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A TREATISE ON
INTERNATIONAL LAW

W. E. HALL

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ON

INTERNATIONAL LAW

BY

WILLIAM EDWARD HALL, M.A.

FIFTH EDITION

EDITED BY J. B. ATLAY, M.A.

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PREFACE TO THE FIFTH EDITION

The late Mr. Hall at the time of his lamented death in November 1894 had completed for the press the fourth edition of this book, and the first nine sheets had received his final revision[1]. The task of correcting the remaining proofs and otherwise preparing the book for publication was entrusted to me by the Delegates of the Clarendon Press, at whose request also I have undertaken the present edition.

With regard to the introduction of new matter I have confined myself to what seemed absolutely necessary in order to bring the book up to date, and, in so doing, I have followed, as far as possible, the lines laid down by the author in previous editions. Wherever either in the text or notes I have gone beyond mere verbal alteration the additions are placed within square brackets [ ]. Events in Japan and China, the Venezuela boundary dispute, the Hague Conference with its various Conventions, together with incidents in the Spanish-American War and our own war in South Africa, are among the topics which have demanded notice. The controversy between Great Britain and Germany over the seizure of the *Bundesrath* having given a new prominence to the doctrine of 'continuous voyages' it seemed desirable that the paragraphs on that subject which Mr. Hall had consigned to a footnote should be brought up into the text, while I have taken upon myself to indicate in the note the position, opposed to the views of Mr. Hall, which was assumed by Lord Salisbury's Government.

[1] For a Memoir of Mr. Hall by Professor Holland, and some account of his writings, the reader is referred to the *Law Quarterly Review* for 1895, vol. xi, p. 113.

Several lists of treaties relating to consular jurisdiction, to the exemption of foreigners from military service, and to kindred subjects have been deleted. The rapidity with which such treaties have multiplied since the early editions of this book had swollen the notes containing them to dimensions which seemed out of all proportion to the value of the references themselves. For the convenience of those who make their first acquaintance with the elements of International Law through these pages, I have given, wherever the name of a jurist prior in date to the nineteenth century or of one of his works is first mentioned, the year of his birth and death, or of the work in question. Acting on the advice of Professor Holland, I have discarded the sectional numbering adopted in the previous editions. The fact that the bulk of the book has been reduced by some thirty pages is due solely to typographical changes. With the exception of the treaty lists above mentioned, and of a sentence here and there which has become inconsistent with the amended context, nothing has been omitted which appeared in the fourth edition. The preface to the third edition is retained as containing Mr. Hall's latest view of the future of International Law.

I have to record my gratitude to Professor Holland, K.C., for valuable suggestions, which I hope may have saved me from more than one pitfall, and to the Delegates of the Press for allowing me to associate my name, however humbly, with one whose friendship is among the most cherished memories of my life.

J. B. ATLAY.

LINCOLN'S INN,
February 1, 1904.

PREFACE TO THE THIRD EDITION

In issuing the third edition of the following work, it has been found necessary to add still further to its bulk. Several topics have assumed a greater importance than they before possessed; in others, recent occurrences have brought to light insufficiency of treatment; in others, new circumstances are tending to establish new rules. I have endeavoured to take notice of such of these topics as seem to me to be ripe for discussion. There are also a certain number of additions in matters of detail.

Perhaps it may not be inopportune to seize the present occasion to say a word or two as to the degree in which it is reasonable to expect that International Law shall be a restraining force on public conduct. Men who have the good fortune to deal actively with affairs are somewhat apt to think and speak lightly of its strength. It would be very unwise of an international lawyer to indulge in the delusion, with which he is often credited, that formulas are stronger than passions. I doubt much if he ever does so. But in order to get clean legal results, he must eliminate the varying elements of tendency to crime, or, to put it more mildly, of infringement of law. He only says what ought to be done, given the acquired moral habits of the past, and the rules of conduct which have been founded upon them. On the other hand, it would also be unwise, on the part of men whose minds are fixed wholly on the present, to underrate the abiding influence of international law. Since it has come into existence, it has often been quietly ignored or brutally disregarded. Nevertheless it so far has force that no state could venture to declare itself independent of it.

So things stand at present; but looking to the future it

must be granted that some doubt as to the strength of international law is not wholly unreasonable. Two different sets of indications point in opposite directions. In no previous period have endeavours been made, such as those which have been made during the present generation by the greater European States, to conclude agreements which should not merely express the momentary convenience, or the selfish aims, of the contracting powers, but should embody principles capable of wider and of impartial application, or to lay down rules of conduct which, it might fairly be hoped, would be adopted by the body of civilised nations. Great pacificatory settlements, such as those of the Congresses of Utrecht and Vienna, used occasionally to be made; but agreements suggesting rules of action, such as that with respect to occupation on the African coast, and agreements prescribing general rules of conduct, such as the Convention of Geneva, are almost wholly new. Again, within the last few years, professors of international law, and writers upon it, have used their best efforts to arrive, upon a vast range of disputed topics, at common conclusions, which might be offered for general acceptance with such authority as may be possessed by professors and writers as a body; and they have done a good deal towards rendering doctrine harmonious and consistent. If such indications as these stood alone, it might be taken not only that the definite rules of international law are extending in range, and gaining in precision, but that their hold is also becoming stronger day by day. On the other hand, it is not to be denied that there is a wide-spread distrust of the reality of this progress. Many soldiers and sailors, many men concerned with affairs, have little belief that much of what has been added of late years to international law will bear any serious strain. And, however convenient a standard of reference that law may be for the settlement of minor disputes; however willing statesmen may be to defer to it when they are anxious not to quarrel, grave doubt is felt

whether even old and established dictates will be obeyed when the highest interests of nations are in play. This feeling, for reasons which cannot be dismissed as unfounded, is probably stronger in England than elsewhere; but it is not confined to England.

Both sets of indications seem to me to point truly. Looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of states. The area within which it reigns beyond dispute has in that time been infinitely enlarged, and it has been greatly enlarged within the memory of living men. But it would be idle to pretend that this progress has gone on without check. In times when wars have been both long and bitter, in moments of revolutionary passion, on occasions when temptation and opportunity of selfishness on the part of neutrals have been great, men have fallen back into disregard of law and even into true lawlessness. And it would be idle also to pretend that Europe is not now in great likelihood moving towards a time at which the strength of international law will be too hardly tried. Probably in the next great war the questions which have accumulated during the last half century and more, will all be given their answers at once. Some hates moreover will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existences will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous,

whether on the part of belligerents or neutrals; and most likely the next war will be great. But there can be very little doubt that if the next war is unscrupulously waged, it also will be followed by a reaction towards increased stringency of law. In a community, as in an individual, passionate excess is followed by a reaction of lassitude and to some extent of conscience. On the whole the collective seems to exert itself in this way more surely than the individual conscience; and in things within the scope of international law, conscience, if it works less impulsively, can at least work more freely than in home affairs. Continuing temptation ceases with the war. At any rate it is a matter of experience that times, in which international law has been seriously disregarded, have been followed by periods in which the European conscience has done penance by putting itself under straiter obligations than those which it before acknowledged. There is no reason to suppose that things will be otherwise in the future. I therefore look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist.

I owe a debt of gratitude, which I must not leave unpaid, to the kindness of my friend Mr. Beresford Atlay, who has taken a very irksome labour off my hands by reading the proofs of this edition, inserting references to recent treaties, and revising and adding to the index.

Aug. 1, 1889.

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INTERNATIONAL LAW

INTRODUCTORY CHAPTER

In what international law consists.

INTERNATIONAL law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.

Views held as to its nature and origin.

Two principal views may be held as to the nature and origin of these rules. They may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them. According to the former view, a distinction is to be drawn between international right and international positive law; the one being the logical application of the principles of right to international relations, and furnishing the rule by which states ought to be guided; the other consisting in the concrete rules actually in use, and possessing authority so far only as they are not in disagreement with international right. According to the latter view, the existing rules are the sole standard of conduct or law of present authority; and changes and improvements in those rules can only be effected through the same means by which they were originally formed, namely, by growth in harmony with changes in the sentiments and external conditions of the body of states. As between these two views in their crude form the majority of writers appear to hold to the former, but a considerable number, while thinking that positive international law derives its force from absolute

right, practically refer to positive law as the only evidence of what is right; so that international usage and the facts of modern state life return by a by-road to the position which they occupy in the second view, and from which they appear at first sight to have been expelled.

Reasons for adopting the second of these views.

In the following work the second view is assumed to be correct. The reasons for this assumption are as follows:—

Putting aside all question as to whether an absolute right, applicable to human relations, exists, or whether if its existence be granted its dictates can be sufficiently ascertained, two objections, both of which seem to be fatal, may be urged against taking it as the basis of international law.

The first of these is that it is not agreed in what the absolute standard consists. With some it is the law of God, with others it is a law of nature inductively reached, by others it is erected metaphysically. Standards so different in origin necessarily differ in themselves; and it is scarcely too much to say that if the fundamental ideas of the more prominent systematic writers on international law were worked out without reference to that body of international usage which always insensibly exerts its wholesome influence whenever particular rules are under consideration, there would be almost as many distinct codes as there are writers of authority [1]. The difference of opinion thus shown

[1] The fundamental ideas of the writers who have exercised most influence upon other writers or upon general opinion may be shortly stated as follows. Grotius (1583–1645) based international law in the main upon a natural law imposed upon man by the requirements of his own nature, of which the cardinal quality, so far as the relation of one man to another is concerned, he supposed to be the social instinct. This natural law he regarded as existing independently of divine command (De Jure Belli et Pacis, written in 1624, Prolegomena and lib. i. cap. i.). Pufendorf (1632–1694), by looking upon the natural law as being imposed by a divine injunction, analogous apparently to the injunctions of religion, and as not being binding apart from such injunction, loosened the intimacy of its connexion with human nature; and though he agreed with his predecessor in thinking that the social instinct at least is inherent in the human mind, he appears, in supposing it to have been given as a means of self-preservation, to elevate utility to the individual rather than right between man and man into its primary object (Law of Nature and Nations, written in 1672, bk. i. c. 2; bk. ii. cc. 2, 3).

is no doubt not greater than that which exists as to the principles by which the internal life of a state ought to be regulated, and as to the origin and sanction of those principles.

In one important respect Grotius and Pufendorf were at one. Both considered that natural law not only forbids acts detrimental to the social state, but enjoins acts tending to its conservation, so that neglect to contribute to the maintenance of that state amounts to an infraction of law. Thomasius (1655-1728), on the other hand, narrows the sphere of law by reducing its injunctions to the negative maxim, 'Do not do to others what you do not wish them to do to you,' and relegates everything beyond this to the domain of morals, with respect to which no external obligation exists. It is unnecessary to point out what different international laws would be obtained by the logical application of the former and the latter of these theories respectively. According to Wolff (1679–1764), man is bound by the law of his nature to attain the highest perfection of which he is capable, and the obligation to perform an act being regarded as giving rise to the rights necessary for its performance, he is endowed with innate rights of liberty, equality, and security, which are necessary to his development. These innate rights others are bound in their turn to respect; their acknowledgment may therefore be compelled, and their infringement punished. Subjectively also a man in the natural state is bound to assist his neighbour in arriving at the perfection which is the end of his being; but the obligation implies no correlative right to demand its fulfilment, and compliance with it cannot therefore be enforced (Jus naturae methodo scientifica pertractatum, written in 1741, esp. §§ 28, 78, 197, 208, 640, 645, 659, 669, 676). Thus the natural law of Wolff distinguishes, like that of Thomasius, between law and morals, but it again enlarges the compass of the former by expressly importing into it the principle of right to liberty of action. In their results, the one seems to lead to such laws as those which exist in actual human societies, and the other provides free scope for a vague ideal. The principle of liberty was converted by Kant (1724–1804) into the key of his system. Liberty is a conception of the pure reason, which presents itself to the will as the necessary condition of its action, and the practical principles founded upon it are the determining causes of particular actions, under a law of free obedience on the part of the will to the dictates of reason, and of corresponding external liberty, the presence of which is as necessary to the action of the will as is internal freedom. The dictates of reason indicate rights and obligations, and law consists in the conditions under which the choice of the individual with regard to their subject-matter can be reconciled with that of other men on the assumption of the independence of all upon any constraining will on the part of another; its object is to prevent such aberrant manifestations of will as are inconsistent with the rational liberty of all. Law, however, so defined, cannot exist between states, because they have no machinery for effecting this reconciliation by the use of a 'collective, constraining will' through the means of legislation, which can only be employed in an organised social community. They are therefore in a relation of non-law, in which force is the only arbiter of disputes; but this relation being in itself contrary to the dictates of reason, nations ought to issue

But the external conditions under which individuals and states live with reference to law, or with reference to law in the one case, and to rules equivalent to law in the other, are wholly dissimilar. Law in modern civilised states presents itself as being imposed and enforced by a superior, invested with authority for that purpose; to individuals, therefore, it is immaterial whether they agree with their neighbours as to the speculative basis of law; they have not to reason out for themselves the rules by which they intend to be governed; the law is declared to them by a competent authority, and conscientious persons are moved to obedience so soon as the order in which law is conveyed is communicated to them. States, on the other hand, are independent beings, subject to no control, and owning no superior; no person or body of persons exists to whom authority has been delegated to declare law for the common good; a state is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit; if therefore states are to be subject to anything which can either strictly or analogically be called law, they must accept a body of rules by general consent as an arbitrary code irrespectively of its origin, or else they must be agreed as to the general principles by which they are to be governed.

The second objection is, that even if a theory of absolute right were universally accepted, the measure of the obligations of a state would not be found in its dictates, but in the rules which are received as positive law by the body of states. Just as the legal obligations of an individual are defined, not by the moral ideal recognised in the society to which he belongs, but by the laws in force within it, so no state can have the right to demand that another state shall act in conformity with a rule in advance of the practical morality which nations in general have embodied

from it by agreeing with each other to live in a state of peace. Thus Kant's doctrine on its international side, while it offers an ideal standard of conduct, dispenses with the necessity of obeying it, except on the condition of express compact (Metaphysische Anfangsgründe der Rechtslehre, written in 1796).

in the law recognised by them; and a state cannot itself fall under a legal obligation to act in a different way from that in which it can demand that another state shall act in like circumstances. However useful therefore an absolute standard of right might be as presenting an ideal towards which law might be made to approach continuously nearer, either by the gradual modification of usage or by express agreement, it can only be a source of confusion and mischief when it is regarded as a test of the legal value of existing practices.

By what evidence the rules purporting to constitute international law are shown to be accepted as law.

If international law consists simply in those principles and definite rules which states agree to regard as obligatory, the question at once arises how such principles and rules as may purport to constitute international law can be shown to be sanctioned by the needful international agreement. No formal code has been adopted by the body of civilised states, and scarcely any principles have even separately been laid down by common consent. The rules by which nations are governed are unexpressed. The evidence of their existence and of their contents must therefore be sought in national acts—in other words, in such international usage as can be looked upon as authoritative. What then constitutes an authoritative international usage?

Usage, of which the authority is unquestionable.

Up to a certain point there is no difficulty in answering this question. A large part of international usage gives effect to principles which represent facts of state existence, essential under the conditions of modern civilised state life. Whether these are essential facts in the existence of all states is immaterial; several of them indeed are not so. The assumption that they are essential, so far as that group of states which is subject to international law is concerned, lies at the root of the whole of civilised international conduct; and that they have come to be regarded in this light, and unquestionably continue to be so regarded, is sufficient reason for taking as authoritative the principles and rules which result from them. Another portion of international usage gives effect to certain moral obligations, which are recognised as being the source of legal rules with

the same unanimity as marks opinion with respect to the facts of state existence.

No third basis of legislation can be found of such solid value as are the essential facts of existence of a society and the moral principles to which that society feels itself obliged to give legal effect. Of both the foregoing kinds of usage, therefore, it can be affirmed unhesitatingly that they possess a much higher authority than any other part of international law. It can also be affirmed as unhesitatingly that the principles which underlie them have been accepted not merely as forms of classification of usage, but as distinct sources of law. States are consequently bound, not only to respect those principles in the shape of existing usage, but in dealing with fresh circumstances to apply them whenever their application is possible. The international lawyer, in like manner, when testing the validity of practices claiming to be legal, or indicating appropriate modes of regulating new facts or relations, is justified, within the scope of the principles in question, in going beyond the rules which can be drawn from the bare facts of past practice. He is able, and ought, to hold that the principle governs until an exceptional usage is shown to have been established, or at least until it can be shown that the authority of the principle has been broken by practice at variance with it, but not treated as an infringement of the law. In other words, all practices or particular acts, claiming to be legal, which militate against the principles in question, must be looked upon with disfavour, and the onus of proving that they have a right to exist is thrown upon themselves.

It is to be observed that the accepted principles of international law sometimes lead logically to incompatible results. In such cases it is evident that as neither of two ultimate principles can control the other, and reconciling legislation at the hands of a superior is from the nature of the case impossible, there is nothing but bare practice which can fix at what point the inevitable compromise is to be made.

Usage, of which the value is open to question.

It is more difficult to determine the value of arbitrary usages unconnected with principle, or of usages professing either to be the groundwork of rules derogating from accepted principles, or to form exceptions from admitted rules. In some cases their universality may establish their authority; but in others there may be a question whether the practice which upholds them, though unanimous so far as it goes, is of value enough to be conclusive; and in others again it has to be decided which, or whether either, of two competing practices, or whether a practice claiming to support an exception, is strong enough to set up a new, or destroy an old, authority. To solve such questions it is necessary to settle the relative value of national acts. These split themselves into two great divisions, namely, unilateral acts and treaties and other compacts.

Treaties.

It appears to be usually thought that treaties are more important indications than unilateral acts of the opinion of the contracting parties as to what is, or ought to be, the law; and it is even frequently considered that they are in some sense a fountain of law to others than the signatory states. The reasoning upon which the latter notion rests is not very intelligible. It is conceded that 'in the full rigour of the law, treaties are only obligatory on the contracting parties;' but it is nevertheless held that 'when a certain number, freely entered into by divers nations, have embodied the same principles of natural law, imparting to it the same interpretation, and adopting the same methods for giving effect to it, although no one of them need be compulsorily applicable to states which have not been parties to it, a sort of jurisprudence—a species of law—is formed, which the majority of nations recognise as being obligatory, even upon those who have not signed any of its constituent parts[1].' The doctrine is seldom stated with

[1] Hautefeuille, Des Droits et des Devoirs des Nations Neutres: Discours Préliminaire. Calvo, Le Droit International, 3e ed. § 24, puts forward the same view more indefinitely, but with sufficient distinctness; and Bluntschli, Le Droit International Codifié, 2e ed. § 794, adopts it by implication in looking

this openness and breadth, but it is more or less consciously implied in the use which is generally made of what is called the conventional law of nations. In spite of the largeness of the support which it thus receives, there can be no hesitation in dismissing it at once as essentially unsound. As a pact between two parties is confessedly incapable of affecting a third who has in no way assented to its terms, the only ground on which it is possible that treaties can be invested with more authority than other national acts is that, when they enshrine a principle, they are supposed to express national opinion, in a peculiarly deliberate and solemn manner, and therefore to be of more value than other precedents. Even if this were the case, treaties would be a long way from establishing 'a sort of jurisprudence' separable from that produced by the aggregate of deliberate national acts; but it cannot be admitted that the greater number of treaties do in fact express in a peculiarly solemn manner, or indeed at all, the views of the contracting parties as to what is or ought to be international law.

Treaties included amongst those which have been supposed to express principles of law appear to be susceptible of division into three classes:

upon the declaration of the Treaty of Paris with respect to the effect of the flag on enemy's goods as universally binding, notwithstanding that the United States have not yet adhered to it. Ortolan (Diplomatie de la Mer, Notice Additionnelle) states the reasons for the supposed authority of treaties as follows. The authors, he says, who have asserted it 'ont envisagé successivement et séparément les conventions conclues à diverses époques par chacune des puissances civilisées avec les autres; ils ont reconnu que, dans ces instruments publics ayant pour but non seulement de régler des intérêts de détail et particuliers, mais encore de fixer les grands principes d'intérêt général, quelques-uns de ces principes étaient toujours ou le plus souvent reconnus d'un commun accord; que si, dans des temps de guerre ou de mésintelligence, l'abandon de ces principes avait eu lieu quelquefois, les peuples, instruits par expérience des conséquences funestes de cet abandon, avaient proclamé de nouveau ces mêmes principes dans leurs traités de paix, et en avaient stipulé l'observation constante pour l'avenir. Dès lors on a été fondé à déduire de cette conformité presque générale de décisions une théorie de ce qui se pratique ou de ce qui doit se pratiquer entre les nations civilisées en vertu des stipulations écrites; et c'est là ce que l'on a nommé droit des gens conventionnel ou des traités.'

1. Those which are declaratory of law as understood by the contracting parties.

2. Those which stipulate for practices which the contracting parties wish to incorporate into the usages of the law, but which they know to be outside the actual law.

3. Those which are in fact mere bargains, in which, without any reference to legal considerations, something is bought by one party at the price of an equivalent given to the other.

The first of these kinds is for any purpose of international precedent extremely rare. A few instances there no doubt are of international instruments declaratory of true law; such, for example, as the Protocol signed at the Conference of London in 1871, by which the representatives of Russia, Austria, France, Germany, Great Britain, Italy, and Turkey, stated that they recognised it to be an essential principle of the law of nations that no power can be released from the engagements of treaties, or modify their stipulations, except with the consent of the contracting parties amicably obtained. But the greater number of the few treaties which profess to be declaratory are of the type of the Acts and Conventions of the two Armed Neutralities, and the Convention for the common defence of the liberty of trade between Denmark and Sweden in 1794, which may be taken by implication to assert the principles of the first Armed Neutrality, and to be declaratory of them as general law. In these cases it is certain that the weight of authority was not in accordance with the provisions of the treaties, and that their object was simply to enforce new rules upon a third state in the common interest of the contracting parties[1].

Certain introductory clauses are usually found in treaties of commerce, which do in fact involve principles of existing international usage, as in the case of stipulations that there shall be friendship between the contracting nations. This and like

[1] Treaties are often referred to as declaratory of a principle which are not so in fact. Thus the Treaty of Vienna is sometimes said to be declaratory of the principles of freedom of navigation. For its true effect see postea, p. 137.

covenants, however, are now mere words of surplusage; they add nothing to the authority of the principle which they embody. Once no doubt they were necessary; but long after they ceased to be so they remained as common forms of opening, and it can only be supposed that they owe to their use as such the position which they occupy as the sole exceptions to the general truth that express stipulations are not made to ensure obedience to a law by which both contracting parties would in any case feel themselves to be bound.

Of the second class of treaties there are not many which enunciate principles[1]; but there are a very large number which have for their aim to define the objects which an undisputed principle is to be permitted to affect, or the manner in which it is to be applied. Such are those which enumerate articles contraband of war, those which prescribe the formalities of maritime capture, those directed to the repression of the slave trade, and many of those regulating the functions and defining the privileges of Consuls. The value both of the more general and the more specific kinds is great to the international lawyer; not because the conventions which belong to them can be a source of law, but because they show the flow and ebb of opinion, and its strength at a given time with reference to particular doctrines or practices.

Treaties of the third class are not only useless but misleading.

[1] Treaties are sometimes referred to this class also which do not belong to it in fact. Thus the Treaty of Utrecht, which purported to have for one of its practical objects the establishment of a justum potentiae equilibrium, has been spoken of as being designed to affirm the doctrine of the balance of power. As examples of treaties which were really intended to enunciate principles may be instanced the Treaty of 1850 between Great Britain and the United States for the construction and regulation of a Ship Canal across Central America, and the Declaration of Paris in 1856. It was recited in the former that the contracting parties desired 'not only to accomplish a particular object, but also to establish a general principle,' in the latter that the signatory states proposed 'introduire dans les rapports internationaux des principes fixes' with reference to certain points of maritime international law. Apart from such express recitals, or from distinct external evidence, it would be rash to assume that a treaty is intended to enunciate a principle.

Unfortunately, they are also the most numerous. Sometimes they mingle with conventions intended to affirm or extend a principle in such manner as to blur their effect, or even to throw an air of uncertainty on the wishes of the contracting parties; sometimes they contradict in a long succession of separate agreements what from other evidence would appear to be the settled policy of a nation; sometimes they form a mere jumble in which no clue to intention can be traced. Thus in 1801, Great Britain and Russia and Great Britain and Sweden signed treaties by which enemy's goods in neutral vessels were rendered liable to confiscation, while in the same year Russia and Sweden reiterated as between themselves the principle of the armed neutrality under which hostile property was protected by a friendly ship. During the last century the United States concluded no less than ten treaties under which neutral goods were confiscated in enemy's vessels; but their courts regard such goods as free in all cases not specially provided for by international agreement. Again, in 1785 the United States agreed with Prussia that contraband of war should not be confiscable; by their treaty of 1794 with England not only were munitions of war subjected to confiscation, but the list was extended to include materials of naval construction; and in the only treaty since concluded by Prussia, in which the subject is referred to, except two in 1799 and 1828 reviving that of 1785 with the United States, articles contraband of war are dealt with in the usual manner. Instances of like kind might be endlessly multiplied, and it may be safely said that it is rarely that the treaty policy of any country is consistent with itself over a long period of time.

On thus exposing the nature of treaties to analysis, no ground appears for their claim to exceptional reverence. They differ only from other evidences of national opinion in that their true character can generally be better appreciated; they are strong, concrete facts, easily seized and easily understood. They are, therefore, of the greatest use as marking points in the movement of thought. If treaties modifying an existing

practice, or creating a new one, are found to grow in number, and to be made between states placed in circumstances of sufficient diversity; if they are found to become nearly universal for a while, and then to dwindle away, leaving a practice more or less confirmed, then it is known that a battle has taken place between new and old ideas, that the former called in the aid of special contracts till their victory was established, and that when they no longer needed external assistance, they no longer cared to express themselves in the form of so-called conventional law. While, therefore, treaties are usually allied with a change of law, they have no power to turn controverted into authoritative doctrines, and they have but little independent effect in hastening the moment at which the alteration is accomplished. Treaties are only permanently obeyed when they represent the continued wishes of the contracting parties.

Conclusions as to the legal value of different kinds of national acts.

If the legal value of national acts is not to be estimated with reference to a divine or natural law, and if treaties are mere evidences of national will, not necessarily more important, and occasionally, from being the result of a temporary exigency, less important than some unilateral acts, it remains to be asked whether all indications of national opinion with reference to international law are to be considered of an equal weight, except in so far as their significance is determined by attendant circumstances, and whether, therefore, authority will attach to them in proportion to their number and to the length of time during which they have been repeated. Subject to two important qualifications this may probably be said to be the case.

The first qualification is that unanimous opinion of recent growth is a better foundation of law than long practice on the part of some only of the body of civilised states. But it must be remembered that as no nation is bound by the acts of other countries in matters which have not become expressly or tacitly a part of received international usage, the refusal of a single state to accept a change in the law prevents a modification agreed upon by all other states from being immediately com-

pulsory, except as between themselves. The rule, as altered for their purpose, merely becomes an unusually solid foundation of usage, capable of upholding law in less time than if the number of dissentients had been greater. Thus the provisions of the Declaration of Paris cannot in strictness be said to be at present part of international law, because they have not received the adherence of the United States; but if the signatories to it continue to act upon those provisions, the United States will come under an obligation to conform its practice to them in a time which will depend on the number and importance of the opportunities which other states may possess of manifesting their persistent opinions.

The second qualification is that there are some states, the usages of which in certain matters must be taken to have preponderant weight. It is impossible to overlook the fact that the practice, first of Holland and England, and afterwards of England and France, exercised more influence on the development of maritime law than that of states weaker on the sea; and it would at the present day be absurd to declare a maritime usage to be legally fixed in a sense opposed to the continued assertion of both Great Britain and the United States. The acts of minor powers may often indicate the direction which it would be well that progress should take, but they can never declare actual law with so much authority as those done by the states to whom the moulding of law has been committed by the force of irresistible circumstance.

Whether international law constitutes a branch of true law.

In what has been said up to this point the rules governing the conduct of states have been spoken of as legal rules; it has therefore been implied either that they constitute a body of true law, identical in its essential characteristics with law regulating an organised political community, or at least that, if not identical with such law, they are so closely analogous to it as to be more properly described as law than by any other name. It is however not uncommonly thought—in England at any rate—that neither of these views is correct. The only fundamental

distinction, it is said, which separates legal from moral rules, is that the former are, and the latter are not, commands given and enforced by a determinate authority; both are general precepts relating to overt acts, but in the one case a machinery exists for securing obedience, in the other no more definite sanction can be appealed to than disapprobation on the part of the community or of a section of it. Judged by this test, it is urged, the rules of International Law are nothing more than counsels of morality, sanctioned by the public opinion of states.

That there is an element of truth in this criticism must be frankly admitted. International law does not conform to the most perfect type of law. It is not wholly identical in character with the greater part of the laws of fully developed societies, and it is even destitute of the marks which strike the eye most readily in them. But it is now fully recognised that the proper scope of the term law transcends the limits of the more perfect examples of law. To what extent it transcends them is not equally certain. The various ideas of law formed in different societies and times, and the various groups of customs which have been obeyed as law, have probably not yet been sufficiently compared and analysed, and until an adequate comparison and analysis have been made, no definition or description of law can be regarded as final. During the continuance of this state of uncertainty as to the proper limits of law, it is impossible, in dealing with international law, to ignore the two broad facts, that it is habitually treated as law, and that a certain part of what is at present acknowledged to be law is indistinguishable in character from it.

Even supposing the view to be erroneous that the body of international usages constituted a branch of law from the time at which it first acquired authority, the fact that states and writers have acted and argued as if it were law cannot but affect the nature of the rules which now exist. The doctrines of international law have been elaborated by a course of legal reasoning; in international controversies precedents are used in

a strictly legal manner; the opinions of writers are quoted and relied upon for the same purposes as those for which the opinions of writers are invoked under a system of municipal law; the conduct of states is attacked, defended, and judged within the range of international law by reference to legal considerations alone; and finally, it is recognised that there is an international morality distinct from law, violation of which gives no formal ground of complaint, however odious the action of the ill-doer may be[1]. It may fairly be doubted whether a description of law is adequate which fails to admit a body of rules as being substantially legal, when they have received legal shape, and are regarded as having the force of law by the persons whose conduct they are intended to guide.

It is moreover not true to say that municipal law is invariably enforced by a determinate authority. There are stages of social organisation in which public opinion, which is the ultimate sanction of all law, whether municipal or international, is often able only to say to the individual that, when the law is broken to his hurt, he may himself exact redress if he can. When the early Teutonic societies allowed a person, upon whom a certain kind of legal injury had been inflicted, to seize the cattle of the wrongdoer and keep them till he obtained satisfaction, or when they told him to refer a quarrel involving legal questions to the issue of trial by combat, they showed much the same powerlessness to enforce law directly that is usually shown by the community of states. Even at a far more advanced point of development there is probably always some law which can only be supposed by a violent fiction to be enforced by a determinate authority. A custom which, on being infringed, is brought before the courts for enforcement, and is enforced by them, must have been law for some indefinite time before judicial cognizance can be taken of it. If not, the courts have legislated, and the person against whom the custom has been enforced is subjected

[1] The above points are well put by Sir Frederick Pollock in a paper on the methods of Jurisprudence. Law Magazine, November 1882.

to an ex post facto law. The supposition of such legislation is inadmissible; and the fiction that the courts, without legislating, have by their decision transformed the custom retrospectively into law, is as unsatisfactory as fictions always must be. Evidently the courts give effect to a custom because it is already regarded in the community as having the force of law; and during the time that it has existed, before appeal has been made to the courts, it must have been imposed upon unwilling persons by the strength of public opinion alone.

To regard the foregoing facts as unessential is impossible. If the rules known under the name of international law are linked to the higher examples of typical positive law by specimens of the laws of organised communities, imperfectly developed as regards their sanction, the weakness and indeterminateness of the sanction of international law cannot be an absolute bar to its admission as law; and if there is no such bar, the facts that international rules are cast in a legal mould, and are invariably treated in practice as being legal in character, necessarily become the considerations of most importance in determining their true place. That they lie on the extreme frontier of law is not to be denied; but on the whole it would seem to be more correct, as it certainly is more convenient, to treat them as being a branch of law, than to include them within the sphere of morals.

PART I

CHAPTER I

PERSONS IN INTERNATIONAL LAW, AND COMMUNITIES POSSESSING AN ANALOGOUS CHARACTER

The communities governed by international law.

PRIMARILY international law governs the relations of such of the communities called independent states as voluntarily subject themselves to it. To a limited extent, as will be seen presently, it may also govern the relations of certain communities of analogous character. The marks of an independent state are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control. It is postulated of those independent states which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another they are in the same relation as that in which individuals stand to each other who are subject to law. They are collective persons, and as such they have rights and are under obligations.

These postulates assume the conformity of the nature of such states as are governed by law to the conditions necessarily precedent to the existence of law; because the capacity in a corporate person to be subject to law evidently depends upon the existence of a sense of right, and of a sense of obligation to act in obedience to it, either on the part of the community at large, or at least of the man or body of men in whom the will governing the acts of the community resides. In so far moreover as states are permanently established societies their marks represent a necessary condition of subjection to law. A society,

for example, of which the duration is wholly uncertain cannot offer solid guarantees for the fulfilment of obligations, and cannot therefore acquire the rights which are correlative to them. It cannot ask other communities to enter into executory contracts with it, and at any moment it may cease to be a body capable of being held responsible for the effects of its present acts.

Their marks.

On the other hand, the marks constituted by independence and association with specific territory represent facts which, though they determine the form of the particular law, are not in themselves necessary to law.

The absolute independence of states, though inseparable from international law in the shape which it has received, is not only unnecessary to the conception of a legal relation between communities independent with respect to each other, but, at the very least, fits in less readily with that conception than does dependence on a common superior. 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. The minds of men were at that time occupied with hierarchical ideas, and if a law had come into existence, it must have involved either a solidification of the superiority of the Empire, or legislation at the hands of the Pope. Law imposed by a superior was the natural ideal of a religious epoch; and in spite of the fierce personal independence of the men of the Middle Ages, the ideal might have been realized if it had not been for the mutual jealousy of the secular and religious powers. As it was, neither the Church nor the Empire became strong enough to impose law. With their definitive failure to establish a regulatory authority international relations tended to drift into chaos; and in the fifteenth century international life was fast resolving itself into a struggle for existence in its barest form. In such a condition of things no law could be established which was unable to recognise absolute independence as a fact prior to itself; and rules of conduct which should command obedience apart from an external sanc-

tion were the necessary alternative to a state of complete anarchy.

That the possession of a fixed territory is a distinct requirement must be looked upon as the result of more general, but not strictly necessary, circumstances. Abstractedly there is no reason why even a wandering tribe or society should not feel itself bound as stringently as a settled community by definite rules of conduct towards other communities, and though there might be difficulty in subjecting such societies to restraint, or in some cases in being sure of their identity, there would be nothing in such difficulties to exclude the possibility of regarding them as subjects of law, and there would be nothing therefore to render the possession of a fixed seat an absolute condition of admission to its benefits. The explanation of the requirement must be sought in the circumstances of the special civilisation which has given rise to international law. Partly, no doubt, it is to be found in the fact that all communities civilised enough to understand elaborated legal rules have, as a matter of experience, been settled, but the degree to which the doctrines of international law are based upon the possession of land must in the main be attributed to the association of the rights of sovereignty or supreme control over human beings with that of territorial property in the minds of jurists at the period when the foundations of international law were being laid. The notion of tribal or national sovereignty, universal after the fall of the Roman empire, disappeared during the Middle Ages before the feudal idea which united the right of control with the possession of determinate portions of land; and the substitution of the conceptions of Roman law for those of feudalism tended to strengthen the bond of connexion. As the result of this substitution, land actually under the administration of a particular person became freed from the paramount title or authority of others; the notion of 'dominium' was introduced; and by the sixteenth century the person or persons possessing sovereignty within a specific territory were deemed its absolute owners.

From the invariable association of land with sovereignty, or in other words with exclusive control, over the members of a specific society, to the necessary association of such control with the possession of land, is a step which could readily be made, and which became inevitable when no instances were present of civilised communities without fixed seats.

When a community becomes a person in law.

States being the persons governed by international law, communities are subjected to law, with a certain exception which will be dealt with presently, from the moment, and from the moment only, at which they acquire the marks of a state. So soon, therefore, as a society can point to the necessary marks, and indicates its intention of conforming to law, it enters of right into the family of states, and must be treated in conformity with law. The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community, and in conformity with the dictates of international law, and finally that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law. On the other hand, since, with the exception above mentioned, communities become subject to law from the moment only at which they acquire the marks of a state, international law takes no cognizance of matters anterior to the acquisition of those marks, and is, consequently, indifferent to the means which a community may use to form itself into a state. The legal status of a duly organised community is affected neither by moral faults of origin, nor by violations of right by which its establishment may have been accompanied, unless the violations have been such as to make it doubtful whether the community claiming to be a state will be able or willing to fulfil its legal obligations.

In what circumstances personal

The personal identity which is thus established exists in the eye of the law solely for international purposes. It is therefore retained so long as the corporate person undergoes no change

identity is retained.

which essentially modifies it from the point of view of its international relations, and with reference to them it is evident that no change is essential which leaves untouched the capacity of the state to give effect to its general legal obligations or to carry out its special contracts.

It flows necessarily from this principle that internal changes have no influence upon the identity of a state. A community is able to assert its rights and to fulfil its duties equally well, whether it is presided over by one dynasty or another, and whether it is clothed with the form of a monarchy or a republic. It is unnecessary that governments, as such, shall have a place in international law, and they are consequently regarded merely as agents through whom the community expresses its will, and who, though duly authorised at a given moment, may be superseded at pleasure. This dissociation of the identity of a state from the continued existence of the particular kind of government which it may happen to possess is not only a necessary consequence of the nature of the state person; it is also essential both to its independence and to the stability of all international relations. If in altering its constitution a state were to abrogate its treaties with other countries, those countries in self-defence would place a veto upon change, and would meddle habitually in its internal politics. Conversely, a state would hesitate to bind itself by contracts intended to operate over periods of some length, which might at any moment be rescinded by the accidental results of an act done without reference to them. Even when internal change takes the form of temporary dissolution, so that the state, either from social anarchy or local disruption, is momentarily unable to fulfil its international duties, personal identity remains unaffected; it is only lost when the permanent dissolution of the state is proved by the erection of fresh states, or by the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable.

The identity of a state is also unaffected by external modification through accession or through loss of part of its territory.

It is seldom, if ever, that enlargement so interferes with the continuity of its life as to make it difficult to carry out international obligations[1]. Annexation implies that the identity of the annexed territory is merged in that of the state to which it is added. The former, therefore, by becoming part of the latter, becomes subject to its obligations; while the annexing state, for the same reason, is not bound by personal contracts affecting its new acquisition, except when, having absorbed a state in its entirety, it becomes heir to the whole of the property of the latter, and consequently is morally obliged to accept responsibility for the debts with which it may have been burdened. The case of loss of territory is so far different that it may become impossible for a state to perform duties of guarantee or alliance under which it may lie by special agreement, but inability to perform contracts of this kind obviously leaves untouched both the capacity to give effect to general legal obligations, and to carry out special agreements based merely upon the possession of independence. The identity of a state therefore is considered to subsist so long as a part of the territory which can be recognised as the essential portion through the preservation of the capital or of the original territorial nucleus, or which represents the state by continuity of government, remains either as an independent residuum or as the core of an enlarged organisation.

When personal identity is lost.

States cease to exist by being absorbed into other states as the result of conquest or of peaceful agreement, by being split into two or more new states in such manner that no part can be

[1] Even Sardinia, while enlarging its area to nearly four times its original size by the absorption of the rest of the Italian States, and after changing its name to that of the kingdom of Italy, did not consider its identity to be destroyed, and held its existing treaties to be applicable as of course to the new provinces. This was no doubt an extreme case, and Holtzendorff (Handbuch des Völkerrechts, i. 37) seems justified in thinking that it would have been more reasonable to regard a new state as having been brought into existence by so great an expansion, coupled with a change of name and capital. Still, it must be admitted that the essential fact of ability to carry out international obligations affecting the old territory remained untouched, and that the government of the enlarged state was fully able to apply them to its fresh acquisitions.

looked upon as perpetuating the national being[1], and by being united upon equal terms with others into a new state.

Communities possessing the marks of a state imperfectly are in some cases admitted to the privilege of being subject to international law, in so far as they are capable of being brought within the scope of its operation.

Communities possessing the marks of a state imperfectly.

A state in its perfect form has, in virtue of its independence, complete liberty of action, subject to law, in its relations with other states; and its liberty, for the purposes of international law, is not considered to be destroyed by the fact that it has concluded agreements fettering its action, provided that such agreements are terminable at any moment or upon stipulated notice, or provided that they are not of such nature in themselves as to necessarily subordinate the national will for an indefinite time to that of another power. But so soon as compacts are entered into, which are not intended to be revocable, or are not likely by the nature of their provisions to be susceptible of unilateral revocation, and which, at the same time, subject the external action of a state to direction by a will other than its own, it ceases within the sphere of these compacts to be independent, and consequently to be a person in international law. Its personality is not however wholly merged, and in matters not covered by the compacts it retains its normal legal position.

States in possession of imperfect independence.

States commonly understood to be subject to law in a partial manner are classed under the several heads of states joined to others by a personal, real, federal, or confederate union, and of states placed under the protection or suzerainty of others[2]. For

The usual classification of such states.

[1] This, for instance, would occur if Austria were to separate into German, Hungarian, Czech, Polish, and South Slavonic states.

[2] Some confusion is apt to creep into the arrangement of existing states under the proper heads, because of the inappropriate names by which some of them are designated,—as in the case of the new German Empire, which, to save the *amour propre* of the component parts, is called a confederated Empire,—and because, in some instances, of deficient attention on the part of writers to the essential facts. The characteristics properly distinguishing the different classes are, however, sufficiently well defined; see Ortolan, Dip. de la Mer (4ᵉ ed.), liv. i. ch. 2; Heffter, Le Droit International de l'Europe (3ᵉ ed.), §§ 20–1; Bluntschli, §§ 70, 75, 76, 78; Calvo, §§ 44–67.

international purposes, however, this classification is in great part immaterial. When it is proposed to place a community under the head of those which are capable of entering into some only of the relations with other states which are contemplated by international law, the only questions which require to be settled are whether its independence is in fact impaired, and if so, in what respects and to what degree. The nature of the bond derogating from independence which unites the community to another society is a matter, not of international, but of public law; because in so far as the former is identified with that society in its relations with other states, it is either a part of it, or in common with it is part of a composite state.

Whether states linked by a personal union, and members of federal states, are among states only partially subject to international law.

Looking at the subject from this point of view, states linked by a personal union may at once be excluded from consideration. A personal union exists, as in the instance of Great Britain and Hanover from 1714 to 1837, when two states, distinct in every respect, are ruled by the same prince; and they 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[1]. For the opposite reason the members of a federal state are equally excluded from the category of states possessed of

[1] M. Heffter says (§ 20) that states joined by a personal union cannot make war upon one another. I fail to see what legal justification can be given for this assertion so long as the prince is looked upon as the organ or agent and not as the sovereign-owner of the state. Of course it is not as a matter of fact likely that war will be made without previous expulsion of the sovereign from one or the other, but this has obviously nothing to do with the matter in its legal aspect.

The term 'personal union' is sometimes applied when 'the individuality of the state is merged by such personal union, and with respect to its external relations, remains for the time in abeyance, but emerges again on the dissolution of the union, and resumes its rank and position as an independent sovereign state;' Halleck, International Law (ed. London 1878), i. 62; see also Phillimore, Commentaries upon International Law, § lxxvi. The relation thus described is wholly different from that of personal union in the ordinary sense; so long as it lasts, it is practically identical with that of real union. It only differs from the latter in that it purports to be terminable on the death of an individual or the cessation of a dynasty, while a real union, though not always in fact independent of a change in

imperfect independence. The distinguishing marks of a federal state upon its international side consist in the existence of a central government to which the conduct of all external relations is confided, and in the absence of any right on the part of the states forming the corporate whole to separate themselves from it. Under the Constitution of the United States, for example, the central authority regulates commerce, accredits diplomatic representatives, makes treaties, provides for the national defence, declares war and concludes peace; the individual states, on the other hand, are expressly forbidden to enter into any agreement with foreign powers without the assent of Congress, to maintain military or naval forces, or to engage in war. The citizens of the United States have a common nationality[1]. Again, in the two kingdoms of Sweden and Norway an hereditary king is invested with like power to that which belongs to the federal government of the United States, and provision is made, in case of extinction of the dynasty, for the election of a new common head, so that the permanence of the union is secured[2]. Under the Constitution of 1871, the German empire forms another state of the same character, notwithstanding that some of the component parts possess the complimentary privilege of receiving foreign ministers at their courts, and of accrediting ministers empowered to deal with matters not reserved to the Imperial Government. All Germans have a common nationality. The joint will of the several states regulates by means of the Imperial Government all matters connected with the diplomatic representation of the corporate state, and the latter has sole power of concluding treaties of peace and alliance, or treaties of any other kind for political objects, commercial treaties, conventions regulating questions of domicil and emigration, postal matters,

the personal sovereign, is contemplated as permanent. It is difficult to understand the advantage of classing together cases which are broadly distinct from each other, and of separating cases which for the purposes of international law are indistinguishable.

[1] Constitution of the United States, in Story, Commentaries on the Constitution of the United States, i. xvii.

[2] De Martens, Nouveau Recueil des Traités de Paix, ii. 608.

protection of copyright and consular matters, extradition treaties and other conventions connected with the administration of civil or criminal law. Whenever members of the Confederation do not fulfil their constitutional duties, which include obedience to the central authority in the above matters, they may be constrained to do so by way of execution [1].

Real union.

A real union is indistinguishable for international purposes from a federal union. It occurs when states are indissolubly combined under the same monarch, their identity being merged in that of a common state for external purposes, though each may retain distinct internal laws and institutions. Such differences as exist between a state so composed and a federal state are merely matters of public law.

States in possession of imperfect independence. Confederated states.

Of states in possession of imperfect independence, confederated states are those which have the highest individuality. The union which is established between them is strictly one of independent states which consent to forego permanently a part of their liberty of action for certain specific objects, and they are not so combined under a common government that the latter appears to their exclusion as the international entity. The best example of a union of this kind is supplied by the German confederation as it existed from 1820 to 1866 [2]. By the Act under which it was constituted, its objects were defined to be the maintenance of the external and internal security of Germany, and the independence and inviolability of the confederated states, who mutually guaranteed each other's possessions, and who could not make war on one another. A Diet was instituted, composed of plenipotentiaries of the states, which

[1] Hertslet, Map of Europe by Treaty, iii. 1931. The other instances of Federal union at present existing are Mexico, Colombia, Venezuela, the Swiss and Argentine Confederations. For the constitution of Switzerland, see De Martens, Nouv. Rec. Général, xi. 129. That of the Argentine confederation is nearly identical with that of the United States. Calvo, i. § 60; Twiss, The Law of Nations, i. § 48–9.

[2] The Confederation was formed in 1815, but it was not finally organized until the signature of the Schluss Act in 1820. See the Federal Act in De Martens, Nouv. Rec. ii. 353, and the Schluss Act, id. v. 466.

formed the organ of the Confederation for common external matters, and which, consequently, could receive and accredit envoys and conclude treaties on behalf of the Confederation, and could declare war against foreign states on the territory of the Confederation being threatened. These powers were not however exclusive. The individual states retained the right of receiving and accrediting ministers, of making treaties, and of forming any alliance of which the terms should not be prejudicial to the Confederation; and if the majority of the Diet decided in a case alleged to be one of common danger, that no such risk of hostile attack existed as would call the united forces of the Confederation into the field, the minority was authorised to concert measures of self-defence. The several states had no right of withdrawal from the Confederation, and when war had been declared by the Diet they could not make a separate peace; but the Diet had no means of constraining a recalcitrant state, except by using the military forces of other states, which could only be employed with their consent, and there was no trace of over-sovereignty affecting individual subjects of the respective states, who remained subjects of those states only, and had no common nationality. Thus the liberty of action of the various members of the Confederation was restrained so far only as was necessary for the common peace and the integrity of the different territories.

Protected states.

For the purposes of international law a protected state[1] is

[1] Protected states such as those included in the Indian Empire of Great Britain are not subjects of international law. Indian native states are theoretically in possession of internal sovereignty, and their relations to the British Empire are in all cases more or less defined by treaty; but in matters not provided for by treaty a 'residuary jurisdiction' on the part of the Imperial Government is considered to exist, and the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved, or even when the interests of the subjects of the native princes are gravely affected. The treaties really amount to little more than statements of limitations which the Imperial Government, except in very exceptional circumstances, places on its own action. No doubt this was not the original intention of many of the treaties, but the conditions of English sovereignty in India have greatly changed since these were concluded, and the modifications of their effect which the

one which, in consequence of its weakness, has placed itself under the protection of another power on defined conditions, or has been so placed under an arrangement between powers the interests of which are involved in the disposition of its territory. The incidents of a protectorate may vary greatly; but in order that a community may fall within the category of the protected states, which are persons in international law, it is necessary that its subjects shall retain a distinct nationality, and that its relations to the protecting state shall be consistent with its neutrality during a war undertaken by the latter; in other words, its members must owe no allegiance except to the community itself, and its international liberty must be restrained in those matters only in which the control of the protecting power tends to prevent hostile contact with other states, or to secure safety if hostilities arise. So long as these conditions are observed the external relations of the state may be entirely managed by the protecting power. The most important modern instance of a protected state is afforded by the United Republic of the Ionian Islands, established in 1815 under the protectorate of Great Britain. In this case the head of the government was appointed by England, the whole of the executive authority was practically in the hands of the protecting power, and the state was represented by it in its external relations. In making treaties, however, Great Britain did not affect the Ionian Islands unless it expressly stipulated in its capacity of protecting power; the vessels of the republic carried a separate trading flag; the state received consuls, though it could not accredit them; and during the Crimean War it maintained a neutrality the validity of which was acknowledged in the English Courts [1]. The only pro-

changed conditions have rendered necessary are thoroughly well understood and acknowledged. [By notification in its official Gazette, August 21, 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.] For the international aspects of protectorates over Eastern and African states and communities, not themselves subjects of international law, and not included in the Indian Empire, see postea p. 125.

[1] De Martens (Nouv. Rec. ii. 663) and Hertslet (338) give the Austro-

tected states now existing in Europe are the republics of Andorra and San Marino, and possibly the principality of Monaco[1].

States under the suzerainty of others

States under the suzerainty of others are portions of the latter which during a process of gradual disruption or by the grace of the sovereign have acquired certain of the powers of an independent community such as that of making commercial conventions, or of conferring their exequatur upon foreign consuls. Their position differs from that of the foregoing varieties of states in that a presumption exists against the possession by them of any given international capacity. A member of a confederation or a protected state is *primâ facie* independent, and consequently possesses all rights which it has not expressly resigned; a state under the suzerainty of another, being confessedly part of another state, has those rights only which have been expressly granted to it, and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign.

Belligerent communities.

When a community in attempting to separate itself from the state to which it belongs, sets up a government and carries on

British Convention declaring the Ionian Islands to be an independent state under the protection of Great Britain; identical conventions were concluded with Russia and Prussia; and see the Leucade, Spinks, Adm. Prize Cases, 1854-6, 237. For the case of Cracow, see Twiss, i. § 27. The Danubian Principalities and Servia have also usually been mentioned among protected states. As, however, both Roumania and Servia, until their acquisition of independence by the Treaty of Berlin, legally formed part of the Turkish dominions, their case is the abnormal one of a protectorate exercised rather as against than in support of the sovereign of the country.

[1] The legal position of Monaco is far from clear. By the treaty of Peronne in 1641 the principality placed itself under the protection of France. In 1815 it was provided as part of the settlement of Europe that the protectorate should be transferred to Sardinia, and by the treaty of Turin in 1817 the necessary arrangements were made. Monaco unquestionably continued to be a protected state until after the cession of Nice to France by Italy; but in 1861 it took upon itself, without the concurrence of Italy, to cede a portion of its territory to France, which thus became interposed between it and the Italian frontier. In the particular circumstances of the case the act was tantamount to a repudiation of the Italian protectorate. Italy neither protested at the time nor has she subsequently asserted her rights, she therefore most likely has acquiesced. France has not assumed a protectorate. It consequently would seem most probable that Monaco is legally independent.

hostilities in a regular manner, it shows in the course of performing these acts a more complete momentary independence than those communities, just mentioned, of which the independence is qualified. But full independence at a given moment is consistent with entire uncertainty as to whether it can be permanently maintained, and without a high probability of permanence a community fails to satisfy one of the conditions involved in its conception as a legal person. Frequently however it is admitted, through what is called recognition as a belligerent, to the privileges of law for the purposes of the hostilities in which it has engaged in order to establish its legal independence. Such recognition may be accorded either by a foreign state, or by that from which the community has revolted. In the former case the effect is to give the belligerent community rights and duties, identical with those attaching to a state, for the purposes of its warlike operations, as between it and the country recognising its belligerent character, and also to compel the state at war with it to treat the recognising country as a neutral between two legitimate combatants, unless the good faith of the recognition can be impugned, when, as a wrong has been committed, the right accrues to obtain satisfaction by war. In the second case the state puts itself under an obligation to treat its revolted subjects as enemies and not rebels until hostilities are ended, and asserts its intention on the ground of the existence of war to throw upon other countries the duties, and to confer upon them the rights, of neutrality. So soon as recognition takes place, the parent state ceases to be responsible to such states as have accorded recognition, and when it has itself granted recognition to all states, for the acts of the insurgents, and for losses or inconveniences suffered by a foreign power or its subjects in consequence of the inability of the state to perform its international obligations in such parts of its dominions as are not under its actual control.

Their recognition as being possessed of belligerent rights.

The effect of recognition being so important, not merely to the society recognised, but to foreign countries and to the parent

state, it becomes necessary to fix as accurately as possible the conditions under which it may be granted. Putting aside the case of recognition by the parent state, which it may be assumed would not be given with undue haste, and by which therefore, if given before foreign recognition, it is not likely that the interests of foreign states would be prejudiced, the questions remain, whether a community claiming to be belligerent has a right in any circumstances to demand its recognition as such, and in what circumstances a foreign state may voluntarily accord recognition.

Whether they have a right to demand such recognition.

The first of these questions may be readily answered. It only requires to be put at all because of a certain confusion which is sometimes introduced into the subject of the recognition of belligerent character by mixing up its moral with its legal aspects. As soon, it is said, as a considerable population is arrayed in arms with the professed object of attaining political ends, it resembles a state too nearly for it to be possible to treat individuals belonging to such population as criminals [1]; it would

[1] It is implied by Vattel (Le Droit des Gens, written in 1758, liv. iii. ch. xviii. § 293–4), and stated by Bluntschli (§ 512), that insurgents possessing these characteristics have a legal right to recognition. See also President Monroe's Message on the recognition of the South American Republics in 1822; De Martens, Nouv. Rec. vi. i. 149. Somewhat loose language has also been used by English statesmen. In 1861 Lord John Russell, in answering a question in the House of Commons, said that 'with respect to belligerent rights in the case of certain portions of a state being in insurrection, there was a precedent which seems applicable to this purpose in the year 1825. The British government at that time allowed the belligerent rights of the provisional government of Greece, and in consequence of that allowance the Turkish government made a remonstrance. The Turkish government complained that the British government allowed to the Greeks a belligerent character, and observed that it appeared to forget that to subjects in rebellion no national character could properly belong. But the British government informed Mr. Stratford Canning that "the character of belligerency was not so much a principle as a fact, that a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be treated as a belligerent, and even if this title were questionable, rendered it the interest well understood of all civilized nations so to treat them."' (Hansard, 3rd Series, clxii. 1566.) It is impossible to be certain on the terms of the despatch to Mr. Stratford Canning whether the British government intended to convey an impression that the Greek insurgents merely deserved, or that they had a legal right to, belligerent recognition. There is no room for a like doubt as to the effect

be inhuman for the enemy to execute his prisoners; it would be still more inhuman for foreign states to capture and hang the crews of war-ships as pirates; humanity requires that the members of such a community shall be treated as belligerents, and if so there must be a point at which they have a right to demand what confessedly must be granted. So far, the correctness of this view may at once be admitted. It is no doubt incumbent upon a state to treat subjects who may have succeeded in establishing a temporary independence as belligerents and not as criminals, and if it is incumbent upon the state itself, it is still more so upon foreign governments, who deal only with external facts, and who have no right to pass judgment upon the value, from a moral or municipally legal point of view, of political occurrences taking place within other countries. But the obligation to act in this manner flows directly from the moral duty of human conduct, and in the case of foreign states from that also of not inflicting a penalty where there is no right to judge; it has nothing to do with international law. As a belligerent community is not itself a legal person, a society claiming only to be belligerent, and not to have permanently established its independence, can have no rights under that law. It cannot therefore demand to be recognised upon legal grounds, and recognition, when it takes place, either on the part of a foreign government, or of that against which the revolt is

of a claim made by the United States on its own behalf against Denmark. In 1779 the latter power delivered up to England some merchant vessels of which Paul Jones had made prize, and which had been sent into Norwegian ports. Compensation was demanded, and in the course of the negotiation it was argued that 'in the case of a revolution in a sovereign empire, by a province or colony shaking off the dominion of the mother country, and whilst the civil war continues, if a foreign power does not acknowledge the independence of the new state, and form treaties of commerce and amity with it, though still remaining neutral, as it may do, or join in an alliance with one party against the other, thus rendering that other its enemy, it must, while continuing passive, allow to both the contending parties all the rights, which public war gives to independent sovereigns.' (Lawrence's Wheaton's Elem., Introd. cxxxiv.) The claim against Denmark was kept alive by intermittent action until 1844, and does not appear to have been ever formally dropped.

directed, is from the legal point of view a concession of pure grace.

True ground of recognition.

The right of a state to recognise the belligerent character of insurgent subjects of another state must then, for the purposes of international law, be based solely upon a possibility that its interests may be so affected by the existence of hostilities in which one party is not in the enjoyment of belligerent privileges as to make recognition a reasonable measure of self-protection. As a matter of fact this condition of things may arise so soon as hostilities approach the borders of the state which is their scene, and is inseparable from their extension to the ocean. In a time of maritime war between two states neutral powers concede to the belligerents certain rights which abridge the freedom of action of their subjects, and they allow the property of the latter to be seized and confiscated for acts which in time of peace would fall within the range of legitimate commerce. The possession of these belligerent privileges is necessary to the effective prosecution of hostilities; when therefore a government is engaged in a struggle with insurgents in command of a sea-coast, it invariably uses, and consequently all states at the outbreak of civil war may be expected to use, the same means of putting a stress upon an antagonist as would be employed against an enemy state. But these means, so far as they affect other powers, are only acquiesced in because of the existence of war, and under limitations and safeguards which, being prescribed by international law with reference only to war, could not be insisted upon during the continuance of nominal peace. The assailed community also cannot be expected to refrain from using like weapons to those with which it is attacked, and refusal on the part of foreign powers to acknowledge its right to act in the manner which is permitted to a state, would be met by force at the moment if it were strong enough, and would at any rate cause a resentment to which effect might be given at a future time if the insurgent community ultimately conquered independence.

Testing the right of a state to recognise insurgent com-

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Circumstances in which recognition is permissible.

munities as belligerent by the relation of the war to its own interest, three classes of cases may be distinguished with reference to which its conduct will naturally differ. So long as a government is struggling with insurgents isolated in the midst of loyal provinces, and consequently removed from contact with foreign states, the interests of the latter are rarely touched, and probably are never touched in such a way that they can be served by recognition. It is not therefore necessary, and it is not the practice, to recognise communities so placed, however considerable they may be, and however great may be the force at their disposal. When a state is contiguous with a revolted province it may be different. The incidents of continental war are such as to render the probability of embarrassment small, and it is therefore usual to leave cases involving questions of belligerent character to be dealt with as they arise, but it must be for the foreign state to decide whether its immediate or permanent interests will be better secured by conceding or withholding recognition; and though recognition, except in peculiar circumstances, may expose the conduct of a government to suspicion, the grant of recognition cannot be said to exceed the legal powers of the state. In the case of maritime war the presumption of propriety lies in the opposite direction. No circumstances can be assumed as probable under which the interests of a foreign state possessed of a mercantile marine will not be affected, and it may recognise the insurgent community, without giving just cause for a suspicion of bad faith, so soon as a reasonable expectation of maritime hostilities exists, or so soon as acts are done at sea by one party or the other which would be acts of war if done between states, unless it is evidently probable that the independent life of the insurgent government will be so short that the existence of war may be expected to interfere with the interests of the foreign state in a merely transient and unimportant manner[1].

[1] On the general question of recognition of belligerency, see Wheaton, Elements of International Law (ed. Lawrence, 1855), pt. i. ch. ii. § 7, and

Withdrawal of recognition.

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

Dana's note (No. 15) upon the passage; Bluntschli, § 512, and in the Revue de Droit International, ii. 452; Calvo, § 82–4; Bernard, Historical Account of the Neutrality of Great Britain during the American Civil War, ch. 5 and 7.

As the existence of belligerency imposes burdens and liabilities upon neutral subjects, a state engaged in civil war has not the right of endeavouring to effect its warlike objects by measures unfavourably affecting foreigners, which, though permissible in peace, are not allowed in time of war; it cannot enjoy at one and the same moment the special advantages afforded by opposite states of things. Thus in 1861, New Granada being in a state of civil war, its government announced that certain ports would be closed, not by blockade, but by order. The method was one which could not be adopted against a foreign enemy holding the ports in question; it could not consequently be adopted against a domestic enemy. Lord John Russell, speaking upon the subject, said, 'that it was perfectly competent to the government of a country in a state of tranquillity to say which ports should be open to trade, and which should be closed. But in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were *de facto* in the hands of the insurgents, and that such a proceeding would be an invasion of the international law relating to blockade.' (Hansard, clxiii. 1646.) Subsequently, the government of the United States proposed to adopt the same measure against the ports of the Southern States, upon which Lord John Russell wrote to Lord Lyons that 'Her Majesty's government entirely concur with the French government in the opinion that a decree closing the southern ports would be entirely illegal, and would be an evasion of that recognised maxim of the law of nations that the ports of a belligerent can only be closed by an effective blockade.' (State Papers, North America, No. i. 1862.) In neither case was the order carried out. In 1885 the President of Colombia, during the existence of civil war, declared the ports of Sabanilla, Sta Marta, and Baranquilla, to be closed, without instituting a blockade. Mr. Bayard, Secretary of State of the United States, in a despatch of April 24th of that year, fully adopted the principle of the illegitimateness of such closure, and refused to acknowledge that which had been declared by Colombia.

it cannot regulate its conduct simply by its own convenience. In refusing or granting recognition it casts special responsibilities upon other states; it is to be supposed that whatever course it adopts is for its advantage at the time of choice; it must therefore accept the responsibility which is correlative to the advantage, even though it should subsequently turn out that a disproportionate burden is imposed in the end.

Forms of recognition.

Since recognition of belligerency is not imposed upon a foreign state as a duty, but is caused by circumstances the force of which may not be fully present to the other parties interested, it is evidently necessary that a state recognising an insurgent community as belligerent shall render its intention perfectly clear, and shall indicate the date from which it will take up the attitude of neutral in a war. It must therefore issue a formal notification of some kind, the most appropriate probably being a declaration of neutrality. A parent state stands in a different position. It cannot be expected to volunteer direct recognition. The relation in which it conceives itself to stand to the insurgents must be inferred from its acts. Hence, the question arises, what acts are sufficient to constitute indirect recognition. There can be no doubt as to the effect of acts, such as capture of vessels for breach of blockade or carriage of articles contraband of war, which affect the neutral directly, and in a manner permissible only in time of war. But what is the effect of acts of the nature of *commercia belli*:—such, for example, as the conclusion of cartels for the exchange of prisoners? The pretension has been put forward by the United States that such acts, being acts consistent only with a state of war, constitute sufficient evidence of its existence to throw the duties of neutrality upon foreign states[1]. Evidence of the existence of hostilities conducted according to the analogy of war they

[1] The above view was urged by the United States during the controversy with Denmark mentioned in a previous note. It was claimed that the conclusion of cartels, &c., between England and the American insurgents constituted a recognition of the latter as belligerents, and consequently affected Denmark with the duties of neutrality.

certainly are; but it may be safely affirmed that states would not usually wish, in doing them, to be understood to recognise the belligerent character of insurgents, and as they in no way touch the interests of foreign powers, the latter would not themselves take them as a ground of recognition. It would seem to be better, from every point of view, that the performance of acts of such kind as those the expectation of which justifies recognition by a foreign state, should alone be held to imply recognition by the parent state.

Recognition by England of the Confederate States as belligerents.

The recognition by England of the Confederate States as belligerents in 1861 affords an example of the recognition of belligerent character, interesting both because the case presents a strongly marked instance of the circumstances which compel recognition on the part of a foreign power, and because of the controversy which arose between the governments of the United States and of Great Britain with reference to the propriety and opportuneness of recognition on the occasion in question. During the first three months of 1861 seven of the states composing the United States formed themselves into a separate Union, with a constitution intended to be permanent, under a fully constituted executive government, and with an elected legislative body. The insurgent community therefore possessed a government established as formally as is possible in a society the separate political existence of which is not acknowledged. Immediately on being constituted the executive took active measures to organise a military force; and hostilities broke out on the 11th of April with the bombardment of Fort Sumter by the Southern troops. Within a few days afterwards 75,000 men were called out in the Northern States, and before the end of the month 100,000 men were under arms in the revolted portion of the country. Actual war existed on a large scale, and there was every reason to believe that it would be conducted by the Confederate States in accordance with the rules of international law. Up to this point however, though the insurgent community satisfied the conditions necessarily precedent

to recognition, there was no imperative reason for notice to be taken of it by foreign powers. The scene of war was remote, and the ocean as yet remained unaffected. But on the 17th April the President of the Southern States issued a Proclamation inviting applications for letters of marque and reprisal, and as at this period a large extent of coast was in the hands of the insurgents, such an expectation of maritime hostilities might have been reasonably entertained as to have justified immediate recognition. The likelihood of maritime war was converted into a certainty by a Proclamation issued by President Lincoln on the 19th April, which declared the coasts of the seceded states to be under blockade. Thus, when on the 14th May a Proclamation of neutrality was issued by the British Government, twelve days after it received intelligence that the two American Proclamations had been put forth, the condition of affairs was as follows:—the government of the United States had recognised the belligerent character of the Southern confederacy by proclaiming a blockade, that being a measure the adoption of which admitted the existence of war, in rendering foreign ships liable to penalties illegal except in time of war[1]; apart from the effect of the blockade as a recognition of belligerency, every element of a state of war between a legitimate government and a community in possession of *de facto* sovereignty was fully in existence, in circumstances making it probable that British interests would be gravely affected; finally, as the intercourse

[1] 'Now therefore, I, Abraham Lincoln, President of the United States . . . have deemed it advisable to set on foot a blockade of the ports within the states aforesaid in pursuance of the Laws of the United States and of the Law of Nations in such case provided. For this purpose a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave, any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and the date of such warning; and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo as prize as may be deemed advisable.' Proclamation of the 19th April, 1861.

between England and North America was both large and incessant, and the cargoes belonging to English owners lying at the time in the Mississippi alone were worth a million sterling, it was obviously of immediate importance that the British Government should warn traders of the existence of a state of things which affected them with duties, and by which their freedom of commerce was restrained. The action of Great Britain was therefore not only justified but necessary. By the Government of the United States however it was made the subject of reiterated complaint. It was at first alleged that no war existed, that no war could exist so long as the United States retained the legal sovereignty of their dominions, and that therefore it was not in the power of a foreign state to recognise any society within their boundaries as having rights of war; it was necessary, in short, that recognition of independence should precede recognition of belligerency. This contention being not only untenable in itself, but being opposed to decisions given in the courts of the United States, it was succeeded by an assertion that although 'a nation is its own judge when to accord the rights of belligerency,' recognition which 'has not been justified on any ground of either necessity or moral rights[1]' is 'an act of wrongful intervention,' and it was urged that no necessity had arisen at the time of the issue of the Queen's Proclamation. No definition of necessary emergency was offered; but the refusal to admit an imminent certainty that the interests of a foreign state will be seriously touched by the operations of war as a due ground for recognition of belligerent character, implies that it is the duty of a state before according recognition to allow some illegal acts, at least, to be

[1] It is not altogether clear what is intended by the phrase 'moral rights.' Probably, however, it means moral right on the part of an oppressed community to be recognised. If so, it is an instance of an intrusion of sentimental, moral, or political, considerations into the sphere of pure law, which was frequent in American argument during the British-American controversies which took place from 1861 to 1872.

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done at the expense of its subjects. To state such a contention is to demonstrate its inadmissibility [1].

What states are subject to international law.

It is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilisation. They have lived, and are living, under law, and a positive act of withdrawal would be required to free them from its restraints. But states outside European civilisation must formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or of some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction. It is not enough consequently that they shall enter into arrangements by treaty identical with arrangements made by law-governed powers, nor that they shall do acts, like sending and receiving permanent embassies, which are compatible with ignorance or rejection of law. On the other hand, an express act of accession can hardly be looked upon as requisite. By the Treaty of Paris in 1856 Turkey was declared to be admitted 'to a participation in the advantages of the public law of Europe and the system of concert attached to it'; but if she had been permitted, without such express admission,

[1] Bernard, British Neutrality, chaps. iv–vii; Mr. Seward to Mr. Adams, Jan. 19, 1861, State Papers, North America, No. ii. 1862; Mr. Seward to Mr. Adams, Jan. 12, 1867, State Papers, North America, No. i. 1867; Case of the United States laid before the Tribunal of Arbitration at Geneva, p. 17; The brig *Amy Warwick* and others, ii. Black, 635; Woolsey's International Law (5th ed.), § 180. M. Bluntschli sums up an examination of the controversy by saying, 'Tout le monde était d'accord qu'il y avait guerre, et que dans cette guerre il y avait deux parties belligérantes. Mais voilà, et voilà seulement ce que les Cabinets de France et de l'Angleterre ont présumé, en reconnaissant la Confédération comme étant de fait une puissance belligérante. Je ne puis donc en aucune façon y voir une injustice, une violation de droit pratiquée au détriment de l'Union. Que la déclaration ait été faite un peu plus tôt ou un peu plus tard, c'était là une question qui regardait la politique, non le droit.' (Rev. de Droit Int. ii. 462.)

to sign the Declaration accompanying the Treaty, which was in fact signed on her behalf, and of which the object was to lay down principles intended to be reformatory of law, it could scarcely have been contended that the legal responsibilities and privileges of Turkey were to be limited to matters covered by those principles.

When a new state comes into existence its position is regulated by like considerations. If by its origin it inherits European civilisation, the presumption is so high that it intends to conform to law that the first act purporting to be a state act which is done by it, unaccompanied by warning of intention not to conform, must be taken as indicating an intention to conform, and brings it consequently within the sphere of law. If on the other hand it falls by its origin into the class of states outside European civilisation, it can of course only leave them by a formal act of the kind already mentioned.

A tendency has shown itself of late to conduct relations with states, which are outside the sphere of international law, to a certain extent in accordance with its rules; and a tendency has also shown itself on the part of such states to expect that European countries shall behave in conformity with the standard which they have themselves set up. Thus China, after France had blockaded Formosa in 1884, communicated her expectation that England would prevent French ships from coaling in British ports. Tacitly, and by inference from a series of acts, states in the position of China may in the long run be brought within the realm of law; but it would be unfair and impossible to assume, inferentially, acceptance of law as a whole from isolated acts or even from frequently repeated acts of a certain kind. European states will be obliged, partly by their sense of honour, partly by their interests, to be guided by their own artificial rules in dealing with semi-civilised states, when the latter have learned enough to make the demand, long before a reciprocal obedience to those rules can be reasonably expected. For example, it cannot be hoped that China, for a considerable

time to come, would be able, if she tried, to secure obedience by her officers and soldiers even to the elementary European rules of war; [and her representatives at the Hague Peace Conference of 1899 refrained from signing the Convention relative to the laws and customs of land warfare. On the other hand, the adhesion of China was given to the Convention for the pacific regulation of international disputes and to several other subsidiary instruments executed on the same occasion. The mere fact that the Chinese Government was invited to send representatives to such an assemblage may be taken as an acknowledgement of its international status, and the same argument applies to the Shah of Persia, on whose behalf all the Conventions of July 29, 1899 were signed and ratified. How far China has forfeited her position by the gross breach of comity involved in the assault on the Pekin Legations in the summer of 1900 remains to be seen.

The right of Japan to rank with the civilised communities for purposes of international law is now clearly established. Previously to the war of 1894 she had acceded (in 1886) to the Geneva Convention, and to various 'universal conventions' as to weights and measures, posts, telegraphs, and the like. During the course of hostilities against China, in that year and again in 1900, she adhered scrupulously, with one terrible exception, to the recognised laws of war, and attained a high standard in the care of her own troops, the treatment of the wounded enemies, and of the civil population generally[1]. The European nations have now abandoned their extra-territorial privileges in Japan, and the Anglo-Japanese Treaty of 1902 may be said to have set the final seal on the recognition of the latter Power.]

[1] [See an interesting article in the Law Quarterly Review for 1898, vol. xiv. p. 405, by Sakue Takahashi, Professor of Law in the Royal University in Tokio.]

CHAPTER II

GENERAL PRINCIPLES OF THE LAW GOVERNING STATES IN THEIR NORMAL RELATIONS

The fundamental rights and duties of states.

The ultimate foundation of international law is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature. In virtue of this assumption it is held that since states exist, and are independent beings, possessing property, they have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence, and of holding and acquiring property, subject to the qualification that they are bound correlatively to respect these rights in others. It is also considered that their moral nature imposes upon them the duties of good faith, of concession of redress for wrongs, of regard for the personal dignity of their fellows, and to a certain extent of sociability.

Right of continuing and developing existence.

Under the conditions of state life, the right to continue and develop existence gives to a state the rights—

1. To organise itself in such manner as it may choose.

2. To do within its dominions whatever acts it may think calculated to render it prosperous and strong.

3. To occupy unappropriated territory, and to incorporate new provinces with the free consent of the inhabitants, provided that the rights of another state over any such province are not violated by its incorporation.

Thus a state may place itself under any form of government that it wishes, and may frame its social institutions upon any model. To foreign states the political or social doctrines which may be exemplified in it, or may spread from it, are legally immaterial. A state has a right to live its life in its own way,

so long as it keeps itself rigidly to itself, and refrains from interfering with the equal right of other states to live their life in the manner which commends itself to them, either by its own action, or by lending the shelter of its independence to persons organising armed attack upon the political or social order elsewhere established.

Again, a state is free to adopt any commercial policy which it thinks most to its advantage; it may erect fortifications anywhere within its dominions; and it may maintain military or naval forces upon any scale, and organised in any way, that it likes. That the latter measures may invest it with a strategical position or a material strength which under certain contingencies may be a danger to other powers gives them in general no right to take umbrage or to endeavour to restrain its growth. In the absence of distinct menace the only precaution which can be taken is to arm with equal care. It is not an exception to this rule that it is legitimate to anticipate an attack which measures adopted by a state under colour, or in the exercise, of its right of self-development afford reasonable ground to expect. The same right to continued existence which confers the right of self-development confers also the right of self-preservation, and a point exists at which the latter of the two derivative rights takes precedence of the duty to respect the exercise of the former by another state. If a country offers an indirect menace through a threatening disposition of its military force, and still more through clear indications of dangerous ambition or of aggressive intentions, and if at the same time its armaments are brought up to a pitch evidently in excess of the requirements of self-defence, so that it would be in a position to give effect to its intentions, if it were allowed to choose its opportunity, the state or states which find themselves threatened may demand securities, or the abandonment of the measures which excite their fear, and if reasonable satisfaction be not given they may protect themselves by force of arms.

Rights of property.

The rights of a state with respect to property consist in

the power to acquire territory, and certain other kinds of property susceptible of being held by it, in absolute ownership by any means not inconsistent with the rights of other states, in being entitled to peaceable possession and enjoyment of that which it has duly obtained, and in the faculty of using its property as it chooses and alienating it at will.

Theory that the rights of a state over its territory, &c., are not strictly proprietary rights.

According to a theory which is commonly held, either the term 'property,' when employed to express the rights possessed by a state over the territory occupied by it, must be understood in a different sense from that which is attached to it in speaking of the property of individuals, or else its use is altogether improper. Property, it is said, belongs only to individuals; a state as such is incapable of owning it; and though by putting itself in the position of an individual it may hold property subject to the conditions of municipal law, it has merely in its proper state capacity either what is called an 'eminent domain' over the property of the members of the community forming it, in virtue of which it has the power of disposing of everything contained within its territory for the general good, or certain supreme rights, covering the same ground, but derived from sovereignty [1]. It cannot be denied that the immediate property which is possessed by individuals is to be distinguished for certain purposes from the ultimate property in the territory of the state, and the objects of property accessory to it, which is vested in the state itself. But these purposes are foreign to international relations. The distinction therefore, though it may be conveniently kept in mind for purposes of classification in dealing with the rules of war, has no further place in international law. Its proper field is public law. As between nations, the proprietary character of the pos-

[1] Vattel, liv. i. ch. xx. §§ 235, 244, but see also liv. ii. ch. vii. § 81; Heffter, § 64; Bluntschli, § 277. Calvo (§§ 208–9) distinguishes between the public and international aspects of the right of the state with reference to property, and recognises, as do also De Martens (Précis du Droit des Gens Moderne de l'Europe, § 72) and Riquelme (Elementos de Derecho Público Internacional, i. 23), the absolute character of the latter relatively to other states.

session enjoyed by a state is logically a necessary consequence of the undisputed facts that a state community has a right to the exclusive use and disposal of its territory as against other states, and that in international law the state is the only recognised legal person. When a person in law holds an object with an unlimited right of use and alienation as against all other persons, it is idle to say that he does not legally possess complete property in it. Internationally, moreover, a full proprietary right on the part of the state is not only a reasonable deduction of law, but a necessary protection for the proprietary rights of the members of a state society. The community and its members, except in their state form, being internationally unrecognised, any rights which belong to them must be clothed in the garb of state rights before they can be put forward internationally. A right of property consequently, in order to possess international value, must be asserted by the state as a right belonging to itself.

Alleged limitation upon the right to alienate.

A misapprehension of like kind is sometimes met with in regard to the right of alienation, the exercise of which is said to be subject to the tacit or express consent of the population inhabiting the territory intended to be alienated. The doctrine appears in two forms, a moderate and an extreme one. In its more moderate shape it appears to come to little more than a denial that title by cession is complete when the ceded territory has been handed over by the original owner to the new proprietor, peaceable submission by the inhabitants being necessary to perfect the right of the latter; but it is occasionally declared that the cession of land cannot be dissociated from that of the people who live and enjoy their political rights upon it, that 'a people is no longer a thing without rights and without will,' that its consent, if not otherwise proclaimed, must be testified by a vote of the population or its representatives, and that international law has adopted this principle by its practical recognition in the treaty of Turin, which regulated the cession of Savoy to France, in the treaty of London, by which the

Ionian Islands were ceded to Greece, in the treaty of Vienna, which stipulated for the eventual cession of Venetia to Italy, and in that portion of the treaty of Prague which referred to Northern Slesvig[1]. For an answer to this doctrine in its extreme form it is only necessary to traverse the allegation of fact. The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared. The pretension that it was sanctioned by the treaties cited has an air rather of mockery than of serious statement, when the circumstances accompanying the cession of Savoy and Nice are remembered, and when the only treaty of the number, the breach of which opportunity and desire combined to render possible, remained unobserved, and has finally been cancelled. As to the milder form of the doctrine, it is only to be said that states being the sole international units, the inhabitants of a ceded territory, whether acting as an organised body or as an unorganised mass of individuals, have no more power to confirm or reject the action of their state than is possessed by a single individual. An act, on the other hand, done by the state as a whole is, by the very conception of a state, binding upon all the members of it.

Rights of independence.

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[2], and so taken it would embrace the rights of preserving and developing existence which have been already spoken of. But it is more convenient to include

[1] Bluntschli, § 286; Calvo, § 220.

[2] 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.

those rights only which a state possesses, not in respect of its existence as a living and growing being, but in a more limited aspect as a being exercising its will with direct reference either to other states or to persons and things within the sphere of its legitimate control.

Rights of independence directly affecting other states.

The former of these branches of the rights of independence gives rise to no special usages. It merely secures to a state with respect to other states a general liberty of action within the law as defined by the other rights and by the duties of a state. A state is enabled to determine what kind and amount of intercourse it will maintain with other countries, so long as it respects its social duties, and by what conditions such intercourse shall be governed; it is permitted to form relations of alliance or of special friendship; it may make contracts containing any provisions not repugnant to the law; and it may demand and exact reparation for acts done by other states which it may consider to be wrongs.

Rights of sovereignty.

The second branch comprehends a group of rights which go by the name of rights of sovereignty. The state community, in virtue of the supremacy of its common will over that of its individual members for the ends contemplated by it as a political society, puts them under obligations by its political, civil, and criminal legislation, which are not only exclusive of all other like obligations within the national territory, but are not necessarily extinguished as between them and their own state when they enter a foreign country or some place not under the jurisdiction of any power. And it being a necessary result of independence that the will of the state shall be exclusive over its territory, it also asserts authority as a general rule over all persons and things, and decides what acts shall or shall not be done, within its dominion. It consequently exercises jurisdiction there, not only with respect to the members of its own community and their property, but with respect to foreign persons and property. But as jurisdiction over the latter is set up as a consequence of their presence upon the

territory, it begins with their entrance and ceases with their exit, so that it cannot, except in a particular case to be mentioned later[1], be enforced when they have left the country; and with respect to acts done by foreign persons, it can only be exercised with reference to such as have been accomplished, or at least begun, during the presence within the territory of the persons doing them[2]. In principle, then, the rights of sovereignty give jurisdiction in respect of all acts done by subjects or foreigners within the limits of the state, of all property situated there, to whomsoever it may belong, and of those acts done by members of the community outside the state territory of which the state may choose to take cognizance.

In practice, however, jurisdiction is not exercised in all these directions to an equal extent.

Sovereignty in relation to the subjects of the state.

The authority possessed by a state community over its members being the result of the personal relation existing between it and the individuals of which it is formed, its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state, but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction. Thus the subjects of a state are not freed by absence from their allegiance; the fact of their legitimacy or illegitimacy if they are born abroad, the date at which they attain majority, the conditions of marriage and divorce, are determined by the state so far as their effects within its own dominions are concerned; if they commit crimes they can be arraigned before the tribunals of their country notwithstanding that they may have been already punished elsewhere.

Logically, the principle of the exclusive force of the corporate

[1] See postea, p. 256.

[2] For an exception made by the practice of some states, see postea, pp. 218 et seq.

Sovereignty in relation to subjects of foreign powers.

will within state territory would lead to the possession of an identical authority over foreigners and members of the state community during such time as the former remain in the country, in respect of all acts done by them there, of relations set up between them and other persons, and of duties owed to the state; while correlatively to such duties they would temporarily have the same rights as natural born subjects. But international usage does not allow the effects of the principle to be pushed so far. Its application receives limitations which are partly necessitated by that respect for the rights of other states over their members which is legally compulsory under the principle that a state must respect in others the rights with which it is itself invested, and which have partly grown out of unwillingness to extend to foreigners the full benefits enjoyed by subjects. Existing law stops short of the point of temporarily converting the subject of another state into a member of the community. Until a foreigner has made himself by his own act a subject of the state into which he has come, he has politically neither the privileges nor the responsibilities of a subject. His allegiance to his own state is recognised as being intact, and he cannot be obliged either to do anything inconsistent with it, or to render active service to the state under the control of which he momentarily is. On the other hand, he has no claim upon it for protection or good treatment except as a member of his own state, and to the extent that it has a right to demand. He is merely a person who is required to conform himself to the social order of the community in which he finds himself, but who is politically a stranger to it, obliged only to the negative duty of abstaining from acts injurious to its political interests or contrary to its laws. By accepted international law, therefore, a state has only the right of subjecting foreigners to such general or special political and police regulations as it may think fit to establish; of making them share in those public burdens which are not attached to the status of subject or citizen; of rendering them amenable to its ordinary criminal jurisdiction; of placing all

contentious matters in which they may be engaged under the cognizance of its own courts; and, subject to the qualification to be made immediately, of declaring that in contracts which are made, or to which it is asked that effect shall be given, within the state, and in matters connected with property existing within it, their competence, as well as the formalities requisite to give legal effect to their acts, shall be determined by the laws of the country [1].

Private international law.

The rights over foreigners and their property which are thus left to a state in strict law are further limited in practice by derogations which states are in the habit of voluntarily making from them. Modern legislation, in dealing with purely private relations between individuals, is more anxious to give effect to those relations as they really are, or as it is conceived that they ought to be, than to affirm the exclusiveness of the rights of sovereignty; and there are many cases in which this object is best attained by allowing the law of the country to which a foreigner belongs to operate in lieu of the territorial law, or by allowing a subject to be affected by a foreign instead of his national law, when the two are in conflict. The concessions or

[1] Grotius, de Jure Belli et Pacis, lib. ii. c. xi. § 5; Wolff, Jus Gentium, § 301; Vattel, liv. ii. ch. viii. §§ 101, 107-8; De Martens, Précis, § 83; Twiss, i. §§ 150-2; Bluntschli, §§ 388, 391; Calvo, § 1046. Portalis (1746-1807), quoted by Phillimore, puts the general principle of the submission of strangers to the authority of a foreign state as follows:—'Chaque état a le droit de veiller à sa conservation, et c'est dans ce droit que réside la souveraineté. Or comment un état pourrait-il se conserver et maintenir s'il existait dans son sein des hommes qui pussent impunément enfreindre sa police et troubler sa tranquillité? Le pouvoir souverain ne pourrait remplir la fin pour laquelle il est établi, si des hommes étrangers ou nationaux étaient indépendants de ce pouvoir. Il ne peut être limité, ni quant aux choses, ni quant aux personnes. Il n'est rien s'il n'est tout. La qualité d'étranger ne saurait être une exception légitime pour celui, qui s'en prévaut contre la puissance publique qui régit le pays dans lequel il réside. Habiter le territoire, c'est se soumettre à la souveraineté.' It is evident from what is said above that this language requires some qualification. Some writers make the unnecessary supposition that 'an individual in entering a foreign territory binds himself by a tacit contract to obey the laws enacted by it, for the maintenance of the good order and tranquillity of the realm.' Phillimore, i. § cccxxxii.

relaxations of sovereign rights which it has become customary for civilised nations to make for these reasons have given rise to a body of usage of considerable bulk, called private international law. Private international law is not however a part of international law proper. The latter, as has been seen, is concerned with the relations of states; in so far as individuals are affected, they are affected only as members of their state. Private international law, on the other hand, is merely a subdivision of national law. It derives its force from the sovereignty of the states administering it; it affects only the relations of individuals as such; and it consists in the rules by which courts determine within what national jurisdiction a case equitably falls, or by what national law it is just that it shall be decided. In the following work, therefore, private international law will not be touched upon.

Duty of administering reasonable civil and criminal justice to foreigners.

One further limitation of the rights of sovereignty there is, which, unlike the customary derogation last mentioned, is obligatory in strict law. As has been already mentioned, international law is a product of the special civilisation of modern Europe, and is intended to reflect the essential facts of that civilisation so far as they are fit subjects for international rules. Among these facts is the existence in almost all states of a municipal law, consonant with modern European ideas, and so administered that foreigners are able to obtain criminal and civil justice with a tolerable approach to equality as between themselves and the subjects of the state. International law therefore contemplates the existence of such law and such administration; and a state, professing to be subject to international law, is bound to furnish itself with them. If it fails to do so, either through the imperfection of its civilisation, or because the ideas, upon which its law is founded, are alien to those of the European peoples, other states are at liberty to render its admission to the benefits of international law dependent on special provision being made to safeguard the person and property of their subjects[1].

[1] Since the year 1856 Turkey has been in the position of a state, obliged to submit to derogations from her full rights of sovereignty, in consequence of

Responsibility of a state.

The exclusive force possessed by the will of an independent community within the territory occupied by it is necessarily attended with corresponding responsibility. A state must not only itself obey the law, but it must take reasonable care that illegal acts are not done within its dominions. Foreign nations have a right to take acts done upon the territory of a state as

her institutions not being in reasonable harmony with those of European countries. At various times from 1535 to the present century, arrangements called Capitulations, and treaties confirmatory of them, were made between the Porte and European States, the effect of which was to withdraw foreigners from Turkish jurisdiction for most civil and criminal purposes. Turkey was then outside the pale of international law; but by the treaty of Paris she was brought within it. On general principles the Capitulations should have been abrogated; and in Protocol xiv, of March 25, 1856, it appears that 'M. le Baron de Bourqueney et les autres plénipotentiaires admettent que les capitulations répondent à une situation à laquelle le traité de paix tend nécessairement à mettre fin.' They have nevertheless been maintained. It is evident that a law inextricably mixed up with a religion which rejects equality between believers and unbelievers, and an administration so corrupt as is that of Turkey, offer no guarantee that foreigners will be treated with a sufficient modicum of justice.

Roumania and Servia are in a like legal situation. As provinces at first, and then as states dependent on Turkey, they were subject to the Capitulations; and when their independence was acknowledged by the treaty of Berlin it was provided that foreign immunities should be continued. Their case is a more remarkable one than that of Turkey. Their religion is no source of difficulty, and their laws are modelled upon the Code Napoléon. They are merely excluded from the full enjoyment of the rights of sovereignty because, through ignorance and evil traditions, the administrators of justice are not worthy of trust. Probably in these cases the limitations imposed by the capitulations will insensibly cease to exist. Already in Roumania foreigners frequently appeal to the local courts, and contracts are made (e. g. with importers of goods or contractors), subject to a condition that in case of dispute their rights under the capitulations shall be waived. As between Great Britain and Servia the immunities possessed under the Capitulations were abolished in 1880 by the treaty of Nisch (De Martens, Nouv. Rec. Gén. 2e série, vi. 459), except so far as they concern the mutual relations between British subjects and the subjects of other powers which shall not have surrendered them. [The extra-territorial privileges enjoyed by foreigners in Japan ever since that country was first thrown open to Europeans were abandoned by Great Britain in 1899 under the terms of a treaty concluded July 16, 1894. The example has been followed by the United States, Russia, Germany, Sweden, France, and Austria.]

It is obvious that there would be considerable difficulty in imposing limitations of the above kind on a state which had already been admitted to the full privileges of international law; but practical difficulties of application do not affect the question of principle.

being *primâ facie* in consonance with its will; since, where uncontrolled power of effective willing exists, it must be assumed in the absence of proof to the contrary that all acts accomplished within the range of the operation of the will are either done or permitted by it. Hence it becomes necessary to provide by municipal law, to a reasonable extent, against the commission by private persons of acts which are injurious to the rights of other states, and to use reasonable vigour in the administration of the law so provided.

Duty of respecting the independence of other states.

A second duty arising out of the right of independence is that of respecting the independence of others. As has already been said, a state has entire freedom of external and internal action within the law. To interfere with it therefore is a wrong, unless it can be shown that there are rights or duties which have priority, either invariably or in certain circumstances, over the duty of respecting independence.

Priority of the right of self-preservation over the foregoing duty.

That there is one such right is incontestable. Even with individuals living in well-ordered communities the right of self-preservation is absolute in the last resort. *À fortiori* it is so with states, which have in all cases to protect themselves. If the safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there, which the government of the latter is unable, or professes itself to be unable, to prevent, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place the right of self-preservation above the duty of respecting a freedom of action which must have become nominal, on the supposition that the state from which the danger comes is willing, if it can, to perform its international duties.

Whether any other right or duty has such priority.

Whether there is any other right or duty which has priority of the right of independence so long as a state endeavours, or professes that it endeavours, to carry out its strictly international duties is, to say the least of it, eminently doubtful, especially

considering that no guarantees exist tending to limit the occurrence of such interference to due occasions, or to secure that it shall be used only for its ostensible objects. The subject will be touched upon elsewhere.

Right of states to repress or punish violations of law.

When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder the wrong-doing from being accomplished, or to punish the wrong-doer. Liberty of action exists only within the law. The right to it cannot protect states committing infractions of law, except to the extent of providing that they shall not be subjected to interference in excess of the measure of the offence; infractions may be such as to justify remonstrance only, and in such cases to do more than remonstrate is to violate the right of independence. Whatever may be the action appropriate to the case, it is open to every state to take it. International law being unprovided with the support of an organised authority, the work of police must be done by such members of the community of nations as are able to perform it. It is however for them to choose whether they will perform it or not. The risks and the sacrifices of war with an offending state, the chances of giving umbrage to other states in the course of doing what is necessary to vindicate the law, and the remoter dangers that may spring from the ill-will produced even by remonstrance, exonerate countries in all cases from the pressure of a duty.

Moral duties of states.

Duty of good faith.

Of the duties which flow directly from the possession by states of a moral nature, one only, viz. that of good faith, can probably be said to have acquired a legal value. In recognising the binding force of contracts, law takes it up and includes it in itself. But there can be little question that all other duties, which are independent of the legal principles already stated, remain in the stage of purely moral obligations. There are but two, both arising out of the duty of sociability, which can at all be said to put in a serious claim to fall within the boundaries of law.

PART I
CHAP. II

Alleged legal duty of a state to permit commercial and other intercourse to be maintained with it by foreign countries.

It is not uncommonly said that nations have a right to maintain intercourse, if it so pleases them, with other nations; that an entire refusal on the part of a state to allow of intercourse, by being a denial of a fundamental legal obligation, is a renunciation of the advantages of international law, so that a nation becomes an outlaw by isolating itself; and that in particular the innocent use of the land and water communications within the territory of a state cannot be withheld from other states, and the privilege of trade in articles of necessity cannot be refused[1]. The doctrine is no doubt limited by the qualification that a state may take what measures of precaution it considers needful to prevent the right of access and intercourse from being used to its injury[2], and may subject foreigners and foreign trade to regulation in the interest either of its own members or of states which it wishes to favour. In the last resort however there would still remain a right taking priority of the rights of independence and property, and capable of being enforced, if broken, by war. Of the working of such a right, if it existed, there would be deep traces in both law and history. In law however it cannot be pretended that any definite usages are to be referred to it, except those of the freedom of territorial seas to navigation and of the opening of rivers to co-riparian

[1] Heffter, §§ 26 and 33; Grotius, De Jure Belli et Pacis, lib. ii. c. ii. § 13; Bluntschli, p. 26.

The doctrine is at least an old one. Franciscus à Victoria (1480–1546) argued (Relectiones Theologicæ, Relect. v. sect. iii. 2) that the Spaniards had a right to go to the Indies and live there because it has been the custom from the beginning of the world for any one to go into whatever country he chooses, and prohibition of entrance is a violent measure not far removed from war.

[2] In many states laws of more or less stringency are in force, preventing the access, or providing for the expulsion, of alien vagabonds, destitute persons, criminals, and others whose presence in the country would be undesirable. For an abstract of the laws of different states on the subject, see Parl. Papers, Miscell. No. 1, 1887. [And see Musgrove v. Chun Teeong Toy, L. R., App. Ca. 1891, p. 272, where the Judicial Committee of the Privy Council decided that an alien has no legal right enforceable by action to enter British territory.] The recent legislation of the United States is a somewhat excessive instance of the use of a right, which in the most limited view of the scope of sovereignty must be admitted to exist. Comp. postea, pp. 213 et seq.

states. The former can be accounted for as readily by the absence of any wish to interfere with harmless navigation as by the recognition of a right; and the latter will be seen later to be destitute of an authoritative character. The evidence of history is still less favourable. States formerly claimed a right of innocent passage for military purposes. But this, so far from governing the rights of independence, has long been recognised to be subordinate both to them and to the duties of neutrality which are founded on them. In other directions there is no trace of the operation of the supposed right. It is true that the interest which every country has in trade prevents the questions from arising which might be produced by total or by almost complete seclusion; but if so wide-reaching a right had been admitted at all as an operative rule of law, the occasions for its employment adversely to foreign states would neither have been few nor insignificant.

Alleged legal duty of extraditing criminals.

It is also alleged that states have a right to require that persons accused of crime, who have escaped into a foreign country, shall be delivered up for trial and punishment on conviction. Authority is much divided on the matter; but there appears on the whole to be a distinct preponderance of opinion against the existence of the right, and the weight of argument unquestionably leans in the same direction. Sometimes it is said that crimes, or at least the more serious crimes, are not merely an infraction of a command which a particular society chooses to give; they sap the foundations of social life, they are an outrage upon humanity at large, and all human beings therefore ought to contribute to repress them. More often it is said that all nations have a common interest in the repression of crime, that its commission is encouraged when a criminal enjoys immunity so soon as he leaves the territory of his country, and that in order to secure reciprocity states must give up criminals at the demand of their neighbours. The latter views are just, but it is difficult to connect them with a duty of extradition. An obligation to do an act for the benefit

of another person cannot be founded on a demonstration that to perform it will be advantageous to the doer. The former argument, on the other hand, goes too far. It implies that international law commands human beings to combine for the repression of everything which is gravely injurious to the bases of social life. This evidently it does not do; and as a matter of fact, even in the particular question of extradition, states have been far from acknowledging a duty of giving up criminals. Surrender, apart from convention, has been unusual, and when effected, it has been treated as an act of comity. In recent times, since facility of travel has given criminals more opportunities of escaping from the scene of their crime, and it has consequently become important to be able to obtain their extradition, delivery for specified crimes, and under specified conditions, has been provided for internationally by express agreements. Positive international law therefore does not recognise the duty of extradition; in other words, assuming international law to be what it was stated to be in the Introduction, the duty of extradition cannot at present exist[1]. That it is not only wise to give up fugitive criminals, but that they ought to be surrendered, may readily be granted. But the obligation is that only which is stated by M. Bluntschli[2]; the individual, he says, does not completely satisfy the call of moral duty if he merely does what is right within his own sphere of activity, without offering a hand to others who need it to do right in their sphere: and just as little does a state entirely fulfil its task if it acts justly in its own dominions, but declines to give to other states the help of which they are in want.

Duties of courtesy.

By many writers the ceremonial rules which regulate the

[1] The chief authorities on either side are enumerated by Fœlix, Droit International Privé, liv. ii. tit. ix. ch. vii, and Von Bar, Das Internationale Privat- und Strafrecht, § 148. Among recent authors, Sir R. Phillimore (i. § ccclxiv), Woolsey (§ 77), Bluntschli (§ 395), and Fiore (Trattato di Diritto Internazionale Pubblico, § 611), deny that extradition is legally obligatory. Calvo (Liv. xv. Sect. ii) gives a very full account of the treaties on the subject, and of practice independently of treaties.

[2] Staatswörterbuch, i. 501.

forms of state relations are included in international law. They conceive that the feelings of honour and personal dignity possessed by states not only prompt a wish that the existence of those feelings shall be recognised by other states, but confer a legal right to demand external manifestations of recognition. To the English mind the elevation of courtesy, and of observance of the etiquette which is its formal expression, into a legal duty is not easily comprehensible. The most that can be said of them is that an intentional breach of ceremonial rules is an offensive act, and that an offensive act is inconsistent with the comity which exists between friendly nations; but their disregard gives no right to exact reparation by force, or to take any further measures, if reparation be denied, than to return discourtesy with discourtesy, or to withdraw from actively friendly intercourse [1].

Insusceptibility of the open sea to be appropriated as property.

It being recognised that states are unable to maintain effective control over large spaces of sea, so as to be able to reserve their use to themselves, it is a principle of international law that the sea is in general insusceptible of appropriation as property. The qualifications by which the application of this principle is limited will be examined later.

[1] International ceremonial rules have reference to—

1. The direct relations of sovereigns with each other.
2. Diplomatic correspondence.
3. The intercourse of official persons with each other.
4. Maritime ceremonial.

Ample information with respect to them will be found in Heffter (§§ 194–7), Calvo (§§ 296–345), or Klüber (Droit des Gens Moderne de l'Europe, §§ 89–122).

CHAPTER III

GENERAL PRINCIPLES OF THE LAW GOVERNING STATES IN THE RELATION OF WAR

PART I CHAP. III

In what the relation of war consists.

When differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant.

The place of war in international law.

As international law is destitute of any judicial or administrative machinery, it leaves states, which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction, to exact redress for themselves by force. It thus recognises war as a permitted mode of giving effect to its decisions. Theoretically therefore, as it professes to cover the whole field of the relations of states which can be brought within the scope of law, it ought to determine the causes for which war can be justly undertaken; in other words, it ought to mark out as plainly as municipal law what constitutes a wrong for which a remedy may be sought at law. It might also not unreasonably go on to discourage the commission of wrongs by investing a state seeking redress with special rights and by subjecting a wrong-doer to special disabilities.

How far international law defines just causes of war.

The first of these ends it attains to a certain degree, though very imperfectly. It is able to declare that under certain circumstances a clear and sufficiently serious breach of the law, or of obligations contracted under it, takes place. But in most of the disputes which arise between states the grounds of quarrel, though they might probably be always brought into connexion with the wide fundamental principles of law, are

too complex to be judged with any certainty by reference to them; sometimes again they have their origin in divergent notions, honestly entertained, as to what those principles consist in, and consequently as to the injunctions of secondary principles by which action is immediately governed; and sometimes they are caused by collisions of naked interest or sentiment, in which there is no question of right, but which are so violent as to render settlement impossible until a struggle has taken place. It is not therefore possible to frame general rules which shall be of any practical value, and the attempts in this direction, which jurists are in the habit of making, result in mere abstract statements of principles, or perhaps of truisms, which it is unnecessary to reproduce[1].

The legal position of parties to a war relatively to each other.

The second end international law does not even endeavour to attain. However able law might be to declare one of two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war, when it is powerless to enforce its decisions. The obedience which is paid to law must be a willing obedience, and when a state has taken up arms unjustly it is useless to expect it to acquiesce in the imposition of penalties for its act. International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights[2].

[1] Ayala, De Jure et Officiis Bellicis (published in 1582), lib. i. c. ii. § 34; Grotius, De Jure Belli et Pacis, lib. i. c. iii. § 4, and lib. iii. c. iii. § 1, and c. iv; Vattel, liv. iii. ch. xii. §§ 190–2; De Martens, Précis, § 265; Halleck, i. 472.

[2] The conditions under which war is just are largely explained by Grotius (lib. ii. c. i. and xxii–vi), Pufendorf (bk. viii. c. vi. § 3), Wolff (Jus Gent. §§ 617–46), Vattel (liv. iii. ch. iii), Halleck (ch. xv), and Fiore (ii. 238, ed. 1869); and are more shortly noticed by Franciscus à Victoria (Relect. Theol. vi), Ayala (lib. i. c. ii. § 12), Albericus Gentilis (De Jure Belli, written in 1588, lib. i. c. iii), De Martens (Précis, § 265), and Klüber (§ 237). Heffter (§ 113) properly characterises discussions upon the subject as 'oiseuses.'

Limits of the right to use violence in war.

The use of violence by a country towards its enemy necessarily suspends the full observance of the right to the enjoyment of independence and of the continuance and development of existence, which a state possesses when in its normal relation to others. Except in so far also as the right to use violence may be limited by something external both to itself and to any of the rights over which it thus has a necessary precedence, it is incompatible with a secure enjoyment of the rights of property. The more important therefore of the definite rights belonging to states in their normal relation to each other are governed by the right to use violence for a specific end. The temporary and exceptional right supplants for the moment the permanent rights. But just as violence in war has at no time of modern European history been in fact exercised without the encumbrance of moral restraint, so theoretically it must always be exercised with due regard to the character of the state as an aggregate composed of moral beings. It is agreed that the use of wanton and gratuitous violence is not consistent with the character of a moral being. When violence is permitted at all, the amount which is permissible is that which is necessary to attain the object proposed. The measure of the violence which is permitted in war is therefore that which is required to reduce the enemy to terms[1]. It is of course evident that this amount is conceivably variable, that greater or less violence might be regarded as necessary according to the degree of obstinacy shown by the enemy, and that in the absence of specific rules, applying the general principle, a latitude might be given to belligerent action which would reduce the principle to impotence. At this point usage steps in, and provides from time to time standards of permissible violence for universal

The doctrine of M. Bluntschli (§§ 515–8) must be exempted from the charge of being truistic, whatever may be the criticism to which it is exposed on other grounds.

[1] Grotius, lib. iii. c. i. § 2; Vattel, liv. iii. c. viii. §§ 136–8; Lampredi, Juris Publici Universalis Theoremata (written in 1776), pars iii. c. xiii. §§ 1–5; Heffter, § 119.

application. The differences in the kind and degree of resistance which can be offered by civilised nations to an enemy are not considered to be such as to justify differences in the kind of violence employed to subdue it. In all wars consequently the same means of putting stress upon an adversary must be employed, save in rare cases when, by himself overstepping the prescribed bounds, the latter makes it necessary or allowable to adopt exceptional measures with respect to him.

In what international law as applied to war consists.

International law as applied to war thus consists in customary rules by which the maximum of violence which can be regarded as necessary at a given time is determined. These rules, though sufficiently ascertained at any particular moment to afford a test of the conduct of a state, have been, and still are, changing gradually under the double influence of the growth of humane feeling and of the self-interest of belligerents. Springing originally from limitations upon a right, which in its extreme form constitutes a denial of all other rights, and developed through the action of practical and sentimental considerations, the law of war cannot be expected to show a substructure of large principles, like those which underlie the law governing the relation of peace, upon which special rules can be built with fair consistency. It is, as a matter of fact, made up of a number of usages which in the main are somewhat arbitrary, which are not always very consistent with one another, and which do not therefore very readily lend themselves to general statements. So far as any connexion between them exists, it can be indicated sufficiently, and more conveniently than here, when the various usages are separately discussed.

The doctrine that the relation of war does not affect individuals except in so far as they con-

In what has just been said it has been taken for granted that a certain doctrine is not part of international law, which is declared by many writers to be of incontestable authority, which, if it is really accepted, constitutes a fundamental principle of the laws of war, and which, if carried out to its natural results, would deeply modify the rules by which belligerents are actually guided. A doctrine of such pretension must be examined, and if it is

PART I CHAP. III tribute to the prosecution of hostilities.

groundless, must be shown to be so, before the special rules affecting war can be satisfactorily treated.

The doctrine in question starts with the admitted fact that international law is concerned only with the relations of states, and that war is consequently 'a relation of a state to a state, and not of an individual to an individual.' The individual, so far as he is affected at all, is affected only through his state. But individuals, it is said, occupy a double position. In one respect they are private persons, with rights of property and person which have no relation to state life; and in another they are members of the state, from whom it derives its means of carrying on war, and whom it employs as its agents. These two aspects correspond, according to the theory, to a substantial distinction; to which some writers give effect by supposing an individual to be an enemy only while actually fighting for his country, and others by regarding him as such to the extent only that he is in the service of his state, or that he contributes to enable it to sustain hostilities. Both consider that in all matters outside one or other of these lines he is a stranger to the war in person and property.

In opposition to this doctrine is another, which also takes as its basis that international law is concerned only with the relations of states. War is a relation between states alone. But states being the only subjects of international law, that law takes cognizance of the individual solely through his state, and as belonging to it, so that except as a member of it he has neither personal nor proprietary rights. Thus for good and for evil he is wholly identified with it, and when war is declared he becomes the enemy of the enemy state and of every person belonging to it.

It is claimed on behalf of the former theory, not only that it furnishes an admitted principle to modern international law, but that it is in fact applied in many of the actual rules of war, and that many of the improvements by which modern law is distinguished from the older customs are due to it.

Whether the doctrine is supported by the authority—

(1) of writers;

In the first hundred and seventy years of the existence of international law as a system, the notion of the separability of the individual from his state for the purposes of war was unknown to international jurists. To all it was a matter of course that the subjects of an enemy state were themselves individually enemies [1]. It was not till 1801 that the theory of the exclusion of private persons as such from the hostile relations of the states to which they belong began to find its way into international law. In that year Portalis, in a speech delivered on opening the French Prize Court, said that 'war is a relation of state to state, and not of individual to individual. Between two or more belligerent nations the private persons of whom those nations are composed are only enemies by accident; they are not so as men, they are not even so as citizens, they are so only as soldiers [2].'

[1] Grotius, lib. iii. c. iii. § 9, and c. iv. § 8; Pufendorf, bk. viii. ch. vi; Molloy, De Jure Maritimo (written in 1676), bk. i. ch. i. § 22; Bynkershoek, Quæst. Jur. Pub. (written in 1737), lib. i. c. i; Burlamaqui, The Principles of Natural and Politic Law, trans. by Nugent (written in 1763), vol. ii. pt. iv. ch. iv. § 20; Wolff, Jus Gent. §§ 721 and 723; Vattel, liv. iii. ch. v. §§ 70-2; Lampredi, Jur. Pub. Theorem. pars iii. c. xii. § 10. See also the judgment of Mr. Justice Johnson in the case of the Rapid, viii Cranch, 160-2.

[2] Portalis borrowed his doctrine almost textually from Rousseau. 'La guerre,' says the latter, 'n'est point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs. Enfin chaque état ne peut avoir pour ennemis que d'autres états, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport.' He goes on to make the startling assertion that 'ce principe est même conforme aux maximes établies de tous les temps et à la pratique constante de tous les peuples policés.' Contrat Social, liv. i. ch. iv.

With an admirable irony, of which it is hard to suppose him unconscious, Talleyrand wrote to Napoleon in 1806:—'Trois siècles de civilisation ont donné à l'Europe un droit des gens que, selon l'expression d'un écrivain illustre, la nature humaine ne saurait assez reconnaître. Ce droit est fondé sur le principe que les nations doivent se faire dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible.

'D'après la maxime que la guerre n'est point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, non pas même comme membres ou sujets de l'état, mais uniquement comme ses défenseurs, le droit des gens ne permet pas que le droit de guerre, et le droit de conquête

The doctrine did not immediately spread. De Martens, Klüber, Kent, Wheaton, and Manning expressly or implicitly manifested their adherence to the traditional view; and an opinion which is supported by their authority may be regarded as the established law of the earlier part of the present century[1]. Their example has more recently been followed by Riquelme, Twiss, Phillimore, Halleck, and Negrin[2]. On the other hand, the ideas of Rousseau have undoubtedly become a commonplace of most of the recent continental writers[3]; but however valuable the opinion

qui en dérive, s'étendent aux citoyens paisibles et sans armes, aux habitations et aux propriétés privées, aux marchandises de commerce, aux magasins qui les renferment, aux chariots qui les transportent, aux bâtiments non armés qui les voiturent sur les rivières ou sur les mers, en un mot à la personne et aux biens particuliers.

'Ce droit, né de la civilisation, en a favorisé les progrès. C'est à lui que l'Europe a été redevable du maintien et de l'accroissement de prospérité, au milieu même des guerres fréquentes qui l'ont divisée,' &c. Quoted by Heffter note to § 119) from the Moniteur of Dec. 5, 1806.

The wars of Napoleon were hardly conducted in the spirit of this passage, which indeed may be suspected to have been only written for the purpose of casting odium upon the power which captured French ships, and upon which France was unable to retaliate.

[1] De Martens, Précis, § 263; Klüber, § 232; Kent, Comm. i. 55; Wheaton, Elem. pt. iv. ch. i. § 6; Manning, Commentaries on the Law of Nations (ed. 1875), p. 166.

[2] Riquelme, lib. i. c. 10; Twiss, ii. § 42; Phillimore, iii. § lxix; Halleck, i. 480; Negrin, Tratado Elemental de Derecho Internacional Maritimo, 141. The deliberate view of the government of the United States is shown by the 20th and 21st articles of the 'Instructions for the Government of Armies in the Field,' in which it is laid down that 'Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilised existence that men live in political, continuous societies, forming organised units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.' See also, for the doctrine of the American Courts, White *v.* Burnley, xx Howard, 249.

[3] For example, Bluntschli, Introd. p. 32 and §§ 530-1; Fiore, II^e p^tie, ch. iii. ed. 1869; De Laveleye, Du Respect de la Propriété Privée, p. 26.

It is to be wished that the advocates of the new doctrine were more sensible than they are of the necessity of offering some proof in support of their assertion that it has replaced the previously existing law. They simply take for granted that the latter is exploded. M. Pradier Fodéré, in his notes to Vattel (iii. 132, ed. 1863), uses typical language in speaking of it

of some of these may be, it would be idle to put them in competition with the mass and continuity of authorities which are arrayed against them, unless it could be shown that practice has clearly anticipated their decision, or that it has recently changed to accommodate itself to their views.

(2) of usage.

Is, then, existing usage reasonably consistent with the theory in question, or has any improvement in practice taken place which can fairly be attributed to its influence? If individuals are not enemies as men, if they are not so even as subjects of the state, if they are enemies as soldiers only, or at most as officials or tax-payers, an enemy can have no right to interfere with the civil organisation of the hostile country, he can have no right of doing violence directly or indirectly to civilians, he can have no right to touch a shilling of their property or to derange their daily life by using for military purposes anything which belongs to them, he can have no right to treat them in his own country in any respect less favourably than in time of peace[1]. Yet not a single modern war has been made, except upon territory of which the population has been actively friendly to the invader, without every one of these things being done; and the pages of the writers who repeat the empty declamation of Portalis may be turned over in vain for a word which denies the right to do them. On entering his enemy's territory an invader replaces

as the 'erreur si étrangement adoptée par Vattel, et dont le droit des gens du xix^e^ siècle a fait justice.'

[1] What is said above need not be pressed so far as to exclude from the list of enemies any one in the employment of the state or actually aiding it in any way, and it is of course to be understood that the property of the state itself, including the money payable in respect of ordinary taxes as it becomes due, may be seized by the enemy; but, on the most liberal construction, the language of M. Portalis can lead to nothing less than what is said in the text, thus guarded; and as the extract which has been given from his speech is repeated *ad nauseam* by the writers who follow him, it must be assumed to embody their views. M. Fiore indeed (ii. 270, ed. 1869) says, 'Tant que les sujets des divers états ne prennent pas personnellement part au combat, leurs droits et leurs biens personnels ne peuvent pas souffrir à cause des opérations de la guerre, dont les effets sont limités aux droits et aux propriétés publiques des nations belligérantes.' M. Bluntschli (p. 33) may not seem to go so far; but if he does not intend to do so, he is inconsistent with his own opinion as expressed in §§ 530–1.

the civil government by military control, and makes any changes which are necessary for his safety and success; when he arrives before a fortress he not only bombards it without thought for the peaceable inhabitants, but he often directs his fire upon them and their houses instead of upon the fortifications, in order that the commander may be induced by their sufferings to surrender; the property of his enemy's subjects he seizes by way of contribution and requisition; he forces them to render him personal service in furtherance of his war; he destroys their buildings and cuts up their fields for military purposes; he stops farming work and the daily intercourse of the country by requisitioning carts and horses and monopolising the use of railways and canals; and during the continuance of the war he denies them the civil justice of his courts. Most of these and of similar acts, which are habitually done, are necessary to war, some of them are unnecessary; but all alike are incompatible with any reasonable application of the principle that individuals are not enemies.

Whether practice has been modified by the influence of the doctrine.

If, again, it is urged that practice, to whatever extent it may fall below a theoretical standard, has at least been improved since the introduction of the doctrine, the answer is simple. From the middle of the seventeenth century the laws of war have been continuously softened with the growth of humanity. It would be hard, and probably impossible, to show that a more marked or rapid change has occurred during the present century than during a former period of equal length; and even if such a change could be established, it would be more rational to attribute it to a reaction from the excesses of the Napoleonic wars, to the influence of a long peace, and above all to the general softening of modern manners, than to a principle, which has been seen to be at variance with practice, which perhaps is not seriously adopted even in theory in any country, except by writers, and which is certainly repudiated in England and the United States, the inhabitants of which may justly claim not to have less than the average amount of humane feeling.

Reasons for regard-

There are two reasons for which it is satisfactory to be able to

reject the doctrine of the separability of the individual from the state.

ing the doctrine as objectionable.

The first is that the doctrine is a fiction. International law rests no doubt in great part upon fictions. But they are fictions which have become in a sense realities by the degree to which they have seized upon the imaginations of peoples, and to which they have been acted upon for generations; in the main also they are antecedent to international law; they may have been strengthened by it; but to begin with they imposed themselves upon it. New fictions are in a different position. As obvious unrealities they are destitute of inherent force, and they consequently ought never to be lightly introduced. In the present case it is impossible to draw a real distinction between the public and private aspects of the individual. The state is made up of the sum of the individuals belonging to it, and its will is the sum of their wills. It is by pressure of different kinds which is brought to bear upon them individually that the state is compelled to submit to a victor. To separate individuals theoretically from the state in respect of a number of interests, which are nevertheless recognised in universal practice as giving a fair hold for putting stress upon it, is simply to ignore facts. To separate the state from the individuals which compose it is to reduce it to an intangible abstraction.

The second reason is that the doctrine is mischievous. It is the argumentative starting-point of attack upon the right of capture of private property at sea. Whatever from certain points of view may be the merits of this question, it is inconvenient, to say the least of it, that the discussion as to the propriety of retaining the right should be placed upon a false basis, and that by the quiet assumption of an inadmissible principle the semblance of a justification should be obtained for branding a practice as an iniquitous contravention of rule, which in reality is in harmony with the ground principles of the laws of war. Still more objectionable is its effect upon the legal position of the inhabitants of a militarily occupied country. If they are

not enemies they have no right of resistance to an invader; the spontaneous rising of a population becomes a crime; and the individual is a criminal who takes up arms without being formally enrolled in the regular armed forces of his state. The customs of war no doubt permit that such persons shall under certain circumstances be shot, and there are reasons for permitting the practice; but to allow that persons shall be intimidated for reasons of convenience from doing certain acts, and to mark them as criminals if they do them, are wholly distinct things. A doctrine is intolerable which would inflict a stain of criminality on the defenders of Saragossa[1].

[1] In speaking upon this point in 1874, Baron Lambermont, one of the Belgian delegates at the Conference of Brussels, said, 'Il y a des choses qui se font à la guerre, qui se feront toujours, et que l'on doit bien accepter. Mais il s'agit ici de les convertir en lois, en prescriptions positives et internationales. Si des citoyens doivent être conduits au supplice pour avoir tenté de défendre leur pays au péril de leur vie, il ne faut pas qu'ils trouvent inscrits sur le poteau au pied duquel ils seront fusillés l'article d'un traité signé par leur propre gouvernement qui d'avance les condamnait à mort.' Parl. Papers, Miscell. No. 1, 1875, p. 92. The efforts of some of the great military powers at the Conference to suppress the right of a population to defend itself were so sturdily resisted by several of the minor states that the draft rules originally proposed were modified, as a result of the discussion which took place, in a sense favourable to the right.

CHAPTER IV

GENERAL PRINCIPLES OF THE LAW GOVERNING BELLIGERENTS AND NEUTRALS IN THEIR RELATIONS WITH EACH OTHER

How the special law of neutrality has been formed.

The rudimentary propositions of international law contemplate no other relations than those of war and peace. At a time when the relations of countries in amity with one another were the subject of elaborate rule, and when the violence of war was already limited by definite customs, neutrality had no existence. If hostilities broke out between two states, every other was an ally or an enemy. Little by little a third attitude became recognised as possible and legitimate; and its maintenance has gradually been transformed into a duty by the jealousy of belligerents, whose anxiety to deprive their enemy of advantages which the preference of the neutrals might give to him has been helped by the equal anxiety of neutrals to continue their habits of trade and intercourse. A code of rules has grown up affecting states in their new relations, which in part is the accidental result of the immediate collision of interests of various strength, in part is a fair deduction from the principles of the law governing states in their normal relations, and in part represents a compromise between conflicting deductions from those principles and from the rights which belligerents are conceived to possess as against their enemies. As these last-mentioned principles and rights are equally starting-points in law, and as they contemplate the contradictory states of war and peace, and have no inherent reference to any third relation in which countries can stand to one another, any compromise arrived at between them may be expected to be rough. As a matter of fact, not only is the usage which governs the conduct of neutrals and belligerents often inconsistent with itself, but there are even

two broadly divided tendencies of opinion as to its right basis, of which one prefers the interests of the neutral and the other those of belligerents.

However unfortunate the existence of these divergent tendencies may be, they are equally defensible theoretically on the fundamental principles with which the law of neutrality is bound to conform; and as it is beyond the province of the international lawyer to settle precedence between the interests of neutrals and belligerents, he must leave to moralists and to statesmen the task of deciding which of the two are the more worthy of encouragement, and therefore which theoretic tendency is to be preferred.

The rudimentary principle of the law of neutrality. Duty of impartial conduct.

It is a reasonable, and indeed a necessary, deduction from the principle that a state is bound to respect the right of free action possessed by other states, that it must not allow feelings of friendship for a country to betray it into embarrassing an enemy of the latter in the exercise of his legitimate rights of war. It has been mentioned as an incident of sovereignty that every people possessing sovereignty has the right of determining what kind and amount of intercourse it will maintain with foreign nations, and that it may choose to mark out one as an object for greater friendship than another. In time of peace it is easy to accord such preference, and to remain, nevertheless, on terms of perfect amity with less favoured countries. But during war, privileges tending to strengthen the hands of one of two belligerents help him towards the destruction of his enemy. To grant them is not merely to show less friendship to one than the other; it is to embarrass one by reserving to the other a field of action in which his enemy cannot attack him; it is to assume an attitude with respect to him of at least passive hostility. If therefore a people desires not to be the enemy of either belligerent, its amity must be colourless in the eyes of both; in its corporate capacity as a state it must abstain altogether from mixing itself up in their quarrel.

In the oldest and most rudimentary form of the theory of

neutrality this principle was fully recognised. But when once its dictates had been satisfied, the duties of a state were, for all practical purposes, supposed to end.

Territorial sovereignty as a source of neutral responsibility.

Gradually, as the theory of neutrality was worked out, it came to be thought that a neutral state is not merely itself bound to refrain from helping either of two belligerents, but that it is also bound to take care to a reasonable extent that neither one nor the other shall be prejudiced by acts over which it is supposed to have control. States become affected by the duty of responsibility which is correlative to the fact of sovereignty. Sovereign states being in possession of the sole right to decide what acts shall or shall not be openly done within their territory, all countries are supposed to be jealous of any infringement of that right; and no stranger being able to look behind the fact of sovereignty, they are supposed to be capable of securing that it shall be respected. It would neither be likely, nor is it found to be the fact, that nations, in matters connected principally with their own interests, regard with patience any exercise of authority or of force within their territories independently of their own sanction. If therefore a people is found to acquiesce in conduct injurious to its friends; if it permits a belligerent to use its lands or its harbours as the scene of hostile action, or the basis of hostile preparation, a violent presumption is raised that its neutrality is unreal, and that it deliberately intends under the mask of equal friendship to help the belligerent who has committed an unpunished offence.

The reasoning which applies to strangers applies also to subjects. As the presumption that a sovereign has control over avowed acts done within his dominions is still stronger in the case of subjects than of foreigners, if any acts are done by them which are in opposition to his declared policy, it is easier to believe the declaration to be false than the power to be inadequate. *Primâ facie* everything which they do is permitted by him.

On the other hand, it is admitted that no government can

exercise an inquisitorial surveillance over all the doings of persons living within its jurisdiction. There is a point at which the responsibility of a state ceases in respect of concealed acts. What this point is will be a subject for consideration later.

In all this it is evident that the duties of a neutral state are identical with those of a state in a time of universal peace. It is at peace with both the parties to a war; it must therefore fulfil its pacific duties with respect to them. The only difference in the position of a state in the two cases of peace and neutrality is that the range and frequency of the occurrences which call for the fulfilment of duty in time of war is greater than in time of peace. In peace, attempts to use the territory of a state to the injury of another state are only made by private persons and are rare, in war they may be made by a belligerent state itself as well as by its subjects, and they may occur at any moment. A state may therefore be reasonably expected to show somewhat more watchfulness as a neutral than can be demanded from it in a season of apparent tranquillity.

Territorial sovereignty as the measure of neutral responsibility.

As territorial sovereignty brings with it duties, so it supplies the measure of neutral responsibility. A state cannot be asked to take cognizance of what occurs outside its own borders. In another country it obviously cannot act. On the sea it is not required to act, both because its jurisdiction, being confined to its own ships, is inadequate, and because it would be beyond the power of any state to supervise the actions of its subjects, or of persons who may have made improper use of its territory, on all the oceans of the world. A state therefore washes its hands of responsibility at the edge of its territorial waters. Of whatever hostile conduct its subjects, or other persons issuing from its shores, may be guilty, the remedy of a belligerent is upon them personally, and not upon the nation to which they belong or the territory of which they may have used.

Rights of belligerents in restraint of com-

Connected with the cessation of state control at the frontier of state territory, though not springing from it, is a privilege of interference with neutral commerce which belligerents have

mercial acts of individuals.

been allowed to establish. Much of the trade which is ordinarily carried on between states, and which they have a right to carry on with whom they choose in virtue of their general right of self-development, is incompatible with the successful conduct of warlike operations. An army cannot permit free ingress into a besieged town, or egress from it. The stress put upon a country by blockade would be nullified if neutral merchants were allowed to bring in everything that the blockaded state might want. And there are kinds of merchandise, the supply of which to a belligerent, owing to their direct usefulness in war, is peculiarly injurious to his adversary. It is considered that the harm done to a belligerent by noxious trade is so great as to outweigh the loss inflicted upon a neutral by interruption or restriction of his commerce. A belligerent consequently is held to have a right to exact that trade which is injurious to his operations shall be restrained. There are only two ways in which this can be effected. Either the neutral sovereign may be responsible for the conduct of his subjects, or the belligerent may himself be entrusted with the necessary power. The grave and obvious inconveniences inseparable from the former method [1] would have secured its rejection if the impatience of belligerents had not denied it the opportunity of trial; but the actual practice in fact arose because it was easy for the belligerent to protect himself by summary action, while it was not easy for the neutral sovereign to give him an equal security.

[1] 'No power can exercise such an effective control over the actions of each of its subjects as to prevent them from yielding to the temptations of gain at a distance from its territory. No power can therefore be effectually responsible for the conduct of all its subjects on the high seas; and it has been found more convenient to entrust the party injured by such aggressions with the power of checking them. This arrangement seems beneficial to all parties; for it answers the chief end of the law of nations,—checking injustice without the necessity of war. Endless hostilities would result from any other arrangement. If a government were to be made responsible for each act of its subjects, and a negotiation were to ensue each time that a suspected neutral merchantman entered the enemy's port, either there must be a speedy end put to neutrality, or the affairs of the belligerent and neutral must both stand still.' Lord Brougham's Works, ed. 1857, viii. 386.

The origin of the privilege was lawless, but existing custom fortunately gives effect to a real distinction which separates non-neutral acts, with which the state is identified, from commercial acts done by individuals from which a belligerent suffers.

Distinction between state acts and commercial acts of the individual.

An act of the state which is prejudicial to the belligerent is necessarily done with the intent to injure; but the commercial act of the individual only affects the belligerent accidentally. It is not directed against him; it is done in the way of business, with the object of getting a business profit, and however injurious in its consequences, it is not instigated by that wish to do harm to a particular person which is the essence of hostility. It is prevented because it is inconvenient, not because it is a wrong; and to allow the performance by a subject of an act not in itself improper cannot constitute a crime on the part of the state to which he belongs. Trade between a neutral individual and a belligerent, which is prejudicial to the operations of a country at war, not being in itself wrong, even in the qualified sense in which non-neutral national acts can be said to be wrong, the belligerent right to interfere with it is theoretically a derogation from the strict rights of the neutral state, which refrains in so far as its subjects are affected by the belligerent from protecting them in the performance of innocent acts. The justification of this usage lies in its convenience.

The belligerent is allowed to control the latter directly.

By existing custom the belligerent has the right of hindering neutral commerce when it is noxious to him, either because it supplies his enemy with articles of direct use in war, or because it diminishes the stress which he puts upon his enemy; or even because it is tainted by association with hostile property. In all these cases the neutral trader is left face to face with the belligerent nation. It alone determines whether he has infringed its privileges, and in its courts alone can he in the first instance find a remedy for wrongs done to him by its agents. The neutral state cannot interfere until the belligerent has overstepped the boundary of his rights. When he has done this by rendering unjust decisions, the question transfers itself to

another head of international law. The belligerent has practically committed an act of war, and the neutral state can demand and exact such reparation as may be needful.

Division of the law of neutrality into two branches.

It appears, then, that international usage as between belligerents and neutrals consists of two branches, distinct in respect of the parties affected, of the moral relation of these parties to each other, and of the means by which a breach of the accepted rules can be punished.

1. That affecting states in their relation to one another.

In one the parties are sovereign states. Both of these are affected by the same duties as in peace time. The belligerent therefore remains under an obligation to respect the sovereignty of the neutral; the neutral is under an equal obligation not to aid directly or indirectly, and within certain limits to prevent a state or private persons from aiding in places under his control, the enemy of the belligerent in matters immediately bearing on the war. If a wrong is done, the remedy is of course international.

2. That affecting states and individuals in their relation to one another.

In the other the parties are the belligerent state and the neutral individual. They are, and can be, bound by no obligations to each other. The only duty of the individual is to his own sovereign; and so distinctly is this the case, that acts done even with intent to injure a foreign state are only wrong in so far as they compromise the nation of which the individual is a member. At the same time the only duty of the belligerent state is to beings of like kind with itself; and it is merely bound to behave in a particular manner to the neutral individual because of the international agreement which sets limits to the severity which may be used in repressing his noxious acts. But within these limits the belligerent is irresponsible. He exacts in his own prize-courts the penalty for infraction of the rules which he is allowed to enforce; and if he inflicts a wrong, it is for him to repair it.

The two branches are sometimes con-

This distinction between the usages affecting national and private acts is deeply rooted in the habits of nations. At no time since the rules which make up international law assumed

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definite shape has there been any room for question as to the existence or nature of an authoritative practice in the matter. But the usage was shaped in the first instance by the blind working of natural forces, and its permanence is more due to their continued operation than to the clearness with which its principle has been defined by legal writers. It has been, and still is, usual for them to confuse neutral states and individuals in a common relation towards belligerent states; and in losing sight of the sound basis of the established practice they have necessarily failed to indicate any clear boundary of state responsibility. This want of precision is both theoretically unfortunate, and not altogether without practical importance. For it has enabled governments from time to time to put forward pretensions, which though they have never been admitted by neutral states, and have never been carried into effect, cannot be often made without endangering the stability of the principles they attack. But the common sense of statesmen has generally met such pretensions with a decided assertion of the authoritative doctrine, and state papers are not wanting in that clearness which is deficient in the writings of jurists.

1777, French statement of the law.

In 1777 M. de Vergennes, in his observations on the celebrated English 'Mémoire Justificatif' of that year, said that 'it will be found, whether by consulting usage or treaties, not that trade in articles contraband of war is a breach of neutrality, but that the persons engaged in it are exposed to the confiscation of their goods[1].' When England suggested to the United States in 1793 that the government of that country 'will deem it more expedient to prevent the execution of the President's Proclamation than to expose vessels belonging to its citizens

1793, American statement of the law.

[1] De Martens, Causes Célèbres du Droit des Gens, iii. 247. The correctness of M. de Vergennes' law is not affected by the circumstance that the facts in the particular case do not seem to have been altogether covered by the principle which he stated. The exportations of articles contraband of war of which the English government complained, were chiefly made by a body of persons who owned privateers, sailing under the American flag, but fitted out in French ports, and manned by Frenchmen. In such a case exportations of arms might fairly be taken as part of a series of hostile operations.