other may resent its action, and may treat it as an enemy. So long however as this does not occur, and war in consequence does not break out, the former professes that its operations are of a friendly nature; it is therefore strictly limited to such action as is barely necessary for its object, and it is evidently bound to make compensation for any injury done by it[1].

English operations against Denmark, 1807.

The most remarkable instance of action of the kind in question is that which is presented by the English operations with respect to Denmark in 1807. At that time the Danes were in possession of a considerable fleet, and of vast quantities of material of naval construction and equipment; they had no army capable of sustaining an attack from the French forces then massed in the north of Germany; it was provided by secret articles in the Treaty of Tilsit, of which the British government was cognizant, that France should be at liberty to take possession of the Danish fleet and to use it against England; if possession had been taken, France 'would have been placed in a commanding position for the attack of the vulnerable parts of Ireland, and for a descent upon the coasts of England and Scotland;' in opposition, no competent defensive force could have been assigned without weakening the Mediterranean, Atlantic, and Indian stations to a degree dangerous to the national possessions in those regions; the French forces were within easy striking distance, and the English government had every reason to expect that the secret articles of the Treaty of Tilsit would be acted upon. Orders were in fact issued for the entry of the corps of Bernadotte and Davoust into Denmark before Napoleon became aware of the

[1] Grotius (De Jure Belli et Pacis, lib. ii. c. ii. § 10) gives the occupation of neutral territory, under such circumstances as those stated, as an illustration of the acts permissible under his law of necessity; and the doctrine of Wolff (Jus Gentium, § 339), Lampredi (Jur. Pub. Univ. Theorem. pt. iii. cap. vii. § 4), Klüber (§ 44), Twiss (i. § 102), &c., covers the view expressed in the text; its best justification however is that the violation of the rights of sovereignty contemplated by it is not more serious, and is caused by far graver reasons, than can be alleged in support of many grounds of defensive intervention, which have been acted upon, and have been commonly accepted by writers. For defensive intervention, see postea, pp. 285–6.

despatch, or even of the intended despatch, of an English expedition. In these circumstances the British government made a demand, the presentation of which was supported by a considerable naval and military force, that the Danish fleet should be delivered into the custody of England; but the means of defence against French invasion and a guarantee of the whole Danish possessions were at the same time offered, and it was explained that 'we ask deposit—we have not looked for capture; so far from it, the most solemn pledge has been offered to your government, and it is hereby renewed, that, if our demand be acceded to, every ship of the navy of Denmark shall, at the conclusion of a general peace, be restored to her in the same condition and state of equipment as when received under the protection of the British flag.' The emergency was one which gave good reason for the general line of conduct of the English government. The specific demands of the latter were also kept within due limits. Unfortunately Denmark, in the exercise of an indubitable right, chose to look upon its action as hostile, and war ensued, the occurrence of which is a proper subject for extreme regret, but offers no justification for the harsh judgments which have been frequently passed upon the measures which led to it[1].

Permissible action in non-territorial waters.

If acts of the foregoing kind are allowed, *a fortiori* acts are also permitted which constitute less direct infringements of the sovereignty and independence of foreign states. A country the peace of which is threatened by persons on board vessels sailing under the flag of another state may in an emergency search and capture such vessels and arrest the persons on board, notwithstanding that as a general rule there is no right of visiting

[1] Alison, Hist. of Europe, vi. 474–5; De Garden, Hist. des Traités de Paix, x. 238–43 and 325–31. Writers who still amuse themselves by repeating the attacks upon the conduct of England, which were formerly common, might read with profit the account of the transaction given by the best French historian who has dealt with the Napoleonic period (Lanfrey, Hist. de Napoléon 1er, iv. 146–9) [and the comments on the English policy by Captain Mahan of the U. S. Navy, 'Influence of Sea Power upon the French Revolution and Empire,' ii. 277].

and seizing vessels of a friendly power in time of peace upon the seas. That the act is somewhat less violent a breach of ordinary rule than the acts hitherto mentioned does not however render laxity of conduct permissible, or exonerate a state if the grounds of its conduct are insufficient. As in other cases the danger must be serious and imminent, and prevention through the agency of the state whose rights are disregarded must be impossible.

Case of the *Virginius*.

A case of which some account has already been given with reference to another point illustrates the different views which may be held as to the circumstances under which protective action of the kind under consideration is legitimate; and it also opens a question whether a state may not have a power of dealing more freely with subjects captured at sea than with such as may be taken prisoners on the soil of a foreign state. It will be remembered that in 1873 the *Virginius*, a vessel registered as the property of an American citizen, but in fact belonging to certain Cuban insurgent leaders, attempted to land upon the island some men, among whom were persons of importance. The vessel was captured when making for Cuba, but while still a considerable distance outside territorial waters; and the Spaniards, besides doing illegal acts which are not to the present point, executed the insurgents on board. Whether the danger was sufficient to justify the seizure of the vessel at the moment when it was effected may, to say the least, be doubtful; but assuming urgent danger to have existed, was its capture in other respects permissible, and had the Spanish authorities a right to punish insurgent subjects taken on board? The United States maintained that the fact that the *Virginius* was *primâ facie* an American vessel was enough to protect her from interference of any kind outside territorial waters. 'Spain,' argued the Attorney-General in his opinion, 'no doubt has a right to capture a vessel with an American register and carrying the American flag, found on her own waters, assisting or endeavouring to assist the insurrection in Cuba, but she has no right to capture such a vessel on the

high seas on an apprehension that in violation of the neutrality or navigation laws of the United States, she was on the way to assist such rebellion. Spain may defend her territory and people from the hostile attack of what is or appears to be an American vessel; but she has no jurisdiction whatever on the question as to whether or not such vessel is on the high seas in violation of any law of the United States[1].' In taking up this position the United States in effect denied the right of doing any acts of self-protection upon the high seas in time of peace in excess of ordinary peace rights. In the end, however, the question between it and the Spanish government was settled on the ground that the ship was not duly invested with an American national character, according to the requirements of the municipal law of the United States, so that much of what the latter country had contended for was surrendered. If a vessel fraudulently carrying a national flag may be seized, the right of visit and search to establish the identity of the ship and to substantiate the suspicion of fraud must be conceded; the broad ground that the *primâ facie* character of the ship covers it with an absolute protection has been abandoned. And when once it is granted that the means necessary to bring fraud to light may be taken, and that a ship fraudulently carrying a national flag may be seized, it would seem somewhat pedantic to say that where clear evidence of hostile intention is found on board a vessel it is to be released, however imminent the danger, if it is discovered that the suspicion of fraud is not justified, and that the ship is really a vessel of its professed country, but engaged in an unlawful act which its own government would be bound to prevent if possible. Unless the principle upon which the whole of the present chapter is founded is incorrect it must be unnecessary for a threatened state, if imminently and seriously threatened, to trouble itself with such refinements. Apparently this was the view taken by the English government, which

[1] Parl. Papers, lxxvi. 1874, 65; and see President's Message of January 6, 1874, ib. 72.

became mixed up in the affair through the presence of Englishmen on board the *Virginius* as part of the crew. In demanding reparation for the death of some of them who were executed it does 'not take the ground of complaining of the seizure of the *Virginius*, nor of the detention of the passengers and crew . . . Much may be excused,' it was added with reference to their deaths, 'in acts done under the expectation of instant damage in self-defence by a nation as well as by an individual. But after the capture of the *Virginius* and the detention of the crew was effected, no pretence of imminent necessity of self-defence could be alleged[1].' It is clear from this language that the mere capture of the vessel was an act which the British government did not look upon as being improper, supposing an imminent necessity of self-defence to exist.

Due treatment of subjects captured in foreign vessels in non-territorial waters.

The fate of the insurgents who were captured and executed was not made a question between the English and American governments on the one hand and that of Spain on the other, and no international discussion appears to have taken place with regard to other cases—if other cases have occurred—of subjects captured under like circumstances. General principles of law therefore are the only guide by the help of which the rights of a state over such persons can be arrived at. Looked at by their light the matter would seem to stand thus. Although a merchant ship is not part of the territory of the state to which she belongs, under ordinary circumstances she remains while upon non-territorial waters under the jurisdiction of her own state exclusively; permission to another state to do such acts as may be necessary for self-preservation cannot be supposed in any case to imply a cession of more jurisdiction than is barely necessary for the purpose, and when, as in the present case, no cession of criminal jurisdiction is required, none can be presumed to be made; whether therefore the conduct of persons on board is criminal, and in what sense or to what degree, must be tested by reference to the laws of the state to which the vessel belongs,

[1] Parl. Papers, lxxvi. 1874, 85.

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and they ought to be judged by its tribunals. The powers of their own state would seem therefore to be limited to keeping them in custody so long as may be necessary for its safety, and to handing them over afterwards to the state owning the vessel for trial and punishment under any municipal laws which they may have broken by making attacks upon a friendly country. On principle the powers of the capturing state would seem to be no greater over persons captured on non-territorial seas than over persons seized in foreign territory; and the conduct of the Spanish authorities, in shooting the insurgents taken on board the *Virginius*, might have been seriously arraigned by the United States, had the latter country chosen to do so[1].

Protection of subjects abroad.

States possess a right of protecting their subjects abroad which is correlative to their responsibility in respect of injuries inflicted upon foreigners within their dominions; they have the right, that is to say, to exact reparation for maltreatment of their subjects by the administrative agents of a foreign government if no means of obtaining legal redress through the tribunals of the country exist, or if such means as exist have been exhausted in vain; and they have the right to require that, as between their subjects and other private individuals, the protection of the state and the justice of the courts shall be afforded equally, and

[1] The British government, in complaining of the execution of British members of the crew after sentence by court martial, said that 'it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners.' On any principle too much seems to have been conceded in saying this. Whether or not there can be any doubt as to whether a subject of the state, unquestionably guilty of a crime against it, can be punished when he has been seized within foreign jurisdiction, it is impossible to admit that foreigners seized under like circumstances may be put upon their trial; properly until they enter a state they can commit no crime cognizable by it (comp. antea, p. 210). As the *Virginius* was an unarmed ship, and no resistance could consequently be made, it is difficult to see that the Spanish authorities would have had a right to do more than try the foreign crew 'in proper form of law,' if she had been captured within territorial waters, and in the act of landing her passengers;—a presumption, where a vessel is unarmed, must always exist in favour of the innocence or ignorance of the crew, which can only be destroyed by evidence more carefully sifted than it is likely to be before a court martial.

that compensation shall be made if the courts from corruption or prejudice or other like causes are guilty of serious acts of injustice. Broadly, all persons entering a foreign country must submit to the laws of that country; provided that the laws are fairly administered they cannot as a rule complain of the effects upon themselves, however great may be the practical injustice which may result to them; it is only when those laws are not fairly administered, or when they provide no remedy for wrongs, or when they are such, as might happen in very exceptional cases, as to constitute grievous oppression in themselves, that the state to which the individual belongs has the right to interfere in his behalf [1]. When an injury or injustice is committed by the government itself, it is often idle to appeal to the courts; in such cases, and in others in which the act of the government has been of a flagrant character, the right naturally arises of immediately exacting reparation by such means as may be appropriate.

It is evident that the legitimacy of action in any given case and the limits of right action if redress be denied, are so essentially dependent on the particular facts of the case that it is useless, taking the question as a whole, to go beyond the very general statement of principle which has been just made. A single case may however be mentioned, to illustrate the delicacy of the questions to which the position of subjects in foreign countries may give rise. A Mr. Rahming, a British subject and commission agent in New York, was arrested during the American civil war, and consigned to military custody, on a charge of

[1] Phillimore, ii. §§ ii–iii; Bluntschli, §§ 380, 386; Calvo, § 361. The latter writer (§ 362) narrates a dispute which took place between England and Prussia as an illustrative case. The question at issue was the conduct of a certain criminal court in the latter country, before which an English subject was brought. As M. Calvo has given the name of the accused person, as from the date of the occurrence the latter is very likely to be still alive, and as the affair would have been highly discreditable to him if M. Calvo's account bore any resemblance to the facts, it is to be regretted that M. Calvo did not take the precaution of looking into the English Blue Book (Parl. Papers, 1861, lxv), where the most complete materials for forming an accurate judgment are provided. Had he done so, the story would have assumed a very different aspect in his pages.

having endeavoured to persuade the owners of a vessel wrecked six months before, to import cannon into Wilmington at some time or other before the wreck took place. A writ of habeas corpus was applied for and granted; but obedience to it was refused by the commandant of Fort M^{c}Henry under orders from the executive government, and in answer to a complaint on the part of Lord Russell, that 'the military authorities refuse to pay obedience to, or indeed to notice, a writ of habeas corpus,' Mr. Seward alleged that the President had the right of suspending the writ whenever in his opinion the public safety demanded that measure. The Supreme Court so little shared this view that it issued an attachment against the commandant. Lord Russell nevertheless forebore to press his remonstrances[1]. As Mr. Rahming was ultimately liberated on executing a bond, with condition that he should do no act hostile to the United States, the conduct of Lord Russell was no doubt judicious. Had he however been kept in custody, the question would have arisen whether a state is bound to abstain from interference on behalf of a subject, so soon as constitutional authority is claimed for an act, whether there be reason to believe that the claim is well or ill founded. Certainly, as a general rule, a foreign government must take its information as to the functions of the different organs of a state from that one which is duly charged with the conduct of foreign relations. To make this rule absolute however would place foreign subjects at the mercy of a ruler able and willing to violate the law; and a sovereign, if bound to abandon his subjects to any moderately reasonable law, however hardly it may press on them, is not bound to allow them to be treated in defiance of law, even though they may be so treated in common with all the other inhabitants of the territory in which they are. In the particular case the authority of the Supreme Court was undoubtedly superior to that of the Executive.

Protection with respect to debts due

There is one general point upon which a few words may be added. It has become a common habit of governments,

[1] Parl. Papers, North America, i. 1862.

especially in England, to make a distinction between complaints of persons who have lost money through default of a foreign state in paying the interest or capital of loans made to it and the complaints of persons who have suffered in other ways. In the latter case, if the complaint is thought to be well founded, it is regarded as a pure question of expediency on the facts of the particular case or of the importance of the occurrence whether the state shall interfere, and if it does interfere, whether it shall confine itself to diplomatic representations, or whether, upon refusal or neglect to give redress, it shall adopt measures of constraint falling short of war, or even resort to war itself. In the former case, on the other hand, governments are in the habit of refusing to take any steps in favour of the sufferers, partly because of the onerousness of the responsibility which a state would assume if it engaged as a general rule to recover money so lost, partly because loans to states are frequently, if not generally, made with very sufficient knowledge of the risks attendant on them, and partly because of the difficulty which a state may really have, whether from its own misconduct or otherwise, in meeting its obligations at the time when it makes default. Fundamentally however there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrong-doer, is immediately responsible. The difference which is made in practice is in no sense obligatory; and it is open to governments to consider each case by itself and to act as seems well to them on its merits [1].

[1] The policy which has been pursued by England was laid down in 1848 by Lord Palmerston in the following terms, in a circular addressed to the British representatives in foreign states:—

'Her Majesty's government have frequently had occasion to instruct her Majesty's representatives in various foreign states to make earnest and friendly, but not authoritative representations, in support of the unsatisfied claims of British subjects who are holders of public bonds and money securities of those states.

'As some misconception appears to exist in some of those states with regard to the just right of her Majesty's government to interfere authoritatively, if it should think fit to do so, in support of those claims, I have to

When the subject of a state is not merely passing through, or temporarily resident in, a foreign country, but has become domiciled there, the right of his state to protect him is somewhat affected. He has deliberately made the foreign country the chief seat of his residence; for many purposes, as will be seen

inform you, as the representative of her Majesty in one of the states against which British subjects have such claims, that it is for the British government entirely a question of discretion, and by no means a question of international right, whether they should or should not make this matter the subject of diplomatic negotiation. If the question is to be considered simply in its bearing on international right, there can be no doubt whatever of the perfect right which the government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country, or any wrong which from such foreign government those subjects may have sustained; and if the government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the government of another country, the right so to require redress cannot be diminished merely because the extent of the wrong is increased, and because instead of there being one individual claiming a comparatively small sum, there are a great number of individuals to whom a very large amount is due.

'It is therefore simply a question of discretion with the British government whether this matter should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.

'It has hitherto been thought by the successive governments of Great Britain undesirable that British subjects should invest their capital in loans to foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.

'For the British government has considered that the losses of imprudent men, who have placed mistaken confidence in the good faith of foreign governments, would prove a salutary warning to others, and would prevent any other foreign loans from being raised in Great Britain, except by governments of known good faith and ascertained solvency. But nevertheless it might happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiation.' (Quoted by Phillimore, ii. § v.) A short time previously Lord Palmerston, in answer to a question in the House of Com-

later[1], he has become identified with it; he must be supposed to obtain some advantages from this intimacy of association, since its existence is dependent on his own act; it would be unreasonable that he should be allowed to reap these advantages on the one hand, and that on the other he should retain the special advantages of a completely foreign character. To what degree the right of a government to protect a subject is thus modified it is at present impossible to say with any precision in the abstract; but the rule is one which can in general be probably applied without much difficulty to individual cases.

mons, indicated that under certain circumstances he might be prepared to go to the length of using force. The doctrine and the principles of policy laid down in Lord Palmerston's circular were more lately reaffirmed by Lord Salisbury. See the *Times* of January 7, 1880.

[1] Pt. iii. chap. vi.

CHAPTER VIII

INTERVENTION

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The equivocal character of intervention.

INTERVENTION takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. *Primâ facie* intervention is a hostile act, because it constitutes an attack upon the independence of the state subjected to it. Nevertheless its position in law is somewhat equivocal. Regarded from the point of view of the state intruded upon it must always remain an act which, if not consented to, is an act of war. But from the point of view of the intervening power it is not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war. In the case moreover of intervention in the internal affairs of a state, it is generally directed only against a party within the state, or against a particular form of state life, and it is frequently carried out in the interest of the government or of persons belonging to the invaded state. It is therefore compatible with friendship towards the state as such, and it may be a pacific measure, which becomes war in the intention of its authors only when resistance is offered, not merely by persons within the state and professing to represent it, but by the state through the persons whom the invading power chooses to look upon as its authorised agents. Hence although intervention often ends in war, and is sometimes really war from the commencement, it may be conveniently considered abstractedly from the pacific or belligerent character which it assumes in different cases.

It may also be worth while to simplify the discussion of the subject by avoiding express reference to intervention as between different states, all questions relating to the conditions under which such intervention may take place being covered by the principles applicable in the more complex case of intervention in the internal affairs of a single state.

General conditions of the legality of intervention.

It has been seen that though as a general rule a state lies under an obligation to respect the independence of others, there are rights which may in certain cases take precedence of the right of independence, and that in such cases it may be disregarded if respect for it is inconsistent with a due satisfaction of the superior right[1]. The permissibility of an infringement of the right of independence being thus dependent upon an incompatibility of respect for it with a right which may claim priority over it, the legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of it. That this may sometimes be done is undisputed; but the right of independence is so fundamental a part of international law, and respect for it is so essential to the existence of legal restraint, that any action tending to place it in a subordinate position must be looked upon with disfavour, and any general grounds of intervention pretending to be sufficient, no less than their application in particular cases, may properly be judged with an adverse bias.

Classification of the grounds upon which intervention has taken place, or which are alleged to be sufficient.

The grounds upon which intervention has taken place, or upon which it is said with more or less of authority that it is permitted, may be referred to the right of self-preservation, to a right of opposing wrong-doing, to the duty of fulfilling engagements, and to friendship for one of two parties in a state.

Self-preservation.

Interventions for the purpose of self-preservation naturally include all those which are grounded upon danger to the institutions, to the good order, or to the external safety of the intervening state.

[1] See antea, pp. 53 et seq.

To some of these no objection can be offered. If a government is too weak to prevent actual attacks upon a neighbour by its subjects, if it foments revolution abroad, or if it threatens hostilities which may be averted by its overthrow, a menaced state may adopt such measures as are necessary to obtain substantial guarantees for its own security. The state which is subjected to intervention has either failed to satisfy its international duties or has intentionally violated them. It has done or permitted a wrong, to obtain redress for which the intervening state may make war if it chooses. If war occurs the latter may exact as one of the conditions of peace at the end that a government shall be installed which is able and willing to observe its international obligations. And if the intervening state may make war, *a fortiori* it may gain the same result in a milder way. When however the danger against which intervention is levelled does not arise from the acts or omissions of the state, but is merely the indirect consequence of the existence of a form of government, or of the prevalence of ideas which are opposed to the views held by the intervening state or its rulers, intervention ceases to be legitimate. To say that a state has a right to ask a neighbour to modify its mode of life, apart from any attempt made by it to propagate the ideas which it represents, is to say that one form of state life has a right to be protected at the cost of the existence of another; in other words, it is to ignore the fundamental principle that the right of every state to live its life in a given way is precisely equal to that of another state to live its life in another way. The claim besides is essentially inequitable in other respects. Morally a state cannot be responsible for the effect of example upon the minds of persons who are not under its control, and whom it does not voluntarily influence. If the intervening state is imperilled, its danger comes from the spontaneous acts of its own subjects or of third parties, and it is against them that it must direct its precautions[1].

[1] De Martens, Précis, § 74; Wheaton, Elem. pt. ii. ch. i. § 3; Phillimore, i. §§ cccIxxxvii–viii and cccxcii; Halleck, i. 83, quoting a speech of Chateau-

Intervention to hinder internal changes in a state from prejudicing rights of succession or of feudal superiority possessed by the intervening state is recognised as legitimate by some writers. Unquestionably, in the abstract, if provision is made by treaty for the union of one state with another upon the occurrence of certain contingencies, the state to which the right of succession belongs is justified in taking whatever measures may be necessary to protect its reversionary interests. A state may of course contract itself out of its common law rights. In agreeing to invest another state with rights over itself, whether contingent on the extinction of its ruling family or on anything else, it must be held to have surrendered its right of dealing with itself in matters affecting the reversion which it has granted; and though the engagements into which it has entered may in time become extremely onerous, and it may be morally justified in endeavouring to escape from them, it has obviously no reason to expect the state with which it has contracted to consent upon such grounds to a rescission of the agreement. But it must be remembered that the arrangements of this nature which have been usually made have either been family compacts between proprietary sovereigns, or have been designed to provide rather for the succession of a family than of a state. In such cases the permissibility of intervention can hardly be conceded. International law no longer recognises a patrimonial state. A country is not identified with its sovereign. He is merely its organ for certain purposes, and it has no right to interfere for an object which is personal to him. The question of the permissibility of

briand upon the French intervention in Spain in 1823, as stating the rule clearly, and i. 465; Bluntschli, § 474 note, and § 478; Mamiani, 100–1; Fiore, i. 421–55. Calvo (§§ 141–2) adheres to the principles stated by Lord Castlereagh in his circular of the 19th January, 1821. British and Foreign State Papers, 1820–1, p. 1160. Vattel, liv. ii. ch. iv. §§ 54 and 57, ignores self-preservation as a ground of intervention, but admits the adequacy of the weaker reason of oppression by a tyrannical sovereign, § 56. Heffter, §§ 30–1 and 44–5, while also sanctioning intervention on more doubtful grounds, limits what may be done under that of self-preservation to negotiation or to the establishment at most of a military cordon.

intervention must in fact depend upon whether, at the time of the arrangement being made upon which intervention is based, it was intended by both states that in the contingency contemplated a union should be effected irrespectively of the form of government or of the persons composing the government of the state owning the succession. If this was not intended, the engagement, whether implied or expressed, is not one entered into by the states but by individuals, who from their position have the opportunity of giving to their personal agreements the form of a state act; and it then only becomes possible to answer in one way the question put by Sir R. Phillimore, who asks whether it can be denied that when 'a state, having occupied for a long period the position of a free and independent nation in the society of other states, thinks fit to secure its constitution, and to pass a fundamental law, similar to that by which Great Britain excluded James II and his descendants from her throne, that no Prince of a certain race shall be henceforth their ruler, the exercise of such a power is inherent in the nature of an independent state[1].'

Interventions in restraint of wrong-doing:

Interventions which have for their object to check illegal intervention by another state are based upon the principle that a state is at liberty to oppose the commission of any act, which in the eye of the law is a wrong; and the frequent interventions which have taken place upon the real or pretended grounds of humanity and religion must be defended, in so far as they can be defended at all, upon the same principle, coupled with the assumption that international law forbids the conduct of rulers to their subjects, and of parties in a state towards each other, which such interventions are intended to repress.

[1] Phillimore, i. § cccc; De Martens, Précis, § 75; Heffter, § 45; Bluntschli, § 479. The latest occasions on which any question of intervention on the above ground seems to have arisen were in 1849, when, according to Phillimore, Austria meditated, but did not carry out, an intervention in Tuscany; and in 1860, when Spain appears to have intervened diplomatically on behalf of the Duchess of Parma, on the occasion of the annexation of Parma to the kingdom of Italy by a popular vote.

1. against illegal acts;

It has already been seen that the existence of a right to oppose acts contrary to law, and to use force for the purpose when infractions are sufficiently serious, is a necessary condition of the existence of an efficient international law. It is incontestable that a grave infraction is committed when the independence of a state is improperly interfered with; and it is consequently evident that another state is at liberty to intervene in order to undo the effects of illegal intervention, and to restore the state subjected to it to freedom of action [1].

2. against immoral acts.

Interventions of the second kind stand in a very different position. International law professes to be concerned only with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution, are acts which have nothing to do directly or indirectly with such relations. On what ground then can international law take cognizance of them? Apparently on one only, if indeed it be competent to take cognizance of them at all. It may be supposed to declare that acts of the kind mentioned are so inconsistent with the character of a moral being as to constitute a public scandal, which the body of states, or one or more states as representative of it, are competent to suppress. The supposition strains the fiction that states which are under international law form a kind of society to an extreme point, and some of the special grounds, upon which intervention effected under its sanction is based, are not easily distinguishable in principle from others which modern opinion has branded as unwarrantable. To some minds the excesses of a revolution would seem more scandalous than the tyranny of a sovereign. In strictness they ought, degree for degree, to be precisely equivalent in the eye of the law. While however it is settled

[1] Heffter, § 96; Mamiani, 104; Bluntschli, § 479. Fiore (i. 445) considers international law to be 'sotto la protezione di tutti gli stati associati. Il dovere della tutela giuridica importa da parte dei medesimi l'obbligo d'intervenire per ripristinare l'autorità del diritto se fosse lesa per parte di uno o di più stati.'

that as a general rule a state must be allowed to work out its internal changes in its own fashion, so long as its struggles do not actually degenerate into internecine war, and intervention to put down a popular movement or the uprising of a subject race is wholly forbidden, intervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour. Again, religious oppression, short of a cruelty which would rank as tyranny, has ceased to be recognised as an independent ground of intervention, but it is still used as between Europe and the East as an accessory motive, which seems to be thought by many persons sufficiently praiseworthy to excuse the commission of acts in other respects grossly immoral. Not only in fact is the propriety or impropriety of an intervention directed against an alleged scandal judged by the popular mind upon considerations of sentiment to the exclusion of law, but sentiment has been allowed to influence the more deliberately formed opinions of jurists. That the latter should have taken place cannot be too much regretted. In giving their sanction to interventions of the kind in question jurists have imparted an aspect of legality to a species of intervention, which makes a deep inroad into one of the cardinal doctrines of international law; of which the principle is not even intended to be equally applied to the cases covered by it; and which by the readiness with which it lends itself to the uses of selfish ambition becomes as dangerous in practice as it is plausible in appearance.

It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or unless the whole body of civilised states have concurred in authorising it. Interventions, whether armed or diplomatic, undertaken either for the reason or upon the pretexts of cruelty, or oppression, or the horrors of a civil war, or whatever the reason put forward, supported in reality by the justification which such facts offer to the popular

mind, would have had to justify themselves, when not authorised by the whole body of civilised states accustomed to act together for common purposes, as measures which, being confessedly illegal in themselves, could only be excused in rare and extreme cases in consideration of the unquestionably extraordinary character of the facts causing them, and of the evident purity of the motives and conduct of the intervening state. The record of the last hundred years might not have been much cleaner than it is; but evil-doing would have been at least sometimes compelled to show itself in its true colours; it would have found more difficulty in clothing itself in a generous disguise; and international law would in any case have been saved from complicity with it [1].

[1] The opinions of the modern international jurists who touch upon humanitarian intervention are very various, and for the most part the treatment which the subject receives from them is merely fragmentary, notice being taken of some only of its grounds, which are usually approved or disapproved of without very clear reference to a general principle. Vattel (liv. i. ch. iv. § 56) considers it permissible to succour a people oppressed by its sovereign, but does not appear to sanction any of the analogous grounds of intervention. Wheaton (Elem. pt. ii. ch. i. § 9), Bluntschli (§ 478), Mamiani (p. 86), give the right of aiding an oppressed race. Heffter (§ 46), while denying the right of intervention to repress tyranny, holds that so soon as civil war has broken out a foreign state may assist either party engaged in it. Calvo (§ 166) and Fiore (i. 446) think that states can intervene to put an end to crimes and slaughter. Mamiani (112), on the other hand, refuses to recognise intervention on this ground. 'Per vero,' he says, 'a qual diritto positivo degli altri popoli è recata ingiuria? Udiste mai alcuno che affermi essere nell' uomo il diritto di non avere dinanzi agli occhi se non buoni modelli di virtù, e vivere tra cittadini nelle cui abitazioni non si commettano eccessi d'alcuna sorta e i quali tutti professino opinioni vere e ammodate?' The reason is doubtfully admitted by Phillimore (i. § cccxciv) and Halleck (i. 465) as accessory to stronger ones, such as self-defence or the duties of a guarantee. Phillimore (i. §§ cccciii–iv) is the only writer who seems to sanction intervention on the ground of religion.

A circular issued by the Russian government, when England and France suspended diplomatic relations with Naples in consequence of the inhumanity with which the kingdom was ruled, is not without value in itself, and is of especial interest as issuing from the source from which it came. 'We could understand,' it says, 'that as a consequence of friendly forethought one government should give advice to another in a benevolent spirit, that such advice might even assume the character of exhortation; but we believe that to be the furthest limit allowable. Less than ever can it now be allowed in

PART II CHAP. VIII Intervention under a treaty of guarantee.

It may perhaps at one time have been an open question whether a right or a duty of intervention could be set up by a treaty of guarantee binding a state to maintain a particular dynasty or a particular form of government in the state to which the guarantee applied. But the doctrine that intervention on this ground is either due or permissible involves the assumption that independent states have not the right to change their government at will, and is in reality a relic of the exploded notion of ownership on the part of the sovereign. According to the views which are now held as to the relation of monarchical or other governments to the states which they represent, no case could arise under which a treaty of the sort could be both needed and legitimate. As against interference by a foreign power the general right of checking illegal intervention is enough to support counter interference; and as against a domestic movement it is evident that a contract of guarantee is made in favour of a party within the state and not of the state as a whole, that it therefore amounts to a promise of illegal interference, and that being thus illegal itself, it cannot give a stamp of legality to an act which without it would be unlawful[1].

Europe to forget that sovereigns are equal among themselves, and that it is not the extent of territory, but the sacred character of the rights of each which regulates the relations that exist between them. To endeavour to obtain from the King of Naples concessions as concerns the internal government of his state by threats, or by a menacing demonstration, is a violent usurpation of his authority, an attempt to govern in his stead; it is an open declaration of the right of the strong over the weak.' Martin, Life of the Prince Consort, iii. 510.

[1] Some treaties, e. g. the Treaties in 1713, by which Holland, France, and Spain guaranteed the Protestant succession in England (Dumont, viii. i. 322, 339, 393), and the Final Act of the Germanic Confederation, arts. 25 and 26 (De Martens, Nouv. Rec. v. 489), contain guarantees which clearly extend to cases arising out of purely internal troubles; most treaties of guarantee however are directed against the possible action of foreign powers. Twiss (i. § 231) and Halleck (i. 85) deny the right of intervention under a treaty of guarantee. Taking what Vattel (liv. ii. ch. xii. §§ 196–7) says as a whole he may probably be understood to express the same doctrine. Phillimore (ii. § lvi) appears to be somewhat doubtful. De Martens (Précis, § 78), Klüber (§ 51), and Heffter (§ 45) allow intervention under a treaty of guarantee.

It is generally said, and the statement is of course open to no question, that intervention may take place at the invitation of both parties to a civil war. But it is also sometimes said, even by modern writers, that interventions carried out at the invitation of one only of the two parties are not always illegal. They are permitted, for example, both by M. Bluntschli and M. Heffter[1]. The former of these writers concedes a right of intervention on behalf of an established government, for so long as it may be considered the organ and representative of the state; and the latter grants it in favour of whichever side appears to be in the right. It is hard to see by what reasoning these views can be supported. As interventions, in so far as they purport to be made in compliance with an invitation, are independent of the reasons or pretexts which have been already discussed, it must be assumed that they are based either on simple friendship or upon a sentiment of justice. If intervention on the ground of mere friendship were allowed, it would be idle to speak seriously of the rights of independence. Supposing the intervention to be directed against the existing government, independence is violated by an attempt to prevent the regular organ of the state from managing the state affairs in its own way. Supposing it on the other hand to be directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state. If, again, intervention is based upon an opinion as to the merits of the question at issue, the intervening state takes upon itself to pass

[1] Bluntschli, §§ 476-7; Heffter, § 46. See also Vattel, liv. ii. ch. iv. § 56. Phillimore (i. § cccxcv) considers that intervention upon the application of one party to a civil war 'can hardly be asserted to be at variance with any abstract principle of international law, while it must be admitted to have received continual sanction from the practice of nations.' Halleck (i. 87) on the other hand holds what might seem the obvious truth that an invitation 'from only one of the contestants can by itself confer no rights whatever as against the other party.' Mamiani (p. 85) places the matter on its right footing.

judgment in a matter which, having nothing to do with the relations of states, must be regarded as being for legal purposes beyond the range of its vision.

Intervention under the authority of the body of states.

A somewhat wider range of intervention than that which is possessed by individual states may perhaps be conceded to the body of states, or to some of them acting for the whole in good faith with sufficient warrant. In the general interests of Europe, for example, an end might be put to a civil war by the compulsory separation of the parties to it, or a particular family or a particular form of government might be established and maintained in a country, if the interests to be guarded were strictly international, and if the maintenance of the state of things set up were a reasonable way of attaining the required object.

If a practice of this kind be permissible, its justification must rest solely upon the benefits which it secures. The body of states cannot be held to have a right of control, outside law, in virtue of the rudimentary social bond which connects them. More perfectly organised societies are contented with enforcing the laws that they have made; in doing this they consider themselves to have exhausted the powers which it is wise to assume; they do not go on to impose special arrangements or modes of life upon particular individuals; beyond the limits of law, direct compulsion does not take place; and evidently the community of states cannot in this respect have larger rights than a fully organised political society.

Is then such intervention justified by its probable or actual results? Certainly there must always be a likelihood that powers with divergent individual interests, acting in common, will prefer the general good to the selfish objects of a particular state. It is not improbable that this good may be better secured by their action than by free scope being given to natural forces. In one or two instances, as, for example, in that of the formation of Belgium, and in the recent one of the arrangements made by the Congress of Berlin, and of the minor interventions springing

out of it, settlements have been arrived at, or collisions have been postponed, when without common action an era of disturbance might have been indefinitely prolonged, and its effects indefinitely extended. There is fair reason consequently for hoping that intervention by, or under the sanction of, the body of states on grounds forbidden to single states, may be useful and even beneficent. Still, from the point of view of law, it is always to be remembered that states so intervening are going beyond their legal powers. Their excuse or their justification can only be a moral one[1]. [The latest instance of such an intervention is not calculated to illustrate the disinterestedness of the intervening powers. The original terms of the Treaty of Shimonoseki, concluded in April 1895 between China and Japan, provided for the cession to the latter of the Liao-tong Peninsula including Port Arthur. Thereupon Russia, Germany and France interposed with what was euphemistically termed 'a friendly representation,' and informed Japan, practically under the threat of war, that she would not be allowed to retain any increase of territory on the mainland. Great Britain was invited to join in the remonstrance, but declined to do so; Lord Rosebery however advised Japan to yield to the overwhelming forces arrayed against her, a course which was reluctantly adopted. The reason assigned for the intervention was the danger to the independence of Korea and the humiliation inflicted upon the Court of Pekin if Japan were thus to acquire

[1] M. Rolin Jaequemyns, in treating of the action of the European powers with reference to the Greco-Turkish conflict of 1885-6 (Rev. de Droit Int. xviii. 603), expresses the opinion that the Eastern Question constitutes a case apart, and that within the area of the Turkish Empire and the small states adjoining there exists 'une autorité collective, historiquement et juridiquement établie; c'est celle des grandes puissances.' I cannot see that the case differs from any other in which common action is taken or settlements are effected by the great European powers, except in the circumstance that danger being great and constantly recurrent, preventive interference may need also to be recurrent. Such interference must still be justified on each occasion by the necessities of the moment [and no such ground as that laid down by M. Jaequemyns was adopted by the Powers on the occasion of their intervention on behalf of Greece after the war of 1897].

a footing upon the Gulf of Pe-chi-li. Into the motives of France and Germany it is unnecessary to enter; but the facts that in 1898 Russia obtained from China a 'lease' of Port Arthur under which it has been converted into one of the strongest naval ports in the world, and that she remains in virtual occupation of the Liao-tong Peninsula, cast a significant light upon her action.]

CHAPTER IX

THE AGENTS OF A STATE IN ITS INTERNATIONAL RELATIONS

Agents of a state.

The agents of a state in its international relations are—

i. The person or persons to whom the management of foreign affairs is committed.

ii. Agents subordinate to these, who are—

1. Public diplomatic agents,
2. Officers in command of the armed forces of the state,
3. Persons charged with diplomatic functions but without publicly acknowledged character,
4. Commissioners employed for special objects, such as the settlement of frontiers, supervision of the execution of a treaty, &c.

With international agents of the state properly so called may be classed consuls, who are only international state agents in a qualified sense.

Person to whom the management of foreign affairs is committed by the constitution of the state.

The person or persons who constitute the first-mentioned kind of state agent are determined by the public law of the state the agents of which they are. A state may confide the whole management of its international affairs to a single person, or to a group of persons made up in one of many different ways; but, as was before mentioned, foreign states are indifferent to the particular form of the government under which a community may choose to place itself, and can only require that there shall be an ascertained agent or organ of some kind. However the organ may be constituted, it is completely representative of the state; its acts are the acts of the state, and are definitively binding on the latter so long as the authority delegated by it has not been recalled. For international purposes the continuance or the

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recall of authority is judged of solely upon the external facts of the case; so long as a person or body of persons are indisputably in possession of the required power, foreign states treat with them as the organ of the state; so soon as they cease to be the actual organ, foreign states cease dealing with them; and it is usual, if the change is unquestionably final, to open relations with their successors independently of whether it has been effected constitutionally. When the finality of the change is doubtful, it is open to a government in the exercise of its discretion, under the same limitations with which it is open in the case of newly-formed states, either to treat the person or body in whom the representation of the country is lodged as being established, or to enter only into such relations of an imperfect kind as may be momentarily necessary[1].

Observances due to a sovereign in a foreign state;

When a state has an individual head, whether he be a sovereign or the chief of a republican government, he is considered so to embody the sovereignty of his state that the respect due to the state by foreign powers in virtue of its sovereignty is reflected upon him, and takes the form of personal observances, some of which are purely honorary, while others rest upon the double foundation of respect and of their necessity to enable the head of the state when abroad to be free to exercise the functions with which he is usually invested. The nature and extent of the latter observances have already been discussed[2]; the former, in so far as their specific forms are concerned, are mere matters of etiquette—it is sufficient to remark with reference to them that their object being to express the respect due to an independent state, an intentional neglect to comply with them must be regarded as an insult to the state, and consequently as being an act which it has a right to resent.

to an elective head of a state.

Although no difference exists between the observances due to hereditary and elective heads of a state in their capacity of heads, a certain difference appears in the conditions under which they

[1] Comp. antea, pt. ii. ch. i.

[2] Antea, p. 169.

are respectively regarded as appearing in that capacity. An hereditary sovereign is always looked upon as personifying his state for ceremonial purposes, except when he suppresses his identity by travelling in foreign countries incognito, or when he puts himself in a position inconsistent with the assertion of sovereignty by taking service under another sovereign; the chief of a republic, on the other hand, only embodies the majesty of his state when he ostensibly acts as its representative.

Diplomatic agents.

The political relations of states are as a rule carried on by diplomatic agents, acting under the superior organs of their states, and either accredited for the conduct of particular negotiations or resident in a foreign state and employed in the general management of affairs.

As those states which live under international law are practically unable to withdraw themselves wholly from intercourse with other states, and as diplomatic agents are the means by which necessary intercourse is kept up, it is not in a general way permissible for a state to refuse to receive a diplomatic agent from another power, when the latter conceives that it is proper to send him, and a state has of course conversely the right to send one when it chooses; in practice, all states, with the exception perhaps of a few very minute ones, have for a long time past accredited permanent representatives to all foreign civilised states of any importance. Every state can however refuse to receive diplomatic agents for special reasons; as, for example, that their reception may be taken to imply acquiescence in claims inconsistent with rights belonging to the state to which they are sent, or that their personal position is in some way incompatible with the proper performance of their diplomatic functions. Thus England did not receive a legate or nuncio from the Pope when he was a temporal sovereign; other states have on several occasions refused to receive legates when invested with powers incompatible with the state constitution; and the Pope refused in 1875 to accept Prince Hohenlohe as ambassador from Germany because, being a cardinal, he was *ex officio* a member

Grounds on which a state may refuse to receive them.

of the curia. Countries again have refused to accept ministers whose political opinions have been known to be at variance with the established régime, and states frequently make it a rule not to allow their own subjects to be diplomatically accredited to them[1]. Finally, a state may always decline to receive an agent who is personally disagreeable to the sovereign, or who is individually objectionable on other grounds. If, however, the grounds are trivial, or are not such as to commend themselves to the state accrediting a representative, it is not bound to acquiesce in the rejection; and cases occasionally occur when a diplomatic post remains vacant in consequence, or is only nominally filled, for a considerable time. Thus in 1832, the Emperor Nicholas having refused to receive Sir Stratford Canning, his appointment was not cancelled, and he remained ambassador for three years, though he did not proceed to St. Petersburg; and when in 1885 the American minister then appointed to Vienna resigned, on being objected to by the Austrian government, the legation was left in the hands of a chargé d'affaires[2]. To avoid the in-

[1] It is sometimes discussed, as if the question were open, whether an envoy, accredited to a government of which he is a subject, or a like person attached to a legation remains liable to the laws of his own country. It is of course open to a state to refuse to receive a particular person except upon conditions varying from the ordinary diplomatic usage; but equally of course, unless the condition of subjection to the local laws be stated before recognition of diplomatic character is given, it must be understood that the person is accepted without reserve, and consequently with the advantage of all diplomatic immunities.

In England, it may be noted, the indubitable rule has been affirmed by judicial decision: Macartney *v.* Garbutt, L. R. xxiv Q. B. D. 368.

[2] This case is a curious one of a double rejection, once upon good, and once upon bad, grounds. The American minister above mentioned was in the first instance appointed to Italy. Objection was taken to him there because he had openly inveighed against the destruction of the temporal power of the Pope. In the actual circumstances of Italy the objection was evidently valid. He was then appointed to Austria; where the government was indisposed to receive a person who had given umbrage to an allied power. There were reasons for which it was inadvisable to put forward the true motive of refusal, and objection was taken because it was believed, apparently under a misapprehension, that he was married, by civil contract only, to a Jewess. It was alleged that he would be in an untenable social position in Vienna. The American government upheld the appointment on the ground

conveniences and the possible dangers, which may spring from inadequate representation, it is the practice of most states to inquire confidentially before making an appointment whether the intended agent will be acceptable to the government to which it is proposed to accredit him. The mere expression of a wish may reasonably be enough to prevent an appointment from being made; good cause alone justifies a demand that it shall be cancelled.

Classification.

By regulations adopted at the Congress of Vienna and Aix-la-Chapelle, and conformed to by all states, diplomatic agents are divided into the following classes, arranged in the order of their precedence.

1. Ambassadors. Legates; who are papal ambassadors extraordinary, charged with special missions, primarily

that by the constitution of the United States it was debarred from inquiring into the religious belief of any official. The pretended reason for non-acquiescence may not have been good; but the American government could perhaps hardly in courtesy urge, as was the fact, that though the objection taken was one which should have been listened to, if it had been made before overt appointment, it was much too trivial to be made a ground of subsequent rejection. The domestic circumstances of the minister might be a source of inconvenience to himself, but, in the particular case of Austria and the United States, they could not seriously interfere with his diplomatic usefulness. Wharton, Digest, i. 601; Geffcken in Holtzendorff's Handbuch, iii. 632. [The most recent example of a person whom a foreign government has refused to receive is also afforded by the United States. In 1891 the Chinese government objected to the appointment of Mr. Blair as minister of the United States to China on the ground that he had 'abused the Chinese labourers too bitterly while in the Senate and was conspicuous in helping to pass the oppressive Exclusion Act.' Mr. Blair maintained that both his language in the Senate and his attitude to the Chinese Exclusion Bill had been misrepresented, but he placed his resignation in the hands of the President. Mr. Wharton, Acting Secretary for Foreign Affairs at Washington, admitted the sovereign rights of any government to determine the acceptability or non-acceptability of a Foreign Envoy while insisting that the President in selecting Mr. Blair's successor could not take into account his previous attitude on the Chinese question. And he declined to admit the sufficiency of the objections urged against Mr. Blair on the ground that they applied to any person who had cast a vote for any measure obnoxious to the Chinese government. The President however preferred to treat the incident as closed by the 'peremptory resignation' of Mr. Blair, and there was no interruption of the diplomatic representation at Pekin. Martens, Nouv. Rec. Gén. 2e Sér. xxii. p. 288.]

representing the Pope as head of the Church, always cardinals, and sent only to states acknowledging the spiritual supremacy of the Pope. Nuncios; who are ordinary ambassadors resident, and are never cardinals.

2. Envoys and ministers plenipotentiary.
3. Ministers resident, accredited to the sovereign.
4. Chargés d'affaires, accredited to the minister of foreign affairs.

The classification is of little but ceremonial value; the right which ambassadors are alleged to possess, of treating with the sovereign personally, having lost its practical importance under modern methods of government.

Credentials.

A diplomatic agent enters upon the exercise of his functions from the moment, and from the moment only, at which the evidence that he has been invested with them is presented by him to the government to which he is sent, or to the agents of other governments whom he is intended to meet, and has been received by it or them. When he is sent to a specific state the evidence with which he is required to be furnished consists in a letter of credence of which the object is to communicate the name of the bearer, to specify his rank as ambassador, minister plenipotentiary, minister resident, or chargé d'affaires, and finally to bespeak credit for what he will communicate in the name of his government. When specific negotiations are to be conducted, he must be furnished with powers to negotiate, which may either be contained in the letter of credence, or, as is more usual, may be conferred by letters patent; their object is to define the limits within which the bearer has the right of negotiating and within which, subject to the qualifications which will be made in discussing treaties, his acts are binding on his government. The full powers indispensable for signing treaties are invariably conferred by letters patent. When a diplomatic agent is charged with a double mission, the one part general and permanent, the other special and temporary, as for example when a minister resident is charged with the conclusion of a commercial treaty,

he is furnished with special letters patent empowering him for the latter purpose, in addition to the general letters patent, or to the powers contained in his letter of credence, given at his entrance on his mission. Ambassadors or ministers not accredited to a specific state, but sent to a congress or conference, are not generally provided with letters of credence, their full powers, copies of which are exchanged, being regarded as sufficient.

Rights of a diplomatic agent.

The entrance of a diplomatic agent upon the exercise of his functions places him in full possession of a right of inviolability, of certain immunities from local jurisdiction, and of rights to ceremonial courtesy, which are conceded to him partly because the intercourse of states could not conveniently be carried on without them, and partly as a matter of respect to the person representing the sovereignty of his state. The right of inviolability primarily secures an envoy from all violence directed against him for political reasons, from being retained as a hostage, or kept as a prisoner of war; but it may also be regarded as the source of that personal immunity from the local jurisdiction which has been already discussed [1], and it so imparts a character of peculiar gravity to offences committed against his person that they are looked upon by the state to which he is accredited as equivalent to crimes committed against itself. The nature and extent of the immunities enjoyed by diplomatic agents have been fully examined; and upon the ceremonial branch of his rights it is unnecessary to enlarge, because although the principle that due ceremonial respect must be given is included in international law, the particular observances, like those to which sovereigns are entitled, fall within the province of etiquette [2].

[1] Antea, p. 172.

[2] Those who take an interest in these 'graves riens,' which however have given rise to infinite disputes, may find them sufficiently or superfluously descanted upon in Moser (Versuch, vols. iii. and iv.), De Martens (Précis, §§ 206–13), Klüber (§§ 217–27), Heffter (§§ 220–1). The Germans have treated the subject with exemplary seriousness, and the learning applicable to it has

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Although diplomatic agents do not enter upon the exercise of their functions, nor consequently into the full enjoyment of their rights, until their reception has taken place, they are inviolable as against the state to which they are accredited while on their voyage to it; and after entering it before their formal reception, or, on being dismissed, until their departure from it, they have a right to all their immunities, their diplomatic character being sufficiently shown by their passports[1].

Termination of a mission.

The mission of a diplomatic agent is terminated by his recall, by his dismissal by the government to which he is accredited, by his departure on his own account upon a cause of complaint stated, by war or by the interruption of amicable relations between the country to which he is accredited and his own, by the expiration of his letter of credence, if it be given for a specific time, by the fulfilment of a specific object for which he may have been accredited, and in the case of monarchical countries by the death of the sovereign who has accredited him. There is some difference of opinion as to whether the death of a sovereign to whom an ambassador or minister is accredited in strictness necessitates a fresh letter of credence, but it is at least the common habit to furnish him with a new one; though the practice is otherwise when the form of government is republican. A like difference of opinion exists as to the consequences of a change of government through revolution, it being laid down on one hand that the relations between the state represented by a minister or other diplomatic agent and the new government may be regarded as informal or official at the choice of the parties, and on the other that a new letter of credence is not only necessary, but that the necessity is one of the distinctive marks separating the position of a diplomatist from that of

been so patiently exhausted in monographs upon special points that a treatise by Moser is devoted to an ambassador's 'Recht mit sechs Pferden zu fahren.'

On the right of inviolability see Phillimore, ii. ch. iv–vi; De Martens, § 215; Bluntschli, §§ 191–3; Heffter, § 212; Calvo, §§ 552–4.

[1] Heffter, § 210; Calvo, § 420.

a consul. Practice appears to be more in favour of the latter view. Letters of credence being personal, it is scarcely necessary to say that a diplomatic mission comes to an end by the death of the person accredited [1].

It is unnecessary to discuss the reasons for which recall may take place on the proper motion of the accrediting power. If they are personal to the diplomatic agent, they lie between him and his government; if they concern the relations between his country and that to which he is accredited they have to do with matters of offence and quarrel lying outside law. So also when an ambassador or minister is dismissed because of disagreements between the two states, it lies wholly with the state dismissing him to choose whether it will do an act which must bring about an interruption of friendly relations. It is always open to one state to quarrel with another if it likes. But there are occasions on which a diplomatic agent is dismissed, or his recall is demanded, for reasons professing to be personal to himself. In such cases, courtesy to a friendly state exacts that the representative of its sovereignty shall not be lightly or capriciously sent away; if no cause is assigned, or the cause given is inadequate, deficient regard is shown to the personal dignity of his state; if the cause is grossly inadequate or false, there may be ground for believing that a covert insult to it is intended. A country, therefore, need not recall its agent, or acquiesce in his dismissal, unless it is satisfied that the reasons alleged are of sufficient gravity in themselves [2]. In justice to him his

Dismissal; and recall on demand of the state to which a diplomatic agent is accredited.

[1] De Martens, Précis, §§ 238–42; Wheaton, Elem. pt. iii. ch. i. §§ 23–4; Heffter, § 223; Phillimore, ii. § ccxl; Bluntschli, §§ 227–43; Calvo, §§ 473–41.

[2] M. Calvo says (§ 439) that a state is bound to recall a minister who has become unacceptable to the government to which he is accredited, on the bare information that he is so, and that it has no right to ask for any reason to be assigned. It would be natural to treat M. Calvo's opinion with respect as that of a professional diplomatist; but what he says is merely a textual translation from Halleck (i. 307), who in turn can only rely upon an opinion of Mr. Cushing, Attorney-General of the United States, which does not support his contention. The language of Merlin, to whom Halleck also refers, is wide of the point. He merely says that 'le souverain étranger ne peut s'offenser si l'on prie son ministre de se retirer quand il a terminé les

government also may, and usually does, examine whether his conduct in fact affords reasonable foundation for the charges brought against him; in the larger number of instances which have occurred, states have been very slow and cautious in consenting to recall, and no modern case seems to exist in which dismissal has been held to be justified. Various grounds may be imagined which would warrant a state in dismissing or in requiring the recall of a foreign diplomatic agent; but those which have been alleged, and those which for practical purposes are likely to be alleged, resolve themselves into offensive conduct towards the government to which the agent is accredited, and interference in the internal affairs of the state. In 1804 the minister of Spain to the United States was accused of attempting to bribe a newspaper with reference to a matter at issue between the two countries, and of other improper conduct; his recall was demanded; after considerable deliberation the Spanish government acceded to the request, but gave the minister permission to retire at such season of the year as might be convenient to him; he was still at Washington in October of 1807. In 1809 the government of the United States demanded the recall of Mr. Jackson, British minister at Washington, relations with him being suspended until an answer should be returned: Mr. Jackson was stated to have given offensive toasts at public dinners, and to have in effect charged the American administration with 'falsehood and duplicity.' The British government was not satisfied with the evidence of ill conduct produced; but, in order to show its friendliness to the United States, it consented to the recall, placing, however, on record that 'His Majesty has not marked with any expression of displeasure the conduct of Mr. Jackson, who does not appear to have committed any intentional offence against the United States.' Again in 1871 the United States, which has had the misfortune to supply almost all the modern instances in which a government has felt

affaires qui l'avaient amené;' his view being that a state need not receive resident ministers.

itself unable to continue relations with a minister accredited to it, intimated to the Russian government its desire that the head of the Russian legation should be changed. Recall was avoided on the alleged ground of the impossibility of replacing M. Catacazy at the moment; and a compromise seems to have been arrived at; the minister was 'tolerated' for some months on the tacit understanding that he was to be afterwards withdrawn[1]. Two modern cases only of dismissal have occurred. In the spring of 1848 Spain, which was then under the reactionary government of Narvaez, was greatly agitated by revolutionary infection from France. That Queen Isabella occupied the throne was principally due to England; English assistance had been given on the condition of constitutional government; and England was bound to a certain extent by treaty to support the existing régime. In these circumstances Lord Palmerston, the Secretary for Foreign Affairs, thought it opportune to warn the Spanish government through Mr. Bulwer, British minister at Madrid, of what he conceived to be the danger of the course which the government was taking. The warning was violently resented, and the Spanish administration seem to have determined to rid themselves of Mr. Bulwer, whose views they knew to be in full accordance with those of his own government. Shortly afterwards his passports were sent him with an intimation that he must quit Madrid within forty-eight hours. The reason assigned for his dismissal was that he had mixed himself up with the party opposed to the existing order of things, and that he was guilty of complicity in actual revolt. As the Spanish government was unable to offer, and in fact did not seriously attempt to offer, any justification of their charges, Lord Palmerston responded by dismissing the Spanish minister in London[2]. A still more

[1] Papers presented to Parliament in 1813; Wharton, Digest, §§ 84, 106, 107, and Appendix § 106.

[2] State Papers, 1848. M. Calvo (§ 581) states as a fact that Mr. Bulwer was implicated in the insurrectionary movement. To any one acquainted with the traditions of the English public service the charge would in any case

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recent, and very curious, case is that of Lord Sackville's dismissal from Washington [1].

Diplomatic agents in friendly states to which they are not accredited.

The character of a diplomatic agent is not, like that of a sovereign, inseparable from his personality; unlike military and naval commanders, he has usually no functions except in the state to which he is accredited; there is no practical reason for his immunities, and he does not represent his country, except when he is actually engaged in his diplomatic business; he does not therefore as a general rule possess special rights or privileges in states to which he is not accredited as against the government or laws of that state; and there are cases in which a minister has been arrested for personal debts and other civil liabilities, and even in which he has been criminally punished while staying in or passing through the territory of a friendly power. Probably the only respect in which his position differs from that

appear to be scarcely credible; the State Papers above referred to contain ample evidence of its entire groundlessness.

[1] Shortly before the American presidential election of 1888, a person, professing to be an ex-British subject who still 'considered England his mother land,' wrote to Lord Sackville, asking him to advise 'privately and confidentially' how the writer of the letter should vote, and to inform him whether Mr. Cleveland, if re-elected, would adopt a policy of friendliness to England. Lord Sackville answered vaguely and generally that the party in power were fully aware that 'any party openly favouring the mother country would lose popularity;' that he 'believed' the party in question 'to be still desirous of maintaining friendly relations with Great Britain;' but that it was 'plainly impossible to predict the course which Mr. Cleveland may pursue in the matter.' Usually it would be a piece of natural and almost necessary courtesy to assume that a government was disposed to continue friendly relations with a state with which it was on terms of amity; to do so in the United States would no doubt have been indiscreet if the expression of opinion had been public; it may be conceded that it was indiscreet for a diplomatist to express any opinion at all, however privately, during an election; but the act was not treated as an indiscretion; it was treated as an open and intentional offence. The British government was requested to recall Lord Sackville, and as it did not do so by telegraph, without waiting to receive explanations from its minister, his passports were sent to him and he was dismissed within three days. The government of the United States endeavoured to support its action by alleging that Lord Sackville had spoken insultingly of the President and Senate to a newspaper reporter. The allegation was totally destitute of foundation. Parl. Papers, United States, No. 4 (1888) and No. 1 (1889); [De Martens, Nouv. Rec. Gén. 2e Sér. xvi. 649.]

of an ordinary foreign subject is that, while theoretically the latter has no right of access and passage overruling the will of the state, a diplomatic agent must be allowed innocent passage to the state to which he is accredited. Even this meagre privilege is qualified by a right, on the part of the state through which he travels, to prescribe a route and to require that his stay shall not be unnecessarily prolonged. In at least one case indeed a government has gone somewhat further, and has stopped a diplomatic agent on the threshold of its territory, until it could receive his assurance that no longer sojourn would be made than was absolutely necessary. In 1854 Mr. Soulé, a Frenchman by birth, but naturalised in the United States, and accredited to Spain as minister of the latter power, was stopped at Calais by order of the French government, while on his journey to Madrid. In the correspondence which followed, M. Drouyn de Lhuys declared that 'the government of the Emperor has not wished to prevent an envoy of the United States from crossing French territory to go to his post, in order to acquit himself of the commission with which he was charged by his government. But between this simple passage and the sojourn of a foreigner, whose antecedents have awakened, I regret to say, the attention of the authorities invested with the duty of securing the public order of the country, there exists a difference. If Mr. Soulé was going immediately and directly to Madrid, the route of France was open to him; if he intended to come to Paris with a view of staying there, that privilege was not accorded to him. It was therefore necessary to consult him as to his intentions, and he did not afford time for doing this.' Possibly the right of a diplomatic agent to innocent passage may carry with it that the sovereign of the country through which he passes ought, as a matter of courtesy, to make provision for securing him from the operation of its local laws in petty matters, so that he may not be detained on his journey except by grave causes. More than this it would be difficult at present to claim; and it

hardly seems that there is any need to go further in the direction of protecting him from civil or criminal process instituted by private persons [1].

Diplomatic agents at a congress or conference.

The case of negotiators at a congress or conference is exceptional. Though they are not accredited to the government of the state in which it is held, they are entitled to complete diplomatic privileges, they being as a matter of fact representative of their state and engaged in the exercise of diplomatic functions [2].

Diplomatic agents found within enemy jurisdiction.

As a diplomatic agent in the employment of a hostile country is not only himself an enemy, but is likely from the nature of his functions to be peculiarly noxious, it is unquestionable that ministers or other agents accredited by their country to a state friendly to it may be seized and retained as prisoners of war by

[1] De Martens, Précis, §§ 246–7; De Garden, Traité de Diplomatie, ii. 212; Calvo, 596–8; Heffter, § 207. The despatch of M. Drouyn de Lhuys is quoted by Lawrence, note to Wheaton (Elem. pt. iii. ch. i. § 20). Wheaton (loc. cit.) says that the opinion of jurists seems to be somewhat divided on the question of the respect and protection to which a public minister is entitled, in passing through the territories of a state other than that to which he is accredited. He starts with the assertion that an ambassador has a sacred character, and that a government in allowing him to enter its territories makes an implied promise to respect it. He acknowledges that Grotius (De Jure Belli et Pacis, lib. ii. c. 18. § 5), Bynkershoek (De Foro Legatorum, c. ix. § 7), and Wicquefort (1626–82), De l'Ambassadeur, liv. i. § 29 are of a different opinion; Vattel (liv. iv. ch. vii. § 84), whom he quotes in support of his view, merely says that acts of violence must not be done or permitted against an ambassador which would be inconsistent with the protection due to an ordinary stranger, and expressly states that a diplomatic agent has no right to expect the full enjoyment of diplomatic privileges from the hands of a government to which he is not accredited. The only authority, in fact, whom Wheaton can adduce as taking the same view as himself is Merlin (Répertoire, tit. Ministre Public). That an ambassador has a generally sacred character by modern custom, and that he enters a state to which he is not accredited under an implied promise that he will be allowed to enjoy diplomatic privileges, are of course the very points which require to be proved by practice or by a consensus of opinion. Phillimore (§ clxxiv) thinks that an ambassador on his passage through a country, where he is not accredited, would probably be accorded exterritoriality by the courts of all nations, although he could not claim the privilege as a matter of 'tacit compact.' He does not explain upon what ground the courts could take upon themselves to accord exterritoriality in the absence of 'tacit compact,' or in other words of an international usage overriding municipal law.

[2] Phillimore, loc. cit.

an enemy, if they come without permission within the jurisdiction of the latter, whether the state to which they are accredited be hostile or friendly to that which effects the capture. The arrest of the Maréchal de Belleisle in 1744 constitutes a leading case on the subject. He was charged with an embassy from the court of France to that of Prussia, and on his way to Berlin he unwittingly touched the soil of Hanover, which country in conjunction with England was then at war with France. He was seized and sent to England as a prisoner of war. His arrest was not complained of as illegitimate either by himself or his government, and it has since been commonly cited as an example of legitimate practice [1].

Diplomatic agents found by the enemy of the state to which they are accredited in the territory of the latter.

On the other hand, if a diplomatic agent accredited to a country which is at war with another is found by the forces of the latter upon the territory of its enemy, he is conceded all the rights of inviolability which can come into existence as against a state having only military jurisdiction [2]. Whether his privileges extend further, and if so how much further, must probably be regarded as unsettled. The point has not been considered by jurists, and until lately, whether by accident or through the courtesy of belligerents, it has not presented itself in the form of a practical question. During the siege of Paris however it was partially raised by the conduct of the German authorities with reference to the correspondence of diplomatic representatives shut up in the besieged city. On the minister of the United States being refused leave to send a messenger with

Question as to their correspondence when within a besieged town.

[1] Vattel, liv. iv. ch. vii. § 85; De Martens, Précis, § 247; Heffter, § 207; Moser, Versuch, iv. 120, or De Martens, Causes Cél. ii. 1. Phillimore (ii. § clxxv) while stating the existing rule suggests that 'the true international rule would be that the ambassador should be allowed in all cases the jus transitus innoxii,' meaning apparently that he should only be liable to be seized within an enemy's jurisdiction if he does acts of hostility there; in other words, he would compel a state to allow an ambassador to pass through it in order to negotiate an offensive alliance against it with a state on the further side. Fiore (ed. 1882, § 1221) says that a diplomatic agent of an enemy state 'entrando nel territorio senza salvocondotto potrebbe essere ricondotto alle frontiere.'

[2] De Martens, Précis, § 247; Heffter, § 207.

a bag of despatches to London, except upon condition that the contents of the bag should be unsealed, Mr. Fish directed the American minister at Berlin to protest against the act of the German commanders, and argued in a note, in which the subject was examined, that the right of legation, that is to say the right of a state to send diplomatic agents to any country with which it wishes to keep up amicable relations, is amply recognised by international law, that a right of correspondence between the government and its agent is necessarily attendant upon the right of legation, that such correspondence is necessarily confidential in its nature, that the right of maintaining it would be nullified by a right of inspection on the part of a third power, and finally that there is no trace of any special usage authorising a belligerent to place diplomatic agents in a besieged town on the same footing as ordinary residents by severing their communication with their own governments [1].

The general question.

Looking at the question from the point of view of strict legal right, it is not altogether clear that any good reason can be assigned for giving the interests of a state accrediting an agent priority over those of a belligerent. It is no doubt true that the right of legation is fully established. But the right of legation, primarily at least, is only a right as between the states sending and receiving envoys; in other words, it only secures to each of two states having relations with each other the opportunity of diplomatic intercourse with the other. Is there any sufficient reason for enlarging it to embrace a power of compelling third states to treat countries sending envoys as exercising a right which has priority over their own belligerent rights? Even in time of peace it has been seen that an ambassador can only claim his complete diplomatic immunities in the state to which he is accredited. His privileges in their full extent are dependent on the fact that he has business to transact with the power by whom the privileges are accorded. Wholly apart therefore from

[1] D'Angeberg, Recueil des Traités, &c., concernant la guerre Franco-Allemande, Nos. 756 and 783.

any question as to the effect of a conflict between those privileges and urgent interests of a belligerent, there is no presumption in favour of the existence of an obligation on the part of the latter to grant more than personal inviolability. And if the existence of a conflict can be alleged, the case against the priority of ambassadorial rights over those of a belligerent becomes stronger. The rules of war dealing with matters in which such conflict occurs certainly do not presuppose that the rights of neutrals are to be preferred to those of belligerents; and the government of the United States itself, while in the very act of protesting against the right of communication between a state and its agents being subordinated to belligerent rights, admitted that 'evident military necessity' would justify a belligerent in overriding it. On the whole it seems difficult, in the absence of a special custom, to deny to belligerents the bare right of restricting the privileges of a minister, not accredited to them, within such limits as may be convenient to themselves, provided that his inviolability remains intact.

The question however assumes a different aspect if it is looked at from the point of view of the courtesy which a state may reasonably be expected to show to a friendly power. Diplomatic relations are a part of ordinary international life; there is no reason for supposing that their maintenance is inconsistent with amity towards the invading government; there is on the other hand every reason to suppose that their interruption may be productive of extreme inconvenience to its friend. To withhold any privileges which facilitate those relations, in the absence of suspicion of bad faith or of grave military reasons, is not merely to be commonly discourteous, it is to be ready to injure or imperil the serious interests of a friend without the existence of reasonable probability that any important interests of the belligerent will be remotely touched.

Officers in command of armed forces of the state when upon friendly territory possess certain privileges, which have been already defined, in virtue of their functions and of the repre-

Officers in command of armed forces of the state.

sentative character of the force which is under them; and in time of war they have certain powers of control within an enemy's country and of making agreements with the enemy in matters incident to war, which will be mentioned in subsequent chapters[1]. To complete the view of their position, and of that of the members of forces under their command, it is only necessary to add that neither they, nor the members of such forces, are in any case amenable to the criminal or civil laws of a foreign state in respect of acts done in their capacity of agents for which they would be punishable or liable to civil process if such acts were done in their private capacity. Thus, when a state in the exercise of its right of self-preservation does acts of violence within the territory of a foreign state while remaining at peace with it, its agents cannot be tried for the murder of persons killed by them, nor are they liable in a civil action in respect of damage to property which they may have caused.

Case of McLeod.

An incident which arose out of the case of the Caroline, mentioned in a previous chapter[2], is of some interest with reference to this point. A person named McLeod, who had been engaged as a member of the colonial forces in repelling the attack made upon Canada from United States territory, and who consequently had acted as an agent of the British government, was arrested while in the State of New York in 1841 upon a charge of having been concerned in what was called the murder of one Durfee, who was killed during the capture of the Caroline. The British minister at Washington at once demanded his release, stating it to be 'well known that the destruction of the steamboat Caroline was a public act of persons in Her Majesty's service, obeying the orders of the superior authorities. That act therefore, according to the usages of nations, can only be the subject of discussion between the two national governments. It cannot be justly made the ground of legal proceedings in the United States against the individuals concerned, who were bound to obey the authorities

[1] Cf. pt. iii. chaps. iv and vii.

[2] Antea, p. 270.

appointed by their own government.' The matter being in the hands of the courts it was impossible for the government of the United States to release McLeod summarily. Its duties were confined to the use of every means to secure his liberation by the courts, and to seeing that no sentence improperly passed upon him was executed. Whether reasonable efforts were made to fulfil the first of these duties it is not worth while to discuss here; and fortunately McLeod, after being detained in prison for several months, was acquitted on his trial. The essential point for the present purpose is that Mr. Webster, Secretary of State in the latter portion of the time during which the affair lasted, acknowledged that 'the government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilised states, to be holden personally responsible in the ordinary tribunals of law for their participation in it;' and that, the year after, an act was passed directing that subjects of foreign powers, if taken into custody for acts done or omitted under the authority of their state, 'the validity or effect whereof depends upon the law of nations,' should be discharged[1].

Diplomatic agents not of publicly acknowledged character.

A diplomatic agent secretly accredited to a foreign government is necessarily debarred by the mere fact of the secrecy with which his mission is enveloped from the full enjoyment of the privileges and immunities of a publicly accredited agent. He has the advantage of those only which are consistent with the maintenance of secrecy; that is to say, he enjoys inviolability and the various immunities attendant on the diplomatic character in so far as the direct action of the government is concerned. Thus his political inviolability is complete; as between him and the government his house has the same immunities as are possessed by the house of a publicly accredited minister; and it may be presumed that no criminal process would be instituted against

[1] Halleck, i. 430, and Ann. Register, 1841, p. 316.

him where the state charges itself with the duty of commencing criminal proceedings. On the other hand, in all civil and criminal cases in which the initiative can be taken by a private person he remains exposed to the action of the courts; though it would no doubt be the duty of the government to prevent a criminal sentence from being executed upon him by any means which may be at their disposal, consistently with the state constitution [1].

Commissioners.

Commissioners for special objects are not considered so to represent their government, or to be employed in such functions, as to acquire diplomatic immunities. They are however held to have a right to special protection, and courtesy may sometimes demand something more. It would probably not be incorrect to say that no very distinct practice has been formed as to their treatment, contentious cases not having sufficiently arisen [2].

Bearers of Despatches.

Persons carrying official despatches to or from diplomatic agents have the same rights of inviolability and innocent passage that belong to the diplomatic agent himself, provided that their official character be properly authenticated. It is usual to provide this authentication in the form of special passports, stating in precise terms the errand upon which they are engaged.

Consuls.

Consuls are persons appointed by a state to reside in foreign countries, and permitted by the government of the latter to reside, for the purpose partly of watching over the interests of the subjects of the state by which they are appointed, and partly of doing certain acts on its behalf which are important to it or to its subjects, but to which the foreign country is indifferent, it being either unaffected by them, or affected only in a remote and indirect manner. Most of the duties of consuls are of the latter kind. They receive the protests and reports of captains of vessels of their nation with reference to injuries

Their functions.

[1] De Martens, Précis, § 249; Heffter, § 222; De Garden, Traité de Dip. ii.

[2] De Garden, Traité de Dip. ii. 13; Bluntschli, § 243; Heffter (§ 222) considers that commissioners, &c., have a right to the 'prérogatives essentielles dues aux ministres publics.'

sustained at sea; they legalise acts of judicial or other functionaries by their seal for use within their own country; they authenticate births and deaths; they administer the property of subjects of their state dying in the country where they reside; they send home shipwrecked and unemployed sailors and other destitute persons; they arbitrate on differences which are voluntarily brought before them by their fellow countrymen, especially in matters relating to commerce, and to disputes which have taken place on board ship; they exercise disciplinary jurisdiction, though not of course to the exclusion of the local jurisdiction, over the crews of vessels of the state in the employment of which they are; they see that the laws are properly administered with reference to its subjects, and communicate with their government if injustice is done; they collect information for it upon commercial, economical and political matters. In the performance of these and similar duties the action of a consul is evidently not international. He is an officer of his state to whom are entrusted special functions which can be carried out in a foreign country without interfering with its jurisdiction. His international action does not extend beyond the unofficial employment of such influence as he may possess, through the fact of his being an official and through his personal character, to assist compatriots who may be in need of his help with the authorities of the country. If he considers it necessary that formal representations shall be made to its government as to treatment experienced by them or other matters concerning them, the step ought in strictness to be taken through the resident diplomatic agent of his state—he not having himself a recognised right to make such communications[1]. Thus he is not internationally a representative of his state, though he possesses a public official character,

[1] By some Consular Conventions the right is given of making representations to the local authorities not only for the protection of subjects of their state, but in the case of an infraction of any treaty, and of addressing themselves to the government itself, if attention is not paid to their representations, whenever the diplomatic representative of their state is absent.

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which the government of the country in which he resides recognises by sanctioning his stay upon its territory for the purpose of performing his duties; so that he has a sort of scintilla of an international character, sufficiently strong to render any outrage upon him in his official capacity a violation of international law, and to give him the honorary right of placing the arms of his country upon his official house[1].

The persons employed as consuls are divided into consuls general, consuls, vice-consuls, and consular agents, a difference of official rank being indicated by the respective names. The division is not one of international importance.

Mode of appointment.

A consul may either be a foreigner to the country within which he exercises his functions, and his office may be the only motive of his sojourn there, or he may be a foreigner who for purposes of commerce or other reasons lives in the state independently of his office, and has perhaps acquired a domicile there, or finally he may be a subject of the state in which he executes the functions of consul. A consul general or consul is in all cases appointed by a commission or patent, which is communicated to the government of the country where he is to reside. On its receipt by the latter government he is recognised by it through the issue of what is called an exequatur or confirmation of his commission, which enables him to execute the duties of his office, and guarantees such rights as he possesses in virtue of it. Vice-consuls and consular agents are usually also appointed by patent, but sometimes are merely nominated by the consul to whom they are subordinate; the recognition of vice-consuls is generally given by means of an exequatur; and it is frequently issued even to consular agents, though it is perhaps more common that recognition is given in a less formal manner. An exequatur usually consists in a letter patent signed by the sovereign, and countersigned by the minister of foreign

[1] Spain, which in several respects gives exceptional privileges to consuls, in this matter is less liberal than other countries. The arms of the consul's state may only be put up inside his house.

affairs; but it is not necessarily conferred in so formal a manner; in Russia and Denmark the consul merely receives notice that he is recognised, and in Austria his commission is endorsed with the word 'exequatur' and impressed with the imperial seal. The exequatur is not issued as of course, and it may be refused if the person nominated as consul is personally objectionable for any serious reason. Thus in 1869 the exequatur was refused by England to a certain Major Haggerty, an Irishman naturalised in the United States, who was known to have been connected with Fenian plots. Again, the exequatur may be revoked if the consul outsteps the limits of his functions, especially if he meddles in political affairs; and though revocation seldom takes place, it being the practice to give an opportunity of recalling the offending consul to the state by which he has been nominated, a certain number of instances have occurred in which the measure has been resorted to. Thus in 1834 the Prussian consul at Bayonne having helped in getting clandestinely into Spain supplies of arms for the Carlists, and his government having refused to recall him, his exequatur was withdrawn; in 1856 the exequatur of three English consuls in the United States was revoked on the ground of their alleged participation in attempts to recruit men for the British army during the Crimean War; the exequatur was withdrawn from an American citizen acting as consul at St. Louis for a foreign power for endeavouring to make use of his consular office to escape from military service during the Civil War; and in 1866 the consul for Oldenburg at New York was deprived of his exequatur for refusing to appear and give evidence before the Supreme Court in a cause to which he was one of the parties[1]. So soon as the exequatur is revoked

Dismissal.

[1] Possibly a state may in strictness have the right to withdraw an exequatur without cause. In 1861 the English and French consuls at Charleston, under identical directions from their respective governments, jointly expressed to the Confederate government a hope that the Confederate States would observe the provisions of the Treaty of Paris with respect to the capture of private property at sea. The exequatur of the English consul was revoked by the Federal government on the ground that, in making the

the person up to that time consul totally loses his official character.

Privileges.

The functions of a consul being such as have been described, it being frequently the case that he is a subject of the state in which he exercises them, and the tenure of his office being dependent upon so formal a confirmation and continued permission on the part of that state, it is natural that he should not enjoy the same privileges as agents of a state employed in purely international concerns or representative of its sovereignty. As a general rule he is subjected to the laws of the country in which he lives to the same extent as persons who are of like status with himself in all points except that of holding the consular office. Consuls, the sole object of whose residence is the fulfilment of their consular duties, those who are chosen from among persons domiciled in the country, and those who are subjects of the state, are broadly in the same position respectively as other commorants, domiciled persons, and subjects. It is agreed however that the official position of a consul commands some ill-defined amount of respect and protection; that he cannot be arrested for political reasons; that he has the specific privileges of exemption from any personal tax and from liability to have soldiers quartered in his house, and the right of

communication in question, he had infringed a statute providing that no person not authorised by the President should assist in any political correspondence with the government of a foreign state 'in relation to any disputes with the United States, or to defeat the measures of their government.' The alleged ground was obviously a mere pretence; for (1) the exequatur of the French consul was not withdrawn, (2) the consul was employed in a business with which the United States had no concern, viz. in obtaining protection for British commerce from a de facto authority. The revocation of the exequatur remained therefore without plausible ground assigned or assignable. Nevertheless Lord Russell 'did not dispute the right of the United States to withdraw the exequatur of Mr. Consul Bunch, though H.M.'s government are of opinion that there was no sufficient ground for that act of authority' (Parl. Papers, North Am. 4, 1862); and it is in fact not easy to see how the refusal without reason assigned to allow a person, who is not representative of his state, and who therefore is not identified with its sovereignty, to continue to exercise certain functions in a given territory, can be beyond the strict powers of the sovereign of that territory.

putting up the arms of his nation over his door; and that he must be conceded whatever privileges are necessary to enable him to fulfil the duties of his office, except such as would withdraw him from the civil and criminal jurisdiction of the courts[1],—it being understood to be implied in the consent given by the state to his appointment for the performance of certain duties that all reasonable facilities must be given for their fulfilment. These latter privileges appear to be reducible to inviolability of the archives and other papers in the consulate[2], and to immunity from any personal obligations, weighing under the local law upon private persons, which are incompatible with a reasonably continuous presence of the consul at his consulate or with his ability to go wherever he may be called by his

[1] For obvious reasons a consul is not liable to the courts for acts done by order of the government from which he holds his commission.

[2] In the second edition of this book I stated on the authority of M. Calvo (§ 468) that the archives of the French consulate in London were seized and sold not many years ago for arrears of house tax payable by the landlord of the house occupied by the consulate; and on the authority of Mr. Lawrence (Rev. de Droit Int. x. 317) that in 1857 the whole consular property in the United States consulate at Manchester, with flag, seal, arms, and archives, was seized for a private debt of the consul, and would have been sold if security had not been temporarily given by a private person, and if the American minister in London had not paid the amount due. I supposed that the seizure had been found to be legally permissible, and it appeared to me that a state of the law which permitted consular archives to be sold was certainly not to be commended.

I regret that the fact of two similar but independent stories being told by writers of repute, who had treated in much detail and apparently with care, of the whole subject of the position of consuls, induced me to deviate from a habit, which has been forced upon me by experience, of never repeating any assertion to the disadvantage of England, made by a foreign writer, without myself examining upon what evidence it rests.

In the Journal de Droit International Privé for 1888 (p. 66), M. Clunet stated on the authority of the Foreign Office and the Inland Revenue Department that no such incident had occurred as that alleged by M. Calvo. I find on inquiry that the Manchester case is entirely unknown; and though the circumstances differ from those of the London case in that the debt is said to have been a private one, and that in consequence the seizure need not necessarily have become known to the public departments, the American minister is so unlikely to have neither taken official notice of the matter nor tested the legality of the seizure, that I can have no hesitation in relegating this case also to the domain of fiction.

consular duty[1]. Thus it is held that consuls are exempt from serving on juries, because such employment implies absence, and may compel them to travel to some distance from their official residence; and as a matter of course they cannot be drawn for service in militia or even in a municipal guard. If possible also, a consul accused of a criminal offence ought to be set at liberty on bail, or be kept under surveillance in his own house, instead of being sent to prison, where the exercise of his functions is difficult or impossible. If a state consents to receive one of its own subjects as consul for a foreign country it consents in doing so to extend to him the same privileges as are due to consuls who are subjects of the foreign country or of third powers.

Position in case of change of government in the country of residence.

It follows from the absence of any political tinge in the functions of a consul that political changes in a state do not affect his official position, and that the nomination of a person for the performance of consular duties in a given territory does not imply that the government of that territory, if of contested legitimacy, is recognised by the state employing the consul. If the form of government of a state is changed, or if the place in which a consul resides is annexed to a state other than that from which he has received his exequatur, no new exequatur is required. The cases of consuls in the Confederated States, nominated before the outbreak of the Civil War, who continued to exercise their functions during its progress, and that of the nomination of consuls by England to the various South American Republics eighteen months before the earliest recognition of any of them as a state, are instances of the dissociation of consular relations from any question of political recognition.

Consideration due to consular house during hostilities.

When a place in which a consul is resident in time of war becomes the scene of actual hostilities, it is usual to hoist the flag of the state in the employment of which he is over the

[1] The United States only claim this immunity for such of their consuls as are citizens of the United States and do not hold real estate or engage in business in the country to which they are sent. Regulations for the Consular Service of the United States, quoted in Halleck, i. 316.

consular house; and the combatants become bound by a usage of courtesy, failure to observe which is peculiarly offensive, to avoid injuring it by their fire or otherwise, except in cases of actual military necessity, or when the enemy makes incontestible use of it as a cover for his own operations [1].

Consuls diplomatically accredited.

Consuls are sometimes accredited as chargés d'affaires. When such is the case their consular character is necessarily subordinated to their superior diplomatic character, and they are consequently invested with diplomatic privileges.

Responsibility of a state for acts done by its agents.

A state is responsible for, and is bound by, all acts done by its agents within the limits of their constitutional capacity or of the functions or powers entrusted to them. When the acts done are in excess of the powers of the person doing them the state is not bound or responsible; but if they have been injurious to another state it is of course obliged to undo them and nullify their

[1] On the functions and privileges of consuls, see De Garden, Traité de Dip. i. 315; Phillimore, ii. §§ ccxlvi–lxxi; Heffter, §§ 244–8; Bluntschli, §§ 244–75; Halleck, i. 310–30; Calvo, §§ 442–500, and 515–20; and especially Lawrence, Commentaire i. 1–103.

Works devoted to the subject have been written by Miltitz (Manuel des Consuls), Tuson (The British Consul's Guide), De Clercq et de Vallat (Guide Pratique des Consulats), and Lehr (Manuel théorique et pratique des agents diplomatiques et consulaires).

Of late there has been a growing tendency to define the position of consuls by conventions. [The rapidity with which they have multiplied renders it necessary to abandon their enumeration: they are all to be found in the collections of De Martens. The typical example printed in Appendix v. to the first edition of this book was the Convention between Austria and the United States, De Martens, Nouv. Rec. Gén. 2e Sér. i. 44.] They differ as to details, e. g. as to the way in which the evidence of consuls is to be procured by the courts, or as to the contraventions of the territorial law for which consuls can be arrested; but in the main they are practically identical, and represent, though with some enlargement, the privileges and functions with which consuls are invested by custom; and see antea, p. 203 n.

Consuls in states not within the pale of international law enjoy by treaty exceptional privileges for the protection of their countrymen, without which the position of the latter would be precarious. These privileges properly find no place in works on international law, because they exist only by special agreement with countries which are incompetent to set precedents in international law. Information with respect to consuls in such states may be found in Lawrence, Comment. 104–284, Phillimore, ii. §§ cclxxii–vii, Calvo, §§ 501–14, and the above-mentioned special works.

effects as far as possible, and, where the case is such that punishment is deserved, to punish the offending agent. It is of course open to a state to ratify contracts made in excess of the powers of its agents, and it is also open to it to assume responsibility for other acts done in excess of those powers. In the latter case the responsibility does not commence from the time of the ratification, but dates back to the act itself.

CHAPTER X

TREATIES

It follows from the position of a state as a moral being, at liberty to be guided by the dictates of its own will, that it has the power of contracting with another state to do any acts which are not forbidden, or to refrain from any acts which are not enjoined by the law which governs its international relations, and this power being recognised by international law, contracts made in virtue of it, when duly concluded, become legally obligatory[1].

They may be conveniently considered with reference to—

1. The antecedent conditions upon which their validity depends.
2. Their forms.
3. Their interpretation.
4. Their effects.
5. Certain means of assuring their execution.
6. The conditions under which they cease to be obligatory.
7. Their renewal.

[1] Contracts entered into between states and private individuals, or by the organs of states in their individual capacity, are of course not subjects of international law. Of this kind are—

1. Concordats, because the Pope signs them not as a secular prince, but as head of the Catholic Church.

2. Treaties of which the object is to seat a dynasty or a prince upon a throne, or to guarantee its possession, in so far as the agreement is directed to the imposition of the dynasty or prince upon the state for reasons other than strictly international interests, or to their protection against internal revolution, because such contracts are in the interest of the individuals in their personal capacity, and not in their capacity as representatives of the will of the state.

3. Agreements with private individuals, e. g. for a loan.

4. Arrangements between different branches of reigning houses, or between the reigning families of different states, with reference to questions of succession and like matters.

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Antecedent conditions of the validity of a treaty.

The antecedent conditions of the validity of a treaty may be stated as follows. The parties to it must be capable of contracting; the agents employed must be duly empowered to contract on their behalf; the parties must be so situated that the consent of both may be regarded as freely given; and the objects of the agreement must be in conformity with law.

Capacity to contract.

All states which are subject to international law are capable of contracting, but they are not all capable of contracting for whatever object they may wish. The possession of full independence is accompanied by full contracting power; but the nature of the bond uniting members of a confederation, or joining protected or subordinate states to a superior, implies either that a part of the power of contract normally belonging to a state has been surrendered, or else that it has never been acquired. All contracts therefore are void which are entered into by such states in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior states [1].

Possession of sufficient authority by the persons contracting on behalf of the state.

The persons to whom the conduct of foreign relations is delegated by the constitution of a state necessarily bind it by all contracts into which they enter on its behalf [2]. There are also persons who in virtue of being entrusted with the exercise of certain special functions have a limited power of binding it by contracts relating to matters within the sphere of their authority. Thus officers in command of naval or military forces may conclude agreements for certain purposes in time of war [3]. If such persons, or negotiators accredited by the sovereign or the body exercising the general treaty-making power in a state, exceed the limits of the powers with which they are invested, the contracts made by them are null; but it is incumbent upon their state, when any

[1] Bluntschli, § 403; Vattel, liv. ii. ch. xii. § 155; Calvo, § 681.

[2] Comp. antea, p. 297.

[3] For the limits of the powers of military and naval commanders, see postea, pt. iii. chap. viii. For certain cases in which local and other subordinate authorities appear to have powers in some countries to make agreements for particular purposes, see Bluntschli, § 442.

act has been done by the other party in compliance with the agreement, or when any distinct advantage has been received from it, either to restore things as far as possible to the condition in which they previously were, or to give compensation, unless the contract made was evidently in excess of the usual powers of a person in the position of the negotiator, in which case the foreign state, having prejudiced itself by its own rashness, may be left to bear the consequences of its indiscretion [1].

Freedom of consent.

The freedom of consent, which in principle is held to be as necessary to the validity of contracts between states as it is to those between individuals, is understood to exist as between the former under conditions which would not be thought compatible with it where individuals are concerned. In international law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for. Consent therefore is conceived to be freely given in international contracts, notwithstanding that it may have been obtained by force, so long as nothing more is exacted than it may be supposed that a state would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts. And as international law cannot measure what is due in a given case, or what is necessary for the protection of a state which declares itself to be in danger, it regards all compacts as valid, notwithstanding the use of force or intimidation, which do not destroy the independence of the state which has been obliged to enter into them. When this point however is passed constraint vitiates the agreement, because it cannot be supposed that a state would voluntarily commit suicide by way of reparation or as a measure of protection to another. The doctrine is of course one which gives a legal sanction to an infinite number of agreements one of the parties to each of which has no real freedom of will; but it is obvious that unless a considerable

[1] Bluntschli, §§ 404–5 and 407; Heffter, § 84.

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degree of intimidation is allowed to be consistent with the validity of contracts, few treaties made at the end of a war or to avert one would be binding, and the conflicts of states would end only with the subjugation of one of the combatants or the utter exhaustion of both.

Effect of personal intimidation.

Violence or intimidation used against the person of a sovereign, of a commander, or of any negotiator invested with power to bind his state, stand upon a different footing. There is no necessary correspondence between the amount of constraint thus put upon the individual, and the degree to which one state lies at the mercy of the other, and, as in the case of Ferdinand VII at Bayonne, concessions may be extorted which are wholly unjustified by the general relations between the two countries. Accordingly all contracts are void which are made under the influence of personal fear.

Of fraud.

Freedom of consent does not exist where the consent is determined by erroneous impressions produced through the fraud of the other party to the contract. When this occurs therefore;—if, for example, in negotiations for a boundary treaty the consent of one of the parties to the adoption of a particular line is determined by the production of a forged map, the agreement is not obligatory upon the deceived party [1].

Conformity with law.

The requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority. Thus a treaty is not binding which has for its object the subjugation or partition of a country, unless the existence of the

[1] Heffter, § 85; Klüber, § 143; Bluntschli, §§ 408–9. De Martens (Précis, § 50) regards consent as remaining free whenever the contract is not palpably unjust to the party, the freedom of whose consent is in question. The test of justice or injustice is evidently not a practical one. Phillimore (ii. xlix) well remarks that the obligation of international treaties concluded under the influence of intimidation is analogous to that of contracts entered into to avoid or stop litigation, which are binding upon a party consenting only from fear of the expense and uncertain issue of a law-suit.

latter is wholly incompatible with the general security; and an agreement for the assertion of proprietary rights over the open ocean would be invalid, because the freedom of the open seas from appropriation, though an arbitrary principle, is one that is fully received into international law. It may be added that contracts are also not binding which are at variance with such principles, not immediately applicable to the relations of states, as it is incumbent upon them as moral beings to respect. Thus a compact for the establishment of a slave trade would be void, because the personal freedom of human beings has been admitted by modern civilised states as a right which they are bound to respect and which they ought to uphold internationally.

Forms of contract.

Usage has not prescribed any necessary form of international contract. A valid agreement is therefore concluded so soon as one party has signified his intention to do or to refrain from a given act, conditionally upon the acceptance of his declaration of intention by the other party as constituting an engagement, and so soon as such acceptance is clearly indicated. Between the binding force of contracts which barely fulfil these requirements, and of those which are couched in solemn form, there is no difference. From the moment that consent on both sides is clearly established, by whatever means it may be shown, a treaty exists of which the obligatory force is complete[1].

Thus sometimes, when conventional signs have a thoroughly understood meaning, a contract for certain limited purposes may even be made by signal. The exhibition of white flags, for example, by both of two hostile armies establishes a truce[2].

Generally of course international contracts are, as a matter of prudence, consigned to writing, and take the form of a specific agreement signed by both parties or by persons duly authorised on their behalf. Agreements so made are sometimes called treaties, and sometimes conventions. Essentially, there is no

[1] De Martens, Précis, § 49; Klüber, § 143; Heffter, § 87; Phillimore, ii. § 1; Bluntschli, § 422.
[2] De Martens, Précis, § 65; Bluntschli, 422.

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difference between the two forms; but in practice the word treaty is commonly used for the larger political or commercial contracts, the term convention being applied to those of minor importance or more specific object, such as agreements regulating consular functions, making postal arrangements, or providing for the suppression of the slave trade[1]. Occasionally consent is shown, and a treaty is consequently concluded, by edicts or orders in some other shape given to the subjects of the contracting powers[2], or by a declaration and answer, or by a declaration signed by the contracting parties or their agents[3]; frequently it is shown by an exchange of diplomatic notes.

Ratification by the supreme power of treaties made by its agents.

Except when an international contract is personally concluded by a sovereign or other person exercising the sole treaty-making power in a state, or when it is made in virtue of the power incidental to an official station, and within the limits of that power, tacit or express ratification by the supreme treaty-making power of the state is necessary to its validity.

Tacit ratification.

Tacit ratification takes place when an agreement, invalid because made in excess of special powers, or incomplete from want of express ratification, is wholly or partly carried out with the knowledge and permission of the state which it purports to bind; or when persons, such as ministers of state, who usually act under the immediate orders or as the mouth-piece in foreign affairs of the person or body possessing the treaty-making power,

[1] During the negotiations for a treaty the discussion of each sitting and the resolutions arrived at are set down in a document called a protocol. When, as in important negotiations frequently occurs, it is wished that the negotiators shall be bound to give effect to the views expressed by them in the course of debate, the protocol is signed by them. The obligation thus contracted however is practically only binding in honour. It is an agreement which is conditioned upon the success of the negotiations as a whole, and which consequently does not subsist if they fall through from any cause.

[2] e. g. Treaty of Commerce of 1785 between Austria and Russia by simultaneous edicts; De Martens, Rec. iv. 72 and 84.

[3] e. g. The Declaration of Paris of 1856 with respect to maritime law, and that of St. Petersburg of 1868 forbidding the use of explosive balls in war.

enter into obligations in notes or in any other way for which express ratification is not required by custom, without their action being repudiated so soon as it becomes known to the authority in fact capable of definitively binding the state [1].

Express ratification.

Express ratification, in the absence of special agreement to the contrary, has become requisite by usage whenever a treaty is concluded by negotiators accredited for the purpose. The older writers upon international law held indeed that treaties, like contracts made between individuals through duly authorised agents, are binding within the limits of the powers openly given by the parties negotiating to their representatives, and that consequently where these powers are full the state is bound by whatever agreement may be made in its behalf [2]. But it was always seen by statesmen that the analogy is little more than nominal between contracts made by an agent for an individual and treaties dealing with the complex and momentous interests of a state, and that it was impossible to run the risk of the injury which might be brought upon a nation through the mistake or negligence of a plenipotentiary. It accordingly was a custom, which was recognised by Bynkershoek as forming an established usage in the early part of the eighteenth century, to look upon ratification by the sovereign as requisite to give validity to treaties concluded by a plenipotentiary; so that full powers were read as giving a general power of negotiating subject to such instructions as might be received from time to time, and of concluding agreements subject to the ultimate decision of the sovereign [3]. Later writers may declare that by

[1] Wheaton, Elem. pt. iii. ch. ii. § 4; Halleck, i. 230. The writers who say that ratification cannot be inferred from silence are evidently thinking of conventions concluded in excess of specific powers, and not of agreements which are practically within the powers of the persons making them, but which are not technically binding from the moment of their conclusion, owing to the signataries not being the persons in whom the treaty-making power of the state is theoretically lodged by constitutional law.

[2] This opinion appears still to meet with a certain amount of support; see Phillimore (ii. § lii), who relies on Klüber (§ 142). Heffter thinks that a state is morally bound in such cases (§ 87).

[3] Quæst. Jur. Pub. lib. ii. c. vii.

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the law of nature the acts of an agent bind his state so long as he has not exceeded his public commission, but they are obliged to add that the necessity of ratification is recognised by the positive law of nations [1].

Ratification not to be refused except for solid reasons.

The necessity of ratification by the state may then be taken as practically undisputed, and the reason for the requirement is one which prevents it from being given as a mere formality. Ratification may be withheld; and perhaps in strict law it is always open to a state to refuse it [2]. Morally however, if not legally, it cannot be arbitrarily withheld. The right of refusal is reserved, not simply to give an opportunity of reconsideration, but as a protection to the state against betrayal into unfit agreements. Its exercise therefore must be prompted by solid reasons. It is agreed, for example, that a state is not bound if a plenipotentiary exceeds his instructions; and a right of refusal must also be held to exist if the new treaty conflicts with anterior obligations, if it is found to be incompatible with the constitutional law of one of the contracting states, if a sudden change of circumstances occurs at the moment of signing it, by which its power to accomplish its object is nullified or seriously impaired, or if an error is discovered with respect to facts, a correct knowledge of which would have prevented the acceptance of the treaty in its actual form [3]. M. Guizot went further when defending the French government for refusing, in consequence of the opposition of the Chambers, to ratify a treaty made in 1841 for the suppression of the slave trade. 'Ratification,' he maintained, 'is a real and substantive right; no treaty is complete without being ratified; and if, between the conclusion and the ratification, important facts come into existence—new and evident facts—which change the relations of the two powers and the circumstances amidst which the treaty is concluded,

[1] Vattel, liv. ii. ch. xii. § 156; De Martens, Précis, § 48.

[2] Bluntschli at least adopts this view expressly (§ 420), and most writers treat the limitations upon the right of refusal as questions rather of morals than of law.

[3] Wheaton, Elem. pt. iii. ch. ii. § 5; Calvo, § 697.

a full right of refusal exists.' Wide as is the discretion which the language of M. Guizot gives to a state, it probably corresponds better with the necessities of the case than any doctrine which, in affecting to indicate the occasions, or the sort of occasions, upon which ratification may be refused, tacitly excludes cases which are not analogous to those mentioned. With the complicated relations of modern states the reasons which may justify a refusal to ratify a treaty are too likely to be new for it to be safe to attempt to enumerate them. A state must be left to exercise its discretion, subject to the restraints created by its own sense of honour, and the risk to which it may expose itself by a wanton refusal.

Exceptions.

Exceptions to the rule that ratification ought not to be refused, except for solid reasons coming into existence or discovered after the signature of the treaty, occur when by the constitution of a state it is essential to the validity of a treaty concluded by plenipotentiaries duly instructed by the appropriate persons that it shall be sanctioned by a body, such as the Senate in the United States, which is not necessarily even cognizant of the instructions given to the negotiators, and when, the control of expenditure or the legislative power not being in the hands of the person or persons invested with the treaty-making power, the treaty includes financial clauses or requires legislative changes. In such cases, since the different agents of a state bind it only within the limits of their constitutional competence, and since it is the business of the state with which a contract is made to take reasonable care to inform itself as to the competence of those with whom it negotiates, it is an implied condition of negotiations that an absolute right of rejecting a treaty is reserved to the body the sanction of which is needed or in which financial or legislative power resides, and that the discretion of this body is not confined within the bounds which are morally obligatory under other forms of constitution [1].

Reservation of ratification.

It is now the practice to make an express reservation of the

[1] Wheaton, Elem. pt. iii. ch. ii. § 6; Calvo, §§ 707–8; Bluntschli, § 413.

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right of ratification either in the full powers given to the negotiators or in the treaty itself. A reservation of this kind is however of no legal value, because it does not enlarge the rights which a state already possesses in law.

Effect of provision that a treaty shall take effect without ratification.

An exception to the requirement that a treaty shall be ratified by the contracting states is said to occur when, as was the case with the Convention of July 1840 between Austria, Great Britain, Prussia, Russia, and Turkey, for the pacification of the Levant, it is expressly provided that the preliminary engagements shall take effect immediately without waiting for an interchange of ratifications[1]. It is difficult to see in what way a treaty of this kind can constitute an exception. The plenipotentiaries who sign it, unless they act under a previous enabling agreement between their states, have no more power to debar their respective governments from the exercise of their legal rights than they have to bind them finally for any other purpose. The treaty is properly a provisional one, which, if carried into effect, receives a tacit ratification by the execution of its provisions.

Completion of ratification.

Ratification is considered to be complete only when instruments containing the ratifications of the respective parties have been exchanged. So soon as this formality has been accomplished, and not until then, the treaty comes into definite operation. But, in the absence of express agreement, effects which are capable of being retroactive, such as the imposition of national character upon ceded territory, are so to the date of the original signature of the treaty, instead of commencing from the time of the exchange of ratifications; and stipulations, the execution of which during the interval between signature and ratification has been expressly provided for, must be carried out subject to a claim which the party burdened by them may make to be placed in his original position, or to receive compensation, if the treaty be not ratified by the other contracting state; because if the stipulations are not carried out, their neglect will

[1] Wheaton, Elem. pt. iii. ch. ii. § 5; Twiss, i. § 233.

be converted into an infraction of the treaty so soon as its ratification is effected [1].

Ratification is given by written instruments, of identical form, exchanged between the contracting parties, and signed by the persons invested with the supreme treaty-making power, or where that power resides in a body of persons, by the agent appropriate for the purpose. In strictness the provisions of the treaty should be textually recited; but it is sufficient, and is perhaps as usual, to recite only the title, the preamble, the date and the names of the plenipotentiaries, the essential requirement in a ratification being only that it shall evidently refer to the agreement as expressed in the text of the treaty [2].

Treaties to be interpreted.

Jurists are generally agreed in laying down certain rules of construction and interpretation as being applicable when disagreement takes place between the parties to a treaty as to the meaning or intention of its stipulations. Some of these rules are either unsafe in their application or of doubtful applicability; and rules tainted by any shade of doubt, from whatever source it may be derived, are unfit for use in international controversy. Those against which no objection can be urged, and which are probably sufficient for all purposes, may be stated as follows:—

1. According to their plain sense.

1. When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualifications, that any words which may have a customary meaning in treaties, differing from their common signification,

[1] Bluntschli, § 421; Heffter, § 87. Occasionally exceptions are made by agreement to the practice of making the effect of a treaty date from the time of the signature. The Treaty of Paris in 1856 dated from the moment of ratification.

[2] Some countries, especially the United States, have occasionally presented a ratification clogged with a condition or embodying a modification of the treaty agreed upon. Obviously in such cases it is not a ratification, but a new treaty, that is presented for acceptance. The word ratification is simply a misnomer, under which a refusal of ratification is disguised.

It is equally obvious that a new contract is not constituted by a ratification which contains an interpretation clause, agreed upon between the two parties, for the purpose of removing an obscurity in the original text.

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must be understood to have that meaning, and that a sense cannot be adopted which leads to an absurdity, or to incompatibility of the contract with an accepted fundamental principle of law.

Difference between England and Holland in 1756.

A celebrated case, illustrating the operation of this rule, is that of the difference between England and Holland in 1756 as to the meaning of the treaties of guarantee of 1678, 1709, 1713, and 1717, the last-mentioned of which was renewed by the Quadruple Alliance of 1718 and by the Treaty of Aix la Chapelle in 1748. By these treaties England and Holland guaranteed to each other all their rights and possessions in Europe against 'all kings, princes, republics and states,' and specific assistance was stipulated if either should 'be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of its states, territories, rights, immunities, and freedom of commerce.' On assistance being demanded by England from Holland, the latter power, which was unwilling to give it, argued that the guarantee applied only to cases in which the state in want of help was in the first instance the attacked and not the attacking party in the war, and alleged that England was in fact the aggressor. It was also argued that even if France were the aggressor in Europe, her aggressions there were only incidents of a state of war which had previously arisen in America, to hostilities on which continent the treaties did not apply. In taking up these positions the Dutch government assumed that the guarantee which it had given would be incompatible with international law if it were understood as covering instances of attack upon the territories of the guaranteed powers arising out of an aggression made by the latter; and it consequently held that the language of the treaties into which it had entered must be construed in some other than its plain sense. The assumption made by Holland was at variance with one of the principles upon which international law rests, and necessarily rests. As has been already said, the causes of war are generally too complex, and it is usually too open to argument whether an attack is properly to be considered

aggressive or defensive, for the question whether a war is just or unjust to be subjected to legal decision. Accordingly both parties in all wars occupy an identical position in the eye of the law. The assumption of the Dutch being indefensible, all justification of their conduct fell to the ground; for Mr. Jenkinson in his 'Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations,' had no difficulty in showing that the bare words of the treaties, if uncontrolled by any principle of international law, could only be reasonably understood to refer to attacks made at any time in the course of a war, the expressions used being perfectly general[1].

Clayton-Bulwer Treaty.

A later case, in which it was necessary to reaffirm the rudimentary principle that effect is to be given to the plain meaning of the language of a treaty when a plain meaning exists, is that of the Clayton-Bulwer Treaty of 1850. By that treaty the government of Great Britain and the United States declared 'that neither one nor the other will ever . . . occupy, or fortify, or colonise, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America, nor will either make use of any protection which either affords, or may afford, or any alliance which either has, or may have, to or with any state or people for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying or colonising Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same.' Under the terms of this engagement the United States called upon England to abandon a protectorate over the Mosquito Indians, which she had exercised previously to the date of the treaty, urging that the Indians being a savage race a 'protectorate must from the nature of things be an absolute submission of these Indians to the British government, as in fact it has ever been.' Lord Clarendon met the demand by referring to the principle that

[1] Jenkinson's Treaties, Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations.

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'the true construction of a treaty must be deduced from the literal meaning of the words employed in its framing,' and pointed out that the 'possibility' of protection is clearly recognised, so that the intention of the parties to the arrangement must be taken to be 'not to prohibit or abolish, but to limit and restrict such protectorate.' The whole of the words in fact limiting the use which could be made of a protectorate must have been excised before the interpretation contended for by the American government could become matter for argument[1].

2. When terms have a different legal meaning in different states, according to their meaning in the state to which they apply.

2. When terms used in a treaty have a different legal sense within the two contracting states, they are to be understood in the sense which is proper to them within the state to which the provision containing them applies; if the provision applies to both states the terms of double meaning are to be understood in the sense proper within them respectively. Thus by the treaty of 1866 it was stipulated between Austria and Italy, that inhabitants of the provinces ceded by the former power should enjoy the right of withdrawing with their property into Austrian territory during a year from the date of the exchange of ratifications. In Austria the word inhabitant signifies such persons only as are domiciled according to Austrian law; in Italy it is applied to every one living in a commune and registered as resident. The language of the treaty therefore had not an identical meaning in the two countries. As the provision referred to territory which was Austrian at the moment of the signature of the treaty, the term inhabitant was construed in conformity with Austrian law[2].

3. When a plain sense is wanting, according to their spirit,

3. When the words of a treaty fail to yield a plain and reasonable sense they should be interpreted in such one of the following ways as may be appropriate:—

a. By recourse to the general sense and spirit of the treaty as shown by the context of the incomplete, improper, ambiguous, or obscure passages, or by the provisions of the instrument as a whole. This is so far an exclusive, or rather a controlling

[1] De Martens, Rec. Gén. ii. 219–39.

[2] Fiore, § 1121.

method, that if the result afforded by it is incompatible with that obtained by any other means except proof of the intention of the parties, such other means must necessarily be discarded; there being so strong a presumption that the provisions of a treaty are intended to be harmonious, that nothing short of clear proof of intention can justify any interpretation of a single provision which brings it into collision with the undoubted intention of the remainder.

β. By taking a reasonable instead of the literal sense of words when the two senses do not agree. It was stipulated, for example, by the Treaty of Utrecht that the port and fortifications of Dunkirk should be destroyed, 'nec dicta munimenta, portus, moles, aut aggeres, denuo unquam reficiantur.' It was evident that England required the destruction of Dunkirk not because of any feeling with regard to the particular port and fortification in themselves, but because her interests were affected by the existence of a defensible place of naval armament immediately opposite the Thames; the particular form of words chosen was obviously adopted only because an attempt to avoid the obligations of the treaty by the creation of a new place in a practically identical spot was not anticipated by the English negotiators. When therefore France, while in the act of destroying Dunkirk in obedience to her engagements, began forming a larger port, a league off, at Mardyck, England objected to the construction put upon the language of the treaty as being absurd. The French government in the end recognised that the position which it had taken up was untenable, and the works were discontinued [1].

or their reasonable sense.

4. Whenever, or in so far as, a state does not contract itself out of its fundamental legal rights by express language a treaty must be so construed as to give effect to those rights. Thus, for example, no treaty can be taken to restrict by implication the exercise of rights of sovereignty or property or self-preservation. Any restriction of such rights must be effected in a clear and

4. So as to give due effect to the fundamental legal rights of a state.

[1] Phillimore, ii. § lxxiii.

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distinct manner. A case illustrative of this rule is afforded by a recent dispute between Great Britain and the United States. By the Treaty of Washington of 1871, it was provided that the inhabitants of the United States should have liberty, in common with the subjects of Great Britain, to take fish upon the Atlantic coasts of British North America. Subsequently to the conclusion of the treaty, the Legislature of Newfoundland passed laws with the object of preserving the fish off the shores of the colony; a close time was instituted, a minimum size of mesh was prescribed for nets, and a certain mode of using the seine was prohibited. These regulations were disregarded by fishermen of the United States; disturbances occurred at Fortune Bay between them and the colonial fishermen; and the matter became a subject of diplomatic correspondence in the course of which the scope of the treaty came under discussion. It was argued by the United States that the fishery rights conceded by the treaty were absolute, and were to be 'exercised wholly free from the restraints and regulations of the Statutes of Newfoundland now set up as authority over our fishermen, and from any other regulations of fishing now in force or that may hereafter be enacted by that government;' in other words it was contended that the simple grant to foreign subjects of the right to enjoy certain national property in common with the subjects of the state carries with it by implication an entire surrender, in so far as the property in question is concerned, of one of the highest rights of sovereignty, viz. the right of legislation. That the American government should have put forward the claim is scarcely intelligible. There can be no question that no more could be demanded than that American citizens should not be subjected to laws or regulations, either affecting them alone, or enacted for the purpose of putting them at a disadvantage[1].

5. So as to give what is necessary to the

5. Subject to the foregoing rule every right or obligation which is necessarily attendant upon something clearly ascertained

[1] De Martens, Nouv. Rec. Gén. xx. 708; Parl. Papers, U. S. No. 3, 1878. Cf. antea, p. 278.

to be agreed to in the treaty, including a right to whatever may be necessary to the enjoyment of things granted by it, is understood to be tacitly given or imposed by the gift or imposition of that upon which it is attendant[1].

enjoyment of things granted by them.

When a conflict occurs between different provisions of a treaty or between different treaties, the provision or treaty to which preference is to be given is determined by the following rules:—

Interpretation of conflicting agreements.

1. A generally or specifically imperative provision takes precedence of a general permission. Thus if a treaty concedes a right of fishing over certain territorial waters and at the same time prohibits the persons to whom permission is given from landing to dry or cure the fish which may be caught, the prohibition outweighs the permission, notwithstanding that the power of curing and drying on the spot may be found to be so essential to the enjoyment of the fishing that the right to fish is nullified by its absence.

2. On the other hand, a special permission takes precedence of a general imperative provision; that is to say, if a treaty contains an agreement couched in general terms, and also an agreement with regard to a particular matter which if allowed to operate will act as an exception from the former agreement, effect is given to the exception.

3. If a penalty for non-observance is attached to one of two prohibitory stipulations and not to the other, or if a more severe penalty is attached to one than the other, preference is given to that which is the better guarded. If a penalty is attached to neither, the stipulation has precedence which has the more precision in its command.

[1] On the whole subject of the interpretation of treaties see Grotius, De Jure Belli et Pacis, lib. ii. cap. xvi; Vattel, liv. ii. ch. xvii; Heffter, § 95; Phillimore, ii. ch. viii; Calvo, §§ 713–22; Fiore, §§ 1117–31.

Besides the above rules of interpretation many others are usually given, which scarcely seem to be of much practical use in international law. They are mainly rules of interpretation of Roman law, which appear to have been imported into international law without a very clear conception of the manner in which they can be supposed to be applicable. There is no place for the refinements of the courts in the rough jurisprudence of nations.

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4. When stipulations are of identical nature, that is to say when both are general and prohibitory or special and imperative, &c., and no priority can be ascribed to either upon the grounds mentioned in the last rule, that which is the more important must be observed by the party obliged, unless the promisee, who is at liberty to choose that the less important stipulation shall be performed, exercises his power of choice in that direction.

5. When two treaties made between the same states at different dates conflict, the latter governs, it being supposed to be in substitution for the earlier contract. It is hardly an exception from this rule that when of two conflicting treaties the later is made by an inferior. though competent authority, the earlier is preferred. In the year 1800, for example, Piacenza was surrendered with its garrison to the French by the Austrian commandant, who from the nature of his command had authority to conclude an agreement of the kind made. The surrender took place at three in the afternoon, and at eight in the morning of the same day a convention had been concluded between generals Berthier and Melas, under which the whole Austrian forces were to retire behind the Mincio, giving over Piacenza to the French, but withdrawing the garrison. It was claimed and at once admitted that the latter convention ought to be carried out to the exclusion of the former[1].

6. When two treaties conflict which are made with different states at different times, the earlier governs, it being of course impossible to derogate from an engagement made with a particular person by a subsequent agreement with another person entered into without his consent. Hence until all the parties to a treaty have consented to forego their rights under it, no subsequent treaty incompatible with it can be valid; any such treaty is null at least to the extent of its direct incompatibility; and if the incompatible portions are not

[1] Corresp. de Nap. i. vi. 365.

separable from the remainder, it is null in its entirety[1]. Thus when Russia, in 1878, concluded with Turkey the Treaty of San Stefano, 'every material stipulation of which involved a departure from the treaty of 1856,' that is to say, from a treaty to which not only Russia and Turkey, but England, France, Austria, Prussia and Sardinia were parties, the later treaty was void as against the last-mentioned powers, or the states legally representing them[2].

Treaties of guarantee.

A kind of treaty which demands a few words of separate notice on account of its special characteristics is a treaty of guarantee. Treaties of guarantee are agreements through which powers engage, either by an independent treaty to maintain a given state of things, or by a treaty or provisions accessory to a treaty, to secure the stipulations of the latter from infraction by the use of such means as may be specified or required against a country acting adversely to such stipulations.

Guarantees may either be mutual, and consist in the assurance to one party of something for its benefit in consideration of the assurance by it to the other of something else to the advantage of the latter, as in the Treaty of Tilsit, by which France and Russia guaranteed to each other the integrity of their respective possessions; or they may be undertaken by one or more powers for the benefit of a third as in the treaty of the 15th April, 1856, by which England, Austria, and France guaranteed

[1] Grotius, lib. ii. cap. xvi. § 29; Vattel, liv. ii. ch. xvii. §§ 312–22; Phillimore, ii. ch. ix; Calvo, §§ 720–3.

M. Bluntschli (§ 414) says that 'les traités de ce genre ne sont pas nuls d'une manière absolue, mais seulement d'une manière relative. Ils conservent toute leur efficacité lorsque l'état dont les droits antérieurs sont lésés ne s'oppose pas aux modifications amenées par le traité.' It is difficult to understand this doctrine. Two incompatibles cannot co-exist. One or other of the treaties, in so far as they are incompatible with one another, must be destitute of binding force. Either the second treaty has abrogated the first or the first alone is operative. It is granted that the second treaty has not abrogated the first; it therefore has no efficacity to keep. It can only acquire validity when all the parties with whom a contract was made in the first treaty give their consent to the abrogation of the latter, and it must date as a contract from that moment.

[2] De Martens, Nouv. Rec. Gén. 2e Sér. iii. 246, 259.

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'jointly and severally the independence and the integrity of the Ottoman Empire, recorded in the treaty concluded at Paris on the 30th March;' or finally they may be a form of assuring the observance of an arrangement entered into for the general benefit of the contracting parties, as in the treaties of 1831 and 1839, by which Belgium was constituted an independent and neutral state in the common interests of the contracting powers, and while placed under an obligation to maintain neutrality received a guarantee that it should be enabled to do so; or in the treaty of November, 1855, by which Sweden and Norway engaged not to cede or exchange with Russia, nor to permit the latter to occupy any part of the territory belonging to the crowns of Sweden and Norway, nor to concede any right of pasturage or fishery or other rights of any nature whatsoever, in consideration of a guarantee by England and France of the Swedish and Norwegian territory[1]. In the two former cases a guarantor can only intervene on the demand of the party or, where more than one is concerned, of one of the parties interested, because the state in favour of which the guarantee has been given is the best judge of its own interests, and as the guarantee purports to have been given solely or at least primarily for its benefit, no advantage which may happen to accrue to the guaranteeing state from the arrangements to the preservation of which the guarantee is directed can invest the latter power with a right to enforce them independently. In the last-mentioned case, on the other hand, any guarantor is at liberty to take the initiative, every guaranteeing state being at the same time a party primarily benefited.

[The treaty of 1902 between Great Britain and Japan, though clearly a Treaty of Guarantee, is too complex in its stipulations to fall strictly within any of the above categories. Under it the contracting parties, while mutually recognising the indepen[illegible] of China and Corea, declared that in view of their special

[1] De Martens, Rec. viii. 642; Hertslet, Map of Europe by Treaty, 863, 870, 981, 983, 1241, 1281.

interests in these countries, it should be admissible for either of them to take such measures as might be indispensable to safeguard those interests from the aggressive action of any other powers or from internal disturbances necessitating intervention for the protection of life and property. It was further agreed that if either Great Britain or Japan should become involved in war with another power in defence of their respective interests as above described, the other contracting party should maintain strict neutrality and use its best efforts to prevent other powers from joining in hostilities against its ally. Should, however, any other power or powers take part in the conflict, then it was agreed that the other contracting party should come to the assistance of its ally, conduct the war in common, and make peace in mutual agreement with it [1].]

When a guarantee is given by a single state or by two or more states severally, or jointly and severally, it must be acted upon at the demand of the country benefited unless such action would constitute a clear infraction of the universally recognised principles and rules of international law, unless it would be inconsistent with an engagement previously entered into with another power, or unless the circumstances giving rise to the call upon the guaranteeing power are of the nature of internal political changes;—a guarantee given to a particular dynasty, for example, is good only against external foes and not against the effects of revolution at home, unless the latter object be specifically mentioned, and then only subject to the limitations before mentioned. It need scarcely be added that the fulfilment of the guarantee must be possible [2].

Effect of a collective guarantee.

When a guarantee is given collectively by several powers the extent of their obligation is not quite so certain. M. Bluntschli

[1] [Annual Register 1902, pp. 58, 59.]

[2] Vattel, liv. ii. ch. xvi. §§ 235-9; Klüber, §§ 157-9; Twiss, i. § 231; Phillimore, ii. ch. vii; Bluntschli, §§ 430-41. Sir R. Phillimore thinks that a guarantee 'contra quoscunque' obliges to assistance against rebellion. M. Bluntschli considers that a guarantee falls to the ground when it is irreconcileable with 'les progrès du droit international.'

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lays down that they are bound, upon being called upon to act in the manner contemplated by the guarantee, to examine the affair in common for the purpose of seeing whether a case for intervention has arisen, and to agree if possible upon a common conclusion and a common action; but that if no agreement can be arrived at, each guarantor is not only authorised but bound to act separately according to his view of the requirements of the case. A very different doctrine was put forward by Lord Derby in 1867 when explaining in the House of Commons the opinion held by the English government as to the nature of the obligations undertaken by it in signing the Luxemburg convention of that year. According to him a collective guarantee means, 'that in the event of a violation of neutrality all the powers who have signed the treaty may be called upon for their collective action. No one of those powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability. We are bound in honour—you cannot place a legal construction upon it—to see in concert with others that these arrangements are maintained. But if the other powers join with us it is certain that there will be no violation of neutrality. If they, situated exactly as we are, decline to join, we are not bound single-handed to make up the deficiency. Such a guarantee has obviously rather the character of a moral sanction to the arrangements which it defends than that of a contingent liability to make war. It would no doubt give a right to make war, but would not necessarily impose the obligation[1].' It is in favour of the latter construction that a collective guarantee must be supposed to be something different from a several, or a joint and several, guarantee, and that if it imposes a duty of separate intervention in the last resort it is not very evident what distinction can be drawn between them. On the other hand, a guarantee is meaningless if it does no more than provide for common action under circumstances in which the guaranteeing powers would act together apart from treaty, or for a right of

[1] Bluntschli, § 440; Hansard, 3rd Ser. clxxxvii. 1922.

single action under circumstances which would provoke such action as a matter of policy. The only objects of a guarantee are to secure that action shall be taken under circumstances in which a state might not move for its own sake, and to prevent other states from disregarding the arrangement, or attacking the territory guaranteed, by holding up to them the certainty that the force of the guaranteeing powers will be employed to check them. On the construction given to a collective guarantee by Lord Derby neither end would be attained. Whichever view be adopted the word collective is inconvenient. If it imposes a duty, the extent of the duty is not at least clearly defined. If it can be held to prevent a duty from being imposed, it would be well to abstain from couching agreements in terms which may seriously mislead some of the parties to them, or to avoid making agreements at all which some of the contracting parties may intend from the beginning to be illusory.

Effects of treaties 1. upon the contracting parties;

The effect of an international contract is primarily to bind the parties to it by its provisions, either for such time as is fixed, if it be made for a definite period, or until its objects are satisfied, or indefinitely if its object be the infinite repetition of certain acts, or the setting up once for all of a permanent state of things. In all cases the continuance of the obligation is dependent upon conditions which will be mentioned later.

2. upon third parties.

In a secondary manner the due conclusion of an international contract also affects third parties. A state of things has come into existence which, having been legally created in pursuance of the fundamental rights of states, other countries are bound to respect, unless its legal character is destroyed by the nature of its objects, or unless it is evidently directed, whether otherwise legally or not, against the safety of a third state, and except in so far as it is inconsistent with the rights of states at war with one another. So long therefore as a contract is in accordance with law, or consistent with the safety of states not parties to it, the latter must not prevent or hinder the contracting parties from carrying it out.

PART II CHAP. X Modes of assuring execution of treaties.

It was formerly the habit to endeavour to increase the security for the observance of treaties, offered by the pledged word of the signataries, by various means, which have now almost wholly fallen into disuse. Three only have at all been employed in relatively modern times, viz. the taking of hostages, the occupation of territory, and guarantee by a third power.

The Treaty of Aix la Chapelle in 1748 was the last occasion upon which hostages were given to secure the performance of any agreement other than a military convention. Anything which requires to be said about hostages may therefore be postponed until conventions of the latter kind come under notice.

A guarantee by a third power is only one form of the treaties of guarantee, which have already been noticed.

Occupation of territory was formerly often used as a mode of taking security for the payment of debts for which the territory occupied was hypothecated. In such cases the territory occupied becomes the property of the creditor if a term fixed for repayment of the debt passes without the claim being satisfied, or if possession, as in the case of Orkney and Shetland, which were mortgaged by Denmark to Scotland in 1469, has been retained long enough for a title by prescription to be set up. In recent times occupation of territory by way of security for the payment of a debt has taken place only when the victor in a war has retained possession of part of his enemy's country until payment of the sum levied for war expenses, and occupation to compel the fulfilment of stipulations of other kinds has also occurred only as part of the arrangements consequent upon the conclusion of peace[1].

Extinction of treaties.

International contracts are extinguished when their objects are satisfied or when a state of things arises through which they become void, and they temporarily or definitively cease to

[1] Klüber, §§ 155-6; Phillimore, ii. §§ liv–v; Bluntschli, § 428; Calvo, § 702.

be obligatory when a state of things arises through which they are suspended or become voidable [1].

1. When their objects are satisfied.

The object of a treaty is satisfied if, as sometimes happens with treaties of commerce, it has been concluded for a fixed time, so soon as the period which has been fixed has elapsed, or if it has been concluded irrespectively of time, so soon as the acts stipulated in it have been performed. A treaty, for example, by which one state engages to pay another a sum of money, as compensation for losses endured by the subjects of the latter through illegal conduct of the former, is satisfied on payment being made; and an alliance between two states for the purpose of imposing specified terms upon a third is satisfied when a treaty has been concluded by which those terms are imposed.

It may at first seem to be an exception to this rule, though it is not so in reality, that a treaty is not extinguished when the acts contemplated by it, though done once for all, leave legal obligations behind them. If a treaty stipulates for the cession of territory or the recognition of a new state, the act of cession or of recognition is no doubt complete in itself; but the true object of the treaty is to set up a permanent state of things, and not barely to secure the performance of the act which forms the starting-point of that state; the ceding or recognising country therefore remains under an obligation until the treaty has become void or voidable in one of such of the ways to be indicated presently as may be applicable to it [2].

A treaty becomes void—

2. When they become void.

1. By the mutual consent of the parties, shown either tacitly by the conclusion of a new treaty between them which is inconsistent with that already existing, or expressly by declaration of its nullity [3].

[1] For the effect of war in extinguishing and suspending treaties, see postea, pt. iii. ch. i.

[2] Calvo, § 643. Most writers content themselves with saying that treaties of the above kind are perpetual, without mentioning any reason for their being so.

[3] The former mode of showing mutual consent is of course frequent; of

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2. By express renunciation by one of the parties of advantages taken under it.

3. By denunciation; when the right of denunciation has been expressly reserved; or when the treaty, as in the case of treaties of alliance or commerce, postal conventions and the like, is voidable at the will of one of the parties, the nature of its contents being such that it is evidently not intended to set up a permanent state of things.

4. By execution having become impossible, as, for example, if a state is bound by an offensive and defensive alliance with both of two states which engage in hostilities with one another.

5. When an express condition upon which the continuance of the obligation of the treaty is made to depend ceases to exist.

6. By incompatibility with the general obligations of states, when a change has taken place in undisputed law or in views universally held with respect to morals. If, for example, it were found that, by successive renewals of treaties and incorporations of treaties in others subsequently made, an agreement to allow a state certain privileges in importing slaves into the territory of the other contracting power was still subsisting, it might fairly be treated as void, and as not protecting subjects of the former state who might endeavour to introduce slaves in accordance with its terms [1].

3. When they become voidable.

Up to this point it has not been difficult to state the conditions under which treaties cease to be binding. They resume themselves into impossibility of execution, consent of the parties, either present or anticipatory in view of foreseen contingencies, satisfaction of the object of the compact, and incompatibility with undisputed law and morals. With regard to such causes of nullity there can be no room for disagreement, and little for the exercise of caution. It is less easy to lay down precisely the conditions under which

the latter the Treaty of Paris of 1814 is an example, the treaties of Presburg and Vienna between France and Austria, and those of Basle and Tilsit between France and Prussia, having been declared by it to be null. Hertslet, Map of Europe by Treaty, 22 and 25.

[1] Klüber, § 164; Bluntschli, §§ 450 and 454; Calvo, § 726.

a treaty becomes voidable; that is to say, under which one of the contracting parties acquires the right of declaring itself freed from the obligation under which it has placed itself. A clear principle is ready to hand, which, if honestly applied, would generally furnish a sufficient test of the existence or non-existence of the right in a particular case; but modern writers, it would seem, are more struck by the impossibility of looking at international contracts as perpetually binding, than by the necessity of insisting upon that good faith between states without which the world has only before it the alternatives of armed suspense or open war, and they too often lay down canons of such perilous looseness, that if their doctrine is to be accepted an unscrupulous state need never be in want of a plausible excuse for repudiating an inconvenient obligation. And this unfortunately occurs at a time when the growing laxity which is apparent in the conduct of many governments and the curious tolerance with which gross violations of faith are regarded by public opinion render it more necessary than ever that jurists should use with greater than ordinary care such small influence as they have to check wrong and to point out what is right[1].

Test of voidability.

The principle which has been mentioned as being a sufficient test of the existence of obligatory force or of the voidability of a treaty at a given moment may be stated as follows. Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment

[1] Fénelon, in the following passage, perhaps claims too much favour for a short prescription, and he writes with reference to the customs of his age; but essentially he is right for all time. 'Pour donner quelque consistance au moral et quelque sûreté aux nations il faut supposer, par préférence à tout le reste, deux points qui sont comme les deux pôles de la terre entière: l'un que tout traité de paix juré entre deux princes est inviolable à leur égard, et doit toujours être pris simplement dans son sens le plus naturel, et interprété par l'exécution immédiate; l'autre, que toute possession paisible et non-interrompue depuis le temps que la jurisprudence demande pour les prescriptions les moins favorables doit acquérir une propriété certaine et légitime à celui qui a cette possession, quelque vice qu'elle ait pu avoir dans son origine. Sans ces deux règles fondamentales point de repos ni de sûreté dans le genre humain.' Directions pour la Conscience d'un Roi. Œuvres, vi. 319 (ed. 1810).

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when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered. If this be true, and it will scarcely be contradicted, it is only necessary to determine under what implied conditions an international agreement is made. When these are found the reasons for which a treaty may be denounced or disregarded will also be found.

Implied conditions under which a treaty is made.

1. That it shall be observed in its essentials by both parties to it.

It is obviously an implied condition of the obligatory force of every international contract that it shall be observed by both of the parties to it. In organised communities it is settled by municipal law whether a contract which has been broken shall be enforced or annulled; but internationally, as no superior coercive power exists, and as enforcement is not always convenient or practicable to the injured party, the individual state must be allowed in all cases to enforce or annul for itself as it may choose. The general rule then is clear that a treaty which has been broken by one of the parties to it is not binding upon the other, through the fact itself of the breach, and without reference to any kind of tribunal. The question however remains whether a treaty is rendered voidable by the occurrence of any breach, or whether its voidability depends upon the breach being of a certain kind or magnitude. Frequently the instrument embodying an international compact includes provisions of very different degrees of importance, and directed to different ends. Is it to be supposed that an infraction of any one of these provisions, whether it be important or unimportant, whether it has reference to a main object of the treaty or is wholly collateral, gives to a state the right of freeing itself from the obligation of the entire agreement? Some authorities hold that the stipulations of a treaty are inseparable, and consequently that they stand and fall together[1]; others distinguish between principal and secondary articles, regarding infractions of the principal articles only as destructive of the

[1] Grotius, lib. ii. cap. xv. § 15; Vattel, liv. ii. ch. xiii. § 202; Heffter, § 98.

binding force of a treaty[1]. Both views are open to objection. It may be urged against the former that there are many treaties of which slight infractions may take place without any essential part being touched, that some of their stipulations, which were originally important, may cease to be so owing to an alteration in circumstances, and that to allow states to repudiate the entirety of a contract upon the ground of such infringements is to give an advantage to those which may be inclined to play fast and loose with their serious engagements. On the other hand, it is true that every promise made by one party in a treaty may go to make up the consideration in return for which essential parts of the agreement are conceded or undertaken, and that it is not for one contracting party to determine what is or is not essential in the eyes of the other. It is impossible to escape altogether from these difficulties. It is useless to endeavour to tie the hands of dishonest states beyond power of escape. All that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the main object, or if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract; but it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant, whether originally or by change of circumstances, with respect to it, could in fairness absolve the other party from performance of his share of the rest of the agreement, though if he had suffered any appreciable harm through the breach he would have a right to exact reparation and an end might be put to the treaty as respects the subject-matter of the broken stipulation. It would of course be otherwise if it could be shown

Calvo (§ 729) adheres to the doctrine, but qualifies it afterwards in such a manner as to make it doubtful how far he intends it to operate.

[1] Wolff, Jus Gentium, § 432; De Martens, Précis, § 59.

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that a particular stipulation, though not apparently connected with the main object of the treaty, formed a material part of the consideration paid by one of the parties.

Treaty of Paris, 1856.

In 1856 the Crimean War was ended by the Treaty of Paris. The object of the treaty was to settle the affairs of the East, so far as possible, in a permanent manner; and in order that this should be done it was considered necessary to secure Turkey against being attacked by Russia under conditions decidedly advantageous to the latter power. To this end the prevention of the naval preponderance of Russia in the Black Sea was essential, and the simplest mode of prevention was to forbid the maintenance of a fleet. This course was accordingly fixed upon. But as, without a fleet, Russia would be exposed to danger in the event of war with a third power, unless access to the Black Sea were denied to its enemy, and as at the same time, in the absence of a Russian navy, the presence of foreign fleets was unnecessary to Turkey, the Treaty of Paris, while limiting the number of vessels to be kept within the Sea by the two powers respectively, contained also a promise on the part of Turkey to close the Bosphorus to foreign vessels of war, except in case of hostilities in which she was herself engaged; and the Black Sea was declared to be neutral. In 1870 the Russian government seized the occasion presented by the Franco-German War to escape from the obligations under which it lay, and issued a circular declaring itself to be no longer bound by that part of the Treaty of Paris which had reference to the Black Sea. The grounds upon which it was attempted to justify this proceeding were the following. It was alleged that fifteen years' experience had shown the principle of the neutralisation of the Black Sea to be no more than a theory, because while Russia was disarmed, Turkey retained the privilege of maintaining unlimited naval forces in the Archipelago and the Straits, and France and England preserved their power of concentrating their squadrons in the Mediterranean; it was asserted that 'the treaty of the $\frac{18}{30}$ March, 1856, had not escaped the modifications to which

most European transactions have been exposed, and in the face of which it would be difficult to maintain that the written law, founded upon the respect for treaties as the basis of public right and regulating the relations between states, retains the moral validity which it may have possessed at other times,' the modifications indicated being the changes which had been sanctioned in Moldavia and Wallachia, and which had been effected by 'a series of revolutions equally at variance with the spirit and letter' of the treaty; finally, it was pretended that 'under various pretexts, foreign men of war had been repeatedly suffered to enter the straits, and whole squadrons, whose presence was an infraction of the character of absolute neutrality attributed to those waters, admitted to the Black Sea.' It needed some boldness to put forward the two former excuses. The disadvantages under which Russia lay through the ability of Turkey to maintain a fleet elsewhere than in the Black Sea, and through the power of England and France to place squadrons in the Mediterranean, were neither new nor revealed by the experience of fifteen years; the second of them was of course independent of the treaty, and the first lay before the eyes of the Russian negotiators when they consented to its stipulations. As regards the Danubian Principalities, their relations with the suzerain power had been put aside by the Treaty of Paris for precise definition in a separate convention; the language of the treaty did not exclude their union; they coalesced before a convention was signed; and Russia was a party to that by which their unification was recognised. The third ground is the only one which could be used with some plausibility. 'Whole squadrons' had not been admitted into the Black Sea, but in the course of fifteen years three American vessels, one Russian, one English, one French, and three of other nations, had apparently been allowed to enter, for reasons other than certain ones expressly recognised by the treaty as sufficient. There can be no question that in strictness a breach of the treaty had been committed; but there can be equally little doubt that the admission of a few

isolated ships at different times was not an act in itself calculated to endanger the objects of the treaty, viz. the settlement of Eastern affairs and the security of Turkey, or to impair the efficacy of the safeguards given to Russia by way of compensation for the loss of naval power. Lord Granville indeed in answering the Russian circular did not think it worth while to answer the pleas which it contained. He took for granted that no breach had taken place of such kind as to free Russia from her obligations, and confined himself to 'the question in whose hand lay the power of releasing one or more of the parties to the treaty from all or any of its stipulations. It has always been held,' he says, 'that the right' of releasing a party to a treaty 'belongs only to the governments who have been parties to the original instrument. The despatches of the Russian government appear to assume that any one of the powers who have signed the engagement may allege that occurrences have taken place which in its opinion are at variance with the provisions of the treaty, and though their view is not shared nor admitted by the co-signatary powers, may found upon that allegation, not a request to those governments for a consideration of the case, but an announcement to them that it has emancipated itself, or holds itself emancipated, from any stipulations of the treaty which it thinks fit to disapprove. Yet it is quite evident that the effect of such doctrine and of any proceeding which, with or without avowal, is founded upon it, is to bring the entire authority and efficacy of treaties under the discretionary control of each of the powers who may have signed them; the result of which would be the entire destruction of treaties in their essence.' The protest of Lord Granville, although uttered under circumstances which made its practical importance at the moment very slight, nevertheless compelled Russia to abandon the position which it had taken up. A conference was held of such of the powers, signatary of the Treaty of Paris, as could attend, at which it was declared that 'it is an essential principle of the law of nations that no power can liberate itself from the engagements

of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement.' The general correctness of the principle is indisputable, and in a declaration of the kind made it would have been impossible to enounce it with those qualifications which have been seen to be necessary in practice. The force of its assertion may have been impaired by the fact that Russia, as the reward of submission to law, was given what she had affected to take. But the concessions made were dictated by political considerations, with which international law has nothing to do. It is enough from the legal point of view that the declaration purported to affirm a principle as existing, and that it was ultimately signed by all the leading powers of Europe[1].

2. That it shall remain consistent with the rights of self-preservation.

A second implied condition of the continuance of the obligatory force of a treaty is that if originally consistent with the primary right of self-preservation, it shall remain so. A state may no doubt contract itself out of its common law rights—it may, for example, surrender a portion of its independence or may even merge itself in another state; but a contract of this kind must be distinct and express. A treaty therefore becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a state, provided that its injurious effects were not intended by the two contracting parties at the time of its conclusion. Thus if the execution of a treaty of alliance or guarantee were demanded at a time when the ally or guaranteeing state were engaged in a struggle for its own existence or under circumstances which rendered war inevitable with another state against which success would be impossible, the country upon which the demand was made would be at liberty to decline to fulfil its obligations of alliance or guarantee. If, again, a treaty is made in view of the continuance of a particular form of government in one or both of the contracting states, either of them may release itself from the agreement so soon

[1] Hertslet's Map of Europe by Treaty, 1256–7, 1892–8, 1904.

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as its provisions become inconsistent with constitutional change [1].

3. That the parties to it shall retain their freedom of will with respect to its subject-matter.

It is also an implied condition of the continuing obligation of a treaty that the parties to it shall keep their freedom of will with respect to its subject-matter except in so far as the treaty is itself a restraint upon liberty, and the condition is one which holds good even when such freedom of will is voluntarily given up. If a state becomes subordinated to another state, or enters a confederation of which the constitution is inconsistent with liberty of action as to matters touched by the treaty, it is not bound to endeavour to carry out a previous agreement in defiance of the duties consequent upon its newly-formed relations. In such cases the earlier treaty does not possess priority over the later one, because it cannot be supposed that a state will subordinate its will to that of another state, or to a common will of which its own is only a factor, except under the pressure of necessity or of vital needs, so that arrangements involving such subordination, like those made under compulsion at the end of a war, are taken altogether out of the category of ordinary treaties.

Other alleged grounds upon which a treaty may be voided.

Beyond the grounds afforded by these three conditions there is no solid footing upon which repudiation of treaty obligations can be placed. The other reasons for which it is alleged that states may refuse to execute the contracts into which they have entered resolve themselves into so many different forms of excuse for disregarding an agreement when it becomes unduly onerous in the opinion of the party wishing to escape from its burden. M. Heffter says that a state may repudiate a treaty when it conflicts with 'the rights and welfare of its people;' M. Hautefeuille declares that 'a treaty containing the gratuitous cession or abandonment of an essential natural right, such for example as part of its independence, is not obligatory;' M. Bluntschli thinks that a state may hold treaties incompatible

[1] De Martens, Précis, §§ 52, 56; Wheaton, Elem. pt. iii. ch. ii. § 10; Bluntschli, §§ 458, 460.

with its development to be null, and seems to regard the propriety of the denunciation of the treaties of 1856 by Russia as an open question[1]. The doctrine of M. Fiore exhibits the extravagancies which are the logical consequence of these views. According to him 'all treaties are to be looked upon as null, which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights;' and by the light of this principle he finds that if 'the numerous treaties concluded in Europe are examined they are seen to be immoral, iniquitous, and valueless[2].' Such doctrines as these may be allowed to speak for themselves. Law is not intended to bring licence and confusion, but restraint and order; and neither restraint nor order can be imposed by the principles of which the expression has just been quoted. Incapable in their vagueness of supplying a definite rule, fundamentally immoral by the scope which they give to unregulated action, scarcely an act of international bad faith could be so shameless as not to find shelter behind them. High-sounding generalities, by which anything may be sanctioned, are the favourite weapons of unscrupulousness and ambition; they cannot be kept from distorting the popular judgment, but they may at least be prevented from affecting the standard of law.

Renewal of treaties.

An extinguished treaty may be renewed by express or tacit consent. It is agreed that when the consent is tacit it must be signified in such a manner as to show the intention of the parties unmistakably[3]; and it may be added that in the case of the majority of treaties it would be hard to show intention tacitly beyond chance of mistake. In such a case no doubt as that put by Vattel, who supposes a treaty of subsidy to have been concluded for a term, on the expiration of which a sum equal to the annual amount of the subsidy is offered and taken, there can be no question that the parties tacitly agree to renew the treaty for

[1] Heffter, § 98; Hautefeuille, i. 9; Bluntschli, §§ 415 and 456.
[2] Nouv. Droit Int. 1re ptie, chap. iv.
[3] Vattel, liv. ii. ch. xiii. § 199; Heffter, § 99; Calvo, § 733; Fiore, §§ 1133–5.

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twelve months, and that the power receiving the money is bound for that time to render the services for which it is the payment. But in general, intention cannot be inferred with like certainty. If, for example, it is provided in a commercial treaty that certain duties shall be levied on both sides, and the parties continue after the expiration of the treaty to levy the duties fixed by it, it is manifest that there is nothing to show that the admission of goods by one party at a certain rate is intended to be dependent upon admission by the other party at a corresponding rate, still less that the condition, if intended, has been accepted; the conduct of both sides is consistent with volunteered action in their own interests independently of any agreement [1]. It would in fact be unsafe to assume a treaty to be tacitly renewed except in cases in which something is done or permitted which it cannot be supposed would have been done or permitted without such an equivalent as that provided in the treaty [2].

[1] It might perhaps be otherwise if the whole of a commercial treaty containing provisions of very various kinds continued to be observed. De Martens (quoted by Phillimore, iii. § dxxix) mentions in his treatise 'über die Erneuerung der Verträge' that more than one treaty of commerce entered into in the seventeenth century was in existence towards the end of the eighteenth century.

[2] Most writers devote considerable space to a classification of treaties. Vattel, for example, divides them into equal treaties, by which 'equal, equivalent, or equitably proportioned' promises are made, and unequal treaties in which the promises do not so correspond; personal treaties which expire with the sovereign who contracts them, and real treaties which bind the state permanently. De Martens arranges them under the heads of personal and real treaties, of equal and unequal alliances, and of transitory conventions, treaties properly so called, and mixed treaties. Of these last the first kind, being carried out once for all, is perpetual in its effects; the duration of the second, which stipulates for the performance of successive acts, is dependent on the continued life of the state and other contingencies; and the third partakes of both characters. Heffter divides them into (1) 'conventions constitutives, qui ont pour objet soit la constitution d'un droit réel sur les choses d'autrui, soit une obligation quelconque de donner ou de faire ou de ne faire point (e.g. treaties of cession, establishment of servitudes, treaties of succession); (2) conventions réglementaires pour les rapports politiques et sociaux des peuples et de leurs gouvernements (e.g. treaties of commerce); (3) traités de société (e.g. of alliance, or for the repression of the slave trade).' Calvo distinguishes treaties with reference to their form into transitory and permanent, with reference to their nature into personal and

real, with reference to their effects into equal and unequal, and simple and conditional, finally with reference to their objects into treaties of guarantee, neutrality, alliance, limits, cession, jurisdiction, commerce, extradition, &c.

It is not very evident in what way these and like classifications are of either theoretical or practical use. Vattel (liv. ii. ch. xii. §§ 172–97), De Martens (Précis, §§ 58–62), Heffter (§ 89), Calvo (§§ 643–68), Twiss (i. ch. xii), may however be consulted with respect to them.

It may be remarked that international law is not concerned with so-called personal treaties. Accidentally the state may be mixed up with them as a matter of fact when it is identified with the sovereign, but this does not affect the question of principle. Either a treaty is such that one of the two contracting parties must be supposed to have entered into it with a state as the other party, in which case it is 'real' and not terminable with the death or change of the sovereign, or else it is such that it must be supposed to have been entered into with the sovereign in his individual capacity, in which case it never affects the state except in so far as the individual who happens to be sovereign is able to use the resources of the state for his private purposes.

CHAPTER XI

AMICABLE SETTLEMENT OF DISPUTES; AND MEASURES OF CONSTRAINT FALLING SHORT OF WAR

Modes of settling disputes amicably.

Disputes can be amicably settled either by direct agreement between the parties, by agreement under the mediation of another power, or by reference to arbitration. The last of these modes is the only one of which anything need be said, the other two being obviously outside law.

Arbitration.

When two states refer a disputed matter to arbitration, the scope and conditions of the reference are settled by a treaty or some other instrument of submission. Among the conditions are sometimes the rules or principles which are to be applied in the case. When no such rules or principles are laid down the arbitrators proceed according to the rules of civil law, unless, as is sometimes the case, they agree to be bound by special rules framed by themselves. To form the arbitrating tribunal the litigating states either choose a sovereign or other head of a state as sole arbitrator, or they fix upon one or more private persons to act in that capacity, or finally they commit to foreign states the choice of either the whole or part of a body of arbitrators. When more than one person is appointed it is usual either to make the number uneven, or to nominate a referee with whom the decision lies in case of an equal division of votes. If no such precaution is taken, and an equal division of votes occurs, the arbitration falls to the ground. When the head of a state is chosen as arbitrator it is not understood that he must examine into and decide the matter personally; he may, and generally does, place the whole affair in the hands of persons designated by him, the decision only being given in his name. Private persons on the other hand cannot delegate the functions which have been confided to them. The arbitrating person or body forms

a true tribunal, authorised to render a decision obligatory upon the parties with reference to the issues placed before it. It settles its own procedure, when none has been prescribed by the preliminary treaty; and when composed of several persons it determines by a majority of voices.

An arbitral decision may be disregarded in the following cases; viz. when the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal. Some writers add that the decision may also be disregarded if it is absolutely contrary to the rules of justice, and M. Bluntschli considers that it is invalidated by being contrary to international law; he subsequently says that nothing can be imposed by an arbitral decision which the parties themselves cannot stipulate in a treaty. It must be uncertain whether in making this statement he intends to exemplify his general doctrine or to utter it in another form. Whatever may be the exact scope of these latter reserves, it is evident that an arbitral decision must for practical purposes be regarded as unimpeachable except in the few cases first mentioned; and that there is therefore ample room for the commission, under the influence of sentiment, of personal or national prejudices, of erroneous theories of law, and views unconsciously biassed by national interests, of grave injustice, for which the injured state has no remedy. It may be observed also that it must always be difficult for a state to refuse to be bound by an arbitral award, however unjust it may be. The public in foreign states will seldom give itself the trouble to form a careful judgment in the facts; it will prefer the simple course of assuming that arbitrators are probably right; a state by rejecting an award may stir up foreign public opinion against itself; and this it is not worth while to do unless very grave issues are involved. It must in these circumstances be permissible to distrust arbitration as a means of obtaining an equitable settlement of international controversies;

at the same time it is to be admitted that where the matter at stake is unimportant, and the questions involved are rather pure questions of fact than of law or mixed fact and law, reference to arbitration is often successful, both as a means of securing that justice shall be done, and of allaying international irritation. Of the arbitral decisions which have been delivered during the last hundred years upon relatively unimportant matters, very few are open to serious criticism; and more than one have settled disputes out of which a good deal of ill feeling might have arisen. It is unfortunate that both the proceedings and the issue in the most important case of arbitration that has yet occurred [namely, that arising out of the Alabama Claims] were little calculated to enlarge the area within which confidence in the results of arbitration can be felt. [On the other hand, both in the recent case of the Behring Sea Fur Seal Fisheries and the still more recent instance of the Venezuela Boundary, recourse has been had to arbitration with conspicuous success[1], and the arbitral method of settling international differences has acquired new authority from the dignity and ability that marked the course of the proceedings[2].

[1] See antea, pp. 111–113, 149.

[2] Vattel, liv. ii. ch. xviii. § 329; Heffter, § 109; Phillimore, iii. § iii; Calvo, §§ 1512–32; Bluntschli, §§ 488–98; Fiore, §§ 1478–91. A scheme of arbitral procedure drawn up by a Committee of the Institute of International Law, was adopted at the meeting of the Institute held at the Hague in 1875; see Annuaire de l'Institut de Droit International for 1877, pp. 123–33. Calvo (§§ 1489–1510) gives a list of twenty-one disputes settled by arbitration from 1794 onwards. Four later examples may be found in the Rev. de Droit Int. xix. 196 and xx. 511. One is a case of compensation for ill-treatment of a foreigner; three are cases of doubtful boundary; one is unimportant, the other three are concerned only with matters of fact. They are therefore cases which are eminently fitted to be settled by arbitration if there is good faith on both sides, and the arbitrator can be trusted to be equitable. In these instances there is no reason to doubt that arbitration will be successful; but the rejection by the United States in 1831 of the award given against it in the matter of the British-American boundary shows how little calculated the method is to put an end to disputes of any magnitude unless honesty of intention exists on every hand. [Mr. John Bassett Moore, in his 'History and Digest of the International Arbitrations to which the United States has been a party,' has compiled a list of arbitral decisions in general up to the year 1898; see pp. 4821, 4851 et seq.

On the 29th of July, 1899, a convention for the pacific settlement of international disputes was signed by the representatives of twenty-four of the states assembled at the Hague on the initiative of the Czar to consider the practicability of a reduction of international armaments and of the substitution of pacific methods for force and violence in the sphere of foreign relations. Under that convention a Permanent Court of Arbitration, with an official staff, is constituted at the Hague, while the signatary powers are each to designate not more than four representatives to act as arbitrators in case of need, and as such to be enrolled as members of the court. Should disputes arise between any of the parties to the convention the court is always at their disposal, and recourse may be had to it even by contestants who have not signified their adhesion to the convention. The powers who signed were Germany, Austria, Belgium, Denmark, Spain, the United States, Mexico, France, Great Britain, Italy, Japan, Luxembourg, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden and Norway, Switzerland, and Bulgaria. The Republics of Salvador, Guatemala, and Uruguay as well as the Empire of Corea have subsequently requested to be admitted to the benefits of the convention.

The tribunal which has so recently made its award in the case of the disputed Alaskan boundary was in all essentials a Court of Arbitration, though its constitution was unusual. It consisted of 'six impartial jurists of repute, who should consider judicially the questions submitted to them,' nominated in equal numbers by the British Sovereign and the President of the United States. No provision was made for the contingency of an equal division of votes, though the fact that the Commissioners appointed were three British and three American subjects rendered such an event by no means improbable. In the result a bare majority of four was obtained, and the two Commissioners who formed the minority, both Canadians, declined to sign the award. This fact, though unfortunate, did not of course affect its validity. The serious blot on the proceedings was the manner in which the United States chose to construe the term 'impartial jurists of repute'; and though the amicable settlement of a dispute of long standing is a matter for congratulation, it seems improbable that recourse will again be had to a court similarly composed. The full text of the award will be found in the Times of October 21, 1903; the reasons of the Canadian Commissioners for refusing to append their signatures are contained in the issue of the following day.]

Up to the present date only one judgment has been pronounced by the Permanent Court of Arbitration, and that in a dispute of long standing between the United States and Mexico relating to 'The Pious Fund of the Californias,' but the court is at this moment sitting to decide certain questions of preferential treatment arising out of the claims made by Great Britain, Italy, and Germany against Venezuela. Under a treaty signed at Tokio in August, 1902, the interpretation of various disputed clauses in treaties between Japan, Great Britain, France, and Germany are to go before the Hague Tribunal; and on October 14, 1903, an agreement was entered into between the English and French Governments, providing that questions of a judicial character or relating to the interpretation of existing treaties which might arise between the two countries should, if found incapable of settlement by diplomatic means, be referred to the same Court of Arbitration.

The existence of such a permanent body provides a convenient machinery for the settlement of international disputes of a minor order, and we may safely predict that recourse will be had to it with growing frequency and success, while its decisions, both final and interlocutory, will tend to furnish a body of precedents possessing value and authority in the conduct of international controversy. Whether there is any reasonable prospect of the Hague Tribunal being invoked in cases where questions of magnitude, or involving popular prejudices, are at stake time alone can show. The omens as yet are scarcely propitious; and in the Anglo-French agreement mentioned in the last paragraph it is expressly stipulated that the method of arbitration shall apply only to such questions as do not involve the vital interests, the independence, or the honour of the two contracting parties [1].]

[1] [The text of the Hague Convention will be found in De Martens, Nouv. Rec. Gén. 2e Sér. xxvi. 920–48. For additional information I am indebted to Dr. L. H. Ruyssenaers, Secretary-General of the Permanent Court of Arbitration. In the Recueil Général of De Martens, China and Turkey appear among the signataries, but Dr. Ruyssenaers does not include them in

A reference to arbitration falls to the ground on the death of an arbitrator, unless provision for the appointment of another has been made, and on the conclusion of a direct agreement between the parties by way of substitution for the reference. [The Hague Convention provides for the substitution of a fresh arbitrator in cases of death, resignation, or removal.]

Of the measures falling short of war which it is permissible to take, retorsion and reprisal are the subjects of longest custom.

Retorsion. Retorsion is the appropriate answer to acts which it is within the strict right of a state to do, as being general acts of state organisation, but which are evidence of unfriendliness, or which place the subjects of a foreign state under special disabilities as compared with other strangers, and result in injury to them. It consists in treating the subjects of the state giving provocation in an identical or closely analogous manner with that in which the subjects of the state using retorsion are treated. Thus if the productions of a particular state are discouraged or kept out of a country by differential import duties, or if its subjects are put at a disadvantage as compared with other foreigners, the state affected may retaliate upon its neighbours by like laws and tariffs [1].

Reprisal. Reprisals are resorted to when a specific wrong has been committed; and they consist in the seizure and confiscation of property belonging to the offending state or its subjects by way of compensation in value for the wrong; or in seizure of property or acts of violence directed against individuals with the object of compelling the state to grant redress; or, finally, in the suspension of the operation of treaties. When reprisals are not directed against property they usually, though not necessarily, are of identical nature with, or analogous to, the act by which they have been provoked. Thus for example, when Holland in 1780 repudiated the treaty obligation, under which she lay, to

his list of the powers that have ratified. The adhesion of Turkey to the principle of arbitration was clogged by a declaration which robbed it of all value (Nouv. Rec. Gén. l. c. p. 737); the course of events in China since the summer of 1899 is sufficient explanation for its non-appearance.]

[1] De Martens, Précis, § 254; Phillimore, iii. § vii; Bluntschli, § 505.

succour England when attacked, the British government exercised reprisals by suspending 'all the particular stipulations concerning freedom of navigation and commerce, &c. contained in the several treaties now existing between his majesty and the republic[1].'

Such measures as those mentioned are *primâ facie* acts of war; and that they can be done consistently with the maintenance of peace must be accounted for, as in the case of like acts done in pursuance of the right of self-preservation, by exceptional reasons. The reasons however in the two cases are very different. In the one they are supplied by urgent necessity; in the other there is not only no necessity, but as a rule the acts for which reprisals are made, except when reprisals are used as a mere introduction to war, are of comparative unimportance. It is this which justifies their employment. They are supposed to be used when an injury has been done, in the commission of which a state cannot be expected to acquiesce, for which it cannot get redress by purely amicable means, and which is scarcely of sufficient magnitude to be a motive of immediate war. A means of putting stress, by something short of war, upon a wrong-doing state is required; and reprisals are not only milder than war, since they are not complete war, but are capable of being limited to such acts only as are the best for enforcing redress under the circumstances of the particular case. It of course remains true that reprisals are acts of war in fact, though not in intention, and that, as in the parallel instances of intervention and of acts prompted by the necessities of self-preservation, the state affected determines for itself whether the relation of war is set up by them or not. If it elects to regard them as doing so, the outbreak of war is thrown back by the expression of its choice to the moment at which the reprisals were made.

The forms of reprisals most commonly employed in recent times consist in an embargo of such ships belonging to the

[1] Declaration of the Court of Great Britain, 17th April, 1780. Ann. Regist. for 1780, p. 345.

offending state as may be lying in the ports of the state making reprisal, or in the seizure of ships at sea, or of any property within the state, whether public or private, which is not entrusted to the public faith. Embargo is merely a sequestration. Vessels subjected to it are consequently not condemned so long as the abnormal relations exist which have caused its imposition. If peace is confirmed they are released as of course; if war breaks out they become liable to confiscation [1]. It is not necessary that vessels, or other property, seized otherwise than by way of embargo, should be treated in a similar manner. They may be confiscated so soon as it appears that their mere seizure will not constrain the wrong-doing state to give proper redress. In recent times however instances of confiscation do not seem to have occurred, and probably no property seized by way of reprisal would now be condemned until after the outbreak of actual war.

Embargo by way of reprisal.

A somewhat recent case of reprisals by way of combined seizure and embargo is afforded by the proceedings taken by England against the Two Sicilies in 1839. A sulphur monopoly had been granted by the latter country to a French company in violation of a treaty of commerce made with Great Britain in

Reprisals made by England upon the Two Sicilies in 1839.

[1] The doctrine of the English courts with respect to the effect of embargo was laid down by Lord Stowell in the case of the Boedes Lust (v Rob. 246). The seizure of Dutch property under an embargo in 1803 was, he said, 'at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, and so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the animus by which it is done; that it was done hostili animo, and is to be considered as a hostile measure, ab initio, against persons guilty of injuries which they refuse to redeem by any amicable alteration in their measures. This is the necessary course, if no particular compact intervenes for the restoration of such property taken before a formal declaration of hostilities.' It may be questioned whether this doctrine is not unnecessarily artificial. To imagine a hostile animus at the moment of capture is surely needless when the property has undoubtedly acquired an enemy character at the time of condemnation through the fact that war has broken out.

1816. The revocation of the grant was demanded and refused; upon which the English government decided to make reprisals, and the admiral commanding the Mediterranean fleet was ordered 'to cause all Neapolitan and Sicilian ships which he might meet with either in the Neapolitan or Sicilian waters to be seized and detained, until such time as notice should be received from her Majesty's minister at Naples that this just demand of her Britannic Majesty's government had been complied with.' A number of vessels were captured accordingly, and an embargo was at the same time laid on all ships at Malta bearing the flag of the Two Sicilies. These measures not being intended to amount to war, or to be introductory to it, the English minister was directed to remain at Naples; and he in fact remained there notwithstanding that a counter embargo was laid on British vessels by the Sicilian government. The affair was ultimately composed under the mediation of France; the grant of the monopoly being rescinded, the vessels seized and embargoed by England were restored to their owners.

Acts which may be done by way of reprisal.

It must not be assumed that forms of reprisal other than the above are improper because they have for a long time been rare. The justification of reprisals being that they are the means of avoiding the graver alternative of war, it must in principle be conceded that anything short of complete war is permissible for sufficient cause. Remedies must vary in stringency with the seriousness of the injuries which call for their application. If however on the one hand the acts which may be done by way of reprisals cannot be kept within any precise bounds, on the other they stray so widely from the ordinary rules of peace that the burden of showing their necessity, and still more the necessity that they shall be of a given severity, is thrown upon the state making use of them. To make reprisals either disproportioned to the provocation, or in excess of what is needed to obtain redress, is to commit a wrong; and, to judge from the amount of feeling which has been shown with respect to some cases in which it was commonly thought that the action taken was in

excess of the occasion, it may be added that the wrong is one which there is less disposition to judge leniently than there is to pardon offences of a much more really serious nature[1].

Pacific blockade.

Since the beginning of the nineteenth century what is called pacific blockade has been not infrequently used as a means of constraint short of war. The first instance occurred in 1827, when the coasts of Greece were blockaded by the English, French and Russian squadrons, while the three powers still professed to be at peace with Turkey. Other like blockades followed in rapid succession during the next few years. The Tagus was blockaded by France in 1831, New Granada by England in 1836, Mexico by France in 1838, and La Plata from 1838 to 1840 by

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. c. xxiv; Vattel, liv. ii. ch. xviii. §§ 342–54; De Martens, Précis, §§ 255–62; Ortolan, Dip. de la Mer, liv. ii. ch. xvi; Heffter, § 110; Twiss, ii. §§ 11–20; Calvo, §§ 1568–89; Bluntschli, §§ 500 and 502–4.

Much of what appears in the older and even in some modern books upon the subject of reprisals has become antiquated. Special reprisals, or reprisals in which letters of marque are issued to the persons who have suffered at the hands of the foreign state, are no longer made; all reprisals that are now made may be said to be general reprisals carried out solely through the ordinary authorised agents of the state, letters of marque being no longer issued.

It is not a little startling to find M. Bluntschli enumerating amongst forms of reprisal, the sequestration of the public debts of the state, and the arrest of subjects of the state offering provocation who may happen to be within the jurisdiction of the state making reprisals. It is true that as regards sequestration M. Bluntschli at first limits the right of making such reprisals to the case of the seizure by the wrong-doing state 'des biens possédés sur son territoire par des citoyens de l'autre état;' but since he goes on to mention the notorious case of the sequestration of the Silesian loan by Frederic II as an example of such reprisals, and as legitimate, he cannot intend to be bound by his general statement of law. As reprisals fall short of war, acts cannot be legitimate by way of reprisal which are not permitted even in war. It is well established that the action of Frederic II was in every way a gross violation of the then accepted law, and the principle that debts due by the state are inviolable in time of war has certainly not lost authority since his time. The arrest of foreigners as hostages is equally opposed to the unquestioned modern rule. Of course these or any other acts may be done by way of retaliation for identical acts already done by the other state; but M. Bluntschli's meaning is evidently not this; moreover such reprisals would be of the nature of hostile reprisals, that is to say, of reprisals made in order to restrain the commission of acts illegitimate according to the rules of war.

France, and from 1845 to 1848 by France and England; the Greek ports were blockaded by England in 1850, and Rio de Janeiro by the same power in 1862. From the last-mentioned year no fresh instance occurred until 1884, when France blockaded a portion of the coast of Formosa. In 1886 Greece was blockaded by the fleets of Great Britain, Austria, Germany, Italy and Russia. [And in 1897 the 'concert of Europe,' represented by the fleets of Great Britain, Austria, France, Germany, Italy, and Russia, blockaded the Island of Crete where an armed insurrection was raging and where a detachment of Greek regular troops had been landed. Finally, in 1902 Venezuela was blockaded by Great Britain and Germany. The fact that in both these last cases it was found necessary by the blockading fleets to fire on the inhabitants of the blockaded territory makes 'pacific' a word of doubtful applicability.]

The manner in which these blockades have been carried out has varied greatly. During the blockade of Mexico by France in 1838, not only were Mexican ships held liable to capture, but vessels belonging to third powers were seized and brought in for condemnation[1]. In the other early instances of pacific blockade the vessels both of the state operated against and of other powers were sequestrated, and were restored at the termination of the blockade, no compensation being given to foreign ships for loss of time and expenses. In 1850 Great Britain adopted a milder course; Greek vessels only were seized and sequestrated, and even Greek vessels were allowed to enter with cargoes *bonâ fide* the property of foreigners, and to issue from port if chartered, before notice of the blockade was given, for the conveyances of cargoes wholly or in part

[1] This is believed to be the only occasion on which vessels of third powers have been confiscated; though, if the pacific character of the Formosan blockade had been omitted, and neutral vessels had been seized, they would have been treated, it would seem, in like manner. M. F. de Martens, in his recent work (Traité de Droit Int. iii. 174), has been misled by M. Hautefeuille into saying that 'l'Angleterre ne laisse passer ni les navires de l'État bloqué ni les navires neutres; elle confisque les uns et les autres.' The statement is entirely destitute of foundation.

belonging to foreigners[1]. In 1886 this precedent was followed[2]; but the blockade of Formosa in 1884 was intended to be enforced in a very different spirit. The French government disavowed any wish to assume the character of a belligerent, but it proposed to treat neutral vessels as liable to capture and condemnation; it was anxious to retain the privilege of coaling its fleet at Hongkong, while it enjoyed the powers attendant upon a hostile blockade. Lord Granville refused to assent to conduct so inequitable towards China, and intimated that he should consider the hostilities which had in fact taken place, together with the formal notice of blockade, to constitute a state of war[3].

[1] State Papers, xxxix.

[2] The instructions given to the British Admiral were to detain every ship under the Greek flag coming out from or entering any of the blockaded ports or harbours, or communicating with any ports within the limit blockaded. 'Should any parts of the cargo on board of such ships belong to any subject or citizen of any foreign power other than Greece, and other than "Austria, Germany, Italy and Russia," and should the same have been shipped before notification of the blockade, or after such notification, but under a charter made before the notification, such ship or vessel shall not be detained. The officer who boards will enter in the log of any ship allowed to proceed the fact of her having been visited and allowed to proceed; also date and at what place such visit occurred. . . . In case of detention steps must be adopted as far as practicable to insure safety of ship and cargo.' Parl. Papers, Greece, No. 4, 1886. Incidentally some occurrences perhaps took place which must have been beyond the intended action of the powers. For example, it is alleged that at Skiathos part of the Austrian squadron made requisitions of provisions on the island, carrying off so much flour as to exhaust the stock, and that it also cut telegraphic communication, and seized fishing boats. There seems however to be much doubt as to the truth of the allegation. [In 1902 Great Britain reverted to the stricter custom, and it was notified that vessels attempting to violate the blockade rendered themselves 'liable to all measures authorised by the law of nations and the respective treaties between His Majesty and the different neutral powers.' (Parl. Papers, No. 1 (1903), p. 131.) Though the blockade was thus made applicable to all nationalities there does not appear to have been any seizure of vessels not flying the Venezuelan flag. The blockade was rendered effective from the day of publication (Dec. 20), but fifteen days of grace were allowed for vessels 'lying in ports now declared to be blockaded,' and varying periods were granted to steamers and sailing vessels which had left harbour prior to notification.]

[3] 'The contention of the French government that a "pacific blockade" confers on the blockading power the right to capture and condemn the ships

Between blockades so different in their incidents there is little in common. With regard to those under which vessels of third powers are condemned or even sequestrated, the question arises whether a state in time of peace can endeavour to obtain redress from a second state for actual or supposed injuries by means which inflict loss and inconvenience upon other countries. In England at any rate it was soon thought not. In 1846, Lord Palmerston said in writing to Lord Normanby, the ambassador at Paris, with reference to the blockade of La Plata, 'The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of the Plata has been from first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas; but blockade is a belligerent right, and unless you are at war with a state you have no right to prevent ships of other states from communicating with the ports of that state—nay, you cannot prevent your own merchant ships from doing so. I think it important therefore, in order to legalise retrospectively the operations of the blockade, to close the matter by a formal convention of peace between the two powers and Rosas[1].' To this language there is nothing to add, except an expression of surprise that the subject could have ever presented itself to any mind in a different light. No state can expect another to submit to annoyance, still less to loss, for its mere convenience. It is only under the supreme necessities of war, when the gain or loss of belligerent states is wholly out of proportion to the loss inflicted upon neutral individuals, that other states can be reasonably asked to forego their right of intercourse with the enemy. If a country itself professes that its quarrel is not serious or dangerous enough to make recourse to hostilities necessary, its needs cannot be so urgent as to justify

of third nations for a breach of such a blockade is in conflict with well established principles of international law.' Lord Granville to M. Waddington, Nov. 11, 1884; Parl. Papers, France, No. 1, 1885.

[1] Lord Dalling's Life of Lord Palmerston, iii. 327.

a demand for privileges conceded only upon the ground of necessity and danger.

The practice however assumes a very different aspect when it is so conducted as to be harmless to the interests of third powers. It is a means of constraint much milder than actual war, and therefore, if sufficient for its purpose, it is preferable in itself. It is true that its very mildness may tempt strong powers to employ it against weak countries on occasions when, if debarred from its use, they would not resort to hostilities; but it is not to be forgotten that weak countries sometimes presume upon their weakness, and that the possibility of taking measures against them less severe than war may be as much to their advantage as to that of the injured power. Moreover the circumstances of the Greek blockade of 1886 show that occasions may occur in which pacific blockade has an efficacy which no other measure would possess. The irresponsible recklessness of Greece was endangering the peace of the world; advice and threats had been proved to be useless; it was not till the material evidence of the blockade was afforded, that the Greek imagination could be impressed with the belief that the majority of the Great Powers of Europe were in earnest in their determination that war should be avoided.

Pacific blockade, like every other practice, may be abused. But, subject to the limitation that it shall be felt only by the blockaded country, it is a convenient practice, it is a mild one in its effects even upon that country, and it may sometimes be of use as a measure of international police, when hostile action would be inappropriate and no action less stringent would be effective [1].

[1] Pistoye et Duverdy (Traité des Prises Maritimes, ii. 376–8), and Woolsey (§ 119), deny the existence of a right to enforce pacific blockade, but their minds were fixed upon its earlier form. Heffter (§ 111), Calvo (§ 1591), and Cauchy (ii. 428) pronounce in favour of it. Bluntschli (§§ 506–7) approves the practice on condition that the blockade shall be so conducted as not to touch third states. Von Bulmerincq (Holtzendorff's Handbuch, 1889, vol. iv. § 127) unwillingly admits it as being at any rate a less evil than war. The opinions of many recent writers will be found summarised by von

Embargo in contemplation of war.

It was formerly common to place ships of a foreign power under embargo, not by way of reprisals, but in contemplation of war, in order to make sure of having enemy's property, of a kind liable to condemnation, under command at the outbreak of hostilities. The practice has happily not been followed as a preliminary to recent wars. On the contrary, a tendency has been shown to found a custom not only of permitting ships to leave, but of giving a time of grace for lading and reaching their port of destination. As is remarked by Sir Travers Twiss, 'An embargo which is made merely in contemplation of war under circumstances in which reprisals could not justly be granted,' or, it may be added, whether they could or could not be justly granted, so long as the embargo does not in fact purport to operate by way of reprisals, 'cannot well be distinguished from a breach of good faith to the parties who are the subject of it[1].'

Bulmerincq. In 1887 the Institut de Droit International, twenty-seven members being present, adopted the following 'declaration' on the subject of Pacific Blockade:—'L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit des gens que sous les conditions suivantes:

1°. Les navires de pavillon étranger peuvent entrer librement malgré le blocus.

2°. Le blocus pacifique doit être déclaré et notifié officiellement, et maintenu par une force suffisante.

3°. Les navires de la puissance bloquée qui ne respectent pas un pareil blocus peuvent être séquestrés. Le blocus ayant cessé, ils doivent être restitués avec leurs cargaisons à leurs propriétaires, mais sans dédommagement à aucun titre.' Annuaire de l'Institut, 1887–8, p. 300.

[1] Twiss, ii. § 12; Calvo, § 1583. M. Bluntschli (§ 509) condemns embargo in contemplation of war unless its object is 'd'avoir sous la main un nombre de navires suffisant pour user de représailles envers un ennemi qui abuserait du droit de prises maritimes.' M. Bluntschli seems always ready to support any practice, however doubtful its legality, or undoubted its illegality, which can be used to injure or embarrass captors of private property at sea.

PART III

CHAPTER I

COMMENCEMENT OF WAR

Whether the issue of a declaration or manifesto before the commencement of hostilities is necessary.

On the threshold of the special laws of war lies the question whether, when a cause of war has arisen, and when the duty of endeavouring to preserve peace by all reasonable means has been satisfied, the right to commence hostilities immediately accrues, or whether it is necessary to give some preliminary notice of intention. *A priori* it might hardly be expected that any doubt could be felt in the matter. An act of hostility, unless it be done in the urgency of self-preservation or by way of reprisal, is in itself a full declaration of intention; any sort of previous declaration therefore is an empty formality unless an enemy must be given time and opportunity to put himself in a state of defence, and it is needless to say that no one asserts such quixotism to be obligatory. Nevertheless a declaration in some form is insisted upon by the majority of writers, and it has sometimes been treated as being so essential to the justice of hostilities that a neglect to issue one has supplied an excuse for a good deal of unnecessary invective against one at least of the states which at various times have dispensed with it.

The opinion that the date of the commencement of war must be indicated by a formal notification appears to rest upon the idea that without such a notification the date of commencement must be uncertain. As between belligerents however—and the subject is being considered here solely as between belligerents—no uncertainty need exist. The date of the commencement of a war can be perfectly defined by the first act of hostility. A more real doubt used formerly to arise from the very fact that declarations

were commonly issued. In the eighteenth century declarations were frequently published several months after letters of marque had been granted, after general reprisals had been ordered, and even after battles had been fought; and disputes in consequence took place as to whether war had begun independently of the declaration, or from the date of the declaration, or in consequence of the declaration, but so as to date, when once declared, retrospectively to the time of the first hostilities. As the legitimacy of the appropriation of private property depends upon the existence of a state of war, it is evident that conflicts of this nature were extremely embarrassing and, where different theories were in play, were altogether insoluble. To take the state of war on the other hand as dating from the first act of hostility, only leads to the inconvenience that in certain cases, as for example of intervention, a state of war may be legally set up through the commission of acts of hostility, which it may afterwards appear that the nation affected does not intend to resent by war; and, as in such cases the nation doing hostile acts can always refrain from the capture of private property until the question of peace or war is decided, the practical inconvenience is small.

History of practice.

It may be suspected that the writers who in recent times have maintained the necessity of notification of some kind have been unconsciously influenced by the merely traditional force of ideas which belong to a period anterior to international law, and which are of little value under the conditions of modern war. During the middle ages, and down to the sixteenth century, direct notice of war was always given to an intended enemy, in the earlier times by letters of defiance, and latterly by heralds. Whether the practice had a distinct origin, or whether it descended from the fetial law of the Romans, is immaterial; it was at any rate of undisputed authority, and, owing to the way in which war was then made, it was of great value in its time. When therefore it began to die away in the transition from mediæval to modern civilisation, it is not surprising that the conception of right which it had so long embodied should reappear in another

shape; and it happened that by leaning on natural law and on the growing authority of Roman custom it was able to secure vigorous allies. The practice of sending heralds was disused in the beginning of the seventeenth century, but Albericus Gentilis had already cited Roman usage in support of the assertion that the voice of God and Nature ordered men to renounce friendship expressly before embarking in war; and Grotius, though seeing clearly that express notification is useless, when it is once understood that demands made on one side will not be granted on the other without war, allowed himself in describing the 'conditional declaration' which he held to be commanded by natural law, to be tied down by ancient precedent, and especially by fetial forms, to a demand for reparation coupled with notice of war in case of non-compliance [1]. Zouch, in laying down that declaration is necessary, relies only upon fetial law. Pufendorf barely states that war must be duly proclaimed; but if the language of his predecessors be kept in mind, there can be little doubt as to the intention of his doctrine. Cocceius regards declaration as only necessary before an offensive war [2]. Thus in the seventeenth century the theoretical assertion of the necessity of declaration was continuous and nearly universal; but the views and habits of men of action are better represented in a passage of Molloy than in the pages of Grotius or Pufendorf. 'A general war,' he says, 'is either solemnly denounced or not solemnly denounced; the former is when war is solemnly declared or proclaimed by our king against another state. Such was the Dutch war, 1671. An unsolemn war is when two nations slip into a war without any solemnity; and ordinarily happeneth among us. Again, if a foreign prince invades our coasts, or sets upon the king's navy

[1] Alb. Gent. De Jure Belli, lib. ii. cap. i; Grotius, De Jure Belli et Pacis, lib. iii. cap. iii. §§ 6 and 7. The latest instances of the employment of a herald were in 1635, when Louis XIII sent one to Brussels to declare war against Spain, and in 1657, when Sweden declared war against Denmark by a herald sent to Copenhagen. Twiss, ii. § 32.

[2] Zouch, Juris Fecialis Explicatio, pars i. sect. 6; Pufendorf, bk. viii. c. vi. § 9; Cocceius, note to Grotius, lib. iii. cap. iii. § 6.

at sea, hereupon a real, though not solemn war may, and hath formerly, arisen. Such was the Spanish invasion in 1588. So that a state of war may be between two kingdoms without any proclamation or indiction thereof, or other matter of record to prove it[1].' The distinction which is here drawn between solemn and unsolemn war is indicative of the tenacity of life which is shown by forms; and the history of the eighteenth century shows how powerless in this case they really were. They inspired sufficient respect to prevent prizes taken before declaration of war from being condemned until after declaration took place, and it was perhaps worth while to endeavour to excite odium against

[1] De Jure Maritimo, bk. i. c. 1.

Most of the wars of the seventeenth century began without declaration, though in some cases declarations were issued during their continuance. Gustavus Adolphus began and carried on his war against the Emperor without declaration (Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2, and Ward, An Enquiry into the Manner in which the different Wars in Europe have commenced, 11); in 1652 Blake and Tromp fought in the Downs before manifestos were issued, and in 1654 the expedition of Penn and Venables sailed for the West Indies without notice to Spain (Lingard, Hist. of England, xi. 153 and 257): from 1645 to 1657 the Dutch and the Portuguese fought in Brazil, in Africa, and in Ceylon, and it was not till the latter year that war was formally declared (De Garden, Hist. des Traités de Paix, i. 61-2); for a year before the English declared war against the Dutch in 1665 the latter ravaged British commerce in the Indies and the former were engaged in conquering the Dutch establishments in Africa and America (Lingard, xii. 116, &c., or De Garden, ii. 46); the letter in which Louis XIV in 1667 announced his intention to take possession of the Spanish Netherlands 'sans que la paix soit rompue de notre part' was rather a piece of insolence than a compliance with any supposed duty of declaring war (Martin, Hist. de France, xiii. 315); finally in 1688, when war broke out between France and the Empire, Kaiserslautern was taken by the French on the 20th September, and the declaration of war was dated at Versailles on the 24th of the same month (Ward, 18).

Of the foregoing wars the expedition sent by Cromwell against the Spanish West Indies was little better than filibustering, and in many cases as much damage as possible was done to commerce before purely military or naval operations began. The occurrence of such incidents as the former, and the uncertainty induced by sudden attacks upon commerce, were no doubt a chief cause of the inclination to represent the issue of a declaration as a necessity; but the evil was really in the manners of the time, and it could not have been cured by an alteration of form. A declaration which could be issued at the very moment of attack (Grotius, lib. iii. cap. iii. § 13) could be no safeguard against unscrupulous conduct.

a nation by accusing it of not observing due formalities[1]; but wars constantly began without declaration so long as the custom of using declarations continued, and when after the Seven Years' War a practice of publishing manifestos within the country beginning the war, and of communicating them to neutral states, was substituted for direct presentation of a declaration to the enemy, wars were begun without manifestos[2]. The majority of writers however continued to repeat that declaration is necessary[3].

[1] Austria, for example, made use in this way of the absence of any declaration on the occasion of the invasion of Silesia by Prussia in 1740.

[2] The War of Succession began in 1701; the Emperor's declaration appeared on the 15th May, 1702, and that of the King of France in the following July; in 1718 the Spaniards occupied Sardinia and attacked Sicily without declaration, the Spanish fleet was destroyed by the English at Cape Passaro in August of the same year and war was declared in December; in 1740 Frederic invaded Silesia two days before his ambassador arrived at Vienna to demand the surrender of the province, no demand having been at any time previously made, so that the Austrian court was ignorant of the existence of even a ground of quarrel; in 1744 an action was fought off Toulon between the English and French fleets in February and declarations were not issued till the end of March (Ward, 19–30); in 1747 the French entered Holland without declaring war (Moser, Versuch, ix. 67); before English and French declarations were exchanged in May and June, 1756, war had been waged for two years in America, and it had become maritime since June 1755; that Frederic II on invading Saxony in 1756 pretended to have no hostile intention did not alter the fact that his conduct was only consistent with war,—he blockaded the Saxon army in Pirna, he occupied the whole country, and he caused the taxes to be paid to himself (Lord Mahon's Hist. of England, ch. xxxiii); in 1778 the expedition of D'Estaing sailed for America in April without any declaration or manifesto on the part of France, and it was the accident of a slow voyage which prevented him from surprising the English, as he had intended, in the Delaware, where he arrived on the 7th July. A declaration was issued at Versailles on the 28th of that month (Ward, 42, and Marten, Hist. de France, xvi. 433).

Col. (now Major-General Sir Frederick) Maurice, in his 'Hostilities without declaration of War,' has made a valuable collection of all the instances from 1700 to 1870 in which acts of violence have been directed against a state without previous intimation of intention. From the scientific point of view it might have been wished that he had distinguished between cases of war properly so called, and cases of intervention, of attacks by unauthorized forces, &c., but in its practical aspects the collection is none the less useful for its indiscriminate inclusion; it proves more clearly than a stricter enumeration would show, how difficult it often is to be sure whether or not a state of war exists.

[3] Wolff, Jus Gentium, § 710; Burlamaqui (1694–1678), vol. ii. pt. iv. c. iv. §§ 15–18 is logical, and says that an enemy ought not to be attacked

PART III CHAP. I

Opinions of jurists in the present century.

In the present century the views of jurists are more divided. To M. Hautefeuille the necessity of a declaration made direct to the state against which an attack is intended seems to be incontestible, and all hostile acts done before its issue are 'flagrant violations of "le droit primitif."' It is difficult to say whether Heffter looks upon a direct declaration as a necessity in law or only as the preferable practice. M. Calvo, in spite of some inconsistencies of language, appears to regard declaration as obligatory. Riquelme thinks that a manifesto is indispensable to the regularity of war as between the belligerents, though, as it is not addressed specifically to or served upon one by the other, it is not easy to see how it can act as a notice. M. Bluntschli considers that the intention to make war must be notified to an enemy, but holds that notification is effected by the publication of a manifesto, and also that in a defensive war no declaration is required, and that a war undertaken for defensive motives is a defensive war notwithstanding that it may be militarily offensive. It would probably be seldom that a state adopting this doctrine would feel itself obliged to publish a manifesto. Wheaton says that 'no declaration or other notice to the enemy of the existence of war is necessary in order to legalise hostilities,' but he is sufficiently influenced by the conception of a difference between solemn and unsolemn war to believe that without a manifesto 'it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.' Klüber and Twiss consider that the practice of giving notice of hostility to an enemy ceased with the disuse of declarations in the middle of last century, and think with Phillimore that manifestos are

immediately after declaration of war, 'otherwise the declaration would only be a vain ceremony;' Vattel (liv. iii. ch. iv. §§ 51-60) also pronounces for declaration, but he allows it to be issued after the enemy's territory has been entered. Bynkershoek (Quæst. Jur. Pub. lib. i. c. ii) and Heineccius (Elem. Jur. Nat. et Gent. lib. ii. § 199) pronounced for the legitimateness of beginning war without declaration.