intended for the information of neutrals and of the subjects of the state issuing them, and that no obligation to declare war now exists as between the enemy states[1]. Practice on the other hand has been less variable than formerly. The United States began war with England in 1812, and with Mexico in 1846, without either notice or manifesto; Piedmont opened hostilities against Naples in 1860 in like manner; and the war between France and Mexico in 1838, beginning in a blockade instituted by the former country which the latter chose to consider an act of hostility, forms an exact parallel in its mode of commencement to many of the wars of last century. The war of 1870, which was commenced by a declaration handed to Count Bismarck by the French chargé d'affaires, and that in 1877 between Russia and Turkey, which was declared by a formal despatch handed to the Turkish chargé d'affaires at St. Petersburg, afford instances of direct notice. In most, if not all, other cases, hostilities have been preceded by manifestos. [President Kruger, it will be remembered, issued an ultimatum to the British Government on

Recent practice.

[1] Hautefeuille, tit. iii, ch. i. sect. 2; Heffter, § 120; Calvo, § 1663; but see also § 1649; Riquelme, i. 131–3; Bluntschli, §§ 521–2; Wheaton, pt. iv. ch. i. § 6; Klüber, §§ 238–9; Twiss, ii. §§ 35–7; Phillimore, iii. ch. v. In Holtzendorff's Handbuch (1889, vol. iv. §§ 82–4) neither declaration nor manifesto is held to be necessary though a belligerent ought, it is said, to give notice of some sort if he can do so consistently with his political interest and his military aims. F. de Martens (Traité de Droit Int. iii. 205) considers that neither proclamation nor diplomatic notice are obligatory, provided that the state of relations is such that hostilities will not be a surprise. Hostilities which constitute a surprise he characterises as brigandage and piracy. As instances of such attacks he mentions the invasion of Silesia in 1740, and the commencement of war by the United States in 1812 before the vote of Congress was known in England. Geffcken (1888, notes to Heffter, § 120) regards a notice fixing a date, from which hostilities shall be considered to begin, to be necessary in the interests of neutrals and of the subjects of the belligerent states. To this view, so far as neutrals and the subjects of the state commencing hostilities are concerned, no objection can be taken; but if there is no duty towards the enemy state, there can be no duty towards its subjects. Probably M. Geffcken is influenced by the consideration that enemy subjects ought not to be exposed without warning to danger of life, and to the manifold risks and horrors of war upon land. This is so; but for reasons which have nothing to do with the illusory safeguard of a manifesto.

Oct. 9, 1899, demanding, *inter alia*, that all British troops should be withdrawn from the borders of the Republic and all reinforcements stopped; default of a satisfactory answer within forty-eight hours would be regarded as a formal declaration of war. On the expiration of this period the Transvaal forces crossed the frontier, and the President of the Orange Free State at the same time declared war on Great Britain in a manifesto addressed to his Burghers.]

Conclusions.

Looking at the foregoing facts as a whole it is evident that it is not necessary to adopt the artificial doctrine that notice must be given to an enemy before entering upon war. The doctrine was never so consistently acted upon as to render obedience to it at any time obligatory. Since the middle of last century it has had no sensible influence upon practice. In its bare form it meets now with little support, compared with that which it formerly received. In the form of an assertion that a manifesto must be published it is so enfeebled as to be meaningless. To regard a manifesto as the equivalent of a declaration is to be satisfied with a fiction, unless it be understood that hostilities are not to commence until after there is a reasonable certainty that authenticated information of its contents has reached the enemy government. The use of a declaration does not exclude surprise, but it at least provides that notice shall be served an infinitesimal space of time before a blow is struck. A manifesto, apart from the reservation mentioned, is quite consistent with a blow before notice. The truth is that no forms give security against disloyal conduct, and that when no disloyalty occurs states always sufficiently well know when they stand on the brink of war. Partly for the convenience of the subjects of the state, and partly as a matter of duty towards neutrals[1], a manifesto or an equivalent notice ought always to be issued, when possible, before the commencement of hostilities; but to imagine a duty of giving notice to an enemy is both to think incorrectly and to keep open a door for recrimination in cases, which may sometimes arise, when action, for example on conditional orders

[1] See postea, p. 574.

to a general or admiral, takes place in such circumstances that a manifesto cannot be previously published.

If the above views are correct, the moment at which war begins is fixed, as between belligerents, by direct notice given by one to the other, when such notice is given before any acts of hostility are done, and when notice is not given, by the commission of the first act of hostility on the part of the belligerent who takes the initiative.

Negative effects of the commencement of war.

The outbreak of war, besides calling into existence the rights which will be discussed in the following chapters, has the negative effect of—

1. Abrogating and suspending treaties of certain kinds.

2. Putting an end to all non-hostile relations between subjects of the belligerent states.

Abrogation and suspension of treaties. Opinions of writers.

It is not altogether settled what treaties are annulled or suspended by war, and what treaties remain in force during its continuance or revive at its conclusion. According to some writers all treaties are annulled, except in so far as they are concluded with the express object of regulating the conduct of the parties while hostilities last [1]. Wheaton considers that so-called 'transitory conventions,' which set up a permanent state of things by an act done once for all, such as treaties of cession or boundary, or those which create a servitude in favour of one nation within the territory of another, generally subsist notwithstanding the existence of war, 'and although their operation may in some cases,' which he does not specify, 'be suspended during war, they revive on the return of peace without any express stipulation;' other treaties, as of commerce and navigation, expire of course, except 'such stipulations as are made expressly with a view to a rupture [2].' De Martens is of the same opinion, except that he thinks that transitory conventions may always be suspended and sometimes annulled [3]. Other writers, and the English and American courts, hold that 'transitory conventions'

[1] Vattel, liv. iii. ch. x. § 175; Riquelme, i. 171.
[2] Elem. pt. iii. ch. ii. §§ 9, 10.
[3] Précis, § 58.

are in no case destroyed or suspended by war, they being, according to Sir Travers Twiss, less of the nature of an agreement than of a recognition of a right already existing, or, as the same view was put in the form of an example by an American judge, if treaties which 'contemplate a permanent arrangement of territorial or other national rights were extinguished by the event of war, even the treaty of 1783, so far as it fixed our limits and acknowledged our independence, would be gone,' and on the occurrence of war between England and the United States 'we should have had again to struggle for both upon original revolutionary principles[1].' Others again think that all treaties remain binding unless their terms imply the existence of peace, or unless the reason for their stipulations is destroyed by the war; or else that treaties of the last-mentioned kind, such as treaties of alliance, are annulled, but that treaties of commerce, postal conventions, and other arrangements of like character, are suspended only, and that treaties or provisions in them, such as those ceding or defining territory, which are intended to be permanent, remain in force; or finally that treaties are put an end to or suspended only when or in so far as their execution is incompatible with the war itself[2].

Recent practice.

A like divergence of opinion is suggested by the conduct of states at the conclusion of recent wars. By the Treaty of Paris, which ended the Crimean War, it was stipulated that until the treaties or conventions existing before the war between the belligerent powers were renewed or replaced by fresh agreements, trade should be carried on on the footing of the regulations in force before the war, and the subjects of the inter-belligerent states should be treated as between those states as favourably as those

[1] Twiss, i. §§ 225-6; Sutton *v.* Sutton, i. Russell and Mylne, 663; The Society for the Propagation of the Gospel in Foreign Parts *v.* The Town of Newhaven, viii Wheaton, 494. Sir R. Phillimore (pt. xii. ch. ii) seems to consider that treaties which 'recognise a principle and object of permanent policy' remain in operation, and that those which relate 'to objects of passing and temporary expediency' are annulled; but he does not very clearly indicate the boundaries of the two classes.

[2] Heffter, §§ 122 and 180-1; Calvo, § 1687; Bluntschli, § 538.

of the most favoured nation. Under this provision, not only were fresh treaties of commerce concluded, but it seemed necessary to Russia and Sardinia to exchange declarations to the effect that a convention for the abolition of the droit d'aubaine, than which no agreement could seem to be more thoroughly made in view of a permanent arrangement of rights, was to be considered as having recovered its force from the date of the exchange of ratifications of the treaty. Again, as between Austria and Sardinia in 1859, all treaties in vigour upon the commencement of the war of that year were confirmed, that is to say were stated by way of precaution to be in force, by the Treaty of Zurich, and among those treaties seem to have been a treaty of commerce and a postal convention; but as between Austria and France no revival or confirmation of treaties was stipulated although agreements of every kind existed between them. In 1866 the Treaty of Vienna between Austria and Italy confirmed afresh the engagements with which the Treaty of Zurich had dealt, and the Treaty of Prague revived, or in other words restipulated, all the treaties existing between Prussia and Austria in so far as they had not lost their applicability through the dissolution of the German Confederation. In 1871 the Treaty of Frankfort revived treaties of commerce and navigation, a railway convention having reference to the customs, copyright conventions and extradition treaties, without making any mention of other treaties by which France and Germany were bound to each other.

Classification of treaties with reference to war.

Looking at the matter apart from authority and from practice, treaties and other conventions, except those made in express contemplation of war, or articles so made forming part of more general treaties, as to the binding force of which during hostilities there is no question, would seem to fall naturally for present purposes under the following heads:—

1. Treaties, such as great European territorial settlements and dynastic arrangements, intended to set up a permanent state of things by an act done once for all, in which the belligerent parties have contracted with third powers as well as with each other.

2. Treaties also binding the belligerent states with third powers as well as to each other, but unlike the former class stipulating for continuous acts or for acts to be done in certain contingencies, such for example as treaties of guarantee.

3. Treaties with political objects, intended to set up a permanent state of things by an act done once for all, which have been concluded between the belligerent parties alone, such as treaties of cession or of confederation.

4. Treaties concluded between the belligerent states only, and dealing with matters connected with the social relations of states, which from the nature of their contents appear to be intended to set up a permanent state of things, such as conventions to abolish the droit d'aubaine or regulate the acquisition and loss of nationality.

5. Treaties concluded between the belligerent states only, whether with political objects or not, which from the nature of their contents do not appear to be intended to set up a permanent state of things, such as treaties of alliance, commercial treaties, postal conventions, &c.

Conclusions.

With regard to the first of these classes of treaties it is obvious that the fact of war makes no difference in their binding force, since each party remains bound to another with whom he is not at war. There is also no difficulty in observing them, since they merely oblige to an abstention from acts at variance with their provisions. The second class remain equally obligatory, subject to the condition that there shall be a reasonable possibility of carrying out their provisions; but as those provisions require performance of acts, and not simply abstention from them, compliance may readily be inconsistent with the state of war or with the incidents of the particular war. Treaties of this kind therefore must be viewed according to circumstances, as continuing or as being suspended. Compacts of the third kind, on the other hand, must in all cases be regarded as continuing to impose obligations until they are either supplanted by a fresh agreement or are invalidated by

a sufficiently long adverse prescription. Suppose, for example, that a province belonging to one of two states is held under a treaty of cession from the other. On the outbreak of war between them, if the treaty were annulled by the occurrence of hostilities, the former owner would re-enter the province as his own, or if it were suspended he would be able to exercise the rights of a sovereign there as against those of an occupant in the remainder of his enemy's territory. Neither of these things however takes place. The rights of a belligerent in territory which he has formerly ceded are identical with those which he has in territory which has never belonged to him. In both he has merely the rights of a military occupant; he may appropriate both; but neither become definitively his until the conclusion of a peace assigning the territory to him, or, if his enemy refuses to treat, until a due term of prescription has elapsed. As regards treaties of the fourth class, it would seem reasonable that they should continue or be suspended at the will of either of the belligerents. They are intended to be permanent arrangements so long as peace shall exist, and there is nothing in the fact of war to prevent them from recommencing their operation automatically with the conclusion of peace; there is therefore no reason for supposing them to be annulled. But as all social relations are suspended for the time of war except by express or tacit permission of the sovereign, it is impossible to look upon treaty modifications of the normal social relations which are thus interrupted as being compulsorily operative during the progress of hostilities; except that the effects of acts previously done under their sanction must remain unaltered. Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace,—frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with a renewal of the identical stipulations. It would appear therefore to be simplest to take them to be all

annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace.

In all cases in which war is caused by differences as to the meaning of a treaty, the treaty must be taken to be annulled. During hostilities the right interpretation is at issue; and it would be pedantry to press the analogy between war and legal process so far as to regard the meaning ultimately sanctioned by victory as representing the continuing obligation of the original compact. Whether the point in dispute be settled at the peace by express stipulations, or whether the events of the war have been such as to render express stipulations unnecessary, a fresh starting-point is taken; a peace which, whether tacitly or in terms, gives effect to either of two interpretations has substituted certainty for doubt, and thus has brought a new state of things into existence.

Termination of non-hostile relations between subjects of the enemy states, and between the government of the one and the subjects of the other.

To say that war puts an end to all non-hostile relations between the subjects of enemy states, and between the subjects of one and the government of the other, is only to mention one of the modes of operation of the principle, which lies at the root of the laws of war, that the subjects of enemy states are enemies. The rule is thus one which must hold in strict law in so far as no exception has been established by usage. Logically it implies the cessation of existing intercourse, and therefore a right on the part of a state to expel or otherwise treat as enemies the subjects of an enemy state found within its territory; the suspension or extinction of existing contracts according to their nature, among extinguished contracts being partnerships, since it is impossible for partners to take up their joint business on the conclusion of war at precisely the point where it was abandoned at its commencement; a disability on the part of the subjects of a belligerent to sue or be sued in the courts of the other [or to be naturalised in the state with which their country is at war][1]; and finally, a prohibition of fresh trading or other

[1] Rex *v.* Lynch, L. R. 1903, i K. B. 444.

intercourse and of every species of private contract[1]. Of late years it is seldom that a state has exposed itself, together with its enemy, to the inconveniences flowing from a rigid maintenance of the rule of law; but the mitigations of it which have taken place have generally been either too distinctly dictated by the self-interests of the moment alone, or have been too little supported by usage, to constitute established exceptions[2]. Probably the only application of the rule, a relaxation of which has acquired international authority, is that which has to do with the treatment of enemy subjects who happen to be in a belligerent country at the outbreak of war.

Exceptional usage with respect to enemy subjects

Bynkershoek in speaking of the right of a belligerent state to treat as prisoners enemy subjects found within its boundaries at the beginning of war, mentions that the right had seldom been exercised in recent times, and gives a list of treaties, which might

[1] Contracts arising out of the state of war, and permitted under the customs of war;—as ransom bills (see postea, p. 460), are exceptions. They can be made and enforced during the continuance of war.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. c. iii; The Hoop, i Rob. 196; The Rapid, viii Cranch, 160–2; Mr. Justice Story in Brown *v.* the United States, ib. 136; Wheaton, Elem. pt. iv. ch. i. §§ 13, 15; Twiss, ii. §§ 46–57; Phillimore, pt. ix. ch. vi. De Martens (Précis, § 269) thinks that the outbreak of war does not produce the above effects of itself, but that a state may if it chooses issue 'letters inhibitory' of all intercourse with the enemy. Heffter (§ 123) is of the same opinion. Bluntschli (§ 674) says only that 'tous rapports entre les contrées occupées par les armées ennemies sont dans la règle interdits;' thus suggesting that only personal intercourse within the area of military operations is forbidden; he at least argues, on the strength of his doctrine that the subjects of enemy states are not enemies, that this ought to be the case. Calvo (§§ 1682–6) admits the rule of law to be that all relations between the subjects of states at war with one another become interdicted by the fact of war, but regards the rule as out of date and of unjustifiable rigour. Dr. Lueder in Holtzendorff's Handbuch (1889, iv. § 87) follows Heffter, because 'die Handelsfreiheit ist das Ursprüngliche, die Regel und das naturgemäss den einzelnen Menschen Zukommende.' His opinion might have more weight if he had not given his reason for it. Geffcken (1888, notes to Heffter, § 123) agrees fully with the statement of law given in the text, and holds that any relaxations given must be expressly granted.

For the revival of the right at the end of a war to enforce contracts made before its outbreak, and therefore suspended during its continuance, see Ex parte Bousmaker, xiii Vesey, 71, and Wheaton, Elem. pt. iv. ch. i. § 12.

PART III CHAP. I

in a belligerent state at the outbreak of war.

easily be enlarged, stipulating for the reservation of a specified time during which the subjects of the contracting parties should be allowed to withdraw themselves and their property from the respective countries in the event of war between them[1]. By the early part of the eighteenth century therefore a usage was in course of growth, under which enemy subjects were secured the opportunity of leaving in safety, and though the custom did not establish itself so firmly as to dispense altogether with the support of treaties, those which were made in the end of that century, and which have been made since then, may rather be looked upon

[1] Quæst. Jur. Pub. lib. i. c. iii. Vattel (liv. iii. ch. iv. § 63) says that 'le souverain qui déclare la guerre ne peut retenir les sujets de l'ennemi qui se trouvent dans ses états au moment de la déclaration. Ils sont venus chez lui sur la foi publique: en leur permettant d'entrer dans ses terres et d'y séjourner, il leur a promis tacitement toute liberté et toute sûreté pour le retour. Il doit donc leur marquer un temps convenable pour se retirer avec leurs effets; et s'ils restent au delà du terme prescrit, il est en droit de les traiter en ennemis, toutefois en ennemis désarmés.' Moser, on the other hand, could still write in 1779 that 'wann keine Verträge deswegen vorhanden seynd, ist es dem Europäischen Völkerrecht nicht entgegen, wann ein Souverain die in seinem Lande befindliche feindliche Unterthanen arrestirt' (Versuch, ix. i. 49).

In the infancy of international law the harsher of these two doctrines, as might be expected, existed alone. Ayala says, 'Est quoque notatu dignum quod inter duos populos bello exorto, qui ex hostibus apud utrumque populum fuerint, capi possint, licet in pace venerint; nam et olim servi efficiebantur' (De Jure et Off. Bell. lib. i. cap. v. § 25). And Grotius writes, 'Ad minuendas hostium vires retineri eos (i. e. enemy subjects within the country of a belligerent) manente bello non iniquum videbatur; bello autem composito nihil obtendi poterat, quominus dimitterentur. Itaque consensum in hoc est; ut tales in pace semper libertatem obtinerent, ut confessione partium innocentes' (De Jure Belli et Pacis, lib. iii. c. ix. § 4).

During the middle ages nevertheless it seems to have been a pretty general practice not to detain enemy subjects, and to give them when expelled sufficient warning to enable them to carry off or to sell their property. When Louis IX arrested the English merchants within his kingdom on the commencement of war in 1242 Matthew Paris stigmatises his conduct as 'laedens enormiter in hoc facto antiquam Galliae dignitatem;' by the Statute of Staples, 27 Ed. III, it was provided that on war breaking out foreign merchants should have forty days in which to depart the realm with their goods; an Ordinance of Charles V shortly afterwards gave a like indulgence in France; and in 1483 a treaty was concluded between France and the Hanse Towns under which merchants of the Hanse Confederation were to be at liberty to remain in the French dominions for one year after war broke out. Twiss, ii. § 49.

as intended to secure a reasonable length of time for withdrawal and for the settlement of private affairs than to guard against detention [1]. The solitary modern instance of detention, which is presented by the arrest of the English in France in 1803, is only excused by writers whose carelessness has allowed them to rest content with the French assertion that the act was a measure of reprisal [2]. There can be no doubt that a right of detention no longer exists, except when persons have wilfully overstayed a period granted to them for withdrawal, and in the case of persons whose conduct or the magnitude of whose importance to their state afford reasons for special treatment; perhaps also in the case of persons belonging to the armed forces of their country.

Custom of allowing enemy subjects to remain in a country during good behaviour.

It is a more real question whether, or to what extent, a usage of permitting enemy subjects to remain in a country during good behaviour is becoming authoritative. The origin of the practice is not remote. It may fairly be inferred from the manner in which Vattel mentions the permission to remain which was given by the English government at the opening of the war of 1756 to French persons then in the country, that the instance was the only one with which he was acquainted [3]. When a custom began to form it is difficult to say, because residence was no doubt often tacitly allowed where evidence of permission is wanting; but in recent wars express permission has always been given, and the sentiment of the impropriety of expulsion has of late become so strong that when in 1870 the government of the National Defence in France so far rescinded the permission to remain which was accorded to enemy subjects at the beginning of the war as to expel them from the department of the Seine, and to require them either to leave France or to retire to the south of

[1] The period provided in the numerous treaties which have been concluded with this object during the last century and a half ranges from six months to a year. They will be found in the collections of De Martens: the earliest in date is that between England and Russia in 1766 (Recueil, i. 396).

[2] [For a very half-hearted attempt to justify the conduct of Bonaparte on this ground see the Mémoires du Chancelier Pasquier, i. 164.]

[3] Liv. iii. ch. iv. § 63. A like permission was given to Spanish subjects in England in 1762. Twiss, ii. 89.

the Loire, it appeared to be generally thought that the measure was a harsh one[1]. It is scarcely probable that the feeling which showed itself would have been entertained unless public opinion was not only moving in advance of the notion that persons happening to be in a country at the outbreak of war between it and their own state ought to have some time for withdrawal, but was already ripe for the establishment of a distinct rule allowing such persons to remain during good behaviour. In the particular case some injustice was done to the French government. The fear that danger would arise from the presence of Germans in Paris may have been utterly unreasonable; but their expulsion was at least a measure of exceptional military precau-

[1] For the French permission of the 20th July, and the order of Gen. Trochu of the 28th of August, see D'Angeberg, Nos. 194 and 367.

The writers by whom the subject is mentioned still generally hold to the doctrine that a reasonable space of time for leaving the country is all that can be asked for. Heffter says (§ 126) that 'les sujets ennemis qui, lors de l'ouverture des hostilités, se trouvent sur le territoire de l'une des puissances belligérantes ou qui y sont entrés dans le cours de la guerre, devront obtenir un délai convenable pour le quitter. Les circonstances néanmoins peuvent aussi rendre nécessaire leur séquestration provisoire, pour les empêcher de faire des communications et de porter des nouvelles ou des armes à l'ennemi.' Twiss (ii. §§ 47–8, 50) seems to think that where a commercial domicil has been acquired by a foreigner a sort of tacit contract may be presumed between him and the state that he will be allowed to live under its protection so long as he obeys its laws; but that in 'strict right' he may nevertheless be expelled on the outbreak of war, and that foreigners *in transitu* have no shadow of a claim to be allowed to stay. Calvo (§ 1712) does not appear to regard even the right of withdrawal to be wholly assured where no treaty stipulations exist. Riquelme (i. 135) mentions the practice of allowing enemy subjects to continue to reside, but considers that international law only prescribes that they shall be allowed to leave the country. F. de Martens (1887, iii. 200) regards permission to remain as a settled usage.

There are a certain number of treaties in which the right of residence during good behaviour is stipulated for. In the treaty between England and the United States in 1795 it was stipulated that merchants and other enemy subjects 'shall have the privilege of remaining or continuing their trade, so long as they behave peaceably and commit no offence against the laws; and in case their conduct should render them suspected and the respective governments should think proper to order them to remove, the term of twelve months from the publication of the order shall be allowed them for that purpose' (De Martens, Rec. v. 684). The term allowed for removal varies considerably in the different treaties; in the treaty of 1886 between France and Mexico it is merely 'un délai suffisant.'

tion. The conduct of the government may have been foolish, but it was not wrong. Any right of staying in a country during good behaviour, which may be acquired by enemy subjects, must always be subordinate to considerations of military necessity; and whatever progress may have been made in the direction of acquiring the right itself, there can be no doubt that it is not yet firmly established.

When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country.

CHAPTER II

RIGHTS WITH RESPECT TO THE PERSON OF ENEMIES

PART III
CHAP. II
Limits to the right of violence against the person of enemies.

BELLIGERENT rights with respect to the person of an enemy, in their actual form, represent the general right of violence over the person of all the inhabitants of a hostile country which an enemy formerly considered himself to possess, as modified by the mitigating principle, which has gradually succeeded in establishing a superior authority, that the measure of permissible violence is furnished by the reasonable necessities of war [1].

These reasonable necessities are marked out in a broad way by the immediate objects at which a belligerent aims in attacking the person of his enemy. He endeavours to break down armed resistance, because upon the ability of his enemy to offer it depends the power of the latter to reject the terms to which it is sought to bring him. A belligerent consequently kills his armed enemies so far as is needed to overcome the national resistance, and makes prisoners of them and of persons by whom the action of the enemy state is directed. But the attainment

The Hague Conference.

[1] [Since the last edition of this book the International Peace Conference held at the Hague during May, June and July, 1899, has dealt with many of the subjects treated in this and the following chapters. While the Conference failed signally to attain the object for which it was originally convened by the Czar—the limitation and diminution by common consent of international armaments on land and sea—its labours in other directions were crowned by considerable success. In addition to the establishment of a Permanent Court of International Arbitration two conventions were concluded dealing with the laws and customs of war by land, and adapting to maritime warfare the principles of the Geneva Convention of 1864. The majority of the Powers assembled also agreed upon three declarations prohibiting the use in warfare of projectiles the only object of which is the diffusion of asphyxiating gases, and of bullets which expand or flatten easily in the human body, and forbidding projectiles and explosives to be launched from balloons. These declarations were left unexecuted by the representatives of Great Britain as well as by those of the United States.]

of this immediate object of crushing the armed force opposed to him is not helped by the slaughter or ill-usage of persons who either are unable to take part in hostilities, or as a matter of fact abstain from engaging in them; and although the adoption of such measures might tend, by intimidating the enemy, to persuade him to submit, their effect is looked upon with reason as being too little certain or immediate to justify their employment[1]. Hence the body of persons who are enemies in law split themselves in the main into two classes;—non-combatants, whom a belligerent is not allowed to ill-use or to kill intentionally, except as a punishment for certain acts, which though not done with the armed hand, are essentially hostile[2]; and combatants, whom in permitted places it is allowable to capture at all times, and under certain conditions to kill[3].

Non-combatants.

Of the non-combatant class little need be said. It only re-

[1] The principle that innocuous persons ought not to be killed was asserted in the Canon De Treuga (Decretal. Greg. lib. i. tit. xxxiv. cap. 2), and Franciscus à Victoria declares explicitly that 'nunquam licet per se et ex intentione interficere innocentem. Fundamentum justi belli est injuria; sed injuria non est ab innocente: ergo non licet bello uti contra illum.' Hence 'sequitur quod etiam in bello contra Turcos non licet interficere infantes. Imo nec foeminas inter infideles, . . . imo idem videtur judicium de innoxiis agricolis apud Christianos, imo de alia gente togata et pacifica, quia omnes praesumuntur innocentes nisi contrarium constaret.' (Relect. Theol. vi.) But these utteranees of a doctrine of mercy were far in advance of the habits of the time; and their repetition by Grotius was contemporary with the horrors of the Thirty Years' War (lib. iii. cap. xi. §§ 8–12). From that period however opinion changed rapidly. The conduct of the French armies in the Palatinate and the Low Countries, and the Proclamation of Louis XIV to the Dutch, in which he announced that 'lorsque les glaces ouvriront le passage de tous côtés, sa Majesté ne donnera aucun quartier aux habitants des villes' (Dumont, Mém. Politiques pour servir à la parfaite Intelligence de la Paix de Ryswick, ii. 66), were reprobated throughout Europe; Pufendorf (bk. viii. c. vi. § 7) in echoing the doctrine of Grotius, spoke to a world which was already convinced; and Bynkershoek (Quæst. Jur. Pub. lib. i. cap. i) stands alone in the eighteenth century in giving to a belligerent unlimited right of violence.

[2] For these acts see postea, pp. 471–2, 539.

[3] On the whole subject of rights with respect to the person of enemies see the Manuel des Lois de la Guerre sur Terre, drawn up by a Committee of the Institut de Droit International, and published by the Institut (Brussels, 1880).

quires to be pointed out that the immunity from violence to which they are entitled is limited by an important qualification, which is no doubt in part necessary to the prosecution of military and naval operations, but the extent of which is only to be accounted for by remembering that if the principle that the measure of permissible violence is furnished by the reasonable necessities of war is theoretically absolute, the determination of reasonable necessity in practice lies so much in the hands of belligerents that necessity becomes not infrequently indistinguishable from convenience. The qualification in question is that though non-combatants are protected from direct injury, they are exposed to all the personal injuries indirectly resulting from military or naval operations directed against the armed forces of the state, whether the mode in which such operations are carried out be reasonably necessary or not. So far as death or injury may be caused by such acts as firing upon a ship carrying passengers, or an attack upon the train of an army, in the course of which for example chaplains or surgeons might be killed without deliberate purpose, there is no reason to complain of the effect of the qualification. But the bombardment of a town in the course of a siege, to take an example on the other side, when in strict necessity operations need only be directed against the works, and when therefore bombardment really amounts to an attempt to obtain an earlier surrender than would be militarily necessary, through the pressure of misery inflicted on the inhabitants, is an act which, though permissible by custom, is a glaring violation of the principle by which custom professes to be governed.

Combatants.

The right to kill and wound armed enemies is subordinated to the condition that those enemies shall be able and willing to continue their resistance. It is unnecessary to kill men who are incapacitated by wounds from doing harm, or who are ready to surrender as prisoners. A belligerent therefore may only kill those enemies whom he is permitted to attack while a combat is actually in progress; he may not as a general rule refuse

quarter; and he cannot mutilate or maim those who fall into his power[1].

Duty of giving quarter.

The general duty to give quarter does not protect an enemy who has personally violated the laws of war, who has declared his intention of refusing to grant quarter or of violating those laws in any grave manner, or whose government or commander has done acts which justify reprisals[2]. It may be doubted however whether the right of punishment which is thus placed in the hands of a belligerent has been used within the present century in any strictly international war, and though its existence may be a wholesome check to the savage instincts of human nature which now and then break through the crust of civilised habit, it is certain that it ought only to be sparingly exercised after great and continuous provocation, and that any belligerent who availed himself of his power would be judged with extreme severity. [Article 23 of the Hague Convention on the Laws and the Customs of War expressly forbids a belligerent to declare that no quarter will be given.]

Possible exception.

An exception to the rule that quarter cannot be refused is also supposed to arise when from special circumstances it is impossible for a force to be encumbered with prisoners without danger to itself[3]. Instances of such impossibility have not presented themselves in modern warfare. Prisoners who cannot safely be kept can be liberated, and the evil of increasing the strength of the enemy is less than that of violating the dictates

[1] Vattel, liv. iii. ch. viii. § 140; De Martens, Précis, § 272; American Instructions for Armies in the Field, Art. 60; Bluntschli, § 580; Art. 13 of the Project of Declaration on the Laws and Usages of War, adopted by the Conference of Brussels in 1874 as a basis of negotiation with a view to a general agreement upon the subject of the practices of war. De Martens, Nouv. Rec. Gén. 2e Sér. iv. 1.

'Qui merci prie, merci doit avoir' was already a maxim in the fourteenth century, but in the beginning of the seventeenth century prisoners might in strict law be still slaughtered, though to do so was looked upon as 'mauvaise guerre.'

[2] De Martens, Précis, § 272; American Instruct., Art. 63.

[3] Vattel, liv. iii. ch. viii. § 151; De Martens, Précis, § 272; American Instruct., Art. 60; Bluntschli, § 580.

of humanity, unless there is reason to expect that the prisoners if liberated, or a force successfully attempting rescue, would massacre or ill-treat the captors. Subject to the condition that there shall be reasonable ground for such expectation it may be admitted that cases might occur in which the right could be legitimately exercised, both at sea and in campaigns resembling those of the Indian Mutiny, when small bodies of troops remained for a long time isolated in the midst of enemies [1].

[1] Formerly quarter was not given to the garrison of a place which resisted an attack from an overwhelming force, which held out against artillery in the absence of sufficient fortifications, or which compelled the besiegers to deliver an assault. In 1543, for example, the French took 'Sainct Bony' in Piedmont by storm, 'et furent tous ceux de dedans tuez, hors mis le capitaine, qui fu pendu, pour avoir ésté si oultrageux de vouloir tenir une si meschante place devant le canon' (Mém. de Martin du Bellay, liv. ix). It might have been hoped that such a usage would now only rank among the curiosities of history. But Vattel (liv. iii. chap. viii. § 143) thinks it necessary to argue at length against executing a commandant; M. Heffter (§ 128) expresses the hope that such an execution will never occur again; M. Calvo (§ 856) treats as a still existing opinion the view that the garrison of a weak place may be massacred for resistance; Gen. Halleck (ii. 90), while condemning the practice as contrary to humanity, seems to state it as a living usage; and the Duke of Wellington, though he never acted in conformity with it, wrote in 1820 that 'I believe it has always been understood that the defenders of a fortress stormed have no right to quarter; and the practice, which has prevailed during the last century, of surrendering a fortress when a breach was opened in the body of the place and the counterscarp was blown in, was founded upon this understanding' (Despatches, 2nd Series, i. 93); finally, the Russian government thought it worth while in the original sketch of a convention respecting the laws of war to enumerate among forbidden acts 'la menace d'extermination envers une garnison qui défend obstinément une forteresse.'

In spite of this accumulated evidence that up to a late period the usages of war allowed a garrison to be massacred for doing their duty to their country, there can be no hesitation in excluding the practice from the list of those which are now permitted. It is wholly opposed to the spirit of the general body of the laws of war, and it therefore can only pretend to rank as an exceptional usage. But for an exceptional usage to possess validity in opposition to general principles of law it must be able to point to a continued practical recognition, which the usage in question is unable to show.

There is probably no modern instance of the indiscriminate slaughter of a garrison, except that of the massacre of the garrison and people of Ismail by the Russians in 1790, and if one instance were now to occur, the present temper of the civilised world would render a second impossible. [Since these words were written (in 1880) an even more hideous massacre

In the case of enemies rendered harmless by wounds or disease, the growth of humane feeling has long passed beyond the simple requirements that they shall not be killed or ill-used, and has cast upon belligerents the duty of tending them so far as is consistent with the primary duty to their own wounded. But the care which the wounded of a defeated army thus obtain is necessarily inadequate to their wants, and the usefulness of surgeons on both sides is hampered by their liability to be detained as prisoners. A step, of which the value in mitigating the unnecessary horrors of war cannot be over-estimated, would therefore be made if a general, and sufficiently full, understanding were arrived at as to the treatment of sick and wounded, and of persons and things engaged in their service, which should give free scope, so far as the exigencies of war permit, to the action of every one whom duty or charity may enlist in the mitigation of suffering. Under the Convention of Geneva of 1864, the greater part of the European states bound themselves to observe a code framed with this object, and the accession of nearly all the civilised states of the world has converted its provisions into rules of overwhelming authority. The states which have not yet signified their adhesion are indeed of such slight importance that the contents of the Convention may fairly be regarded as forming a portion

Treatment of sick and wounded.

The Geneva Conventions.

than that of Ismail has been perpetrated. On November 21, 1894, the Japanese army stormed Port Arthur and for five days indulged in the promiscuous slaughter of non-combatants, men, women, and children, with every circumstance of barbarity. The only excuse alleged was that officers and soldiers alike were roused to uncontrollable fury by the sight of the mutilated remains of comrades who had fallen into the hands of the Chinese and been tortured to death (*Times*, Jan. 8, 1895). Though an enquiry was ordered by the Japanese military authorities, no satisfactory explanation or reparation was ever tendered, but the scrupulous anxiety shown by Japan on every other occasion throughout the war to conduct its operation in harmony with the laws of humanity has been accepted in condonation of a solitary though deplorable lapse into savagery. Of the frightful atrocities committed by some of the European contingents on the defenceless Chinese population during the advance upon Pekin in August 1900, and in the subsequent operations, there is unhappily no room for doubt; and the slaughter by the Russians of the whole Chinese population of Blagovestchensk recalls the worst horrors of the Thirty Years' War.]

of authoritative international law[1]. The provisions, however, which were agreed upon by no means exhausted the matters which needed regulation, or sufficiently dealt with those which were touched, and a conference was held at Geneva in 1868 with the object of framing a supplementary Convention. Further rules were drafted by the plenipotentiaries of the states represented, but while they were accepted in principle, they failed to secure ratification, and they remain without binding force, though the provisional agreement which was arrived at with regard to them lends no inconsiderable weight in a general sense to their prescriptions. [Article 21 of the Hague Convention for regulating the laws of land warfare, while re-enacting the Geneva Convention of 1864, is silent as to the supplementary Convention; but in many respects the stipulations of the latter are given effect to in the various formal Acts of the Hague Conference.][2]

Under the Geneva Conventions wounded and sick soldiers must be collected and tended; while in field or military hospitals, in hospital ships, or in course of being transferred from one hospital to another, wounded or sick men belonging to land or sea forces are regarded as neutrals; and if on recovery while in the hands of the enemy it appears that they are unfit for military service they must be sent back to their country. By an article of the

[1] The states which acceded to the Convention in the first instance, and which are still independent, were Switzerland, France, Belgium, Denmark, Italy, Spain, the Netherlands, Greece, Great Britain, Prussia, Sweden, Austria, Russia, and Turkey. The names are arranged in the order of time in which ratification was given. Since then Roumania (1874), Persia, San Salvador, Montenegro, Servia, Bolivia, Chile, the Argentine Confederation, Peru, Nicaragua, the United States (1882), Bulgaria (1884), and Japan (1886), have notified their adhesion. Thus the only states which have not yet adopted the Convention are Portugal, Brazil, Mexico, Colombia, Costa Rica, Uruguay and Venezuela. [But Art. 21 of the Hague Convention for regulating the laws of land warfare expressly imposed the Geneva Convention of 1864 on all its signataries, amongst whom are numbered Portugal and Mexico.]

[2] A very full account of the Geneva Convention will be found in Holtzendorff's Handbuch (1889, iv. §§ 76–9). For the text of the two Conventions [and for those of the Hague] see Parl. Papers. [See also for the latter De Martens, Nouv. Rec. Gén., 2e Sér. xxvi. 958.]

supplementary Convention which probably demands more from a belligerent than a just regard for his own interests will allow him to perform, ability to serve was not to prevent the restoration of convalescents on parole, except in the case of superior officers. Surgeons and other persons engaged in attendance on the sick and wounded or in their transport, whether they are volunteers or in the service of the enemy, are neutralised during such time as they are actually employed; so long as there are any sick or wounded to succour, they may remain in any hospital to which they may be attached, and so long as they stay with it they must continue to fulfil their duties; but they may also in the exercise of their own discretion rejoin the corps or return to the country to which they belong, the enemy having only the right to detain them for such time as may be required by strict military necessities. Field and military hospitals are also neutralised so long as any sick or wounded are in them: but while ambulances with their horses and medical and surgical stores are in no case liable to seizure, and accompany their staff when the latter rejoin the enemy, in fixed hospitals the stores are appropriated by the captors, and the medical staff in leaving only carry with them their private property. The special conditions of naval war call for provisions applicable to it alone, and an attempt was made to supply them by the Conference of 1868. Trading vessels containing sick and wounded passengers exclusively, and not laden either with enemy's goods or with contraband of war, were not to be seized; but the fact of a visit notified in the log-book by an enemy's cruiser, by establishing ability to capture, rendered the sick and wounded incapable of serving during the continuance of the war. Surgeons belonging to a captured vessel were bound to give their assistance until and during the removal of the wounded; so soon as this is effected they were free to return to their country. As hospital ships may be deprived of protection by accident of weather or position, and their capture is not therefore, as in the case of military hospitals, necessarily connected with the defeat of the force to which they belong,

they were not assimilated to fixed hospitals on land, but enjoyed a complete neutrality, if they had been officially designated as hospitals before the outbreak of war, and if they were unfit for warlike use; when these conditions were not satisfied they became the property of the captor, but he could not divert them from their special employment until after the conclusion of peace. Hospital ships fitted out by societies for the aid of sick and wounded, if provided with certain guarantees, were recognised as neutral, and permitted to operate under the reserve of a right of control and visit on the part of the belligerents. In order that neutralised objects and persons shall be recognised, hospitals were to be indicated by a special flag, hospital ships by a distinctive colour, and persons attendant on the sick and wounded by a badge. [These provisions were embodied in the Convention for the adaptation to maritime warfare of the principles of the Geneva Convention signed at the Hague by the representatives of all the twenty-six powers there assembled, and they now form part of the recognised laws of war.]

There can be no doubt that the Geneva [and Hague] Conventions embody the principles on which the services giving aid to sick and wounded in war ought to be, and will be, regulated in the future, but the specific rules will probably undergo some change. In their present form they are open to criticism in many details, and the occurrences of 1870, besides suggesting that voluntary assistance may need to be brought under firmer control, betrayed at least one serious omission in the stipulations which have been accepted. The instances of disregard for the Convention, which appear to have been unfortunately numerous during the Franco-German War, may in part be explained by unavoidable accident, and in the main may probably be referred to an ignorance in the soldiery of the duties imposed upon them which it may be hoped has not been allowed to continue; but the possibility must always exist that acts will take place which cannot be so leniently judged, and until belligerents see proof that intentional violation of the Convention will be punished by their enemy, every violation will

be regarded as the evidence of a laxity of conduct on his part which will lead to corresponding laxity in them. In 1868 a proposal was made, and rejected by the European governments, that an article should be added to the Convention rendering infractions of it penal under their Articles of War. If the language of the article had covered wilful infractions only, its rejection would not have been to their credit[1]. [During the late South African War there were serious complaints, not confined to one side only, of the violation of the Geneva Convention. Strictly speaking, its provisions were not binding upon either of the combatants, since the Dutch Republics had not given adhesion to it and had not been represented at the Peace Conference at the Hague. It need hardly be said that no disposition to take advantage of this was manifested on the part of Great Britain, and the Boers, with rare exceptions, showed, in their treatment of the

[1] M. Bluntschli (§§ 587–9, 590-1-2) makes several criticisms on the details of the Convention and suggestions for its improvement. He notices with justice (§ 586) that the meaning of an expression in the 1st article is equivocal. It is stated that 'la neutralité cesserait si ces ambulances ou hôpitaux étaient gardés par une force militaire.' If the word 'gardés' is to be taken to signify 'militarily held,' no objection can be felt to the clause; but if it is to be read in the more natural sense of 'protected,' it sanctions a practice less liberal than that which has hitherto been customary. It is often necessary to place guards over hospitals to protect the inmates, or to prevent their contents from being plundered, and if on the appearance of the enemy these guards offer no resistance it has been usual to allow them to return to their army. The usage, and the duty of non-resistance correlative with the privilege, are illustrated by an occurrence which took place during the Peninsular War. Col. Trant on entering Coimbra, which was full of French sick and wounded, was resisted by the captain in command of the company left as a hospital guard. After sustaining an attack for three hours the captain requested to be allowed to rejoin the French army, and supported his demand when it was refused by referring to the case of an English company which had just before been sent in after the battle of Busaco. Colonel Trant required an unconditional surrender. 'You are not,' he said, 'in the same position as the English company. I have taken you with arms in your hands. You have killed or wounded thirty men and a superior officer; your resistance has been long and obstinate. You may think yourselves only too happy to be prisoners at all.' Koch, Mém. de Masséna, vii. 238. General Koch insinuates that the fact of resistance ought to have made no difference in the treatment accorded to the guard; but his judgment was apt to be warped when the conduct of English was in question.

wounded and prisoners a desire to act in accordance with its spirit. It cannot be affirmed, however, that they were equally scrupulous in some other respects, and there were undoubtedly occasions on which the white flag and the Geneva badge were abused[1]. The enormously increased range of modern cannon and rifles tends to an ever-increasing difficulty in the location of field hospitals, and it cannot be expected that combatants will allow their operations to be impeded by the presence of an ambulance in the line of fire. Many of the so-called Ambulance Corps fitted out in neutral states were utilised as a cloak by volunteers from Europe and America desirous of joining the armies of the Republics, and in future wars it may be safely assumed that this form of international benevolence will be closely scrutinised by the belligerent powers.]

What persons may be made prisoners of war.

All persons whom a belligerent may kill become his prisoners of war on surrendering or being captured. But as the right to hold an enemy prisoner is a mild way of exercising the general rights of violence against his person, a belligerent has not come under an obligation to restrict its use within limits so narrow as those which confine the right to kill. He may capture all persons who are separated from the mass of non-combatants by their importance in the enemy's state, or by their usefulness to him in his war. Under the first of these heads fall the sovereign and the members of his family when non-combatants, the ministers and high officers of government, diplomatic agents, and any one who for special reasons may be of importance at a particular moment. Persons belonging to the auxiliary departments of an army, whether permanently or temporarily employed, such as commissariat employés, military police, guides, balloonists, messengers, and telegraphists, when not offering resistance on being attacked by mistake, or defending themselves personally during an attack

[1] For instance at Driefontein, on March 10, 1900, Lord Roberts reports from his own observation a 'flagrant breach of the recognised usages of war' in connexion with the white flag, and complains of the persistent use by the enemy of flat-nosed expanding bullets. Annual Register, 1900, p. 399.

made upon the combatant portions of the army, in which case they become prisoners of war as combatants, are still liable to capture, together with contractors and every one present with a force on business connected with it, on the ground of the direct services which they are engaged in rendering. Finally, sailors on board enemy's trading vessels become prisoners because of their fitness for immediate use on ships of war [1]. The position of surgeons and chaplains, apart from the Convention of Geneva,

[1] Bluntschli, §§ 594-6; Manuel de Droit Int. à l'Usage des Officiers de l'Armée de Terre (French Official Handbook), 37; American Instruct., art. 50; Project of Declaration of Brussels, § 34; Heffter, § 126. M. Bluntschli, the American Instructions, and the Project of Declaration include correspondents of newspapers among persons liable to be made prisoners of war. Probably it is only meant that they may be detained if their detention is recommended by special reasons. All persons however can be made prisoners for special reasons; newspaper correspondents in general seem hardly to render sufficiently direct service to justify their detention as a matter of course; and they are quite as often embarrassing to the army which they accompany as to its enemy. Perhaps it is unfortunate that they are enumerated as subjects of belligerent right together with persons who are always detained. The Manual of the Institut de Droit International (art. 22) directs that newspaper correspondents shall be detained for so long only as military necessity may dictate.

In 1870 Count Bismarck denied that sailors found in merchant vessels can be made prisoners of war, and in a note addressed to the government of the National Defence threatened to use reprisals if those who had been captured were not liberated. In justification of his doctrine he pretended that the only object of seizing merchant seamen is to diminish the number of men from whom the crews of privateers could be formed, and that therefore as France was a party to the Declaration of Paris, it must be supposed that it had 'adhered in advance' to their immunity from capture. The Comte de Chaudordy had no difficulty in showing that no such inference could be drawn from the fact of adherence to the Declaration of Paris, that the usage of capturing sailors had been invariable, that the mercantile marine of a nation, apart from any question of privateering, is capable of being transformed at will into an instrument of war, and that in countries where, as in Germany, all seafaring men are subject to conscription for the navy of the state, the reasons for capture are of double force (D'Angeberg, Nos. 580, 694, 813, 826, 911). Count Bismarck executed his threat to use reprisals, and sent Frenchmen of local importance as prisoners to Bremen in a number equal to that of the captains of merchantmen who were detained in France. The pretension of Count Bismarck to create an international rule by his simple fiat need scarcely be treated seriously, but it is a matter for indignation that he should attempt to prevent an adversary from acting within his undoubted rights by means which are reserved to punish and to brand violations of law.

is not fully determined. In the eighteenth century they were liable to capture, but on an exchange of prisoners they were commonly returned without equivalents or ransom. During the Peninsular War they shared the lot of other non-combatants. According to De Martens a usage had in his time grown up of sending them back to the enemy, and Klüber recognises their entire immunity; but as both writers class with them non-combatants of whose liability to capture there can be no doubt, the value of their evidence is open to question. More recently M. Heffter subjects surgeons and chaplains to seizure; and the American Instructions for armies in the field, by directing that they are only to be retained if the commander of the army capturing them has need of their services, render their dismissal a matter of grace[1]. On the whole it may be concluded that as the Convention of Geneva is not yet universally binding, belligerents, who are unfettered as respects their enemy by its obligations, still have the right to treat his medical staff as prisoners of war.

[1] Moser, ix. ii. 255 and 260. Cartel of exchange between England and France in 1798, De Martens, Rec. vi. 498. In some cases doctors, surgeons, and their assistants were returned without ransom long before any usage in their favour had begun to be formed. So far back as 1673 a provision to this effect was made in a cartel between France and the United Provinces, Dumont, vii. i. 231; and a like indulgence is stipulated for in the Anglo-French Cartel of 1780, De Martens, Rec. iii. 306. De Martens, Précis, § 276; Klüber, § 247; Heffter, § 126; American Instruct., art. 53. On Massena assuming command of the army of Portugal, Lord Wellington proposed that surgeons and officers of other civil departments should, if captured, be returned. At the moment an arrangement to this effect was believed by the French to be contrary to their interests, and no notice was taken of the suggestion; but after the seizure by Colonel Trant of the whole of the French hospitals at Coimbra, the same proposal was made by Massena in his turn. It does not appear whether under the then circumstances Lord Wellington would have acceded to it, as before any answer could be given it became known that an arrangement had been made between the English and French governments for a general exchange. Wellington Despatches, vii. 591. [Mr. Larpent, Judge-Advocate-General to the British forces in the Peninsular War, who was captured by the French in 1813, was treated as a prisoner of war and exchanged in the ordinary way. See his 'Private Journal,' ii. 103, where he says there was much difficulty about it. Under art. 3 of the Hague Convention non-combatants attached to armed forces of a belligerent 'have the right to be treated as prisoners of war.']

The rights possessed by a belligerent over his prisoners under the modern customs of war are defined by the same rule, that more than necessary violence must not be used, which ought to govern him in all his relations with his enemy. The seizure of a prisoner is the seizure of a certain portion of the resources of the enemy, and whatever is needed to deprive the latter of his resources during the continuance of the war may be done; a prisoner therefore may be subjected to such regulations and confined with such rigour as is necessary for his safe custody. Beyond this point or for any other object no severity is permissible. The enemy has been captured while performing a legal act, and his imprisonment cannot consequently be penal.

By the practice which is founded on these principles prisoners are usually interned in a fortress, barrack, or camp, where they enjoy a qualified liberty, and imprisonment in the full sense of the word is only permissible under exceptional circumstances, as after an attempt to escape, or if there is reason to expect that an attempt to escape will be made[1]. If a prisoner endeavours to escape, he may be killed during his flight, but if recaptured [it used to be held that] he cannot be punished, except by confinement sufficiently severe to prevent the chance of escape, because the fact of surrender as prisoner of war is not understood to imply any promise to remain in captivity[2]; [now, however, the Hague Convention subjects a prisoner of war to disciplinary punishment for attempting to escape]. A belligerent may exact obedience to rules necessary for safe custody under the sanction of punishment, and he also has the right of punishing in order to maintain discipline.

[1] Formerly a harsher practice obtained. During the wars of Independence and of the French Revolution and Empire, prisoners of war were often kept on board ships, and sometimes in common gaols. At a remoter period they were still worse treated,—prisoners were not only sent to the galleys, but were kept there after the termination of war. In 1630 it was stipulated between England and Spain that this should not be done, and the practice does not seem to have been wholly abandoned till near the end of the seventeenth century.

[2] Bluntschli, § 607; American Instruct., art. 77. [Hague Convention, art. 8.]

Prisoners are fed and clothed at the expense of the state which holds them in captivity, and they sometimes also receive an allowance of money[1]. The expenses thus incurred may be recouped by their employment on work suited to their grade and social position; provided that such work has no direct relation to the war[2]. Prisoners are themselves allowed to work for hire on their own account, subject to such regulations as the military authorities may make. In principle the right of the captor appears to be sufficiently just, and labour is obviously better for the health of the men than is unoccupied leisure in a confined space; but it might be wished that their privilege were held to

[1] It was formerly the custom for each state to pay the cost of the maintenance of its prisoners in the enemy's country, and when advances were made by the enemy for the subsistence of the prisoners, accounts were sometimes balanced from time to time during the war, and sometimes at its termination. Several treaties—e. g. those of Paris in 1763 (De Martens, Rec. i. 64), of Versailles in 1783 (id. ii. 465), between England and the United Provinces in 1783 (ib. 522), between the United States and Prussia in 1785 (ib. 577), of Amiens in 1802 (id. sup. ii. 565), of Paris in 1814 (Nouv. Rec. ii. 16), and of Ghent in 1814 (ib. 78)—contain stipulations for repayment of the amount expended on either side. See also Moser, Versuch, ix. ii. 272, and Wolff, Jus Gentium, § 816.

Under the more modern practice each state maintains the prisoners captured by it. Comp. Bluntschli (§ 605), Calvo (§ 1857), the proposed Declaration of Brussels (art. 27), and the Manual of the Institute (art. 69). In 1793 the French National Convention decreed that prisoners should be given the pay of a corresponding rank in the French service (De Martens, Rec. v. 370). During the war of 1870 France paid to officers from £4 to £13 10s. per month according to their rank, and to private soldiers 7·50 c. per day. Germany was not so liberal; privates received nothing, and officers from £1 16s. to £3 15s. per month. (D'Angeberg, No. 694.) [Article 17 of the Hague Convention provides that officers may receive, if necessary, the full pay allowed them in this position by their country's regulations, the amount to be repaid by their Government.]

[2] Klüber, § 249; Heffter, § 129; Manuel de Droit Int. à l'Usage, &c., 74; American Instruct., art. 76; Project of Declaration of Brussels, art. 25; Manual of the Institute, arts. 71–2. Bluntschli (§ 608) would allow the employment of prisoners on any work which was not an 'immediate' relation to the war; they may be used to construct fortifications 'pendant que la lutte est encore éloignée.' He appears to stand alone. [Articles 4 to 20 of the Hague Convention are devoted to the treatment of prisoners of war. Article 14 provides for the establishment in each belligerent state of a 'Bureau de renseignements' to watch after the treatment of prisoners of war, to ascertain the various places of detention, to supply information to the relatives, and to undertake the delivery of letters and packages.]

overrule the right of the enemy, so that they could only be compulsorily employed in default of work yielding profit to themselves.

Dismissal of prisoners on parole.

Prisoners are often released from confinement or are dismissed to their own country on pledging their parole, or word of honour, to observe conditions which render them innocuous to their enemy. They are allowed to live freely within a specified district on undertaking not to pass the assigned bounds, or they return home on giving their word not to serve against the captor for a stated time or during the continuance of the war.

The release of prisoners in this manner is not necessarily an act of grace on the part of the captor; for it may often occur that his willingness to parol them may be caused by motives of convenience or by serious political or military reasons. Hence prisoners cannot be forced to give their parole, and their dismissal with a simple declaration by the enemy that they are paroled affects them with no obligation. So also non-commissioned officers and privates, who are not supposed to be able to judge of the manner in which their acceptance of freedom upon parole may touch the interests of their country, are not allowed to pledge themselves, except through an officer, and even officers, so long as a superior is within reach, can only give their word with his permission. Finally, the government of the state to which the prisoners belong may refuse to confirm the agreement, when made; and if this is done they are bound to return to captivity, and their government is equally bound to permit, or if necessary to enable, them to do so.

The terms upon which prisoners may be paroled are naturally defined by the character of the rights which their captor possesses over them. By keeping them in confinement he may prevent them from rendering service to their state until after the conclusion of peace. He may therefore in strictness require them to abstain not only from acts connected with the war, but also from engaging in any public employment. Generally however a belligerent contents himself with a pledge that his prisoner, unless exchanged, will not serve during the existing

war against the captor or his allies engaged in the same war. This pledge is understood to refer only to active service in the field, and does not therefore debar prisoners from performing military duties of any kind at places not within the seat of actual hostilities, notwithstanding that the services thus rendered may have a direct effect in increasing the power of the country for resistance or aggression. Thus paroled prisoners may raise and drill recruits, they may fortify places not yet within the scope of military operations, and they may be employed in the administrative departments of the army away from the seat of war. As the right of a belligerent over his prisoners is limited to the bare power of keeping them in safe custody for the duration of the war, he cannot in paroling them make stipulations which are inconsistent with their duties as subjects, or which shall continue to operate after the conclusion of peace. Thus if prisoners are liberated on condition of not serving during a specified period, before the end of which peace is concluded and hostilities again break out, they enter upon the fresh war discharged from obligation to the enemy.

A prisoner who violates the conditions upon which he has been paroled is punishable with death if he falls into the hands of the enemy before the termination of the war[1]. [But the Hague Convention merely states that he loses the right to be treated as a prisoner of war, and 'peut être traduit devant les tribunaux.']

Prisoners may acquire their definite freedom during the continuance of war either by ransom or exchange.

Ransom.

When the European nations, under the influence of Christianity, desisted from reducing their prisoners to slavery, they preserved a remnant of the ideas which they had before held,

[1] Vattel, liv. iii. chap. viii. § 151; Moser, Versuch, ix. ii. 369; De Martens, Précis, § 275; American Instruct., arts. 119–33; Bluntschli, §§ 617–26; Project of Declaration of Brussels, arts. 31–3. [Hague Convention, art. 12.]

The practice of paroling troops for a specified period was common in the eighteenth century; it is now usual to require an engagement not to serve during the duration of the war.

and regarded the individual captor as acquiring a right to get such profit by way of ransom out of his prisoner as the prospect of indefinite captivity would enable him to exact. So long as armies were composed of feudal levies or of condottieri this practice remained nearly undisturbed, and it only so far changed that prisoners of great importance became the property of the sovereign, and that the sums payable, which were at first dependent on agreement in each case, gradually became settled by usage according to a tolerably definite scale[1]. But in proportion as royal armies took the place of the earlier forms of levies, the sovereign who paid his soldiers took to himself the right of dealing with their prisoners in the manner best suited to his interests. Under the practice which thus became established in the seventeenth century, one mode of liberation continued to be by ransom, but this agreement instead of being personal became international, and a common scale under which either state should be allowed to redeem its prisoners was fixed by cartel either at the outbreaking of the war or from time to

[1] Edward III was amongst the first, if not the first, to take prisoners of consequence out of the hands of their captors. He was obliged however to buy them. (Lingard, Hist. of England, vol. iv. 107.) Before the end of the sixteenth century it had become an 'old custom' in England, France, and Spain, that dukes, earls, barons, or other persons *magni nominis*, should belong to the king (Ayala, De Jure et Off. Bell. § 27). The private interest of the actual captor however in prisoners of inferior rank died out very slowly. From a Proclamation of Charles I, of July 23, 1628, it seems that at that time it had not wholly disappeared in England; prisoners brought into the kingdom by private men were to be kept in prison at the charge of the captors, until they could be delivered by way of exchange or otherwise (Rymer, Fœdera, viii. ii. 270).

Gustavus Adolphus reserved to himself all prisoners of note taken by his troops, and recompensed the captor 'according to the quality of the person,' but left the prisoners of inferior rank to the takers, subject to the proviso that they should not be ransomed without the leave of a general officer. The Swedish Discipline (Lond. 1632), art. 101. Albericus Gentilis (De Jure Belli, lib. ii. c. 15) and Grotius (De Jure Belli et Pacis, lib. iii. c. xiv. § 9) mention rates of ransom customary in their day; the former stating the amount as the equivalent of the annual pay or income and pay of the prisoner, the latter as the equivalent of three months' or a month's pay, according as it would seem to the prisoner's rank. Probably Gentilis is speaking only of prisoners of superior, and Grotius of those of inferior, station.

time during its continuance. Gradually this mode of recovering captive subjects became alternative with or supplementary to exchange, and of late has been so entirely superseded by it, that ransom might almost be regarded as obsolete, were it not that the possibility of its employment is contemplated by the American Instructions for Armies in the Field, and that as there is no moral objection to the practice, the convenience of particular belligerents might revive it at any moment[1].

Exchange.

Exchange consists in the simple release of prisoners by each of two belligerents in consideration of the release of prisoners captured by the other, and takes place under an agreement between the respective governments, expressed in a special form of convention called a Cartel[2]. As belligerents have a right to keep their prisoners till the end of the war, exchange is a purely voluntary arrangement, made by each party for his own convenience; it may therefore be refused by either, but if accepted it must evidently be based on the principle that equal values shall be given and received. Equality of value is roughly obtained by setting off the prisoners against each other, man by man according to their grade or quality, or by compensating for superiority of rank by the delivery of a certain number of inferior grade. But the principle of equality is not fully satisfied unless the prisoners handed over on one side are as efficient as those which are received from the other: if an officer is worth several privates, so also a disciplined soldier is worth more than a man

[1] Vattel, liv. iii. ch. viii. § 153, and ch. xvii. §§ 278-81; American Instruct., art. 108; Bluntschli, § 616. A Cartel of 1673 made between France and the United Provinces (Dumont, vii. i. 231) provided for ransom alternatively with exchange; and like agreements became common from that time. Examples of the rates of ransom paid in the eighteenth century for military officers and soldiers may be seen in Moser (Versuch, ix. ii. 390 and 408), and for naval officers and sailors in De Martens (Rec. iv. 287). The Cartel agreed to between England and France in 1780 (ib. 276), which provided for the ransom of members of the naval and military forces of the two nations, is the latest instance of such agreements; and since that time no prisoners have probably been ransomed except sailors captured in merchant vessels which have subsequently been released under a ransom bill.

[2] For cartels and matters connected with them, see postea, p. 550.

destitute of training, and a healthy man more than an invalid. A government therefore in proposing or carrying out an exchange is bound not to attempt to foist upon its enemy prisoners of lower value than those which it obtains from him [1].

Some controversies have occurred which illustrate the bearing of this rule. In 1777 an agreement for an exchange of prisoners was made between General Washington and Sir W. Howe, in which it was merely stipulated that 'officers should be given for officers of equal rank, soldier for soldier, citizen for citizen.' When the agreement came to be carried out, the Americans objected that 'a great proportion of those sent out' by the English 'were not fit subjects of exchange when released, and were made so by the severity of their treatment and confinement, and therefore a deduction should be made from the list' to the extent of the number of non-effectives. Sir W. Howe, while denying the alleged fact of severe treatment, and referring the bad state of health of the prisoners to the sickness which is said to have prevailed in the American army at the time, fully granted 'that able men are not to be required by the party, who contrary to the laws of humanity, through design, or even neglect of reasonable and practicable care, shall have caused the debility of the prisoners he shall have to offer to exchange [2].'

Controversies between 1. England and the United States in 1777;

In 1810 negotiations for an exchange took place between England and France. At that time 43,774 French soldiers and sailors, together with 2,700 Dutch, Danes, and Russians, were prisoners in England. France on her part could only offer 11,458 efficient English, but she also held in custody 500 civilian 'détenus' and 38,355 Spaniards. The English government proposed an exchange of English as against French only; but the Emperor demanded that as the Spaniards were the allies of England they should be exchanged against French on like terms with the English, and *pari passu* with them so far that for every

2. England and France in 1810.

[1] Vattel, liv. iii. ch. viii. § 153; American Instruct., arts. 105–6, 109; Bluntschli, §§ 612–14; Wheaton, Elem. pt. iv. ch. ii. § 3.

[2] Washington's Corresp., vol. iv. 439, 454, and Append. xiii and xiv; Moser, Versuch, ix. ii. 291–311.

three Frenchmen exchanged one Englishman and two Spaniards should be handed over. The difference of quality between English or French soldiers and Spanish troops rendered the pretension that all should be exchanged on equal terms an absurd one, and the British government refused at first to admit it. Afterwards in their anxiety to procure the release of the civilians detained in France they consented to a general exchange; making it only a condition of the agreement that the exchange should begin with the release of the English against an equivalent number of Frenchmen. Their caution was justified by the condition being rejected, and the negotiations consequently fell through [1].

It is the usage that in the absence of express stipulation exchanged prisoners must not take part in the existing war [2].

Under an old custom chaplains and members of the medical staff are given up on an exchange taking place without equivalents being demanded [3].

Rights of punishment and security.

A belligerent, besides having the rights over his enemy which flow directly from the right to attack, possesses also the right of punishing persons who have violated the laws of war, if they afterwards fall into his hands, of punishing innocent persons by way of reprisal for violations of law committed by others, and of seizing and keeping non-combatants as hostages for the purpose of enabling himself to give effect without embarrassment to his rights of war.

Punishment.

To the exercise of the first of the above-mentioned rights no objection can be felt so long as the belligerent confines himself to punishing breaches of universally acknowledged laws. Persons convicted of poisoning wells, of assassination, of marauding, of the use of a flag of truce to obtain information, or of employing weapons forbidden on the ground of the needless suffering caused by them, may be abandoned without hesitation to the fate which they

[1] Corresp. de Nap. i. xxi. 69; Ann. Register for 1811, p. 76.

[2] Bluntschli, § 613.

[3] For examples of early cartels in which stipulations for such surrender are contained, see Dumont, vii. i. 231; Pelet, Mém. Milit. relatifs à la Succ. d'Espagne, iii. 778; Moser, ix. ii. 397 and 418.

deserve. When however the act done is not universally thought to be illegitimate, and the accused person may therefore be guiltless of intention to violate the laws of war, it may be doubtful whether a belligerent is justified in enforcing his own views to any degree, and unquestionably he ought as much as possible to avoid inflicting the penalty of death, or any punishment of a disgraceful kind. In 1870 the Germans issued a proclamation under which French combatants, not possessing the distinguishing marks considered by their enemy to be necessary, were to be liable to the penalty of death, and in cases in which it was not inflicted were to be condemned to penal servitude for ten years, and to be kept in Germany until the expiration of the sentence[1]. The whole question by what kind of marks combatants should be indicated, and to what degree such marks should be conspicuous, was at the time an open one; if inadequate marks were used, they would be used in the vast majority of instances under the direction or permission of the national authorities; and the individual would as a rule be innocent of any intention to violate the laws of war. If the marks sanctioned by the French government were glaringly insufficient, there might be good reason for executing a few members of its irregular forces or for condemning some to penal servitude until the end of the war. But measures of this kind ought only to be threatened when disregard of the laws of war on the part of an enemy is clear; they ought only to be carried out in the last extremity; and it can never be legitimate to inflict a penalty extending beyond the duration of the war. To do so is to convert a deterrent into a punishment for crime; and in such cases as that in question a crime cannot be committed by the individual so long as he keeps within the range of acts permitted by his government. The case of individuals who outstep this range is of course a wholly different one.

Reprisal, or the punishment of one man for the acts of another, Reprisal.

[1] The proclamation is given in Delerot, Versailles pendant l'Occupation, 104.

is a measure in itself so repugnant to justice, and when hasty or excessive is so apt to increase rather than abate the irregularities of a war, that belligerents are universally considered to be bound not to resort to reprisals except under the pressure of absolute necessity, and then not by way of revenge, but only in cases and to the extent by which an enemy may be deterred from a repetition of his offence [1].

Seizure of hostages.

Hostages are often seized in order to ensure prompt payment of contributions and compliance with requisitions, or as a collateral security when a vessel is released on a ransom bill; more rarely they are used to guard against molestation in a retreat and for other like purposes [2]. Under a usage which has long become obligatory it is forbidden to take their lives, except during an attempt at escape, and they must be treated in all respects as prisoners of war, except that escape may be guarded against by closer confinement [3].

[1] Manuel de Droit Int. à l'Usage, &c., 25; American Instruct., arts. 27-8; Manual of the Institute, art. 86. See also the Articles on Reprisals submitted by the Russian Government to the Conf. of Brussels, Parl. Papers, Miscell. No. i. 1875, p. 109.

[2] Bluntschli, § 600; Moser, Versuch, ix. 395, and ix. ii. 458; Twiss, ii. 360; Valin, Ord. de la Marine, liv. iii. tit. ix. art. 19. The German army appears to take hostages almost as a matter of course when requisitioning and even when foraging; Von Mirus, Hülfsbuch des Kavalleristen, 2^er Theil, Kap. 18. In Wolseley's Soldier's Pocket Book, p. 167, the seizure of hostages is recommended as a means of obtaining information. For hostages taken to guarantee the maintenance of order in occupied territory, see postea, p. 474.

[3] Vattel, liv. ii. ch. xvi. §§ 246-7; Bluntschli, § 600.

CHAPTER III

RIGHTS WITH RESPECT TO THE PROPERTY OF THE ENEMY

Division of the subject.

Under the old customs of war a belligerent possessed a right to seize and appropriate all property belonging to an enemy state or its subjects, of whatever kind it might be, and in any place where acts of war are permissible. Gradually this extreme right has been tempered by usage under the influence of the milder sentiments of recent times. In a few directions it has disappeared; in most it has been restricted by limitations greater or less according to the nature of the property and the degree to which its seizure is possible or advantageous to the belligerent. The law upon the subject therefore is broken up into several distinct groups of rules corresponding to the differences indicated.

Those relating to the appropriation of the ultimate or eminent property possessed by the state in its territory may be put aside for the moment. As such appropriation cannot be completed until peace has been concluded or an equivalent state of things has been set up, they will find their proper place in another chapter. The remaining rules may be conveniently divided into the heads of those affecting—

1. State property other than ultimate territorial property, viz. moveables and land and buildings in which the immediate as well as the ultimate property is in the hands of the state.
2. Private property within the territory of its owner's state.
3. Private property within the jurisdiction of the enemy.
4. Private property in places not within the jurisdiction of any state.

Rough division of property

Behind the customs with respect to the appropriation of enemy property, and modelling them with tolerable, though not with

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susceptible of appropriation from property insusceptible of appropriation.

complete consistency and success, may perhaps be found the principle that property can be appropriated of which immediate use can be made for warlike operations by the belligerent seizing it, or which if it reached his enemy would strengthen the latter either directly or indirectly, but that on the other hand property not so capable of immediate or direct use or so capable of strengthening the enemy is insusceptible of appropriation. Whether this is the case or not, there is at least a rough correspondence between the principle and accepted practice, which it may be worth while to keep in mind as a sort of guide to what may or may not be seized.

State property. Moveables.

As a general rule the moveable property of the state may be appropriated. Thus a belligerent seizes all munitions of war and other warlike materials, ships of war and other government vessels, the treasure of the state and money in cheques or other instruments payable to bearer, also the plant of state railways, telegraphs, &c. He levies the taxes and customs, and after meeting the expenses of administration in territory of which he is in hostile occupation, he takes such sum as may remain for his own use[1].

So far there is no question. A belligerent either seizes property already realised and in the hands of the state, or property which he may perhaps be considered to appropriate under a sort of mixed right, of which it is difficult to disentangle the elements, partly as moneys belonging to the state when they accrue due, and partly as private property appropriated according to a scale conveniently supplied by the amount of existing taxation. It is, no doubt, unsatisfactory to explain thus the latter kind of appropriation; and it probably can only be accounted for logically by adopting an inadmissible doctrine which will be discussed under the head of military occupation. The practice however is settled in favour of the belligerent.

But can he go further? Can he substitute himself for the

[1] From the taxes, customs, or other state revenues which an enemy may take for his own use must be excepted any which have been hypothecated by the state in payment of any loan contracted with foreign lenders before the commencement of the war.

invaded state, and appropriate moneys due upon bills or cheques requiring endorsement, or upon contract debts in any other form? Seizure in such case might not be direct; it might have to be enforced through the courts, and possibly through the courts of a neutral state; seizure also would not be effected once for all; upon the question of its validity or invalidity would depend whether the invaded state could demand a second payment at a future time. The matter is therefore one of considerable importance. The majority of writers, it would seem[1], consider funds in the shape contemplated to be amongst those which a belligerent can take. The arguments of M. Heffter and Sir R. Phillimore in a contrary sense appear however to be unanswerable. According to them, incorporeal things can only be occupied by actual possession of the subject to which they adhere. When territory is occupied, there are incorporeal rights, such as servitudes, which go with it because they are inherent in the land. But the seizure of instruments or documents representing debts has not an analogous effect. They are not the subject to which the incorporeal right adheres; they are merely the evidence that the right exists, 'or, so to speak, the title-deeds of the obligee.' The right itself arises out of the purely personal relations between the creditor and the debtor; it inheres in the creditor. It is only consequently when a belligerent is entitled to stand in the place of his enemy for all purposes, that is to say, it is only when complete conquest has been made and the identity of the conquered state has been lost in that of the victor, that the latter can stand in its place as a creditor, and gather in the debts which are owing to it[2].

[1] Heffter, § 134. Power to appropriate recoverable or negotiable debts or securities belonging to the state is recognised by the Manual of the Institute, art. 50. [But by art. 53 of the Hague Convention an army of occupation is only permitted to take possession of the cash, funds, and property liable to requisition belonging strictly to the state, and generally all moveable property of the state which may be used for military operations.]

[2] Heffter (§ 134) discusses the question tersely; Sir R. Phillimore (pt. xii. ch. iv) with extensive learning.

The latter writer remarks that the jurists who consider that the seizure of

Land and buildings on the other hand may not be alienated. They may perhaps be conceived of as following the fate of the territory, and as being therefore incapable of passing during the continuance of war, though as the immediate property of the state is distinguishable from the ultimate or eminent property, this view would not be satisfactory; and it is more probable that the custom, which has now become compulsory, originally grew out of the impossibility of giving a good title to a purchaser. Purchase, unlike the payment of taxes, is a voluntary act; the legitimate government therefore in recovering possession is obviously under no obligation to respect a transaction in which the buyer knows that he is not dealing with the true owner.

An occupant may however seize the profits accruing from the real property of the state and may make what temporary use he can of the latter, subject it would seem to the proviso that he must not be guilty of waste or devastation. Thus he can use buildings to quarter his troops and for his administrative services, he receives rents, he can let lands or buildings and make other contracts with reference to them, which are good for such time as he is in occupation, and he can cut timber in the state forests; but in cutting timber, for example, apart from the local necessities of war, he must conform to the forest regulations of the country, or at least he must not fell in a destructive manner so as to diminish the future annual productiveness of the forests[1]. [In the words of the Hague Convention, he 'must

an instrument representing a debt carries with it the right to exact payment from the debtor appear to have been misled by supposed analogies of Roman law. As in the cases contemplated by that law intention to transfer the right is supposed, and the instrument is understood to be handed over as a bequest or donation in proof of the right, the analogy is not evident.

[1] In 1870 the German government sold 15,000 oaks growing in the state forests of the Departments of the Meuse and the Meurthe. After the conclusion of peace the French government seized those which had not already been removed. The purchasers appealed to the German government; but the latter, recognising that it had exceeded its rights, replied that the matter must be left to the judgment of the French Courts, which annulled the sale as being wasteful and excessive. Journal de Droit Int. Privé, 1874, p. 126. [See Hague Convention, art. 55.]

protect the capital of these properties and administer it according to the rules of usufruct.']

State property attributed to the maintenance of hospitals, &c.

From the operation of this general right to seize either the totality, or the profits, of property according to its nature are excluded property vested in the state but set permanently apart for the maintenance of hospitals, educational institutions, and scientific or artistic objects, and also the produce of rates and taxes of like kind levied solely for local administrative purposes[1].

Archives, &c.

It is also forbidden to seize judicial and other legal documents or archives and state papers, except, in the last case, for specific objects connected with the war. The retention of such documents is generally of the highest importance to the community to which they belong, but the importance is as a rule rather of a social than of a political kind; their possession by an invader, save in the rare exception stated, is immaterial to him; their seizure therefore constitutes a wanton injury.

Contents of museums, &c.

Although the matter is sometimes treated as being open to doubt, there seems to be no good ground for permitting the appropriation of works of art or the contents of museums or libraries. If any correspondence ought to exist between the right of appropriation and the utility of a thing for the purposes of war, it is evident that the objects in question ought to be exempted. There is besides a very persistent practice in their favour; though it must be admitted that the major part of that practice has been prompted by reasons too narrow to support a rule of exemption as things are now viewed. During the eighteenth century works of art and the contents of collections were spared, as royal palaces were spared, on the ground of the personal courtesy supposed to be due from one prince to another. Museums and galleries are now regarded as national property. The precedents afforded by last century are consequently scarcely in point. But usage has remained unchanged. Pictures and

[1] Manuel de Droit Int. à l'Usage, &c., 2e ptie, tit. iv. ch. i. § 1; American Instruct., arts. 31 and 34; Manual of the Institute, arts. 52–3; Halleck, ii. 97; Bluntschli, §§ 646, 648. [Hague Convention, art. 56.]

statues and manuscripts have not been packed in the baggage of a conqueror, except during the campaigns of the Revolution and of the first French Empire. The events which accompanied the conclusion of peace in 1815 were not of a kind to lend value to the precedents which those campaigns had created. The works of art which had been seized for the galleries of Paris during the early years of the century were restored to their former owners; and Lord Castlereagh in suggesting their restoration by a note addressed to the ministers of the allied powers on Sept. 11, 1815, pointed out that it was a duty to return them to the countries to which 'they of right belonged,' and stigmatised the conduct of France as 'a reproach to the nation by which it has been adopted.' A restoration effected in consequence of this note may be taken to be a solemn affirmation of the principle of exemption by all the great powers except France; and if the language of the Declaration on the laws of war proposed at the Conference of Brussels was somewhat ambiguous, the discussion reported in the Protocols shows that it was not wished to reserve a right of carrying off works of art, but to subject them to the momentary requirements of military necessity[1]. [And

[1] The practice or doctrine of exemption is indicated or stated by Moser (Versuch, ix. i. 159); De Martens (Précis, § 280); Klüber (§ 253); Calvo (§§ 1915–17). See also Manuel de Droit Int. à l'Usage, &c., p. 119. [Hague Convention, art. 56.]

Sir T. Twiss (§ 68) also seems to hold that public collections are exempt from capture, and quotes a case in which a collection of Italian paintings and prints taken by a British vessel on its passage from Italy to the United States in 1812 was restored to the Academy of Arts at Philadelphia on the ground that 'the arts and sciences are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species; and that the restitution of such property to the claimants would be in conformity with the Law of Nations, as practised by all civilised countries.' For the documents relating to the restoration of the works of art in Paris in 1815 to their former owners, see De Martens, Nouv. Rec. ii. 632–50; in one of the despatches there given the Duke of Wellington speaks of the French appropriations as having been 'contrary to the practice of civilised war.'

Vattel and Heffter take no notice of the matter; Wheaton (pt. iv. ch. ii. § 6) refrains from giving any opinion of his own.

Halleck (ii. 104) and Bluntschli (§ 651) consider that the immunity of works of art and like objects is not obligatory on a belligerent. Sir Samuel

the practice is absolutely forbidden by the terms of the Hague Convention.] PART III CHAP. III

Finally, vessels engaged in exploration or scientific discovery are granted immunity from capture. The usage began in the last century when Bougainville and La Pérouse appear to have been furnished with safe-conducts to protect them in the event of war breaking out during their voyage, and the French government in 1776 ordered all men of war and privateers to treat Captain Cook as a neutral so long as he abstained from acts of hostility. During the present century there have been several occasions on which there has been reason for behaving in a like manner, and on which accordingly vessels have been furnished with protections. The most recent of these was the despatch of the Austrian corvette Novara on a scientific expedition in 1859[1].

Vessels engaged in scientific discovery.

Of the private property found by a belligerent within the territory of his enemy, property in land and houses, including property in them held by others than their absolute owners, was very early regarded as exempt from appropriation. The exemption was no doubt determined by reasons much the same as those which have been suggested as accounting for the prohibition to alienate state domains. Land being immoveable, its fate was necessarily attendant on the ultimate issue of hostilities; an invader could not be reasonably sure of continued possession for himself, nor could he give a firm title to a purchaser; and these impossibilities re-acted upon his mind so as to prevent him from feeling justified in asserting the land to be his.

Private property within the territory of its owner's state. Land, &c.

Personal property on the other hand, until a late period,

Personal property.

Romilly's speech of February 20, 1816, which is sometimes quoted in favour of this view, merely objects to the restitution made by the allies, that the most valuable of the works of art seized by the French had been secured to them by treaty stipulations, and that the allies had no right to override treaties made between France and other states by unilateral acts of their own. This contention may be well founded enough, but of course it has nothing to do with the principle in question. Hansard, xxxiii. 759.

[1] Halleck, ii. 149; Calvo, § 2056.

consisted mainly in the produce of the soil, merchandise, coin, and moveables of value. It was therefore of such kind that much of it being intended to be destroyed in the natural course of use, an invader could render his ownership effective by consuming the captured objects, and that all of it was capable of being removed to a place of safety whither it might reasonably be supposed that its owner would be unable to follow it. Hence personal property remained exposed to appropriation by an enemy; and so late as the seventeenth century, armies lived wholly upon the countries which they invaded, and swept away what they could not eat by the exercise of indiscriminate pillage. But gradually the harshness of usage was softened, partly from an increase of humane feeling, partly for the selfish advantage of belligerents, who saw that the efficiency of their soldiers was diminished by the looseness of discipline inseparable from marauding habits, and who found, when war became systematic, that their own operations were embarrassed in countries of which the resources were destroyed. A custom grew of allowing the inhabitants of a district to buy immunity from plunder by the payment of a sum of money agreed upon between them and the invader[1], and by furnishing him with specified quantities of

[1] Both the Swedes and Imperialists commonly admitted towns to ransom during the Thirty Years' War; see the cases, e. g. of Munich, Würtzburg, Freisingen, and Rothenburg, which paid contributions to the Swedes, and those of Hildesheim, Spires, Bayreuth, and Altenburg, to the Imperialists. Swedish Intell. pts. ii. and iii. From the Army Regulations of Gustavus Adolphus may be seen the intimate connexion between the restriction of pillage and the sense of its bad effect on the efficiency of the soldiery. 'They that pillage or steale eyther in our land or in the enemies or from any of them that come to furnish our leaguer or strength, without leave, shall be punisht for it as for other theft. If it so please God that we beate the enemy either in the field or in his leaguer then shall every man follow the chace of the enemies; and no man give himself to fall upon the pillage, so long as it is possible to follow the enemy, and untill such time as he be assuredly beaten. Which done then may their quarters be fallen upon, every man taking what he findeth in his owne quarter.' The Swedish Discipline, London, 1632, p. 56. It would seem that as a general rule pillage was only permitted in the Swedish army after a battle or the capture of a town; the Swedish soldiers however were at that time far better organised and disciplined than those of any other country, and the habits of the Imperialists

articles required for the use of his army; and this custom has since hardened into a definite usage, so that the seizure of moveables or other personal property in its bare form has, except in a very few cases, become illegal.

The former custom of pillage was the most brutal among the recognised usages of war. The suffering which directly attended it was out of all proportion to the advantages gained by the belligerent applying it; and it opened the way to acts which shocked every feeling of humanity. In the modern usage, however, so long as it is not too harshly enforced, there is little to object to. As the contributions and requisitions which are the equivalents of compositions for pillage are generally levied through the authorities who represent the population, their incidence can be regulated; they are moreover unaccompanied by the capricious cruelty of a bombardment, or the ruin which marks a field of battle. If therefore they are compared, not merely with universal pillage, but with more than one of the necessary practices of war, they will be seen to be relatively merciful. At the same time if they are imposed through a considerable space of territory, they touch a larger proportion of the population than is individually reached by most warlike measures, and they therefore not only apply a severe local stress, but tend, more than evils felt within a narrower range, to indispose the enemy to continue hostilities.

Contributions and requisitions.

The regulated seizure of private property is effected by the levy of contributions and requisitions. Contributions are such payments in money as exceed the produce of the taxes, which, as has been already seen, are appropriated as public property. Requisitions consist in the render of articles needed by the army for consumption or temporary use, such as food for men and animals, and clothes, waggons, horses, railway material, boats, and other means of transport, and of the compulsory labour, whether gratuitous or otherwise, of workmen to make roads, to

were very different. [The pillaging of a town taken by assault is expressly forbidden by the Hague Convention, art. 28.]

drive carts, and for other such services[1]. The amount both of contributions and requisitions is fixed at the will of the invader[2]; the commander of any detached body of troops being authorised under the usual practice to requisition objects of immediate use, such as food and transport, while superior officers are alone permitted to make demands for clothing and other articles for effecting the supply of which some time is necessary[3], and con-

[1] It is constantly said, apparently on the authority only of De Garden, that the term 'requisition,' and the mode of appropriation signified by it, were both invented by Washington. The term may very possibly have been invented by him, but the practice is of much older date. Indeed, considering the difficulties of transport before his time, requisitions were most likely larger during the whole of the eighteenth century in proportion to the size of the armies employed than they now are. The use of the word contribution to express both contributions and requisitions has tended to keep the fact that the latter were exacted from becoming prominent; but there are plenty of passages in despatches and military memoirs in which the context shows that the word contribution is used of contributions in kind, that is to say of determinate quantities of specified articles furnished on the demand of an enemy by a given place or district. Not infrequently the levy of requisitions is plainly stated; and their systematic use is prescribed by Frederic II. 'If an army is in winter quarters in an enemy's country,' he says, 'the soldiers receive gratis bread, meat, and beer, which are furnished by the country.' A few lines further on he adds that 'the enemy country is bound to supply horses for the artillery, munitions of war, and provisions, and to make up any deficiency in money.' Les Principes Généraux de la Guerre, Œuv. xxviii. 91. Comp. Moser, Versuch, ix. i. 378.

[2] Towards the end of the seventeenth century the custom of making bargains with towns or districts by way of compounding for pillage seems to have been changed into one under which belligerent sovereigns at the commencement of war made arrangements with each other limiting the amount of the contributions which should be levied in their respective territories on invasion taking place, and fixing the conditions under which they should be imposed (Vattel, liv. iii. ch. ix. § 165); but in the eighteenth century usage again altered, and while contributions were invariably substituted for pillage, except in the case of towns taken by assault, the amount was usually settled in the same manner as at present. Moser (Versuch, ix. i. 376) gives both methods as used.

[3] In 1870, for example, an order issued by the commanders-in-chief of the German armies stated that 'tous les commandants de corps détachés auront le droit d'ordonner la réquisition de fournitures nécessaires à l'entretien de leurs troupes. La réquisition d'autres fournitures jugées indispensables dans l'intérêt de l'armée ne pourra être ordonnée que par les généraux et les officiers faisant fonctions de généraux.' D'Angeberg, No. 328. In 1797 Napoleon ordered that a general of division should not make 'd'autres réquisitions que celles nécessaires pour les objets de subsistance, pour les

tributions can be levied only by the commander-in-chief, or by the general of a corps acting independently. Hostages are sometimes seized to secure the payment or render of contributions and requisitions; and when the amount demanded is not provided by the time fixed, the invader takes such measures as may be necessary to enforce compliance at the moment or to guard by intimidation against future disobedience[1]. Receipts or 'bons de réquisition' are given in acknowledgment of the sums or quantities exacted in order that other commanders may not make fresh impositions without knowing the extent of those already levied, and to facilitate the recovery by the inhabitants from their own government of the amounts paid, if the latter determines on the conclusion of peace to spread the loss suffered over the nation as a whole[2].

transports indispensables, et pour les souliers;' all others were to be made by the commander-in-chief alone. Corresp. ii. 321. See also the Project of Declaration of Brussels, arts. 41–2.

[1] The nature of the methods which are sometimes used may be seen from the measures taken by the Germans in Nancy in January, 1871:—

'Considérant qu'après avoir requis 500 ouvriers, en vue d'exécuter un travail urgent, ceux-ci n'ont pas obtempéré à nos ordres; arrêtons:—

'1°. Aussi longtemps que ces 500 ouvriers ne se seront pas rendus à leur poste, tous les travaux publics du département de la Meurthe seront suspendus; sont donc interdits tous travaux de fabrique, de voirie, de rues ou de chemins, de construction et autres d'utilité publique.

'2°. Tout atelier privé qui occupe plus de dix ouvriers sera fermé dès à présent et aux mêmes conditions que pour les travaux prémentionnés; sont donc fermés tous ateliers de charpentiers, menuisiers, maçons, manœuvres, tous travaux de mine et fabriques de toute espèce.

'3°. Il est en même temps défendu aux chefs, entrepreneurs et fabricants, dont les travaux ont été suspendus, de continuer à payer leurs ouvriers.

'Tout entrepreneur, chef ou fabricant qui agira contrairement aux dispositions ci-dessus mentionnées, sera frappé d'une amende de 10 à 50,000 francs pour chaque jour où il aura fait travailler et pour chaque paiement opéré.

'Le présent arrêté sera révoqué aussitôt que les 500 ouvriers en question se seront rendus à leur poste, et il leur sera payé à chacun un salaire de 3 francs par jour.'

An intimation was at the same time made to the Mayor of Nancy which caused him to issue the following proclamation:—'Monsieur le Préfet de la Meurthe vient de faire à la mairie de Nancy l'injonction suivante: "Si demain mardi, 24 janvier, à midi, 500 ouvriers des chantiers ne se trouvent pas à la gare, les surveillants d'abord, et un certain nombre d'ouvriers ensuite, seront saisis et fusillés sur lieu."' D'Angeberg, Nos. 1016, 1017.

[2] On contributions and requisitions see Vattel, liv. iii. ch. ix. § 165; Moser,

No usage is in course of formation tending to abolish or restrain within specific limits the exercise of the right to levy contributions and requisitions. The English on entering France in 1813, the army of the United States during the Mexican War, and the Allied forces in the Crimea, abstained wholly or in the main from the seizure of private property in either manner; but in each case the conduct of the invader was dictated solely by motives of momentary policy, and his action is thus valueless as a precedent. There is nothing to show that the governments of any of the countries mentioned have regarded the levy of contributions and requisitions as improper; and that of the United States, while allowing its generals in Mexico to use their discretion as to the enforcement of their right, expressly affirmed it in the instructions under which they acted [1]. One of the articles of the proposed Declaration of Brussels, had it become law, would have deprived an invader of all right to levy contributions except in the single case of a payment in money being required in lieu of a render in kind, and would therefore have enabled him at a maximum to demand a sum not greater than the value of all articles needed for the use and consumption of the army and not actually requisitioned [2]. But so long as armies are of the present size it may be doubted whether the inhabitants of an occupied territory would gain much by a rule under which an invader

Versuch, ix. i. 375–83; Halleck, ii. 109–14; Bluntschli, § 653; Calvo, §§ 1933–9; Manuel de Droit Int. à l'Usage, &c., 2e ptie, tit. iv. ch. iii; Manual of the Institute, arts. 56, 58, and 60. [Hague Convention, arts. 48, 49, 51, 52, 53.]

[1] Mr. Marcy's Instructions to Gen. Taylor, quoted by Halleck, ii. 112. The Treaty of Guadalupe Hidalgo, which closed the Mexican war, provided that during any future hostilities requisitions shall be paid for 'at an equitable price if necessity arise to take anything for the use of the armed forces.' De Martens, Nouv. Rec. Gén. xiv. 34. Probably the treaty of 1785 between the United States and Prussia (id. Rec. ii. 576) is the only other in which a like provision is contained, and the article directing that private property if taken should be paid for was struck out when the treaty was renewed in 1799 (id. sup. ii. 226).

[2] The so-called contributions by way of fine, or as equivalents of the taxes payable by the population to its own government, which are mentioned in the same article, are not of course contributions in the proper sense of the word.

would keep possession of so liberal a privilege; and though the representatives of some minor states put forward the view that a belligerent ought to pay or definitively promise to pay for requisitioned articles, the scheme of declaration as finally settled gave to the right of requisition the entire scope which is afforded by the so-called 'necessities' of war; [and this view has been followed in the Hague Convention][1]. It must not be forgotten that in the war of 1870–1 the right of levying contributions and requisitions was put in force with more than usual severity[2].

Whether contributions and requisitions are a form of appropriation of private property.

The subject of the appropriation of private property by way of contribution and requisition cannot be left without taking notice of a doctrine which is held by a certain school of writers, and which the assailants of the right of maritime capture use in the endeavour to protect themselves against a charge of inconsistency. It is denied that contributions and requisitions are a form of appropriation of private property. As pillage is not now permitted, payments in lieu of it must, it is said, have become illegal when the right to pillage was lost; a new 'juridical motive' must be sought for the levy of contributions and requisitions; and it is found in 'a right, recognised by public law as belonging to an occupying belligerent, to exercise sovereign authority to the extent necessary for the maintenance

[1] Declaration of Brussels, arts. 40–1 [and Hague Convention, arts. 49, 52], and see Parl. Papers, Miscell. i. 1875, 97–9, 102–9, 128.

[2] The language of some writers (Heffter, § 131; Bluntschli, §§ 653–5; Calvo, §§ 1938–9) might at first sight be supposed to mean that under the existing rules of law articles or services can only be obtained by requisition on payment of their value. A closer examination shows this construction to be hasty. According to M. Heffter the payment is to be provided for by the terms of peace; in other words, the invader merely pays if his enemy becomes strong enough to compel him to do so. M. Bluntschli says that 'il faut dédommager les propriétaires, et d'après les principes du droit naturel, cette tâche incombe en première ligne à l'état qui saisit ces biens et les emploie à son profit. Si les réclamations dirigées contre cet état n'aboutissaient pas, l'équité exigerait que l'état sur le territoire duquel la réquisition a eu lieu fût rendu subsidiairement responsable.' But he remarks elsewhere that 'l'armée ennemie manque la plupart du temps de l'argent nécessaire; elle se bornera donc en général à constater le paiement des contributions. . . . Les réquisitions sont donc la plupart du temps pour les particuliers un mal inséparable de la guerre et qui doit être supporté par ceux qui en sont atteints.'

and safety of his army in the occupied country, where the power of the enemy government is suspended by the effect of his operations.' Private property is thus not appropriated, but 'subjected to inevitable charges' laid upon it in due course of ordinary public law[1]. It is not the place here to discuss the assertion that an invader temporarily stands in the stead of the legitimate sovereign. It is enough for the moment to say that the legal character of military occupation will be shown later to be wholly opposed to the doctrine of such substitution, that in order to find usages of occupation which require that doctrine to explain them it is necessary to go back to a time of less regulated violence than the present, that taking occupation apart from any question as to contributions and requisitions practice and opinion have both moved steadily away from the point at which substitution was admitted, and that thus the theory which affects to be a progress is in truth a retrogression[2]. On the minor point of the alleged necessity of the charges laid by way of contribution and requisition on the population of an occupied territory, it can hardly be requisite to point out that no such necessity exists. It is often impracticable to provide subsistence and articles of primary necessity for an army without drawing by force upon the resources of an enemy's country; labour is often urgently wanted, and when wanted it must be obtained; but there is nothing to prevent a belligerent from paying on the spot or giving acknowledgments of indebtedness binding himself to future payment. If a state cannot afford to pay, it simply labours under a disadvantage inseparable from its general position in the world, and identical in nature with that which weighs upon a country of small population or weak frontier. Whether states cannot or will not pay, fictions cannot be admitted into law in order to disguise the fact that private property is seized. That its seizure is effective, and that seizure as now managed is a less violent practice than many with which belligerent popula-

[1] See for example Bluntschli, Du Droit du Butin, Rev. de Droit Int. ix. 545

[2] Comp. postea, p. 469.

tions unhappily become familiar, has been already said. It may be indulged in without shame while violence is legitimate at all; and so long as the practice lasts, it will be better to call it honestly what it is than to pretend that it is authorised by a right which a belligerent does not possess and a necessity that does not exist.

Under what conditions contributions and requisitions may be levied by a naval force.

Thus far contributions and requisitions have been considered with tacit reference to that phase of warfare only, viz. warfare on land, with which they have hitherto been associated. But the great increase which has taken place in several countries in the number of rich undefended coast towns, the larger facilities for making descents upon them which are afforded by the use of steam, and, finally, certain recent indications that the levy of money under threat of attack may be used as a means of offence in the next naval war, render it necessary to consider whether the exaction of requisitions is a permissible incident, and the levy of contributions a permissible form, of hostilities conducted by a naval force.

In 1882 Admiral Aube, in an article on naval warfare of the future, expressed his opinion that 'armoured fleets in possession of the sea will turn their powers of attack and destruction against the coast towns of the enemy, irrespectively of whether these are fortified or not, or whether they are commercial or military, and will burn them and lay them in ruins, or at the very least will hold them mercilessly to ransom;' and he pointed out that to adopt this course would be the true policy of France, in the event of a war with England [1]. There is no reason to believe that either political or naval opinion in France dissented from these views [2];

[1] Revue des Deux Mondes, tom. l. p. 331.

[2] The French government, on being asked by the British government whether it accepted responsibility for Admiral Aube's articles, dissociated itself from him; but a repudiation, which was immediately followed by his appointment as Minister of Marine, and by the adoption of a scheme of naval construction in accordance with his views, could have no serious value. His proposals met with the approval of the newspaper press. They were supported and exceeded in various articles spread over a considerable space of time by 'Un Officier de la Marine' in the Nouvelle Revue, and in the

very shortly after their publication Admiral Aube was appointed Minister of Marine; and he was allowed to change the ship-building programme of the country, and to furnish it with precisely the class of ships needed to carry them out. During the English Naval Manœuvres of 1888, an attempt was made to bring home to the inhabitants of commercial ports what the consequences of deficient maritime protection might be, by inflicting imaginary bombardments and levying imaginary contributions upon various places along the coast. Mr. Holland objected to these proceedings on the ground that they might be cited by an enemy as giving an implied sanction to analogous action on his part. A correspondence followed, in which several naval officers of authority combated Mr. Holland's objections, partly on the ground that, in view of foreign naval opinion on the subject, an enemy must be expected to attack undefended English towns, partly on the ground that attack upon them would be a legitimate operation of war[1]. Still more significant is the fact, which has become known, that in 1878 it was intended by the Russian government that the fleet at Vladivostock should sail for the undefended Australian ports and lay them under contribution immediately on the outbreak of hostilities.

Two questions are suggested by the above indications of opinion and of probable action on the part of naval powers. First, the restricted one, whether contributions and requisitions can legitimately be levied by a naval force under threat of bombardment, without occupation being effected by a force of debarkation; and, secondly, the far larger one, whether the bombardment and devastation of undefended towns, and the accompanying slaughter of unarmed populations, is a proper means of carrying on war. The latter question will find its answer elsewhere[2].

Requisitions may be quickly disposed of. They are not likely

Revue des Deux Mondes by M. Charmes, whose position and influence in the Foreign Office renders his utterances noticeable. The only voice raised against them was that of Admiral Bourgois in 1885 (Nouvelle Revue).

[1] *The Times*, August, 1888.

[2] See postea, p. 536.

to be made except under conditions in which a demand for the articles requisitioned would be open to little, if any, objection. A vessel of war or a squadron cannot be sent to sea in an efficient state without having on board a plentiful supply of stores identical with, or analogous to, those which form the usual and proper subjects of requisition by a military force. It is only in exceptional and unforeseen circumstances that a naval force can find itself in need of food or of clothing; when it is in want of these, or of coal, or of other articles of necessity, it can unquestionably demand to be supplied wherever it is in a position to seize; it would not be tempted to make the requisition except in case of real need; and generally the time required for the collection and delivery of large quantities of bulky articles, and the mode in which delivery would be effected, must be such that if the operation were completed without being interrupted, sufficient evidence would be given that the requisitioning force was practically in possession of the place. In such circumstances it would be almost pedantry to deny a right of facilitating the enforcement of the requisition by bombardment or other means of intimidation [1].

Contributions stand upon a different footing. They do not find their justification in the necessity of maintaining a force in an efficient state; they must show it either in their intrinsic reasonableness, or in the identity of the conditions, under which they would be levied, with those which exist when contributions are levied during war upon land. Such identity does not exist. In the case of hostilities upon land a belligerent is in military occupation of the place subjected to contribution; he is in it, and remains in it long enough to deprive the inhabitants of the equivalent of the contribution demanded, by plundering the town, or by seizing and carrying off the money and the valuables

[1] If articles are requisitioned which are not needed for the efficiency of the force, such as articles of luxury, or articles which will not be used by it, but will be turned into money, a disguised contribution is of course levied, and the propriety or impropriety of the demand must be judged by the test of the propriety or the impropriety of contributions.

which he finds within it; he accepts a composition for property which his hand already grasps. This is a totally different matter from demanding a sum of money or negotiable promises to pay, under penalty of destruction, from a place in which he is not, which he probably dare not enter, which he cannot hold even temporarily, and where consequently he is unable to seize and carry away. Ability to seize, and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment, are indissolubly mixed up with the right to levy contributions; because they render needless the use of violent means of enforcement. If devastation and the slaughter of non-combatants had formed the sanction under which contributions are exacted, contributions would long since have disappeared from warfare upon land. It is not to be denied that contributions may be rightly levied by a maritime force; but in order to be rightly levied, they must be levied under conditions identical with those under which they are levied by a military force. An undefended town may fairly be summoned by a vessel or a squadron to pay a contribution; if it refuses a force must be landed; if it still refuses like measures may be taken with those which are taken by armies in the field. The enemy must run his chance of being interrupted, precisely as he runs his chance when he endeavours to levy contributions by means of flying columns. A levy of money made in any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right[1].

[1] See postea, p. 533. It is to be regretted that the officers who levied imaginary contributions during the British Naval Manœuvres of 1889 acted in a manner which in war would have been wholly indefensible. At Peterhead two officers were sent in with a message demanding a large sum within two hours under penalty of bombardment; a very large sum was in like manner demanded of Edinburgh by a force which could not possibly have ventured to set foot on land. [The Institute of International Law, at their meeting at Venice in 1896, condemned the bombardment of open towns by a naval force for the purpose of obtaining a ransom or merely to bring pressure on a belligerent. It sanctioned the practice, however, 'aux fins

Foraging consists in the collection by troops themselves of forage for horses, and of grain, vegetables, or animals as provision for men, from the fields or other places where the materials may be found. This practice is resorted to when from want of time it would be inconvenient to proceed by way of requisition. With it may be classed the cutting of wood for fuel or military use.

Booty. Booty consists in whatever can be seized upon land by a belligerent force, irrespectively of its own requirements, and simply because the object seized is the property of the enemy. In common use the word is applied to arms and munitions in the possession of an enemy force, which are confiscable as booty, although they may be private property; but rightly the term includes also all the property which has hitherto been mentioned as susceptible of appropriation.

Property in territorial waters of its own state. Enemy's property within the territorial waters of its own state is subject to the same rules which affect enemy's property in places not within the jurisdiction of any power.

Private property within the jurisdiction of the enemy. Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and although seizure would always now be looked upon with extreme disfavour, it would be unsafe to declare that it is not generally within the bare rights of war.

Moneys lent to the state. In one case a strictly obligatory usage of exemption has no doubt been established. Money lent by individuals to a state is not confiscated, and the interest payable upon it is not sequestrated. Whether this habit has been dictated by self-interest, or whether it was prompted by the consideration that money so lent was given 'upon the faith of an engagement of honour, because a Prince cannot be compelled like other men in an adverse way by a Court of Justice,' it is now so confirmed that in the absence

d'obtenir par voie de réquisitions ou de contributions ce qui est nécessaire pour la flotte.' Annuaire de l'Institut, xv. 150.]

of an express reservation of the right to sequestrate the sums placed in its hands on going to war a state in borrowing must be understood to waive its right, and to contract that it will hold itself indebted to the lender and will pay interest on the sum borrowed under all circumstances [1].

Other property.

Real property, merchandise and other moveables, and incorporeal property other than debts due by the state itself, stand in a less favourable position. Although not appropriated under the usual modern practice they are probably not the subjects of a thoroughly authoritative custom of exemption. During the middle ages time was often given to merchants at the outbreak of war to withdraw with their goods from a belligerent country, but the indulgence was never transformed into a right, and at the beginning of the seventeenth century all kinds of property belonging to an enemy were habitually seized. In the course of that century milder practices began to assert themselves, and it became unusual to appropriate land, though its revenues were taken possession of during the continuance of war, and confiscations sometimes occurred so late as the war of the Spanish Succession. In the treaties of peace made in 1713 between France and Savoy,

[1] Writers in international law frequently support their statement of the above unquestioned rule by reference to the Anglo-Prussian controversy of 1753, and to the conduct of the British government with respect to the Russian Dutch Loan during the Crimean War. The King of Prussia, by way of reprisal for the capture of Prussian vessels engaged in prohibited commerce, while himself at peace with Great Britain, seized certain funds which had been lent by English subjects upon the security of the Silesian revenues, and which he had bound himself to repay under the treaties of Breslau and Dresden. The facts of the case are not therefore in point; but they are connected with the rule under consideration through the statement of law put out by the English government, which went beyond the necessities of the moment and covered the case of a loan as between enemy states. The reason for which mention is made of the Russian Dutch Loan is not easy to divine. The English government simply paid interest during the war to the agents of the Russian government upon a debt which Great Britain had taken over from Holland under a treaty in which, the circumstances being somewhat exceptional, it was provided specifically that payment should not cease in case of war. To have stopped payment would have been, not merely to disobey a rule of law, but to be false to an express engagement.

the United Provinces and the Empire, it was stipulated that confiscations effected during the preceding war should be reversed [1]. During the eighteenth century the complete appropriation of real property disappeared, but its revenues continued to be taken, or at least to be sequestrated; and property of other kinds was sometimes sequestrated and sometimes definitely seized. In order to guard in part against these effects of acknowledged law it was stipulated in many commercial treaties that a specified time varying from six months to a year should be allowed for the withdrawal of mercantile property on the outbreak of war [2]; but property of other kinds was still governed by the general rule, and cases frequently occurred, owing to the absence of special stipulations, in which mercantile property was sequestrated or subjected to confiscation. In the Treaties of Campo Formio, Lunéville, Amiens, Friedrichshamm, Jönköping, and Kiel, and in those between France and Wurtemberg and France and Baden in 1796, and between Russia and Denmark in 1814, and between France and Spain in the same year, it was necessary to provide for the removal of sequestrations which had been placed upon incomes of private persons and upon debts [3]; at the commencement of war between England and Denmark in 1807, the former power seized and condemned the Danish ships lying in British waters, and the

[1] Dumont, viii. i. 365, 367, 419.

[2] The treaty of 1786 between England and France, and that of 1795 between England and the United States, permitted the subjects of the respective states to continue their trade during war unless their conduct gave room for suspicion, in which case twelve months were to be allowed for winding up their affairs; and the latter treaty provided that in no case should 'debts due from individuals of the one nation to individuals of the other, nor shares, nor monies which they may have in the public funds or in the public or private banks,' be sequestrated. (Article x.)

[3] De Martens, Rec. vii. 208 (Campo Formio), id. 536 (Lunéville), id. sup. ii. 563 (Amiens); Nouv. Rec. i. 27 (Friedrichshamm); ib. 224 (Jönköping); ib. 674 (Kiel); Rec. vi. 670 (France and Wurtemberg); ib. 679 (France and Baden); Nouv. Rec. i. 681 (Denmark and Russia); Hertslet, Map of Europe by Treaty, i. 36 (France and Spain). The confiscation of English property in France in 1793 and the sequestration of English property by Russia in 1800 have not been instanced in the text, because, being in violation of the treaties of 1786 and 1797, they were mere acts of lawlessness.

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latter confiscated all ships, goods and debts within the kingdom which belonged to English subjects; in 1812 also the majority of the Supreme Court of the United States held that, though enemy property within the territory at the outbreak of war could not be condemned in the then state of the law of the United States, it was competent for the legislature to pass a law authorising confiscation, and Justice Story considered that no legislative act was necessary, and that 'the rule of the law of nations is that every such exercise of authority is lawful, and rests in the sound discretion of the nation[1].' Since the end of the Napoleonic wars the only instance of confiscation which has occurred was supplied by the American Civil War, in which the Congress of the Confederate States, by an Act passed in August 1861, enacted that 'property of whatever nature, except public stocks and securities held by an alien enemy since the 21st May 1861, shall be sequestrated and appropriated[2].' The custom which has become general of allowing the subjects of a hostile state to reside within the territory of a belligerent during good behaviour brings with it as a necessary consequence the security of their property within the jurisdiction, other than that coming into territorial waters, and indirectly therefore it has done much to foster a usage of non-confiscation; but as it is not itself strictly

[1] Wolff against Oxholm, vi Maule and Selwyn, 92; Brown *v.* the United States, viii Cranch, 110. De Martens remarks, both in the early editions of his Précis, and in those which appeared down to 1822, that 'là où il n'y a point de lois ou de traités sur ce point, la conduite des puissances de l'Europe n'est rien moins qu'uniforme' (§ 268). Lord Ellenborough was obviously mistaken in saying in the course of his judgment in Wolff against Oxholm that the 'Ordinance of the Court of Denmark stands single and alone, not supported by any precedent. . . . No instance of such confiscation except the Ordinance in question is to be found for more than a century.'

[2] Lord Russell to Acting Consul Cridland. State Papers, 1862, lxii. No. 1. 108. All persons domiciled within the States with which the Confederate States were at war were held to be subject to the provisions of the Act. On this point Lord Russell remarked that 'whatever may have been the abstract rule of the Law of Nations in former times, the instances of its application in the manner contemplated in the Act of the Confederate Congress in modern and more civilised times, are so rare and have been so generally condemned that it may almost be said to have become obsolete.'

obligatory, it cannot confer an obligatory force, and the treaties which contain stipulations in the matter, though numerous, are far from binding all civilised countries even to allow time for the withdrawal of mercantile property[1].

Upon the whole, although, subject to the qualification made with reference to territorial waters, the seizure by a belligerent of property within his jurisdiction would be entirely opposed to the drift of modern opinion and practice, the contrary usage, so far as personal property is concerned, was until lately too partial in its application, and has covered a larger field for too short a time to enable appropriation to be forbidden on the ground of custom as a matter of strict law; and as it is sanctioned by the general legal rule, a special rule of immunity can be established by custom alone. For the present therefore it cannot be said that a belligerent does a distinctly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon the public faith; but the absence of any instance of confiscation in the more recent European wars, no less than the common interests of all nations and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse[2]. All this was put aside in the present war. 1915-1916

[1] Most of these treaties will be found to contain stipulations either that 'merchants and other subjects' shall have the privilege of remaining and continuing their trade 'as long as their conduct does not render them objects of suspicion,' or that 'persons established in the exercise of trade or special employment' shall be allowed so to remain, other persons being given time to wind up their affairs. Others merely stipulate for a term during which the subjects of the contracting parties should be at liberty to withdraw with their property after the outbreak of war from the enemy's country. Sequestration and confiscation have been expressly forbidden by a convention between the United States and France in 1800 (De Martens, Rec. vii. 484) and by a number of treaties during the last century, to which, with scarcely an exception, one of the parties is a South American state. It might be argued not unfairly that if like treaties do not exist between European countries, and between them and the United States, it is because there has been for a long time little fear that the right guarded against would be exercised by well-regulated states.

[2] Some writers suggest that 'whenever a government grants permission to foreigners to acquire property within its territories, or to bring and deposit

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Property entering territorial waters of the enemy after the commencement of war.

Enemy property entering territorial waters after the commencement of war is subject to confiscation.

Apart from an indulgence which has sometimes been granted in recent wars, and which will be mentioned on a later page[1], the only exceptional practice which claims to be of some authority is one of exempting from capture shipwrecked vessels, and vessels driven to take refuge in an enemy's port by stress of weather or from want of provisions. There are one or two cases in which such exemption has been accorded. In 1746 an English man-of-war entering the Havana, and offering to surrender, was

it there, it tacitly promises protection and security' (Hamilton's Letters of Camillus, quoted by Woolsey, § 124, note); but, as is properly remarked by Dana (note to Wheaton, § 308), 'persons who either leave their property in another country or give credit to a foreign citizen, act on the understanding that the Law of Nations will be followed whatever that may be. To argue therefore that the rule under the Law of Nations must be to abstain from confiscation because the debt or property is left in the foreign country on the public faith of that country seems to be a petitio principii.'

It is evident that although it is within the bare rights of a belligerent to appropriate the property of his enemies existing within his jurisdiction, it can very rarely be wise to do so. Besides exposing his subjects to like measures on the part of his adversary, his action may cause them to be obliged to pay debts twice over. The fact of payment to him is of course no answer to a suit in the courts of the creditor's state; and property belonging to the debtor coming into the jurisdiction of the latter at a subsequent time might be seized in satisfaction of the creditor's claim.

For recent opinion upon the whole question of the rights of a belligerent with respect to property of his enemy within his jurisdiction, see Dana (note to Wheaton, § 305), Woolsey (Introd. to Int. Law, § 124), Twiss (ii. §§ 56 and 59), Calvo (§§ 1671–8), Heffter (§ 140).

In delivering judgment in the case of the Johanna Emilie during the Crimean War Dr. Lushington said, 'With regard to an enemy's property coming to any port of the kingdom or being found there being seizable, I confess I am astonished that a doubt could exist on the subject. . . . There are many instances in which a capture has been made in port by non-commissioned captors. . . . If the property was on land, according to the ancient law it was also seizable; and certainly during the American War there were not wanting instances in which such property was seized and condemned by law. That rigour was afterwards relaxed. I believe no such instance has occurred from the time of the American War to the present day,—no instance in which property inland was subject to search or seizure, but no doubt it would be competent to the authority of the crown, if it thought fit.' Spinks, 14.

[1] See postea, p. 449.

given means of repairing damages and was allowed to leave with a passport protecting her as far as the Bermudas; in 1799 a Prussian vessel called the Diana which had taken refuge in Dunkirk was restored by the French courts; and a few years afterwards an English frigate in distress off the mouth of the Loire was saved from shipwreck and allowed to leave without being captured. But a French Ordonnance of the year 1800 prescribed a contrary conduct, and in the same year the precedent of the Diana was reversed and a vessel which had entered a French port under like circumstances was condemned. Some writers, without asserting that a rule of exemption exists, think that justice, or humanity, or generosity demand that a belligerent shall refuse to profit by the ill-fortune of his enemy. Whether this be so or not—and in the case of a ship of war at any rate a generosity would seem to be somewhat misplaced which furbishes arms for an adversary, and puts them in his hands, without making any condition as to their use—it is clear that a belligerent lies under no legal obligations in the matter[1].

Private property in places not within the territory of any state.

In places not within the territorial jurisdiction of any power, that is to say for practical purposes, on non-territorial seas, property belonging to enemy subjects remains liable to appropriation, save in so far as the usage to this effect is derogated from by certain exceptional practices, to be mentioned presently.

Theory of the immunity of private property at sea from capture.

That the rule of the capture of private property at sea has until lately been universally followed, that it is still adhered to by the great majority of states, that it was recognised as law by all the older writers, and is so recognised by many late writers, is uncontested[2]. A certain amount of practice however exists

[1] Pistoye et Duverdy, ii. 89; Ortolan, Dip. de la Mer, liv. iii. ch. viii; Halleck, ii. 152; Calvo, § 2054.

[2] The existing law will be found stated within the present century either with approval, or without disapproval, by De Martens (Précis, § 281), Kent (Comm. pt. i. lect. v), Klüber (§§ 253–4), Wheaton (Elem. pt. iv. ch. ii. § 7), Manning (p. 183), Hautefeuille (tit. iii. ch. ii. sect. iii. § 1), Ortolan (Dip. de la Mer, liv. iii. ch. ii), Heffter (§ 137), Riquelme (i. 264), Twiss (ii. § 73), Phillimore (iii. § cccxlvii), Dana (Notes to Wheaton's Elem., No. 171), Negrin (tit. ii. cap. iv).

of recent date in which immunity of private property from capture has been agreed to or affirmed; and a certain number of writers attack warmly, and sometimes intemperately, both the usage of capture itself, and the state which is supposed to be the chief obstacle to its destruction [1]. It becomes therefore necessary to see what value can be attached to the practice in question and to the new doctrines.

Practice in its favour.

Turning the attention first to practice and to indications of national opinion, the United States is found, under the presidency of Mr. Monroe, proposing to the governments of France, England, and Russia that merchant vessels and their cargoes belonging to subjects of belligerent powers should be exempted from capture by convention. Russia alone accepted the proposal in principle, but refused to act upon it until it had been also accepted by the maritime states in general. Again in 1856, Mr. Marcy, in refusing on the part of the United States to accede to the Declaration of Paris, by which privateering was abolished, stated that as it was a cardinal principle of national policy that the country should not be burdened with the weight of permanent armaments, the right of employing privateers must be retained unless the safety of the mercantile marine could be legally assured, but he offered to give it up if it were conceded that 'the private property of the subjects of one or other of two belligerent powers should not be subject to capture by the vessels of the other party, except in cases of contraband of war.' That the United States, as might be expected from its situation, has remained willing to consent to the abolition of the right to capture private property at sea, is shown by two more recent facts. In 1870 Mr. Fish expressed his hope to Baron Gerolt that 'the government and people of the United States may soon be gratified by seeing the principle' of the immunity of private property at

[1] Vidari (Del rispetto della proprietà privata fra gli stati in guerra), Calvo (§ 2108), De Laveleye (Du Respect de la Propriété Privée en Temps de Guerre), Bluntschli (Du Droit de Butin, Rev. de Droit Int. tom. ix and x), Fiore (Nouv. Droit Int. pt. ii. ch. vii, viii). M. F. de Martens has written a pamphlet in Russian on the subject.

sea 'universally recognised as another restraining and humanising influence imposed by modern civilisation on the art of war;' and in 1871 a treaty was concluded with Italy by which it is stipulated that private property shall not be seized except for breach of blockade or as contraband of war. Italy had already shown its own disposition in a decisive manner by passing a marine code in 1865, by which the capture of mercantile vessels of a hostile nation by Italian vessels of war is forbidden in all cases in which reciprocity is observed. Austria and Prussia on the outbreak of the war of 1866 declared that enemy ships and cargoes should not be captured so long as the enemy state granted a like indulgence, and hostilities were accordingly carried on both as between those states and as between Austria and Italy without the use of maritime capture. Finally, in 1870 the Prussian government issued an ordonnance exempting French vessels from capture without any mention of reciprocity [1]. In the above facts is comprised the whole of the international practice which can be adduced in favour of the new doctrine. They extend over a short time; they are supplied only by four states; to three out of these four the adoption of the doctrine as a motive of policy was recommended by their maritime weakness. Even therefore if it were not rash to assume that the views of the states in question would remain unchanged with a change in their circumstances, it is plain that up to now not only is there no practice of strength enough to set up a new theory in competition with the old rule of law, but that there are scarcely even the rudiments of such a practice.

Its relation to the general principles of law.

Is there then any sound theoretical reason for abandoning the right to capture private property at sea? Its opponents declare that it is in contradiction to the fundamental principle that war is 'a relation of a state to a state, and not of an individual to an

[1] De Laveleye, Du Respect de la Propriété Privée en Temps de Guerre; Bluntschli, Du Droit de Butin, Rev. de Droit Int. tom. ix.
In 1870 France acted upon the established law; in January 1871, consequently, Prussia changed her attitude, and stated her intention to make captures (D'Angeberg, No. 971).

individual,' and that it constitutes the sole important exception to the principle of the immunity of private property from seizure, which is proclaimed to be a corollary of the former principle, and to have been besides adopted into international law by the consent of nations. The value of the first of these two principles, and its claims to form a part of international law, have been already examined in the chapter upon the general principles of the law governing states in the relation of war[1]. It may be judged whether it is true that capture at sea is a solitary exception to the immunity of private property in war by reading the section upon contributions and requisitions in the present chapter, together with the portion of the chapter on military occupation which is there referred to as bearing upon the assertion that contributions and requisitions are not a form of appropriation of private property.

Its moral aspect.

Finally, is there any moral reason for which maritime states ought to abandon their right of capturing private property at sea? Is the practice harsher in itself than other common practices of war; or, if it be not so, is it harsher in proportion to the amount of the stress which it puts upon an enemy, and so to the amount of advantage which a belligerent reaps from it? The question hardly seems worth answering. It is needless to bring into comparison the measures which a belligerent takes for the maintenance of his control in occupied country, or to look at the effects of a siege, or a bombardment, or any other operation of pure military offence. It is enough to place the incidents of capture at sea side by side with the practice to which it has most analogy, viz. that of levying requisitions. By the latter, which itself is relatively mild, private property is seized under conditions such that hardship to individuals—and the hardship is often of the severest kind—is almost inevitable. In a poor country with difficult communications an army may so eat up the food as to expose the whole population of a large district to privations. The stock of a cloth or leather merchant is seized:

[1] Antea, pt. i. ch. iii.

if he does receive the bare value of his goods at the end of the war, which is by no means necessarily the case, he gets no compensation for interrupted trade and the temporary loss of his working capital. Or a farmer is taken with his carts and horses for weeks or months and to a distance of a hundred or two hundred miles; if he brings back his horses alive, does the right to ask his own government at some future time for so much daily hire compensate him for a lost crop, or for the damage done to his farm by the cessation of labour upon it? It must be remembered also that requisitions are enforced by strong disciplinary measures, the execution of which may touch the liberty and the lives of the population; and that in practice those receipts which are supposed to deprive requisitioning of the character of appropriation are not seldom forgotten or withheld. Maritime capture on the other hand, in the words of Mr. Dana, 'takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war, for the purposes of gain, and with the protection of insurance,' which by modern trading custom is invariably employed to protect the owner of property against maritime war risks, and which effects an immediate distribution of loss over a wide area. Mild however as its operation upon the individual is, maritime capture is often an instrument of war of a much more efficient kind than requisitioning has ever shown itself to be. In deranging the common course of trade, in stopping raw material on its way to be manufactured, in arresting importation of food and exportation of the produce of the country, it presses upon everybody sooner or later and more or less; and in rendering sailors prisoners of war it saps the offensive maritime strength of the weaker belligerent. In face of the results that maritime capture has often produced it is idle to pretend that it is not among the most formidable of belligerent weapons; and in face of obvious facts it is equally idle to deny that there is no weapon the use of which causes so little individual misery.

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Conclusion.

Legally and morally only one conclusion is possible; viz. that any state which chooses to adhere to the capture of private property at sea has every right to do so [1]. It is at the same time to be noted that opinion in favour of the contrary principle is sensibly growing in volume and force; and it is especially to be noted that the larger number of well-known living international lawyers, other than English, undoubtedly hold that the principle in question ought to be accepted into international law. It is easy in England to underrate the importance of continental jurists as reflecting, and still more as guiding, the drift of foreign opinion [2].

[1] The question whether it is wise for states in general, or for any given state, to agree as a matter of policy to the abolition of the right of capture of private property at sea, is of course entirely distinct from the question of right. It may very possibly be for the common interests that a change in the law should take place; it is certainly a matter for grave consideration whether it is not more in the interest of England to protect her own than to destroy her enemies' trade. Quite apart from dislike of England, and jealousy of her maritime and commercial position, there is undoubtedly enough genuine feeling on the continent of Europe against maritime capture to afford convenient material for less creditable motives to ferment; and contingencies are not inconceivable in which, if England were engaged in a maritime war, European or other states might take advantage of a set of opinion against her practice at sea to embarrass her seriously by an unfriendly neutrality. The evils of such embarrassment might, or might not, be transient; there are also conceivable contingencies in which the direct evils of maritime capture might be disastrous. In the Contemporary Review for 1875 (vol. xxvi. pp. 737–51) I endeavoured to show that there are strong reasons for doubting whether England is prudent in adhering to the existing rule of law with respect to the capture of private property at sea. The reasons which were then urged have grown stronger with each successive year; and the dangers to which the practice would expose the country are at length fully recognised. That there is not a proportionately active wish for the adoption of a different rule is perhaps to be attributed to a doubt as to what the action of foreign powers would be under the temptation of a war with England.

[2] At the meeting of the Institute of International Law, held at the Hague in 1875, the following resolutions were adopted :—

'Il est à désirer que le principe de l'inviolabilité de la propriété privée ennemie naviguant sous pavillon ennemi soit universellement accepté dans les termes suivants, empruntés aux déclarations de la Prusse, de l'Autriche, et de l'Italie en 1866, et sous la réserve ci-après ;—les navires marchands et leurs cargaisons ne pourront être capturés que s'ils portent de la contrebande de guerre ou s'ils essaient de violer un blocus effectif et déclaré.

'Il est entendu que, conformément aux principes généraux qui doivent

Exceptions to the rule that private property at sea may be captured.

The chief and most authoritative exception to the rule that enemy's goods at sea are liable to capture is made in favour of cargo shipped on board neutral vessels, which by an artificial doctrine are regarded as having power to protect it. As the modern usage in the matter forms a concession to neutrals, and has arisen out of the relation between them and belligerents, it will be convenient to treat of it together with the rest of the law belonging to that relation; and the only exceptions which claim to be noticed here are, the more doubtful one which exempts from seizure boats engaged in coast-fishing, and an occasional practice under which enemy's vessels laden with cargoes for a port of the belligerent are allowed to enter the latter and to reissue from it in safety.

Fishing-boats.

The doctrine of the immunity of fishing-boats is mainly founded upon the practice with respect to them with which France has become identified, but which she has by no means invariably observed. During the Anglo-French wars of the Middle Ages it seems to have been the habit of the Channel fishermen not to molest one another, and the French Ordonnances of 1543 and 1584, which allowed the Admiral of France to grant fishing-truces to subjects of an enemy on condition of reciprocity, did no more than give formal effect to this custom. It does not appear to what degree the power vested in the Admiral was used

régler la guerre sur mer aussi bien que sur terre, la disposition précédente n'est pas applicable aux navires marchands qui, directement ou indirectement, prennent part ou sont destinés à prendre part aux hostilités.'

At the meeting of the Institute at Turin in 1882 a clause, asserting that 'la propriété privée est inviolable sous la condition de réciprocité et sauf les cas de violation de blocus,' &c., was inserted in a project for a Règlement international des prises maritimes, there adopted. Annuaire de l'Institut, 1877, p. 138, and 1882–3, pp. 182–5.

The Hague resolution, which merely expressed a desire for alteration in the law, was passed without a division, though under protest from the English members; at Turin, the more positive resolution was only carried by ten votes to seven, two English members being present. The difference is indicative of the stage at which opinion on the question has arrived.

M. Geffcken stands almost alone in urging, in an able note to Heffter (p. 379, ed. 1883), the adoption of the principle of immunity upon practical rather than upon legal or moral grounds.

PART III CHAP. III during the early part of the seventeenth century, but by the Ordonnances of 1681 and 1692 fishing-boats were subjected to capture, and from that time until the war of American Independence both France and England habitually seized them. Throughout that war and in the beginning of the revolutionary wars both parties refrained from disturbing the home fisheries, but the English government in 1800 distinctly stated that in its view the liberty of fishing was a relaxation of strict right made in the interests of humanity, and revocable at any moment for sufficient reasons of war. The attitude of the French government is less clear. Napoleon no doubt complained that the seizure of fishing-boats was 'contrary to all the usages of civilised nations,' but as his declaration was made after the English government had begun to capture them on the ground that they were being used for warlike purposes, it is valueless as an expression of a settled French policy; it was merely one of those utterances of generous sentiment with which he was not unaccustomed to clothe bad faith. At a later time during the wars of the Empire the coast fisheries were left in peace[1]. The United States followed the same practice in the Mexican [and Spanish] wars; and France in the Crimean, Austrian, and German wars prohibited the capture of fishing-vessels for other than military and naval reasons[2].

In the foregoing facts there is nothing to show that much real

[1] Pardessus, Col. de Lois Marit. iv. 319; Ortolan, Dip. de la Mer, liv. iii. ch. ii; De Martens, Rec. vi. 511–14. The English courts gave effect to the doctrine of the English government; the French courts, on the other hand, appear to have considered the immunity of fishing-vessels to exist as of right. Lord Stowell said, 'In former wars it has not been usual to make captures of these small fishing-vessels; but this was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighbouring countries and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment, and as they are brought before me for my judgment they must be referred to the general principles of this court. . . . They are ships constantly and exclusively employed in the enemy's trade.' The Young Jacob and Johanna, i Rob. 20. La Nostra Segnora de la Piedad y Animas, Pistoye et Duverdy, i. 331.

[2] Calvo, ii. §§ 2049–52 [and see for the most recent American practice The Paquete Habana, 175 U. S. Reports, p. 677 and 189, p. 453].

difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing-vessels so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption. It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardship on their owners, is as a measure of general application wholly ineffective against the hostile state. But it must at the same time be recognised that fishing-boats are sometimes of great military use. It cannot be expected that a belligerent, if he finds that they have been employed by his enemy, will not protect himself against further damage by seizing all upon which he can lay his hands; nor that he will respect them under circumstances which render their employment probable. The order to capture French fishing-boats given by the British government in 1800 was caused by the use of some as fire-vessels against the British squadron at Flushing, and of others with their crews to assist in fitting out a fleet at Brest; and it was intended that between 500 and 600 should form part of the flotilla destined for the invasion of England. They had before this time been largely used as privateers to prey upon British commerce in the Channel; and they continued to be so used. They lay about, apparently fishing, with most of their crews concealed; at night or in thick weather they drew alongside merchantmen, which were easily boarded and captured by surprise[1]. Any immunity which is extended to objects on the ground of humanity or of their own innocuousness, must be

[1] De Martens, Rec. vii. 295; Corresp. de Nap. i. viii. 483; Mahan, Influence of Sea Power upon the French Revolution and Empire, ii. 208.

subject to the condition that they shall not be suddenly converted into noxious objects at the convenience of the belligerent; and it is not probable that states will consent to forego the advantages which they may derive from the use of their fishing-vessels in contingencies which cannot always be foreseen [1].

It has never been contended, except by the French at the beginning of the last century, that vessels engaged in deep-sea fishing are exempt from capture.

Enemy's vessels on their voyage at the outbreak of war to a belligerent port, &c.

Enemy's vessels which at the outbreak of war are on their voyage to the port of a belligerent from a neutral or hostile country, and even vessels which without having issued from an enemy or other foreign port have commenced lading at that time, are occasionally exempted from capture during a specified period. At the beginning of the Crimean war an Order in Council directed that 'any Russian merchant vessel which prior to the date of this Order shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.' France gave a like indulgence; and in 1870 German vessels which had begun to lade upon the date of the declaration of war were allowed to enter French ports without limit of time, and to reissue with a safe-conduct to a German port. In 1877 also, Turkish vessels were permitted to remain in Russian ports until they had taken cargo on board and to issue freely afterwards [2]. [In 1898 President McKinley issued a proclamation on

[1] M. Calvo (loc. cit.) seems to think that the principle of immunity is settled, and M. Heffter (§ 137) states the rule absolutely. M. Bluntschli (§ 667) considers that fishing-boats can only be captured while being actually used for a military purpose.

[2] London Gazette, March 29, 1854; Pistoye et Duverdy, i. 123; D'Angeberg, Nos. 194, 224, 326; Journal de St. Pétersbourg, $\frac{14}{26}$ May, 1877. In 1870 England objected that in according the privilege then given an injustice was done to neutrals, since German ships bound for neutral ports or inversely remained liable to capture for due cause from the day of the commencement

April 20, allowing Spanish merchant vessels in United States ports to load their cargoes and depart up to May 21, with permission, if met at sea by a man of war, to continue their voyage should their papers be found on examination to be satisfactory. Spanish vessels sailing from a foreign to an United States port prior to the declaration of war were permitted to enter, discharge cargo, and depart without molestation. The corresponding Spanish proclamation merely gave a period of five days for United States vessels anchored in Spanish ports to depart.]

What constitutes a valid capture, and its effect.

It being the right of a belligerent sovereign to appropriate under specified conditions certain kinds of moveable property belonging to his enemy, the effectual seizure of such property in itself transfers it to him. Beyond this statement it is needless for legal purposes to go as between the captor and the original owner, because possession is evidence that an act of appropriation has been performed the value of which an enemy can always test by force. But it is possible for persons other than the captor or the owner to acquire interests in the property seized through its recapture, or through its transfer by the appropriator to a neutral or a friend; and as no one can convey a greater interest than he himself possesses, the existence of such interests depends upon whether the belligerent in the particular case has not only endeavoured to appropriate the property, but has given clear proof of his ability to do so. If objects which have duly passed to the captor are recaptured by an ally of the owner, they become the prize or booty of the recaptor, but if change of ownership has not taken place, they must be restored to the original possessor. So also if the original owner in the course of his war finds the objects which he has lost in the hands of a co-belligerent or a neutral, he may inquire whether they were effectually seized, and if not he may reclaim them. Thus it becomes necessary to determine in what effectual seizure consists.

of war. Equity appears certainly to demand that if a belligerent for his own convenience spares enemy's ships laden with cargoes destined for him, he should not put neutrals to inconvenience who have not had an opportunity of sending their goods in vessels which are free from liability to capture.

To do this broadly is sufficiently easy. It is manifest that momentary possession, although coupled with the intention to appropriate the captured objects, affords no evidence of ability to retain them, and that a presumption of such ability can only be raised either by an acknowledgment of capture on the part of the owner, as when a vessel hauls down her flag in token of surrender, or by proof from the subsequent course of events that the captor, at the time of seizure, had a reasonable probability of keeping his booty or prize. But the latter test is in itself vague. It can only be applied through a more or less arbitrary rule, and consequently, as is usual in such cases, considerable varieties of practice have been adopted at different times and by different nations.

Early practice.

In the Middle Ages a captor seems, under the more authoritative usage, to have acquired property in things seized by him on their being brought within his camp, fortress, port, or fleet. It was provided in the Consolato del Mare that if a vessel was retaken before arriving in a place of safety, it was to be given up to the owners on payment of reasonable salvage; if afterwards, it belonged to the recaptors; and Ayala in the end of the sixteenth century lays down unreservedly that booty belongs to the captor when it has entered within his lines[1]. Before that time however a practice had become very general under which a captor was regarded as not acquiring ownership of a vessel or booty until after possession during twenty-four hours. This view found expression in a French Edict of 1584; it was very early translated into a custom of England, Scotland, and Spain; it seems to have been adopted by the Dutch in the first years of the Republic; and was taken in Denmark with respect to captured vessels[2]. In the seventeenth century therefore it was

[1] Consolato del Mare; Pardessus, Col. de Lois Marit. ii. 338–9 and 346; Ayala, De Jur. et Off. Bell. lib. i. c. ii. § 37; Albericus Gentilis, De Jure Belli, lib. iii. c. 17; Chief Justice Hale, Concerning the Customs of Goods exported and imported, Hargrave's Tracts, vol. i. The principle is that which was applied by Roman law to persons captured by an enemy: 'Antequam in praesidia perducatur hostium manet civis.'

[2] Pardessus, iv. 312; Hale, Customs of Goods, Hargrave's Tracts, i. 246;

on the way to become the ground of an authoritative rule. From that period however it has become continuously less and less general. The larger number of writers attribute an equal or greater authority to the opinion that property is lost by an owner only when the captured object has reached a place of safe custody; and as in countries governed by the Code Napoléon 'possession gives title in respect of moveables,' the rule that security of possession is the test of the acquisition of property is more in consonance with the municipal law of France and of the states which have usually followed its example in matters of International Law than the arbitrary rule of twenty-four hours; finally, the latter was abandoned by England in the seventeenth century[1]. Probably therefore it may now be said that, in so far as exceptional practices have not been formed, property in moveables is transferred on being brought into a place so secure that the owner can have no immediate prospect of recovering them. An exceptional mode of dealing with recaptured vessels has however become common, under which the transfer of property effected by capture is ignored as between the recaptor and the original owner, and therefore as the right

Rule that the captured property must be brought into a place of safe custody.

Grotius, De Jure Belli et Pacis, lib. iii. ch. vi. § 3, and Barbeyrac's note; Twiss, § 173. The rule is said to have been derived from, and very likely may have a common origin with, a game law of the Lombards, under which a hunter might recover possession during twenty-four hours of an animal killed or wounded by him.

[1] Zouch (Juris Fecialis Explicatio, pars ii. sect. viii) and Molloy (De Jure Marit. bk. i. c. 1. § 12), in the seventeenth century, Bynkershoek (Quæst. Jur. Pub. lib. i. c. iv), Wolff (Jus Gentium, § 860), and Vattel (liv. iii. ch. xii. § 196), in the eighteenth century, state the rule of deposit in a safe place absolutely. Lampredi (Jur. Pub. Theoremata, pars iii. ch. xiii. § 6) and Klüber (§ 254) thought that the twenty-four hours' rule had been established by custom. De Martens thinks that it is authoritative in continental warfare, but remarks that both practices are adopted at sea. Wheaton (Elem. pt. iv. ch. ii. § 11) mentions the two rules as alternative. Heffter (§ 136) says that the twenty-four hours' term 'a passé en usage chez quelques nations dans les guerres terrestres et maritimes. Toutefois il ne laisse pas de présenter certaines difficultés dans l'application, et il ne saurait être regardé comme une règle commune du droit international.' Lord Stowell considered that 'a bringing *infra praesidia* is probably the true rule' at sea; The Santa Cruz, i Rob. 60.

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to make direct seizure of property in continental warfare is now restricted within narrow limits, the general rule has been reduced to slight importance [1].

Evidence of intention to retain possession.

If capture, in order to be effectual, must be proved by a certain firmness of possession, it is evidently still more necessary that the captor shall show an intention to seize and retain his prize or booty. With respect to the latter no difficulty can arise. The fact of custody, when it exists at all, can be easily recognised. But a prize is often necessarily separated from the ship which has taken it, and though it is the usual, and where possible the obvious course, to secure a captured vessel by putting a prize-crew in her of sufficient strength to defeat any attempt at rescue, it may under some circumstances be impossible to spare a sufficient force, or even to place it on board. Hence a maritime captor is allowed to indicate his intention to keep possession by any act from which such intention may fairly be inferred. It has been held that he can establish his right of property as against subsequent captors by sending a single man on board, although the latter may exercise no control, and may not interfere with the navigation of the ship. So also when a vessel has been brought to, and obliged to wait for orders, and to obey the direction of the captor, but owing to the boisterousness of the weather has received no one on board, he has been considered to have taken effectual possession [2].

Disposal of captured property.

As the property in an enemy's vessel and cargo is vested in the state to which the captor belongs so soon as an effectual seizure has been made, they may in strictness be disposed of by him as the agent of his state in whatever manner he chooses [3]. So long as they were clearly the property of the enemy at the

[1] See postea, p. 493.

[2] The Grotius, ix Cranch, 370; The Resolution, vi Rob. 21; The Edward and Mary, iii Rob. 306.

[3] It is the invariable modern custom for the state to cede its interest in vessels belonging to private owners to the actual captors, and the property so ceded does not vest until adjudication has been made by a competent tribunal; but this is merely an internal practice, designed to prevent abuses, and has no relation to the date at which the property of the state is acquired.

time of capture, it is immaterial from the point of view of International Law whether the captor sends them home for sale, or destroys them, or releases them upon ransom. But as the property of belligerents is often much mixed up with that of neutrals, it is the universal practice for the former to guard the interests of the latter, by requiring captors as a general rule to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly, or only in part, the property of the enemy [1]. And though the right of a belligerent to the free disposal of enemy property taken by him is in no way touched by the existence of the practice, it is not usual to permit captors to destroy or ransom prizes, however undoubted may be their ownership, except when their retention is difficult or inconvenient.

General rule that it shall be brought into port for adjudication.

Perhaps the only occasions on which enemy's vessels have been systematically destroyed, apart from any serious difficulty in otherwise disposing of them, were during the American revolutionary war and that between Great Britain and the United States in 1812–14. On the outbreak of the latter war the American government instructed the officers in command of squadrons to 'destroy all you capture, unless in some extraordinary cases that shall clearly warrant an exception.' 'The commerce of the enemy,' it was said, 'is the most vulnerable point of the enemy we can attack, and its destruction the main object;

Destruction.

[1] Although the practice now exists for the benefit of neutrals, its origin is due to the fact that formerly the state abandoned a part only of the value of prizes to the actual captors. In Spain the enactment in the Partidas of 1266, which reserved a fifth of all prizes to the king 'por razon de señorio' (tit. xxvi. ley xxix, Pardessus, vi. 30), remained in force till after the time of Grotius. The Dutch government also took a fifth (Grotius, De Jure Belli et Pacis, lib. iii. cap. vi. § 24). In France the Admiralty claimed the tenth share of every prize until the war of 1756, when it was remitted for the first time to the captors (Valin, Ord. de la Marine, liv. iii. tit. ix. art. 32); and as in England a proclamation issued in May of that year gave 'sole interest in and property of every ship and cargo to the officers and seamen on board his Majesty's ships from and after the 17th of that month' during the continuance of the war with France (Entick's Hist. of the Late War, i. 414), it may be inferred that the Crown took a share at least in the prizes made during 1755 and the early part of 1756.

and to this end all your efforts should be directed. Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in. A single cruiser, if ever so successful, can man but few prizes, and every prize is a serious diminution of her force; but a single cruiser destroying every captured vessel has the capacity of continuing in full vigour her destructive power, so long as her provisions and stores can be replenished, either from friendly ports or from the vessels captured.' Under these instructions seventy-four British merchantmen were destroyed[1]. The destruction of prizes by the ships commissioned by the Confederate States of America was not parallel because there were no ports into which they could take them with reasonable safety; and the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary[2].

[1] Mr. Bolles, Solicitor to the Navy; quoted in Parl. Papers, America, No. 2, 1873, p. 92.

[2] The view taken in the English courts as to the circumstances under which vessels should be destroyed may be illustrated from the judgment of Lord Stowell in the case of the Felicity (ii Dodson, 383): 'The captors fully justify themselves to the law of their own country which prescribes the bringing in, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, the President, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy, enemy's property.' During the Crimean War Dr. Lushington said, 'it may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed the bringing into adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor, where there is no neutral property on board.' The Leucade, Spinks, 221. By the French Ordonnance of 1681 a captor 'ne pouvant se charger du vaisseau pris' was allowed to destroy it. The circumstances enumerated by Valin as justifying this course are 'lorsque la prise est de peu de valeur, ou qu'elle n'est pas assez considérable pour mériter d'être envoyée dans un lieu de sûreté; surtout s'il fallait pour cela affaiblir l'équipage du corsaire au point de ne pouvoir plus continuer la course avec succès;' and 'lorsque la prise est si délabrée par le combat ou par le mauvais temps qu'elle fait assez d'eau pour faire craindre

It is at the same time impossible to ignore the force of the consideration suggested by the government of the United States in the latter part of the foregoing extracts. It would be unwise to assume that a practice will be invariably maintained which has been dictated by motives not necessarily of a permanent character. Self-interest has hitherto generally combined with tenderness towards neutrals to make belligerents unwilling to destroy valuable property; but the growing indisposition of neutrals to admit prizes within the shelter of their waters, together with the wide range of modern commerce, may alter the balance of self-interest, and may induce belligerents to exercise their rights to the full [1].

qu'elle ne coule bas; lorsque le navire pris marche si mal qu'il expose l'armateur corsaire à la reprise; ou lorsque le corsaire, ayant aperçu des vaisseaux de guerre ennemis, se trouve obligé de prendre la fuite et que sa prise le retarde trop ou fait craindre une révolte.' Ord. de la Marine, ii. 281. In 1870 a French ship of war destroyed two German vessels, because from the large number of prisoners whom she had on board she was unable safely to detach prize crews. A claim for restitution in value being made by the owners, the prize court determined 'qu'il résultait des papiers de bord et de l'instruction que ces bâtiments appartenaient à des sujets allemands, que leur prise était donc bonne et valable; que la destruction ayant été causée par force majeure pour conserver la sûreté des opérations du capteur, il n'y avait pas lieu à répartition au profit des capturés; qu'en agissant comme ils avaient fait, les capteurs avaient usé d'un droit rigoureux sans doute, mais dont l'exercice est prévu par les lois de la guerre et recommandé par les instructions dont ils étaient porteurs.' Calvo, § 2817.

[1] Some authorities appear to look upon the destruction of captured enemy's vessels as an exceptionally violent exercise of the extreme rights of war. M. Bluntschli says that 'l'anéantissement du navire capturé n'est justifiable qu'en cas de nécessité absolue, et toute atteinte à ce principe constituerait une violation du droit international' (§ 672), and Dr. Woolsey calls 'the practice a barbarous one, which ought to disappear from the history of nations' (§ 148). It is somewhat difficult to see in what the harshness consists of destroying property which would not return to the original owner, if the alternative process of condemnation by a prize court were suffered. It has passed from him to the captor, and if the latter chooses rather to destroy than to keep what belongs to himself, persons who have no proprietary interest in the objects destroyed have no right to complain of his behaviour. Destruction of neutral vessels or of neutral property on board an enemy's vessel would be a wholly different matter.

By the model 'règlement des prises maritimes' adopted by the Institut de Droit International at Turin in 1882 it is provided that a captor may burn or sink a captured vessel:—

PART III
CHAP. III
Ransom.

Ransom is a repurchase by the original owner of the property acquired by the seizure of a prize. As the agreement to ransom is a voluntary act on his part, and as he can always allow his vessel to be sent in for adjudication or to be destroyed, it must be supposed to be advantageous to him; the crew also is released under it, instead of becoming prisoners of war. The practice therefore constitutes a distinct mitigation of the extreme rights of capture [1].

When a vessel is released upon ransom the commander gives a Ransom Bill, by which he contracts for himself and the owner of the vessel and cargo that a stipulated sum shall be paid to the captor. A copy of the ransom bill is retained by himself, and serves as a safe-conduct protecting the vessel from seizure by ships of the enemy country or its allies, so long as a prescribed

'1. Lorsqu'il n'est pas possible de tenir le navire à flot, à cause de son mauvais état, la mer étant houleuse;
2. Lorsque le navire marche si mal qu'il ne peut pas suivre le navire de guerre et pourrait facilement être repris par l'ennemi;
3. Lorsque l'approche d'une force ennemie supérieure fait craindre la reprise du navire saisi;
4. Lorsque le navire de guerre ne peut mettre sur le navire saisi un équipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûreté;
5. Lorsque le port où il serait possible de conduire le navire saisi est trop éloigné.' Annuaire de l'Institut, 1883, p. 221.

[1] The same reasons for which ransom is a mitigation of the rights of war cause most nations to be unwilling to allow captors to receive it. In England captors were formerly liable to fines for liberating a prize on ransom, unless the Court of Admiralty could be satisfied that 'the circumstances of the case were such as to have justified' the act. With respect to English ships captured by an enemy, the sovereign in council may permit or forbid contracts for ransom by orders issued from time to time, and any person entering into such contract in contravention of an order so issued may be fined to the extent of five hundred pounds. In France public vessels of war appear not to be prohibited from ransoming ships which they may have taken, but privateers could only do so with the consent of the owners. Spain allows ransom to be received by privateers which have taken three prizes, and which may therefore be assumed not to be in a condition to spare any portion of their crew. Russia, Sweden, Denmark, and the Netherlands wholly forbid the practice. The United States, on the other hand, permit contracts for ransom to be made in all cases. 27 and 28 Vict. c. 25; Règlement of 1803, De Martens, Rec. viii. 18; Twiss, ii. § 183; Calvo, § 2121; Pistoye et Duverdy, i. 280.

course is kept for a port of destination agreed upon. If the ransomed vessel voluntarily diverges from her course, or exceeds the time allowed for her voyage in the ransom bill, she becomes liable to be captured afresh, and any excess of value realised from her sale over the amount stipulated for in the bill then goes to the second captors; if on the other hand she is driven from her course or delayed by stress of weather, no penalty is incurred. The captor on his side, besides holding the ransom bill, usually keeps an officer of the prize as a hostage for the payment of the stipulated sum. If on his way to port, with the bill and hostage or either of them on board, he is himself captured, the owner of the prize is exonerated from his debt[1]; but as the bill and hostage are the equivalent of the prize, this consequence does not follow from his capture if both have previously arrived in a place of safety.

Foreign maritime tribunals rank arrangements for ransom among *commercia belli*; hence they allow the captor to sue directly upon the bill if the ransom is not duly paid. The English courts refuse to except such arrangements from the effect of the rule that the character of an alien enemy carries with it a disability to sue, and compel payment of the debt indirectly through an action brought by the imprisoned hostage for the recovery of his freedom[2].

Loss of property acquired by capture.

The property acquired through effectual seizure by way of booty or prize is devested by recapture or abandonment, and in the case of prize it is also lost by escape, rescue by the crew of the prize itself, or discharge. The effect of abandonment when the

[1] Twiss (ii. § 181), referring to Emérigon, Traité des Assurances, c. 12. sect. 23. § 8. But, as is remarked by Dr. Woolsey, who nevertheless acknowledges the authority of the practice, 'why, if the first captor had transmitted the bill, retaining the hostage who is only collateral security, should not his claim be still good?' Introd. to Int. Law, § 510.

[2] On the whole subject see Twiss, ii. §§ 180–2; Calvo, §§ 2123–7; Wheaton, Elem. pt. iv. ch. ii. § 28; Valin, Ord. de la Marine, liv. iii. tit. ix. art. xix. Anthon *v.* Fisher, ii Douglas, 650, note, and the Hoop, i Rob. 200, give the principles on which the English courts proceed.

If a ransomed vessel is wrecked the owner is naturally not exonerated from payment of the ransom.

property is found and brought into port by neutral salvors is perhaps not conclusive. By the courts of the United States at any rate it has been held that the neutral Court of Admiralty has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners, it being considered that by the capture the captors acquire such a right of property as no neutral nation can justly impugn or destroy; consequently the proceeds, after deducting salvage, belong to the original captors, and neutral nations ought not to inquire into the validity of a capture between belligerents[1].

[1] The Mary Ford, iii Dallas, 188.

CHAPTER IV

MILITARY OCCUPATION

Nature of military occupation in its *primâ facie* aspect.

When an army enters a hostile country, its advance, by ousting the forces of the owner, puts the invader into possession of territory, which he is justified in seizing under his general right to appropriate the property of his enemy. But he often has no intention of so appropriating it, and even when the intention exists there is generally a period during which, owing to insecurity of possession, the act of appropriation cannot be looked upon as complete. In such cases the invader is obviously a person who temporarily deprives an acknowledged owner of the enjoyment of his property; and logically he ought to be regarded either as putting the country which he has seized under a kind of sequestration[1], or, in stricter accordance with the facts, as being an enemy who in the exercise of his rights of violence has acquired a local position which gives rise to special necessities of war, and which therefore may be the foundation of special belligerent rights.

Theories with respect to it.

Self-evident as may seem to be this view of the position of an invader, when the intention or proved ability to appropriate his enemy's territory is wanting, it was entirely overlooked in the infancy of international law. An invader on entering a hostile country was considered to have rights explicable only on the assumption that ownership and sovereignty are attendant upon the bare fact of possession. Occupation, which is the momentary detention of property, was confused with conquest, which is the definitive appropriation of it. Territory, in common with all other property, was supposed, in accordance with Roman Law, to become a *res nullius* on passing out of the hands of its owner

Confusion of it with conquest down to the middle of 18th century.

[1] This is the view taken by Heffter (§ 131).

in war; it belonged to any person choosing to seize it for so long as he could keep it. The temporary possession of territory therefore was regarded as a conquest which the subsequent hazards of war might render transient, but which while it lasted was assumed to be permanent. It followed from this that an occupying sovereign was able to deal with occupied territory as his own, and that during his occupation he was the legitimate ruler of its inhabitants.

Down to the middle of the eighteenth century practice conformed itself to this theory. The inhabitants of occupied territory were required to acknowledge their subjection to a new master by taking an oath, sometimes of fidelity, but more generally of allegiance; and they were compelled, not merely to behave peaceably, but to render to the invader the active services which are due to the legitimate sovereign of a state[1]. Frederic II, in his General Principles of War, lays down that 'if an army takes up winter quarters in an enemy's country it is the business of the commander to bring it up to full strength; if the local authorities are willing to hand over recruits, so much the better, if not, they are taken by force;' and the wars of the century teem with instances in which such levies were actually made[2]. Finally,

[1] In the seventeenth century express renunciation of fealty to the legitimate sovereign was sometimes exacted. During the decadence of the usage in the eighteenth century an oath of allegiance was perhaps not required unless it was intended to retain the territory, and the promise of fidelity and obedience may have been taken as sufficient when it was wished to leave its fate in uncertainty. Swedish Intelligencer, pt. ii. 4; Moser, Versuch, ix. i. 231, 280, and ix. ii. 27; Memorial of the Elector of Hanover to the Diet of the Empire, Entick, Hist. of the Late War, ii. 425; De Martens, Précis, § 280; Heffter, § 132. [The Hague Convention (Arts. 44, 45) forbids any compulsion of the population of occupied territory to take part in military operations against its own country, or to take the oath to the hostile power.]

[2] Œuvres de Fréd. II. xxviii. 98. In 1743 Bavarian militia were used by the Austrians to fill up gaps in their Italian armies; in 1756 the Prussians on breaking into Saxony immediately required the States, who were in session, to supply 10,000 men, and two years afterwards 12,000 more were demanded. In 1759 the French made levies in Germany. Moser, Versuch, ix. i. 296, 389. It was sometimes necessary to stipulate on the conclusion of peace for the restitution of men taken in this

the territory itself was sometimes handed over to a third power while the issue of hostilities remained undecided; as in the case of the Swedish provinces of Bremen and Verden, which were sold by the King of Denmark during the continuance of war to the Elector of Hanover[1].

After the termination of the Seven Years' War these violent usages seem to have fallen into desuetude, and at the same time indications appear in the writings of jurists which show that a sense of the difference between the rights consequent upon occupation and upon conquest was beginning to be felt. In saying that a sovereign only loses his rights over territory which has fallen into the hands of an enemy on the conclusion of a peace by which it is ceded, Vattel abandons the doctrine that territory passes as a *res nullius* into the possession of an occupant, and in effect throws back an intrusive foe for a justification of such acts of authority as he may perform within a hostile country upon his mere right of doing whatever is necessary to bring the war to a successful conclusion[2]. But the principle which was thus admitted by implication was not worked out to its natural results. While the continuing sovereignty of the original owner became generally recognised for certain purposes, for other purposes the occupant was supposed to put himself temporarily in his place. The original national character of the soil and its inhabitants remained unaltered; but the invader was invested with a quasi-sovereignty, which gave him a claim as of right to the obedience of the conquered population, and the exercise of which was limited only by the qualifications, which gradually became established, that he must not as a general rule modify the permanent institutions of the country, and that he must not levy recruits for his army. The first portion of this self-contradictory doctrine, besides being a common-place of modern treatises, has, in several

Doctrine of temporary and partial substitution of sovereignty.

manner. See, for example, art. 8 of the Peace of Hubertsburg, De Martens, Rec. i. 140.

[1] Lord Stanhope, Hist. of England, ch. vii.

[2] Vattel, liv. iii. ch. xiii. § 197. Lampredi takes the same view, Jur. Pub. Univ. Theorem. pt. iii. c. xiii. § 6.

countries, been expressly affirmed by the courts. In 1808, when the Spanish insurrection against the French broke out, Great Britain, which was then at war with Spain, issued a proclamation that all hostilities against that country should immediately cease. A Spanish ship was shortly afterwards captured on a voyage to Santander, a port still occupied by the French, and was brought in for condemnation. In adjudicating upon the case Lord Stowell observed: 'Under these public declarations of the state establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property [1].' In France the Cour de Cassation has had occasion to render a decision of like effect. In 1811, during the occupation of Catalonia, a Frenchman accused of the murder of a Catalan within that province was tried and convicted by the assize Court of the Department of the Pyrénées Orientales. Upon appeal the conviction was quashed, on the ground that the courts of the territory within which a crime is perpetrated have an exclusive right of jurisdiction, subject to a few exceptions not affecting the particular case, that 'the occupation of Catalonia by French troops and its government by French authorities had not communicated to its inhabitants the character of French citizens, nor to their territory the character of French territory, and that such character could only be acquired by a solemn act of incorporation which had not been gone through [2].' It is somewhat

[1] The Santa Anna, Edwardes, 182.

[2] Ortolan, Dip. de la Mer, liv. ii. ch. xiii. p. 324 ad finem. See also the American case of the American Insurance Company *v.* Canter, i Peters, 542. During the Mexican War the Attorney-General of the United States took the same view with respect to crimes committed during the occupation of Mexico as that adopted by the French courts in the Catalan murder case. Halleck, ii. 451. The continuance of the sovereignty of the state over its occupied parts is affirmed, though in the subordinate shape of a kind of 'latent title,' by Klüber, § 256; Wheaton, Elem. pt. iv. ch. iv. § 4, and Manning, ch. 5, among the earlier writers of this century. De Martens (Précis, § 280) would seem by his silence to adhere to the ancient doctrine.

curious that a principle which has sufficiently seized upon the minds of jurists to be applied within the large scope of the foregoing cases should not have been promptly extended by international lawyers to cover the whole position of an occupied country relatively to an invader. The restricted admission of the principle is the more curious that the usages of modern war are perfectly consistent with its full application. The doctrine of substituted sovereignty, and with it the corollary that the inhabitants of occupied territory owe a duty of obedience to the conqueror, are no longer permitted to lead to their natural results. They confer no privileges upon an invader which he would not otherwise possess; and they only now serve to enable him to brand acts of resistance on the part of an invaded population with a stigma of criminality which is as useless as it is unjust. Until recently nevertheless many writers, and probably most belligerent governments, have continued to hold that in spite of the unchanged national character of the people and the territory, the fact of occupation temporarily invests the invading state with the rights of sovereignty, and dispossesses its enemy, so as to set up a duty of obedience to the former and of disregard to the commands of the latter. The reasoning or the assumptions upon which this doctrine rests may be stated as follows. The power to protect is the foundation of the duty of allegiance; when therefore a state ceases to be able to protect a portion of its subjects it loses its claim upon their allegiance; and they either directly 'pass under a temporary or qualified allegiance to the conqueror,' or, as it is also put, being able in their state of freedom to enter into a compact with the invader, they tacitly agree to acknowledge his sovereignty in consideration of the relinquishment by him of the extreme rights of war which he holds over their lives and property [1]. It is scarcely necessary to point out

Examination of the doctrine.

[1] Klüber, § 256; De Martens, Précis, § 280; Mr. Justice Story in Shanks v. Dupont, iii Peters, 246; Halleck, ii. 462-4; Twiss, ii. § 64.

A recent instance of the assertion of substituted sovereignty by a belligerent government is supplied by the proclamation which Count Bismarck Bohlen, Governor-General of Alsace, issued on entering on his office in

that neither of these conclusions is justified by the premises. Supposing a state to have lost its right to the allegiance of its subjects, the bare fact of such loss cannot transfer the right to any other particular state. The invaded territory and its inhabitants merely lie open to the acceptance or the imposition of a new sovereignty. To attribute this new sovereignty directly to the occupying state is to revive the doctrine of a *res nullius*, which is consistent only with a complete and permanent transfer of title. On the other hand, while it may be granted that incapacity on the part of a state to protect its subjects so far sets them free to do the best they can for themselves as to render valid any bargain actually made by them, the assertion that any such bargain as that stated is implied in the relations which exist between the invader and the invaded population remains wholly destitute of proof. Any contract which may be implied in these relations can only be gathered from the facts of history, and though it is certain that invaders have habitually exercised the privileges of sovereignty, it is equally certain that invaded populations have generally repudiated the obligation of obedience whenever they have found themselves possessed of the strength to do so with effect. The only understanding which can fairly be said to be recognised on both sides amounts to an engagement on the part of an invader to treat the inhabitants of occupied territory in a milder manner than is in strictness authorised by law, on the condition that, and so long as, they obey the commands which he imposes under the guidance of custom.

Recent doctrine.

In the face of so artificial and inconsistent a theory as that which has just been described it is not surprising that a tendency should have become manifest of late years to place the law of occupation upon a more natural basis. Recent writers adopt the view that the acts which are permitted to a belligerent in

August, 1870. It begins as follows: 'Les événements de la guerre ayant amené l'occupation d'une partie du territoire français par les forces allemandes, ces territoires se trouvent par ce fait même soustraits à la souveraineté impériale, en lieu et en place de laquelle est établie l'autorité des puissances allemandes.' D'Angeberg, No. 371.

occupied territory are merely incidents of hostilities, that the authority which he exercises is a form of the stress which he puts upon his enemy, that the rights of the sovereign remain intact, and that the legal relations of the population towards the invader are unchanged. If the same doctrine has not yet been expressly accepted by most of the great military powers, it is probably not premature to say that the smaller states are unanimous in its support, and the former at the Conference of Brussels at least consented to frame the proposed Declaration in language which implies it [1].

Conclusions.

Looking at the history of opinion with reference to the legal character of occupation, at the fact that the fundamental principle of the continuing national character of an occupied territory and its population is fully established, at the amount of support which is already given to the doctrines which are necessary to complete its application in detail, and to the uselessness of the illogical and oppressive fiction of substituted sovereignty, the older theories may be unhesitatingly ranked as effete, and the rights of occupation may be placed upon the broad foundation of simple military necessity.

Extent of the rights of a military occupant;

If occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war [2]; in other words

[1] Calvo, § 1877; Rolin Jaequemyns, La Guerre actuelle dans ses Rapports avec le Droit International, p. 29; Heffter, § 131. Bluntschli, §§ 539–40 and 545, fully recognises the purely military character of the invader's authority, but seems somewhat to confuse the extreme inadvisability under ordinary circumstances of resisting it with the absence of right to resist. See also American Instruct., arts. 1 and 3. The text of the Project of Declaration of Brussels requires to be read in connexion with the discussions which took place at the Conference. The French Manuel de Droit Int. à l'Usage, &c. says (p. 93), 'L'occupation est simplement un état de fait, qui produit les conséquences d'un cas de force majeure; l'occupant n'est pas substitué en droit au gouvernement légal.'

[2] The right of appropriating all property of the enemy state which is

he has the right of exercising such control, and such control only, within the occupied territory as is required for his safety and the success of his operations. But the measure and range of military necessity in particular cases can only be determined by the circumstances of those cases. It is consequently impossible formally to exclude any of the subjects of legislative or administrative action from the sphere of the control which is exercised in virtue of it; and the rights acquired by an invader in effect amount to the momentary possession of all ultimate legislative and executive power. On occupying a country an invader at once invests himself with absolute authority; and the fact of occupation draws with it as of course the substitution of his will for previously existing law whenever such substitution is reasonably needed, and also the replacement of the actual civil and judicial administration by military jurisdiction. In its exercise however this ultimate authority is governed by the condition that the invader, having only a right to such control as is necessary for his safety and the success of his operations, must use his power within the limits defined by the fundamental notion of occupation, and with due reference to its transient character. He is therefore forbidden as a general rule to vary or suspend laws affecting property and private personal relations, or which regulate the moral order of the community [1]. Commonly also he has not the right to interfere with the public exercise of religion [2], or to restrict expression of opinion upon matters not

their limits.

separable from the occupied territory, e. g. the produce of taxes, is usually classed with rights of occupation (Bluntschli, § 545); it clearly flows however, not from any right of occupation, but from the general right of appropriation. Cf. antea, p. 431.

[1] If an occupant does forbidden acts of the above kind they cease to have legal effect from the moment that his occupation ceases. Compare a decision of the French Cour de Cassation, in 1841, in which it was laid down that acts which 'troublent la société et compromettent l'ordre public tombent de plein droit aussitôt que l'occupation cesse; si, d'autre part, ils concourent au bien-être de ce pays, et sont conformes aux intentions du souverain légitime, ils persistent jusqu'à leur abrogation expresse.' Journal Int. Privé, 1874, p. 224. Comp. also postea, p. 488.

[2] It would be an exception if, owing to the fanaticism of the population,

directly touching his rule, or tending to embarrass him in his negotiations for peace[1].

Practice in matters bearing on the security of the occupant.

The invader deals freely with the relations of the inhabitants of the occupied territory towards himself. He suspends the

the public performance of the ceremonies of their religion could not take place without risk of an excitement which might lead to outbreaks.

[1] Bluntschli, §§ 539–40; and comp. American Instruct., arts. 1–3. The manner in which the will of the invader acts under ordinary circumstances is thus described by the Duke of Wellington: 'Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all; therefore the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out. Now I have in another country carried out martial law; that is to say, I have governed a large proportion of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law; and I carried into execution that my so declared will.' Hansard, 3rd Series, cxv. 881. Compare the Project of Declaration of Brussels, art. 3, and the decision of the delegated Commission of the Conference, made at the sitting of Aug. 22, that art. 3 shall be understood to mean that political and administrative laws shall be subject to suspension, modification, or replacement in case of necessity, but that civil and penal laws shall not be touched. Parl. Papers, Miscell. i. 1875, p. 120. On assuming the government of Alsace in 1870, Count Bismarck Bohlen declared that 'le maintien des lois existantes, le rétablissement d'un ordre de choses régulier, la remise en activité de toutes les branches de l'administration, voilà où tendront les efforts de mon gouvernement dans la limite des nécessités imposées par les opérations militaires. La religion des habitants, les institutions, et les usages du pays, la vie et la propriété des habitants jouiront d'une entière protection.' Proclam. of Aug. 30, D'Angeberg, No. 371. [Cf. Art. 43 of the Hague Convention, 'L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.'

The well-known definition of martial law quoted above from the Duke of Wellington must be limited to the case of alien enemies in a foreign country. The question whether a British commander has any right which the Civil Courts would recognise to supersede within British territory during war time the ordinary law is a far broader one. It assumed much importance both during the Boer invasions of Cape Colony and Natal and our own occupation of the annexed Dutch Republics, but it belongs clearly to the domain of constitutional rather than international law. The Privy Council in Ex parte Marais, L. R. 1902, A. C. 109, decided that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals; see also Law Quarterly Review, vol. xviii. pp. 117, 133, 152, for a discussion of the historical aspect of martial law. The confusion between *military* and martial law has been the cause of much loose speaking and writing.]

operation of the laws under which they owe obedience to their legitimate ruler, because obedience to the latter is not consistent with his own safety; for his security also, he declares certain acts, not forbidden by the ordinary laws of the country, to be punishable; and he so far suspends the laws which guard personal liberty as is required for the summary punishment of any one doing such acts. All acts of disobedience or hostility are regarded as punishable; and by specific rules the penalty of death is incurred by persons giving information to the enemy, or serving as guides to the troops of their own country, by those who while serving as guides to the troops of the invader intentionally mislead them, and by those who destroy telegraphs, roads, canals, or bridges, or who set fire to stores or soldiers' quarters[1]. If the inhabitants of the occupied territory rise in insurrection, whether in small bodies or *en masse*, they cannot claim combatant privileges until they have displaced the occupation, and all persons found with arms in their hands can in strict law be killed, or if captured be executed by sentence of court martial[2]. Sometimes the inhabitants of towns or districts in which acts of the foregoing nature have been done, or where they are supposed to have originated, are rendered collectively responsible, and are punished by fines or by their houses being burned. In 1871 the German governor of Lorraine ordered, 'in consequence of the destruction of the bridge of Fontenoy, to the east of Toul, that the district included in the Governor-Generalship of Lorraine shall pay an extraordinary contribution of 10,000,000 francs by way of fine,' and announced that 'the village of Fontenoy has been immediately burned.' In October 1870 the general commanding in chief the second German Army issued a proclamation declaring that all houses or villages affording shelter to Francs Tireurs would be burned, unless the Mayor of the Commune informed

[1] Bluntschli, §§ 631, 636, 641. Rolin Jaequemyns (Second Essai sur la Guerre Franco-Allemande, p. 30) remarks that while the right of inflicting death for such acts must be maintained, its actual infliction ought only to take place in exceptional cases.

[2] American Instruct., 85; Bluntschli, § 643.

the nearest Prussian officer of their presence immediately on their arrival in the Commune; all Communes in which injury was suffered by railways, telegraphs, bridges or canals, were to pay a special contribution, notwithstanding that such injury might have been done by others than the inhabitants, and even without their knowledge. A general order affecting all territory occupied or to be occupied had been already issued in August, under which the Communes to which any persons doing a punishable act belonged, as well as those in which the act was carried out, were to be fined for each offence in a sum equal to the yearly amount of their land-tax [1].

[1] D'Angeberg, Nos. 328, 854, and 1015. The following extract from the General Orders issued to the Prussian Army in August, 1870, gives a connected view of the acts punished by the Germans and of the penalties which they affixed to their commission:—

'1°. La juridiction militaire est établie par la présente. Elle sera appliquée dans toute l'étendue du territoire français occupé par les troupes allemandes à toute action tendant à compromettre la sécurité de ces troupes, à leur causer des dommages ou à prêter assistance à l'ennemi. La juridiction militaire sera réputée en vigueur et proclamée pour toute l'étendue d'un canton, aussitôt qu'elle sera affichée dans une des localités qui en font partie.

'2°. Toutes les personnes qui ne font pas partie de l'armée française et n'établiront pas leur qualité de soldat par des signes extérieurs et qui:

'(*a*) Serviront l'ennemi en qualité d'espions;

'(*b*) Egareront les troupes allemandes quand elles seront chargées de leur servir de guides;

'(*c*) Tueront, blesseront ou pilleront des personnes appartenant aux troupes allemandes ou faisant partie de leur suite;

'(*d*) Détruiront des ponts ou des canaux, endommageront les lignes télégraphiques ou les chemins de fer, rendront les routes impraticables, incendieront des munitions, des provisions de guerre, ou les quartiers de troupes;

'(*e*) Prendront les armes contre les troupes allemandes;

seront punis de la peine de mort.

'Dans chaque cas, l'officier ordonnant la procédure instituera un conseil de guerre chargé d'instruire l'affaire et de prononcer le jugement. Les conseils de guerre ne pourront condamner à une autre peine qu'à la peine de mort. Leurs jugements seront exécutés immédiatement.

'3°. Les communes auxquelles les coupables appartiendront, ainsi que celles dont le territoire aura servi à l'action incriminée, seront passibles, dans chaque cas, d'une amende égale au montant annuel de leur impôt foncier.' D'Angeberg, No. 328.

A proclamation, issued on the occasion of the insurrection in Lombardy in 1796, shows the manner in which Napoleon dealt with risings in occupied countries:—

It has been confessed that it is impossible to set bounds to the demands of military necessity; there may be occasions on which a violent repressive system, like that from which the foregoing examples have been drawn, may be needed and even in the end humane; there may be occasions in which the urgency of peril might excuse excesses such as those committed by Napoleon in Italy and Spain. But it is impossible also not to recognise that in very many cases, probably indeed in the larger number, the severity of the measures adopted by an occupying army is entirely disproportioned to the danger or the inconvenience of the acts which it is intended to prevent; and that when others than the perpetrators are punished, the outrage which is done to every feeling of justice and humanity can only be forgiven where military necessity is not a mere phrase of convenience, but an imperative reality. [The language of the Hague Convention on this subject is somewhat lacking in precision: 'No general penalty,

'L'armée française, aussi généreuse que forte, traitera avec fraternité les habitants paisibles et tranquilles; elle sera terrible comme le feu du ciel pour les rebelles et les villages qui les protégeraient. Art. 1. En conséquence le général en chef déclare rebelles tous les villages qui ne se sont pas conformés à son ordre du 6 prairial (which was, Ceux qui, sous 24 heures, n'auront pas posé les armes et n'auront pas prêté de nouveau serment d'obéissance à la République, seront traités comme rebelles; leurs villages seront brûlés). Les généraux feront marcher contre les villages les forces nécessaires pour les réprimer, y mettre le feu, et faire fusiller tous ceux qu'ils trouveront les armes à la main. Tous les prêtres, tous les nobles qui seront restés dans les communes rebelles seront arrêtés comme otages et envoyés en France. Art. 2. Tous les villages où l'on sonnera le tocsin seront sur le champ brûlés. Les généraux sont responsables de l'exécution du dit ordre. Art. 3. Les villages sur le territoire desquels serait commis l'assassinat d'un Français seront taxés à une amende du tiers de la contribution qu'ils payaient à l'archiduc dans une année, à moins qu'ils ne déclarent l'assassin et qu'ils ne l'arrêtent, et le remettent entre les mains de l'armée. Art. 4. Tout homme trouvé avec un fusil et des munitions de guerre sera fusillé de suite, par ordre du général commandant l'arrondissement. Art. 5. Toute campagne où il sera trouvé des armes cachées sera condamnée à payer [illegible] du revenu qu'elle rend, en forme d'amende. Toute maison où il sera trouvé un fusil sera brûlée, à moins que le propriétaire ne déclare à qui il appartient. Art. 6. Tous les nobles ou riches qui seraient convaincus d'avoir excité le peuple à la révolte, soit en congédiant leurs domestiques, soit par des propos contre les Français, seront arrêtés comme otages, transférés en France, et la moitié de leurs revenus confisquée.' Corresp. de Nap. i. i. 323, 327.

pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible[1].']

Hostages are sometimes seized by way of precaution in order to guarantee the maintenance of order in occupied territory. The usage which forbids that the life of any hostage shall be taken, for whatever purpose he has been seized or accepted, and which requires that he shall be treated as a prisoner of war, renders the measure unobjectionable; but in proportion as it is unobjectionable it fails to be deterrent. The temporary absence of a deposit which must be returned in the state in which it was received can only prevent action where it is a necessary means to action; and the detention of hostages when they are treated in a legal manner can only be of use if it totally deprives a population of its natural leaders[2]. Hence the seizure of hostages is less often used as a guarantee against insurrection than as a momentary expedient or as a protection against special dangers, which it is supposed cannot otherwise be met. In such cases a belligerent is sometimes drawn by the convenience of intimidation into acts which are clearly in excess of his rights. In 1870 the Germans ordered that 'railways having been frequently damaged, the trains shall be accompanied by well-known and respected persons inhabiting the towns or other localities in the neighbourhood of the lines. These persons shall be placed upon the engine, so that it may be understood that in every accident caused by the hostility of the inhabitants, their compatriots will be the first to suffer. The competent civil and military authorities together with the railway companies and the etappen commandants will organise a service of hostages to accompany the trains.' The order was universally and justly reprobated on the ground that it violated the principle which denies to a belligerent any further power than that of keeping his hostage in confinement; and it is for governments

[1] Hague Convention, art. 50.

[2] Napoleon endeavoured to do this in Italy in 1796. See Arts. 1 and 6 of Proclamation quoted above.

to consider whether it is worth while to retain a right which can only be made effective by means of an illegal brutality which existing opinion refuses to condone[1]. [It is to be regretted that on some occasions during the South African War the British military authorities should have adopted a similar policy in the hope of stopping the epidemic of train-wrecking. Its futility, to say nothing of the question of humanity, was speedily recognised.]

Practice in administrative matters, &c.

It has been seen that the authority of the local civil and judicial administration is suspended as of course so soon as occupation takes place. It is not usual however for an invader to take the whole administration into his own hands. Partly because it is more easy to preserve order through the agency of the native functionaries, partly because they are more competent to deal with the laws which remain in force, he generally keeps in their posts such of the judicial and of the inferior administrative officers as are willing to serve under him, subjecting them only to supervision on the part of the military authorities, or of superior civil authorities appointed by him[2]. He may require persons so serving him to take an oath engaging themselves during the continuance of the occupation to obey his orders, and not to do anything to

[1] Order of the Civil Governor of Rheims. D'Angeberg, No. 686; Rolin Jaequemyns, La Guerre Actuelle, p. 32; Calvo, ii. 1868-71. Bluntschli (§ 600) says that the measure was 'peu recommandable.'

At St. Quentin and other places the Germans innocently but uselessly required hostages as a guarantee against the commission of irregular hostilities between the surrender of the town and the completion of its occupation. It is not easy to suppose that any hot-headed person who might be inclined to break into acts of violence at such a moment would be deterred by the prospect that two municipal counsellors would be prisoners in Germany until the end of the war.'

[2] In 1806 Napoleon, on occupying the greater part of Prussia, retained the existing administration under the general direction of a French official. Lanfrey, Hist. de Nap. i. iv. 25. The Duke of Wellington, on invading France, directed the local authorities to continue the exercise of their functions, apparently without appointing any English superior. Wellington Despatches, xi. 307. The Germans, on the other hand, in 1870 appointed officials, at least in Alsace and Lorraine, in every department of the administration and of every rank. Calvo, § 1896. See also the French Manuel à l'Usage, &c. p. 98.

his prejudice[1]; but he cannot demand that they shall exercise their functions in his name[2]. The former requirement is merely a precaution which it is reasonable for him to take in the interests of his own safety; the latter would imply a claim to the possession of rights of sovereignty, and would therefore not be justified by the position which he legally holds within the occupied territory.

Use of the resources of the country.

Under the general right of control which is granted to an invader for the purposes of his war he has obviously the right of preventing his enemy from using the resources of the occupied territory. He therefore intercepts the produce of the taxes, of duties[3], and other assistance in money, he closes commercial access so as to blockade that portion of the territory which is conterminous with the occupied part, and forbids the inhabitants of the latter, under such penalties as may be necessary, from joining the armies of their country[4].

[1] American Instruct., art. 26; Bluntschli, § 551. The following was the oath taken in 1806 by the Prussian officials who continued to exercise their functions during the French occupation: 'I swear to exercise with fidelity the authority which is committed to me by the Emperor of the French, and to act only for the maintenance of the public tranquillity, and to concur with all my power in the execution of all the measures which may be ordered for the service of the French army, and to hold no correspondence with its enemies.' Alison, Hist. of Europe, v. 855.

[2] Calvo, § 1891. In 1870 this rule was infringed by the German authorities in France, who after the fall of the Emperor Napoleon ordered the Courts at Nancy to administer justice in the name of the 'High German Powers occupying Alsace, Lorraine, &c.,' alleging that the formula 'in the name of the French people and government,' which was actually in use, implied a recognition of the republic. The situation was no doubt embarrassing, as Prussia was at that time unwilling to negotiate with any but the Imperial government; but there can be equally little doubt that the manner in which the difficulty was met was eminently improper. Few will probably be found to dispute the common sense of the remark of M. Bluntschli, who says (§ 547) that 'la solution la plus naturelle aurait été ou bien une formule neutre, par exemple: "au nom de la loi," ou la suppression de la formule elle-même, dont l'utilité est fort contestable.' The courts refused to obey, and suspended their sittings. For documents connected with the occurrence, see Calvo, § 1896. The French Manuel à l'Usage, &c. (p. 100) prescribes that magistrates shall be allowed to administer justice in the name of the legitimate sovereign.

[3] Foreigners paying duties to an invader are of course not liable to pay them a second time when he is expelled or withdrawn.

[4] During the Franco-German War, if persons subject to conscription

Under the same general right he may apply the resources of the country to his own objects. He may compel the inhabitants to supply him with food, he may demand the use of their horses, carts, boats, rolling stock on railways, and other means of transport, he may oblige them to give their personal services in matters which do not involve military action against their sovereign.

according to French law, and inhabiting occupied territory not comprised within the governor-generalship of Alsace-Lorraine, left their place of residence clandestinely, or without sufficient motive, their relatives were fined 50 francs for each day of absence (Ordonnance of 27th Oct., 1870, D'Angeberg, No. 684). Within Alsace-Lorraine a decree ordered (art. 1) that 'celui qui se joint aux forces militaires françaises est puni par la confiscation de sa fortune présente et future et par un bannissement de dix ans. (Art. 5.) Celui qui veut s'éloigner du siège de son domicile, doit en demander, après justification préalable de motif, l'autorisation par écrit au préfet. De celui qui s'est éloigné, sans cette autorisation, plus longtemps que huit jours de son domicile, on suppose en droit qu'il est allé rejoindre les forces françaises. Cette supposition suffit pour la condamnation.' (D'Angeberg. No. 875.) Commenting upon the latter order M. Bluntschli says (§ 540) that 'au sujet des peines de la confiscation et du bannissement prononcées contre les contrevenants des doutes graves peuvent être soulevés, d'une part, parce que ces peines paraissent d'une rigueur excessive, et ensuite parce que leurs effets ont une durée plus considérable que les intérêts militaires ne l'exigent.' M. Rolin Jaequemyns thinks (Second Essai, p. 34) 'qu'il n'est pas contraire au droit d'exiger des habitants que, pour s'absenter, ils se munissent d'un permis spécial, et de considérer comme suspects ceux qui, étant en âge de porter les armes, voyagent sans ce permis.' But, 'nous ne pouvons que trouver exorbitants les moyens indiqués par le décret. La peine odieuse par elle-même de la confiscation générale de tous biens présents et futurs devient plus odieuse encore lorsqu'elle s'applique à un acte qui dans l'opinion de ses auteurs a dû passer non seulement pour légitime, mais pour obligatoire. . . . On peut comparer l'individu qui a réussi à s'échapper sans permis à un vaisseau . . . qui violerait un blocus. Une fois l'obstacle franchi, c'est à l'état dont la vigilance a été en défaut à en subir les conséquences. . . . Tout ce que l'on pourrait admettre c'est que, jusqu'au retour de la personne absente sans permis, l'état envahissant mit ses biens sous séquestre provisoire.' It may be answered to the above criticisms that the rights of punishment possessed by an invader being entirely independent of the legitimateness of the action for which its punishment is inflicted, it is immaterial whether the individual is acting rightly or wrongly; the sole point to consider is whether a certain amount of rigour is necessary to attain an end, and whether that end is important enough to justify rigour. It is clear that emigration to join a national army is in itself as hostile an act as others which a belligerent is authorised to repress with severity, and that if carried on largely over a considerable area it would be highly dangerous to him. It is hard therefore to say that if milder means are first tried, any

But the right to take a thing does not necessarily involve the right to take it without payment, and the right of an invader is a bare one; so long therefore as he confines himself within the limits defined by his right of control he can merely compel the render of things or services on payment in cash or by an acknowledgment of indebtedness which he is himself bound to honour. If he either makes no such payment or gives receipts, the value represented by which he leaves to the sovereign of the occupied territory to pay at the end of the war, he oversteps these limits, and seizes private property under his general right of appropriation [1].

Legal relation of an enemy to the government and people of an occupied territory.

It has been already mentioned that belligerents have commonly assumed, and that some writers still maintain, that it is the duty of the inhabitants of an occupied country to obey the occupying sovereign, and that the fact of occupation deprives the legitimate sovereign of his authority. It has been shown however, upon the assumption that the rights of an occupant are founded only on military necessity, that this view of the relation between the invader and the invaded population, and between the latter and their government, is unsound. The invader succeeds in a military operation, in order to reap the fruits of which he exercises control within the area affected; but the right to do this can no more imply a correlative duty of obedience than the right to attack and destroy an enemy obliges the latter to acquiesce in his own

ultimate harshness is too great. In the particular case the Alsace-Lorraine decree was not issued till December; it strikes no one but the emigrant himself; and 12,000 men had already escaped to join the French army (Circular of Count Chaudordy, D'Angeberg, No. 1024); under all the circumstances therefore it possibly was not too severe. The earlier decree affecting the other occupied provinces is far more open to criticism. Vicarious punishment never commends itself by its justice, and recourse should only be had to it in the last extremity. M. Bluntschli's objection that the effects of a punishment ought not to have a greater duration than the state of military affairs which renders it necessary is sound. The termination of war ought to put an end to all punishments which are still in progress.

[1] See antea, p. 423. The distinction must be kept in mind, belligerent governments and some writers being anxious to represent seizure without payment for military purposes as an act of sovereignty and not of military violence.

destruction. The legal and moral relation therefore of an enemy to the government and people of an occupied territory are not changed by the fact of occupation. He has gained certain rights; but side by side with these the rights of the legitimate sovereign remain intact. The latter may forbid his officials to serve the invader, he may order his subjects to refuse obedience, or he may excite insurrections[1]. So also the inhabitants of the occupied territory preserve full liberty of action. Apart from an express order from their own government they are not called upon to resist the invader, or to neglect such commands as do not imply a renunciation of their allegiance; but on the other hand they may rise against him at any moment, on the full understanding that they do so at their own peril.

Duties of an occupant.

Though the fact of occupation imposes no duties upon the inhabitants of the occupied territory the invader himself is not left equally free. As it is a consequence of his acts that the regular government of the country is suspended, he is bound to take whatever means are required for the security of public order[2]; and as his presence, so long as it is based upon occupation, is confessedly temporary, and his rights of control spring only from

[1] Bluntschli (§ 541) justly says that when the government of an invaded territory withdraws its functionaries, and even its police, as was done by Austria in 1866, the enemy suffers much less than the inhabitants. The ordinary life of the country is paralysed, but the invader will find the means of doing whatever is necessary for his own convenience. If however the doctrine stated in the text is well founded, M. Bluntschli is wrong in declaring (§ 540) that the French government overstepped the limits of its rights in December 1870, when it forbade the people in Lorraine under pain of death to work for the German forest administration. It was only guilty of forcing them to choose between the alternative of immediate punishment by the Germans, and of possible future punishment, with the brand of unpatriotism added, from the courts of their own nation. Such acts are generally unwise and even cruel, but they are none the less clearly within the rights of a government.

[2] The costs of administration are defrayed out of the produce of the regular taxes, customs, &c. of the country, which the invader is authorised to levy for this purpose. These costs must be satisfied before he exercises his right to appropriate the taxes, &c. to his own profit. Comp. American Instruct., art. 39; Project of Declaration of Brussels, art. 5; Bluntschli, § 647; [art. 48 of the Hague Convention].

the necessity of the case, he is also bound, over and above the limitations before stated [1], to alter or override the existing laws as little as possible, whether he is acting in his own or the general interest. As moreover his rights belong to him only that he may bring his war to a successful issue, it is his duty not to do acts which injure individuals, without facilitating his operations, or putting a stress upon his antagonist. Thus though he may make use of or destroy both public and private property for any object connected with the war, he must not commit wanton damage, and he is even bound to protect public buildings, works of art, libraries, and museums [2].

When occupation begins and ceases.

The consequences of occupation being so serious as they in fact are to the inhabitants of an occupied territory, it becomes important to determine as accurately as possible at what moment it begins and ends in a given spot. Up to a certain point there can be no doubt. Within the outposts of an army and along its lines of communication, so long as they are kept open, the exclusive power of the invader is an obvious fact. But in the territory along the flank and in advance of the area thus defined it is an unsettled question under what conditions occupations can exist. According to one view it is complete throughout the whole of a district forming an administrative unit so soon as notice of occupation has been given by placard or otherwise at any spot within it, unless military resistance on the part of duly organised national troops still continues [3]; when occupation is once established it does not cease by the absence of the invading force, so that flying columns on simply passing through a place can render the inhabitants liable to penalties for disobedience to orders issued subsequently when no means of enforcing them exists, or for

[1] These duties are clearly stated in arts. 2 and 3 of the Project of Declaration of Brussels. See also the Manual of the Institute of Int. Law, arts. 42-9.

[2] [See Hague Convention, art. 56.]

[3] The administrative unit adopted by the Germans in 1870 as that, the whole of which was affected by notice of occupation given at any spot within it, was the canton. The average size of a French canton is about 72 square miles.

resistance offered at any later time to bodies of men in themselves insufficient to subdue such resistance; although also occupation comes to an end if the invader is expelled by the regular army of the country, it is not extinguished by a temporary dispossession, effected by a popular movement, even if the national government has been reinstated. This doctrine may be gathered from the recent German practice, and from that of Napoleon in the early years of last century; it is therefore that which has been acted upon in most modern wars in which occupation has taken place upon a large scale[1]. No distinct usage of a more moderate kind can, on the other hand, be said to have formed itself; though

[1] M. Bluntschli's language (§ 544) expresses the above view, except that he would seem to exclude occupation by flying columns: 'La prise de possession du territoire ne cesse pas par le simple fait du départ des troupes d'occupation. Lorsqu'une armée pénètre sur le territoire ennemi, elle conserve la possession de la partie du territoire situé derrière elle, même lorsqu'elle n'y a pas laissé de soldats, et cela tant qu'elle ne renonce pas intentionnellement à sa possession ou qu'elle n'est pas dépossédée par l'ennemi.' See Gen. Von Voigts Rhetz on flying columns and temporarily successful insurrections, Parl. Papers, Miscell. i. 1875, p. 65; art. 1 of the German Arrêté of 1870, quoted above, p. 473. A good example of the manner in which the Germans maintained occupation during the French War without the support of present or neighbouring force is afforded by their occupation of the country lying between Paris, Amiens, and the sea. 'I once travelled,' says Mr. Sutherland Edwards, 'from St. Germain to Louviers, a distance of fifty miles along a road occupied theoretically by the Prussians, without seeing a Prussian soldier. From the outskirts of Rouen to Dieppe, nearly fifty miles, I met here and there, and at one place found a post of perhaps half-a-dozen men. At Dieppe, Prussian proclamations on the walls and the local cannons spiked or otherwise spoiled; the police and firemen disarmed; the telegraph in every direction cut, the postal service stopped; but nowhere a Prussian or a German soldier. From Dieppe to Neufchâtel, not a soldier, with the exception of a few invalids kept in Neufchâtel in hospital; from Neufchâtel to the advanced posts of the army at Amiens, again not a soldier. Yet from St. Germain, by way of Louviers and Elbœuf to Rouen, from Rouen to Dieppe, from Dieppe to Amiens, the roads and adjacent districts were all under Prussian rule.' (The Germans in France.) The practice of Napoleon with respect to flying columns may be indicated by an order issued in 1806 to Marshal Lannes when the French army had not yet passed the Oder: 'Mon intention est que vous réunissiez toute votre cavallerie légère au delà de l'Oder, et qu'elle batte tout le pays jusqu'à la Vistule. Vous donnerez pour instructions aux commandants de défendre aux recrues d'aller rejoindre, conformément à l'appel que leur fait en ce moment le roi de Prusse, et de faire connaître partout que le premier village qui laissera partir ses recrues sera puni.' Corresp. xiii. 467.

there are indications of the growth of an opinion hostile to the current practice. The discussions which took place at the Conference of Brussels resulted in the introduction of a new article into the Project of Declaration for the purpose of defining the conditions under which territory should be considered to be occupied. By this, occupation was said to 'extend only to territories where the authority of the enemy's army is established and is capable of being exercised,' and it is evident from the Protocols that capacity to exercise authority was understood to depend upon the existence of an immediately available force[1]. The language of the article is wanting in precision, and if it were received without amendment as the standard of law, Lord Derby would be justified in entertaining the fear which he has expressed, that 'the inhabitants of an invaded territory would find in such colourless phrases very inadequate protection from the liberal interpretation of the necessities and possibilities of warfare by a victorious enemy[2].' Defective however as it is, and notwithstanding that it represents little more than an endeavour to find out a common ground upon which conflicting opinions might momentarily unite, distinct gain would have accrued from the acceptance of any definition, however imperfect, which is more in harmony with the true basis of the law of occupation than that to which great military states have hitherto been in the habit of giving effect. The principle that occupation, in order to confer rights, must be effective, when once stated, is too plainly in accordance with common sense, and too strictly follows the law already established in the analogous case of

[1] The delegates of Sweden and Switzerland directed attention to the close analogy which exists between occupation and a blockade (Parl. Papers, Miscell. i. 1875, p. 64). The right of blockade which, like occupation, is based solely upon the military necessities of a belligerent, gives him certain rights within limits of place which are defined by his immediately effective force. See postea, part iv. chap. vi. The principle of the article was approved of by a considerable number of jurists at a meeting of the Institute of International Law in 1875. See also Rolin Jaequemyns, Second Essai, p. 34.

[2] Parl. Papers, Miscell., No. ii. 1875, p. 5.

blockade, to remain unfruitful, and there can be little doubt that practice will in time be modified so as to conform within reasonable bounds to the deductions which may logically be drawn from it. [The principle of the Brussels article has now been adopted by the Hague Convention of 1899 [1].]

That the more violent usage is theoretically indefensible scarcely requires proof. Rights which are founded upon mere force reach their natural limit at the point where force ceases to be efficient. They disappear with it; they reappear with it; and in the interval they are non-existent. If moreover neither the legitimate sovereign of a territory nor an invader holds a territory as against the other by the actual presence of force, so that in this respect they are equal, the presumption must be that the authority of the legitimate owner continues to the exclusion of such rights as the invader acquires by force. As a matter of fact, except in a few cases which stand aside from the common instances of extension of the rights of occupation over a district, of which part only has been touched by the occupying troops, the enforcement of those rights through a time when no troops are within such distance as to exercise actual control, and still more the employment of inadequate forces, constitute a system of terrorism, grounded upon no principle, and only capable of being maintained because an occupying army does not scruple to threaten and to inflict penalties which no government can impose upon its own subjects.

If it were settled that occupation should be considered to exist only together with the power of immediate enforcement of the rights attendant on it, occupation by flying columns, and occupation evidenced by the presence of a plainly inadequate force, would disappear; and with them would disappear the abuses which are now patent. To insist without reservation upon the requirement of present force would not however be altogether

[1] [Art. 42. Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie. L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.]

just to the invader. It must be admitted that the country which is covered by the front of an army, although much of it may not be strongly held, and though it may in part be occupied only by the presence of a few officials, is as a rule far more effectually under command than territory beyond those limits, even when held by considerable detachments. This is so much the case that in such districts a presumption in favour of efficient control may be said to exist which the occurrence of a raid by national troops, the momentary success of an insurrection, or the presence of guerilla bands, is not enough to destroy. An invader may therefore fairly demand to be allowed to retain his rights of punishment, within the district indicated, until the enemy can offer proofs of success, solid enough to justify his assertion that the occupier is dispossessed. This requirement might probably be satisfied, and at the same time sufficient freedom of action might be secured to the invaded nation by considering that a territory is occupied as soon as local resistance to the actual presence of an enemy has ceased, and continues to be occupied so long as the enemy's army is on the spot; or so long as it covers it, unless the operations of the national or an allied army or local insurrection have re-established the public exercise of the legitimate sovereign authority.

CHAPTER V

POSTLIMINIUM

PART III
CHAP. V
In what postliminium consists.

When territory which has been occupied and population which has been controlled by an enemy comes again into the power of its own state during the progress of a war, or when a state the whole of which has been temporarily subjugated throws off the yoke which has been placed upon it before a settled conquest has been clearly effected, or finally when a state or portion of a state is freed from foreign domination by the action of an ally before a conquest of it has been consolidated, the legal state of things existing prior to the hostile occupation is re-established. In like manner, when property of any of the kinds which have been mentioned as being susceptible of appropriation during the course of hostilities is captured by an enemy, and is then recaptured by the state to which it belongs or of which the person to whom it belongs is a subject, or by an ally, before the moment at which it so becomes the property of its captor that third parties can receive a transfer of it, the owner is replaced in legal possession of it. In all these cases the legal state of things existing before the hostile occupation or capture is conceived of for many purposes as having been in continuous existence [1].

The above rule is based upon what is called, by an unnecessarily imposing name, the right of postliminium, from a somewhat distant analogy to the *jus postliminii* of the Roman law. Properly it is difficult to see that the so-called right has any ground for claiming existence as such. Hostile occupation of territory being merely the detention of property belonging to

[1] Grotius, De Jure Belli et Pacis, lib. iii. c. ix; Vattel, liv. iii. ch. xiv; De Martens, Précis, § 283; Phillimore, iii. §§ ccccciii–vi; Bluntschli, §§ 727–8, 736. Grotius, followed by Vattel and some more modern writers, supposes postliminium not to extend to moveables.

another, the control exercised over its inhabitants being the mere offspring of military necessity, and appropriation by conquest, in those cases in which the intention to conquer is present, being incomplete during the continuance of war, the rights of the original state person, where the life of the state is momentarily suspended, or of the legal owner, where a portion of its territory is cut off, remain untouched. The state is simply deprived temporarily of the means of giving effect to those rights; and when the cause of the deprivation is taken away, it is not a right, but the fact of power which revives. In the case therefore of territory recovered after hostile occupation the right of postliminium is merely a kind of substantive dress which is given to the negative fact that a legitimate owner is under no obligation to recognise as a source of rights the disorder which is brought into his household by an intruder; and though the case of property susceptible of appropriation during war is not identical, since the right of the enemy to deal with it as his own arises immediately that effectual seizure is made, it is rendered closely analogous by the fact that evidence of effectual seizure is only considered to be sufficient to bind the other belligerent, or to warrant recognition by neutrals, after the captured object has been taken into a safe place. In effect, the doctrine of postliminium amounts to the truistic statement that property and sovereignty cannot be regarded as appropriated until their appropriation has been completed in conformity with the rules of international law.

Putting aside certain of the effects of postliminium, which are mentioned by writers, but with which international law is not concerned, such as its effect in reviving the constitution of the state, there seem to be only four subjects connected with it which need to be touched upon—viz.

1. Certain limitations to the operation of the right in the case of occupied territory.
2. The effect of acts done by an invader in excess of his rights.