 14 December) lead, copper, lumber, wood, coal-tar, sulphur, sulphuric acid, aluminium and nickel. On 23 December the British lists were withdrawn, and alterations were made in the absolute list, which was to include various chemical ingredients and metals susceptible to use for purposes of war, e.g. sulphur, glycerine and barbed wire were transferred thereto from the conditional list whilst submarine sound signalling apparatus was a new addition. Again France and Russia issued similar lists. On 11 March, 1915, the British absolute list was greatly extended: raw wool, woollen yarns, tin, castor oil, paraffin wax, lubricants, hides, skins, leather, ammonia, aniline, etc. ; to the conditional list were added tanning substances, and the number of articles of "foodstuffs" and "feeding stuffs for animals" was considerably enlarged. France at the same time announced similar modifications, and Russia and Italy adopted lists to the like effect. Germany retaliated on 18 April, 1915, drawing up lists much the same as the British, but making coal and coke absolute contraband ; unlike Great Britain, she issued a free list, which, but for the omission of metallic ores, rubber, oil seeds and nuts, practically corresponded to Article 28 of the Declaration. On 27 May, 1915, the British absolute list was once more enlarged, e.g. toluol, lathes and other machines, machine-tools, certain maps and plans; and linseed oil was added to the conditional list. On 21 August, 1915, Great Britain and France included raw cotton in the absolute list. The lists were again revised on 14 October, 1915, and on subsequent dates. On 2 April, 1916, gold, silver, paper money, negotiable instruments and realisable securities were made absolute

contraband; and on 2 November, 1916 and 2 July, 1917, the number of such articles was amplified. Moreover, on 13 April, 1916, a list of 169 separate items was issued making no distinction between absolute and conditional contraband; this was justified on the ground that the circumstances of the war rendered a distinction valueless, that it was impossible to discriminate between the armed forces and the civilian population, of whom such enormous numbers were engaged in war work, and that the German Government had assumed control of nearly all the articles enumerated in the list of conditional contraband.¹ However, the list of 2 July, 1917, preserved the distinction between absolute and conditional contraband.

Innocent
carriers of
contraband.

Beyond the necessity intended to have been afforded by its lists of contraband, the Declaration aimed at further protection to neutral trade by Article 43:

" If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41.² The same rule applies if the master, after becoming aware of the outbreak of hostilities or of the declaration of contraband, has had *no* opportunity of discharging the contraband.

"A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities."

Pre-emption. The first paragraph of the above Article provided for a special form of pre-emption, a practice that had long been followed under the British system. According to the latter, when a doubt arose as to the contraband character of goods in question, the captor, instead of confiscating them, agreed to buy them at a reasonable market price, and allowed in addition a fair profit together with freight to the vessel³ This practice was recognised in the Naval Prize Act of

¹ *Parl. Papers, Misc.*, No. 12 (1916).

² I.e. the costs and expenses incurred by the captor when, though contraband is carried, the vessel is released. See p. 370, *infra*.

³ *The Haabet* (1800), 2 C. Rob. 179; *The Sarah Christina* (1799), 1 C. Rob. 237 (absolute contraband goods in a raw state and the produce of the country exporting them).

1864, section 38¹; and the **Manual of Naval Prize Law**, 1888, provides accordingly (Article 84): "The carriage of goods conditionally contraband, and of such absolutely contraband goods as are in an unmanufactured state, and are the produce of the country exporting them, is usually followed only by the pre-emption of such goods by the British Government, which then pays freight to the vessel carrying the goods." During the Great War such goods were confiscated, but freight as a rule was not allowed. The provision of the Article relating to pre-emption was held by Sir S. T. Evans to apply only to neutral ships innocently carrying cargo which turned out in fact to be contraband and to neutral cargo which was in fact contraband and was innocently laden and carried on a neutral ship. Accordingly enemy cargo of a contraband nature destined for the enemy was liable to be condemned without compensation.²

The rule as to destination of conditional contraband was set out in the following Articles: Conditional contraband.

"Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4) "3 (Article .33).

"The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption of this kind arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places, if it is sought to prove that she herself is contraband.

"In cases where the above presumptions do not arise, the destination is presumed to be innocent.

"The presumptions set up in this Article may be rebutted " (Article 34).

These Articles embodied the British rule that proof of destination

¹ As to naval stores.

² *The Rijn* (1917), P. 145. See also *The Sorfareren* (1915), 1 B. & C, P. C.

³ I.e. gold and silver in coin or bullion, paper money.

for the forces of the enemy is essential,¹ with the exception that in place of the words "place of military or naval equipment" or similar words (which were given by way of example) there were used the words "base for the armed forces." The distinction does not make much, if any, difference in practice.² Under these provisions, if they had become law, there seemed little doubt that a place regularly used for supplying, by railway transit, a place of equipment, would be treated in the same way as the actual place of equipment. The old cases, decided when there were no railways, afford no reliable guidance. No specific provision was made for the case of fraudulent concealment or spoliation of the ship's papers, which the British Courts have held to raise the presumption of such destination; but there could be little doubt that fraud of this kind would always be considered to supply the proof required.³

Conditional
contraband,
continuous
voyage:
(i.) Declara-
tion of
London.

By Article 35 it was provided that:

"Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

"The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation."

By this Article the doctrine of continuous voyage was to be abolished in the case of conditional contraband, and, subject to the proviso contained in the latter part of the Article, if goods were found to be documented to a neutral port, no further conjecture or examination was possible as to any destination beyond that port.

The conclusiveness of the ship's papers were intended, however, to depend upon their *bona fides*; and would not be allowed to cover fraud.

Article 35, which would have abolished the doctrine of continuous voyage in the case of conditional contraband, illustrates the unsatisfactory nature of the compromises contained in the Declaration and their ineffectiveness to appeal to the signatories of the Declaration.

¹Cf. *The Jonge Margaretha* (1798), 1 C. Rob. 188; *The Edward* (1801), 4 C. Rob. 68; *The Ringende Jacob* (1798), 1 C. Rob. 92; *The Twendre Brodre* (1801), 4 C. Rob. 33. Cf. *The Hakan* (1918), A. C. 148.

²Thus in the Great War Hamburg was treated as a base of supply, and Belfast was so treated by Germany.

³Cf. *The Kim* (1915), P. 215. See *infra*, p. 361.

when they became deeply engaged in hostilities. There was no logical reason for excluding the doctrine in its application to conditional contraband except that it was necessary in order to secure agreement upon its application to absolute contraband. " If it is right that a belligerent should be permitted to capture absolute contraband with an ultimate destination for enemy territory, why should he not be allowed to capture goods which, though not absolute contraband, become contraband by reason of a further destination to the enemy Government or its armed forces ? " ¹

When at the outbreak of war in 1914 Great Britain adopted the Declaration by Order in Council she did so subject to certain modifications which were again varied with regard to Article 35 by an Order in Council of 29 October, 1914. The latter provided that conditional contraband should be liable to capture on board vessels, even if bound for neutral ports, if the goods were consigned " to order," or if the ship's papers did not indicate the consignee of the goods, or if the goods were consigned to persons in enemy territory or in territory occupied by the enemy. Similar tests were applied to absolute contraband by an Order in Council of 30 March, 1916, which also provided that the destinations referred to in Articles 30 and 33 of the Declaration (dealing with absolute and conditional contraband respectively) should be presumed " if the goods are consigned to or for a person, who, during the present hostilities, has forwarded imported contraband goods to territory belonging to, or occupied by, the enemy." Further, these Orders placed upon the owner of the goods the burden of proving innocent destination. These measures adopted by Great Britain and other Allied Powers altered the Declaration out of all recognition, and it was a small step to the Order in Council of 7 July, 1916, which abandoned the Declaration and declared in terms that " the principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and of blockade." The Order contained an exhaustive list of the presumptions of hostile destination to be applied to contraband articles.

Parallel to the development of the rules of contraband by Orders in Council, which were not necessarily binding upon the English Prize Court, ^{(ii.) During the Great War.} ^{(iii.) English Prize Court.} was the new application which the rules received in the decisions of that Court. The foundation was laid by the President, Sir S. T. Evans, in *The Kim*,³ in which the doctrine of continuous voyage came in question. Starting from the basis that " the foundation of the law of contraband and the reason for the doctrine of continuous contraband which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy

¹ Per Sir S. T. Evans in *The Kim* (1915). P. 215, at p. 373.

² *The Zamora* (1916), 2 A. C., p. 77. ³ (1915), P. 215.

for his military use," the President proceeded to justify the developments of the law to which he intended to give effect because "international law, in order to be adequate, as well as just, must have regard to the circumstances of the times, including the circumstances arising out of the particular situation of the war or the condition of the parties engaged in it" ¹ The doctrine of continuous voyage was undoubtedly part of the law of nations and extended to cover not only voyages from port to port, but also transport by land until the real destination was reached. In order to ascertain this real destination the Court ought to look beyond the primary to the ultimate destination which was highly probable. One of the chief tests to be applied in ascertaining whether an ostensible neutral destination was genuine was to discover whether the goods were consigned to the neutral country "for the purpose of being imported into the common stock." ² The goods that were the subject of adjudication in *The Kim* consisted mostly of foodstuffs, and other articles within the list of conditional contraband, consigned to Copenhagen. The fact that the quantity of imports of such articles into Denmark was entirely disproportionate to her requirements and her pre-war demand established that the goods were ultimately destined for Germany. But they could not be condemned unless they were intended to be used for the purposes of the war. This was proved by showing that all the ports through which the goods would have reached Germany (there was no necessity to fix the exact port) were naval or military stations or otherwise connected with the operations of war, that a large proportion of the German population was under arms and that the whole German nation was organised for war. ³

Doctrine of
substitution.

The test of ultimate destination for warlike purposes was more particularly worked out though the doctrine of substitution. In *The Hakan* ⁴ the captured cargo consisted of salted herrings consigned to the German port of Lubeck. It was argued that, as they were only conditional contraband which would have been used on reaching their destination entirely for feeding the civilian population, they should be released. Even if the civilian destination were accepted, "the general scarcity of food in Germany," said the Judicial Committee of the Privy Council, "had made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings their rations of

¹ *The Jonge Margaretha* (1799), 1 C. Rob. 189.

² At p. 275. *The William* (1806), 5 C. Rob. 385; *The Bermuda*, 3 Wail. 514. A neutral cannot claim that he is "importing into the common stock" leather brought into the neutral country to make boots for enemy forces. *The Balto* (1917), P. 79.

³ (1915), P. at pp. 282, 283. A somewhat similar rule was adopted by the Hamburg Prize Court in *The Niobe*, 9 March, 1917.
⁴ (1918), A. C. 148.

bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances the inference is almost irresistible that the goods were intended to be applied for warlike purposes." ¹ Thus the distinction between absolute and conditional contraband was in effect eliminated (though it was verbally retained), and there was justified the forecast of the American jurists in 1914 that belligerents would "be inclined to consider the destination to the enemy country as sufficient even in the case of conditional contraband." ² Proof of contraband character was further facilitated by placing upon the neutral owner of a vessel voyaging between neutral ports the burden of proving the innocent destination of the goods on board if there was reasonable suspicion "that, being in their nature contraband, they are destined for the enemy country, or, being in their nature conditional contraband, military forces." ³ It was a further condition precedent to condemnation that the shipper of the goods (which means any person in a position to control the destination ⁴) should have intended that they should reach the hostile destination. This requirement, however, did not cripple belligerent captors, for the intention, which might be formed before or after the original shipment, could be inferred whenever it was reasonably certain that the shipper ought in the circumstances to have known the real ultimate destination of the goods.⁶

But one of the limits to the extended doctrine of continuous voyage was indicated in *The Bonna*.⁶ The Crown sought to condemn a quantity of cocoanut oil (which was conditional contraband), seized on a neutral vessel bound for Sweden, on the ground that it was to be manufactured into margarine and that the Swedes by eating the margarine would thereby be enabled to release and export a corresponding quantity of butter to Germany. Sir S. T. Evans refused to extend the doctrine of substitution laid down in *The Hakan*⁷ and ordered the goods to be released.

It will be appreciated that many of the facts upon which judgment in prize were based, would have been difficult or, perhaps, impossible of proof according to the ordinary law of evidence. But as Sir S. T. Evans said,⁸ "Prize courts are not governed or limited by strict rules of evidence which bind, and sometimes unduly fetter, our municipal courts. Such strict evidence would often be very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents." Proof as prize courts.

¹ (1918), A. C. 148, at p. 151.

² Quoted by Sir S. T. Evans in *The Kim* (1915), P. 215, at p. 285.

³ *The Louisiana* (1918), A. C. 461, at p. 463.

⁴ *Ibid.*, p. 468.

⁵ *The Kim*, loc. cit., at p. 347. ⁶ (1918), P. 123.

⁷ (1918), A. C. 148. See p. 369, *infra*. ⁸ *The Kim* (1915), P., at p. 250.

The following may be taken as an example of the manner in which prize courts surmounted the difficulties of strict proof and overcame the ordinary limitations of evidence. The *Proton*, a vessel flying the Greek flag, was captured and the question of condemnation turned on her ownership. It was established to the satisfaction of the trial judge that her nominal owner, a Greek, was a poor man who had enemy associations and, further, that he was no seaman. On these facts was erected a pyramid of conclusions: (1) That the owner had not means of his own with which to buy the *Proton*; did not buy her and was not her owner; and only figured as her owner in order that she might continue to fly the Greek flag as a convenient but dishonest device; (2) that in view of his enemy associations he must have bought her with German money; (3) that only the German Government could have been concerned in laying out a large sum of money on the ship in order forthwith to hazard her in a dubious and dangerous adventure; (4) that, as the owner was no seaman, he could only have been on board to look after the interests of his employer, the German Government. The Judicial Committee of the Privy Council accepted the first finding and cast no doubt upon the others.¹

At the Conference of 1909 the contention put forward by Great Britain during the Boer War² was recognised to be sound, and the following exception was made to the rule which would have abolished the doctrine of continuous voyage:

" Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard " (Article 36).

Liability to capture.

The liability to capture of a vessel carrying contraband begins when she leaves her port of departure and ends when she discharges the contraband cargo.³ A passing doubt was thrown upon the unanimity with which this principle is accepted when in 1904 the Russian Prize Court at Vladivostock,⁴ in condemning the *Allanton*, relied upon the fact that the vessel had carried contraband on a previous voyage; but the true principle was laid down by the Supreme Court at St. Petersburg⁵: "The delivery by the *Allanton* on her first voyage of a cargo of Cardiff coal to the Japanese port of Sasebo cannot serve as sufficient ground for the condemnation of the cargo subsequently shipped from Muroran to Singapore, as, under Article 11 of the Prize Regulations, vessels of neutral nationality are only liable to

¹ *The Proton* (1918), A. C. 578.

² See p. 354, *supra*.

³ *The Imina* (1800), 3 C. Rob. 168; *The Frederick Molke* (1798), 1 C. Rob. 86, 87.

⁴ 1 R. & J. Pr. Cas. 1, at p. 4. ⁵ *Ibid.*, at p. 15. See p. 350, *supra*.

condemnation in the event of their being found in the act of conveying contraband to the enemy or to an enemy port, and not merely if they had on a previous occasion carried contraband to the enemy."

The principle was enunciated in Articles 37 and 38:

Exemptions.

"A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination " (Article 37).

"A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end " (Article 38).

In some cases the English courts¹ have, in exceptional circumstances of fraud, held liable to condemnation vessels on the homeward voyage for having carried contraband on the outward voyage; e.g. when contraband goods were carried from Europe to the East Indies, with false papers and false destination, which were intended to conceal the real object of the expedition. No provision was made in the Declaration for such a contingency. The exception to the general rule is not unreasonable, and a vessel clearly proved guilty of such conduct can scarcely complain of hardship. In *The Nancy*² it was justified by the connection between the outward and the homeward cargo, the latter being the proceeds of the former, and by treating the whole voyage as one adventure tainted with fraud.

It was held in the case of *The Imina*³ that if a destination originally hostile is changed in good faith and the ship is captured on its changed course, the offence is no longer committed⁴: "To say that it (the cargo) is nevertheless exposed to condemnation on account of the original destination as it stood in the minds of the owners, would be carrying the penalty of contraband further than it has ever been carried by this or the superior Court"

In like manner,⁵ if the port of destination, originally hostile, ceased to be so by capture or surrender, the offence ceases and the goods are no longer contraband.

¹ *The Rosalie and Betty* (1800), 2 C. Rob. 343; *The Nancy* (1800), 3 C. Rob. 122; *The Margaret* (1810), 1 Acton, 333; *The Trende Sostre* (1807), 6 C. Rob. 390; *The Alwina* (1918), A. C. 444.

² (1800), 3 C. Rob. 122. This case was really one of enemy property; and apparently the vessel was not condemned. Apart from this and other cases involving illegal trade and enemy property, there appears to be no English decision condemning a vessel solely for the carriage of contraband on a previous voyage.

³ (1800), 3 C. Rob. 167.

⁴ Cf. *The Lydia* (1906), 2 R. & J. Pr. Cas. 359; *The Lincluden* (1903), 2 R. & J. Pr. Cas. 341.

⁵ *The Trende Sostre* (1807), 6 C. Rob. 390, n.

Limit of
exemption
during Great
War.

There was nothing in the Declaration of London to throw any doubt upon either of these principles, but when the Declaration was adopted by Great Britain in August 1914, Article 38 was modified by a provision that a neutral vessel which succeeded in carrying contraband to the enemy with false papers, might be detained for carrying contraband if encountered before completing her return voyage. A further modification was made on 29 October, 1914, and retained in the Order in Council of 7 July, 1916, by which Great Britain withdrew her adherence to the Declaration of London. It ran: "A neutral vessel, with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage." As these provisions were in mitigation of the rights of the Crown to punish neutral vessels for fraud on its belligerent rights, they were held binding upon the Prize Court, and a neutral vessel which, with false papers and a false destination, had carried contraband coal intended to be delivered to enemy warships at sea was released because before her capture on a subsequent voyage she had failed to carry the coal to the enemy, had abandoned the voyage and had disposed of her contraband cargo.¹

Free goods.

One of the results of the Conference of 1909 was found in the treatment of articles in the second class of the Grotian category, "things which merely serve for pleasure and have no warlike use." The general principle was laid down in Article 27:

"Articles which are not susceptible of use in war may not be declared contraband of war."

By agreeing to the abandonment of the doctrine of continuous voyage in relation to conditional contraband, the British Government succeeded in securing the assent of the other nations to a list of specific articles which, without prejudice to the generality of Article 27, were to be regarded as in no circumstances contraband of war. These were set out in Article 28, which enumerated a *free* list of seventeen groups of articles, including raw cotton, wool and other raw materials of the textile industries, rubber, oil seeds, metallic ores, numerous chemicals, and articles of jewellery and fashion.

The list was an obvious makeshift, and was not adopted in 1914 by Great Britain or any of the Allied Powers; when several of the enumerated articles appeared in the published lists of contraband the Free list lost all meaning. Germany, however, adhered to a modified free list throughout the war.

¹ *The Alwina* (1918), A. C. 444.

The list in Article 28 was further extended by Article 29: Medical stores.

" Likewise the following may not be treated as contraband of war:

(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.¹

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage."

Hospital ships are specially dealt with under the Hague Convention, No. X. (1907),² and the above Article does not apply to them; and the right of requisition arises only where the articles have an enemy destination. The rule as to medical materials was adopted during the Great War.

The ordinary penalty for carriage of contraband is confiscation of the cargo: Confiscation of contraband.

" Contraband goods are liable to condemnation " (Article 39).

In the case of conditional contraband there has been in the past a practice of substituting pre-emption for confiscation, that is, purchase of the goods at the market value, with the addition of ten per cent, for profit³; and in some cases the same privilege was extended to goods which were clearly contraband but were the products of the country exporting them.⁴ Applied to undoubted contraband this doctrine is a concession to the neutral; but serious trouble was raised by its application by Great Britain in 1795 to articles which were not contraband at all.⁵ The Naval Prize Act, 1864, section 38, adopted this right of pre-emption⁶; and it was set out in Article 84 of the Manual of Naval Prize Law (1888).⁷

In the Memoranda drawn up by the Powers for the purposes of the Conference, Austria-Hungary, while admitting that in theory and practice absolute contraband was subject to confiscation,⁸ argued

¹ I.e. territory belonging to or occupied by the enemy or the armed forces of the enemy. See p. 346, *supra*.

² *Misc.*, No. 5 (1909), Cd. 4555, p. 356; and see p. 234, *supra*.

³ *The Haabet* (1800), 2 C. Rob. 174, 182. A case of a cargo of corn.

⁴ *The Twee Juffrewen* (1802), 4 C. Rob. 242, 243. Cf. *The Eliza Holtz*, Adm., 3 July, 1784, referred to in *The Ringende Jacob* (1798), 1 C. Rob. 91; *The Sarah Christina* (1799), 1 C. Rob. 241.

⁵ Hall, 8th ed., p. 793, n.

In regard to naval stores.

⁷ See p. 358, *supra*, where pre-emption is more fully treated.

⁸ *Misc.*, No. 5 (1909). Cd. 4555, p. 70.

in favour of the principle of indemnity in all cases, with an option of sequestration only, if the belligerent desired it; but apart from this, no nation put forward any claim to the treatment of any contraband goods as subject merely to pre-emption, except in the cases, already mentioned, of vessels encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband applying to their cargo (Article 43).¹

It seemed, therefore, that in view of the comprehensive character of the words of Article 39, the doctrine of pre-emption might be regarded as a thing of the past; and indeed, with the clear enumeration of what was to be contraband and what was not, it was thought that the greater part of the reason for the doctrine had disappeared.

Effect on
vessel
carrying
contraband.

With regard to the treatment of the vessel itself, practice has varied very greatly. The ancient rule was that the vessel is subject to condemnation on the ground that she was contaminated by the contraband goods she had on board; and it was defended by Sir W. Scott in *The Neutralitet*²: "If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is that the vessel does not become confiscable for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers, these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one."³

The modern rule appeared in treaties so early as 1650 (between Spain and the United Provinces)⁴ and 1655 (between France and the Hanseatic Towns), and was well established by the end of the eighteenth century; though Russia so late as 1854 claimed the right to confiscate neutral vessels carrying contraband,⁵ and even in 1904 issued a Declaration to the effect that "neutral ships captured while engaged in flagrant act of contraband can, according to circumstances, be seized and even confiscated." It was illustrated in *The fong Tobias*,⁶ where, the owner of the cargo being part-owner of the vessel, his share in the vessel was condemned, while the other part-owners

¹ See p. 358, *supra*. Cf. *The Rijn* (1917), P. 145 (where it was held that Art. 43 applies only to neutral ships and neutral cargoes); *The Sorfareren* (1915), 32 T. L. R. 108.

² (1801), 3 C. Rob. 295.

³ Cf. *The Hakan* (1918), A. C. 148 (where the decision in *The Neutralitet* is discussed and explained); and *The Zamora* (1921), 1 A. C., at p. 805.

⁴ Atherley-Jones, *Commerce in War*, p. 378.

⁵ Declaration of 19 April, 1854; see Atherley-Jones, *op. cit.*, at p. 379.

⁶ (1799), 1 C. Rob. 329.

were held to be not affected by his acts; in *The Stadt Embden*,¹ where the ship and the innocent portion of the cargo belonging to the owner of the contraband were involved in the same penalty; and in *The Franklin*,² where the vessel was condemned on the ground of a false destination.³

Forcible resistance to the captor is also under the modern rule a ground for condemnation of the vessel.⁴ Rule of proportion.

Another method of dealing with the question was to make the fete of the ship depend upon the quantity of contraband carried. By the French Regulations of 1778, the ship was confiscated if three-quarters of its cargo was contraband,⁵ and the same rule was adopted in 1870⁶; and though the principle seems not to have been generally acted upon in practice to any appreciable extent, it was put before the Conference as in theory reasonable by Germany, France, Japan (which named no definite proportion, but only suggested that the ship be forfeited when the transport of contraband is the principal object of the voyage), the Netherlands (which similarly required the contraband to be "an important part" of the cargo) and Russia.

The Conference adopted the suggestion that some such proportion should be taken, and Article 40 represented a compromise on the question of the amount of such proportion:

"A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo."

The question was considered by the English Prize Court in *The Hakan*,⁷ and it was held by the President, Sir S. T. Evans, that the rule expressed in Article 40 had become part of the law of nations and that, if the proportion there laid down was satisfied, knowledge of the contraband character of the goods on the part of the owner was immaterial. In the result the vessel was condemned, and the decision was upheld by the Judicial Committee of the Privy Council, but on different grounds. The test of a fixed proportion was rejected, and after an exhaustive review of British and continental practice it was held to be an accepted rule of international law that "knowledge of the character of the goods on the part of the owner of the ship is

¹ (1798), 1 C. Rob. 26. ² (1801), 3 C. Rob. 217.

³ Cf. also *The Edward* (1801), 4 C. Rob. 68; *The Richmond* (1804), 5 C. Rob. 325; *The Ranger* (1805), 6 C. Rob. 125.

⁴ Misc., No. 5 (1900), Cd. 4555, pp. 70, 71. Cf. *The Jonge Tobias* (1799).
⁵ 1 C. Rob. 329.

⁶ Atherley-Jones, *op. cit.*, p. 378.

⁷ Barboux, *Jurisprudence du conseil des prises*, 1870-1, Appendix, Art. 6. (1916), P. 266.

sufficient to justify the condemnation of the ship, at any rate where the goods in question constitute a substantial part of the whole cargo." The extent to which the cargo is contraband may alone raise a presumption of knowledge, rebuttable or irrebuttable according to the proportion.¹ Knowledge may also be inferred from circumstances such as the failure of a shipowner to make inquiries after suspicious facts pointing to an intended enemy destination have come to his notice.² For the purpose of condemnation it matters not in what manner the cargo is proved to be contraband: the vessel may be condemned if the proportion of contraband only becomes substantial by adding to goods originally contraband those which have become constructively so by reason of the doctrine of infection,³ shortly to be considered.

Though it was necessary in the Declaration of London to adopt all the four standards in order to minimise the possibility of devices being employed to defeat the intention of the clause, what would have been a real safeguard against any systematic carrying of just such a quantity of contraband as would enable the ship to avoid confiscation lay in Article 41:

" If a vessel carrying contraband is released, the costs and expenses incurred by the captor in respect of the proceedings in the National Prize Court and of the custody of the ship and cargo during the proceedings shall be borne by the ship."

By the British practice⁴ a ship was refused her freight and expenses, unless as in *The Neptunus*⁵ the amount of contraband carried was very small; and the American courts followed a similar rule.⁶ The above Article apparently went rather further by making the offending vessel liable for costs.

Rule of
infection.

The rule of infection, which condemns as contraband any innocent goods which belong or are deemed to belong at the moment of capture to the owner of contraband goods in the same vessel, had long been recognised by England and adopted by the United States and Japan, and it was incorporated into the Declaration by Article 42:

" Goods which belong to the owner of the contraband, and are on board the same vessel, are liable to condemnation."

¹(1918), A. C. 148.

²

The Hillerod (1918), A. C. 412.

³*The Hakan* (1916), P. 266.

⁴*The Sarah Christina* (1799), i C. Rob. 237; *The Mercurius* (1799), I C. Rob. 288.

⁵(1800), 3 C. Rob. 108. Cf. *The Jeanne*; *The Vera*; *The Forsvik*; *The Albania* (No. 2) (1917), p.8.

⁶*The Commercen* (1816), 1 Wheat. 387; *The Peterhoff* (1866), 5 Wall. 28.

The application of the rule depends on the question of ownership, Ownership in and a court of prize follows its own rules in finding the owner. Prize law.

"The question of the ownership of goods carried by sea in time of war between maritime nations must be determined in accordance with the doctrines of prize law and not of municipal law."¹ An example of the difference between the two codes will be found in the case of transfer of property in goods afloat from an enemy to a neutral without actual delivery of the goods; the enemy may convey a good title according to municipal law, but a court of prize will ignore the transfer. The rules of prize are not confined to the determination of the ownership of the contraband goods; they are equally applicable to goods which are alleged to be "infected." If a neutral is the owner of contraband goods in a vessel which also carries innocent goods that he has sold and a captor claims to apply the doctrines of infection, the ownership of the innocent goods is tested by the law of prize and not by municipal law, although according to the latter the property in the goods may have passed.² As prize courts are notoriously shy of paper transfers even in the course of ordinary commercial practice, a neutral shipper of several consignments runs a grave risk of losing them all if one parcel turns out to be contraband.³

¹ Per Sir S. T. Evans in *The Posteiro* (1917), 3 B. & C. P. C. 275, at p. 286. See also *The Parana* (1919), P. 249; and *The Kronprinsessan Margareta* (1921), 1 A. C. 486.

* This is another example of the manner in which the law of prize was developed during the Great War. "This application of the doctrine (of infection) goes far beyond anything contemplated by those who established it in totally different circumstances" (*The Antwerpen* (1919), p. 252, n.). But it was applied by Sir S. T. Evans in *The Posteiro* (1917), 3 B. & C. P. C. 275, and *The Kronprinsessan Margareta* (1917), P. 114, and the latter case was approved by the Judicial Committee (1921), 1 A. C. 486, q.v. for a full consideration of the doctrine. If found to be infected, enemy goods in neutral ships are not protected by the Declaration of Paris. *Ibid.*, p. 503.

³ On the whole question of the effect of the Great War on the law of contraband see Sir Erle Richards, B. Y. I. L. (1920-1), n; (1922-3), 1; Hall, 8th ed., pp. 804-16; Lawrence, 7th ed., pp. 723-46; A. J. I. L. xvii. (1923), 1.

CHAPTER V

THE LAW OF BLOCKADE

THE question of the rules regulating a blockade was the first that engaged the attention of the delegates at the Conference of London. A series of twenty-one Articles was drawn up and agreed upon, partly as representing the generally recognised principles of international law and partly by way of conventional stipulation on points where no such generally recognised principle could be found. The history of the Declaration which contained this code of the law of blockade, of its non-ratification, its adoption and its abandonment, has already been given. But although it was thus reduced to a position of secondary importance as an international document, it must occupy a prominent place in the historical survey of the conflicting practices and professions of nations from which the principles of blockade are to be deduced. *

Definition of
blockade. |

A blockade may be generally described as the obstruction "of commerce to or from a defined part of the enemy's coast by sea as an incident in hostile operations."¹ This definition is certainly comprehensive of the practice as it was at one time understood, and it is submitted that it remains sufficiently wide to cover modern developments, as long as "incident" be given a wide meaning and "hostile operations" be construed as embracing the whole of a nation's belligerent activity.

Blockade is practically always carried out by a warship or warships of a belligerent. Whether the operation may be effected by means of submarines, or assisted by laying mine-fields, are questions which will subsequently be considered in the light of recent events. Other alternatives to ships of war are not unknown: in certain circumstances blockade may be effected by land batteries commanding the approach to a blockaded port. But it must in that case be supported "by a naval force sufficient to warn off innocent, and capture offending vessels attempting to enter"²; so that such exception to the rule that a blockade is an operation of warships was one of little substance, and indeed was not dealt with specifically in the Declaration of London,

¹Cf. the British memorandum, *Pari. Papers, Misc.*, No. 4 (1909), p. 51 see also No. 5 (1909), p. 35. Blockade is here treated solely as an operation of war. For pacific blockade see pp. 189, 331 *supra*.

²*The Circassian* (1864), ²Wall. 135, 149.

which did not attempt to define the word "blockade." That the operation is carried on by ships was, however, the underlying assumption of the whole of the Articles on the subject, and the true view probably is that the operations of land batteries and obstruction by mine-fields are supplementary to the operations of the ships, as is, for instance, the blocking up of a channel by stones, sunken ships or other obstructions: a method of procedure against which Great Britain, with no very good grounds, protested, when it was applied to the approaches to Charleston and Savannah by the Federal forces in 1861.¹

The limitations of a blockade were narrowly defined in the Declaration as follows: Limitations of blockade.

"A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy" (Article 1).

"The blockading forces must not bar access to neutral ports or coasts" (Article 18).

These rules were thought to follow as of course from the fact that a belligerent can only direct a blockade against his enemy, and in most cases they may seem to be a mere truism. But a port may be blockaded by the stationing of a ship or ships at the mouth of a river, or of a narrow passage, many miles away; one ship, for instance, blockaded Riga in 1854 by lying at the entrance of a channel 120 miles distant²; and Buenos Ayres was blockaded from the neighbourhood of Montevideo.³ When, therefore, such a river or channel leads to a neutral as well as to an enemy port, or forms the boundary line between neutral and enemy territory, the above rules become of great practical importance, if they are valid—which does not follow because they are to be found in the unratified Declaration. But they enunciate a principle anciently laid down by Lord Stowell in 1801,⁴ when a notified blockade of Holland was held not to be violated by a destination to Antwerp, and the Scheldt was treated as a conterminous river, not within Dutch territory. This case was followed by the United States courts during the American Civil War,⁵ when the Texan shore of the Rio Grande being blockaded, trade with Matamoros on the Mexican shore was held to be lawful, subject to the duty of the neutral not to place his ship in suspicious propinquity to the blockaded shore. In the Crimean War the British and French

¹ Lawrence, *Principles*, 7th ed., p. 687.

² *The Franciska* (1854), Spinks, 115.

³ Hall, 8th ed., p. 854.

⁴ *The Frau Isabe* (1801), 4 C. Rob. 63; Hall, p. 866. Cf. *The Luna* (1810), Edw. 190, which was followed in *The Sigurd* (1917), 34 T. L. R. 16.

⁵ *The Peterhoff* (1866), 5 Wall. 28, 52; *The Dashing Wave*, *ibid.* 170; *The Volant*, *ibid.* 178; *The Science*, *ibid.* 179; Hall, 8th ed., p. 866.

fleets blockaded the mouth of the Danube, whereupon the neutral States of Bavaria and Wurtemberg protested. In the Franco-German War, however, when the French blockaded the German coast of the North Sea, they exempted the mouth of the River Ems, which flows partly through Holland. In the case of internationalised canals, such as Suez and Panama, blockade is prohibited by express treaty stipulations.

The practice of the long-distance blockade inaugurated during the Great War compels a reconsideration of the previously recognised limitations of blockade. But as a discussion of the practice involves a consideration of other conditions of blockade, e.g. its effectiveness and impartiality, of retaliatory measures and of the novel conception of "war zones," it is best postponed to the enumeration of principles as they were understood before 1914.¹

Blockade
must be
effective.

It was laid down by the fourth Article of the Declaration of Paris (1856) that blockades to be valid must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy. Paper blockades, or such as are not supported by the material strength to make them effective on the spot, have been by universal agreement for a long time inadmissible. The Napoleonic wars pushed this form of blockade to its illogical conclusion. On 16 May, 1806, a British Order, purporting to be retaliatory, announced a blockade extending from Brest to the Elbe. This was answered by the French Decree of Berlin (1806):

- (1) "Les lies Britanniques sont de'dare'es en etat de blocus."
- (2) "Tout commerce et toute correspondance avec elles est defendu."

This decree was followed by further retaliatory orders issuing from Great Britain, the legality of which was vindicated by Lord Stowell in *The Snipe*²: "These orders were intended and professed to be retaliatory against France; without reference to that character they have not, and would not have, been defended; but in that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice by which the international communications of independent States are usually governed."

That the action of Great Britain was justified even on the ground of retaliation has been questioned by such high authorities as Sir R. Phillimore³ and Sir William Harcourt⁴; but the validity of the principle of retaliation was not doubted by contemporary British

¹ See *infra*, pp. 392 seq. ² (1812), Edwards, 381, 382.

³ *International Law*, vol. iii. sec. 321. ⁴ *Letters of Historicus*, p. 94.

jurists, and in the Great War it was applied by the belligerents, and upheld by the British and French Prize Courts.¹

The principle of the necessity of effectiveness was recognised by the Armed Neutralities of 1780 and 1800; it was acted upon in such cases as *The Arthur*,² *The Nancy*,³ and *The Franciska*⁴; it was confirmed in numerous treaties, notably in those between Great Britain and the United States in 1794, between Great Britain and Russia in 1801, between France and Denmark in 1742, and between Russia and Denmark in 1818⁵; its validity was recognised, though its application was rather strained, when in 1861 the United States blockaded a Confederate coast-line of over 3000 miles; and it was the basis of the successful British protests against the French blockade of Formosa in 1884⁶ and against the blockade of the insurgent Haytian ports in 1888.⁷ The principle was thus well established long before its enunciation in the Declaration of Paris in 1856; and in the Declaration of London (1909) it was only found necessary to repeat the words used in the earlier Declaration as follows:

" In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective, that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coast-line " (Article 2).

Attempts have been made from time to time to produce what would be in effect a paper blockade by Governments struggling against insurgents in their own territory. New Granada in such circumstances attempted to close certain ports by an order in 1861,⁸ and in 1862 the United States proposed to adopt the same measure in regard to the ports in the southern States. British protests were in both cases successful, and in 1885 the United States herself insisted on the illegality of such an attempt when it was made by the President of Colombia.

It is agreed then that blockades must be effective, but there is no agreement to define " effectiveness "; a fact which was recognised by Article 3 of the Declaration of London:

Criterion of "effective-ness."

" The question whether a blockade is effective is a question of fact."

¹ Cf. *The Stigstad* (1919), A. C. 279; *The Zamora* (1916), 2 A. C. 77; *The Leonora and other vessels* (1919), A. C. 974.

² (1814), 1 Dodson, 423.

(1809), 1 Acton, 58.

³ (1854), Spinks, 1 n.; 10 Moore, P. C. C. 37.

⁴ Woolsey, *International Law*, 5th ed., p. 353.

⁵ *Ann. Register*, 1884, p. 374.

⁶ *London Gazette*, 12 July, 1889.

⁸ Hall, 8th ed., p. 41, n.; Lawrence, *Principles*, 7th ed., p. 688.

British and
American
view.

Each case can only be decided in accordance with its own circumstances, first by the national tribunal, and then by the International Court of Appeal, when such court comes to be established. In England¹ and in America² the principle applied in the past has been that a blockade is sufficiently effective provided that, under normal conditions, a breach of it would be unlikely to succeed, or at least very difficult. During the Crimean War, the Privy Council held that a place must be "watched by a force sufficient to render the egress or ingress dangerous: or in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable."³ That the blockading squadron is small, or is a long way off, is not in the least conclusive against the validity of the blockade. Not nearness but capability to maintain the blockade is the true criterion.⁴ Lord Chief Justice Cockburn observed: "In the eye of the law a blockade is effective if the enemy's ships are in such numbers and positions as to render running the blockade a matter of danger, although some vessels may succeed in getting through."⁵ And similarly in an American case decided by the Supreme Court during the Spanish-American War, 1898, it was declared that it was sufficient for legal effectiveness if the danger was real and apparent, that the test of efficiency is not the numbers of the blockading forces, and that one modern cruiser suffices in law, if it is in fact sufficient for the purpose and makes it dangerous for other craft to enter the blockaded port.⁶ Riga, as has already been mentioned,⁷ was effectively blockaded by one ship at a distance of 120 miles; and the development of mines and torpedoes, and the increased range of modern artillery, made and will make it necessary for blockading squadrons to place a considerable space between themselves and the blockaded port or coast.⁸ The Japanese in 1904 blockaded Port Arthur without approaching within many miles of the place; thereby adopting, apparently, the tactics of Lord Nelson, who always insisted that the blockading squadron ought not to be seen from the blockaded port.⁹

¹ *The Columbia* (1799), 1 C. Rob. 156; *The Hoffnung* (1805), 6 C. Rob. 116; *The Frederick Molke* (1798), 1 C. Rob. 86.

² *Radcliff v. Untied Insur. Co.* (1810), 7 Johnson, 37, 53.

³ *The Franciska* (1854), Spinks, 115.

⁴ *Ibid.*, at p. 118; *Naylor v. Taylor* (1829), 1 Moody & Malkin, 207.

⁵ *Geipel v. Smith* (1872), L. R. 7 Q. B. 410.

⁶ *The Olindo Rodrigues* (1898), 174 U.S. Rep. 510.

⁷ See p. 373.

⁸ This forecast was amply justified in the Great War. Effectiveness of blockade was much discussed in relation to the Allied blockade of Germany and the German declaration of "barred zones" maintained by submarines. See *supra*, p. 235, and *infra*, pp. 392 seq.

⁹ Clarke and M'Arthur's *Life of Nelson*, vol. ii., p. 363; *Ann. Register* (1805), 233.

In *The Arthur*¹ Lord Stowell observed that the usual and regular mode of enforcing a blockade is "by stationing a number of ships and forming as it were an arch of circumvallation round the prohibited part. If the arch fails in any one part, the blockade itself fails altogether"; but these words were applied to the circumstances of naval war in 1814, and in modern naval operations stress can hardly be laid on the necessity for anything like an arch of circumvallation. Nor have the prize courts of Great Britain and the United States insisted that the effectiveness of blockades shall be absolutely constant. An accidental interruption occasioned by violent weather or fog has been treated as consistent with the continuance of a blockade²; nor is the blockade interrupted by the occasional success of a vessel in getting in or out,³ or even by frequent successes of the kind, if they are due, as in the case of the blockade of Charleston during the American Civil War, to special circumstances, such as the peculiar nature of the coast.⁴

While the validity of a blockade is impaired by allowing a great number of neutral vessels to pass through in the first instance, it is not impaired by the action of a commander who, having made a number of captures, selects a certain number of flagrant cases and dismisses the rest on the ground of particular circumstances, such as that he cannot afford prize crews to man his captures.⁵

In *The Hoffhung*⁶ Lord Stowell distinguished the case where a blockading squadron was driven off by a superior force: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months without being liable to such temporary interruptions. But when a squadron is driven off by the superior force, a new course of events arises. . . . In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed." It may be added that it was the obvious object of the superior force to procure the raising of the blockade, an object which it has, *ex hypothesis* succeeded in attaining.

Continental nations and jurists have, on the other hand, attempted from time to time to specify with more detail the conditions of "effectiveness," and to confine within narrower bounds the

¹ (1814), 1 Dods. 423.

² *The Franciska* (1854), Spinks, 115.

³ *The Frederick Molke* (1798), 1 C. Rob. 86; *The Columbia* (1799), 1 C. Rob. 154; *The Franciska* (1854), Spinks, at p. 124.

Hall, 8th ed., p. 854.

⁵ *The Rolla* (1807), 6 C. Rob. 364, 374.

⁶ (1805), 6 C. Rob. at p. 117. See also *The Frederick Molke* (1798), 1 C. Rob. 87; *The Columbia* (1799), x C. Rob. 156.

belligerent's right. Their standard was fairly expressed by Ortolan,¹ who refuses to recognise a blockade of a port unless " toutes les passes ou avenues qui y conduisent sont tellement gardees par des forces navales permanentes que tout batiment qui chercherait a s'y introduire ne puisse le faire sans etre apercu et sans en etre detourne."

In 1742 France and Denmark by treaty agreed that at least two vessels were essential, or a battery so placed on the coast that vessels could not get in without manifest danger²; Holland and the Sicilies in 1753 stipulated for at least six vessels, at a distance of little more than cannon-shot from the blockaded port, or batteries so placed on the coast that entrance could not be effected without passing under the guns. The Armed Neutralities of 1780 and 1800 required the blockading ships to be stationary as well as adequate in force and sufficiently near, while a treaty between England and Russia in 1801 provided for the alternatives " stationary or sufficiently near."³ Heffter, Calvo, Hautefeuille and Gessner all insisted on the requirement of stationary vessels guarding the immediate entrance to the port; Hautefeuille added that ships running in must be exposed to a cross-fire; and he and Ortolan both contended that any accidental interruption put an end to the blockade. The French Naval Instructions of 1870 laid it down (when France was herself blockading) that " a blockade is raised by any interruption whatever."

The Declaration of London.

The Declaration of Paris, by declining to define what is a "sufficient force," left the matter vague, and the Declaration of London carried the question no further. The requirement, however, that the blockading vessels be stationary may be regarded as now obsolete; and in the Memoranda which were drawn up by the various Powers represented at the Conference of London, and presented to the Conference as setting out the views of the Powers on the law, no Power used the word " arretes," which was used by the Armed Neutralities.

Temporary absence.

There have been wide divergencies of view between British and continental jurists as to the effect on a blockade of the temporary absence of blockading vessels and as to the circumstances in which temporary absence will not invalidate a blockade. In the passage quoted above from *The Franciska*⁴ an exception was made in the case of " fogs, violent winds and some necessary absences,"⁵ and it has been suggested that a temporary withdrawal to chase a prize may be also an exception⁶; and the United States Code of Naval War (1900) excepts the case of a voluntary abandonment by the blockading force

¹ *Diplom. de la mer*, ii. 328.

² Woolsey, *International Law*, 5th ed., p. 353.

³ Hall, 8th ed., p. 857, n.

See *supra*, p. 376.

⁴ Cf. *The Frederick Molke* (1798), 1 C. Rob. 86; *The Columbia* (1799), 1 C. Rob. 154.

Hall, 8th ed., p. 855.

of its station carried out " in the interest of the blockade." One of the most important of such " necessary absences " or absences " in the interest of the blockade," may be absence in pursuit of a prize, but it does not seem unreasonable to insist that the blockading force must be large enough to enable it to pursue blockade-runners without leaving the blockaded port or coast open. Absences of the whole or the greater part of the force for reasons other than stress of weather will only occur when that force is very small; and blockades by one or two vessels, though possible, are likely to be rare. Nor would a strict interpretation of Article 4 have made much difference in the actual practice followed. Even the United States during the blockade of Galveston in 1863 realised the necessity of maintaining the blockade, and sent only an inferior vessel in pursuit of the *Alabama*, although only two years before she had refused to admit that the blockade of Charleston was at an end when, owing to the pursuit of a prize, the harbour had been open for five days.

With regard to temporary absence in the course of an engagement with an attacking force, there is probably little difficulty. Such an absence is likely to be short, and if the blockading squadron is victorious, it can hardly be contended that an absence so essential to the maintenance of the blockade, and caused by a desire to maintain it, constitutes an abandonment.

In the unratified Declaration the extreme view of the continental jurists and of France in 1870 was abandoned for something more nearly approaching the British view:

"A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather " (Article 4).

This, however, was, according to the Report of the Drafting Committee of the Conference, to be " considered as limitative in the sense that stress of weather is the only form of compulsion which can be alleged ": in other words, the doctrine " *expressio unius est exclusio alterius* " was to apply, though it could not be said to apply to other passages in the Declaration, which was by no means a complete code.

A belligerent does not, as has been shown, lose his rights if some vessels, despite his vigilance, succeed in getting through; but he cannot concede to another belligerent, or to certain neutrals, or take for himself, the right to carry on commercial intercourse which he forbids to other neutrals.¹ This principle was recognised in the Declaration:

"A blockade must be applied impartially to the ships of all nations " (Article 5).

¹ *The Rolla* (1807), 6 C. Rob. 364; *The Success* (1812), 1 Dods. 134; *The Franciska* (1854), 10 Moore P. C. C. at p. 48.

Blockade must be impartial.

Hence there was some ground for the contention of the United States Government in 1915 that the long-distance blockade instituted against Germany by the Allied Powers failed to satisfy the requirement of impartiality in that trade between Germany and neutral Baltic and Scandinavian ports was uninterrupted.¹

To the strictness of the rule that all vessels must be admitted or none, there are two recognised exceptions which were expressed in the unratified Declaration.

The first is permissive:

"The commander of a blockading force may give permission to a warship to enter and subsequently to leave a blockaded port" (Article 6).

A blockade is an act of war, affecting not only neutral subjects but neutral States,² and the admission of a neutral warship is an act of grace, and the object of laying down a rule upon the subject was merely to make it clear that the admission of neutral warships has no effect in invalidating a blockade.

Vessel in
distress.

The second exception relates to vessels driven into a blockaded port in a state of distress from bad weather or some other cause. Circumstances of distress include, for example, shortage of provisions or water, the leaking condition of the vessel, her need of immediate repairs, no other port being easy of access to make good the deficiency. That on proof of distress a vessel may enter is in accordance with a principle recognised by both American and English courts. In the case of *The Nuestra Senora de Reg/a*,³ a Spanish vessel in distress, on her way from New York to Havannah, put into Port Royal, S.C. (then in rebellion and blockaded by a fleet of the United States), by leave of the admiral commanding the squadron, and was there seized and made use of by the Government of the United States. She was afterwards condemned as a prize; but the Supreme Court of the United States decided that she was not a lawful prize or subject to capture, and that her owners were entitled to a fair indemnity. In the case of *The Charlotta*,⁴ the excuse of alleged distress was admitted after the delivery of an opinion of the Trinity Masters that the state of the wind and other circumstances made it impossible for the vessel to proceed to any other port than the blockaded one—the Texel. Lord Stowell used only to admit the want of water and provisions as an excuse for entering a blockaded port by a neutral where "an uncontrollable necessity, which admits of no compromise, and cannot be resisted," could be satisfactorily explained to exist.

¹ See *infra*, p. 392.

³ (1882), 17 Wall. 29.

²

⁴

Hall, 8th ed., p. 850.
(1810), i Edw. 252.

The proof must be clear: in *The Hurtige Hane*,¹ a Danish vessel alleged the want of water and provisions as an excuse for going into Amsterdam, a blockaded port, and Lord Stowell refused to admit the excuse, observing that: "It is usual to set up the want of water and provisions as an excuse, and if I were to admit pretences of this sort, a blockade would be nothing more than an idle ceremony."²

The unratified Declaration made provision for this exception in Article 7:

"In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided she has neither discharged nor shipped any cargo there."

Except for the agreement that the officer commanding the blockading force should have sole power to decide the question of distress, the Article contained no change in the law.

It would clearly be unfair to neutrals that they should be subjected to the penalties of blockade-running until they are affected by sufficient notice of the existence of a blockade. As to the character of the notification necessary, there had existed in the past considerable divergence between the theory and practice of Great Britain, the United States, Germany and Denmark³ on the one hand, and France, Italy, Spain and Sweden on the other.

A distinction must be made in the first place between "declaration" and "notification." In the words of the Report of the Drafting Committee: "The declaration of blockade is the act of the competent authority (a Government or commander of a squadron), stating that a blockade is, or is about to be, established under conditions to be specified. The notification is the fact of bringing the declaration of blockade to the knowledge of the neutral Powers or of certain authorities"; or, it should be added, of the individual neutral vessel in certain circumstances, as will be seen later.

This distinction was clearly drawn in Article 8 of the Declaration of London:

"A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16."

¹(1799), 2 C. Rob. 124; cf. *The Panaghia Rhomba* (1858), 12 Moore, P. C. C. 168.

²Cf. *The Diana* (1803), 7 Wall. 369; *The Panaghia Rhomba* (1858), 12 Moore, P. C. C. 168; *The Forest King* (1861), Blatchford, Prize Cases, 2; *The Major Barbour* (1862), *ibid.* 167.

³Hall, 8th ed., p. 846.

As to the necessity for a declaration, and as to its requirements, there can hardly be dispute. A blockade is an act of sovereignty¹ and can only be imposed by a Government or a naval officer with the authority of his Government; but such authority will be presumed, if the circumstances are such that express instructions are impossible. In other words, a blockade is an act of sovereignty which may be delegated.² But approval and adoption by the Government is necessary, such adoption relating back to the date of the imposition of the blockade.³ The courts have been strict, too, in insisting that a blockade must not be extended either by construction or on the mere authority of the blockading commander.⁴ And the declaration must be strictly in accordance with the facts; otherwise the blockade is invalid and a new declaration is necessary.⁵

Days of
grace.

Further, by a long-established custom, neutral vessels in the blockaded port are allowed a certain time, which must depend upon the circumstances, but is usually fifteen days, in which to leave. In 1902, when Great Britain and Germany blockaded the Venezuelan ports, a fortnight was granted; in the Spanish-American War, 1898, the United States allowed thirty days in the case of the Cuban ports; in the Russo-Japanese War, 1904, the Japanese did not specify any days of grace in the declaration of blockade of Liao-Tong, but it appears that the circumstances were of an exceptional character.⁶ In 1915 Great Britain allowed in her blockade of German East Africa four days, the Cameroons two days, the entrance to the Dardanelles and the coast of Asia Minor three days, the Bulgarian coast in the Ægean Sea two days.⁷ If the vessels leave with cargo, such cargo must have been shipped before the commencement of the blockade. The United States apparently did not insist upon this limitation, as her Naval Code⁸ required a statement, in the notification of blockade, of the time allowed to neutral vessels to unload, re-load and leave the port.

These principles were embodied in the following Article which, if it had been accepted, would have established a common practice:

"A declaration of blockade is made either by the blockading power or by the naval authorities acting in its name. It specifies:

"(1) The date when the blockade begins.

¹ *The Henrik and Maria* (1799), 1 C. Rob. 146, 148.

² *The Rolla* (1807) 6 C. Rob. 364, 366.

³ *The Rolla*, *supra*-, *The Franciska* (1854), Spinks, 111, at p. 114.

⁴ *The Juffrow Maria* (1800), 3 C. Rob., p. 147; *The Henrik and Maria*, *supra*.

⁵ *The Henrik and Maria*, *supra*; *The Franciska* (1854), Spinks, H I.

⁶ Cf. Takahashi, pp. 373, 374.

⁷ *Manual of Emergency Legislation*, Supplement iii., pp. 292-3; Supp. iv., p. 102; *London Gazette*, 1915, p. 10261.

⁸ *Parl. Papers, Misc.*, No. 5 (1909), Cd. 4555, p. 84.

"(2) The geographical limits of the coast-line under blockade.

"(3) The period within which neutral vessels may come out" (Article 9).

If the particulars under (1) and (2) were inaccurately given, a new declaration was to be necessary before the blockade could become binding (Article 10); in case of neglect to fix a period under (3) the blockade was to remain valid, but neutral vessels coming out must be allowed to pass (Article 16).

The question of notification has in the past presented more difficulties. What we may call the British view has always been that the notification or communication of the declaration of a blockade to neutral Governments constructively affects their subjects; and the latter are therefore not entitled to sail for the blockaded port on the chance that the blockade may have been suspended in the interval between their departure and their arrival. Further, knowledge, from whatsoever source derived, is sufficient to render the neutral liable, and in theory condemnation may be justified by the simple fact of notoriety, subject to this qualification that *'the notice to be inferred from general notoriety must be of such a character that if conveyed by distinct intimation from a competent authority it would have been binding." ¹ Notification: British view.

The British view was stated by Lord Stowell in *The Columbia*²: "But it has been said that by the American Treaty there must be a previous warning: certainly, where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of the blockade, and therefore they are not in the situation which the treaty supposes. It is said also that the vessel had not arrived, that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion that the sailing with an intention of evading the blockade . . . was a beginning to execute that intention, and is to be taken as an overt act constituting the offence. From that moment the blockade is fraudulently evaded."

In *The Neptunus*³ Lord Stowell laid it down that in no circumstances could a neutral individual be heard to plead ignorance of a blockade previously notified to his Government. He pointed out that "it would be the most nugatory thing in the world if individuals Ignorance of blockade.

¹ *The Franciska* (1854), 10 Moore, P. C. C., p. 58.

² (1799), 1 C. Rob. at p. 156. ³ (1799). 2 C. Rob. 111, 112.

were allowed to plead their ignorance of it: it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect." " I shall hold therefore," he continued, " that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own Government, and it may raise a claim of compensation from them, but it can be no plea in the court of a belligerent."

American
view.

The American view was stated in the judgment which Chase, C.J., delivered on behalf of the Court in *The Circassian*¹: " It is a well-established principle of prize law, as administered by the courts both of the United States and Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel and, in most cases, its cargo, to capture and condemnation. We are entirely satisfied with this rule. It was established with some hesitation when sailing vessels were the only vehicles of the ocean commerce; but now, when steam and electricity have made all nations neighbours, and blockade-running from neutral ports seems to have been organised as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights."

There has been some doubt as to the United States doctrine²; and several treaties, to which that country was a party, and even one so late as 1871 (with Italy), provide for notification to a vessel on her voyage; yet the above principle was followed by the United States courts during the Civil War³; and German and Danish practice is in accordance with that of Great Britain and the United States.

Mitigations.

Two mitigations of the British and American practice may be mentioned. In the first place, vessels entering a place under blockade *de facto* only, or clearing from a home port before the public notification, are entitled to a particular warning or " notification speciale " ⁴; in the second place, where the port of clearance is very remote, " lying at such a distance where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ship conjecturally, upon the expectation of finding the blockade broken." ⁵ But as Lord Stowell added, and for obvious reasons, " this inquiry should be made, not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, and which can furnish information without furnishing opportunities for fraud."

¹ (1864), 2 Wall, at pp. 151, 152.

² Atherley-Jones, *Commerce in War*, p. 105.

³ E.g. *The Peterhoff* (1866), 5 Wall. 28.

⁴ *The Vrouw Judith* (1799), 1 C. Rob. 150, at p. 152.

⁵ *The Betsey* (1799), 1 C. Rob. at p. 334.

The practice of France, Italy and Spain has in the past been more indulgent to neutrals. According to it, the essential notification in every case was the "notification speciale," given on the spot to the neutral trader by a vessel of the blockading squadron.¹ It had, it is true, become customary for France to notify blockades to neutral Governments, but such notification was not held to affect the individual subjects of those Governments, or to enable the belligerent to seize a vessel which had not been first notified on the spot. The distinction to be found in the British practice between *de facto* blockade, which required special notification,² and a diplomatically notified blockade, which did not, was thus in the French practice non-existent.

At the Conference of London the British view, prevailed and agreement was reached upon rules relating to notification. Two notifications were to be made: (1) to all neutral powers by the blockading power; (2) to the authorities of the blockaded locality by the officer commanding the blockading forces (Article 11). These rules were to apply not only to the original blockade, but as well to extensions, restrictions, voluntary raising and re-establishment (Articles 12 and 13). The Declaration of London.

Stress was laid primarily upon a proper declaration and a proper notification of that declaration, and the declaration and notification were distinguished as two separate things, though in practice the distinction did not appear to amount to very much, as the declaration, until made to the persons affected, or, in other words, notified, would have had no operative effect, so far as neutrals were concerned.

The distinction between a diplomatically notified and a *de facto* blockade was recognised, as, by the joint effect of Articles 8, 11 and 16, a blockade was binding if notified by a communication to neutral Governments and local authorities, and also if notified on the spot to a vessel which had no actual or presumptive knowledge of its existence. Knowledge was to be presumed if the vessel left a neutral port subsequently to the diplomatic notification, if such notification was made in sufficient time (Article 15); knowledge is, of course, actual if the vessel has been previously stopped and duly warned. Knowledge.

The rule that knowledge is presumed if the vessel sailed subsequently to and a sufficient length of time after diplomatic notification was in accordance with the British practice, as illustrated in the cases of *The Neptunus*³ and *The forge Petronel/a*,⁴ but no provision was made for the British principle, that knowledge is presumed even of

¹ Hall, 8th ed., p. 847; Woolsey, *International Law*, 5th ed., p. 355.

² *The Mercurius* (1799), 1 C. Rob., pp. 80, 83, and see *supra*, p. 384.

³ (1799), 2 C. Rob. 110.

⁴ (1799); 2 C. Rob. 131. In this case the vessel was released because it had sailed only one week after notification, which seems a lenient view.

an unnotified blockade, by reason of its general notoriety at the place from which the vessel last sailed.¹ Indeed, this principle was implicitly negated by the provisions as to notification contained in Article 8; and *in view* of the development of the means of communication, and the inherent difficulties of applying the principle, with the necessary qualification that the notice to be inferred from notoriety must be such that if conveyed by a distinct intimation it would be binding,² the disappearance of this rule would probably in practice have made little difference.

Neutral
vessel
leaving
enemy port.

It is to be noted that, in Article 15, the words "neutral port" were used. It may, however, probably be taken for granted that a neutral vessel leaving an enemy port, or a port of the blockading belligerent, is *a fortiori* presumed to be affected with notice; and it was considered superfluous to require a notice by the blockading power to its enemy, or to those, whether subjects or neutrals, in its own territories. But if, in fact, the neutral vessel can prove that it left a port of the blockading belligerent before any notice of the blockade had reached that port, it should be in no worse position than if it had left a neutral port in similar circumstances. Obviously the blockading belligerent cannot rely on a notice which it had not yet made public in its own territories; but it cannot be blamed for similar neglect on the part of the enemy. This view was followed by the British Government. One of the modifications, subject to which the Declaration was adopted in 1914, was the addition of other circumstances in which a ship's knowledge of a blockade was to be presumed. The existence of a blockade was presumed to be known to all ships which sailed from or touched at (a) an enemy port a sufficient time after the notification of the blockade to the local authorities to have enabled the enemy Government to make known the existence of the blockade, (b) a British or allied port after the publication of the declaration of the blockade.³ Later Orders in Council, concerning blockade did not repeat these provisions—few indeed of the world's ships could have been ignorant of the one blockade which mattered—but they accord with previous British practice.⁴

It has already been observed⁵ that in the Declaration of London the custom of allowing neutral vessels time to leave was made obligatory, it being understood that the time allowed was to be reasonable⁶; but this, of course, only applied to vessels in the port at the time of the institution of the blockade. Apart from the rules of the unratified Declaration it has been a practice for blockading

¹ *The Adelaide Rose* (1799). 2 C. Rob. 111, n.; *The Union* (1855), Spinks, 164.

² *The Franciska* (1854), 10 Moore, P. C. C. 58.

³ Order in Council, 20 Aug. 1914.

⁴ Hall, 8th ed. p. 852, n.

⁵

Supra, p. 382.

⁶ Report of Drafting Committee on Arts. 9 and 16.

commanders to allow a reasonable time within which neutral vessels might leave, but the length of time has varied. According to the Naval War Code of the United States, thirty days were to be allowed unless otherwise ordered¹; other Powers have frequently allowed fifteen days. But the periods allowed in the less important blockades of the Great War were much shorter: two, three or four days.

The difference in practice as to the notice necessary was accompanied by a similar difference as to the time when and the place where the offence of breaking blockade was committed and the neutral vessel could be seized. It followed from the French doctrine as to notice that the vessel could not be liable until it reached the line of the blockade²; and from the British doctrine that the act of sailing with the intention of getting through to the blockaded port constituted the offence,³ a rule which was, however, relaxed in special circumstances,⁴ while in practice prior to 1909 "an attentive examination of all the reported cases in the British Prize Courts relative to questions of blockade has shown that, while the principle of liability to seizure at any point of a voyage to or from a blockaded port or coast has been maintained in theory, there is, in fact, no such case in which a vessel has been condemned for breach of blockade except when actually close to, or directly approaching, the blockaded port or coast."⁵

The Conference of London may well have thought, in 1909, that little alteration, therefore, was made by Article 17:

"Neutral vessels may not be captured for breach of blockade except within the area of operations (*rayon d'action*) of the warships detailed to render the blockade effective."

The object of this provision, together with Article 19 which prohibited the capture of a vessel bound for a non-blockaded port, whatever the ultimate destination of vessel or cargo, was to prohibit the application to blockades of the doctrine of continuous voyage. But it may have been the fruit of a prescience which foresaw, and desired to legislate against, the long-distance blockade. As has already been mentioned, the modified adoption of the Declaration by the Allied Powers in 1914 was afterwards entirely withdrawn, and when Article 19 was abandoned in March 1916 the Governments of Great Britain and France stated in terms that the doctrine of

¹ Art. 43.

² Woolsey, *International Law*, 5th ed., p. 359.

³ Lawrence, *Principles*, 7th ed., p. 694.

⁴ *The Betsey* (1799), 1 C. Rob. at p. 332.

⁵ Instructions to British Delegates at the Conference of London, *Parl. Papers*, Misc., No. 4 (1909).

Continuous voyage or ultimate destination would be held applicable to blockades.

Termination
of the
offence.

By the decisions of the British courts, a vessel breaking blockade outwards was, in theory, liable to capture until the conclusion of her homeward voyage,¹ and by a ship not forming part of the blockading force.² In the words of Sir W. Scott in *The Welvaart van Pillow*³: "If the principle is sound that a neutral vessel is not permitted to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force you are free."

On this point the French doctrine was thought by Hall⁴ to be in accord with that of Great Britain and the United States; but in the French Memorandum submitted to the Conference⁵ the rule was laid down that ships breaking blockade could only be seized within the area of operations of the blockading force, and that a ship which has crossed the line of blockade is liable to capture so long, but only so long, as it is pursued.

At the Conference the British view was not insisted upon, the Government being of the opinion (on the ground that in practice to that time vessels had never been captured at a great distance) "that the acceptance of the latter [*i.e.* the French] view would not be likely to inflict any material injury on the interests of Great Britain."

Article 17, already set out, would have appeared, if accepted, to have made it no longer possible for a vessel which had broken blockade outwards to be captured at a distance from the area of operations by a vessel not forming a part of the blockading squadron; but the case of the breach of blockade outwards was specifically dealt with, and provision was made for the case of pursuit, by Article 20:

"A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected."

The Report added by way of commentary: "This vessel must remain liable to capture so long as she is pursued by a ship of the

¹ *The Welvaart van Pillow* (1799), 2 C. Rob. 128: in this case the vessel broke the blockade of Amsterdam outwards, and was captured off Dungeness. *The General Hamilton* (1805), 6 C. Rob. 61: in this case the vessel had broken blockade outwards from the Seine, and was driven into a British port where she was captured.

² *The Juffrow Maria Schroeder* (1801), 3 C. Rob. 147, 153.

³ (1799), 2 G. Rob. 128.

Hall, 8th ed., p. 864.

⁵ Misc., No. 5 (1909), Cd. 4555, p. 30.

blockading force; and it would not suffice that she be encountered by a cruiser of the blockading enemy which did not belong to the blockading squadron. The question whether or not the pursuit is abandoned is a question of fact; it does not suffice that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait till she leaves it, so that the pursuit is necessarily suspended, but not abandoned."

When a blockade is ended, it can only be resumed on observance of all the formalities of a fresh blockade. A blockade, as has been stated,¹ is not ended by the temporary withdrawal of the blockading force, owing to stress of weather, nor by the occasional success of blockade-runners. It is ended when the war ends, when the blockading squadron is driven off by a superior force,² or is withdrawn for some other service, or if it is declared to have been raised, or—according to the British practice—if the blockading Power occupies the blockaded territory³ (though in *The Circassian*⁴ this doctrine was disputed by the United States courts, till re-enunciated by the Mixed Commission under Article X I I . of the Treaty of Washington⁵), or if for any reason the blockade is not effectively maintained, or impartially enforced.⁶ Where the blockading Power occupies the blockaded territory, the blockade will nevertheless be deemed to exist if the occupation is only partial. Thus, in the Spanish-American War, *The Adula*,⁷ a British vessel, was condemned by the United States Supreme Court for attempting to enter the blockaded Cuban port of Guantanamo, which, though it had been seized by the American forces, was still in the possession of the Spanish troops.

It was urged by the United States in 1861⁸ that a notified blockade continued till notification of its termination; but the claim cannot be put higher than this, that a notified blockade is presumed to continue, and if it has ended it lies upon the neutral vessel to prove that fact.

On this question of the termination of a blockade, the Conference contented itself with requiring, by Article 13, formal notification of the voluntary raising or restriction of a blockade. As is pointed out,⁹ there cannot be any penalty for failure to make such notification, as there is in the case of failure to notify the establishment of a blockade. Little more than diplomatic remonstrances could follow; but what

¹ *Supra*, p. 378.

² *The Hoffnung* (1805), 6 C. Rob. 112, 117; *The Triheien* (1805), 6 C. Rob. 55, 67.

³ Lawrence, *Principles*, 7th ed., p. 691. ⁴ (1864), 2 Wall. 135.

⁵ Moore, *International Arbitrations*, vol. iv., p. 3911.

⁶ *The Hoffnung*, *supra*; *The Franciska* (1854), 10 Moore, P. C. C. 37.

⁷ *The Adula* (1899), 176 U.S. Rep. 361. ⁸ Hall, 8th ed., p. 838.

• Report of Drafting Committee, on Art. 13.

was previously regarded as an act of courtesy to be expected of the belligerent was to have been raised to the level of an international duty. If, however, the area of a blockade were restricted, and, ports A and B having been blockaded, the blockade of A were raised and that of B alone continued, then it would seem to follow that the failure to notify the raising of the blockade of A would invalidate the blockade of B.

Penalty.

The penalty for breach of blockade is confiscation of the ship. By the British rule the cargo will be confiscated if it belongs to the same owner as the ship, or the consignees of the cargo have such control of the ship as to constitute the master their agent¹; if it belongs to a different owner it will be confiscated if at the time of shipment he knew, or might have known, of the blockade.² As a general rule, the master is not treated as the agent of the owner of the cargo in the same way as he is treated as the agent of the owner of the ship³; but in certain cases his acts may by inference bind the owner of the cargo, as, for instance, if he deviates to a port which, before the ship sailed, was known to be blockaded,⁴ or gives a frivolous excuse for his deviation to a blockaded port.⁵

Article 21 of the unratified Declaration confirmed the broad principle on which the British courts had acted:

"A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew, nor could have known, of the intention to break the blockade."

Continuous voyage.

The doctrine of continuous voyage has been fully dealt with in its relation to contraband. By a supposed analogy with this doctrine, the American courts condemned vessels for breach of blockade when they were on their way to a neutral port, on the suspicion that their ultimate destination was a blockaded port,⁶ holding that a voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports, and

¹ *The Columbia* (1799), 1 C. Rob. 154; and cf. *The Imina* (1800), 3 C. Rob. 169; *The Rosalie and Betty* (1800), 2 C. Rob. 343, 351.

² *The Panaghia Rhomba* (1858), 12 Moore, P. C., C. 168.

³ *The Adonis* (1804), 5 C. Rob. 236, 261.

⁴ *The Adonis* (1804), 5 C. Rob. 258; *The Marianna Flora* (1826), 7 Wheaton, 57; *The Alexander* (1801), 4 C. Rob. 93; *The Panaghia Rhomba* (1858), 12 Moore, P. C. C. 180.

⁵ *The Alexander*, *supra*.

⁶ *The Circassian* (1864), 2 Wall. 133; *The Bermuda* (1865), 3 Wall. 515.

THE LAW OF BLOCKADE

whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose.

This, it was argued,¹ was not really an application of the doctrine of continuous voyage, but a dangerous relaxation of the rules of evidence. By the old rule laid down by the British and American courts, if it was proved that a vessel sailed with a destination to a blockaded port, she was liable to capture at any time after she had started, and it would make no difference that she was going first to a neutral port; the American innovation was the seizure of vessels without the proper evidence² of an intention to enter the blockaded port, and even, as in the case of *The Stephen Hart*³ and *The Springbok*⁴ on evidence that the cargo was to be unshipped at the neutral port and conveyed to the blockaded port by other means. The principles of these decisions were an extension of the rule as laid down in the British Manual of Naval Prize Law of 1888, that when a vessel is ostensibly bound for "a neutral or unblockaded enemy port, while she is in reality intended after touching there to go on to a blockaded port . . . her destination is held to be for the blockaded port from the time of sailing." They were at one time severely criticised.

If the Declaration had become binding the problem of continuous voyage would hardly have arisen. In addition to Article 17 restricting capture to the area of operations of the blockading force, the point was further dealt with in Article 19:

"Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade if at the moment she is on her way to a non-blockaded port."

This would not, of course, have shut out proof that the destination to a non-blockaded port was only an ostensible one, and that the blockaded port is the immediate destination. As the Report said: "It is the true destination of the vessel which must be considered when a breach of blockade is in question, and not the ulterior destination of the cargo. Proof or presumption of the latter is therefore not enough to justify the capture, for violation of a blockade, of a ship actually bound for an unblockaded port. But the cruiser might always prove that this destination to an unblockaded port is only apparent, and that in reality the immediate destination of the vessel is the blockaded port." The simple declaration of law in 1909 will suffice as a critical but fitting introduction to a study of blockade in practice from 1914.

¹ Atherley-Jones, *Commerce in War*, p. 255.

² The view as to "proper evidence" in such circumstances must be severely modified in the light of practice and prize-court decisions in the Great War. See *supra*, p. 361.

³ (1863). 3 Waff. 559.

⁴

(1866), 5 Wall. 1.

Blockade in
the Great
War.

The prosecution of the war of 1914-18 led to a reversal of the position which Great Britain and other Powers had come to adopt, and to an adoption and development of the criticised attitude of the United States in 1861. As has been stated, the Declaration was adopted and then abandoned, and the doctrine of continuous voyage was applied to blockade. Further, the rules of evidence, owing to difficulties of proof and the extreme necessity for a rigorous blockade, were widely relaxed.¹ In this as in other branches of the law of blockade the law is now in a state of some uncertainty. Recent warfare has led to no development of the rules as they were understood before 1914, for the minor blockades of the Great War were conducted in strict accordance with the most exact practice, but it has demonstrated two new types of blockade—the long-distance blockade and the submarine blockade. These will now be considered.

Long-
distance
blockade.

With the declared object of preventing by means of a cruiser "cordon" the importation or exportation by sea of all commodities to or from Germany, Great Britain issued an Order in Council on 11 March, 1915. The Order, which was expressed to be retaliatory in character, provided: (i.) No merchant vessel was to be allowed to proceed on her voyage to Germany; (ii.) no merchant vessel was to be allowed to proceed from a German port with goods taken on board at that port. Such goods were to be seized and sold, the proceeds being retained to be returned on the conclusion of peace; (iii.) merchant vessels proceeding to or from neutral ports with goods of enemy character, origin or destination were to discharge such goods in a British or Allied port, to be dealt with as in (ii.) or placed in the custody of the Prize Court; (iv.) merchant vessels leaving a British or Allied port and proceeding to an enemy port were to be liable to capture on any subsequent voyage and to condemnation. The practice thus initiated was not, of itself, directed to condemnation of the goods; this aspect of the question was left to the widening range of contraband and to the extending scope of the term "enemy goods." These matters have been sufficiently dealt with in the previous chapter.

This policy with its two changes in hitherto recognised practice, the establishment of the long-distance blockade and the application to blockade of the doctrine of continuous voyage or ultimate destination, aroused strong protests from the United States. The main grounds of objection were: (i.) The measures instituted established a blockade of neutral ports; (ii.) the measures were not impartial in their application, as trade between the Scandinavian ports and the German coast was uninterrupted; and (iii.) for the same reason the measures were not effective. The British reply to (i.) was that it was the only method by which the blockade could be rendered effective

¹ *The Kim* (1915), P. 215.

and that every effort was made to discriminate between genuine neutral trade and that which was conducted by or for the benefit of enemies. With regard to (ii.) it was pointed out that the fact that goods reached a blockaded area across a land frontier or an inland sea did not invalidate a blockade, and therefore there was no reason, granted the application of the doctrine of continuous voyage, why commerce across the Baltic or even through neutral waters only should be considered as invalidating the blockade. In answer to (iii.) Great Britain replied that the number of vessels which evaded the blockade were probably smaller in proportion to those intercepted than had ever previously been known. In general, it was contended that the measures were "no more than an adaptation of the old principles of blockade to the peculiar circumstances of the Great War."¹ To implement her promise not to interfere with trade of ultimate genuine neutral destination Great Britain established an organisation to detect subterranean sources of supply to Germany and entered into agreements with organisations of traders in neutral countries, granting uninterrupted passage for certain quantities of goods in return for guarantees that such goods should not be exported to the enemy in any form.

The diplomatic correspondence with the United States led to no agreement, nor did the measures adopted prove entirely effective until the United States entered the war, and herself placed stringent measures of restriction on exports to neutral countries which were in a position to trade with the Central Powers.

With the similar object of cutting off all trade with Great Britain, but by a different method, Germany issued in February 1915 a Decree which was also declared to be a measure of reprisals. All the waters surrounding Great Britain were declared to be a war zone, and every enemy merchant vessel found therein was to be liable to destruction. A warning was given that it might not be possible on every occasion to rescue crews and passengers and that passage over the zone by neutral vessels might be attended with danger. Shipping north of the Shetlands, in the eastern area of the North Sea and in a strip of at least thirty nautical miles along the coast of the Netherlands was not imperilled. This policy drew from neutral States protests based on the facts that there were no visible means of rendering the measures effective as a blockade, that the measures, although eventually they became a serious menace to the Allies, were not so effective in preventing access to Great Britain as to constitute a blockade, that the rules relating to visit and search were not complied with, and that the lives of neutrals were endangered and sometimes lost. These protests,

¹ The arguments in the Notes exchanged between Great Britain and the United States are summarised in Oppenheim, ii. § 390a.

while they might succeed in obtaining compensation for neutrals in certain instances, were of no avail to prevent a continuance of the measures adopted. By later Decrees the declared zone was extended to include the waters surrounding France and Italy and the Eastern Mediterranean.

In neither of the orders issued by the belligerents in prescribing these new methods of restricting or preventing enemy trade was the term blockade used. The measures taken were declared on both sides to be in retaliation for alleged breaches of international law by the other. If they can only be considered as reprisals they were on a scale for which no precedent could be found, and, as international law subjects such measures, if justified, to the vague condition that they should not be inconsistent with the fundamental principles of justice and humanity,¹ they can scarcely become the objects of juristic study. Still less so do they become if they are looked upon as measures adopted in a war in which the combatants believed that their very existence as States and the lives of their nationals were involved and in which their highest duty was to obey the law of self-preservation. But although the steps taken were not described in the decrees initiating them as a blockade, the term was in fact extensively employed in the diplomatic discussions and correspondence which they occasioned. As measures designed to prevent food supplies and war materials from reaching the enemy and to cripple his commerce, they fall most naturally under the head of blockade—not as previously known, but as adapted to the peculiar circumstances of the Great War.

This adaptation might be expressed by the concrete question: Were the Allied Navies, in full command of the surface of the seas, to sit with folded arms and watch the enemy obtaining all the material necessary for his prosecution of war through neutral countries? No less did the Central Powers ask: Was a submarine commander to watch with muzzled guns the free passage to an enemy country of enemy or neutral merchantmen laden with vital commodities, because he could not dispose in safety of the crews and passengers? It has been held by judges in prize, repeated by jurists and pressed by diplomats, that the international law of the sea must change to meet the changing conditions of naval warfare, and it has been widely advanced that its development at the hands of the Allied Powers was based on the fundamental principles underlying the accepted rules of blockade, unneutral service and contraband. All the measures adopted may not be generally acceptable, but the broad policy pursued, it may be safely predicted, will be followed in another war by any naval belligerent to the fullest extent compatible with continued diplomatic relations with neutral States.

¹ See p. 261, *supra*.

The measures adopted by the Central Powers in practice or in principle have not met with anything like the same degree of approval; on the contrary, a strenuous effort has been made to legislate against development in the direction pursued by them. The Treaty of Washington has already been mentioned¹; its provisions include a prohibition against the use of submarines as commerce-destroyers and a requirement that submarines shall fully comply with the recognised rules of visit and search or else refrain from attack. The parties to the treaty (which has not yet been ratified by all the signatories) included the principal naval Powers of the world, which were also those who had suffered most from the submarine campaign of the Central Powers. But the submarine as a weapon of war has come to stay and occupies a growing prominence in naval programmes of construction, and it may be reasonably questioned whether the terms of the Treaty of Washington represent existing international law and if they embody rules which will be generally accepted in the next naval war. No authoritative statement can be made, and, foiling a previous agreement among nations, an estimate of the probable naval practices in the future with regard to blockade would be largely speculative.²

¹ See p. 16, *supra*.

² On the whole question see Oppenheim, ii. § 390a; Hall, 8th ed., pp. 640, 867-71; Lawrence, 7th ed., pp. 687-703; Garner, *International Law and the World War*, ii. chap. 33; and H. W. Malkin, B. Y. I. L. (1922-3), pp. 87-98.

CHAPTER VI

UNNEUTRAL SERVICE

UNDER this heading—"assistance hostile"—being the expression in the French text—the Conference of London dealt with the carriage by neutrals of enemy passengers of a naval or military character, or enemy dispatches, and with the direct participation of a neutral vessel in the service of a belligerent. This branch of the law is sometimes treated under the heading "Analogues of Contraband"; and the principle on which the prohibition of contraband rests is no doubt similar in its general character, but the analogy in its practical application is not very close. The destination of a noxious dispatch or of noxious persons, for instance, may be a neutral port; and in carrying dispatches or persons a neutral may have specially hired himself for the service, in which case he is more closely associated with the belligerent than a dealer in contraband, who merely seeks his best market; or he may be simply carrying them in the ordinary course of his business as a carrier of mails or passengers, in which case his association is far less close.

It may be mentioned here that in an action on a policy insurance arising out of the *Nigretia*, a British vessel that was captured by the Japanese in 1904 for carrying two disguised Russian officers with the connivance of the charterers, it was held that enemy military persons carried by a neutral vessel are not contraband of war in the proper sense of the term.¹

Carriage of
dispatches.

The case of dispatch-carrying presents few difficulties and may be shortly dealt with. To adapt the language of Lord Justice Bowen in a well-known English case,² a dispatch is not like a fire; a neutral may carry it about without being bound to suppose that it is likely to do an injury. The general principle, therefore, is that neutral vessels are prohibited from carrying, or carry at their peril, only those dispatches of which they knew, or ought to have known, the military or naval character. Such knowledge will be presumed, therefore, if they are addressed to persons in the military or naval service, or to agents in a neutral State other than the accredited agents who would

¹ *Yangtze Insurance Association v. The Indemnity Marine Mutual Assurance Co.* (1908), 1 K. B. 910; 2 K. B. 504. See *infra*, p. 400. Cf. *The Trent* (1861), *infra*, p. 404.

² *Emmens v. Pottle* (1885), 16 Q. B. D., at p. 358.

make peaceful communications in the ordinary course} but save in such and similar cases the presumption cannot arise.¹

In *The Atalanta*,² Lord Stowell condemned a ship bound for Bremen, which had touched at the Isle of France, a French colony, and taken on board a French officer and dispatches from the governor to the Minister of Marine at Paris. The case was aggravated by an attempt to conceal the documents. The learned judge intimated his view of the gravity of the offence in the following passage³: "How is the intercourse between the mother-country and the colonies kept up in time of peace? By ships of war or by packets on the service of the State. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy State. . . . Nor let it be supposed that it is an act of light and casual importance. . . . In the transmission of dispatches may be conveyed the entire plan of campaign, that may defeat all the projects of the other belligerent in that quarter of the world. . . . It is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy."

In *The Caroline*⁴ the dispatches were being carried from the ambassador of the enemy's State resident in the neutral State to his own country. Lord Stowell directed restitution, basing a distinction on the character of the person engaged in the correspondence. He is not an executive officer of the Government, acting simply in the conduct of its own affairs within its own territories, but an ambassador resident in a neutral State, for the purpose of supporting an amicable relation with it.⁵ In *The Madison*,⁶ a consul-general was held to be in a similar privileged position, and the ship was restored, though ordered to pay the captor's expenses.

It was also laid down that force or fraud employed by the enemy provided no excuse to the master of the ship⁷; though in one case, *The Rapid*,⁸ a plea of ignorance on the part of the master of the ship was allowed.

¹ In the Russo-Japanese War the Russian Prize Courts held that the prohibition did not extend to ordinary correspondence: *The Calchas* (1904), 1 R. & J. Pr. Cas. 118, at p. 141; *The St. Hilda* (1908), *ibid.* 188, at p. 205. Postal correspondence is now protected by Convention No. XI. of 1907; see *supra*, p. 272.

² (1808), 6 C. Rob. 440; cf. also *The Constantia* (1808), 6 C. Rob. 461, n.

³ At p. 484.

⁴ (1807), 6 C. Rob. 461; cf. *The Madison* (1810), 1 Edwards, 224.

⁵ At p. 467. (1810), 1 Edwards, 224.

⁷ *The Caroline* (1802), 4 C. Rob. 259, a case of carriage of troops; *The Susan* (1808), 6 C. Rob. 461, n.; *The Orozembo* (1807), 6 C. Rob. 436; *The Hope* (1808), 6 C. Rob. 463, n.

⁸ (1814), Edwards, 228.

In 1914 a British vessel and the cargo were condemned by the New South Wales Prize Court for carrying dispatches for the enemy, in a case where, though the owners and charterers were innocent, the vessel had been sub-chartered to, and was in the service of, the enemy Government, and the cargo belonged to the charterers, whose agent had effected the sub-charter.¹

Penalty, The penalty by the British rule was confiscation of the ship and of the cargo, if the property of the same owners.²

In the above cases the ships condemned specially undertook the carriage of the dispatches; and there were generally circumstances of fraud or concealment. It has been argued by some writers,³ and with reason, that the case is different with regular mail-boats, or merchant vessels which carry mails in the ordinary course; and in practice mail-boats have been treated with special consideration, by the United States, for instance, during their wars with Mexico and Spain, by France during the Franco-German War, and by Great Britain during the Boer War, though such indulgence has not been even in recent years universal.

Postal correspondence was specifically dealt with by Articles 1 and 2 of Convention No. XL of 1907.⁴

The unratified Declaration of London by Article 45 dealt only with, and applied the recognised penalty only in, cases where the vessel specially undertakes the transmission of intelligence, which presumably includes the carriage of dispatches:

"A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

" (1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interests of the enemy.

" (2) If to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

" In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation. The provisions of the present Article do not apply

¹ *The Zambesi* (1914), 1 B. & C. P., C. 358.

² *The Atalanta* (1808), 6 C. Rob. 440, 455-60.

³ E.g. Hautefeuille, *Droits des nations neutres*, I I . , p. 463; Calvo, § 2801.

⁴ See p. 272, *supra*.

if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time."

The leading case on the carriage of enemy passengers is *The Orozambo*.¹ In that case an American vessel had been ostensibly chartered by a merchant at Lisbon to proceed in ballast to Macao, and there to take a cargo to America. He proceeded, however, to prepare it for the reception of three military officers and two persons engaged in civil occupations in the Government of Batavia. These five persons came on board, together with a lady and some servants, in all seventeen passengers. Lord Stowell condemned the vessel. He observed²: "In this instance the military persons are three, and there are, besides, other two persons, who were going to be employed in civil capacities in the Government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that principle has been agitated; but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel."

The same judgment³ may be cited as an authority for the proposition already referred to in the case of dispatches, that a person engaged in the carriage of military persons cannot protect himself by alleging or proving his own ignorance, or fraud or force on the part of the enemy: "If the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done by enforcing the penalty of confiscation. . . . If redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger."⁴

¹ (1807), 6 C. Rob. 430. Cf. *The Nigretia* (1905), 2 R. & J. Pr. Cas. 201.

² At p. 434.

At pp. 434-5.

⁴ In *The Zambesi* (1914), 1 B. & C. P. C. 358, it was held that the innocence of the owners and charterers of a vessel sub-chartered to, and engaged in the service of, the enemy Government did not discharge her from liability to condemnation. But in *The Pontopros* (1916), P. 100, the Prize Court of the Straits Settlements held that the engagement of a neutral vessel in unneutral service is not sufficient to condemn her in the absence of *mens rea* on the part of the owners, charterers or master. (The latter is the more equitable view.)

In *The Friendship*,¹ the vessel was condemned for carrying almost exclusively a contingent of officers and sailors, whose passage was paid for by the French Government; but in this case Lord Stowell expressed the opinion² that the penalty would not be enforced where persons, even in the naval or military service of the enemy, were merely travelling as private passengers, in the ordinary way at their own expense. In other words, the ordinary passenger-vessel is, it seems, in the same position with regard to persons as is the ordinary mail-boat with regard to dispatches.

During the Russo-Japanese War, 1904, the *Nigretia*, a British vessel, was captured by the Japanese on her voyage from Shanghai to Vladivostock, and was condemned on the ground that she had on board two Russian officers, who were proceeding, under assumed names and under the pretence of belonging to the crew, with the connivance of the charterers, to a naval port of the enemy.³ In 1916 the French Prize Court condemned a vessel for transporting, under a special charter, an agent of the German Government from China to Siam.⁴

It is to be noted that Article 45 of the Declaration distinguishes between individual passengers, who bring condemnation upon the ship only if her voyage is undertaken specially with a view to their transport (i.e. if it is not her usual service), and military detachments, or persons who, in the course of the voyage, directly assist the enemy (e.g. by signalling), in whose case knowledge only need be proved. In the first case, the rule that ignorance of the master, or fraud or compulsion on the part of the enemy, is no defence, will probably continue to be applicable; in the second case it seems clearly excluded.

It is further to be observed that in sub-section (1) the persons contemplated are those who are "embodied" (*incorpores*), and not merely about to be, or likely to be, embodied in the armed forces of the enemy.⁶ The word "embodied" is in itself not free from ambiguity and the sense in which it is used is to be found in the Report of the Drafting Committee: "Does it include those individuals only who are summoned to serve in virtue of the law of their country, and who have really joined the corps to which they belong? Or does it also include such individuals from the moment when they are summoned and before they join that corps? The question is of great practical importance. Supposing the case is one of individuals who are natives of a continental European country and are settled in America: these individuals have military obligations towards their country of origin;

¹ (1807), 6 C. Rob. 422; cf. *The Caroline* (1802), 4 C. Rob. 256.

² At p. 429.

³ *The Nigretia* (1905), Takahashi, p. 639; 2 R. & J. Pr. Cas. 201.

⁴ *The Iro Maru* (1916).

⁵ Cf. *The Federico* (1915), *infra*, p. 402.

Meaning of
"embodied"
in Art. 45,

they have, for instance, to belong to the reserve of the active army of that country. Their country is at war and they sail to perform their service. Shall they be considered as embodied in the sense of the provision we are discussing? If we judged by the municipal law of certain countries, we might argue that they should be so considered. But, apart from reasons of pure law, the contrary opinion has seemed more in accordance with practical necessity, and has been accepted by all in a spirit of conciliation. It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral Governments would not willingly submit, to pick out among the passengers in a vessel those who are bound to perform military service and are on their way to do so." The argument was reasonable, but it did not carry conviction during the Great War. The Allied Powers stopped neutral vessels and made prisoners of enemy reservists found on board, while the French courts decided that persons voyaging home to enemy countries with the intention of joining the forces were "embodied." The whole question was discussed in the case of *The China*, which is fully noticed later in this chapter.¹

In the cases covered by Article 45, the liability to capture ends with the ending of the voyage; the service performed to the enemy being a single service analogous to the carriage of contraband. This is probably consistent with the British principle; for in *The Caroline*,² though it was held that a vessel is liable after the service has come to an end, this was only subject to the proviso that she is still subservient to the purposes of the belligerent.

Duration of
liability to
capture.

Nothing was said in the Declaration as to the carriage of persons in the civil service of the enemy, so that the doubt expressed by Lord Stowell in *The Orozembo*³ remains unresolved; unless, indeed, as seems probable, the true interpretation of the Article is that the carriage of such persons is in no case to be counted as a prohibited act. A consideration of Article 47,⁴ in which there is a similar restriction to persons embodied in armed forces, suggests that such was the intention of the Declaration.

The cases referred to in Article 45 are cases in which the neutral vessel is not so seriously involved in the service of the enemy as to forfeit her rights as a neutral. But there are acts of a more serious character which may have the result of practically identifying the vessel with the enemy. If, for instance, the neutral vessel is chartered by the enemy to carry cargo or troops, and acts under the orders or direction of the enemy,⁵ or if she takes any part in the hostilities, or,

Identifica-
tion with the
enemy.

¹ *Infra*, p. 407.

³ (1807), 6 C. Rob. 430, 434.

* *The Rebecca* (1811), 2 Acton, 119.

2 D

²

⁴

(1802), 4 C. Rob. 256.

See p. 404, *infra*.

being under the orders or direction of the enemy, is found in the immediate vicinity of the enemy fleet, she may then be treated as an enemy ship. Thus in 1894, during the Chino-Japanese War, the *Kowshing*, a British vessel, having been chartered by the Chinese Government to transport troops and war material to Korea, was captured by a Japanese cruiser and, refusing to be taken into a Japanese port, was sunk.¹ In the Russo-Japanese War, the *Industrie*, a German vessel, was condemned by the Japanese Prize Court because she was found sending information to the Russians as to the Japanese naval movements, whilst purporting to send war news to a newspaper at Chefoo.² A French steamship, the *Quangnam*, having taken in 1905 a cargo of spirits to a Russian squadron, proceeded ostensibly to Manila, but actually directed her course between Formosa and the Pescadores, and was seized by the Japanese in Hatto Channel; she was condemned on the ground that she was employed in the service of the Russians in carrying supplies to their fleet and in reconnoitring on their behalf.³ In 1915 a Spanish steamship, the *Federico*, having been specially engaged for conveying a number of Germans and Austrians from Barcelona to Genoa for the purpose of joining their regiments, was condemned for unneutral service by the French Prize Court, which held that they were "embodied in the armed forces of the enemy."⁴

The cases under this head are dealt with by Article 46:

"A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:

"(i) If she takes a direct part in the hostilities.

"(2) If she is under the orders or control of an agent placed on board by the enemy Government.

"(3) If she is in the exclusive employment of the enemy Government.

"(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

"In the cases governed by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation."⁶

¹ Cf. Holland, *Studies in International Law* (Oxford, 1898), p. 126.

² *The Industrie* (1905), Takahashi, p. 732: 2 R. & J. Pr. Cas. 323.

³ *The Quangnam* (1905), Takahashi, p. 735: 2 R. & J. Pr. Cas. 343.

⁴ *The Federico* (1915), *Journal Officiel*, 10 May, 1915; affirmed by the Conseil d'Etat, *Journ. Off.*, 18 July, 1916.

⁵ In connection with this Article, it may be mentioned that the Prize Court of the Straits Settlements held in 1915 that in the absence of *mens rea* on the part of the owners, charterers or master, the mere fact that a neutral

Under the third head come colliers accompanying the enemy fleet.¹ The fourth head differs from sub-section (2) of Article 45 in that the case at present contemplated is that in which the vessel is wholly devoted to the service of the enemy for the time being, and the liability to capture continues so long as such service lasts.²

The Article was not in force during the war of 1914-18, but its terms broadly represent the measure of agreement in international practice. It is interesting to compare the wider meaning attached to unneutral service by the German Ordinance of 16 July, 1917, a parallel development to the extension of blockade and contraband by the Allied Powers. The Ordinance provided that a neutral vessel would be deemed guilty of unneutral service

- (1) if she was chartered by an enemy Government;
- (2) if she was voyaging to or from an enemy country under charter to an enemy subject, or to a person residing in an enemy country, or to a person who had acted as agent for an enemy Government;
- (3) if the flag which she was entitled to fly belonged to a State which had entered into a general agreement with an enemy Government concerning cargo space, or if the greater part of the mercantile marine of that State was navigating on behalf of the enemy.

There was no unanimity at the Conference of 1909 as to whether a vessel taking part in a trade which would have been closed to her but for the outbreak of hostilities, should be treated as liable under this Article; and consequently the question raised by "the rule of the war of 1756" was left an open one.³

Articles 45 and 46 deal with the liability of the ship and cargo; but there remains the important question as to the treatment of the persons, sometimes incorrectly described as "contraband persons," who are found on board. That when the ship is taken in for adjudication these persons may be made prisoners of war is clear; but there will be many cases in which, though the capture of the individuals

vessel is engaged in unneutral service does not suffice to condemn her: *The Pontoporos* (1915), 1 P. C. 371, at p. 385; cf. Oppenheim, ii. § 408, See also *The Proton* (1918), A. C. 578.

¹ *The Bangor*, a Norwegian vessel, carried German agents as supercargoes, a wireless apparatus that had been shipped as "electrical gear" and a cargo of coal. She was captured while on her way to deliver the coal to any of the warships of the German Pacific Fleet which might call for it, and was condemned for unneutral service: (1916), P. 181.

* This is in accordance with the decision in *The Caroline* (1802), 4 C. Rob. 256, referred to on p. 401, above.

³ See p. 332, *supra*.

is justified, the ship is entitled to go free, and the hardship upon, say, a large mail steamer, which happens to be carrying, innocently, a few enemy persons, may be very great if she is interrupted in her voyage and taken into a belligerent port.

Some continental nations have claimed that the belligerent has a right to remove such persons from a neutral vessel, but Great Britain never admitted any such right, and had insisted upon the exceptional nature of a provision contained in the Convention for the "Adaptation of the Principles of the Geneva Convention to Maritime War,"¹ by which a belligerent could claim the surrender of sick, wounded or shipwrecked men from hospital and other ships. At the Conference of London, however, the British Government expressed itself as willing to modify this attitude, and it was generally agreed that the interests of neutrals would be best served by allowing a belligerent to remove from a neutral vessel persons actually embodied in the armed forces of the enemy, and an Article was inserted in the following terms:

"Any individual embodied in the armed forces of the enemy, who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel " (Article 47).

The careful limitation of the persons who may be so dealt with to persons " embodied in the armed forces of the enemy," suggests, as we have already pointed out,² that the carriage of persons engaged in civil employment is not to be treated as an offence. The best-known case in which the question arose was the case of *The Trent* in 1861,³ which aroused great excitement. During the American Civil War an English vessel, the *Trent*, cleared from Havana for England via St. Thomas, having on board Messrs. Mason and Slidell, who had been appointed envoys from the Confederate States to France and England. Off the coast of Cuba the captain of the *San Jacinto*, an American frigate, boarded the *Trent* and removed the two envoys to his own vessel, whence they were transferred to prison. On these facts the British Government demanded the restoration of Messrs. Mason and Slidell. The United States acceded to the demand on the ground that the ship should have been brought in for adjudication. Mr. Seward, however, in a long dispatch which illustrates very happily the inconveniences to which a politician exposes himself who gets up his international law for the occasion, maintained that the seizure was in other respects good, and that Messrs. Mason and Slidell were a species of contraband. If they were, the reply was obvious

The *Trent*
case.

¹ Art. 12 of Convention X. of 1907.

² See p. 401, *supra*.

³ *Parl. Papers, N. America*, 1862, vol. lxii. (No. 5).

UNNEUTRAL SERVICE

and decisive, that the *Trent* had a neutral destination: " It is of the very essence of the definition of contraband," said Lord Russell in his answer, " that the articles shall have a hostile and not a neutral destination." But in fact it can only lead to confusion to apply the term contraband to persons at all.¹ A few treaties have referred to soldiers and sailors as contraband; but it would be absurd to insist that a belligerent shall prove strictly an enemy destination, before he can prevent a neutral from conveying a regiment of the enemy's troops. The real issues which should have been argued were first: " Were Messrs. Mason and Slidell noxious persons, by the carriage of whom the *Trent* had entered for the time being into the service of the enemy ": and secondly, " If they were such persons, was the *San Jacinto* entitled to seize them and remove them from the *Trent*, without taking the vessel in for adjudication?" On the first point the captors may have had some ground for argument in the fact that, the Confederate States not having yet been recognised as a sovereign State,² the two envoys were going on a mission to persuade England and France to accord such recognition, and were therefore engaged in a service of a distinctly hostile character; but against this is to be set the argument that if they came as diplomatic agents (had the Confederates been already recognised, they would have been formally ambassadors), it is difficult to see how it was a breach of neutrality to convey them, for though Lord Stowell in *The Caroline*³ said, " you may stop the ambassador of the enemy on his passage," that only meant that you may do so if you can do it without trespassing on neutral soil or ships.⁴ On the second point, if the captors were entitled to seize the envoys at all, they were, in taking them out of the *Trent*, instead of taking the *Trent* in for adjudication, only doing what is now regarded as reasonable and convenient in the interests of all parties. In seizing them and allowing the vessel to proceed, they met the very point which Sir William Harcourt⁵ urged against them: " The great and practical danger of the fallacious reasonings of Mr. Seward consists in this, that they would serve to justify, and may be taken to encourage, the captain of the *Tuscarora* to seize the Dover packet-boat and carry her into New York for adjudication, in case Messrs. Mason and Slidell should take a through ticket for Paris." The defect in this criticism lies in the fact that it begs the whole question in issue, for, strictly speaking, if these envoys were noxious persons, or if they had been military officers, that is exactly what the *Tuscarora* would have been entitled to do; and it was

¹ Cf. *The Yangtze Insurance Association v. The Indemnity Marine Mutual Assurance Co.* (1908), 1 K. B. 910; 2 K. B. 504; *supra*, p. 396.

² *Atherley-Jones, Commerce in War*, pp. 312-13.

³ (1807), 6 C. Rob. 468.

⁴ *Letters of Historicists on International Law*, p. 192.

⁵ *Atherley-Jones*, p. 313.

precisely this difficulty which Article 47 of the Declaration was intended to meet.

The whole question of the *Trent* incident has been much discussed,¹ and opinion is by no means unanimous, even at the present day. However this may be, under the terms of the Declaration of London, Messrs. Mason and Slidell would not be liable to seizure at all; but assuming they were so liable, then the belligerent would be justified in arresting them and allowing the vessel to proceed.

Recent
practice.

A case very similar to *The Trent* arose during the Great War, but the doubt which previously existed was not removed. At the outbreak of war Great Britain declared, with reservations, her adherence during hostilities to the Declaration of London, and accordingly enemy civilians, including reservists, were allowed to return to their countries unhindered. But in consequence of Germany's action in removing from the occupied portions of France and Belgium as prisoners of war every Frenchman and Belgian liable for military service, the Allied Powers gave notice that as a measure of reprisal² enemy reservists on neutral vessels would be made prisoners of war.

Some thousands of potential enemy soldiers were captured by this method, and neutral Powers protested, but without avail except in the case of the United States. That country succeeded in obtaining the release of a German reservist taken from the American steamer *Windber*, but Great Britain and France only consented to set him free "as a friendly act while reserving the question of principle involved." It has been mentioned that the French Court held that an enemy reservist was a person "embodied in the armed forces of the enemy" within the meaning of Article 47³; but Great Britain went further in the case of the *China*, the modern parallel to the *Trent*.

The *China*
case.

From an American steamship, the *China*, a British warship in the China Seas removed, and made prisoners of, thirty-eight enemy subjects, mostly Germans. It was not known at the time or during the subsequent discussions that many of them were in fact commissioned in or reservists of the German army, but it was known that they were plotting to foment trouble and to cause grave interference with British trade in the Far East. The Government of the United States protested and demanded the release of the prisoners on the grounds advanced by Lord Russell in *The Trent*. The British Government in reply argued that the steps taken were justified; Article 47 of the Declaration of London was a general recognition of the right of belligerent to remove certain classes of persons from

¹ Cf. M. Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 187-205; Moore, *Digest*, vol. vii. § 1265; T. Harris, *The Trent Affair* (Indianapolis, 1896); *Parl. Papers*, N. America, 1862, No. 5.

² In Oppenheim's opinion this was a measure of doubtful legality (ii. § 413a).

* See p. 402, *supra*.

neutral vessels; these classes were not limited to combatants and those about to become combatants, but must extend to include those actively engaged in damaging belligerent interests away from the sphere of hostilities; the *Trent* case was distinguished as a decision anterior to any agreement over the right of a belligerent to remove certain classes of enemy subjects from neutral vessels; Slidell and Mason were not in the same class as the Germans removed from the *China*. These contentions were not acceptable to the Government of the United States; it maintained that the *Trent* case had clearly established that the right of removal was limited to military and naval persons, and persisted in its original demand. To this Great Britain acceded, while expressing a desire that the case should not be considered a precedent and that some agreement should be arrived at to bestow on belligerents wider powers of control over the movements of enemies at sea.

In the result the present state of the law is far from clear. Although the Declaration of London was not ratified it is safe to assume that a strict interpretation of the rule contained in Article 47 conforms with established law. With regard to reservists, while the French interpretation of the Article as including them may not be generally acceptable, the same result may be obtained by the development of the rule to cover individuals who will or may become effective enemy 'combatants. But it cannot as yet be said that this development has hardened into law, and still less certain is the position with regard to enemy subjects engaged as agents of the enemy State in non-military activities.¹

What is the present law?

The general rules governing unneutral service call for modification in view of the events of the war of 1914—18 and the changes in naval warfare. These changes themselves, particularly the more comprehensive scope of contraband, and the extension of blockade with its increased effectiveness in fact, had the result of restricting the opportunities of neutrals to indulge in unneutral service as such, and the cases in which the rules were considered by prize courts were few. It remains for those courts on some future occasion to undertake the task which the Judicial Committee of the Privy Council decided did not fall to its lot in the *Svithiod*, the task of defining "with very great accuracy the way in which well-known principles [of the law of unneutral service] should be applied under modern conditions."²

¹ See article by H. W. Malkin in B. Y. I. L. (1924), pp. 66 seq.; Oppenheim, ii. §§ 408, 413, 413a; Hall, 8th ed., pp. 832-5.
² (1920), A. C. 718, at p. 723. See Oppenheim, ii. § 407.

CHAPTER VII

I. FREE SHIPS, FREE GOODS. II. ENEMY SHIPS, ENEMY GOODS

Relation of these maxims.

THESE maxims have been so often treated together that it may, perhaps, be worth while to preserve the collocation. There is, however, no necessary or logical connection between the two propositions, and they must be carefully distinguished to avoid confusion. In *The Nereide* the American Supreme Court felt it necessary to emphasise that the treaty of 1795 between the United States and Spain, stipulating merely that free ships should make free goods, did not necessarily imply the converse principle that enemy ships should make enemy goods; so that the goods of a Spanish subject found on board the vessel of an enemy of the United States were not confiscable as prize.¹ The saying, "free ships, free goods," merely expressed the view that enemy goods shipped on neutral vessels ought to be immune from capture; while by the phrase, "enemy ships, enemy goods," the opinion was conveyed that neutral goods shipped on enemy vessels were so tainted by their surroundings as to become liable to condemnation. In each case opinion was divided for many years, and in each case the view favourable to neutral privilege has finally prevailed. In the first case, therefore, the maxim stands: *free* ships make free goods, that is to say, a neutral vessel redeems the enemy quality of her cargo, so far as to protect it from capture. In the second case, the maxim has yielded to considerations based upon the intrinsic innocence of the cargo itself. It is therefore no longer true that carriage on a belligerent vessel necessarily affects neutral goods with a hostile character. Enemy ships do not make enemy goods, and, to put it shortly, the only goods, apart from contraband, which are now subject to capture on the high seas, are enemy goods on enemy ships,² and on the captor's ships.³ A short account may usefully be added of the steps by which these conclusions have been respectively reached.

1. FREE SHIPS, FREE GOODS

Earlier practice.

Until the middle of the seventeenth century the simple view was adopted that enemy goods were enemy goods and, as such, liable to

¹ *The Nereide* (1815), 9 Cranch, 440.

² Cf. *The Hakan* (1918), A. C. 148.

³ Cf. *The Miramichi* (1915). P. 71; *The Roumanian* (1916), 1 A. C. 124.

capture, wheresoever found. From 1650 onwards a large number of treaties¹ are found stipulating for the immunity of such goods, when found on neutral vessels. This concession was especially valuable to countries engaged in a large carrying trade, and the Dutch were particularly active in procuring its conventional adoption. It was not, however, contended that, apart from treaty, neutral ships were able to protect their cargoes, and in many cases, so far from the ship protecting the cargo, it was held that the cargo tainted the ship and made it subject to capture. Acting upon this view, several French Ordinances declared that neutral ships carrying enemy cargoes were themselves confiscable.

In the eighteenth century, France attempted to establish the principle of protection, but her own maritime superiority led Great Britain to maintain the liability of the goods to seizure, though she did not attempt to involve the vessel in the fate of the cargo. The First Armed Neutrality in 1780 collectively issued an affirmation of the immunity of enemy goods, but the individual subscribers, in the course of mutual hostilities, soon abandoned their own principles. The reassertion of them by the Second Armed Neutrality in 1800 was equally transient.

In the earlier part of the nineteenth century practice was still fluctuating. The number of States which desired amendment was considerable, but the existing law was accurately stated by Mr. Dana²:

"The United States and Great Britain have long stood committed to the following points as in their opinion established in the law of nations:

- "(1) That a belligerent may take enemy's goods from neutral custody on the high seas;
- "(2) That neutral goods are not subject to capture from the mere fact that they are on board an enemy's vessel; and
- "(3) That the carrying of enemy's goods by a neutral is no offence, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere with it on the high seas. . . . While the Government of the United States has endeavoured to introduce the rule of 'free ships, free goods,' by conventions, her courts have always decided that it is not the rule of war. . . ."

The military association of Great Britain and France in the Crimean War furnished the occasion for the desired change. To secure uniformity of action England temporarily abandoned her practice and acquiesced, on the conclusion of peace, in the Declaration

The Armed Neutralities.

Early part of 19th century.

Declaration of Paris.

¹ See Wheaton, 5th ed., pp. 703 seq.

" Note to Wheaton, § 475.

Paris, 1856, which affirmed the principle of *free ships, free goods*.¹ It will be remembered that the United States, Spain, Mexico and Venezuela have not subscribed to this Declaration, but the United States recognised the neutral claim to protection in the Civil War, and the same course was adopted by both belligerents in the Spanish-American War, and Spain formally acceded to the Declaration in 1907; while the refusal of the United States has not been due to any objection to the principle, but only to the refusal of the rest of the world to adopt the principle of immunity of all private property at sea. The principle of freedom from capture was duly observed by both parties to the Russo-Japanese War in 1904.

Declaration
of Paris.

The principle was affirmed in the Declaration of Paris by Article 2:

" The neutral flag covers enemy's goods, with the exception of contraband."

The effect of this simple provision was considered by the Prize Court during the Great War, and it was decided that it afforded no protection to enemy goods which at the time of seizure had been discharged from neutral vessels,² or which although on board neutral vessels had been transhipped from enemy vessels.³ *A fortiori* the enemy goods could be condemned when the neutral vessel had identified itself with the enemy by taking a transhipment of the goods (not bought and sold in the ordinary course of business) in order to continue the transit.⁴ The rule in its operation does not override the doctrine of "infection"⁵; thus enemy goods on neutral vessels, if they become contraband by infection, can be seized. "The Declaration is not a charter of immunity in all circumstances for enemy goods under a neutral flag, nor does it protect goods simply as being enemy goods, which, if neutral, would have been liable to condemnation."⁶ A contention that, although the Article conferred no rights upon enemies, it was made in the interest of neutrals so as to give them a right of complaint for undue interference with their voyages, was also rejected.⁷

Rules of
property.

In this as in other connections it is well to remember that a Court of Prize considers as enemy property goods in course of shipment from a neutral to an enemy country, although the goods according to municipal law are only to become enemy property on arrival at their destination, and also goods in course of shipment from an enemy to a

¹ That is, if not contraband.

² *The Batavier II*. (1918), P. 66, n. 5 ³ *The Bawtan* (1918), P. 58.

⁴ *The Jeanne* (1917), P. 8. See p. 370, *supra*.

⁶ *The Kronprinsessan Margareta* (1921), 1 A. C. 486, at p. 503.

⁷ *The Dirigo* (1919), P. 204.

ENEMY SHIPS, ENEMY GOODS 411

neutral country, although by municipal law they have become the property of a neutral, by payment or otherwise.¹

Whether the immunity conferred by the neutral flag extends to enemy public property was thought to be doubtful; juristic opinion is not unanimous on the point; but in 1912 the Italian Prize Court answered the question in the negative²—and this is the better view, being consonant to general principles.³

2. ENEMY SHIPS, ENEMY GOODS

The theory that goods of no warlike use to the belligerent were so affected by carriage in his vessels as to become confiscable, owed its survival to the fact that it was too readily accepted as the antithesis of the phrase, "free ships, free goods." "Free ships, free goods" was a reasonable concession to neutrals, which afforded no sort of justification for the infliction upon them of the hardship involved in "enemy ships, enemy goods." The practice expressed in the latter maxim, like commercial blockade, and the rule of war of 1756 in its extended forms, proceeded on a view of neutral rights far too narrow to square with admitted principles of international law. The *Consolato del Mare*⁴ denied the liability to capture of neutral goods in enemy bottoms, and the same view was expressed by Albericus Gentilis⁵: "Property which does not belong to the enemy is nowhere confiscable."

England was, as a rule, on the same side, though occasionally **British view.** the opposite principle was applied⁶; the weight of French policy was thrown into the opposite scale. Lord Stowell in *The Fanny*¹ drew a distinction between the cases where the carrying vessel was a public or a merchant vessel of the belligerent. "A neutral subject," he said,⁸ "is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject, nevertheless, to the rights of the enemy who may capture the vessel, but who has no right, according to the modern practice of civilised States, to condemn the neutral property."⁹ Neither will the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could

¹ *The United States* (1917), p. 30.

² *The Newa; The Sheffield; The Menzaleh* (1912).

• As to the true bearing of the Declaration of Paris, see *infra*, p. 412. As to enemy cargo on neutral ships under the Reprisals Order, 11 March, 1915, see *The Progresso* (1916), 2 B. & C. P. C. 309.

³ See Heffter, § 163. *De jure belli*, lib. ii. c. 22.

⁴ Westlake, part ii., pp. 142, 143. (1815), 1 Dods. 443. 'At p. 448.

• In *The Roland* (1915), 31 T. L. R. 357, the Prize Court emphasised that according to prize law property on an enemy ship consigned to an enemy port is *prima facie* enemy property, and it is for the claimants, who allege that the property belongs to them, as neutrals, to make out their claim clearly.

not have foreseen. But if he puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and, in so far as he does this, he adheres to the belligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; and I take it to be quite clear, that if a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hac vice*, to be considered as an enemy."

American
view.

On the general question the American view coincided with the English, but in *The Atalanta*¹ Johnson, J., refused to follow the distinction insisted upon by Lord Stowell. The learned judge observed²: "The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be and probably will be changed . . . but so long as the principle shall be acknowledged this Court must reject constructions which render it totally inoperative." Nor did it make any difference that the belligerent vessel was an armed cruiser³; it was alleged, argued the learned judge, that the use of such a vessel by a neutral deprived the other belligerent of his right of search, or of capture, or of adjudication of goods, but the right of capture applied only to enemy ships or goods, the right of search to enemy goods on board a neutral carrier; nor was the right of adjudication impaired. The neutral does not deny the right of the belligerent to decide the question of proprietary interest. If it be really neutral, of what consequence is it to the belligerent who is the carrier? He had no right to capture it, and if it be hostile, covered as neutral, the belligerent is only compelled to do that which he must do in all ordinary cases, subdue the ship before he gets the cargo.

Declaration
of Paris.

The interest of these discussions is now chiefly historical, for at the time of the Crimean War France purchased the English adherence to the doctrine of free ships, *free goods*, at the price of a similar concession on her part in the practice under consideration, and the Declaration of Paris affirmed the English and the American view that neutral traders are in no way bound to refuse the convenience of belligerent carriage, in other words, that enemy ships do not make enemy goods.⁴

Declaration
of London.

The Declaration of London provided (Article 59) that "in the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods"—which is in

¹ (1818), 3 Wheaton, 409, ² At p. 415. ³ At pp. 424, 425.

⁴ "Goods" means merchandise; the word does not apply, e.g. to a submarine signalling apparatus leased by a neutral company to the owners of an enemy vessel, and installed thereon: *The Schlesien* (1914), 1 B. & C. P. C. 13.

accordance with British¹ and American practice,² and has been followed in the Great War by both the British³ and the French⁴ Courts; so that if the innocent character of the goods is established they are released.

It need hardly be said that a neutral trader, in one sense, acts at his peril in employing a belligerent carrier. If belligerent necessity impels the other belligerent to destroy the carrying vessel, the neutral probably has no remedy in respect of the concurrent destruction of his cargo.⁶

¹Cf. *The Magnus* (1798), 1 C. Rob. 31; *The Rosalie and Betty* (1800), 2 C. Rob. 343.

²*The Jenny* (1866), 5 Wall. 183; *The Carlos F. Roses* (1899), 177 U.S. Rep. 655.

³*The Roland* (1915), 31 T. L. R. 357.

⁴*The Porto* (1914), *Journ. Officiel*, 30 March, 1915.

⁵See chap ix., *infra*.

CHAPTER VIII

VISIT AND SEARCH

BELLIGERENT public vessels are entitled to stop neutral merchantmen upon the high seas in order to determine their character and the nature of the occupation in which they are engaged. The existence of this right is peremptorily required to enforce the control over neutral trade which belligerents are permitted to exercise.

British view. In the English leading case, *The Maria*¹ Lord Stowell dwelt upon this point of view: "The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships or the cargoes or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. . . . The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner² himself, the great champion of neutral privileges."

Forcible resistance. By Article 63 of the unratified Declaration of London, it was provided that:

"Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods."

It is to be noted that the above consequences follow only from forcible resistance; for a mere attempt at flight there is no penalty,

¹ (1799), 1 C. Rob. 359.

² M. von Hubner, *De la saisie des batiments neutres* (1778).

except that the vessel obtains no compensation if damaged or sunk, as was explained in the official Report.

As to the cargo, in case of forcible resistance, enemy cargo loses the protection of the neutral flag, and neutral cargo is presumed to be enemy till the contrary is proved. This is a mitigation of the British rule laid down in *The Maria*¹ that resistance involves the whole cargo in confiscation.

The question has been much discussed whether neutral vessels are liable to search at the hands of a belligerent when they are sailing under convoy of a commissioned vessel of their own country. The Governments and writers of the Continent entertain the view that vessels so sailing must not be searched. This opinion cannot be supported by the most influential practice, and the principle on which it proceeds is at least open to question.

The claim to immunity was first put forward on behalf of Sweden in the seventeenth century, and the Dutch shortly afterwards placed under convoy some merchant vessels sailing from Cadiz to Flanders, and ordered the convoy to resist any attempt at search. Conformably to these instructions, De Ruyter, who was in charge of the convoy, beat off an English squadron which attempted to exercise the right of search. The Dutch claim was revived in the middle of the eighteenth century, and led to a warm dispute between the English and Dutch Governments. In 1781 Sweden put forward a similar claim as against Great Britain, and on appeal to Russia, received from that Power, for what it was worth, an assurance that the claim to immunity for convoyed vessels was covered by the principles of the armed neutrality. As Hall² points out, the practice of visiting such vessels had been universal until 1781, and the claim to exemption had only "acquired such consistency and authority as it could gain by becoming a part of the deliberate policy of a knot of States possessing very defined and permanent interests." The Second Armed Neutrality laid down the principle of immunity,³ but the chief signatories of it soon fell short of their own standard.

The British view was well stated by Lord Stowell in *The Maria*⁴: ". . . The authority of the Sovereign of the neutral country being interposed in any manner of mere force, cannot *legally* vary the rights of a lawfully commissioned belligerent cruiser. I say *legally*, because what may be given . . . to considerations of comity or of national policy are views of the matter which sitting in this Court I have no right to entertain. All that I assert is that *legally* it cannot be maintained that if a Swedish commissioned cruiser, during the wars of his

¹ (1799), 1 C. Rob. at p. 377.

³ See Hall, 8th ed., pp. 880-6.

² 8th ed., p. 882.

⁴ (1799), 1 C. Rob. at pp. 360. 361.

own country, has a right, by the law of nations, to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorised by that law to obstruct the exercise of that right with respect to the merchant ships of his country. . . . Two Sovereigns may unquestionably agree, if they think fit, by special covenant that the presence of one of their armed ships, along with their merchant ships, shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with neutrality. . . . But surely no Sovereign can legally compel the acceptance of such a security by mere force."

American
view.

On this point, as on others, American judges are generally in agreement with our own—though the practice of the United States has sometimes been at variance—and Story, J., in *The Nereide*,¹ very forcibly observed: "The law deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and, therefore, attributes to such preliminary act the full effect of actual resistance." And in the subsequent case of *The Atalanta* the American Court held that a convoy was an association for a hostile object, that in undertaking it a State spreads over merchantmen an immunity from search which belongs only to a public vessel, and by joining a convoy every individual vessel puts off her pacific character; hence a neutral who suffers the fate of the convoy has only to regret his own folly in wedding his fortune to the enemy's.²

Continental
view.

In practice, therefore, Great Britain and America are ranged on one side, France, Russia, Germany, Austria, Spain, Italy, Denmark and Sweden on the other. The real weakness of the continental claim is that it presupposes in the commanding officer of a convoy an intimacy of information as to the cargo of the vessels convoyed which has no correspondence with facts. However complete his good faith, how can such an officer affirm of his personal knowledge that none of the vessels convoyed has contraband goods or enemy dispatches on board?

In many treaties, however, and even in their instructions to naval officers,³ the United States Government have adopted the contrary principle of exemption.

Convoys and
modern
conditions.

It was pointed out by Hall⁴ that in practice convoys were not likely to be much employed under modern conditions of commerce,

¹ (1815), 9 Cranch, 440.

² *The Atalanta* (1818), 3 Wheaton, 409. That belligerent or enemy convoy amounts to constructive resistance and entails condemnation, has also been laid down in the recent cases of *The Nancy* (1892), 27 Ct. Cl. 99; *The Sea Nymph* (1901), 36 Ct. Cl. 369.

³ Lawrence, *Principles*, 7th ed., p. 673; Glass, *Marine International Law*, p. 168.

⁴ 8th ed., p. 886.

as vessels varied very much in their speed, and, as was then thought, it would be highly inconvenient to keep a body of them together. Further, the doctrine of the right to visit ships under convoy had not been enforced by Great Britain in any recent war¹ prior to the Great War, and when by the Declaration of Paris enemy goods other than contraband could no longer be seized in a neutral vessel, the chief temptation to exercise the right disappeared, though it still remained important to seize contraband and enemy dispatches. Hall² added that the officer in command of the convoy could not guarantee that a vessel under his charge did not intend to break blockade; but with the adoption by the Conference of London of the rule that neutral vessels may not be captured for breach of blockade except within the area of operations of the blockading squadron,³ this point would, if the Declaration had been ratified, have become of little importance, and it could not be suggested, nor was it suggested, that a convoy could protect blockade runners found within the area.

At the Conference of London there was a marked change in the attitude taken up by several of the nations represented. In their Memorandum Germany adopted the British principle; the United States (following her treaty practice rather than her case law) adopted the principle of exemption for convoyed vessels; Austria, while claiming exemption, regarded the point as open to doubt; and Spain, France, Italy, Japan, the Netherlands and Russia claimed exemption; while Great Britain, though denying the right of exemption in her Memorandum, was nevertheless anxious, on behalf of neutral trade, to restrict as far as possible the right of seizure of contraband, and treating the original British contention as having lost its importance, expressed herself as prepared to accept the French view. This was finally adopted in the following Articles:

" Neutral vessels under national convoy are exempt from search.

The commander of a convoy gives in writing at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by search " (Article 61).

" If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander

¹ See *General Instructions to British Delegates*, sec. 18, Cd. 4554.

² 8th ed., p. 885.

³ Art.

17.

of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels " (Article 62).

Convoys in
the Great
War.

The wisdom of the concession thus made by Great Britain was doubted at the time; but her departure from ancient practice gained the more general acquiescence because it was thought that convoys were ceasing to be a practical form of protection and that the definition and limitation of contraband in the unratified Declaration would render it improbable that neutrals would undertake the expense and responsibilities involved in convoying their own merchant vessels. A temporary adherence to the Declaration during the earlier part of the war of 1914-18 was withdrawn by Great Britain in 1916, and when the question of neutral convoy arose in 1918 she was at liberty to assume the position so strenuously maintained by her before 1909. Thus when the Dutch Government announced that it intended to dispatch a convoy to the West Indies, it was informed that the British Government would insist upon its right to examine the merchant vessels included in it. But in view of the fact that the convoy was to consist only of vessels carrying Government passengers and goods, the British Government agreed to waive its rights, subject to certain conditions which were acceptable to the Dutch Government.¹

It is well known that in the latter stages of the Great War, while Germany was prosecuting her unrestricted submarine campaign, almost all ocean-going vessels voyaged to or from Great Britain in convoys, and that these convoys included neutral vessels. If naval warfare in the future takes the form it eventually assumed in the Great War, and if the neutral States include nations with a large sea-carrying trade, the question of convoy is likely to be prominent; but there are now no settled rules of common acceptance.

Formalities
of search.

When a commissioned vessel wishes to exercise the right of search, it is usual to fly the colours and fire off a gun, called the affirming gun ("coup de semonce"), as a signal to the merchant vessel.² It is generally agreed that pursuit under false colours is not illegitimate,³ but that the pursuing warship may not fire until she has assumed her national flag. The requirement that the affirming gun shall be fired is common in continental practice, but is not obligatory

¹ *Parl Papers, Misc.*, No. 13 (1918).

² On the formalities of visit and search, see Atherley-Jones, chap. vi.; Oppenheim, vol. ii. §§ 418 seq.

³ See *The Eleanor* (1817), 2 Wheat. 345. Cf. the German *Prize Regulations* of 1914, of which Art. 82 says: "During the chase it is not necessary to show the war flag; any mercantile flag may be flown."

VISIT AND SEARCH

according to the British and American view. In *The Marianna Flora*,¹ Story, J., delivering the judgment of the Court, made the following observations on this point: "We are not disposed to admit that there exists any such universal rule or obligation of an affirming gun as has been suggested at the bar. It may be the law of the maritime States of the European continent already alluded to, founded on their own usages or positive regulations. But it does not hence follow that it is binding upon all other nations. It was admitted at the argument that the English practice is otherwise; and surely, as a maritime Power, England deserves to be listened to with as much respect on such a point as any other nation."

In the same case it was pointed out that although the right of search does not exist in time of peace,² yet a cruiser has a right to approach a foreign vessel for purpose of observation} it was held further that the vessel approached is under no obligation to lie-by, but that she has no right to fire at a cruiser approaching upon a mere suspicion that she is a pirate, and if this be done the cruiser may lawfully repel force by force and capture her. In order to make the actual visit, an officer is usually sent on board the merchantman from the cruiser, but sometimes the master of the merchantman is summoned to bring his papers to the cruiser for examination.⁸ Capture of a vessel searched is considered to be legitimate where the papers are false or insufficient, and where the results of the visit make it certain, or at least highly probable, that the vessel is tainted by any of the forms of illegality which have been already considered.* If visit and search are impracticable at sea, in view of the conditions of modern warfare, a vessel may be taken into harbour for the purpose. This practice was approved in the Great War by the British,⁵ French⁶ and German⁷ Prize Courts. On the other hand the Government of the United States protested,⁸ but the practice was continued until eventually neutral vessels found it convenient to make voluntary calls at British ports for the purpose of submitting to examination.

¹ (1826), 11 Wheaton, 1.

² By the terms of the Convention for the Control of Trade in Arms and Ammunition the signatories are given the right, in time of peace, to visit native vessels suspected of carrying unlicensed arms and ammunition in the Persian Gulf and the adjacent seas. See p. 100, *supra*.

* This is, however, prohibited by the *Manual of Prize Law* (1888), No. 198; and it is contrary to the view expressed by the Institute of International Law, § 12 of the Project adopted in 1883 and 1887.

* For an extreme instance of grounds of suspicion held justifiable, see *The Baron Stjernblad* (1918), A. C. 173, *Infra*, p. 429.

⁵ *The Zamora* (1916), 2 A. C. 77, at p. 108.

⁶ *The Federico* (1915), *Journal Officiel*, 10 May, 1915.

⁷ *The Bertha Elizabeth*, Supreme Prize Court, Berlin, 25 Nov. 1915.

* For diplomatic correspondence on the question, see *Parl. Papers*, Misc, No. 6 (1915); No. 15 (1916).

CHAPTER IX

THE DESTRUCTION OF PRIZES AND COMPENSATION¹

1. ENEMY PRIZES

Relation
of seizure to
ownership.

WHEN a belligerent captures a commissioned vessel belonging to the enemy Government, she becomes on capture his own property, and he is entitled to deal with her as he pleases—he may destroy her or take her into port. All persons found on board become prisoners of war, and all goods become the property of the captor.² In the case of an enemy merchant ship there is neither unanimous opinion nor uniform practice as to the relation of seizure to ownership. The earlier law deemed the title to have passed as soon as the capture became effective; but the test of effectiveness varied—one view (supported by the *Consolato del Mare*) held it to be "deductio infra praesidia" (taking her to a safe place), another required twenty-four hours' possession.³ The modern view, however, tends to regard the captor's right as one of possession only,⁴ which may be transformed into a proprietary right by the condemnation of a prize court. In *The Flad Oyen*, Lord Stowell observed that the requirement of due condemnation for passing the ownership in prize was in accordance with the general practice of nations⁵; and in *The Henrick and Maria* he emphasised the same principle, holding that "deductio infra praesidia" was not enough, that a purchaser's title can be based only on a sentence of condemnation; and therefore the prize must be brought in for adjudication.⁶ There are American judicial pronouncements to the

¹The present chapter should be supplemented by Lord Birkenhead (then Sir Frederick Smith), *The Destruction of Merchant Ships under International Law* (London, 1917).

²Prize bounty is awarded by the British Prize Court under the Naval Prize Act, 1864, sec. 42 (cf. *O. in C.* 2 March, 1915), for the destruction of an enemy warship; cf. *The Carmania* (1916), 32 T. L. R. 395; *The Sydney* (1916), P. 300. Prize bounty is a purely naval reward; no award is made if the destruction results from joint naval and military action: *H.M.S. Triumph and Ush* (1917), P. 127. Where an enemy warship is sunk by her own crew to avoid capture by a British squadron which was present, prize bounty may be awarded: *The Meteor* (1916), 2 B. & C. P. C. 313. Cf. *The Canopus* (1917), P. 47.

³Cf. *The Santa Cruz* (1798), 1 C. Rob. 49, at pp. 58 seq.

⁴Cf. Oppenheim, ii, § 185.

⁵*The Flad Oyen* (1799), 1 C. Rob. 135.

⁶*The Henrick and Maria* (1799), 4 C. Rob. 43, at p. 55. Cf. *The Kierlighett* (1800), 3 C. Rob. 96; *The Cosmopolite* (1801), 3 C. Rob. 333.

same effect¹; and in 1905 the Russian Prize Court held a like view.² Similarly, in 1915, Lord Mersey, delivering the judgment of the Privy Council, observed: "The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure, and to transfer it, as from that date, to the Sovereign or to his grantees."⁸

In practice, systematic destruction of enemy prizes has been the exception,⁴ and the general rule is that all prizes are brought in for adjudication, unless there are practical difficulties in the way of such a course. Such difficulties have been, for instance, distance from a port of the captor, the danger of compromising the safety of the captor's vessel or the success of the operations in which she is engaged, the unseaworthy character of the prize, lack of men to form a prize crew, lack of provisions, or water, or presence of disease.⁶

When impossible to bring in.

In *The Felicity*,⁶ Lord Stowell stated that if it was impossible to bring in, the next duty was to destroy, an enemy ship, and held destruction to be justified by showing that the immediate service on which they (the captors) were engaged, that of watching the enemy's ship of war, the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. "Under this collision of duties, nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If it is impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss.

In *The Leucade*⁷ it was said that it might be "justifiable or even praiseworthy" to destroy an enemy vessel.

The view of the American Courts was illustrated in the case of *The Admittance*⁸: "As a general rule, it is the duty of the captor to bring it (the captured vessel) within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to
American view.

¹Cf. *Miller v. The Resolution* (1781), 2 Dallas, 1; *Commodore Stewart's Case* (1864), 1 Ct. Cl. 113.

²*The Knight Commander* (1905), 1 R. & J. Pr. Cas. 73.

³*The Odessa* (1916), A. C. 145, at p. 153. Cf. *The Appam* (1917). *Amer. Journ. of Int. Law*, April 1917, p. 443. The American Supreme Court did not make an explicit pronouncement on the point; but from the decision it may be inferred that condemnation is necessary to pass ownership.

⁴In 1812 the United States burnt all, and in the American Civil War the *Alabama* burnt most, of the enemy ships captured.

⁵Smith, *op. cit.*, pp. 27 seq.

⁶(1819), 2 Dodson, 38, at pp. 385, 386; cf. also *The Acteon* (1815), 2 Dodson, 48,

⁷(1855), Spinks, 217.

⁸*Jecker v. Montgomery* (1851), 13 Howard, 498.

have it condemned. . . . But there are cases when, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before adjudication. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient crew to man the captured vessel, or when the orders of his Government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States. But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and may award restitution and damages against the captor, although the seizure as prize was originally lawful or made upon probable cause."

The ship in this case had been sold, but it would appear that the reasoning is equally applicable in the case of destruction. It will be shown later how the suggestion contained in the last sentence above quoted was adopted by the Conference of London, as providing one of the chief safeguards against destruction of neutral vessels.

Continental
practice.

The French Court in 1872 went so far as to hold in the case of two German vessels, the *Ludwig* and the *Vorwarts*,¹ which had been destroyed, that no indemnity was payable to the owners of neutral goods which had been destroyed with the vessels: "The Declaration [of Paris] does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture. . . . The destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because from the large number of prisoners on board no part of the crew could be spared for the navigation of the prize, such destruction was an act of war, the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity."

During the Great War the French Prize Court adopted the rule that the destruction of an enemy merchantman is legally justifiable, when the circumstances of the case imperatively demand it, e.g. if the preservation of the prize would have jeopardised the operations of the captor's cruiser²; if it was impossible to take the vessel into port owing to the unfavourable state of the sea or stress of weather³ if she was in an unseaworthy condition⁴; and, generally, if demanded

¹ Calvo, vol. v. sec. 3033; Atherley-Jones, p. 398.

² *The Mahrousseh* (1915). *Journal Officiel*, 17 Dec. 1915.

³ *The Jabr-el-Kavatsr* (1915), *ibid.*, 4 Jan. 1916.

⁴ *The Cheref* (1915). *ibid.*, 9 Jan. 1916.

by the military necessity of the captor,¹ The same principles were held to be applicable to absolute contraband cargoes.*

Similarly, the German Prize Court held³ that if destruction of the prize is permissible on the ground of military necessity, the destruction of neutral cargo on board is likewise permissible, and the owner thereof is not entitled to indemnity under the Declaration of Paris.⁴

Russia, too, issued regulations and instructions in 1895, and again in her war with Japan, which authorised the destruction of prizes, whether enemy or neutral,⁵ "in exceptional cases, where the preservation of a captured vessel appears impossible, on account of her bad condition or entire worthlessness, the danger of her recapture by the enemy, or the great distance or blockade of ports, or else on account of danger threatening the ship which has made the capture or the success of her operations." In the case of the sinking of the *Knight Commander* in 1905, a strong protest by the British Government produced an assurance that no more neutral vessels would be sunk; and in the similar case of the *Thea* in the same year, compensation was paid to its German owners.⁶

On principle, there can be little doubt that, if the right to capture private property at sea is conceded at all, the destruction of enemy prizes is justifiable, in circumstances of *force majeure*; the chief safeguard against it lies in the fact that it is not to the interest of the captor to destroy what is certain to become his own property, if such destruction can at all be avoided.

Whatever difference of opinion and practice there has been in regard to the circumstances of *force majeure* justifying the destruction of enemy merchantmen, there is and has been unanimity as to the obligation imposed on captors to provide first for the safety of passengers and crew on board and for the preservation of the ship's papers. This rule is explicitly enforced in the naval regulations of maritime States,⁷ emphasised by jurists, and has been generally observed in the actual practice of wars.⁸

Hence it follows that enemy merchantmen may not be sunk or otherwise destroyed without warning,⁹ and that, even though warning

Safety of
passengers
and crew.

Warning
necessary.

¹ *The Selimie* (1916), *ibid.*, 13 March, 1916.

² *The Catania* (1915), *ibid.*, 11 Feb. 1916.

³ *The Glitra* (1915). *Atner. Journ. of Int. Law*, Oct. 1916, p. 921; *The Indian Prince* (1916), *ibid.*, p. 930.

⁴ There has been some doubt on the point, but the decision is in accordance with sound principle.

⁵ *Report of Royal Commission on supply of food and raw material in time of war*, p. 25, 1903, Cd. 2643.

⁶ As to destruction of neutral prizes, see *infra*, p. 424.

⁷ Smith, *op. cit.*, pp. 46 seq.

Ibid., pp. 49, 50.

⁹ Cf. the observation of Lord Stowell in *The Peacock* (1802), 4 C. Rob. 185, at p. 187. For an attempt to provide rules for future submarine warfare by the Treaty of Washington, 1922, see pp. 16, 395, *supra*.

be given, such means of attack should not be adopted as would render it impossible for the attacking forces to conform to the rule;

Use of submarines against merchantmen.

It follows, again, that the use of submarines against merchantmen is illegitimate, if due provision is not made for safety of the crew, passengers and ship's papers, and the status and character of the vessel and cargo are not verified.¹ The use of new weapons in warfare is not permissible, except in conformity with the rules of international law; and no single nation, as an American court said, may change the law of the sea.²

Resistance by merchant

Whilst merchantmen may not take part in offensive operations, they are permitted to evade search or defend themselves in case of attack³; it may not be prudent to offer resistance to a warship, but it is not illegal.

Armed merchantmen.

The use of arms by a merchant ship⁴ for purposes of self-defence is legitimate; the practice is sanctioned by the long-established custom of many maritime Powers, and in this country it has been in use for at least three centuries. It has been recognised in courts of law⁵ and in the naval codes and ordinances of several States⁶; and during the Great War various neutral Governments admitted its legality. Hence, all that has been said above with regard to unarmed merchantmen applies equally to armed merchantmen.⁷

Ransom.

Some nations have, in mitigation of the extreme rigour of the, right of destruction, adopted the principle of ransom, in accordance with which the master of the prize is allowed to buy back the vessel by giving a ransom bill to the captor and, usually, a hostage as collateral security. The British Courts⁸ held that an alien enemy having no *locus standi* could not sue upon a ransom bill, payment being only enforceable indirectly through an action by the hostage for the recovery of his freedom.⁹ In 1782 ransoming was prohibited by

¹Cf. the British and American Notes of 1915 and 1916; Smith, *op. cit.*, PP. 52, 53.

²*The Scotia* (1871), 14 Wall. 170.

³Cf. *The Two Friends* (1799), 1 C. Rob. 271; *The Nereide* (1815), 9 Cranch, 388; *Le Pigou* (or *Pigou*) (1800), 2 Kstoye et Duverdy, 51 (for other references and fuller discussion, see Smith, *op. cit.*, pp. 18 seq.)*.

⁴On the question of armed merchantment see A. Pearce Higgins, *Defensively Armed Merchantmen and Submarine Warfare* (London, 1917), and the same author's *Armed Merchant Ships*, in *Amer. Journal of Int. Law*, vol. viii. (1914). PP. 705 seq.

⁵Cf. *The Panama* (1899), 176 U.S. 535.

⁶Cf. the Regulations of the United States of 25 March, 1916: *Amer. Journ. of Int. Law*, Supplement, Oct. 1916, pp. 367-72.

⁷The words "armed ship" (as used in the O, in C. of 2 March, 1915, awarding prize bounty in case of destruction of armed vessels of the enemy) refer only to a fighting unit of the Fleet, i.e. a ship commissioned and armed for offensive action in naval warfare: *H.M., Submarine E 14* (1920), A. C. 403.

⁸*Anthony v. Fisher* (1781), Doug. Rep. 649, n. And on the whole question see *Atherley-Jones, Commerce in War*, pp. 640 seq.

⁹*The Hoop* (1799), 1 C. Rob. 196, 201.

statute¹ as being against public policy, but under a later statute² power was reserved to issue regulations by Order in Council permitting or forbidding ransom contracts. The practice has been approved in the United States³ and treated as an exception to the rule against trading between enemies; it is approved in France and Spain with limitations in the case of privateers⁴; but is prohibited in Sweden, Denmark, Holland and Russia.

2. NEUTRAL PRIZES

The obligations of belligerents in regard to enemy merchantmen apply much more emphatically to the case of neutral merchantmen,⁵ necessary. so that the authorities cited for the former may be invoked *a fortiori* for the latter. Under the customary law it has long been an established rule • that captured neutral vessels must be taken in for adjudication, and if this be found impossible they must be released, even if there be a doubt whether they are neutral or enemy. The plea of military necessity will not avail; and the captor may not arrogate to himself the functions of a judicial tribunal. It is only a valid condemnation of a prize court that transfers the ownership to the captor; till then he is not entitled to deal with the prize as he deems fit. So long as neutral vessels do not encroach within the defined war-zone, and do not violate their neutrality (e.g. by blockade running, contraband trading or unneutral service), they must be left alone, subject, of course, to visit and search in case of suspicion.

An attack on a neutral vessel is excusable if it is the result of error, if she accidentally enters the area of action and the act results from the legitimate operations against the enemy; and it is justifiable if, after one warning, she deliberately enters therein,⁷ or acts in complicity with the enemy, or repeatedly attempts to escape after the summons to heave to, or offers forcible resistance to visit. (Unlike an enemy merchantman, a neutral merchantman may not resist visit and search, unless the belligerent acts in a manifestly illegal

¹22 Geo. III. c. 25.

²The Prize Act, 1864 (27 & 28 Vict. c. 25); and cf. the rejected Naval Prize Bill, 1910, sec. 40.

³*Goodrich v. Gordon* (1818), 15 John. 6; and cf. *Maisonnaire v. Keating* (1815), 2 Gall. 325, in which the principle is approved when applied between belligerents and neutrals.

⁴Atherley-Jones, *Commerce in War*, p. 641.

⁵See Smith, *op. cit.*, pp. 70 seq.

⁶Cf. *The Felicity* (1819), 2 Dods. 381, at p. 385; *The Acteon* (1815), 2 Dods. 48; *The Leucade* (1855), Spinks, 217, at pp. 221, 222.

⁷Cf. the case of the *Hoffnung* (1800), Ortolan, *Dip. de la mer*, ii. pp. 30, 31.

manner.) Mere suspicion can never be a valid ground for attacking a merchantman.¹

The rule of international law on this subject was correctly stated in the American Note to Germany, 10th February, 1915: "... The sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained. . . . To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that the Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognised."²

When
destruction
permissible.

But it has been recognised even by our own Courts that there may be exceptional cases in which the destruction may be justified, though not without paying full compensation to the owner; if for instance a squadron of the enemy is near, so that it is impossible to put a prize crew on board, and to release the ship would mean that; it might convey information to the enemy³; and from the cases the rule was inferred, not that destruction is never permissible, but that the owner must always be compensated, however justifiable the destruction may have been from the belligerent point of view.⁴ The rule of non-destruction, however, has been consistently observed in a long succession of past wars until the beginning of the present century; in the Russo-Japanese War, the Russian forces sank a number of neutral vessels⁵; and in the Great War the German forces destroyed a great number of neutral vessels⁶—one of the factors that influenced the United States to enter the war. After the Russo-Japanese War, juristic doctrine tended in favour of destruction in certain clearly-defined conditions, e.g. when the neutral prize was found carrying such contraband as arms and munitions in very large quantities, and

¹ Cf. Sir Edward Fry, *The Rights of Neutrals as illustrated by Recent Events* (a paper read before the British Academy, 23 May, 1906), in *Proceedings of the British Academy*, vol. ii., p. 3; cited in Smith, *op. cit.*, pp. 76-8.

² *Amer. Journ. of Int. Law, Supplement*, vol. ix. (July 1915), pp. 86, 87.

³ *The Acteon* (1815), 2 Dods. 48.

⁴ Cf. *The Felicity* (1819), 2 Dods. 381; *The Leucade* (1855), Spinks, 217. But as to the alleged "justification" of destruction on payment of compensation, see Smith, *op. cit.*, pp. 87-90. There is a doubt, however, as to the duty to compensate, if the vessel was clearly liable to confiscation.

⁵ See *supra*, p. 423, and Smith, *op. cit.*, pp. 91-4.

⁶ The number is estimated at 1716, and the number of neutral seamen drowned at 2000: Oppenheim, ii. § 431a.

it was impossible to take her in; and it was felt, too, that the views of various States were becoming more markedly opposed to the British practice.

At the Second Peace Conference in 1907, an attempt was made to arrive at an agreement on the question, but in vain.¹ The Conference of London in 1908-9 was more successful. On the general principle that it is the duty of the captor to take the prize in, there was practical unanimity among the nations represented at that Conference, and this agreement was embodied in Article 48 of the unratified Declaration of London.

"A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture."

It was the desire of Great Britain at the Second Peace Conference to make this rule absolute; and at the Conference of London, Austria, Japan and the Netherlands took up a similar attitude. It was agreed, however, that there were circumstances in which destruction might be justifiable; and the chief subject of contention was the character of these circumstances. Particular objection was taken by Great Britain and Spain to admitting inability to spare a prize crew as an excuse, as this would justify destruction in the majority of cases where the captor had no port of his own near at hand, and would involve great hardship to the passengers and crew of the prize, who would be exposed to the risks incurred on board a belligerent warship.

The ultimate decision at the London Conference was in the nature of a compromise, which defined the circumstances in which destruction was permissible:

"As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time " (Article 49).

Article 50 contained provision for the safety of the persons on board the prize and for the preservation of the necessary evidence:

" Before the vessel is destroyed, all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship."

¹ See Smith, *op. cit.*, pp. 95-7.

Proof of
exceptional
necessity.

A further safeguard against reckless destruction was contained in Article 51:

"A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not."

The provisions of Article 51 were substantially new, though they in effect adopt the suggestion made by the American Court in *The Admittance*,¹ and, taken with the provisions of the other Articles on the subject, they would, if they had become law, have provided in theory very effectually against reckless destruction by belligerents, and realised the aim of the British Government, which was to reduce the practice of destruction within the narrowest possible limits.

Destruction
of cargo.

We have seen that by Article 44 it was provided that a vessel not liable to condemnation because the contraband on board was less than the proportion of one-half, might be allowed to go free, instead of being taken in for adjudication, if she were willing to hand over, and the captor were willing to receive, the contraband cargo. It was agreed to be unreasonable to compel the belligerent in all cases, where the neutral did not agree to hand over the contraband, to allow the vessel to proceed if he were unable to take her into port. It was decided, therefore, to give to the captor the right to seize and destroy the contraband if the circumstances were such that the vessel, if herself liable to condemnation, might with justification be destroyed, and provisions to this end were included in the unratified Declaration.

Compensa-
tion after
release.

It is convenient at this point to refer to the general provision contained in the Declaration of London, relative to cases where vessels or goods are seized and afterwards released:

" If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods " (Article 64).

This principle is of general application, whatever the cause for which the capture was made; and it applies whether the release be after judgment or by the intervention of the executive.

¹ See p. 421, *supra*.

The British Courts¹ have held that restitution may be attended with any one of the following consequences:

1. The claimants may be ordered to pay to the captors their costs and expenses.
2. The restitution may be simple restitution without costs or expenses or damages to either party, or
3. The captors may be ordered to pay costs and damages to the claimant.

Each case must be decided according to its own circumstances, and the ship will not obtain compensation if her capture was due to her own misconduct, or was made in circumstances of suspicion ; but the captor must show reasonable and probable cause for the capture, and will not be excused by honest mistake.² The most important grounds of suspicion, which, if not actually entailing in themselves confiscation, yet prevent the claimant from being treated with any leniency, are the possession of false or double documents, and the spoliation (destruction) of papers.³ In the case of *The Allanton*, which has already been referred to,⁴ the Russian Court, with no justification, included among such grounds the fact that the vessel only stopped after two blank shots were fired, that her cargo was received at an enemy port, that she sailed on an unusual course, and that she had carried contraband on a previous voyage.⁵

By the Declaration of London, the question of the circumstances was properly left to the decision of the Court, and this was the practice followed by British Prize Courts. But in examining the circumstances justifying suspicion the Court did not consider that it was bound to confine itself to circumstances for which the owner of the goods was responsible; it was free to consider circumstances at large. In *The Baron Sjernblad*,⁵ cocoa beans (which were contraband) consigned to Sweden were seized on board a neutral vessel, the ground of suspicion being the enormous increase in the export of cocoa from Sweden to Germany since the outbreak of war in 1914. This was held to be sufficient to justify the need for inquiry and to disentitle the Swedish claimant, although successful in obtaining the release of his goods, from recovering costs, damages or expenses.

If the vessel or the cargo is released without being taken before a prize court at all, the practice of nations has been conflicting.

Release
before
adjudication.

¹ *The Ostsee* (1856), 5 Moore, P. C. 150; *The Leucade* (1855), Spinks, 217; *The Acteon* (1815), 2 Dods. 48, 51; *The Rufus* (1815), 2 Dods. 48, 55.

² *The Ostsee* (1856), 5 Moore, P. C., at p. 162.

³ *The Rising Sun* (1799), 2 C. Rob. 106; *The Hunter* (1815), 1 Dods. 487; *The Johanna Emilie* (1854), Spinks, 22.

⁴ See p. 350, *supra*.

⁵ (1904), 1 R. & J. Pr. Cas. 1, at p. 16.

⁶ (1918), A. C. 173.

National courts in some cases have, and in others have not, jurisdiction to entertain a claim for compensation based upon the ground that the capture would, on inquiry, have proved unjustifiable. The rule was laid down in the terms stated above; but in the Report explaining the rule, it is pointed out that " if the action of the belligerent has been confined to the capture, it is the law of the belligerent captor which decides whether there are tribunals competent to entertain a demand for compensation, and if so, what are those tribunals: the International Court has not, according to the Convention of the Hague, any jurisdiction in such a case. From an international point of view, the diplomatic channel is the only one available for making good such a claim, whether the cause for complaint is founded on a decision actually delivered, or on the absence of any tribunal having jurisdiction to entertain it."

There was some discussion as to whether the compensation should include what were called indirect damages, such as loss of business; and it was finally agreed that no rule should be laid down, the proposed International Prize Court being left to estimate the compensation at its discretion.

The Declaration not ratified.

It may be repeated, in conclusion, that as the Declaration of London has not been ratified it does not possess, as such, binding force.¹ Accordingly, the customary law alone remains applicable, with which, however, the Declaration agrees in many respects. In* these circumstances a belligerent is entitled to adopt, modify or reject any of the provisions of the Declaration (as the belligerents in the Great War did), provided that such adoption, modification or rejection involves no inconsistency with the customary law, to the disadvantage of neutrals.²

¹*Ci The Proton* (1918), A. C. 578; *The Hakan* (1918), A. C. 148; *The Louisiana* (1918), A. C. 461.

²See *supra*, p. 340.

TABLE OF JUDICIAL CASES

Cases of arbitration, and those arising out of various kinds of international transactions, will be found in the Index of Subject Matter.

<i>Abdallah v. Richards</i> (1888).	281	<i>Baron Stjernblad, The</i> (1918).	419, 429
<i>Abd-ul-Messih v. Farra</i> (1888) ..	281	<i>Batavier II., The</i> (1918).	410
<i>Acteon, The</i> (1815).	421, 425, 426, 429	<i>Bawean, The</i> (1918).	410
<i>Adelaide Rose, The</i> (1799).	386	<i>Belgia, The</i> (1915, 1916)....	199, 201
<i>Admittance, The</i> (1851).	421, 428	<i>Benedict, The</i> (1855).	276
<i>Adonis, The</i> (1804).	390	<i>Benito Eslenger, The</i> (1900).	347, 349
<i>Adula, The</i> (1899).	389	<i>Bentzon v. Boyle</i> (1815).	282
<i>Aina, The</i> (1854).	275, 285	<i>Berens v. Rucher</i> (1758).	332
<i>Albania, The</i> (No. 2) (1916).	370	<i>Berlin, The</i> (1914).	271
<i>Alexander, The</i> (1801).	390	<i>Bermuda, The</i> (1865)..	353, 362, 390
<i>Alexandra, The</i> (1863).	311	<i>Bertha Elizabeth, The</i> (1915).	419
<i>Allanton, The</i> (1904)——	350, 364, 429	<i>Betsey, The</i> (1799).	384, 387
<i>Alleganean, The</i> (1885).	105	<i>Bird, The</i> (1903).	347
<i>Alvina, The</i> (1916).	29, 365, 366	<i>Bjorn, The</i> (1915).	274
<i>Anglo-Mexican, The</i> (1917-18)....	281	<i>Blonde, The</i> (1922).	200, 269
<i>Anna, The</i> (1805).	314, 316	<i>Boedes Lust, The</i> (1804).	188
<i>Anna Catharina</i> (1802).	280, 333	<i>Bon Voyage, The</i> (1916).	280
<i>'Anne, The</i> (1818).	71, 93, 316	<i>Bonna, The</i> (1918).	363
<i>Antares, The</i> (1915).	328	<i>Boussmaker, ex parte</i> (1806).	192
<i>Antelope, The</i> (1825).	49	<i>Brunswick, Duke of, v. King of Hanover</i> (1844).	127
<i>Anthon v. Fisher</i> (1781).	424	<i>Brymer v. Atkins</i> (1789).	332
<i>Antwerpen, The</i> (1919).	371	<i>Buena Ventura, The</i> (1899)...	190, 199
<i>Apollo, The</i> (1802).	347		
<i>Appam, The</i> (1917).	323, 421	<i>Calchas, The</i> (1904)——	346, 347, 397
<i>Arabia, The</i> (1904).	346, 347	<i>Canopus, The</i> (1916).	420
<i>Ariel, The</i> (1857).	276, 277, 285	<i>Canton, The</i> (1916).	328
<i>Arthur, The</i> (1814).	375, 377	<i>Cardagli v. Cardagli</i> (1919).	281
<i>Arton, in re</i> (1896).	131	<i>Carlos F. Roses, The</i> (1899)	
<i>Aryol, The</i> (1905).	243		275, 283, 285, 413
<i>Atalanta, The</i> (1808).	397, 398	<i>Carmania, The</i> (1916).	420
——(1818).	412, 416	<i>Caroline, The</i> (1802)....	397, 400, 403
<i>Atlas, The</i> (1801).	285	——(1807).	397, 401, 405
<i>Attorney-General v. Sillem</i> (1863)..	311	<i>Castioni, in re</i> (1891).	131
<i>Attorney-General for British Columbia v. Attorney-General for Canada</i> (1914).	105	<i>Catania, The</i> (1915).	423
<i>Attorney-General for Hong-Kong v. Kwok-a-Sing</i> (1873).	134	<i>Ceres, The</i> (1814).	293
<i>Australia, The</i> (1906).	294	<i>Ceylon, The</i> (1811).	289
<i>Axel Johnson, The</i> (1917).	353	<i>Charlotta, The</i> (1810).....	380
		<i>Charlotte, The</i> (1804).	347, 348
<i>Bain v. Speedwell</i> (1784).	293	<i>Charming Betsey, The</i> (1804).	19
<i>Balitica, The</i> (1857).....	276	<i>Chavasse, ex parte, re Grazebrook</i> (1865)	330, 341
<i>Balto, The</i> (1917).....	353, 362	<i>Ckeref, The</i> (1915).	422
<i>Bangor, The</i> (1916).	304, 315, 403	<i>Cherokee nation v. State of Georgia</i> (1821).	37
<i>Barenfels, The</i> (1915, 1916).....	199	<i>Christine, The</i> (1854).	277
——(No. 2) (1915).	51	<i>Circassian, The</i> (1864)..	372, 389, 390

- Citto, The* (1800). 280
Clan Grant, The (1915). 280, 281
Clarke v. Cretico (1808). 71
Colonia, The (1915). 280, 283, 285
Columbia, The (1799). 376, 377, 378, 383, 390
Comeia, The (1916). 356
Commercen, The (1816). 347, 349, 370
Commodore Stewart's case (1864). 421
Constantia, The (1808). 397
Cook v. Sprigg (1899). 12, 299
Cosmopolite, The (1801). 420
Curlew, The (1812). 328
Cutting's Case (1886). 130

Daiffie, The (1800). 248
Daksa, The (1917). 285
Danckebaar Africaan, The (1798). 276
Dashing Wave, The (1866). 373
De Haber v. The Queen of Portugal (1851). 127
De Witt v. Hendricks (1824). 306
Derfflinger, The (1916). 199
 —(No.1)(1915). 281
Diana, The (1803). 381
Direct United States Cable Co. v. The Anglo-American Telegraph Co. (1877). 96, 105, 168
Dirigo, The (1919). 410
Doelwijk, The (1896). 294, 355
Dos Hermanos, The (1817). 211
Drottning Sophia, The (1917). 353
Duff Development Co. v. Kelantan Government (1924). 33, 128
Dupont v. Pichon (1805). 68
Dusseldorf, The (1920). 315

Edna, The (1921). 278
Edward, The (1801). 347, 360, 369
Eleanor, The (1817). 418
Elida, The (1915). 28
Eliza Ann, The (1813). 190, 291
Eliza Holtz, The (1784). 367
Ella Warley, The (1862). 328
Emma, The (1810). 196
Emmens v. Pottle (1885). 396
Endraught, The (1798). 277, 347
Ernst Merck, The (1854). 277
Esposito v. Bowden (1857). 193
Eumusus, The (1915). 281
Exchange, The v. M'Faddon (1812). 120, 128

Fagerness, The (1926). 105
Fama, The (1804). 91, 254
Fanny, The (1815). 411
Featherstonhaugh v. Boffi (1854). 146
Federico, The (1915). 400, 402, 419
Felicity, The (1819). 421, 425, 426
Fenix, The (1914). 275, 285

Fenton Textile Association v. Krassin (1922). 64
Fisher v. Begres (1832). 67
F/otf (fyett, The). 289, 420
Flamenco, The (1915). 280, 281
Fleming v. Page (1850). 254
Forest King, The (1861). 381
Forsvik, The (1916). 370
Frances, The (1814). 283
Francisco Suarez, deceased, in re, Suarez v. Suarez (1917). 68
Franciska, The (1854). 373, 375, 376, 377, 378, 379, 382, 383, 386, 389
Franconia, The (1876). See *R. v. Keyn*. 17, 101
Franklin, The (1801). 369
Frau Isabe, The (1801). 373
Frederick Molke, The (1798). 364, 376, 377, 378
Freundschaft, The (1819). 280
Friendship, The (1807). 400

Gagara, The (1919). 129
Gelpel v. Smith (1872). 376
General Hamilton, The (1805). 276, 388
Gerasimo, The (1857). 254, 282
Germania, The (1915, 1917). 199, 201
Glitra, The (1915). 423
Gloire La (1804). 248
Goodrich v. Gordon (1818). 425
Goss v. Withers (1759). 289
Grange, The (1793). 105
Griswold v. Waddington (1819). 192
Gutenfels, The (1915, 1916). 51, 199, 201, 282
 —(No. 2) (1915). 199

Haabet, The (1800). 347, 358, 367
Hakan, The (1916, 1917). 340, 346, 347, 360, 362, 363, 368, 369, 370, 408, 430
Hamborn, The (1917). 279
Hampton, The (1866). 285
Hanna Larsen, The (1914). 286
Hardy, he v. Voltigeante, La (1799). 283
Harmony, The (1800). 280
Hart, The (1865). 354
Haver v. Yaker (1869). 142
Heathfield v. Chilton (1767). 17
Helen, The (1855). 341
Henrik and Maria, The (1799). 382, 420

Hillerod, The (1918). 370
Hilton v. Guyot (1894). 19, 24
H.M. Submarine E 14 (1920). 216, 424
Hobbs v. Henning (1865). 354
Hoffnung, The (1805). 376, 377, 389, 425
Holbrook v. Henderson (1851). 69

INDEX OF CASES

433

- Hoop, The* (1799)... 192,194, 286, 424
Hope, The (1808)... 397
 —(1813)... 195
Hugh Stevenson and Sons v. Ahtien-
gesellschaft far Cartonnagen In-
dustrie (1918)... 192
Hunter, The (1815)... 429
Hurtige Hane, The (1799)... 381
Hypatia, The (1916)... 280

Imina, The (1800)... 354, 364, 365, 390
Immanuel, The (1799)... 332
Indian Chief, The (1801)... 280
Indian Prince, The (1916)... 423
Indianic, The (1916)... 356
Industrie, The (1905)... 402
Ionian Ships, The (1855)... 36
Iowa v. Illinois (1893)... 113
Iro Maru, The (1916)... 400
Isaacson v. Durant (1886)... 122

Jabr-el-Kavater, The (1915)... 422
Jacobus Christian v. R. (1925)... 99
Jan Frederick, The (1804).. 276, 284
Jeanne, The (1916)... 370, 410
Jecker v. Montgomery (1851)... 421
Jemmy, The (1801)... 277
Jenny, The (1866)... 413
Johanna Emilie, The (1854)... 429
John, The (1818)... 292
Johnson v. McIntosh (1823)... 94
Jonge Klassina, The (1804)... 280
Jonge Margaretha, The (1798)
 346, 347, 348, 360, 362
Jonge Petronella, The (1799)... 385
Jonge Pieter, The (1801)... 347
Jonge Thomas, The (1801)... 333
Jonge Tobias, The (1799)... 368, 369
Josephine, The (1801)... 275, 283, 285
Juffrouw Anna, The (1799)... 277
Juffrow Maria, The (1800)... 382
Juffrow Maria Schroeder, The (1801),
 388
Juno, The (1903)... 347

Kaisserie, The (1913)... 243
Katwijk, The (1916)... 353
Kennet v. Chambers (1852)... 306
Kierlighett, The (1800)... 420
Kim, The (1915)
 347, 360, 361, 362, 363, 392
Klingender v. Bond (1811)... 196
Knight Commander, The (1905)
 421, 423
Kronprinsessan Margareta, The (1917)
 (1920)... 284
 —(1921)... 371, 410

Leonora, The, and other vessels (1918),
 29, 329, 375

Leucade, The (1855)
 27, 421, 425, 426, 429
Lincluden, The (1903)... 365
Lokken, The (1918)... 105, 316
Lola, The (1899)... 19, 24
Louise Charlotte de Guideroni, The
 (1813)... 196
Louisiana, The (1918).. 340,363,430
Ludwig, The (1872)... 422
Luna, The (1810)... 373
Lydia, The (1906)... 365

Macartney v. Garbutt (1890)
 24, 65, 68
Macleod v. Attorney-General for New
South Wales... 130
Madison, The (1810)... 397
Magdalena Steam Navigation Co. v.
Martin (1859)... 68
Magnet, The (1812)... 328
Magnus, The (1798)... 413
Mahrousseh, The (1915)... 422
Maisonnaire v. Keating (1815)
 347, 349, 422
Major Barbour, The (1862)... 381
Manningtry, The (1915)... 280, 281
Margaret, The (1810)... 365
Maria, The (1799)
 17,27,348,414,415
 —(1915)... 271
Marianna, The (1805)... 275, 285
Marianna Flora, The (1826)... 390,419
Marie Glaeser, The (1914)
 212, 275, 285
Marryat v. Wilson (1799)... 142
Mary, Duchess of Sutherland, in re
 (1915)... 194
Mather v. Cunningham (1909)... 281
Mavromatis Palestine Concessions,
The (No. 1) (1924)... 179
 —(No. 2) (1925)
 179, 180
Memphis, The (1862)... 328
Mentor, The (1799)... 291
Menzaleh, The (1912)... 411
Mercurius, The (1799)... 370, 385
Mermaid, The (1795)... 311
Messicano, The (1916)... 129
Meteor, The (1916)... 420
Meunier, in re (1894)... 132
Mighell v. Sultan of Johore (1894) 127
Miller v. The Resolution (1781)... 421
M'Ilvaine v. Cox's Lessee (1808)... 44
Minerva, The (1807)... 276
Minerve, La (1801)... 349
Miramichi, The (1914)
 270, 275, 285, 408
Molly, The (1814)... 294
Montara, The (1906)... 294, 333

- Montellano, Duke de v. Christian* (1816). 68
- Mowe, The* (1914). 194, 199, 200, 201
- Musgrove v. Chun Teeong Toy* (1891), 126
- Musurus Bey v. Gadban* (1894). 68
- Nancy, The* (1800). 365
- (1809). 375
- (1892). 416
- Naylor v. Taylor* (1829). 376
- Neptunus, The* (1799). 383, 385
- (1800). 347, 370
- Nereide, The* (1815) 368
- 19, 216, 408, 416, 424
- Neutralitet* (1801). 368
- New Chile Gold Mining Co. v. Blanco* (1888). 69
- Newa, The* (1912). 411
- Nigretia, The* (1905) 285, 396, 399, 400
- Niobe, The* (1917). 362
- Noordam, The* (1920). 274
- Nostra Signora di Begona, The* (1804), 347
- Novello v. Toogood* (1823). 67
- Noydt Gedacht, The* (1799). 277
- Nuestra Señora de Regla, The* (1882), 380
- Nymph, The* (1803). 293
- Odessa, The* (1914, 1915), ... 28, 275, 285, 322, 421
- Olindo Rodrigues, The* (1898). 376
- Ophelia, The* (1916). 244
- Orduna, The* (1915). 281
- Orel, The (or Aryol)* (1905). 243
- Oroxembo, The* (1807). 397, 399, 401
- Ostsee, The* (1856). 27, 429
- Packet de Bilboa, The* (1799). 274
- Paklat, The* (1915). 270
- Panaghia Rhomba, The* (1858), ... 381, 390
- Panama, The* (1899). 199, 421
- Panariellos, The* (1915, 1916). 193
- Paquete Habana, The* (1899) 19, 24, 271
- Parana, The* (1919). 371
- Parchim, The* (1915, 1917). 275
- Parkinson v. Potter* (1885). 66, 68
- Parlement Beige, The* (1878) 119, 127, 129
- Peacock, The* (1802). 423
- Pedro, The* (1899). 199
- Pegou, Le [or Pigou]* (1800). 216, 424
- Pellworm, The* (1922). 315
- Peterhof, The* (1909). 342
- Peterhoff, The* (1866). 328, 347, 353, 354, 370, 373, 384
- phœnix, The* (1803). 281
- Pindos, The* (1915, 1916). 51
- Polly, The* (1800). 334
- Pontoporos, The* (1915). 289, 399, 403
- Poona, The* (1915). 281
- Porcher, Le* (1803). 292
- Porter v. Freudenberg* (1915). 194, 224
- Portland, The* (1800). 280
- Porto, The* (1914). 413
- Porto Alexandre, The* (1920). X29
- Posteiro, The* (1917). 371
- Postilion, The* (1779). 280
- Princessa, The* (1799). 333
- Prize Cases, The* (1862). 202
- Progresso, The* (1916). 411
- Proton, The* (1916, 1918) 279, 280, 364, 403, 430
- Procurator in Egypt, H.M. v. Deutsches Kohlen Depot Gesellschaft* (1919.) 201, 271
- Quangnam, The* (1905). 402
- R. v. Ahlers* (1915). 72
- *v. Anderson* (1868). 134
- *v. Cunningham* (1859). 105
- *v. Dawson* (1906). 134
- *v. Keyn (The Franconia)* (1876), 17, 24, 101, 102
- *v. Lynch* (1903). 124
- *v. The Superintendent of Vine Street Police Station, ex parti Liebmann* [1916]. 198
- Radcliff v. United Insurance Co.* (1810). 376
- Ranger, The* (1805). 314, 369
- Rapid, The* (1814). 397
- Rawenweig, The* (1922). 294
- Rebecca, The* (1811). 401
- Recovery, The* (1807). 17, 27
- Rena, The* (1921). 284
- Rendsborg, The* (1802). 333
- Republic of Bolivia v. Indemnity Mutual Marine Insurance Co.* (1909). 134
- Republic of Bolivia Exploration Syndicate, Ltd., in re* (1914). 68
- Richmond, The* (1804). 369
- Ricord v. Bettenham* (1765). 286
- Rijn, The* (1917). 339, 368
- Ringende Jacob, The* (1798). 360, 367
- Rising Sun, The* (1799). 429
- Robinson and Co, v. Continental Insurance Co. of Mannheim* (1914, 1915). 194
- Rodriguez v. Speyer Brothers* (1918), 192, 195
- Roland, The* (1915). 411, 413
- Rolla, The* (1807). 377, 379, 382
- Rosalie and Betty, The* (1800), ... 365, 390, 413

INDEX OP CASES

435

- Rosine, *La* (1800). 248
 Rothersand, *The* (1914). 279
 Roumanian, *The* (1914, 1915),
 269, 270, 282, 408
 Rufus, *The* (1815). 429
 Russell's (*Earl*) *Case* (1901). 130
 Russia, *The* (1904). 285
 Ruys v. Royal Exchange Assurance
 Co. (1897). 355

 St. Hilda, *The* (1908). 397
 St. Tudno, *The* (1916). 277, 279
 San Salvador v. Nicaragua (1917) 105
 Santa Crus, *The* (1798). 420
 Santissima Trinidad, *The* (1822). 311
 Sarah Christina, *The* (1799)
 358, 367, 370
 Schaffenius v. Goldberg [1916] . . . 194
 Schlesien, *The* (1914). 412
 Schoone Sophie, *The* (1805). 293
 Science, *The* (1866). 373
 Scotia, *The* (1871). 19, 424
 Sea Nymph, *The* (1901). 416
 Seeks Geschwistern, *The* (1801) . . . 276
 Secretary of State for India v. Sri Raja
 Chelhhani Rama Rao (1916). . . . 93
 Secretary of State for India v. Sahaba
 (1859). 52
 Silimi4, *The* (1916). 423
 Several Dutch Schuyts (1805) . . . 216
 Seymour v. The London and Provincial
 Marine Insurance Co. (1872) . . . 354
 Sheffield, *The* (1912). 411
 Sigurd, *The* (1917). 373
 Sitka, *The* (1855). 129
 Snipe, *The* (1812). 374
 Societi anonyme beige des Mines
 d'Aljustrel (Portugal) v. Anglo-
 Belgian Agency (1915). 282
 Society for the Propagation of the
 Gospel in Foreign Parts v. The Town
 of New Haven and Wheeler (1823),
 146
 Soglasie, *The* (1854). 277
 Solveig, *The* (1915). 279
 Sorfareren, *The* (1915). 340, 359, 368
 South African Republic v. La Com-
 pagnie Franco-Beige, etc. (1897), 128
 Southfield, *The* (1917). 284, 285
 Springbok, *The* (1866). 353, 391
 Staadt Embden, *The* (1798). 347, 369
 Statham v. Stathatn and the Gaekwar
 of Baroda (1912). 38, 128
 Stephen Hart, *The* (1863). 328, 391
 Stigstad, *The* (1916),
 29, 235, 236, 262, 329, 375
 Suareg v. Suaret (1917). 68
 Submarine E 14, H.M. (1920),
 216, 424
 Success, *The* (1812). 379
 Sudmark, *The* (1917). 51
 —(No. 2) (1917). 324
 Susan, *The* (1808). 397
 Sutton v. Sutton (1830). 146
 Svanfos, *The* (1919). 289
 Svithiod, *The* (1920). 407
 Swineherd, *The* (1803). 292
 Sydney, *The* (1916). 420

 Tergestea, *The* (1915). 286
 Thirty Hogsheads of Sugar, *The*
 (Bentzon v. Boyle) (1815). 28, 282
 Thornton v. Smith (1868). 32
 Thurn and Taxis (Princess) v. Moffat
 (1914). 194
 Tobago, *The* (1804). 275, 285
 Tommi, *The* (1914). 278, 279, 340
 Tootal's Trusts, re (1883). 281
 Trende Sostre, *The* (1807). 365
 Triheten, *The* (1805). 389
 Triquet v. Bath (1764). 16
 Triumph and Usk, H.M.S. (1917) 420
 Tubantia, *The* (1916). 274
 Turner, Le (1870). 285
 Twee Juffrewen, *The* (1802). 367
 Twendre Brodre, *The* (1801). 360
 Two Friends, *The* (1799). 424

 Union, *The* (1855). 386
 United States, *The* (No. 1) (1916). . . 284
 —(No. 2) (1917). 142
 U.S. v. Arredondo (1832). 142
 —v. Diekelman (1875),
 255, 272, 347
 —v. McRae (1869). 298, 299
 —v. Repentigny (1866). 300
 —v. Rice (1819). 254
 —v. Smith (1820). 135
 Usparicha v. Noble (1811). 195

 Venus, *The* (1814). 248
 Vera, *The* (1916). 370
 Vigilantia, *The* (1798). 277
 Villasseque's Case (1818). 254
 Viveash v. Becker (1814). 71
 Volant, *The* (1866). 373
 Volante, II (1807). 349
 Vorwärts, *The* (1872). 422
 Vrouw Judith, *The* (1799). 384
 Vrow Anna Catharina (1806) . . . 281, 316
 Vrow Margaretha, *The* (1799),
 276, 284

 Welvaart van Pillaw, *The* (1799),
 277, 388

- West Rand Central Gold Mining Co. v. The King* (1905)
 12, 18, 24, 298, 299
William, The (1806). 334, 362
Wimbledon, The (1923)
 103, 112, 176, 178, 182
Wilson v. Blanco (1889). 69
Wolff v. Oxholm (1817). 17, 197
Yangtze Insurance Association v. The Indemnity Marine Mutual Assurance Co. (1908). 396, 405
Zambesi, The (1914). 398, 399
Zamora, The (1916).. 28, 29, 278, 280, 327, 328, 329, 351, 361, 368, 375, 419
Zelden Rust, The (1805). 347

INDEX OF SUBJECT MATTER

For references to judicial cases see the preceding Index.

With regard to the various countries, the present Index contains certain references on particular points. To avoid excessive duplication the names of such countries as Great Britain, France, etc., have not been used as heads; the reader must therefore refer to the relative subjects.

- AALAND Islands, 51
- Aboukir, the, 245, n
- Absolute contraband. *See* Contraband
- Action, rights of, 222-4
 - military occupant not to prohibit, 192
- Adjudication in case of neutral prizes necessary, 425
- Admiralty jurisdiction, 134
- Aerial Navigation Acts, (1911) (1913) 116
- Aerial Warfare, explosive projectiles in, 226
 - Washington Conference (1922) on 205, n.
 - Commission (1922), suggested rules of, 227
- Africa, arms traffic, 100
 - Conventions of 1919. 37, 100, 101
 - General Act of African Conference of Berlin, abrogation of, 37
 - liquor traffic, 100
 - mandates in, 99
 - occupation of 37, 100
 - rivers of, 114
 - spheres of influence in, 97
- Agrippina, the, 312
- Air Convention (1919), 116-8
 - air routes, service of, 117
 - International Commission for Air Navigation, 117, 118
 - military aircraft, 117
 - navigation, rules of, enforcement of, 117
 - objections to, 118
 - private aircraft, regulation of, 117
 - prohibited areas, delimitation of, 117
 - salvage rules, application of, 117
 - sovereignty over air-space and territorial waters, 116, 117
- Aircraft, 116 *seq.*
 - attacks by, 225-7
 - foreign, right of passage of, 116
 - private, 117
 - problems raised by, 116
 - registration of, 117
 - state, 117
- Air-space, rights over, 116, 117
- Aix-la-Chapelle, Congress of (1818), 83
 - precedence of diplomatic agents, 64
- Alabama case, 26, 149, 152, 267, 311
- Alaska, boundary dispute, 93, 102, 103
 - cession of, 94
- Albania, Jugo-Slav invasion of, 15
- Aliens, admission of, 126, n.
 - enemy, position of, 126, 192 *seq.*
 - exemptions of, 126
 - extradition. *See* Extradition
 - immigration of, 126, n.
 - jurisdiction over, 126
 - liabilities of, 126
 - naturalisation of, 124, 126
- Allegiance, doctrine of, 123
- Allied subjects trading with the enemy, 193, 194
- Ambassadors, 48 *seq.*
 - extraterritoriality, 65 *seq.*
 - house of, 68
 - immunity from civil jurisdiction, 67
 - immunity from criminal jurisdiction, 65
 - inviolability, 64,
 - public affairs of the country to which accredited, participation in, 70
 - third states, position in regard to, 69
- American Civil War, belligerent status in, 202, 203
 - blockade in, 373, 375, 377, 384
 - conduct of belligerents, 204, 205
 - contraband, destination of, 353
 - neutral waters, hostilities in, 3x4
 - privateers, 212
 - prizes, treatment of, 421, n.
 - requisition of neutral ships and goods, 328
 - supply of neutral warships, 311
- Amiral Ganteaume, the, 271
- Andorra, 46

- Andre, Major, case of, 240
 Angary, right of, 327
 Anglo-French Agreement (1904), Straits of Gibraltar, as to, no
Appam, the, 323, n, 421. n.
 Annexation, title, as a, 91
 Arbitration, 149 *seq.*
 cases of. *For cases decided by the Hague tribunal, see infra.*
 Arbitration Permanent Court of
 Alabama, 152
 Behring Sea (1893), 133, 149, 172, n.
 Delagoa Bay, 149
 Florida Bonds, 149
 Newfoundland Fisheries, 152, 165
 Venezuela boundary, 85, 93, 95, 149, 152
 compulsory, 156
 contract debts recovered by, 152-154, 158
 decisions as evidence of international law, 26
 defects of, 172
 earlier times, in, 149
 fundamental principles, 156
 Judicial Arbitration Court proposed, 160-2
 constitution, 160, 161
 disagreement in regard to, 162
 powers, 161
 Permanent Court of, 157-160
 cases decided by, 162 *seq.*
 Canevaro claim (1912), 169
 Carthage, the (1913), 170
 Interest on Turkish indemnities (1912), 169
 Japanese house-tax (1905), 162
 Manouba, the (1913), 169
 Maritime frontier between Norway and Sweden (1909), 164
 Muscat Dhows (1905), 163
 North Atlantic Coast Fisheries (1910), 164-168
 Pious Fund of the Californias (1902), 162
 Norwegian vessels, requisitioned (1921), 171
 Savarkar (1911), 169
 Tavignano, the (1913), 170
 Timor boundaries (1914), 170
 Venezuelan debts (1904), 158, 162
 costs, 159
 organisation, 157
 privileges of members, 157
 procedure, 158, 159
 procedure, summary form of, 160
 seat of, 157
 Armaments, proposal for limitation of, 150, 151
 Armed merchantmen, status of, 424
 Armed Neutralities, Baltic Sea, claim as to, 108
 blockade, effectiveness of, 374, 378
 contraband, limitation of, on, 349
 enemy goods in neutral ships, on, 409
 Armenia, intervention in, 88
 Arms traffic in Africa, Conventions (1919) on, 100
 Armistice, authority to conclude, 247
 kinds of, 247
 provisions as to, 246, 247
 Arms, causing unnecessary suffering, use of, 218
 Arms, depots of, seizable, 249
 Art, buildings devoted to, bombardment of, 225
 works of, destruction forbidden, 250
 restoration of, 250, 251, n.
 seizure of, 250
 Askold, the, 319
 Asphyxiating gases, 220
 Asylum, ambassador's house, in, 68
 Asylum, neutral territory, on, 317.
 See Internment
 Athens, Treaty of (1913), renewal of previous treaties, 147
 Aube, Admiral, bombardment of coast towns, on, 227
 contributions in naval warfare, on, 229
 Aurora, the, 319
 Austin, basis of international law, on, 8, 9
 nature of law, on, 8
 Austria, annexation of Bosnia and Herzegovina, 10, 143
 separation from Hungary, 33, n.
 League of Nations, and, 60
 Austro-Prussian War (1866), civilian population, 264
 enemy merchantmen in port at outbreak of war, 198
 Ayala, 4
 Azof, Sea of, 107
 Bacon, Lord, lawful cause of war, on, 78
 Badges, Geneva Convention, of, abuse of, 219
 military, abuse of, 219
 Bahama, the, 312
 Balance of power, 89
 Baldus, territorial sea, extent of, 103
 Balkan wars, treaties, effect on, 147
 Balloons, attacks from, 225
 Baltic Sea, 108

- Barbary States, 44
- Barcelona Conference (1921), on navigation of European rivers, "5
- Bays, 105, 106
- Bearing Sea arbitration (1893), 133
- Behring Sea dispute, 149, 172, n.
- Belgium, Congo Free State, and, 44, 45
 - neutralisation of, 50
 - neutrality of, guarantee in, 140
 - Versailles, Treaty of, and status of, 50
 - violation of, 50
- Belleisle, Marshal, case of, 69
- Belligerency, recognition of, 201
- Belligerents, qualifications of, 204 *seq.*
 - Great War, old rules not amended notwithstanding experience in, 205
 - naval warfare, in, 211
 - who are lawful, 208
- Belts, the, 109
- Bentham, "international," use of word, 21
- Berlin, Congress of (1885), 25, 38, 45
 - French decree of, 374
 - International Radio telegraphic Convention of (1906), 119
 - Treaty of (1878), Bosnia and Herzegovina, as to, 143
- Bismarck, international law, on, 10
 - intervention in Armenia, on, *SB*, n.
 - Luxemburg in Franco-German War, 50
- Black lists. *See* Trading with the Enemy
- Black Sea, status of, 108
- Blair, Mr., refusal of China to receive, 63
- Blockade, 372 *seq.*
 - area of operations, 387
 - continuous voyage, 390, 393
 - declaration of, 381
 - definition, 372
 - distress, vessel in, 380
 - effectiveness of, 374, 375, 376
 - British and American view, 376
 - continental view, 377, 378
 - criterion of, 375
 - grace, days of, 382
 - Great War, in, 392 *seq.*
 - long-distance, 392
 - submarine, 393 *seq.*
 - ignorance of, 383
 - impartiality of, 379, 380
 - interruption of, 377
 - knowledge of, 385
 - limitations of, 373
 - limits of liability to seizure, 387
- I Blockade, mines, by, 235
 - notification of, 383
 - American view, 384
 - continental view, 385
 - Declaration of London on, 385
 - mitigations as to, 384
 - pacific, 330
 - paper, 374
 - penalty for breach, 390
 - river leading to a neutral, of, 373
 - temporary absence, effect of, 378, 379
 - termination of, 389
 - termination of the offence, 388
 - visit and search, 393, 395
- Bluntschli, destination of contraband, 355
 - duress in treaties, 137, n.
- Bodin, territorial sea, extent of, 103
- Boer War. *See* South African War
- Bombardment, 225 *seq.*
 - aircraft by, 226
 - coast towns, of, 227
 - indiscriminate, 227
 - military works, of, 231
 - protected buildings, 225, 232
 - undefended places, of, 226, 229, 230, 231
- : warning, 225, 232
- Bosnia, 10
 - annexation of, 103
- Bosporus, neutralisation of, 51
 - passage of warships in Russo-Japanese War, 2x3
- Straits Convention (1923), no, 111
 - warships, exclusion of, no
- Bottomry, 275
- Bounty, prize, 420, n., 424, n.
- Brazil, contraband, export of, prohibited by, 341
- Bright, John, intervention, on, 88
- British subjects, natural-born, defined, 122
 - naturalised, 124, 125, 126
- Brougham, Lord, extradition treaties, on, 131
- Brussels, Conference of (1871), 29
 - Declaration of (1874), 206, 207, 208, 237, 253
- Brussels, The*, case of, 217
- Bryan, Mr., neutral's supply of war materials, on, 310
 - neutral money loans, 307, n.
- Buckingham, Duke of, refusal of France to receive, 63
- Buenos Ayres, blockade of, 373
 - Treaty of (1881), 109

- Buildings, protected, 225, 232
 destruction in Franco-German War, 251
 Great War, and the, Convention as to, 232
 naval warfare, in, 232
- Bulgaria, declaration of independence, 143
- Bulwer, Sir Henry, withdrawal from Madrid, 63
- Bunch, Mr., case of, 72
- Bundesrath* controversy with Germany (1899), 354
- Bundesstaat*, 40, 41
- Bynkershoek, ambassadors, position of, in regard to third states, on, 69
 neutral waters, hostilities in, on, 315
 recapture, on, 288
 territorial sea, extent of, on, 103
 treaties as evidence of international law, on, 26
- Cables, submarine, 251, 252
 cutting of, in Great War, 252
- Calvo, blockade, effectiveness of, 378
- Campo Formio, Treaty of (1797), 251
- Canada, 41
 separate diplomatic representation, 41
- Canals, interoceanic, 111
- Cancale Bay, 105
- Canevaro claim (1912), 168, 169
- Canning, 83, 85
 neutrality, on, 308
- Canso, Gut of, right of innocent passage through, 168
- Cap Trafalgar*, the, 215, 245, n.
- Cape Cod Bay, 105
- Capitulations, 246
 Turkish, abrogated, 73, n.
- Capture, neutral waters, in, forbidden, 304
 vessels, contraband trading, for, of, 364, 365
- Caroline*, the, seizure of, by Canadian forces, 80, 81, 325, n.
- Cartel, 248
 ships, 248
- Carthage*, the, arbitration, 170
- Casablanca arbitration case, 128, n., 164
- Cash, state of, seizable, 249
- Caspian Sea, 107
- Cass, commercial blockades, on, 331
- Castlereagh, Holy Alliance, and the, 83
 seizure of works of art, on, 250
- Cellamare, Prince, case of, 66
- Cession of territory, 94, 295. 'Set also Conquest
 kinds of, 94
 occupation distinguished from, 90
- Channel Tunnel, *res nullius* in relation to, 93, n.
- Charge d'affaires, 64
- Charleston, blockade of, 373, 377
- Chartered companies, 52
- Chateaubriand, intervention, on, 78
- Chesapeake*, the, 314
- Chesapeake Bay, 105
- Chile, neutrality of, in Great War, 304, n.
- China, consular jurisdiction in, 73
 leases in, 97
 member of society of nations, as, 40
 neutrality of, in Russo-Japanese War, 319
 spheres of influence in, 97
- China*, case, the, 406
- Chino-Japanese War (1894-5), 34
 civilian population, 205
- Chitral campaign, experience of ordinary bullets in, 220
- Civil war, intervention in, 88
- Civilian population, earlier wars, in, 204
 Great War, in, 205
 Hague rules, 206, 207
 invaded country, in, compulsion applied to, 224, 225
 recent wars, in, 204, 205
- Civitas gentium*, 3
- Citizenship of the United States, 123, n.
- Clarendon, Lord, treaties of guarantee, obligation in, 140
- Cleveland, President, Monroe doctrine, on, 85
- Coke, bays, on, 105
 foreign ambassadors, on, 64
 immunity of ambassadors from civil jurisdiction, on, 67
- Colombia, wireless stations of, in Great War, 86, 325
- Colonies, enemy, trade with, 332
- Coloured troops, use of, 210, 211, 211, n.
- Comanche, Señor, 67, n.
- Combatants. See Belligerents
- Comity of nations, 21
- Commercial blockade, 330
- Commercial domicile, 280, 281
- Commissions of Inquiry, 155, 156
 establishment of, 155
- Commissions of Inquiry, procedure, 155
- Communications and transit, commission on, 115

- Company, chartered, position of, 52
- enemy shareholders in, 194
- Compensation, neutrality, violation of, for, 316
- destruction of merchantmen, for, 428-430
- Compromis*, 153, 157-160
- Conception Bay, 105, 168
- prescription applied to, 96
- Concert of Powers, 87
- of Europe, 87, 89
- Turkey, and, 47, 49
- Conditional contraband. *See* Contraband
- Confederate States. *See* American Civil War
- Confederation, 40
- Germany, of, 40
- Conference. *See name of place*
- Confiscation of contraband, 367
- Congo river, 114
- Congo State, 44, 45
- declaration of perpetual neutrality, 49, n.
- Congress. *See name of place referred to*
- Conquest, 296 *seq.* *See also* Cession of territory
- acquisition of territory by, 94
- definition of, 296
- general debt, effect on, 298
- * liabilities, effect on, 297, 298
- military occupation in relation to, 90, 296
- persons, effect on, 300, 301
- subjugation and annexation, as, 94
- title resting on, 296
- validity of, 94
- war debts, effect on, 298
- Consolato del mare*, 288, 289
- effective possession of prizes, 420
- neutral goods on enemy ships, 411
- Constantinople, Treaty of (1888), Suez Canal, as to, 50, 111
- Treaty of (1913), renewal of commercial conventions for one year,
- Consuls, 71 *seq.*
- duties of, 72
- Foreign Jurisdiction Act (1890),
- international agents, are not, 71
- jurisdiction in non-Christian states,
- position of, 71, 72
- termination of authority, 72
- Continuous voyage, blockade as to, 334, 390, 391
- conditional contraband, in case of, 364
- contraband, in case of, 353-5
- Continuous voyage, English interpretation before the Great War, 354
- Great War, in the, 335, 361, 387, 388
- rule of war, 1793, in case of, 334
- South African War, British contention during, concerning, 364
- Contraband, 341 *seq.*
- abolition of, suggested by Great Britain, 350
- absolute, definition of, 342, 343
- destination of, 355
- list of, 352, 356 *seq.*
- absolute and conditional distinguished, 343 *seq.*
- analogues of, 396
- capture, liability to, duration of, 364
- exemptions, 365
- carriage of, noxiousness of, 330
- conditional, definition of, 342, 343
- destination of, 359, 360, 364
- list of, 356, 357
- confiscation of, 367
- continuous voyage, doctrine of, 353-5
- English interpretation before the Great War, 354
- Declaration of London, on, 351 *seq.*
- Maritime Rights Order in Council, (1916), dropped by, 351
- definition, 332
- destination of, 342, 343, 353, 355, 359, 360, 364
- effect on vessel of carrying, 368
- fraud, effect of, 365
- Nancy, the, 365
- free goods, 366, 367
- list of, 367
- Great War, in the, 347, 353, 361
- conditional contraband in, 361
- Declaration of London, effect on, of, 351, 361
- limit of exemption from liability to capture during, 366
- Hague Conference on, 350
- ignorance of state of war, effect of, 358
- infection, rule of, 370
- innocent carriers of, 358
- innocent goods on same vessel, 370
- kinds of, 342
- non-contraband distinguished from, 341, 342
- Orders in Council, development by, of rules of, 361
- ownership in prize law, 371

- Contraband, penalty for carrying, 367 seq.
 proportion, rule of, 369
 persons, whether can be, 396, 403
 substitution, doctrine of, 361
 trading in, 341
 treatment of various articles, 347 seq.
 France, 349
 Great Britain, 347, 348
 Prussia, 349
 Russia, 349, 350
 United States, 349
- Contracts, enemy subjects with, 192
 occupant of enemy territory, of, 288
- Contributions, military occupation during, 259
 naval warfare, in, 229, 230
- Conversion of merchantmen into war-ships, 214-16
 British warning to United States Government, 215
 Great War, in, 215
- Convoyed vessels, 415 seq.
 American view, 416
 British view, 415
 continental view, 416
 Declaration of London, 417 seq.
 earlier practice, 415
 Great War, in, 418
 enforcement by Great Britain of visit and search in, 417
 ships' papers, examination of, in, 419
 modern conditions, in, 416, 417
- Copenhagen, Treaty of (1857), 108
 Sound and the Belts, as to, 109
- Corfu, 51, n., 190, n.
- Corinto, seizure of, 188
- "Courir sus aux ennemis," 192
- Court of International Justice, Permanent, 173 seq.
 advisory opinions given by, 181 seq.
 Tunis, nationality in (1922), 181
 Polish Minority Treaty (1922), 181
 Greco-Turkish exchange of populations (1923), 181 seq.
 Danzig letter-boxes (1925), 182
 Mosul dispute (1925), 182, 183
 charter of, 173
 constitution of, 173
 decisions of municipal tribunals, and, 29
 draft scheme for, submitted by Council of League of Nations, 173
 judges, election of, 173, 174, 174, n.
 tenure of, 174
- Court of International Justice, Permanent, judgments given by, 178 seq.
Wimbledon, The (1921), 178
 Mavromatis Concessions (1924 and 1925), 179, 180
 Neuilly, Treaty of, interpretation, 180
 jurisdiction, 176-8
 "Optional Clause," 177
 labour cases before, 175
 law applied by, 175
 League of Nations Covenant and, 13, 173
 location of, 174
locus standi, 175
 navigation of European rivers, disputes as to, 115
 pacific settlement of disputes, obligations of League Members as to, 183
 political questions settled by, 184 seq.
 Graeco-Bulgar frontier incident (1925), 184, 185
 President, Vice-President, and Registrar of, 174
 procedure, 176
 sittings, 174
 technical cases before, 175
- Covenant of the League of Nations; 13 seq.
 Locarno Conference (1925), and, 15
 Sanctions and provisions, 13 seq.
- Creole* case, 131
- Cressy, the, 245, n.
- Crete, blockade of, 189
- Crews on enemy merchantmen, 208
- Crimean War, blockade in, 373, 374, 376
 declaration of war in, 191
 enemy merchantmen in port at outbreak of war, 198, 199
 enemy residents, 197
 loans of Russia in Germany and Holland, 306
 privateers, 211
 treaties, effect on, 147
- Cuba, insurgents in, 81
- Cumberland*, the, 270
- Cutting's Case, 130, n.
- Czecho-Slovakia, 59
 protection of minorities, 59
 recognition of, as allied nation, 203
- D'Aguessau, "international law," use of term, 21
- Dana, free ships, free goods, on, 409
- Danube, the, 115
 blockade of, in Crimean War, 374

- Danube, the, European Commission, 114
- Danzig, letter-boxes, 182
 - status of, 38, 39
- Dardanelles, 51, no, 111
 - neutralisation of, 51
 - Peace of (1809), no
 - Straits Convention (1923), no
- Debt, National, of Dual Monarchy, after Great War, 300
 - Germany, after Great War, 300
 - Turkey, after Great War, 300
- Debts, contract, recovery by arbitration, 158
 - recovery by force of, prohibited, 152-4
 - enemy subjects, of, recovery of, 192
 - state, war, in case of, 196
- Declaration. *See name of place referred to*
- Declaration of armed neutrality, 108
- Declaration of war, 190, 191. *See also War*
- Deductio infra præsidia*, 420
- Defensively-armed merchantmen, 216, 217
- Delagoa Bay arbitration, 93, 149
- Delaware Bay, 105
- Denmark, seizure of fleet by Great Britain, 79, 80
- Derby, Lord, treaties of guarantee, obligation in, 139, 140
- Destruction of enemy prizes, American view, 421, 422
 - continental practice, 422, 423
 - force majeure*, in case of, 423
 - impossible to bring in, when, 421-3
 - ransom instead of, 424
 - resistance, effect of, 424
 - safety of passengers and crew, 423
 - seizure and ownership, 420, 421
 - submarines, use of, 424
 - warning necessary, 423
- Destruction of neutral prizes, cargo, position of, 428
 - compensation, when payable, 428-30
 - conditions necessary for, 427
 - Declaration of London and, 430
 - obligations as to enemy prizes apply, 425
 - permissible, in what cases, 426
 - release before adjudication, 429, 430
 - safety of passengers and crew, 427
- Deutsches Reich, international status, 41
- Devastation of enemy territory, 225, 227 seq., 260, 261
- Diana*, the, 319
- Diplomatic agents, 63 seq. *See also Ambassador*
 - duties of, 70
 - evidence of, not compulsory, 66
 - precedence of, 64
 - refusal to refuse, 63
- Discovery, as a title, 91
- Domicile, 126
 - commercial, 280, 281
 - national character, and, 127
 - persons, of, effects of, 126, 127
- Dominium eminens*, 96
- Dominions, self-governing, of British Empire, 41 seq.
 - foreign affairs, conduct of, 42
 - Imperial Conference (1926), 42, 43
 - inter-imperial relations, 42
 - international status of, 41
 - League of Nations membership, 41
 - Peace Conferences (1919), representation at, 41
 - Treaty-making power of, 42, 43
- Don Carlos, 306
- Don Pacifico case, 188
- Drago doctrine, 152, 153
- Dresden*, the, 304, n., 314, n.
- Droit des gens*, 21
- Droits of admiralty, 198
- "Due diligence" of neutral states, 313-16
- Dumba, Dr., case of (1915), 70
- Dum-dum bullets, 219, 220
 - declaration as to, 151
- Duress, treaties vitiated by, 137, 138
- East India Company, 52
- "Economic Front," 205
- Ecuador, wireless stations of, in Great War, 86, 325
- Egypt, status of, 35, 36
 - British Protectorate of, determined, 36
- El Arish, capitulation of, 246
- Elbe, navigation of, 115
- Elbing*, the, 245, n.
- Elektra*, the, 244
- Embargo, 188
- Eminent domain, ownership and, 96
- Ems, river, exempted from blockade in Franco-German War, 374
- Enemy character, 278 seq.
 - goods of, 280
 - enemy territory, produce of, 281
 - ships of, 279
- Enemy merchantmen. *See Enemy property at sea*
 - armed, status of, 424
 - conversion of, 214-216
 - destruction of. *See Destruction of enemy prizes*

INTERNATIONAL LAW

- Enemy merchantmen, sailors on, 208
- Enemy merchantmen in port at outbreak of war, 198, 199
 - Great War, in, 200
 - Hague rules, 199
 - recent wars, in, 199
- Enemy merchantmen on the high seas ignorant of hostilities, 200
- Enemy persons, neutral ships, on, 403-407
 - Great War, practice in, 406
- Enemy prizes, destruction of, 420-5. *See* Destruction of enemy prizes
 - neutral ports, in, 322, 323. *See* Neutrality as between states
- Enemy property
 - land, on, 249 *seq.*
 - destruction prohibited, in what case, 219
 - exemptions from appropriation, 250
 - local authorities, belonging to, 250
 - private, not confiscable, 249, 269
 - public movable, 249
 - seizure if not imperative, prohibition of, 219
 - what seizable, 239
 - restoration of, how effected, 287
 - sea, at, 263 *seq.*
 - arguments against immunity, 266-8
 - arguments for immunity, 265, 266
 - British ship, on, 269, 282
 - cartel ships, 239, 270
 - coast fisheries, 271
 - exemptions from capture, 270
 - free ships free goods, 270
 - fundamental question, 263, 264
 - hospital ships, 234, 270
 - nationality of, 278-82
 - changes of, 274
 - neutral claims on, 285
 - neutral flag, under, 266
 - postal correspondence, 272-4
 - ransom bills, 286
 - recent history of question, 264
 - religious missions, etc., vessels charged with, 270
 - scientific missions, vessels charged with, 270
 - small boats engaged in local trade, 271
 - transfer *in transitu*, 283
 - transfer of vessels, 275 *seq.*
- Enemy residents on outbreak of war, 196-8
 - British practice in, 197
 - Crimean War, in, 197
 - Enemy residents on outbreak of war, expulsion of, 198
 - Franco-German War, in, 197
 - Graeco-Turkish War (1897), 197
 - immunities as to, 197
 - internment of, 198
 - Magna Carta* on, 197
 - Napoleon's practice in 1803, 197
 - Russo-Japanese War, in, 198
 - South African War, in, 198
 - Spanish-American War, in, 197
 - treaties as to, 196, 197
 - Turco-Italian War, in, 198
- Enemy ships. *See also* Enemy property goods on, 411-13
- Enemy ships enemy goods, 411-13
- free ships free goods, and, 408
- Enemy subjects, company containing, 194
 - contracts with, 192-4
 - debts of, recovery of, 192
 - forced operations, against their country, 219
- locus standi* in court of law, 194, 195
- partnerships with, 192
- Prize Court, in, 194
- Enlistment, neutral troops, of, 308
- Equality of states, theory of, 47-9
- Espionage, 239, 240
- essence of, 240
- Estuaries, 105
- European Concert. *See* Concert of Powers
- Evidence, Prize Courts and the law of, 363
- Evelyn, 260
- Evans, Sir S. T., evidence in Prize Courts, on, 363
- Exequatur, issued to consuls, 72
- revocation of, 72
- Expanding bullets, 151, 219, 220
- Boer War, in, 151
- Expatriation, 124
- Explosive projectiles, 219, 220, 226
- Exterritoriality, ambassadors, of, 65 *seq.*
 - armed forces, 128, 129
 - public vessels, 128, 129, 133
 - sovereigns, 127
- Extradition, 130-3
 - basis of, 131
 - English practice, 131, 132
 - treaties of, 131, 132
 - Wilhelm II., German Ex-Emperor, refusal to extradite, 130
- False ship's papers, 419
- Fashoda incident, 97
- Federal unions of states, 40, *See also* Confederation

- Finland, status of, 51
- Finlay, Lord, on sovereignty, 33, n.
- Fisheries, coast, protection of, 271, 272
- deep-sea, not protected, 271
- Newfoundland, arbitration in, 152, 165
- North Sea Convention (1882), 167, n.
- ten-mile rule, adoption of, 107
- Flag, national, abuse of, 219
- pursuit, in case of, 418, n.
- truce of, 219, 246
- abuse of, 219
- vessels, of, 278, 279
- Flamtnenwerfer*, 221
- Flinders, 270
- Floating mines, 230
- Florida*, the, 312
- Florida, cession of, 94
- Florida Bonds arbitration, 149
- Fons juris*, 22, n.
- Foreigners. *See* Aliens
- Foreign sovereigns, jurisdiction over, 127, 128, 128, n.
- Formosa, blockade of, 189, 375
- Franciscus a Victoria, *jus inter gentes*, 21
- Franco-German War, American dispatches, interference with, 70
- asylum of French army in Switzerland, 317
- belligerents' qualifications, 209
- blockade in, 374, 378
- civilian population, 205
- contracts of Prussian Government, 288
- enemy merchantmen in port at outbreak of war, 199
- enemy residents, 197
- hostages in, 262
- loans raised in London, 306
- Luxemburg in, 50
- military occupation, 254
- protected buildings destroyed, 251
- ransom bills, 286
- Strasburg, bombardment of, 251
- treaties, effect on, 147
- warships of belligerent in neutral port, 318
- Franks-tireurs, 209
- Frankfort, Treaty of (1871), 293, n.
- Frederick the Great and the Silesian loan, 196
- Free ships free goods, 270, 408-13
- Armed Neutralities, 409
- earlier practice, 408, 409
- enemy ships enemy goods, and, 408
- "Frightfulness," 222
- Fryatt, Captain, 217
- Fugitive criminals, 130-3
- Funds, state of, seizable, 249
- Fundy, Bay of, 168
- Galveston, blockade of, 379
- General*, the, 354
- General Armstrong*, the, 316
- Genet, case of, 309
- Geneva arbitration. *See* *Alabama*
- Geneva, Conference of (1868), 206, 207
- Convention of (1864), 25, 51, 207
- Convention of (1868), 241
- Convention of (1906), 23, 206, 207, 241, 317
- Gentilis, 4**
- Mendoza's case, opinion in, 66
- neutral goods in enemy ships, 411
- territorial sea, extent of, 103
- German East Africa, blockade of, 383
- German Republic, 41
- German-Soviet Treaty (1926), 15
- League of Nations Covenant, effect of, on, 15, 16
- Gessner, blockade, effectiveness of, 378
- Ghent, Treaty of (1814), 292
- Gibraltar, Straits of, 110
- Gladstone, loan to Spanish Pretender, on, 306
- war, on, 12, n.
- Good offices, 154
- Graeco-Bulgar frontier incident (1925), 184, 185
- Graeco-Turkish exchange of populations, 181 *seq.*
- Graeco-Turkish War (1897), enemy residents, 197
- Grant, President, 84
- Great War, aircraft, attacks by, 226
- airships and aeroplanes, employment of, 205
- ambassadors, treatment of, 65, n.
- angary, right of, in, 328
- armed forces and civilians in the, 205
- armed merchantmen in, 424
- art, works of, return of, after, 251, n.
- Black Lists, 194
- Blockade in the, 374, 386, 387, 392 *seq.*
- Central Powers, measures adopted by, 395
- continuous voyage, doctrine of, 387, 388
- Declaration of London adopted and abandoned, 387, 392
- long-distance blockade, 374, 392

- Great War, Blockade in the, British Order in Council (11 March, 1915), 392
 mines, by, 235
 submarine, 393 *seq.*
 capture, limit of exemption from liability to, during, 366
 captured vessels, claims against, 275
 commercial blockade, 331
 communications, international, interference with, 206
 companies, enemy, Proclamation by Great Britain as to, 193
 compulsion applied to civilian population by invader, 224, 225
 conscription, spread of, 205
 continuous voyage, development of doctrine of, in, 335, 361
 contraband in, 344, n., 347, 353, 361
 Declaration of London (1909), and, 351 *seq.*
 conditional contraband in, 361
 Katwijk, case of *The*, 353
 lists of contraband goods during, 356-8
 pre-emption, practice as to, 359
 Prize Courts and, 361, 363
 substitution, doctrine of, in, 362
 conversion of merchantmen, 215
 British warning to U.S.A., 215
 convoys in, 418
 Declaration of London, 418
 Czecho-Slovaks recognised as an allied nation, 203
 Declaration of London, modifications of, in, 340, 351 *seq.*
 enemy ships enemy goods, 412, 413
 Declaration of Paris recognised, 211, 212
 neutral flag and enemy's goods, 410
 declaration of war in, 192
 defensively armed merchantmen, 216, 217
 neutrals, regulations issued by, 217, n.
 destruction of enemy merchantmen, 422, 423
 devastation during German retreat to "Hindenburg Line," 261, n.
 "economic front," 205
 enemy aliens, 198
 British practice as to, 193, 194
 enemy merchantmen in port and on high seas on outbreak of war, 200
 ownership of, captured, 421
 enemy persons, neutral ships, on, 406
 Great War, enemy persons, private property, immunity of, from capture at sea, 269
Flammenwerfer, 221
 forced services of civilian populations, 225
 Germany, use of poison gases by, 221
 allied retaliation, 221
 hospital ships, treatment of, 244
 internment of German warships by neutrals in, 321, n.
 land warfare, development of, 205
 loans raised in neutral countries, 306, 307
 mail boats, 273, 274
 man-power in, 205
 maritime war zones, 236
 military necessity, 261, 261, n.
 occupation in, 261, n.
 merchantmen, enemy, ownership of captured, 421
 mines, use of, 235 *seq.*
 Monroe doctrine, recognition of, 87
 "necessity," German doctrine of, 222
 neutral territory invaded, 50
 trade, restrictions on, 236-7
 neutral's supply of war materials, 310
 pillage, in 257, n.
 postal immunity, restriction of, 273
 poison gas, 220, 221
 prisoners of war, treatment of, 239
 Prize, law of, development of, 371 n.
 protected buildings destroyed, 232
 property, private, at sea, capture and destruction of, 195
 Reparations Commission, 300
 reprisals in, 224, 258, n.
 submarine cables, cutting of, 252
 trade of neutrals in, 330
 trading with enemies, 193 *seq.*
 transfer *in transitu*, application of rule of, in, 284, 285, n.
 treaties, effect on, of the, 148
 Turkish capitulations abrogated, 278
 unneutral service in, 401, 400
 China case, *The*, 406
 visit and search in, 417, 418, 419
 Declaration of London, adherence to, 418
 examination of papers, 419
 war crimes in, 301
 warships interned by neutral States, 321, n.
 wireless stations on neutral territory, 86

- Greece, blockade of (1916-17), 189, and n.
- international law in, 1
- intervention of Allied Powers in, in Great War, 81
- modern, creation of, 48
- Greek War of Independence, 306
- Grey, Viscount, treaties of guarantee, 140
- Grosvoei, the, 319
- Grotius, 4
 - conduct in warfare, 204
 - contraband, on, 342
 - enemy aliens, on, 196
 - international rivers, 113
 - military occupation, on, 253
 - resident embassies, reception of, 64
 - territorial sea, extent of, 103
- Guarantee, treaties of, 139, 140
- Guerilla troops, 208, 209
- Guides, use of inhabitants of invaded territory as, 224, 257
- Gulfs, 105 seq.
- Gulistan, Treaty of (1813), 107
- Gyllenborg, 66
- Hague Conference (1899), limitation of armaments proposed, 150, 151
 - states represented at, 149
 - summoning of, 149
- Hague Conferences, 25
 - general results of, 151
 - international law and the, 12
- Hague Conventions. *See particular topic required*
- Hale, bays, on, 105
- Hall, convoyed vessels, 415
 - independence of States, 76
 - intervention in civil war, 88
 - occupation of territory, 91
 - Russian denunciation of Treaty of Paris, 10
 - seizable enemy property, on, 249
 - sovereign independence, 33
 - treaties of guarantee, 140
 - warships of belligerent in neutral ports, 317
- Halleck, conquest affecting general debt, 299
- Harcourt, Sir William, intervention, on, 88
- Hautefeuille, blockade, effectiveness of, 378
 - law of Nature, 7, n.
- Hay-Pauncefote Treaty (1901), Panama Canal, as to, 51, 112
- Hayti, blockade of, 375
- Heffter, blockade, effectiveness of, 378
 - consular privileges, on, 74
- Heineccius, contraband, test of, 342, 349
- Heinrichs, Herr von, case of, 69
- Heligoland, cession of, 95
- Herzegovina, annexation of, 10, 143
- Hesse, Cassel, Elector of, case of, 296, 297
 - Landgrave of, case of, 66, n.
- Hersog, the, 354
- Historic monuments, bombardment of, 225
- Hoffnung, the (1800), 425, n.
- Hogue, the, 245, n.
- Holland, blockade of, 373
 - contraband export prohibited, 341
 - intervention in, 87
- Holland, Sir T. E., international persons, 31
- Holls, Hague Conference, on, 151
- Holy Alliance, 31
- Hospital ships, 243 seq.
 - distinctive marks of, 243
 - duties of, 243
 - Great War, treatment in, 244
 - military purposes, when used for, 243
 - port dues in case of, 246
 - sick bays during conflict, 243
 - signalling for military purposes, 244, n.
 - visit and search, subject to, 243, 244
 - wireless apparatus on, 244
- Hospitals, bombardment of, 225, 232
- Hostages, Franco-German War, in, 262
 - purposes for which taken, 262
 - ransom bill, as security for, 286
 - South African War, in, 262
 - validity of practice, to what extent, 262
- Hotman, opinion in Mendoza's case, 66
- Huascar, the case of, 135
- Hudson Bay, 108
- Hungary, separation from Austria, 33, n., 60
- Imina, the, 354, 365
- Imperial Conference (1926), 42, 43
- Incendiary projectiles in aerial warfare, 226
- Incorporate union of countries, 33
- Indemnity clause in treaty of peace, 294
- Independence, 75 seq.
 - declaration of, 45
 - international status, as test of, 32.33
 - nature of, 75, 76
 - recognition of, 44, 45

- Independence, declaration of, rights
 incident to, 76, 77
 test of, 76
- Independencia*, the, 311
- India, native states of, 38
- India*, the, 245, n.
- Infra præsidia*, rule as to, 288, 420
- Institute of International Law, contraband, abolition of, on, 350, n.
 equipment of armed vessels in neutral territory, on, 314
 mines, on, 232
 occupation of territory, 91, n.
 political offence, nature of, 132, n.
 submarine cables, on, 251
- International Arbitration. *See* Arbitration
- International Air Convention (1919). 22, 25
- International Court of Appeal, proposed establishment, 29
- International law, analytical jurisprudence and, 7
 antiquity, in, 1 *seq.*
 codes of, 22
 definition, 1
 development, 1 *seq.*
 English Courts and, 16, 17
 evidence of, 21 *seq.*
 "General international law," use of term, 14
 Hague Conferences, and the, 12
 law proper, as, 4-6
 mandatory system, a progressive principle of, 39
 modern, 4 *seq.*
 municipal law, relation to, 16 *seq.*
 name, origin of, 21
 nature of, 11, 19
 private international law distinguished from, 21, 22
 sanction of, 9, 10, 13, 19, 20
 sources of, 21 *seq.*
 arbitration tribunals, 26
 instructions issued by States, 29
 opinions of law officers, 26
 practice of States, 23
 prize courts, 27 *seq.*
 reason, 22
 treaties, 25 *seq.*
 writings of jurists, 23, 24
 States under, 31 *seq.*
 subjects of, 31 *seq.*
 treaty obligations, and, 10, 11
 United States Courts and, 19
- International morality, 11
- International powers, 31
 characteristics of, 32 *seq.*
- International Prize Court, 336 *seq.*
 applicability, 337-8
 constitution, 337
 Declaration of London, 339
 difficulties in regard to, 338
 United States of America in, 338
 jurisdiction, 336
 law to be applied, 337
 London, Conference of (1908), 339
 procedure, 337
 proposal of, 336
 remedy granted by, 337
 who may appeal to it, 337
- International status, 31 *seq.*
- Internationalisation, neutralisation and, 51, n.
- Internment, belligerents, of, 303, 317
 crews of dismantled warships, of, 318, 321
 enemy residents, of, 198
 prisoners of war, 237, 322
 sick and wounded, of, 317
 warships, of, 318, 319, 321
- Interoceanic canals, 111
- Intervention, cases of, 81 *seq.*, 86, 88
 civil war, in, 88
 external relations, to regulate, 49
 grounds of, 79, 87
 humanity, on ground of, 88
 law, on ground of, 88
 League of Nations, by, 89
 peaceful, 89
 right of, 78
 treaty, on ground of, 88
 under treaties containing minority clauses, 89
- Investigator*, the, 270
- Ionian Islands, 36, 51, n.
- Iraq, 39, 182, 183
 King of, 39
 Mosul dispute, 182, 183
 Treaty of Versailles, under, 39
- Irish Free State, 42
- Islands, ownership of, 93, 314
- Italian-Abyssinian War, 294
- Italy, contraband, destination of, 355
- Italy, Law of Guarantees and the Pope, 53
- Jameson Raid, 82
- Japan, consular jurisdiction abolished, 73, n.
 member of society of nations, 47
 Japanese house tax arbitration (1905), 162
- Jefferson, Monroe doctrine, 84
 neutrality, on, 314
- Jenkins, Sir Leoline, contraband, on, 346
 territorial waters, on, 101

- Judicial Arbitration Court. *See* Arbitration
- Jugo-Slavia, invasion of Albania by, 15
 protection of minorities, 59
- Jurisdiction, aliens, over, 126, 127
 armed forces of a foreign state, 132
 diplomatic agents, 63 *seq.*
 exemptions from, 127-9
 merchantmen under foreign flags, 129
 natural-born subjects, over, 121-4
 naturalised subjects, over, 124, 125
 over a State's own merchantmen, 133, 134
 over a State's own public ships, 133
 pirates, over, 134-6
 public vessels of foreign States, 128, 129
 sovereigns of foreign States, 127
 territorial waters, within, 133
 within the territory, 121 *seq.*
 without the territory, 130 *seq.*
 subjects abroad, 130-3
- Jurists, writings of, in relation to international law, 23, 24
- Jus angaria*, 327
- Jus civile*, 6
- Jus fetiale*, 3
- **Jus gentium* and *jus civile*, 6, 7
 and *jus inter gentes*, 21
 and *jus nature*, old confusion between, 48
- Jus inter gentes*, 21
- Jus littoris*, 113
- Jus sanguinis*, 121
- Jus soli*, 121
- Justice, Permanent Court of International. *See* Court of International Justice, Permanent
- Karlstad, Treaty of (1905), 33
- Keiley, Mr., refusal of Italy to receive, 63
- Kent, jurisdiction over bays, on, 106
 rule of war of 1756, on, 333
 writings of jurists, on, 24
- Kiel Canal, 112
- King's Chambers, 106
- Knight Commander*, the, sinking of, 423
- Korea, status of, 34
- Koszta case, 126
- Kowshing, the, 402
- "Kriegsmanier," 222
- "Kriegsraison," 222
- Kriegsverrath*, 256
- Kutchuk-Kainardji, Treaty of (1774), 108
- Land warfare, development of, in Great War, 205
- Lakes, 107
- La Plata, blockade of, 190
- Lausanne, Treaty of (1912), renewal of treaties by, 147
 Treaty of (1923),
 Egypt, independence of, 36
 Straits Convention, 51, 112, n.
 Turkish public debt, 300
- Law, international. *See* International Law
 meaning of, 8
 municipal, 16
 nations, of. *See* International Law
 nature, of, 4 *seq.*
- Lawrence, independence of States, on, 76
- Laws of war, questionable value of, 222
- Laybach, Congress of, 83
- League of Nations, 13
- African Conventions (1919), disputes under, 101
- Albania, invasion of, and, 15
- Assembly, 55
- Austria and Hungary, and, 60
- Committees, business of, 56, n.
- Council, 56 *seq.*
 Assembly, relations between, and, expert committees of, 57
 unanimity of decisions, 56, 57
- Covenant of, 13 *seq.*, 54, 60, 61
 amendments of, 61
 provisions, 13 *seq.*
 sanctions, 13, 14
- Danzig Free City under, 38, 39, 61
 diplomatic privileges of members of, 61, 65
 expenses of, 58, 59
 functions, 60, 61
 intervention by, 89
 jurisdiction, 56
- Justice, Permanent Court of International, and, 59. *See* Court of International Justice, Permanent
- Labour Organisation, permanent International, 58
 purpose of, 58
- laws of war and, 222
- Mandates, 97-9
 mandate system, 99
mandatum and conception of, 98, n.
 nationality of inhabitants of mandated territory, 99

League of Nations—*continued*

- Mandates, sovereignty of mandated territory, 99
 - types of, 98
 - members of, 54, 55
 - minorities, protection of, 59, 60
 - objects, 54
 - organs of, 55
 - pacific settlement of disputes,
 - modes of, 172
 - Permanent Secretariat of, 58
 - Saar Basin, status of, 39
 - self-governing Dominions of British Empire, 41, 43
 - status of, 61
 - Straits Convention, 1923, powers under, n 1
 - technical organisations, 57, 58
 - treaties, reconsideration of, by, 145
 - withdrawal from, 55
- Lease of territory, 97
- nature of, 97
- Lee, conduct in American Civil War, 204
- Legates, pope, of, 64
- Lena*, the, 319
- Letters of marque, 211, 214
- piracy, in relation to, 135
- Levies *en masse*, 209, 210
- Licence to trade in time of war, 195, 196
- Lichtenstein, 46
- Lion and Sun, 242, n.
- Liquid fire. *See* Flammenwerfer
- Liquor traffic in Africa, Convention (1919), on, 100
- Littoral sea. *See* Territorial Sea
- Loans, neutral individuals, of, 306, 307
- neutral States, of, 306, 307
- Locarno Conference (1925) League of Nations Covenant, on, 15
- Lody, case of (1914), 240
- London, Conference of (1908), 339
- Convention of (1884), 138
 - Declaration of (1871), inviolability of treaties, 10, 25, 143, 144
 - Declaration of (1909), 339, 340, 351 *seq.*
 - codification of existing law, as a, 339, 340
 - continuous voyage and destination of contraband, 355
 - contraband, 351
 - declaratory treaty, as a, 25
 - Great War, modifications in, 340, 351 *seq.*
 - non-ratification of, 339, 351, 430
 - official report, position of, 340
 - Treaty of (1841), Dardanelles, as to the, no

- London, Treaty of (1871), Dardanelles, as to the, no
- Treaty of Paris (1856) modified by, 108
- Treaty of (1913), 148
- Louisiana, cession of, 94

 - negotiation as to, 92

- Lusitania*, the, assumption of United States flag, 279, n.
- Luxemburg, invasion by German troops (1914), 50

 - neutralisation of, 50
 - neutrality of, collective guarantee, 140

Magellan, Straits of, 109

- Magna Carta*, enemy merchants in England on outbreak of war, 197
- Mail boats, enemy, liable to capture, 273

 - neutral, dispatches carried by, 398
 - visit and search, subject to, 273

- postal correspondence on, immunity of, 272-4
- Maine, Sir H., equality of States, theory of, 48
- Malacca*, the, 213
- Malmesbury, Lord, contraband trading, on, 344, n.
- Mandates, 97-9. *See under* League of Nations
- Mandated Territories, 39, 40
 - British mandates, 39, 98
 - French mandates, 39
 - mandatory system, 39, 99
 - nationality of inhabitants of, 99
 - sovereignty of, 99
- Mandjur*, the, 319
- Mannheim, Convention of (1868), " 5
- Manouba* arbitration, 169
- Martens, G. F. de, on contraband trading, 341
- Marmora, Sea of, 51, no
- Martial law, military occupation, in case of, 254 *seq.*
- Mavromatis Concessions, 179, 180
- McLellan, conduct in American Civil War, 204
- Mediation, 154
- Mendoza, case of, 66
- Merchantmen, conversion on high sea, 214 *seq.*
 - defensively armed, 216
 - status of, 217
- enemy. *See* Enemy merchantmen
- foreign, jurisdiction over, 129
- jurisdiction over, 133, 134

- Merchantmen, nationality, of 119
 - neutral, using enemy pass, liable to capture, 280, n.
- Mesopotamia. *See* Iraq
- Mexico, ports of, blockade of, 189
- Michigan, Lake, 114
- Mickilchenkoff, case of, 66, n.
- Military appliances seizable, 249
 - necessity, 221, 222, 261
 - neutral prizes, destruction of, 426
- occupation, authority of occupant, 254 *seq.*
 - compulsory information, 256, 257
 - conquest distinguished from, 296
 - contracts of occupant, 288
 - contributions in, 259
 - earlier usages in, 253
 - effectiveness of, 253
 - Great War, in, 256
 - hostages, 262
 - legal status of occupant, 256, 259
 - local officials in case of, 256
 - martial law in, 254 *seq.*
 - national character of locality, 253
 - nationality of territory under, 282
 - oath of allegiance of invaded population, 254
 - oath of fidelity, 257
 - penalty, general, forbidden, 258
 - private property, 257
 - rights, 257
 - prohibitions in case of, 218, 219
 - property seizable, 249
 - provisional character of, 254
 - public property in, 259
 - ransom in case of, 260
 - requisitions in, 259
 - taxes, collection of, 257
 - usufruct, rules of, applicable to, 259
 - works, bombardment of, 231
- Mines, 232-6
 - British declaration at the Hague, 233
 - defence by, whether justifying bombardment, 230
 - German declaration at the Hague, 233, 234
 - Great War, in, 235
 - Hague Convention as to, 233
 - Institute of International Law on, 232
 - minefields in Great War, British Order in Council on neutral vessels passing through, 235
 - legality of, 235
 - Russo-Japanese War, in, 232
- Minorities, protection of, 59, 60
- Mississippi, 113, 114
- Mitylene, custom-house at, seizure by way of reprisal, 188
- Moldau, navigation of, 115.
- Moldavia, suzerainty in case of, 34
- Monaco, 38, 46
 - treaty with France (1918), 38, n.
- Monroe, neutrals trading with the enemy, on, 333
- doctrine, 48
 - Drago doctrine, relation to, 132
 - international law, and, 84
 - meaning of, 83
 - origin of, 83
 - recognition of, 86, 87
- Montenegro, independence of, 87
- Morava, navigation of, 115
- Mosul dispute, 182, 183
- Municipal law, international law, relation to, 16 *seq.*
- Munster, Treaty of (1648), Scheldt, as to the, 113
- Muscat dhows, arbitration, 163
- Napoleon, capture of private property at sea, 263
 - enemy residents, arrest of, 197
 - extortion of crown from Ferdinand VII., 138
- Napoleon III., 89
- Nashville, the, 318
- "National honour," 156
- Nationality, British. *See* British subjects
 - inhabitants on ceded territory, of, 296
 - inhabitants of mandated territory, of, 99
 - loss of, Great Britain, in, 125
 - occupied territory, 282
 - persons of, 121 *seq.*
 - conquest affecting, 300, 301
 - property of, changes in, 274
 - Tunis, nationality in (1922), 181
 - United States, citizenship of, 122, 123, and n.
 - vessels of, 277-9
- Naturalisation, 124-6
- Nature, law of, 4 *seq.*
- Naval forces, classification of, 211
- Naval Prize Bill (1910), 338
- Necessity, military, 221, 222
 - self-defence, of, test of, 81
- Nemo potest exuere patriam*, 124
- Nemo potest iudex esse in re sua*, 79
- Netherlands. *See* Holland
- Neuilly, Treaty of, interpretation of, 180

- Neutral, claims on captured vessels, 285
 prizes, adjudication necessary, 425
 vessel, attack of, when excusable, 423, 426
 enemy goods on, 408-11
 shipwrecked on, 245
 wounded on, 245
 waters, hostilities in, 315, 316
- Neutralisation, internationalisation and, 51, n.
 neutrality distinguished from, 50
 Panama Canal, of, 51
 State, of, 49
 Suez Canal, of, 50
- Neutrality. *See also* Unneutral service as between States, 303 *seq.*
Alabama case, 311
Agrippina case, 312
 angary, right of, 327
 asylum, right of, 317
 belligerent troops and material on neutral territory, 304
 enlistment of neutral troops, 308
 fitting out vessels in neutral territory, 309
 Hague Conventions, 303, 304
 ratification, 303, n.
 hostilities in neutral waters, 304, 314, 315, 316
Anna, case of, 314
Bangor, case of, 304, n., 315
 Bynkershoek on, 315, 316
Chesapeake, the, 314
Dresden, the, 304, n., 314, n.
Pellworm, the, 315
 indemnity for breach, 316
 internment of belligerent forces, 317
 loans by neutral States, 306, 307
 Gladstone, Mr., on, 306
 Great War, United States Government, declaration of, on, 306
 Greek War of Independence, in, 306
 meaning of, 303
 passage of belligerent army through neutral territory, 324, 325
 League of Nations, obligation of members of, 325
 Phillimore on, 324
 Vattel on, 324
 prisoners in neutral territory, 322
 prize courts in neutral territory, 304, 323
 prizes in neutral ports, 322, 323
Odessa, the, 322
- Neutrality, as between States—*cotUd.*
 prizes in neutral ports, Phillimore on, 322, 323
 pursuit in neutral waters, 315, 316
Anna, the, 316
 Bynkershoek on, 315
 railway material of neutral found on belligerent territory, 326, 327
 rights of neutrals, 314
 rules of the Treaty of Washington 313
 self-defence in neutral waters, 316
General Armstrong, the, 316
Westlake on, 316
 Terceira incident (1827), 314
 troops, supply of, 304, 305
 use of neutral territory, 308, 309
 war material, supply of, 309, 310
 American Civil War, in, 310
 Great War, in, 310
 Russo-Japanese War, in, 310
 warships, supply of, 304, 305, 310 *seq.*
 of a belligerent in neutral ports, 317 *seq.*
 Hague rules, 319-21
 of two belligerents in neutral ports, 318
 wireless telegraphy, belligerents use of, 325, 326
- as between States and individuals, 329
 commercial blockade, 330 *seq.*
 continuous voyage, 334
 loans to belligerents, 306, 307
 rule of war of 1756, 332, 333
 of 1793, 334
 test of permissible commerce, 313
 trade of neutrals, 329, 330
 war materials, supply of, 309, 313
 warships, supply of, 310 *seq.*
- Newfoundland, prescription applied to territory of, 96
- Fisheries
 arbitration in, 104, 152, 165
 mode of measuring three-mile limit, 106
 three-mile limit agreed to, 104
 dispute as to, 146
- Newspaper correspondents with, an army, position of, 208
- Niemen, navigation of, 115
- Niger river, 114
- Non-combatants with armed forces. 207, 208
- North American Indians, 90, n.
- North Atlantic Coast Fisheries Arbitration, 164-4

- North Borneo Company, 52, n.
- North Sea, closing of, 393
 - Fishery Convention, 167, n.
 - incident (1904), 155, 163, 164
 - Inquiry, 155, 156
 - mines laid in, 235
 - submarine blockade of, in Great War, 393
- Norwegian vessels, requisitioned (1921), case of, 171
- Novik*, the, 319
- Nuncios, 64
- Oath of allegiance, invaded population, in case of, 257
- Occupation, 90
 - area of, 92
 - cession distinguished from, 90
 - conquest distinguished from, 90
 - essentials of, 90
 - military. *See* Military occupation
- Ocean, appropriation, not capable of, 101
 - claims in regard to, 101-103
 - international highway, as, 101
- Oder, navigation of, 115
- Oleg*, the, 319
- Oppenheim, civilian population and armed forces in Great War, vanishing distinction between, on, 205 *seq.*
- consular authority, termination of, on, 75
- "general international law", use of term by, 14, n.
- League of Nations, on, 62, n.
- nationality, principle of, on, 75
- war crimes, on, 301
- "Optional Clause," 177
- Oregon, dispute, 91, n., 92
- Orinoco Steamship Co., arbitration, 168
- Ortolan, blockade, effectiveness of, 378
- contraband, 347
- Pacific, Western, spheres of influence in, 96
- Pacific blockade, 188-90, 330-2, 372
 - legality questioned, 190
 - rules of Institute of International Law, 190
 - settlement of international disputes, 155 *seq.*
- Palestine, 39
 - administration, 40
 - mandatory for, 39
- Palmerston, Lord, Don Pacifico incident, on, 188
- immunity of private property at sea, on, 266
- pacific blockade, on, 190
- recovery of contract debts, on, 153
- Panama Canal, 112
 - neutralisation of, 51
- Pantaleon Sa, case of, 66
- Papacy, the, 53, 63, 64
- Papal legates, 64
- Papen, von, Captain, recall of, 195, n.
- Paper blockade, 374
- Parachute, airman descending by, attack on, prohibited, 227
- Parcel post, 273
- Paris, Conference of (1910), aerial navigation, 116
 - Convention (1919), regulation of aerial navigation, 226
 - Convention of (15 April, 1856), 149
 - Declaration of (1856), adhesions to 212
 - blockade, on, 374
 - declaratory treaty, as a, 25
 - enemy ships enemy goods, 412
 - free ships free goods, 409
 - indemnity for destruction, 422, 423
 - neutral flag and enemy's goods, 410
 - private enemy property, 263
 - privateering abolished, 212, 214
 - recognition generally, 212
- Peace of (1815), 51
- Treaty of (1814), Rhine, freedom of, 114
- Treaty of (1856), abrogation by Russia, 10
 - Black Sea neutralised, 108
 - Danube, regulation of, 115
 - Turkey admitted into European system, 47
- Treaty of (1920), Sovereignty of Spitzbergen, 93
- Parole, officers and crew of captured merchantmen, of, 208
- prisoners of war, of, 238
- Partnerships, enemy subjects, with, 192
- Passage, belligerent army through neutral territory, 324, 325
 - belligerent vessels through neutral waters, of, 317 *seq.*
- Paxo, 51, n.
- Permanent Court of Arbitration. *See* Arbitration
- Permanent Court of International Justice. *See* Court
- Persia, Lion and Sun, use of, 242, n.

- Peru, destination of contraband, Prisoners of war, ransom of, 237
relief societies for, 239
- Privateers, 211, 212
- Prize. *See* Enemy merchantmen; Enemy prize; Enemy property (at sea)
bounty, 420, n., 424, n.
Court, authority of, 28
decisions of, evidence of international law, as, 27
enemy subjects, appearance of, 194
evidence, law of, and, 363, 364
functions of, 27
International, proposed, 336-9.
See International Prize Court
law administered by, 28, 29, 371, n.
neutral flag and enemy's goods, 410
territory, in, forbidden, 304
rules of property, 410
Great War, development of law of, during, 371, n.
- Prizes, adjudication necessary, 420, 421, 425
deductio infra præsidia as effective possession, 420
impossible to bring in, when, 421-3
neutral ports, in, 322-4
ownership of, 420, 425
seizure and ownership, relation between 420, 421
twenty-four hours' possession, 420
Prohibition Act, National, in United States of America, right of search, limits of, under, 104
- Property, captured, restoration of, how effected, 287
enemy. *See* Enemy property
of States, air-space, in regard to, 116 *seq.*
land, in case of, 90 *seq.*
water, in regard to, 101 *seq.*
private, at sea, capture and destruction in the Great War, 195
- Protectorates, 36
position of, 96
- Prussia, contraband rules, 349
- Pruth, navigation of, 115
- Public vessels, exterritoriality of, 119, 128, 133
rights over, 119
- Quarter, giving of, 218
- Railway material, neutral, of, found on belligerent territory, 326, 327
- Peru, destination of contraband, 219
- Peterburg*, the, 214
- Phillimore, duress in treaties, 137
- passage of belligerent army through neutral territory, 324
- prizes lying in neutral port, condemnation of, 322, 323
- Pillage, prohibition of, 225, 249
- Pilots, neutral employment by belligerents, 319
- Pious Fund of the Californias arbitration, 162
- Piracy, definition, 135
- Pirates, definition, 134. *See also* Submarines, belligerent jurisdiction over, 134-6
- Pitcairn Island, 46
- Poison, use of, 220
- Poisonous gases, use of, 220, 221
- Poland, 59
protection of minorities, 59, 181
- Polar regions, whether acquirable by occupation, 93, n.
- Pole, Cardinal, case of, 63, n.
- Polish Minority Treaty, 181
- Pollock, Sir F., international law, character of, 11, 12
- Pope, the, 53, 63, 64
- Port Arthur, blockade of, 326, 376
- Portalis, *imperium* and property, on, 96
- Portugal*, the, hospital-ship torpedoed, 244
- Postal correspondence, 272 *seq.*
- Postliminium, 287
modern doctrine, application of, 287, 288
origin of term, 287
- Pragmatic Sanction, 34, n.
- Pre-emption, 358, 359
Anglo-American Treaty (1806), in, 344
right of, 328
- Prescription, 95, 96
doubts as to validity, 95
period of, 95
- Prisoners of war, 237-9
declaration of name and rank, 238
• earlier treatment, 237
employment of, 237, 238
escaped, treatment of, 238
exchange of, 237
Great War, in, 239
information bureau, 239
internment of, 237
maintenance of, 238
parole of, 238
position of, 237-9

- Ransom, enemy vessels, of, 424
 - invader, by, 260
 - naval destruction, from, 229, 424
- bills, 286
- Realisable securities, 249
- Rebus sic stantibus*, implied in treaties, 145
- Recapture of property, 287, 288
- Recognition, belligerency, of, 20c—202
 - States, of, 46
- Red Crescent, 242, n.
- Red Cross, abuse of, 219
 - protection of, 242
- Relative contraband. *See* Contraband
- Religion, buildings devoted to, bombardment of, 225, 232
- Religious missions, vessels devoted to, 270
- Reparations Commission, 300
- Reprisals, 393
 - Great War, in, 224, 258, n.
 - prebelligerent, 187
 - object of, 187, 188
 - war, in, 258
- Requisition, articles serving for sick and wounded, of, 367
 - military occupation, during, 259
 - naval warfare in, 231
 - neutral railway material, of, 326, 327
 - vessels, of, 327, 328
- Res nullius*, 91, 93, 93, n.
- Retorsion, 187
- Revolutionary government, 32
 - hostilities, belligerent status in, 202, 203
- Rhine-Danube Canal, navigation of, "5
- Rhine, the, 115
- Riga, blockade of, 373, 376
- Rio Grande, blockade of, 373
- Ripperda, Duke of, case of, 66, n.
- Rivers, European, navigation of, under treaties of peace of 1919, 115
 - dividing two States, ownership of, 112
 - international, 113, 115
- Rivier, self-preservation, 79
- Rome, ancient, international law in, 3
- Romilly, Sir Samuel, 251
- Roosevelt, President, position of United States on American continent, 86
 - recovery of contract debts, on, 152
- Rousseau, war a relation, between States, 192
- Rule of War of 1756, 279, 332, 333, 334, 403
- Rule of War of 1793, 334
- Rumania, independence of, 87
 - principality of, formation of, 34, n.
- Ruses of war, 219
- Russia, contraband rules, 341, 349, 350
 - denunciation of Treaty of Paris, 10
 - intervention of Allied Powers in 1919-20, in, 82
- Russo-Dutch loan, 147
- Russo-Japanese War (1904), 34
 - blockade in, 376, 382
 - civilian population, 205
 - contraband, 345, 346, 349, 350
 - declaration of war in, 191
 - destruction of neutral vessels, 426
 - enemy merchantmen in port at outbreak of war, 199
 - residents, 198
 - loans raised in neutral countries, 306
 - maritime war zones, 236
 - supply of neutral warships, 310
 - treaties, effect on, 147
 - unneutral service, 400
 - volunteer navies, 213
 - warships of belligerent in neutral Port, 317, 318, 319
 - wireless telegraphy, 326
- Russo-Swedish War (1877), enemy merchantmen in port at outbreak of war, 199
- Russo-Turkish War (1877), contraband in, 344
- Ryeshitelni*, the, 316, n., 319
- Saar Basin, international status of, 39
- Sackville, Lord, case of, 70
- Safe-conduct, extent of application, 195
 - protected vessels, for, 270
- St. Croix, cession of, island of, 95, n.
- St. Germain, Treaty of, 33, n., 300
- St. John, cession of island of, 95, n.
- St. Lawrence, dispute as to, 113, 114
- freedom of, 114
- St. Petersburg, Declaration of (1868), 206, 218
- St. Thomas, cession of island of, 95, n.
- Salisbury, Lord, contraband, destination of, 355
 - international law, nature of, 8
- Salvage, 288-90
 - amount of, 289
- Samoa, British occupation of, 256, n.
- San Lorenzo el Real, Treaty of (1795), 114
- San Marino, 38, 46
- Santa Lucia negotiation, 93
- Sardinia, 46, 51

- Satow, Sir Ernest, declaration at the Hague as to mine-laying, 234
- Savannah, blockade of, 373
- Savarkar case, 77, 169
- Savoy, neutralisation of part of, 51
deneutralisation of, 51
transfer to France, 51
- Scheldt, the, blockade in regard to, 373
freedom of the, establishment of, 114
status of, 113, 114
- Schönbrenn, Treaty of, 296
- Science, buildings devoted to, bombardment of, 225
vessels devoted to, 270
- Sea, high. *See* Ocean
- land-locked, 107
- territorial. *See* Territorial sea
- Self-defence, neutral waters, in, 316
- Self-preservation, right of, 79, 82
- Semi-civilised troops, use of, 210, 211
- Sequestration, 188, 368
enemy property, of, 249
- Serbia, suzerainty in case of, 34
independence of, 87
- Servitudes, international, 103, and n.
- Shimonoseki, Treaty of (1895), status of Korea, 34
- Ships. *See* Merchantmen; Public vessels; Vessels; Warships
- Shipwrecked, neutral vessel, on, 244, 245
- Siam, consular jurisdiction in, 73
- Sicily, embargo on vessels of, 188
- Sick, treatment of the, 241 *seq.* *See* Wounded
- Siege, regulations as to, 225 *seq.*
- Silesian loan, 196
- Slave trade, 134
- Smolensk*, the, 213, 214, 273, n.
- Society of nations, 47
- Sound, the, 109
- South African Republic, 36, 138
- South African War, civilian population, 205
contraband, 354, 364
declaration of war in, 191
enemy residents, 198
enlistment of neutral troops, 308
hostages in, 262
mail boats, 273
oath of fidelity in, 257
passage of belligerent army through neutral territory, 324, 325
- South American Republics, Monroe doctrine and, 85-7
- Sovereignty, Lord Finlay on, 33, n.
mandated territories, of, 99
- Spanish-American War (1898), blockade in, 376, 382, 389
contraband, 345
Declaration of Paris respected, of war in, 191
enemy merchantmen in port at outbreak of war, 199
residents, 197, 198
mail boats, 273
warships of belligerent in neutral port, 318
- Spheres of influence, 96
- Spies, 239, 240
who are, 240
- Spitzbergen, 93, n.
- Springer, case of, 66, n.
- Spuvlos zu versenken*, 217
- Staal, M. de, Hague Conference, on the, 151
- Staatenbund*, 41
Constitution of Weimar (1919), effect of, on Germany, 41
Dominions, British self-governing, 44
League of Nations, not a, 61, 02
- States, birth of, 44
characteristics of, 31 *seq.*
durability, promise of, 44
equality of, theory of, 47, 48
government, existence of, 32
independence of, 32. *See* Independence
jurisdiction of. *See* Jurisdiction
membership of the society of nations, 47
neutralisation of, 49 *seq.*
representatives of. *See* Ambassadors; Diplomatic agents
right of, land, over, 90 *seq.*
rights of, time of peace, in, 75 *seq.*
time of war, in, 187 *seq.*
self-preservation of, 79
sovereignty of, 32
suzerainty, under, 34
territory of, 90 *seq.*
possession of, 46
unions of, 33
- Status quo ante bellum*, principle of, 288
- Stores of State, seizable, 249
- Straits, 108
Convention (1923), 51, no, 111
islands demilitarised under, 111
League of Nations, powers under, 111
provisions, no, 111
signatories of, 110
Straits Commission constituted by, 111

- Strasburg, bombardment of, Franco-German War, in, 251
- Subditi temporarily* 126
- Submarine cables, connecting belligerent and neutral territory, 252
 - belligerent territories, 252
 - two neutral territories, 251
 - cutting of, in Great War, 252
- Submarine mines, 232-6. *See* Mines
- Submarines, belligerent, in relation to piracy, 136
 - blockade by, 393
 - merchantmen attacked by, 424
- Succession of States, fundamental principles, 295, 296
 - nationality of inhabitants on ceded territory, 296
 - rights and obligations of cessionary State, 296
- Suez Canal, neutralisation, 50
 - Treaty of Constantinople (1888), 111
 - protection, extent of, 51, n.
 - Convention, 112, n.
- Sumter*, the, 119
- Surrendered enemy, treatment of, 218
- Suzerainty, 34
- Sweden, contraband export prohibited, 341
- Switzerland, asylum to French troops, 317
 - federal system, 41
 - neutralisation of, 50
- Tavignano*, the, arbitration, 170
- Taxes, military occupation, during, 257
- Terceira incident, 314
- Termination of war, conquest and subjugation, by, 290
 - modes of effecting, 290
 - reciprocal intermission of hostilities, 290
 - treaty of peace, by, 290. *See* Treaty of Peace
- Territorial sea, 103-105
 - extent of, 103, 104, 105
 - innocent passage through, 103
 - jurisdiction within, 133
 - National Prohibition Act, American rights under, 104
 - range of guns as limit, 104, 106
 - ten-mile rule, adoption of, 107
 - three-mile limit, establishment of, 103
 - various limits suggested, 103
- Tentorium nullius*, 91
- Territory, cession of, 295
 - enemy, of**, devastation of, 260, 261
 - produce of land in**, 281
- Territory, neutrals, of, use of, by belligerents, 308, 309
 - States, of, 90 *seq.*
 - modes of acquiring, 90
- Texas, incorporation in United States, 298
- Thalweg*, 112
- Thaya, navigation of, 115
- Thea*, the, sinking of, 423
- Thirty Years' War, belligerents' conduct in, 204
- Tilsit, Treaty of, 296
- Timor boundaries, arbitration, 170
- Tourkmanitchai, Treaty of (1828), 107
- Tracer projectiles in aerial warfare, 226
- Trade, neutrals with belligerents, of, 320 *seq.*
- Trading with the enemy, 193 *seq.*
 - Black Lists, 194
 - licence as to, 195, 196
 - with the Enemy Acts (1914-18), 196, n.
- Transfer, goods, of, 275, 276
 - vessels, of, 275, n., 276 *seq.*
- Transport, means of, seizable, 249
- Transvaal Republic, 36, 138
- Treaties. For particular treaty *see*
 - name of place
 - binding force of, 142-5
 - classification of, 139
 - commencement of obligations, 142
 - contracts compared with, 137
 - deceit, effect of, 138
 - declaratory, 25
 - duration of, 138
 - duress, effect of, 137, 138
 - enforcement of, 137
 - evidence of legal rules, 25
 - form of, 141
 - guarantee of, 139
 - collective obligation, 139
 - joint and several obligation, 140
 - interpretation of, 142
 - intervention under, 89
 - law-making, 139
 - non-declaratory, 25
 - power to make, 138
 - when absent, 138
 - ratification of, 141
 - refusal of, 141
 - rebus sic stantibus* implied in, 145
 - reconsideration of, by League of Nations, 145
 - registration with the League of Nations, 141
 - signature of, 141
 - termination of, 142 *seq.*
 - war, effect of, 145 *seq.*

- Treaty of peace, adjudication of
 prize court after, 293, 294
 articles of, 294, 295
 additional, 295
 general, 295
 miscellaneous, 295
 secret, 295
 separate, 295
 special, 295
 captures effected after, 293
 cession of territory by, 295, 296
 conquest confirmed by, 296 *seq.*
 date of operation, 291
 effect of, 290
 indemnity clause, 294
 notice of, 292
 private rights, revival of, 291
 purpose of, 291
Trent controversy, 69, 404-406
 Triple Alliance, 41
 Troppau, Congress of, 83
 Truce, authority to conclude, 247
 flag of, 2x9, 246
 provisions as to, 246
Tsarevitch, the, 319
 Turco-Italian War (1911), declaration
 of war in, 192
 enemy residents, 198
 treaties, effect on, 147
 war (1912), shelling of protected
 buildings, 232
 Turkey, capitulations, abrogation of,
 73. n.
 European Concert and, 47, 49
 debt, public, after Great War, 300
 Egyptian independence, recognition
 by, 36
 guarantee of integrity of, 140
 intervention in, 87
 member of society of nations, as, 47
 Red Crescent, use of, 242, n.
 Turkish indemnities, interest on, arbi-
 tration as to, 169
Tuscarora, the, 318, 405
 Twenty-four hours' possession, 420
 stay, 321
 Twiss, permanent personal union,
 34, n.
- Unions of States, 33
 federal, 33, 40
 personal, 34, 40
 real, 34
- United States, arbitration award
 rejected, 27, n.
 belligerency of Confederate States,
 46
 contraband rules, 349
 expatriation, 124
- United States, federal system, 40
 hegemony in America, 48
 inchoate naturalisation, 126
 international law and municipal
 law, 19
 military instructions in the Ameri-
 can Civil War, 29
 nature of union, 34
 primacy on American continent, 86
 Unneutral service, 396 *seq.*
 contraband carriage distinguished
 from, 396
 definition of, 396
 dispatches carried, knowledge pre-
 sumed, 396, 397
 penalty, 398
 privileged cases, 397
 of enemy on neutral ships, 396-9
 duration of liability to capture, 401
 enemy persons on neutral ships,
 403-405
 identification with the enemy,
 401-3
mens rea in, 399, n.
 military persons of enemy on
 neutral ships, 396, 398, 399-401,
 403, 404
 present law on, 407
 rule of war of 1756, 403
 transmission of intelligence, 402
- Uti possidetis*, principle of, 295
- Valin, territorial sea, extent of, 103
- Vattel, devastation, on, 260
 enemies resident within the terri-
 tory, 197
 international rivers, 113
 military occupation, on, 253
 passage of belligerent army through
 neutral territory, 324
 reprisals, prebelligerent, on, 187,
 188
 sovereigns, jurisdiction over, 127
 spies, on, 239
 treaty of peace, effect of, 290
- Venezuela, blockade of, 189
 boundary dispute, 85, 93, 95, 149,
 152
 Venezuelan debts arbitration (1004),
 158, 162
- Versailles, Treaty of (1919), art,
 works of, returned after Great
 War, 251, n.
 cables, submarine, ownership of,
 252
 debt, German pre-war national, 300
 Kiel Canal, 112
 rivers, European, navigation of, 115
 war crimes, 301

