INTERNATIONAL LAW

A TREATISE

BY

L. OPPENHEIM, LL.D.

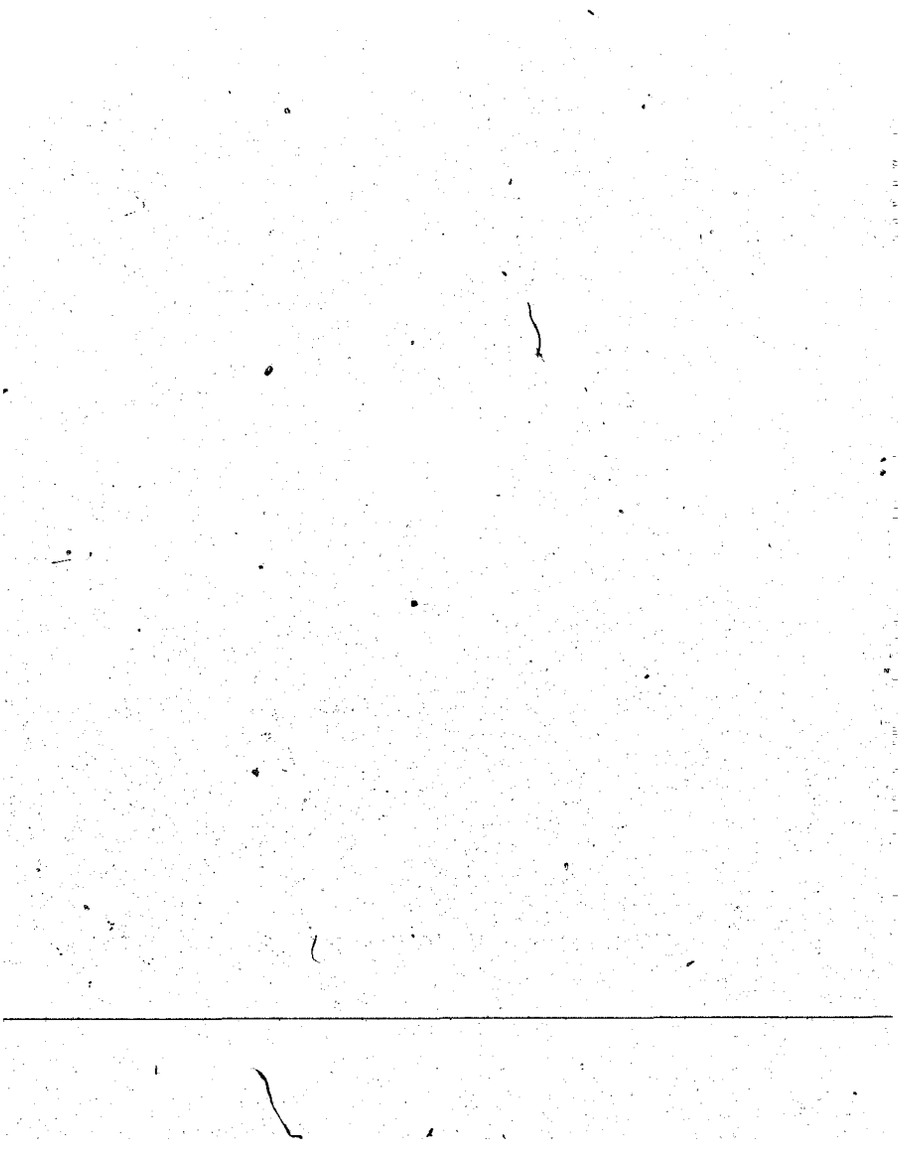
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VOL. I.

PEACE

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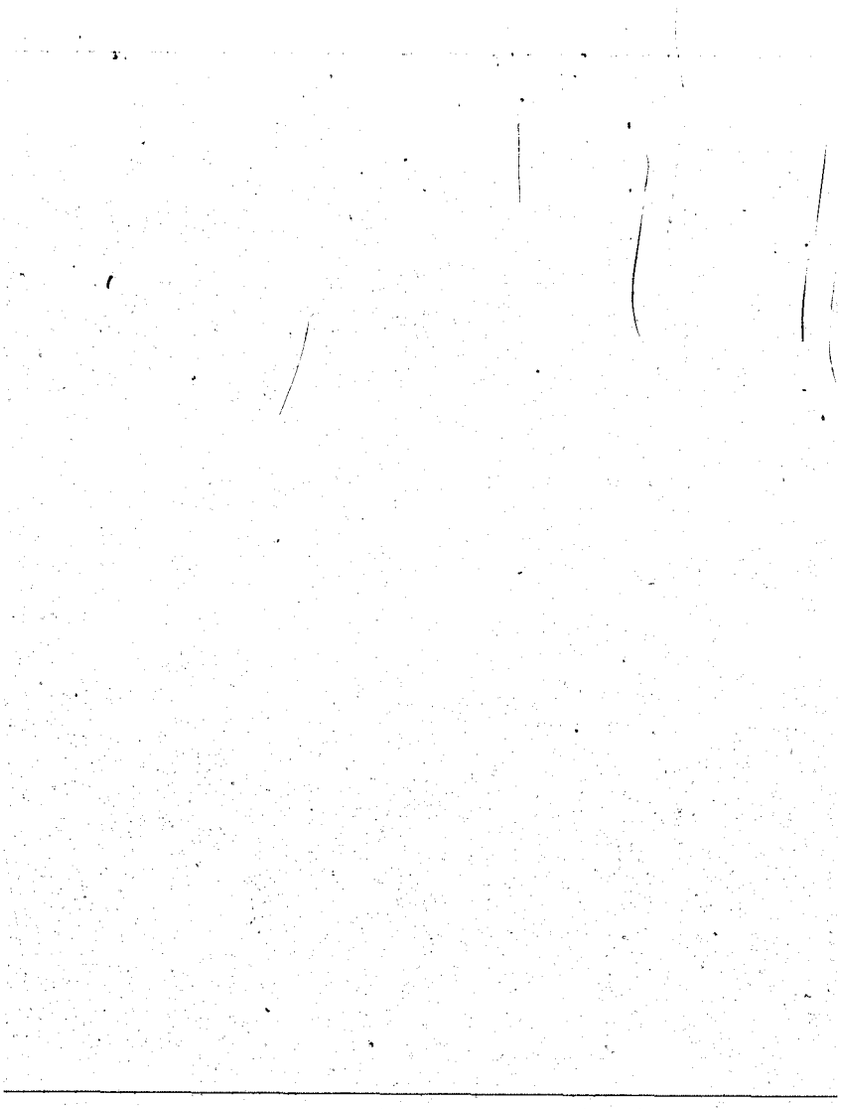
TO

EDWARD ARTHUR WHITTUCK

WHOSE SYMPATHY AND ENCOURAGEMENT

HAVE ACCOMPANIED THE PROGRESS OF THIS WORK

FROM ITS INCEPTION TO ITS CLOSE



PREFACE

Although this treatise on the Law of Nations appears in two volumes, it is intended to be an elementary book for those who are beginning to study International Law. It is a book for students written by a teacher. The majority of the people in this country who take an interest in International Law are not jurists and have no legal training, as my classes at the London School of Economics and Political Science (University of London) show. For this reason, in lectures as well as in a treatise on the Law of Nations, certain truisms must be repeated again and again, and much that is obvious to the trained jurist must, to insure comprehension, be pointed out at some length.

My work endeavours to give a complete survey of the subject. All important points are discussed, and in notes the reader is referred to other books which go more deeply into the subject. And the list of treatises as well as monographs printed at the commencement of each topic will, I hope, be welcome to those who desire to look up a particular point. There is no English treatise which provides such a bibliography. Naturally, my catalogue is not exhaustive, although English, French,

German, Italian, Russian, Swiss, Belgian, Portuguese, American, and Spanish-American authors are represented. And as a rule I have avoided giving references to articles contained in periodicals. But my readers will find these as well as other references in the books quoted. In any case they will know where to find something on any subject in which they take a special interest. That I have everywhere quoted Phillimore, Twiss, and Hall, and have as regards the detail of many points referred my readers to these classics of international jurisprudence, was a matter of course. I should, however, specially mention that I had to quote Hall's treatise in its fourth edition (1895) because the editor of the fifth edition has abandoned the section-marks (§§) in the divisions of the book.

I have tried to the best of my power to build my system and my doctrines on a thorough jurisprudential, which is equivalent to a positive, basis. My definitions are as sharp as possible. Readers may be assured that those definitions in my book which are more or less ambiguous have been intentionally so framed because the actualities on which they are based are not altogether clear. My system itself is, I hope, lucid in its arrangement of topics. An Introduction deals with the Foundation of International Law and gives a sketch of its Development and Scientific Treatment. The First Part comprises the whole matter concerning the Subjects of the Law of Nations—viz. the States and those of their relations which are derived from their very membership of the

Family of Nations. The Second Part deals with the Objects of the Law of Nations—namely, State Territory, the Open Sea, and Individuals. As the States possess Organs for their International Relations, these Organs are treated in the Third Part. The Fourth Part, which deals with International Transactions, concludes the first volume, except for an Appendix comprising the text of the Anglo-French Agreement. The second volume, which is ready in the draft and to which readers are frequently referred in the notes in this first volume, will appear next year and will deal with the Settlement of International Differences, War, and Neutrality.

As regards the method pursued, I should like to point out that I have everywhere endeavoured to let differences of opinion appear in a clear light. It is necessary that those who seek information in a treatise should find an opinion for their guidance. For this reason I have everywhere tried to establish either the opinion I approve or my own opinion as firmly as possible, but I have nearly always taken pains to put other opinions, if any, before my readers. The whole work, I venture to hope, contains those suggestive and convincing qualities which are required in a book for students. Yet I have, on the other hand, been careful to avoid pronouncing rules as established which are not yet settled. My book is intended to present International Law as it is, not as it ought to be.

I owe thanks to many friends for advice and assistance. I must specially mention Mr. W. J.

Addis, M.A., Headmaster of the Holborn Estate Grammar School, to whose scholarly knowledge of language and literary insight I have been constantly indebted, and Mr. Alfred Bucknill, M.A., of the Inner Temple, Barrister-at-Law, who has lent me his most valuable assistance in preparing the MS. for the press and reading the proofs.

L. OPPENHEIM.

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Errata.

Page 88, line 19, *for* Fanchille *read* Fauchille.
„ 122, note 1, line 4, *for* Snow *read* Scott.
„ 303, line 8, *for* 1680 *read* 1580.

ABBREVIATIONS

OF TITLES OF BOOKS, ETC., QUOTED IN THE TEXT

THE books referred to are, as a rule, quoted with their full titles and the date of their publication. But certain books and periodicals which are very often referred to throughout this work are quoted in an abbreviated form, as follows:—

Annuaire	=	Annuaire de l'Institut de Droit International.
Bluntschli	=	Bluntschli, Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 3rd ed. (1878).
Bonfils	=	Bonfils, Manuel de Droit International Public, 4th ed. by Fauchille (1904).
Bulmerincq	=	Bulmerincq, Das Völkerrecht (1887).
Calvo	=	Calvo, Le Droit International etc., 5th ed. 6 vols. (1896).
Despagnet	=	Despagnet, Cours de Droit International Public, 2nd ed. (1899).
Field	=	Field, Outlines of an International Code (1872).
Fiore	=	Fiore, Nouveau Droit International Public, deuxième édition, traduite de l'Italien et annotée par Antoine, 3 vols. (1885).
Gareis	=	Gareis, Institutionen des Völkerrechts, 2nd ed. (1901).
Grotius	=	Grotius, De Jure Belli ac Pacis (1625).
Hall	=	Hall, A Treatise on International Law, 4th ed. (1895).
Halleck	=	Halleck, International Law, 3rd English ed. by Sir Sherston Baker, 2 vols. (1893).
Hartmann	=	Hartmann, Institutionen des praktischen Völkerrechts in Friedenszeiten (1874).
Heffter	=	Heffter, Das Europäische Völkerrecht der Gegenwart, 8th ed. by Geffcken (1888).

Heilborn, System	=	Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896).
Holland, Studies	=	Holland, Studies in International Law (1898).
Holland, Jurisprudence	=	Holland, The Elements of Jurisprudence, 6th ed. (1893).
Holtzendorff	=	Holtzendorff, Handbuch des Völkerrechts, 4 vols. (1885–1889).
Klüber	=	Klüber, Europäisches Völkerrecht, 2nd ed. by Morstadt (1851).
Lawrence	=	Lawrence, The Principles of International Law, 3rd ed. (1900).
Lawrence, Essays	=	Lawrence, Essays on some Disputed Questions of Modern International Law (1884).
Liszt	=	Liszt, Das Völkerrecht, 3rd ed. (1904)
Lorimer	=	Lorimer, The Institutes of International Law, 2 vols. (1883–1884).
Maine	=	Maine, International Law, 2nd ed. (1894).
Manning	=	Manning, Commentaries on the Law of Nations, new ed. by Sheldon Amos (1875).
Martens	=	Martens, Völkerrecht, German translation of the Russian original in 2 vols. (1883).
Martens, G. F.	=	G. F. Martens, Précis du Droit des Gens Moderne de l'Europe, nouvelle éd. by Vergé, 2 vols. (1858).
Martens, R. Martens, N. R. Martens, N. S. Martens, N. R. G. Martens, N. R. G., 2nd Ser.		These are the abbreviated quotations of the different parts of Martens, Recueil de Traités (see p. 94 of this volume), which are in common use.
Martens, Causes Célèbres	=	Martens, Causes Célèbres du Droit des Gens, 5 vols., 2nd ed. (1858–1861)
Nys	=	Nys, Le Droit International, vol. i. (1904).
Perels	=	Perels, Das internationale öffentliche Seerecht der Gegenwart, 2nd ed. (1903).
Phillimore	=	Phillimore, Commentaries upon International Law, 4 vols. 3rd ed. (1879–1888).

Piedelièvre	=	Piedelièvre, Précis de Droit International Public, 2 vols. (1894-1895).
Pradier-Fodéré	=	Pradier-Fodéré, Traité de Droit International Public, 7 vols. (1885-1897).
Pufendorf	=	Pufendorf, De Jure Naturae et Gentium (1672).
Rivier,	=	Rivier, Principes du Droit des Gens, 2 vols. (1896).
R.I.	=	Revue de Droit International et de Législation Comparée.
R.G.	=	Revue Général de Droit International Public.
Taylor	=	Taylor, A Treatise on International Public Law (1901).
Testa	=	Testa, Le Droit Public International Maritime, traduction du Portugais par Boutiron (1886).
Twiss	=	Twiss, The Law of Nations, 2 vols., 2nd ed. (1887-1884).
Ullmann	=	Ullmann, Völkerrecht, 1898.
Vattel	=	Vattel, Le Droit des Gens, 4 books in 2 vols., nouvelle éd. (Neuchâtel, 1773).
Walker	=	Walker, A Manual of Public International Law (1895).
Walker, History	=	Walker, A History of the Law of Nations, vol. i. (1899).
Walker, Science	=	Walker, The Science of International Law, (1893).
Westlake	=	Westlake, International Law, vol. i. (1904).
Westlake, Chapters	=	Westlake, Chapters on the Principles of International Law (1894).
Wharton	=	Wharton, A Digest of the International Law of the United States, 3 vols. (1886).
Wheaton	=	Wheaton, Elements of International Law, 8th American ed. by Dana (1866).

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INTRODUCTION

FOUNDATION AND DEVELOPMENT OF THE LAW OF NATIONS



CHAPTER I

FOUNDATION OF THE LAW OF NATIONS

I

The Law of Nations as Law

Hall, pp. 14-16—Maine, pp. 50-53—Lawrence, §§ 1-3—Phillimore, I., §§ 1-12—Twiss, I. §§ 104-5—Taylor, § 2—Westlake, I. pp. 1-13—Walker, History, I. §§ 1-8—Halleck, I. pp. 46-55—Ullmann, §§ 1-2—Heffter, §§ 1-5—Holtzendorff in Holtzendorff, I. pp. 19-26—Nys, I. pp. 133-43—Rivier, I. § 1—Bonfils, Nos. 26-31—Pradier-Fodéré, I. Nos. 1-24—Martens, I. §§ 1-5—Fiore, I. Nos. 186-208.

Conception of the Law of Nations.

§ 1. Law of Nations or International Law (*Droit des gens, Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other. Such part of these rules as is binding upon all the civilised States without exception is called *universal* International Law, in contradistinction to *particular* International Law, which is binding on two or a few States only. But it is also necessary to distinguish *general* International Law. This name must be given to the body of such rules as are binding upon a great many States, including leading Powers. General International Law, as for instance the Declaration of Paris of 1856, or the Hague Regulations of 1899 concerning the law of warfare on land, has a tendency to become universal International Law.

International Law in the meaning of the term as used in modern times did not exist during antiquity

and the first part of the Middle Ages. It is in its origin essentially a product of Christian civilisation, and began gradually to grow from the second half of the Middle Ages. But it owes its existence as a systematised body of rules to the Dutch jurist and statesman Hugo Grotius, whose work "De jure belli ac pacis libri III" appeared in 1625 and became the foundation of all later development.

The Law of Nations is a law for the intercourse of States with one another, not a law for individuals. As, however, there cannot be a sovereign authority above the single sovereign states, the Law of Nations is a law *between*, not above, the single States, and is, therefore, since Bentham, also called "International Law."

As the distinction of Bentham between International Law public and private has been generally accepted, it is necessary to emphasise that only the so-called public International Law, which is identical with the Law of Nations, is International Law, whereas the so-called private International Law is not. The latter concerns such matters as fall at the same time under the jurisdiction of two or more different States. And as the Municipal Laws of different States are frequently in conflict with each other respecting such matters, jurists belonging to different countries endeavour to find a body of principles according to which such conflicts can be avoided.

Legal Force of the Law of Nations contested.

§ 2. Almost from the beginning of the science of the Law of Nations the question has been discussed whether the rules of International Law can be called legally binding. Hobbes[1] already and Pufendorf[2] had answered the question in the negative. And during the nineteenth century Austin[3] and his

[1] De Cive, XIV. 4.
[2] De Jure Naturæ et Gentium, II. c. iii. § 22.
[3] Lectures on Jurisprudence, VI

followers take up the same attitude. They define law as a body of rules for human conduct set and enforced by a sovereign political authority. If indeed this definition of law be correct, the Law of Nations cannot be called law. For International Law is a body of rules for the relations of Sovereign States between one another. And there is not and cannot be a sovereign political authority above the Sovereign States which could enforce such rules. But this definition of law is not correct. It covers only the written or statute law within a State, that part of the Municipal Law which is expressly made by statutes of Parliament in a constitutional State or by some sovereign authority in a non-constitutional State. It does not cover that part of Municipal Law which is called unwritten or customary law. There is, in fact, no community and no State in the world which could exist with written law only. Everywhere there is customary law in existence besides the written law. This customary law was never expressly enacted by any law-giving body, or it would not be merely customary law. Those who define law as rules set and enforced by a sovereign political authority do not deny the existence of customary law. But they maintain that the customary law has the character of law only through the indirect recognition on the part of the State which is to be found in the fact that courts of justice apply the customary in the same way as the written law, and that the State does not prevent them from doing so. This is, however, nothing else than a fiction. Courts of justice having no law-giving power could not recognise unwritten rules as law if these rules were not law before that recognition, and States recognise unwritten rules as law only because courts of justice do so.

Characteristics of Rules of Law.

§ 3. For the purpose of finding a correct definition of law it is indispensable to compare morality and law with each other, for both lay down rules, and to a great extent the same rules, for human conduct. Now the characteristic of rules of morality is that they apply to conscience, and to conscience only. An act loses all value before the tribunal of morality, if it was not done out of free will and conscientiousness, but was enforced by some external power or was done out of some consideration which lies without the boundaries of conscience. Thus, a man who gives money to the hospitals for the purpose that his name shall come before the public does not act morally, and his deed is not a moral one, though it appears to be one outwardly. On the other hand, the characteristic of rules of law is that they shall eventually be enforced by external power.[1] Rules of law apply, of course, to conscience quite as much as rules of morality. But the latter require to be enforced by the internal power of conscience only, whereas the former require to be enforced by some external power. When, to give an illustrative example, morality commands you to pay your debts, it hopes that your conscience will make you pay your debts. On the other hand, if the law gives the same command, it hopes that, if the conscience has not sufficient power to make you pay your debts, the fact that, if you will not pay, the bailiff will come into your house, will do so.

Law-giving Authority not essential for

§ 4. If these are the characteristic signs of morality and of law, we are justified in stating the principle: A rule is a rule of morality, if by

[1] Westlake, Chapters, p. 12, seems to make the same distinction between rules of law and of morality, and Twiss, I. § 105 adopts it *expressis verbis*.

common consent of the community it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by common consent of the community it shall eventually be enforced by external power. Without some kind both of morality and law, no community has ever existed or could possibly exist. But there need not be, at least not among primitive communities, a law-giving authority within a community. Just as the rules of morality are growing through the influence of many different factors, so the law can grow without being expressly laid down and set by a law-giving authority. Wherever we have an opportunity of observing a primitive community, we find that some of its rules for human conduct apply to conscience only, whereas others shall by common consent of the community be enforced; the former are rules of morality only, whereas the latter are rules of law. For the existence of law neither a law-giving authority nor courts of justice are essential. Whenever a question of law arises in a primitive community, it is the community itself and not a court which decides it. Of course, when a community is growing out of the primitive condition of its existence and becomes more and more so enlarged that it turns into a State in the sense proper of the term, the necessities of life and altered circumstances of existence do not allow the community itself any longer to do anything and everything. And the law can now no longer be left entirely in the hands of the different factors which make it grow gradually from case to case. A law-giving authority is now just as much wanted as a governing authority. It is for this reason that we find in every State a Government, which makes and enforces laws, and courts of justice, which administer the laws.

the Existence of Law.

However, if we ask whence does the power of the Government to make and enforce laws come, there is no other answer than this: From the common consent of the community. Thus in this country Parliament is the law-making body by common consent. An Act of Parliament is law, because the common consent of Great Britain is behind it. That Parliament has law-making authority is law itself, but unwritten and customary law. Thus the very important fact comes to light that all statute or written law is based on unwritten law in so far as the power of Parliament to make Statute Law is given to Parliament by unwritten law. It is the common consent of the British people that Parliament shall have the power of making rules which shall be enforced by external power. But besides the statute laws made by Parliament there exist and are constantly growing other laws, unwritten or customary laws, which are day by day recognised through courts of justice.

Definition and three Essential Conditions of Law.

§ 5. On the basis of the results of these previous investigations we are now able to give a definition of law. We may say that *law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.*

The essential conditions of the existence of law are, therefore, threefold. There must, first, be a community. There must, secondly, be a body of rules for human conduct within that community. And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power. It is not an essential condition either that the respective rules of conduct must be written rules, or that there should be a law-making authority

or a law-administering court within the respective community. And it is evident that, if we find this definition of law correct, and accept these three essential conditions of law, the existence of law is not limited to the State community only, but is to be found everywhere where there is a community. The best example of the existence of law outside the State is the law of the Roman Catholic Church, the so-called Canon Law. This Church is an organised community whose members are dispersed over the whole surface of the earth. They consider themselves bound by the rules of the Canon Law, although there is no sovereign political authority that sets and enforces those rules, the Pope and the bishops and priests being a religious authority only. But there is an external power through which the rules of the Canon Law are enforced—namely, the punishments of the Canon Law, such as excommunication, refusal of sacraments, and the like. And the rules of the Canon Law are in this way enforced by common consent of the whole Roman Catholic community.

Law not to be identified with Municipal Law.

§ 6. But it must be emphasised that, if there is law to be found in every community, law in this meaning must not be identified with the law of States, the so-called Municipal Law,[1] just as the conception of State must not be identified with the conception of community. The conception of community is a wider one than the conception of state. A State is a community, but not every community is a State. Likewise the conception of law pure and simple is a wider one than that of Municipal Law. Municipal Law is law, but not every law is Municipal Law, as, for instance, the Canon Law is not. Municipal Law is a

[1] Throughout this book the term "Municipal Law" is made use of in the sense of national or State law in contradistinction to International Law.

narrower conception than law pure and simple. The body of rules which is called the Law of Nations might, therefore, be law in the strict sense of the term, although it might not possess the characteristics of Municipal Law. To make sure whether the Law of Nations is or is not law, we have to inquire whether the three essential conditions of the existence of law are to be found in the Law of Nations.

The "Family of Nations" a Community.

§ 7. As the first condition is the existence of a community, the question arises, whether an international community exists whose law could be the Law of Nations. Before this question can be answered, the conception of community must be defined. A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals. This definition of community covers not only a community of individual men, but also a community of individual communities such as individual States. A Confederation of States is a community of States. But is there a universal international community of all individual States in existence? This question is decidedly to be answered in the affirmative as far as the States of the civilised world are concerned. Innumerable are the interests which knit all the individual civilised States together and which create constant intercourse between these States as well as between their subjects. As the civilised States are, with only a few exceptions, Christian States, there are already religious ideas which wind a band around them. There are, further, science and art, which are by their nature to a great extent international, and which create a constant exchange of ideas and opinions between the subjects.

of the different States. Of the greatest importance are, however, agriculture, industry, and trade. It is totally impossible even for the largest empire to produce everything its subjects want. Therefore, the productions of agriculture and industry of the different States must be exchanged with each other, and it is for this reason that international trade is an unequalled factor for the welfare of every civilised State. Even in antiquity, when every State tried to be a world in itself, States did not and could not exist without some sort of international trade. It is international trade which has created navigation on the high seas and on the rivers flowing through different States. It is, again, international trade which has called into existence the nets of railways covering the continents, the international postal and telegraphic arrangements, the Transatlantic telegraphic cables.

The manifold interests which knit all the civilised States together and create a constant intercourse between one another, have long since brought about the necessity that these States should have one or more official representatives living abroad. Thus we find everywhere foreign ambassadors and consuls. They are the agents who further the current stream of transactions between the Governments of the different States. A number of International Offices, International Bureaux, International Commissions have permanently been appointed for the administration of international business. And from time to time special international conferences and congresses of delegates of the different States are convoked for discussing and settling matters international. Though the individual States are sovereign and independent of each other, though there is no

international Government above the national ones, though there is no central political authority to which the different States are subjected, yet there is something mightier than all the powerful separating factors: namely, the common interests. And these common interests and the necessary intercourse which serves these interests, unite the separate States into an indivisible community. For many hundreds of years this community has been called "Family of Nations" or "Society of Nations."

The "Family of Nations" a Community with Rules of Conduct.

§ 8. Thus the first essential condition for the existence of law is a reality. The single States make altogether a body of States, a community of individual States. But the second condition cannot be denied either. For hundreds of years more and more rules have grown up for the conduct of the States between each other. These rules are to a great extent customary rules. But side by side with these customary and unwritten rules more and more written rules are daily created by international agreements. The so-called Law of Nations is nothing else than a body of customary and conventional rules regulating the conduct of the individual States with each other.

External Power for the Enforcement of Rules of International Conduct.

§ 9. But how do matters stand concerning the third essential condition for the existence of law? Is there a common consent of the community of States that the rules of international conduct shall be enforced by external power? There cannot be the slightest doubt that this question must be affirmatively answered, although there is no central authority to enforce those rules. The heads of the civilised States, their Governments, their Parliaments, and public opinion of the whole of civilised humanity, agree and consent that the body of rules of inter-

national conduct which is called the Law of Nations shall be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations. And in the necessary absence of a central authority for the enforcement of the rule of the Law of Nations, the States have to take the law into their own hands. Self-help and the help of the other States which sympathise with the wronged one are the means by which the rules of the Law of Nations can be and actually are enforced. It is true that these means have many disadvantages, but they are means which have the character of external power. Compared with Municipal Law and the means at disposal for its enforcement, the Law of Nations is certainly the weaker of the two. A law is the stronger, the more guarantees are given that it can and will be enforced. Thus, the law of a State which is governed by an uncorrupt Government and the courts of which are not venal is stronger than the law of a State which has a corrupt Government and venal judges. It is inevitable that the Law of Nations must be a weaker law than Municipal Law, as there is not and cannot be an international Government above the national ones which could enforce the rules of International Law in the same way as a national Government enforces the rules of its Municipal Law. But a weak law is nevertheless still law, and the Law of Nations is by no means so weak a law as it sometimes seems to be.

Practice recognises Law of Nations as Law.

§ 10. The fact is that theorists only are divided concerning the character of the Law of Nations as real law. In practice International Law is constantly recognised as law. The Governments and Parliaments of the different States are of opinion that they

are legally, not morally only, bound by the Law of Nations, although they cannot be forced to go before a court in case they are accused of having violated it. Likewise, public opinion of all civilised States considers every State legally bound to comply with the rules of the Law of Nations, not taking notice of the opinion of those theorists who maintain that the Law of Nations does not bear the character of real law. And the different States not only recognise the rules of International Law as legally binding in innumerable treaties and emphasise every day the fact that there is a law between themselves. They moreover recognise this law by their Municipal Laws ordering their officials, their civil and criminal courts, and their subjects to take up such an attitude as is in conformity with the duties imposed upon their Sovereign by the Law of Nations. If a violation of the Law of Nations occurs on the part of an individual State, public opinion of the civilised world, as well as the Governments of other States, stigmatise such violation as a violation of law pure and simple. And countless treaties concerning trade, navigation, post, telegraphy, copyright, extradition, and many other objects exist between civilised States, which treaties altogether rest on the existence of a law between the States, presuppose such a law, and contribute through their very existence to the development and the growth of such a law.

Violations of this law are certainly frequent. But the violators always try to prove that their acts do not contain a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts. Has ever a State confessed that it was going to break the Law of Nations or that it

ever did so? The fact is that States, in breaking the Law of Nations, never deny its existence, but recognise its existence through the endeavour to interpret the Law of Nations in such a way as is favourable to their act.

II

Basis of the Law of Nations

Common Consent the Basis of Law.

§ 11. If law is, as defined above (§ 5), a body of rules for human conduct within a community which by common consent of this community shall be enforced through external power, common consent is the basis of all law. What, now, does the term "common consent" mean? If it meant that all the individuals who are members of a community must at every moment of their existence expressly consent to every point of law, such common consent would never be a fact. The individuals, who are the members of a community, are successively born into it, grow into it together with the growth of their intellect during adolescence, and die away successively to make room for others. The community remains unaltered, although a constant change takes place in its members. "Common consent" can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction to its single members. The question where such a common consent is to be stated, is not a question of theory, but of fact only. It is a matter of observation and appreciation, and not of logical and mathe-

matical decision, just as the celebrated question, how many grains make a heap? Those legal rules which come down from ancestors to their descendants remain law so long only as they are supported by common consent of these descendants. New rules can only become law if they find common consent on the part of those who constitute the community at the time. It is for that reason that custom is at the background of all law, whether written or unwritten.

Common Consent of the Family of Nations the Basis of International Law.

§ 12. What has been stated with regard to law pure and simple applies also to the Law of Nations. However, the community for which this Law of Nations is authoritative consists not of individual human beings, but of individual States. And whereas in communities consisting of individual human beings there is a constant and gradual change of the members through birth, death, emigration, and immigration, the Family of Nations is a community within which no such constant change takes place, although now and then a member disappears and a new member steps in. The members of the Family of Nations are therefore not born into that community and they do not grow into it. New members are simply received into it through express or tacit recognition. It is therefore necessary to scrutinise more closely the common consent of the States, which is the basis of the Law of Nations.

The customary rules of this law have grown up by common consent of the States—that is, the different States have acted in such a manner as includes their tacit consent to these rules. As far as the process of the growth of a usage and its turning into a custom can be traced back, customary rules of the Law of Nations came into existence

in the following way. The intercourse of States with each other necessitated some rules of international conduct. Single usages, therefore, gradually grew up, the different States acting in the same or in a similar way when an occasion arose. As some rules of international conduct were from the end of the Middle Ages urgently wanted, the theory of the Law of Nations prepared the ground for their growth by constructing certain rules on the basis of religious, moral, rational, and historical reflections. Hugo Grotius's work, "De jure belli ac pacis libri III" (1625), offered a systematised body of rules, which recommended themselves so much to the needs and wants of the time that they became the basis of the following development. Without the conviction of the Governments and of public opinion of the civilised States that there ought to be legally binding rules for international conduct, on the one hand, and, on the other hand, without the pressure exercised upon the States by their interests and the necessity for the growth of such rules, the latter would never have grown up. When afterwards it became apparent that customs and usages alone were not sufficient or not sufficiently clear, new rules were created through treaties being concluded which laid down rules for future international conduct. Thus conventional rules gradually grew up side by side with customary rules.

New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in existence at the time of their admittance. It is therefore not necessary to prove for every single rule of International Law that every single member of the Family

of Nations consented to it. No single State can say on its admittance into the Family of Nations that it desires to be subjected to such and such a rule of International Law, and not to others. The admittance includes the duty to submit to all the existing rules, with the only exception of those which, such as the rules of the Geneva Convention for instance, are specially stipulated for such States only as have concluded or later on acceded to a certain international treaty containing the respective rules.

On the other hand, no State which is a member of the Family of Nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations. The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State. This applies not only to customary rules, but also to such conventional rules as have been called into existence through a treaty for the purpose of creating a permanent mode of future international conduct without a right of the signatory powers to give notice of withdrawal. It would, for instance, be a violation of International Law on the part of a signatory Power of the Declaration of Paris of 1856 to declare that it would cease to be a party. But it must be emphasised that this does not apply to such conventional rules as are stipulated by a treaty which expressly reserves the right to the signatory Powers to give notice.

States the Subjects of the Law of Nations.

§ 13. Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. This means that the Law of Nations is a law for the international

conduct of States, and not of their citizens. Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, such as a king or an ambassador for example, is never directly a subject of International Law. Therefore, all rights which might necessarily be granted to an individual human being according to the Law of Nations are not international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the respective State by International Law. Likewise, all duties which might necessarily be imposed upon individual human beings according to the Law of Nations are not international duties, but duties imposed by Municipal Law in accordance with a right granted to or a duty imposed upon the respective State by International Law. Thus the privileges of an ambassador are granted to him by the Municipal Law of the State to which he is accredited, but such State has the duty to grant these privileges according to International Law. Thus, further, the duties incumbent upon officials and subjects of neutral States in time of war are imposed upon them by the Municipal Law of their home States, but these States have, according to International Law, the duty of imposing the respective duties upon their officials and citizens.[1]

Equality an Inference from the Basis of International Law.

§ 14. Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law.

[1] The importance of the fact that subjects of the Law of Nations are States exclusively is so great that I consider it necessary to emphasise it again and again throughout this book. See, for instance, below, §§ 289, 344, 384. It should, however, already be mentioned here that this assertion is even nowadays still sometimes contradicted; see, for instance, Kaufmann, Die Rechtskraft des Internationalen Rechts (1899), *passim*.

States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty and of the fact that the Law of Nations is a law between, not above, the States.[1]

III

Sources of the Law of Nations

Hall, pp. 5-14—Maine, pp. 1-25—Lawrence, §§ 61-66—Phillimore, I. §§ 17-33—Twiss, I. §§ 82-103—Taylor, §§ 30-36—Westlake, I. pp. 14-19—Wheaton, § 15—Halleck, I. pp. 55-64—Ullmann, § 7—Heffter, § 3—Holtzendorff in Holtzendorff, I. pp. 79-158—Rivier, I. § 2—Nys, I. pp. 144-165—Bonfils, Nos. 45-63—Pradier-Fodéré, I. Nos. 24-35—Martens, I. § 43—Fiore, I. Nos. 224-238—Calvo, I. §§ 27-38—Bergbohm, "Staatsverträge und Gesetze als Quellen des Völkerrechts" (1877)—Jellinek, "Die rechtliche Natur der Staatsverträge" (1880).

Source in Contradistinction to Cause.

§ 15. The different writers on the Law of Nations disagree widely with regard to kinds and numbers of sources of this law. The fact is that the term "source of law" is made use of in different meanings by the different writers on International Law. It seems to me that most writers confound the conception of "source" with that of "cause," and through this mistake come to a standpoint from which certain factors which influence the growth of International Law appear as sources of rules of the Law of Nations. This mistake can be avoided by going back to the meaning of the term "source" in general. Source means a spring or well, and has to be defined

[1] See below, §§ 115-116, where the legal equality of States in contradistinction to their political inequality is discussed, and where it will also be shown that not-full Sovereign States are not equals to full Sovereign States.

as the rising from the ground of a stream of water. When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water. Source signifies only the natural rising of water from a certain spot of the ground, whatever natural causes there may be for that rising. If we apply the conception of source in this meaning to the term "source of law," the confusion of source with cause cannot arise. Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence these rules come, we have to follow these streams upwards until we come to their beginning. Where we find that such rules rise into existence, there is the source of them. Of course, rules of law do not rise from a spot on the ground as water does; they rise from facts in the historical development of a community. Thus in this country a good many rules of law rise every year from the Acts of Parliament. "Source of Law" is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force.

The two Sources of International Law.

§ 16. As the basis of the Law of Nations is the common consent of the member States of the Family of Nations, it is evident that there must exist, and can only exist, as many sources of International Law as there are facts through which such a common consent can possibly come into existence. Of such facts there are only two. A State may, just as an individual, give its consent either directly by an express

declaration or tacitly by conduct which it would not follow in case it did not consent. The sources of International Law are therefore twofold—namely: (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively[1] the sources of the Law of Nations.

Custom in Contradistinction to Usage.

§ 17. Custom is the older and the original source of International Law in particular as well as of law in general. Custom must not be confounded with usage. In every-day life and language both terms are used synonymously, but in the language of the jurist they have two distinctly different meanings. Jurists speak of a custom, when a clear and continuous habit of doing certain actions has grown up under the ægis of the conviction that these actions are legally necessary or legally right. On the other hand, jurists speak of a usage, when a habit of doing certain actions has grown up without there being the conviction of their legal character. Thus the term "custom" is in juristic language a narrower conception than the term "usage," as a certain conduct may be usual without being customary. A certain conduct of States concerning their international relations may therefore be usual without being the outcome of customary International Law.

As usages have a tendency to become custom, the question presents itself, at what time a usage turns

[1] Westlake, I. p. 15, states custom and reason to be the sources of International Law. Why he does not recognise treaties as a source, I cannot understand, and I cannot agree to reason being a source. Reason is a means of interpreting law, but it cannot call law into existence.

into a custom. This question is one of fact, not of theory. All that theory can point out is this: Wherever and as soon as a certain frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary International Law.

Treaties as Source of International Law.

§ 18. Treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes,[1] it is necessary to emphasise that such treaties only are a source of International Law as either stipulate new rules for future international conduct or confirm, define, or abolish existing customary rules. Such treaties must be called *law-making treaties*. Since the Family of Nations is no organised body, there is no central authority which could make law for that body as Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is that the members of the Family of Nations conclude treaties in which certain rules for their future conduct are stipulated. Of course, such law-making treaties create law for the contracting parties solely. Their law is *universal* International Law only then, when all the members of the Family of Nations are parties to them. Many law-making treaties are concluded by a few States only, so that the law which they create is *particular* International Law. On the other hand, there have been many law-making treaties concluded which contain *general* International Law, because the majority of States, including leading Powers, are parties to them. General

[1] See below, § 492.

International Law has a tendency to become universal because such States as hitherto did not consent to it will in future either expressly give their consent or recognise the respective rules tacitly through custom.[1] But it must be emphasised that, whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations, that treaties are binding upon the contracting parties.[2]

Factors influencing the Growth of International Law.

§ 19. Thus custom and treaties are the two exclusive sources of the Law of Nations. When writers on International Law frequently enumerate other sources besides custom and treaties, they confound the term "source" with that of "cause" by calling sources of International Law such factors as influence the gradual growth of new rules of International Law without, however, being the historical facts out of which these rules receive their legal force. Important factors of this kind are: Opinions of famous writers on International Law, decisions of prize courts, arbitral awards, instructions issued by the different States for the guidance of their diplomatic and other organs, State Papers concerning foreign politics, certain Municipal Laws, decisions of Municipal Courts. All these and other factors may influence the growth of International Law either by creating usages which gradually turn into custom, or by inducing the members of the Family of Nations to conclude such treaties as stipulate legal rules for future international conduct.

A factor of a special kind which also influences the

[1] Law-making treaties of world-wide importance are enumerated below, §§ 556–568.

[2] See below, § 493.

growth of International Law is the so-called *Comity* (*Comitas Gentium, Convenance et Courtoisie Internationale, Staatenpunct*). In their intercourse with one another, States do observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and good-will. Such rules of international conduct are no rules of law, but of comity. The Comity of Nations is certainly not a source of International Law, as it is distinctly the contrast to the Law of Nations. But there can be no doubt that many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law. And it is certainly to be expected that this development will go on in future also, and that thereby many a rule of present International Comity will in future become one of International Law.

Comity of Nations.

IV

Relations between International and Municipal Law.

Holtzendorff in Holtzendorff, pp. 49-53, 117-120—Nys, I. pp. 185-189—Taylor, § 103—Holland, Studies, pp. 176-200—Kaufmann, "Die Rechtskraft des internationalen Rechts" (1899)—Triepel, "Völkerrecht und Landesrecht" (1899).

§ 20. The Law of Nations and the Municipal Law of the single States are essentially different from each other. They differ, first, as regards their sources. Sources of Municipal Law are custom grown up within the boundaries of the respective State and statutes enacted by the law-giving authority. Sources of International Law are custom grown up within the Family of Nations and law-making treaties concluded by the members of that family.

Essential Difference between International and Municipal Law.

The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of the respective State and the relations between this State and the respective individuals. International Law, on the other hand, regulates relations between the member States of the Family of Nations.

The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their law: whereas Municipal Law is a law of a Sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between Sovereign States, and therefore a weaker law.[1]

Law of Nations never *per se* Municipal Law.

§ 21. If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law. If, according to the Municipal Law of an individual State, the Law of Nations as a body or in parts is considered the law of the land, this can only be so either by municipal custom or by statute, and then the respective rules of the Law of Nations have by adoption[2] become at the same time rules of Municipal Law. Wherever and whenever such total or partial adoption has not taken place, municipal courts cannot be considered to be bound by International Law, because it has, *per se*, no power over municipal courts. And if it happens that a rule of Municipal Law is in an indubitable conflict with a rule

[1] See above, § 9.

[2] This has been done by the United States. See The Nereide, 9 Cranch, 388; United States v. Smith, 5 Wheaton, 153; The Scotia, 14 Wallace, 170; The Paquette Habana, 175 United States, 677. See also Taylor, § 103

of the Law of Nations, municipal courts must apply the former. If, on the other hand, a rule of the Law of Nations regulates a fact without conflicting with, but without expressly or tacitly being adopted by Municipal Law, municipal courts cannot apply such rule of the Law of Nations.

Certain Rules of Municipal Law necessitated or interdicted.

§ 22. If Municipal Courts cannot apply unadopted rules of the Law of Nations, and must apply even such rules of Municipal Law as conflict with the Law of Nations, it is evident that the different States, in order to fulfil their international obligations, must possess certain rules, and must not have certain other rules as part of their Municipal Law. It is not necessary to enumerate all the rules of Municipal Law which a State must possess, and all those rules it must not have. It suffices to give some illustrative examples. Thus, on the one hand, the Municipal Law of every State must, for instance, possess rules granting the necessary privileges to foreign diplomatic envoys, protecting the life and liberty of foreign citizens residing on its territory, threatening punishment for certain acts committed on its territory in violation of a foreign State. On the other hand, the Municipal Law of every State is prevented by the Law of Nations from having rules, for instance, conflicting with the freedom of the high seas, or prohibiting the innocent passage of foreign merchantmen through its maritime belt, or refusing justice to foreign residents with regard to injuries committed on its territory to their lives, liberty, and property by its own citizens. If a State does nevertheless possess such rules of Municipal Law as it is prevented from having by the Law of Nations, or if it does not possess such Municipal rules as it must have according to the Law of Nations, it violates an international

legal duty, but its courts cannot by themselves alter the Municipal Law to meet the requirements of the Law of Nations.

Presumption against conflicts between International and Municipal Law.

§ 23. However, although Municipal Courts must apply Municipal Law even if conflicting with the Law of Nations, there is a presumption against the existence of such a conflict. As the Law of Nations is based upon the common consent of the different States, it is improbable that a civilised State should intentionally enact a rule that conflicts with the Law of Nations. A part of Municipal Law, which ostensibly seems to conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as essentially not containing such conflict.

Presumption of Existence of certain necessary Municipal Rules.

§ 24. In case of a gap in the statutes of a civilised State regarding certain rules necessitated by the Law of Nations, such rules ought to be presumed by the Courts to have been tacitly adopted by such Municipal Law. It may be taken for granted that a State which is a member of the Family of Nations does not intentionally want its Municipal Law to be deficient in such rules. If, for instance, the Municipal Law of a State does not by a statute grant the necessary privileges to diplomatic envoys, the courts ought to presume that such privileges are tacitly granted.

Presumption of the Existence of certain Municipal Rules in Conformity with Rights granted by the Law of Nations.

§ 25. There is no doubt that a State need not make use of all the rights it has by the Law of Nations, and that, consequently, every State can by its laws expressly renounce the whole or partial use of such rights, provided always it is ready to fulfil such duties, if any, as are connected with these rights. However, when no such renunciation has taken place, Municipal Courts ought, in case the interests of justice demand it, to presume that their Sovereign has tacitly consented to make use of such rights.

If, for instance, the Municipal Law of a State does not by a statute extend its jurisdiction over its maritime belt, its courts ought to presume that, since by the Law of Nations the jurisdiction of a State does extend over its maritime belt, their Sovereign has tacitly consented to that wider range of its jurisdiction.

Case of the "Franconia."

A remarkable case illustrating this happened in this country in 1876. The German vessel "Franconia," while passing through the British maritime belt within three miles of Dover, negligently ran into the British vessel "Strathclyde," and sank her. As a passenger on board the latter was thereby drowned, the commander of the "Franconia," the German Keyn, was indicted at the Central Criminal Court and found guilty of manslaughter. The Court for Crown Cases Reserved, however, to which the Central Criminal Court referred the question of jurisdiction, held by a majority of one judge that, according to the law of the land, English courts had no jurisdiction over crimes committed in the English maritime belt. Keyn was therefore not punished.[1] To provide for future cases of such kind, Parliament passed, in 1878, the "Territorial Waters Jurisdiction Act."[2]

[1] L.R. 2 Ex. Div. 63. See Phillimore, I. § 198 B; Maine, pp. 39–45. See also below, § 189, where the controversy is discussed whether a riparian State has jurisdiction over foreign vessels that merely pass through its maritime belt.

[2] 41 and 42 Vict. c. 73.

V

Dominion of the Law of Nations

Lawrence, § 44—Phillimore, I. §§ 27-33—Twiss, I. § 62—Taylor, §§ 61-4—Westlake, I. p. 40—Bluntschli, §§ 1-16—Heffter, § 7—Holtzendorff in Holtzendorff, pp. 13-18—Nys, I. pp. 116-132—Rivier, I. § 1—Bonfils, Nos. 40-45—Martens, I. § 41.

Range of Dominion of International Law controversial.

§ 26. Dominion of the Law of Nations is the name given to the area within which International Law is applicable—that is, those States between which International Law finds validity. The range of the dominion of the Law of Nations is controversial, two extreme opinions concerning this dominion being opposed. Some publicists [1] maintain that the dominion of the Law of Nations extends as far as humanity itself, that every State, whether Christian or non-Christian, civilised or uncivilised, is a subject of International Law. On the other hand, several jurists [2] teach that the dominion of the Law of Nations extends only as far as Christian civilisation, and that Christian States only are subjects of International Law. Neither of these opinions would seem to be in conformity with the facts of the present international life and the basis of the Law of Nations. There is no doubt that the Law of Nations is a product of Christian civilisation. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries. And no constant intercourse existed in former times between Christian and Buddhistic States. But from about

[1] See, for instance, Bluntschli, § 8.
[2] See, for instance, Martens, § 41.

the beginning of the nineteenth century matters gradually changed. A condition of perpetual enmity between whole groups of nations exists no longer either in theory or in practice. And although there is still a broad and deep gulf between Christian civilisation and others, many interests, which knit Christian States together, knit likewise some non-Christian and Christian States.

Three Conditions of Membership of the Family of Nations

§ 27. Thus the membership of the Family of Nations has of late necessarily been increased and the range of the dominion of the Law of Nations has extended beyond its original limits. This extension has taken place in conformity with the basis of the Law of Nations. As this basis is the common consent of the civilised States, there are three conditions for the admission of new members into the circle of the Family of Nations. A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member.

The last two conditions are so obvious that they need no comment. Regarding the first condition, however, it must be emphasised that not particularly Christian civilisation, but civilisation of such kind only is conditioned as to enable the respective State and its subjects to understand and to act in conformity with the principles of the Law of Nations. These principles cannot be applied to a State which is not able to apply them on its own part to other States. On the other hand, they can well be applied

to a State which is able and willing to apply them to other States, provided a constant intercourse has grown up between it and other States. The fact is that the Christian States have been of late obliged by pressing circumstances to receive several non-Christian States into the community of States which are subjects of International Law.

Present Range of Dominion of the Law of Nations.

§ 28. The present range of the dominion of International Law is a product of historical development within which epochs are distinguishable marked by successive entrances of various States into the Family of Nations.

(1) The old Christian States of Europe are the original members of the Family of Nations, because the Law of Nations grew up gradually between them through custom and treaties. It is for this reason that this law was in former times frequently called "European Law of Nations." But this name has nowadays historical value only, as it has been changed into "Law of Nations" or "International Law" pure and simple.

(2) The next group of States which entered into the Family of Nations is the body of Christian States which grew up outside Europe. All the American States which arose out of colonies of European States belong to this group. And it must be emphasised that the United States of America have largely contributed to the growth of the rules of International Law. The Christian Negro Republic of Liberia in West Africa and of Haiti on the island of San Domingo belong to this group.

(3) With the reception of the Turkish Empire into the Family of Nations International Law ceased to be a law between Christian States solely. This reception has expressly taken place through Article 7

of the Peace Treaty of Paris of 1856, in which the five Great European Powers of the time, namely, France, Austria, England, Prussia, and Russia, and besides those Sardinia, the nucleus of the future Great Power Italy, expressly "déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert européens." Since that time Turkey has on the whole endeavoured in time of peace and war to act in conformity with the rules of International Law, and she has, on the other hand, been treated accordingly by the Christian States. No general congress has taken place since 1856 to which Turkey was not invited to send her delegates.

(4) Another non-Christian member of the Family of Nations is Japan. Some years ago one might have doubted whether Japan was a real and full member of that family, but since the end of the nineteenth century no doubt is any longer justified. Through marvellous efforts, Japan has become not only a modern State, but an influential Power. Since her war with China in 1895, she must be considered one of the Great Powers that lead the Family of Nations.

(5) The position of such States as Persia, Siam, China, Korea, Abyssinia, and the like, is doubtful. These States are certainly civilised States, and Abyssinia is even a Christian State. However, their civilisation has not yet reached that condition which is necessary to enable their Governments and their population in every respect to understand and to carry out the command of the rules of International Law. On the other hand, international intercourse has widely arisen between these States and the States of the so-called Western civilisation. Many treaties have been concluded with them, and there

is full diplomatic intercourse between them and the Western States. All of them make efforts to educate their populations, to introduce modern institutions, and to raise thereby their civilisation to the level of the Western. They will certainly succeed in this regard in the near future. But as yet they have not accomplished this task, and consequently they are not yet able to be received as full members into the Family of Nations. Although they are, as will be shown below (§ 103), for some parts within the circle of the Family of Nations, they remain for other parts outside. But the example of Japan can show them that it depends entirely upon their own efforts to be received as full members into that family.

(6) It must be mentioned that a State of quite a unique character, the Congo Free State,[1] is, since the Berlin Conference of 1884, a member of the Family of Nations.

Treatment of States outside the Family of Nations.

§ 29. The Law of Nations as a law between States based on the common consent of the members of the Family of Nations naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous. Be that as it may, it is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family.

[1] See below, § 101.

VI

CODIFICATION OF THE LAW OF NATIONS

Holtzendorff in Holtzendorff, pp. 136-152—Ullmann, § 9—Despagnet, Nos. 67-68—Nys, I. pp. 166-183—Rivier, I. § 2—Fiore, I. Nos. 124-127—Martens, I. § 44—Holland, Studies, pp. 78-95—Bergbohm, "Staatsverträge und Gesetze als Quellen des Völkerrechts" (1877), pp. 44-77—Bulmerincq, "Praxis, Theorie, und Codification des Völkerrechts" (1874)—Roszkowski in R. I. XXI. (1889), p. 520.

Movement in Favour of Codification.

§ 30. The lack of precision which is natural to the majority of the rules of the Law of Nations on account of its slow and gradual growth has created a movement for its codification. The idea of a codification of the Law of Nations in its totality arose at the end of the eighteenth century. It was Bentham who first suggested such a codification. He did not, however, propose codification of the positive existing Law of Nations, but thought of a utopian International Law which could be the basis of an everlasting peace between the civilised States.[1]

Another utopian project is due to the French Convention, which resolved in 1792 to create a Declaration of the Rights of Nations as a pendant to the Declaration of the Rights of Mankind of 1789. For this purpose the Abbé Grégoire was charged with the drafting of such a declaration. In 1795, Abbé Grégoire produced a draft of twenty-one articles, which, however, were rejected by the Convention, and the matter dropped.[2]

It was not before 1861 that a real attempt was

[1] See Bentham's Works, ed. Bowring, VIII. p. 537; Nys, in The Law Quarterly Review, XI. (1885), p. 225.

[2] See Rivier, I. p. 40, where the full text of these twenty-one articles is given. They did not contain a real code, but certain principles only.

made to show the possibility of a codification. This was done by an Austrian jurist, Alfons von Domin-Petruchévecz, who published in that year at Leipzig a "Précis d'un Code de Droit International."

In 1862, the Russian Professor Katschenowsky brought an essay before the Juridical Society of London (Papers II. 1863) arguing the necessity of a codification of International Law.

In 1863, Professor Francis Lieber, of the Columbia College, New York, drafted the Laws of War in a body of rules which the United States published during the Civil War for the guidance of her army.[1]

In 1868, Bluntschli, the celebrated Swiss interpreter of the Law of Nations, published "Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt." This draft code has been translated into the French, Greek, Spanish, and Russian languages, and the Chinese Government produced an official Chinese translation as a guide for Chinese officials.

In 1872, the great Italian politician and jurist Mancini raised his voice in favour of codification of the Law of Nations in his able essay "Vocazione del nostro secolo per la riforma e codificazione del diritto delle genti."

Likewise in 1872 appeared at New York David Dudley Field's "Draft Outlines of an International Code."

In 1873 the Institute of International Law was founded at Ghent in Holland. This association of jurists of all nations meets periodically, and has produced a number of drafts concerning various parts of International Law, and in especial a Draft Code of the Law of War on Land (1880).

Likewise in 1873 was founded the Association for

[1] See below, Vol. II. § 68.

the Reform and Codification of the Law of Nations, which also meets periodically and which styles itself now The International Law Association.

In 1874 the Emperor Alexander II. of Russia took the initiative in assembling an international conference at Brussels for the purpose of discussing a draft code of the Law of Nations concerning land warfare. At this conference jurists, diplomatists, and military men were united as delegates of the invited States, and they agreed upon a body of sixty articles which goes under the name of the Declaration of Brussels. But the Powers have never ratified these articles.

In 1880 the Institute of International Law published its "Manuel des Lois de la Guerre sur Terre."

In 1890 the Italian jurist Fiore published his "Il diritto internazionale codificato e sua sanzione giuridica," of which a second edition appeared in 1898.

§ 31. At the end of the nineteenth century the so-called Peace Conference at the Hague, convened on the personal initiative of the Emperor Nicholas II. of Russia, has shown the possibility that parts of the Law of Nations may well be codified. Apart from three Declarations of minor value and of the Convention concerning the adaptation of the Geneva Convention to naval warfare, this conference has succeeded in producing two important conventions which may well be called codes—namely, first, the "Convention for the Pacific Settlement of International Disputes," and, secondly, the "Convention with respect to the Laws and Customs of War on Land." Whereas the future will still have to show whether the first-named convention will be of great practical importance, there can, on the other hand, not be denied the great practical value of the second-named convention. Although the latter

Work of the Hague Peace Conference

contains many gaps, which must be filled up by the customary Law of Nations, and although it is in no way a masterpiece of codification, it represents a model, the very existence of which teaches that codification of parts of the Law of Nations is practicable, provided the Powers are seriously inclined to come to an understanding. The Hague Peace Conference has therefore made an epoch in the history of International Law.

U.S. Naval War Code.

§ 32. Shortly after the Hague Peace Conference the United States of America took a step with regard to sea warfare similar to that taken by her in 1863 with regard to land warfare. She published on June 27, 1900, a body of rules for the use of her navy under the title "The Laws and Usages of War at Sea"—the so-called "United States Naval War Code." This code, which was drafted by Captain Charles H. Stockton, of the United States Navy, contains fifty-five articles which are divided into nine sections under the following titles:—"Hostilities;" "Belligerents;" "Belligerent and Neutral Vessels;" "Hospital Ships—the Shipwrecked, Sick, and Wounded;" "The Exercise of the Right of Search;" "Contraband of War;" "Blockade;" "The Sending in of Prizes;" "Armistice, Truce, and Capitulations, and Violations of Laws of War." I have no doubt that this American code will be the starting-point of a movement for a Naval War Code to be generally agreed upon by the Powers, similar to the Hague Regulations concerning land warfare.

Value of Codification of International

§ 33. In spite of the movement in favour of codification of the Law of Nations, there are many eminent jurists who oppose such codification. They argue that codification would never be possible on

account of differences of languages and of technical juridical terms. They assert that codification would cut off the organic growth and future development of International Law. They postulate the existence of a permanent International Court with power of executing its verdicts as an indispensable condition, since without such a court no uniform interpretation of controversial parts of a code could be possible. They, lastly, maintain that the Law of Nations is at present not yet, and will not be for a long time to come, ripe for codification. Those jurists, on the other hand, who are in favour of codification argue that the customary Law of Nations lacks to a great extent precision and certainty, that writers on International Law differ in many points regarding the latter's rules, and that, consequently, there is no broad and certain basis for the practice of the States to stand upon.

Law contested.

§ 34. I am decidedly not a blind and enthusiastic admirer of codification in general. It cannot be maintained that codification is everywhere, at all times, and under all circumstances opportune. Codification certainly interferes with the so-called organic growth of the law through usage into custom. It is true that a law, once codified, cannot so easily adapt itself to the merits of the individuality of single cases which come under it. It is further a fact, which cannot be denied, that together with codification there frequently enters into courts of justice and into the area of juridical literature a hair-splitting tendency and an interpretation of the law which clings often more to the letter and the word of the law than to its spirit and its principles. And it is not at all a fact that codification does away with controversies altogether. Codification certainly clears up many questions of law which have been

Merits of Codification in general.

hitherto debatable, but it creates at the same time new controversies. And, lastly, all jurists know very well that the art of legislation is still in its infancy and not at all highly developed. The hands of legislators are very often clumsy, and legislation does often more harm than good. Yet, on the other hand, the fact must be recognised that history has given its verdict in favour of codification. There is no civilised State in existence whose Municipal Law is not to a greater or lesser extent codified. The growth of the law through custom goes on very slowly and gradually, very often too slowly to be able to meet the demands of the interests at stake. New interests and new inventions very often spring up with which customary law cannot deal. Circumstances and conditions frequently change so suddenly that the ends of justice are not met by the existing customary law of a State. Thus, legislation, which is, of course, always partial codification, becomes often a necessity in the face of which all hesitation and scruple must vanish. Whatever may be the disadvantages of codification, there comes a time in the development of every civilised State when it can no longer be avoided. And great are the advantages of codification, especially of a codification that embraces a large part of the law. Many controversies are done away with. The science of Law receives a fresh stimulus. A more uniform spirit enters into the law of the country. New conditions and circumstances of life become legally recognised. Mortifying principles and branches are cut off with one stroke. A great deal of fresh and healthy blood is brought into the arteries of the body of the law in its totality. If codification is carefully planned and prepared, if it is imbued with true and healthy conservatism, many

disadvantages can be avoided. And interpretation on the part of good judges can deal with many a fault that codification has made. If the worst comes to the worst, there is always a Parliament or another law-giving authority of the land to mend through further legislation the faults of previous codification.

Merits of Codification of International Law.

§ 35. But do these arguments in favour of codification in general also apply to codification of the Law of Nations? I have no doubt that they do more or less. If some of these arguments have no force in view of the special circumstances of the existence of International Law and of the peculiarities of the Family of Nations, there are other arguments which take the place of the former.

When opponents maintain that codification would never be practicable on account of differences of languages and of technical juridical terms, I answer that such argument is only as much as and no more in the way of codification than it is in the way of contracting international treaties. The fact that such treaties are every day concluded shows that difficulties which arise out of differences of languages and of technical juridical terms are not at all insuperable.

Much more than this weighs the next argument of opponents, that codification of the Law of Nations would cut off the latter's organic growth and future development. It cannot be denied that codification always interferes with the growth of customary law, although the assertion is not justified that codification does *cut off* such growth. But this disadvantage can be met by periodical revisions of the code and by its gradual increase and improvement through enactment of additional and amending rules according to the wants and needs of the days to come.

When opponents postulate an international court with power of executing its verdicts as an indispensable condition of codification, I answer that the non-existence of such a court is quite as much or as little an argument against codification as against the very existence of International Law. If there is a Law of Nations in existence in spite of the non-existence of an international court to guarantee its realisation, I cannot see why the non-existence of such a court should be an obstacle to codifying the very same Law of Nations. It may indeed be maintained that codification is all the more necessary as such an international court does not exist. For codification of the Law of Nations and the solemn recognition of a code by a universal law-making international treaty would give more precision, certainty, and weight to the rules of the Law of Nations than they have now in their unwritten condition. And a uniform interpretation of a code is now, since the Hague Peace Conference has instituted a permanent Court of Arbitration, much more realisable than in former times, although this court has not and will never have the power of executing its verdicts.

But is the Law of Nations ripe for codification? I readily admit that there are certain parts of that law which would offer the greatest difficulty in codification, and which would therefore better remain untouched for the present. But there are other parts, and I think that they constitute the greater portion of the Law of Nations, which are certainly ripe for codification. There can be no doubt that, whatever can be said against codification of the totality of the Law of Nations, partial codification is possible and comparatively easy. The work done by the Institute of International Law, of which the

"Annuaire de l'Institut de Droit International" gives exhaustive evidence, affords a stepping-stone towards such partial codification.

How Codification could be realised.

§ 36. From the basis of this work of the Institute of International Law a partial codification of the Law of Nations must be considered practicable. Nevertheless, codification could hardly be realised at once. The difficulties, though not insuperable, are so great that it would take the work of perhaps a generation of able jurists to prepare draft codes for those parts of International Law which may be considered ripe for codification. The only feasible way in which such draft codes could be prepared consists in the appointment on the part of the Powers of an international committee composed of a sufficient number of able jurists, whose task would be the preparation of the drafts. Public opinion of the whole civilised world would, I am sure, watch the work of these men with the greatest anxiety, and the Parliaments of the civilised States would gladly vote the comparatively small sum of money necessary for the costs of the work. If a noble-minded monarch of far-reaching influence would take a personal interest in the matter, the different Governments would hardly refuse to send delegates to an international conference for the purpose of discussing the ways and means for the appointment of an international committee for the preparation of draft codes.

CHAPTER II

DEVELOPMENT AND SCIENCE OF THE LAW OF NATIONS

I

DEVELOPMENT OF THE LAW OF NATIONS BEFORE GROTIUS

Lawrence, §§ 20-29—Manning, pp. 8-20—Halleck, I. pp. 1-11—Walker, History, I. pp. 30-137—Taylor, §§ 6-29—Holtzendorff in Holtzendorff, I. pp. 159-386—Nys, I. pp. 1-18—Martens, I. §§ 8-20—Fiore, I. Nos. 3-31—Calvo, I. pp. 1-32—Bonfils, Nos. 71-86—Despagnet, Nos. 1-19—Ward, "Enquiry into the Foundation and History of the Law of Nations," 2 vols. (1795)—Osenbrüggen, "De jure belli ac pacis Romanorum" (1876)—Müller-Jochmus, "Geschichte des Völkerrechts im Alterthum" (1848)—Hosack, "Rise and Growth of the Law of Nations" (1883), pp. 1-226—Nys, "Le droit de la guerre et les précurseurs de Grotius" (1882) and "Les origines du droit international" (1894).

No Law of Nations in antiquity.

§ 37. International Law as a law between Sovereign and equal States based on the common consent of these States is a product of modern Christian civilisation, and may be said to be hardly four hundred years old. However, the roots of this law go very far back into history. Such roots are to be found in the rules and usages which were observed by the different nations of antiquity with regard to their external relations. But it is well known that the conception of a Family of Nations did not arise in the mental horizon of the ancient world. Each nation had its own religion and gods, its own language, law, and morality. International interests of sufficient vigour to wind a band around all the civilised States, bring them nearer to each other, and

knit them together into a community of nations, did not spring up in antiquity. On the other hand, however, no nation could avoid coming into contact with other nations. War was waged and peace concluded. Treaties were agreed upon. Occasionally ambassadors were sent and received. International trade sprang up. Political men whose cause was lost often fled their country and took refuge in another. And, just as in our days, criminals often fled their country for the purpose of escaping punishment.

Such more or less frequent and constant contact of different nations with one another could not exist without giving rise to certain fairly congruent rules and usages to be observed with regard to external relations. These rules and usages were considered under the protection of the gods; their violation called for religious expiation. It is of interest to throw a glance upon the respective rules and usages of the Jews, Greeks, and Romans.

The Jews.

§ 38. Although they were monotheists and the standard of their ethics was consequently much higher than that of their heathen neighbours, the Jews did not in fact raise the standard of the international relations of their time except so far as they afforded foreigners living on Jewish territory equality before the law. Proud of their monotheism and despising all other nations on account of their polytheism, they found it totally impossible to recognise other nations as equals. If we compare the different parts of the Bible concerning the relations of the Jews with other nations, we are struck by the fact that the Jews were sworn enemies of some foreign nations, as the Amalekites, for example, with whom they declined to have any relations whatever in peace. When

they went to war with those nations, their practice was extremely cruel. They killed not only the warriors on the battlefield, but also the aged, the women, and the children in their homes. Read, for example, the short description of the war of the Jews against the Amalekites in 1 Samuel xv., where we are told that Samuel instructed King Saul as follows: (3) "Now go and smite Amalek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass." King Saul obeyed the injunction, save that he spared the life of Agag, the Amalekite king, and some of the finest animals. Then we are told that the prophet Samuel rebûked Saul and "hewed Agag in pieces with his own hand." Or again, in 2 Samuel xii. 31 we find that King David, "the man after God's own heart," after the conquest of the town Rabbah, belonging to the Ammonites, "brought forth the people that were therein and put them under saws, and under harrows of iron, and made them pass through the brick-kiln. . . ."

With those nations, however, of which they were not sworn enemies the Jews used to have international relations. And when they went to war with those nations, their practice was in no way exceptionally cruel, if looked upon from the standpoint of their time and surroundings. Thus we find in Deuteronomy xx. 10-14 the following rules:—

(10) "When thou comest nigh unto a city to fight against it, then proclaim peace unto it.

(11) "And it shall be, if it make thee answer of peace and open unto thee, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee.

(12) "And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it.

(13) "And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword.

(14) "But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee."

Comparatively mild, like these rules for warfare, were the Jewish rules as regards their foreign slaves. Such slaves were not without legal protection. The master who killed a slave was punished (Exodus ii. 20); if the master struck his slave so severely that he lost an eye or a tooth, the slave became a free man (Exodus ii. 26 and 27). The Jews, further, allowed foreigners to live among them under the full protection of their laws. "Love . . . the stranger, for ye were strangers in the land of Egypt," says Deuteronomy x. 19, and in Leviticus xxiv. 22 there is the command: "You shall have one manner of law, as well for the stranger as for one of your own country."

Of the greatest importance, however, for the International Law of the future, are the Messianic ideals and hopes of the Jews, as these Messianic ideals and hopes are not national only, but fully *international*. The following are the beautiful words in which the prophet Isaiah (ii. 2–4) foretells the state of mankind when the Messiah shall have appeared:

(2) "And it shall come to pass in the last days, that the mountain of the Lord's house shall be established in the top of the mountains, and shall be

exalted above the hills; and all nations shall flow unto it.

(3) "And many people shall go and say, Come ye, and let us go up to the mountain of the Lord, to the house of the God of Jacob, and he will teach us of his ways, and we will walk in his paths; for out of Zion shall go forth the law, and the word of the Lord from Jerusalem.

(4) "And he shall judge among the nations, and shall rebuke many people: and they shall beat their swords into plowshares, and their spears into pruning-hooks: nation shall not lift up sword against nation, neither shall they learn war any more."

Thus we see that the Jews, at least at the time of Isaiah, had a foreboding and presentiment of a future where all the nations of the world should be united in peace. And the Jews have left this ideal to the Christian world. It is the same ideal which has inspired in bygone times all those eminent men who have laboured to build up an International Law. And it is again the same ideal which inspires nowadays all lovers of international peace. Although the Jewish State and the Jews as a nation have practically done nothing to realise that ideal, yet it sprang up among them and has never disappeared.

The Greeks.

§ 39. Totally different from this Jewish contribution to a future International Law is that of the Greeks. The broad and deep gulf between their civilisation and that of their neighbours necessarily made them look down upon these neighbours as barbarians, and thus prevented them from raising the standard of their relations with neighbouring nations above the average level of antiquity. But the Greeks were before the Macedonian conquest never united into one powerful national State. They

lived in numerous more or less small city States, which were totally independent of one another. It is this very fact which, as time went on, called into existence a kind of International Law between these independent States. They could never forget that their inhabitants were of the same race. The same blood, the same religion, and the same civilisation of their citizens united these independent and—as we should nowadays say—Sovereign States into a community of States which in time of peace and war held themselves bound to observe certain rules as regards the relations between one another. The consequence was that the war practice of the Greeks in their wars among themselves was a very mild one. It was a rule that war should never be commenced without a declaration of war. Heralds were inviolable. Warriors who died on the battlefield were entitled to burial. If a city was captured, the lives of all those who took refuge in a temple had to be spared. War prisoners could be exchanged or ransomed; their lot was, at the utmost, slavery. Certain places, as for example the temple of the god Apollo at Delphi, were permanently inviolable. Even certain persons in the armies of the belligerents were considered inviolable, as the priests, for instance, who carried the holy fire, and the seers.

Thus the Greeks left the example to history that independent and sovereign States can live, and are at the same time obliged to live, in a community which provides a law for the international relations of the member States, provided that there exist some common interests and aims which bind these States together. It is very often maintained that this kind of International Law of the Greek States could in no way be compared with our modern Inter-

national Law, as the Greeks did not consider their international rules as legally, but as religiously binding only. We must, however, not forget that the Greeks never made the same distinction between law, religion, and morality as the modern world makes. The fact itself remains unshaken that the Greek States have set an example to the future that independent States can live in a community in which their international regulations are governed by certain rules and customs based on the common consent of the members of that community.

The Romans.

§ 40. Totally different again from the Greek contribution to a future International Law is that of the Romans. As far back as their history goes, the Romans had a special set of twenty priests, the so-called *fetiales*, for the management of functions regarding their relations with foreign nations. In fulfilling their functions the *fetiales* did not apply a purely secular but a divine and holy law, a *jus sacrale*, the so-called *jus fetiale*. The *fetiales* were employed when war was declared or peace was made, when treaties of friendship or of alliance were concluded, when the Romans had an international claim before a foreign State, or *vice versa*.

According to Roman Law the relations of the Romans with a foreign State depended upon the fact whether or not there existed a treaty of friendship between Rome and the respective State. In case such a treaty was not in existence, persons or goods coming from the foreign land into the land of the Romans, and likewise persons and goods coming from the land of the Romans into the foreign land, enjoyed no legal protection whatever. Such persons could be made slaves, and such goods could be seized and became the property of the captor. Should such an enslaved

person ever come back to his country, he was at once considered a free man again according to the so-called *jus postliminii*. An exception was made as regards the ambassadors. They were always considered inviolable, and whoever violated them was handed over to the home State of those ambassadors to be punished according to discretion.

Different were the relations when a treaty of friendship existed. Persons and goods coming from one country into the other stood then under legal protection. So many foreigners came in the process of time to Rome that a whole system of law sprang up regarding these foreigners and their relations with Roman citizens, the so-called *jus gentium* in contradistinction to the *jus civile*. And a special magistrate, the *praetor peregrinus*, was nominated for the administration of that law. Of such treaties with foreign nations there were three different kinds, namely, of *friendship* (*amicitia*), of *hospitality* (*hospitium*), or of *alliance* (*foedus*). I do not propose to go into details about them. It suffices to remark that, although the treaties were concluded without any such provision, notice of termination could be given. Very often these treaties used to contain a provision according to which future controversies could be settled by arbitration of the so-called *recuperatores*.

Very precise legal rules existed as regards war and peace. Roman law considered war a legal institution. There were four different just reasons for war, namely: (1) Violation of the Roman dominion; (2) violation of ambassadors; (3) violation of treaties; (4) support given during war to an opponent by a hitherto friendly State. But even in such cases war was only justified if satisfaction was not given by the Foreign State. Four *fetiales* used to be sent as

ambassadors to the foreign State who asked for satisfaction. If such satisfaction was refused, war was formally declared by throwing a lance from the Roman frontier into the foreign land by one of the *fetiales*. For warfare itself no legal rules existed, but discretion only, and there are examples enough of great cruelty on the part of the Romans. Legal rules existed again for the end of war. War could be ended, first, through a treaty of peace, which was then always a treaty of friendship. War could, secondly, be ended by surrender (*deditio*). Such surrender spared the enemy their lives and property. War could, thirdly and lastly, be ended through conquest of the enemy's country (*occupatio*). It was in this case that the Romans could act according to discretion with the lives and the property of the enemy.

From this sketch of their rules concerning external relations, it becomes apparent that the Romans gave to the future the example of a State with *legal* rules for its foreign relations. As the legal people *par excellence*, the Romans could not leave their international relations without legal treatment. And though this legal treatment can in no way be compared to the modern International Law, yet it constitutes a contribution to the Law of Nations of the future, in so far as its example furnished many arguments to those to whose efforts we owe the very existence of our modern Law of Nations.

No need for a Law of Nations during the Middle Ages.

§ 41. The Roman Empire gradually absorbed the whole civilised ancient world, so far as it was known to the Romans. They did not know of any independent civilised States outside the borders of their empire. There was, therefore, neither room nor need for an International Law as long as this empire

existed. It is true that at the borders of this world-empire there were always wars with barbarous tribes, but these wars gave opportunity for the practice of a few rules and usages only. And matters did not change when under Constantine the Great (313–337) the Christian faith became the religion of the empire and Byzantium its capital instead of Rome, and, further, when in 395 the Roman Empire was divided into the Eastern and the Western Empire. This Western Empire disappeared in 476, when Romulus Augustus, the last emperor, was deposed by Odoacer, the leader of the Germanic soldiers, who made himself ruler in Italy. The land of the extinct Western Roman Empire came into the hands of different peoples, chiefly of Germanic extraction. In Gallia the kingdom of the Franes springs up in 486 under Chlodovech the Merovingian. In Italy, the kingdom of the Ostrogoths under Theoderich the Great, who defeated Odoacer, rises in 493. In Spain the kingdom of the Visigoths appears in 507. The Vandals had, as early as in 429, erected a kingdom in Africa, with Carthage as its capital. The Saxons had gained a footing in Britannia already in 449.

All these peoples were barbarians in the strict sense of the term. Although they had adopted Christianity, it took hundreds of years to raise them up to the standard of a more advanced civilisation. And likewise hundreds of years passed before different nations came to light out of the amalgamation of the various peoples that had conquered the old Roman Empire with the residuum of the population of that empire. It was in the eighth century that matters became more settled. Charlemagne built up his vast Frankish Empire, and was, in 800, crowned Roman Emperor by Pope Leo III. Again the whole

world seemed to be one empire, headed by the Emperor as its temporal, and by the Pope as its spiritual master, and for an International Law there was therefore no room and no need. But the Frankish Empire did not last long. According to the Treaty of Verdun, it was, in 843, divided into three parts, and with that division the process of development set in, which led gradually to the rise of the different States of Europe.

In theory the Emperor of the Germans remained for hundreds of years to come the master of the world, but in practice he was even not master at home, as the German Princes step by step succeeded in establishing their independence. And although theoretically the world was well looked after by the Emperor as its temporal and the Pope as its spiritual head, there were constantly treachery, quarrelling, and fighting going on. War practice was the most cruel possible. It is true that the Pope and the Bishops succeeded sometimes in mitigating such practice, but as a rule there was no influence of the Christian teaching visible.

The Fifteenth and Sixteenth Century.

§ 42. The necessity for a Law of Nations did not arise until a multitude of States absolutely independent of one another had successfully established themselves. The process of development, starting from the Treaty of Verdun of 843, reached that climax with the reign of Frederic III., Emperor of the Germans from 1440 to 1493. He was the last of the emperors crowned in Rome by the hands of the Popes. At that time Europe was in fact divided up into a great number of independent States, and thenceforth a law was needed to deal with the international relations of these Sovereign States. Six factors of importance prepared the ground for

the growth of principles of a future International Law.

(1) There were first the Civilians and the Canonists. Roman Law was in the beginning of the twelfth century brought back to the West through Irnerius, who taught this law at Bologna. He and the other *glossatores* and *post-glossatores* considered Roman Law the *ratio scripta*, *the* law *par excellence*. These Civilians maintained that Roman Law was the law of the civilised world *ipso facto* through the emperors of the Germans being the successors of the emperors of Rome. Their commentaries to the *Corpus Juris Civilis* touch upon many questions of the future International Law which they discuss from the basis of Roman Law.

The Canonists, on the other hand, whose influence was unshaken till the time of the Reformation, treated from a moral and ecclesiastical point of view many questions of the future International Law concerning war.[1]

(2) There were, secondly, collections of Maritime Law of great importance which made their appearance in connection with international trade. From the eighth century the world trade which had totally disappeared in consequence of the downfall of the Roman Empire and the destruction of the old civilisation during the period of the Migration of the Peoples, began slowly to develop again. The sea trade specially flourished and fostered the growth of rules and customs of Maritime Law, which were collected into codes and gained some kind of international recognition. The more important of these collections are the following: The *Consolato del Mare*, a private collection made at Barcelona in Spain

[1] See Holland, Studies, pp. 40–58; Walker, History, I. pp. 204–212.

in the middle of the fourteenth century; the *Laws of Oléron*, a collection, made in the twelfth century, of decisions given by the maritime court of Oléron in France; the *Rhodian Laws*, a very old collection of maritime laws which partly date back as far as the eighth century; the *Tabula Amalfitana*, the maritime laws of the town of Amalfi in Italy, which date at latest from the tenth century; the *Leges Wisbuenses*, a collection of maritime laws of Wisby on the island of Gothland, in Sweden, dating from the fourteenth century.

The growth of international trade caused also the rise of the controversy regarding the freedom of the high seas (see below, § 248), which indirectly influenced the growth of an International Law (see below, §§ 248–250).

(3) A third factor was the numerous leagues of trading towns for the protection of their trade and trading citizens. The most celebrated of these leagues is the Hanseatic, formed in the thirteenth century. These leagues stipulated for arbitration on controversies between their member-towns. They acquired trading privileges in foreign States. They even waged war, when necessary, for the protection of their interests.

(4) A fourth factor was the growing custom on the part of the States of sending and receiving permanent legations. In the Middle Ages the Pope alone had a permanent legation at the court of the Frankish kings. Later on, the Italian Republics, as Venice and Florence for instance, were the first States to send out ambassadors, who took their residence for several years in the capitals of the States they were sent to. At last, from the end of the fifteenth century, it became a universal custom that the

kings of the different States kept permanent legations at one another's capital. The consequence was that an uninterrupted opportunity was given for discussing and deliberating common international interests. And since the position of the ambassadors in foreign countries had to be taken into consideration, international rules as regards such position grew gradually up.

(5) A fifth factor was the custom of the great States of keeping standing armies, a custom which dates from the fifteenth century also. The uniform and stern discipline in these armies favoured the rise of more universal rules and practices of warfare.

(6) A sixth factor was the Renaissance and the Reformation. The Renaissance of science and art in the fifteenth century, together with the resurrection of the knowledge of antiquity, revived the philosophical and aesthetical ideals of Greek life and transferred them to modern life. Through their influence the spirit of the Christian religion took precedence of its letter. The conviction awoke everywhere that the principles of Christianity ought to unite the Christian world more than they had done hitherto, and that these principles ought to be observed in matters international as much as in matters national. The Reformation, on the other hand, made an end to the spiritual mastership of the Pope over the civilised world. Protestant States could not recognise the claim of the Pope to arbitrate as of right in their conflicts either between one another or between themselves and Catholic States.

II

DEVELOPMENT OF THE LAW OF NATIONS AFTER GROTIUS

Lawrence, §§ 29-53—Halleck, I. pp. 12-45—Walker, History, I. pp. 138-202—Taylor, §§ 65-95—Nys, I. pp. 19-46—Martens, I. §§ 21-33—Fiore, I. Nos. 32-52—Calvo, I. pp. 32-101—Bonfils, Nos. 87-146—Despagnet, Nos. 20-27—Wheaton, "Histoire des progrès du droit des gens en Europe" (1841)—Pierantoni, "Storia del diritto internazionale nel secolo XIX." (1876)—Hosack, "Rise and Growth of the Law of Nations" (1883), pp. 227-320—Brie, "Die Fortschritte des Völkerrechts seit dem Wiener Congress" (1890).

The time of Grotius.

§ 43. The seventeenth century found a multitude of independent States established and crowded on the comparatively small continent of Europe. Many interests and aims knitted these States together into a community of States. International lawlessness was henceforth an impossibility. This was the reason for the fact that Grotius's work "De Jure Belli ac Pacis libri III.," which appeared in 1625, won the ear of the different States, their rulers, and their writers on matters international. Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied a legal basis to most of those international relations which were at the time considered as wanting such basis, the book of Grotius obtained such a world-wide influence that he is correctly styled the "Father of the Law of Nations." It would be very misleading and in no way congruent with the facts of history to believe that Grotius's doctrines were as a body at once universally accepted. No such thing happened, nor could have happened. What did soon take place was that whenever an international question of legal

importance arose, Grotius's book was consulted, and its authority was so overwhelming that in many cases its rules were considered right. How those rules of Grotius, which have more or less quickly been recognised by the common consent of the writers on International Law, have gradually received similar acceptance at the hands of the Family of Nations is a process of development which in each single phase cannot be ascertained. It can only be stated that at the end of the seventeenth century the civilised States consider themselves bound by a Law of Nations the rules of which were to a great extent the rules of Grotius. This does not mean that these rules have from the end of that century never been broken. On the contrary, they have frequently been broken. But whenever this occurred, the States concerned maintained either that they did not intend to break these rules, or that their acts were in harmony with them, or that they were justified by just causes and circumstances in breaking them. And the development of the Law of Nations did not come to a standstill with the reception of the bulk of the rules of Grotius. More and more rules were gradually required and therefore gradually grew. All the historical important events and facts of international life from the time of Grotius down to our own have, on the one hand, given occasion to the manifestation of the existence of a Law of Nations, and, on the other hand, in their turn made the Law of Nations constantly and gradually develop into a more perfect and more complete system of legal rules.

It serves my purpose to divide the history of the development of the Law of Nations from the time of Grotius into six periods—namely, 1648–1721,

1721–1789, 1789–1815, 1815–1856, 1856–1874, 1874–1899.

The period 1648–1721.

§ 44. The ending of the Thirty Years' War through the Westphalian Peace of 1648 is the first event of great importance after the death of Grotius in 1645. What makes remarkable the meetings of Osnaburg, where the Protestant Powers met, and Münster, where the Catholic Powers met, is the fact that there was for the first time in history a European Congress assembled for the purpose of settling matters international by common consent of the Powers. With the exception of England, Russia, and Poland, all the important Christian States were represented at this congress, as were also the majority of the minor Powers. The arrangements made by this congress show what a great change had taken place in the condition of matters international. The Swiss Confederation and the Netherlands were recognised as Independent States. The 355 different States which belonged to the German Empire were practically, although not theroetically, recognised as independent States which formed a Confederation under the Emperor as its head. Of these 355 States, 150 were secular States governed by hereditary monarchs (Electors, Dukes, Landgraves, and the like), 62 were free-city States, and 123 were ecclesiastical States governed by archbishops and other Church dignitaries. The theory of the unity of the civilised world under the German Emperor and the Pope as its temporal and spiritual heads was buried for ever. A multitude of recognised independent States formed now a community on the basis of equality of all its members. The conception of the European equilibrium made its appearance and became an implicit principle as a guaranty for the independence of

the members of the Family of Nations. Protestant States took up their position within this family along with Catholic States, as did republics along with monarchies.

In the second half of the seventeenth century the policy of conquest initiated by Louis XIV. of France led to numerous wars. But Louis XIV. always pleaded a just cause when he made war, and even the establishment of the ill-famed so-called Chambers of Reunion (1680–1683) was done under the pretext of law. There was no period later in history in which the principles of International Law were more frivolously violated, but the violation was always cloaked by some excuse. Five treaties of peace between France and other Powers during the reign of Louis XIV. are of great importance. (1) The Peace of the Pyrenees, which ended in 1659 the war between France and Spain, which had not come to terms at the Westphalian Peace. (2) The Peace of Aix-la-Chapelle, which ended in 1668 another war between France and Spain, commenced in 1667 because France claimed the Spanish Netherlands from Spain. This peace was forced upon Louis XIV. through the triple alliance between England, Holland, and Sweden. (3) The Peace of Nymeguen, which ended in 1678 the war originally commenced by Louis XIV. in 1672 against Holland, into which, however, many other European Powers were dragged. (4) The Peace of Ryswick, which ended in 1697 the war that existed since 1688 between France on one side, and, on the other, England, Holland, Denmark, Germany, Spain, and Savoy. (5) The Peace of Utrecht and the Peace of Rastadt and Baden, which in 1713 and 1714 respectively ended the war of the Spanish Succession since 1701 between France and Spain on the one

side, and, on the other, England, Holland, Portugal, Germany, and Savoy.

But wars were not only waged between France and other Powers during this period. The following treaties of peace must therefore be mentioned:—(1) The Peaces of Roeskild (1658), Oliva (1660), Copenhagen (also 1660), and Kardis (1661). The contracting Powers were Sweden, Denmark, Poland, Prussia, and Russia. (2) The Peace of Carlowitz of 1699, between Turkey, Austria, Poland, and Venice. (3) The Peace of Nystaedt, between Sweden and Russia under Peter the Great in 1721.

The year 1721 is epoch-making because with the Peace of Nystaedt Russia enters as a member into the Family of Nations, in which she at once held the position of a Great Power. The period ended by the year 1721 shows in many points progressive tendencies regarding the Law of Nations. Thus the right of visit and search on the part of belligerents over neutral vessels becomes recognised. The rule "free ship, free goods," rises as a postulate, although it was not universally recognised till 1856. The freedom of the high seas, claimed by Grotius and others, begins gradually to obtain recognition in practice, although here too it did not meet with universal acceptance till the nineteenth century. The balance of power is solemnly recognised by the Peace of Utrecht as a principle of the Law of Nations.

The period 1721–1789.

§ 45. Before the end of the first half of the eighteenth century peace in Europe was again disturbed. The rivalry between Austria and Prussia, which had become a kingdom in 1701 and where Frederick the Great had ascended the throne in 1740, led to several wars in which England, France, Spain,

Bavaria, Saxony, and Holland took part. Several treaties of peace were successively concluded which tried to keep up or re-establish the balance of power in Europe. The most important of these treaties are: (1) The Peace of Aix-la-Chapelle of 1748 between France, England, Holland, Austria, Prussia, Sardinia, Spain, and Genoa. (2) The Peace of Hubertsburg and the Peace of Paris, both of 1763, the former between Prussia, Austria, and Saxony, the latter between England, France, and Spain. (3) The Peace of Versailles of 1783 between England, the United States of America, France, and Spain.

These wars gave occasion to disputes as to the right of neutrals and belligerents regarding trade in time of war. Prussia became a Great Power. The so-called First Armed Neutrality[1] made its appearance in 1780 with claims of great importance, which were not generally recognised till 1856. The United States of America succeeded in establishing her independence and became a member of the Family of Nations, whose future attitude fostered the growth of several rules of International Law.

The period 1789–1815.

§ 46. All progress, however, was endangered, and indeed the Law of Nations seemed partly non-existent, during the time of the French Revolution and the Napoleonic wars. Although the French Convention resolved in 1792 (as stated above, § 30) to create a "Declaration of the Rights of Nations," the Revolutionary Government and afterwards Napoleon I. very often showed no respect for the rules of the Law of Nations. The whole order of Europe, which had been built up by the Westphalian and subsequent treaties of peace for the purpose of maintaining a

[1] See below, Vol. II. §§ 289 and 290, where details concerning the first and second armed neutrality are given.

balance of power, was overthrown. Napoleon I. was for some time the master of Europe, Russia and England excepted. He arbitrarily created States and suppressed them again. He divided existing States into portions and united separate States. The kings depended upon his goodwill, and they had to follow orders when he commanded. Especially as regards Maritime International Law, a condition of partial lawlessness arose during this period. Already in 1793 England and Russia interdicted all navigation with the ports of France, with the intention to subdue her by famine. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to the ports of the enemy or carrying enemy goods. And again Napoleon, who wanted to ruin England by destroying her commerce, announced in 1806 in his Berlin Decrees the boycott of all English goods. England answered with the blockade of all French ports and all ports of the allies of France, and ordered her fleet to capture all ships destined to any such port.

When at last the whole of Europe was mobilised against Napoleon and he was finally defeated, the whole face of Europe was changed, and the former order of things could not possibly be restored. It was the task of the European Congress of Vienna in 1814 and 1815 to create a new order and a fresh balance of power. This new order comprised chiefly the following arrangements: The Prussian and the Austrian monarchies were re-established, as was also the Germanic Confederation, which consisted henceforth of thirty-nine member States. A kingdom of the Netherlands was created out of Holland and Belgium. Norway and Sweden became a Real Union. The old dynasties were restored in Spain, in Sardinia,

in Tuscany, and in Modena, as was also the Pope in Rome. To the nineteen cantons of the Swiss Confederation were added those of Geneva, Valais, and Neuchatel, and this Confederation was neutralised for all the future. But the Vienna Congress did not only establish a new political order in Europe, it also settled some questions of International Law. Thus, free navigation was agreed to on the so-called international rivers, which are rivers running through the land of different States. It was further arranged that henceforth the diplomatic agents should be divided into three classes (Ambassadors, Ministers, Chargés d'Affaires). Lastly, a universal prohibition of the trade with negro slaves was agreed upon.

The period 1815-1856.

§ 47. The period after the Vienna Congress begins with the so-called Holy Alliance. Already on September 26, 1815, before the second Peace of Paris, the Emperors of Russia and Austria and the King of Prussia called this alliance into existence, the object of which was to make it a duty upon its members to apply the principles of Christian morality in the administration of the home affairs of their States as well as in the conduct of their international relations. After the Vienna Congress the sovereigns of almost all the European States had joined that alliance with the exception of England. George IV., at that time prince-regent only, did not join, because the Holy Alliance was an alliance not of the States, but of sovereigns, and therefore was concluded without the signatures of the respective responsible Ministers, whereas according to the English Constitution the signature of such a responsible Minister would have been necessary.

The Holy Alliance had not as such an importance for International Law, for it was a religious, moral,

and political, but scarcely a legal alliance. But at the Congress of Aix-la-Chapelle in 1818, where the Emperors of Russia and Austria and the King of Prussia attended in person, and where it might be said that the principles of the Holy Alliance were practically applied, the Great Powers signed a Declaration,[1] in which they solemnly recognised the Law of Nations as the basis of the international relations, and in which they pledged themselves for all the future to act according to its rules. The leading principle of their politics was that of legitimacy, as they endeavoured to preserve everywhere the old dynasties and to protect the sovereigns of the different countries against revolutionary movements of their subjects. This led in fact to a dangerous neglect of the principles of International Law regarding intervention. The Great Powers, with the exception of England, intervened constantly with the domestic affairs of the minor States in the interest of the legitimate dynasties and of an anti-liberal legislation. The Congresses at Troppau 1820, Laibach 1821, Verona 1822, occupied themselves with a deliberation on such interventions.

The famous Monroe Doctrine (see below, § 139) owes its origin to that dangerous policy of the European Powers as regards intervention, although this doctrine embraces other points besides intervention. As after the Vienna Congress a number of Spanish colonies in South America had fallen off from the mother country and declared their independence, and as Spain thought of reconquering these States with the help of other Powers who upheld the principle of legitimacy, President Monroe delivered his message on December 2, 1823, which pointed out

[1] See Martens, N. R. IV. p. 560.

amongst other things, that the United States could not allow the interference of a European Power with the States of the American continent.

Different from the intervention of the Powers of the Holy Alliance in the interest of legitimacy were the two interventions in the interest of Greece and Belgium. England, France, and Russia intervened in 1827 in the struggle of Turkey with the Greeks, an intervention which led finally in 1830 to the independence of Greece. And the Great Powers of the time, namely, England, Austria, France, Prussia, and Russia, invited by the provisional Belgian Government, intervened in 1830 in the struggle of the Dutch with the Belgians and secured the formation of a separate Kingdom of Belgium.

It may be maintained that the establishment of Greece and Belgium inferred the breakdown of the Holy Alliance. But it was not till the year 1848 that this alliance was totally swept away through the disappearance of absolutism and the victory of the constitutional system in most States of Europe. Since, shortly afterwards, in 1852, Napoleon III. became Emperor of France, who adopted the principle of nationality and exercised a preponderant influence in Europe, one may say that this principle of nationality superseded in European politics the principle of legitimacy.

The last event of this period is the Crimean War, which led to the Peace as well as to the Declaration of Paris in 1856. This war broke out in 1853 between Russia and Turkey. In 1854, England, France, and Sardinia joined Turkey, but the war continued nevertheless for another two years. Finally, however, Russia was defeated, a Congress assembled at Paris, where England, France, Austria, Russia, Sardinia,

Turkey, and eventually Prussia were represented, and peace was concluded in March 1856. In the Peace Treaty, Turkey is expressly received as a member into the Family of Nations. Of greater importance, however, is the celebrated Declaration of Paris regarding maritime International Law which was signed on April 16, 1856, by the delegates of the Powers that had taken part in the Congress. This declaration abolished privateering, recognised the rules that enemy goods on neutral vessels and that neutral goods on enemy vessels cannot be confiscated, and stipulated that a blockade in order to be binding must be effective. Together with the fact that at the end of the first quarter of the nineteenth century the principle of the freedom of the high seas[1] became universally recognised, the Declaration of Paris is a prominent landmark of the progress of the Law of Nations. The Powers that had not been represented at the Congress of Paris were invited to sign the Declaration afterwards, and the majority of the members of the Family of Nations did sign it before the end of the year 1856. The few States, such as the United States of America, Spain, Mexico, and others, which have not signed,[2] have in practice since 1856 not acted in opposition to the Declaration, and one may therefore, perhaps, maintain that the Declaration of Paris has already become or will soon become universal International Law through custom.

The period 1856-1874

§ 48. The next period, the time from 1856 to 1874, is of prominent importance for the development of

[1] See below, § 251.

[2] Japan signed in 1886. It should be mentioned that the United States did not sign the Declaration of Paris because it did not go far enough, and did not interdict capture of private enemy vessels.

the Law of Nations. Under the aegis of the principle of nationality, Austria turns in 1867 into the dual monarchy of Austria-Hungary, and Italy as well as Germany becomes united. The unity of Italy rises out of the war of France and Sardinia against Austria in 1859, and Italy ranges henceforth among the Great Powers of Europe. The unity of Germany is the combined result of three wars: that of Austria and Prussia in 1864 against Denmark on account of Schleswig-Holstein, that of Prussia and Italy against Austria in 1866, and that of Prussia and the allied South German States against France in 1870. The defeat of France in 1870 had the consequence that Italy took possession of the Papal States, whereby the Pope disappeared from the number of governing sovereigns.

The United States of America rise through the successful termination of the Civil War in 1865 to the position of a Great Power. Several rules of maritime International Law owe their further development to this war. And the instructions concerning warfare on land, published in 1863 by the Government of the United States, represent the first step towards codification of the Laws of War. In 1864, the Geneva Convention for the amelioration of the condition of soldiers wounded in armies in the field is, on the initiation of Switzerland, concluded by nine States, and in time almost all civilised States became parties to it. In 1868, the Declaration of St. Petersburg, interdicting the employment in war of explosive balls below a certain weight, is signed by many States. In 1871, the Conference of London, attended by the representatives of the Powers which were parties to the Peace of Paris of 1856, solemnly proclaims "that it is an essential principle of the

Law of Nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement." The last event in this period is the Conference of Brussels of 1874 for the codification of the rules and usages of war on land. Although the signed code was never ratified, the Brussels Conference was nevertheless epoch-making, since it showed the readiness of the Powers to come to an understanding regarding such a code.

The period 1874–1899.

§ 49. After 1874 the principle of nationality continues to exercise its influence as before. Under its aegis takes place the partial decay of the Ottoman Empire. The refusal of Turkey to introduce reforms regarding the Balkan population led in 1877 to war between Turkey and Russia, which was ended in 1878 by the peace of San Stefano. As the conditions of this treaty would practically have done away with Turkey in Europe, England intervened and a European Congress assembled at Berlin in June 1878 which modified materially the conditions of the Peace of San Stefano. The chief results of the Berlin Congress are:—(1) Servia, Roumania, Montenegro become independent and sovereign States; (2) Bulgaria becomes an independent principality under Turkish suzerainty; (3) the Turkish provinces of Bosnia and Herzegovina come under the administration of Austria-Hungary; (4) a new province under the name of Eastern Rumelia is created in Turkey and is to enjoy great local autonomy (according to an arrangement of the Conference of Constantinople in 1885 1886 a bond is created between Eastern Rumelia and Bulgaria by appointing the Prince of Bulgaria governor of Eastern Rumelia); (5) free

navigation on the Danube from the Iron Gates to its mouth in the Black Sea is proclaimed.

In 1897 Crete revolted against Turkey, war broke out between Greece and Turkey, the Powers interfered, and peace was concluded at Constantinople. Crete becomes an autonomous half-Sovereign State under Turkish suzerainty and under Prince George of Greece as governor.

In the Far East war breaks out in 1895 between China and Japan, in which China is defeated and out of which Japan rises as a Great Power. That she must now be considered a full member of the Family of Nations becomes apparent from the treaties concluded by her with other Powers for the purpose of abolishing their consular jurisdiction within the boundaries of Japan.

In America the United States intervene in 1898 in the revolt of Cuba against the motherland, whereby war breaks out between Spain and the United States. The defeat of Spain secures the independence of Cuba through the Peace of Paris of 1898.

An event of great importance during this period is the Congo Conference of Berlin, which took place in 1884–1885, and at which were represented England, Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States of America, France, Italy, Holland, Portugal, Russia, Sweden-Norway, Turkey. This conference stipulated freedom of commerce, interdiction of slave-trade, and neutralisation of the territories in the Congo district, and secured freedom of navigation on the rivers Congo and Niger. The so-called Congo Free State was recognised as a member of the Family of Nations.

A second fact of great importance is the establishment of numerous international unions with special

international offices for various non-political purposes. A Universal Telegraphic Union was established in 1875, a Universal Postal Union in 1878, a Union for the Protection of Industrial Property in 1883, a Union for the Protection of Works of Literature and Art in 1886, a Union for the Publication of Custom Tariffs in 1890.

A third fact of great importance is that in this period a tendency has arisen to settle international conflicts more frequently than in former times by arbitration. Numerous arbitrations have actually taken place, and several treaties have been concluded between different States stipulating the settlement by arbitration of all conflicts which would arise in future between the contracting parties.

The last fact of great importance which is epoch-making for this period is the Peace Conference of the Hague of 1899. This Conference produced, apart from three Declarations of minor importance, a Convention for the Pacific Settlement of International Conflicts, a Convention regarding the Laws and Customs of War on Land, and a Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. It also formulated, among others, the three wishes (1) that a conference should in the near future regulate the rights and duties of neutrals, (2) that a future conference should contemplate the declaration of the inviolability of private property in naval warfare, (3) that a future conference should settle the question of the bombardment of ports, towns, and villages by naval forces.

The Twentieth Century.

§ 50. Soon after the Hague Peace Conference, in October 1899, war breaks out in South Africa between Great Britain and the two Boer Republics, which leads to the latter's annexation at the end of

1901. The assassination of the German Ambassador and the general attack on the European legations in Peking in 1900 lead to a united action of the Powers against China for the purpose of vindicating this violation of the fundamental rules of the Law of Nations. In December 1902 Great Britain, Germany, and Italy institute a blockade against the coast of Venezuela for the purpose of making her comply with their demands for indemnification of their subjects wronged during civil wars in Venezuela, and the latter consents to pay indemnities to be settled by a mixed commission of diplomatists. But as other Powers than those who had instituted the blockade likewise claim indemnities, the matter is referred to the permanent Court of Arbitration at the Hague, which, in 1904, gives its verdict in favour of the blockading Powers. In February of 1904 war breaks out in the Far East between Russia and Japan on account of Manchuria and Korea. In November of 1904 the United States of America make preparations for the convoking of another Peace Conference at the Hague.

Five Lessons of the History of the Law of Nations.

§ 51. It is the task of history, not only to show how things have grown in the past, but also to extract a moral for the future out of the events of the past. Five morals can be said to be deduced from the history of the development of the Law of Nations:

(1) The first and principal moral is that a Law of Nations can exist only if there is an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not and never can be a

central political authority above the Sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent. The history of the times of Louis XIV. and Napoleon I. shows clearly the soundness of this principle.

(2) The second moral is that International Law can develop progressively only when international politics, especially intervention, are made on the basis of real State interests. Dynastic wars belong to the past, as do interventions in favour of legitimacy. It is neither to be feared, nor to be hoped, that they should occur again in the future. But if they did, they would hamper the development of the Law of Nations in the future as they have done in the past.

(3) The third moral is that the principle of nationality is of such force that it is fruitless to try to stop its victory. Wherever a community of many millions of individuals, who are bound together by the same blood, language, and interests, become so powerful that they think it necessary to have a State of their own, in which they can live according to their own ideals and can build up a national civilisation, they will certainly get that State sooner or later. What international politics can do and should do is to enforce the rule that minorities of individuals of another race shall not be outside the law, but shall be treated on equal terms with the majority. States embracing a population of different nationalities can exist and will always exist, as many examples show.

(4) The fourth moral is that every progress in the development of International Law wants due time to ripen. In Utopia the projects of an eternal

peace and of an undisturbed fraternity of States and nations may be realised, but the rude reality of practical international life in our times does not provide any possibility of the realisation of such fanciful ideas. The presupposition of an eternal peace would at least be that the whole surface of the earth would be shared between nations of the same standard of civilisation, of the same interests, aims, and of the same strength, a fact which will never be realised so far as we can see. Eternal peace is an ideal, and in the very term "ideal" the conviction is involved of the impossibility of its realisation, although it is a duty to aim constantly at such realisation. The permanent Court of Arbitration at the Hague, now established by the Hague Peace Conference of 1899, is an institution that can bring us nearer to such realisation than ever could have been hoped. And codification of parts of the Law of Nations, following the codification of the rules regarding land warfare, will in due time arrive and so make the legal basis of international intercourse firmer, broader, and more prominent than before.

(5) The fifth, and last, moral is that the progressive development of International Law depends chiefly upon the standard of public morality on the one hand, and, on the other, upon economic interests. The higher the standard of public morality rises, the more will International Law progress. And the more important international economic interests grow, the more International Law will grow. For, looked upon from a certain standpoint, International Law is, just like Municipal Law, a product of moral and of economic factors, and at the same time the basis for a favourable development of moral and economic interests. This being an indisputable fact,

it may therefore fearlessly be maintained that an immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour.

III

The Science of the Law of Nations

Phillimore, I., Preface to the first edition—Lawrence, §§ 31-36—Manning, pp. 21-65—Halleck, I. pp. 12, 15, 18, 22, 25, 29, 34, 42—Walker, History, I. pp. 203-337, and "The Science of International Law" (1893), *passim*—Taylor, §§ 37-48—Wheaton, §§ 4-13—Rivier in Holtzendorff, I. pp. 337-475—Nys, I. pp. 213-328—Martens, I. §§ 34-38—Fiore, I. Nos. 53-88, 164-185, 240-272—Calvo, I. pp. 27-34, 44-46, 51-55, 61-63, 70-73, 101-137—Bonfils, Nos. 147-153—Despagnet, Nos. 28-35—Kaltenborn, "Die Vorläufer des Hugo Grotius" (1848)—Holland, Studies, pp. 1-58, 168-175—Westlake, Chapters, pp. 23-77—Ward, "Enquiry into the Foundation and History of the Law of Nations," 2 vols. (1795)—Nys, "Le droit de la guerre et les précurseurs de Grotius" (1882), "Notes pour servir à l'histoire . . . du droit international en Angleterre" (1888), "Les origines du droit international" (1894)—Wheaton, "Histoire des progrès du droit des gens en Europe" (1841)—See also the bibliographies enumerated below in § 61.

Forerunners of Grotius.

§ 52. The science of the modern Law of Nations commences from Grotius's work, "De Jure Belli ac Pacis libri III.," because in it a fairly complete system of International Law was for the first time built up as an independent branch of the science of law. But there are many writers before Grotius who wrote on special parts of the Law of Nations. They are therefore commonly called "Forerunners of Grotius." The most important of these forerunners are the following: (1) Legnano, Professor of Law in the University of Bologna, who wrote in 1360 his book "De bello, de represaliis, et de duello," which was, however, not printed before 1477; (2) Belli, an Italian jurist and statesman, who

published in 1563 his book, "De re militari et de bello;" (3) Brunus, a German jurist, who published in 1548 his book, "De legationibus;" (4) Victoria, Professor in the University of Salamanca, who published in 1557 his "Relectiones theologicae,"[1] which partly deals with the Law of War; (5) Ayala, of Spanish descent but born in Antwerp, a military judge in the army of Alexandro Farnese, the Prince of Parma. He published in 1582 his book, "De jure et officiis bellicis et disciplina militari;" (6) Suarez, a Spanish Jesuit and Professor at Coimbra, who published in 1612 his "Tractatus de legibus et de legislatore," in which (II. c. 19, n. 8) for the first time the attempt is made to found a law between the States on the fact that they form a community of States; (7) Gentilis, an Italian jurist, who became Professor of Civil Law in Oxford. He published in 1585 his work, "De legationibus," in 1588 and 1589 his "Commentationes de jure belli," in 1598 an enlarged work on the same matter under the title "De jure belli libri tres,"[2] and in 1613 his "Advocatio Hispanica." Gentilis's book "De jure belli" supplies, as Professor Holland shows, the model and the framework of the first and third book of Grotius's "De jure belli ac pacis." "The first step"—Holland rightly says—"towards making International Law what it is was taken, not by Grotius, but by Gentilis."

Grotius.

§ 53. Although Grotius owes much to Gentilis, he is nevertheless the greater of the two and bears by right the title of "Father of the Law of Nations." Hugo Grotius was born at Delft in Holland in 1583.

[1] See details in Holland, Studies, pp. 51–52.

[2] Re-edited in 1877 by Professor Holland. On Gentilis, see Holland, Studies, pp. 1–391; Westlake Chapters, pp. 33–36; Walker, History, I. pp. 249–277.

He was from his earliest childhood known as a "wondrous child" on account of his marvellous intellectual gifts and talents. He began to study law at Leyden when only eleven years old, and at the age of fifteen he took the degree of Doctor of Laws at Orleans in France. He acquired a reputation, not only as a jurist, but also as a Latin poet and a philologist. He first practised as a lawyer, but afterwards took to politics and became involved in political and religious quarrels which led to his arrest in 1618 and condemnation to prison for life. In 1621, however, he succeeded in escaping from prison and went to live for ten years in France. In 1634 he entered into the service of Sweden and became Swedish Minister in Paris. He died in 1635 at Rostock in Germany on his way home from Sweden, whither he had gone to tender his resignation.

Even before he had the intention of writing a book on the Law of Nations Grotius took an interest in matters international. For in 1609, when only twenty-four years old, he published—anonymously at first—a book under the title "Mare liberum,"[1] in which he contended that the open sea could not be the property of any State, whereas the contrary opinion was generally prevalent.[1] But it was not before fourteen years later that Grotius began, during his exile in France, to write his "De Jure Belli ac Pacis libri III.," which was published, after a further two years, in 1625, and of which it has rightly been maintained that no other book, with the single exception of the Bible, has ever exercised a similar influence upon human minds and matters. The whole development

[1] See details with regard to the controversy concerning the freedom of the open sea below, §§ 248–250.

of the modern Law of Nations itself as well as that of the science of the Law of Nations takes root from this for ever famous book. Grotius's intention was originally to write a treatise on the Law of War, since the cruelties and lawlessness of warfare of his time incited him to the work. But thorough investigation into the matter led him further, and thus he produced a system of the Law of Nature and Nations. In the introduction he speaks of many of the authors before him, and he especially quotes Ayala and Gentilis. Yet, although he recognises their influence upon his work, he is nevertheless aware that his system is fundamentally different from those of his forerunners. There was in truth nothing original in Grotius's start from the Law of Nature for the purpose of deducing therefrom rules of a Law of Nations. Other writers before his time, and in especial Gentilis, had founded their works upon it. But nobody before him had done it in such a masterly way and with such a felicitous hand. And it is on this account that Grotius bears not only, as already mentioned, the title of "Father of the Law of Nations," but also that of "Father of the Law of Nature."

Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of a Law of Nations as were eternal, unchangeable, and independent of the special consent of the single States. Long before Grotius, the opinion was generally prevalent that above the positive law, which had grown up by custom or by legislation of a State, there was in existence another law which had its roots in human reason and which could therefore be discovered without any knowledge of positive law. This law of reason was called Law of Nature or Natural Law. But the system of

the Law of Nature which Grotius built up and from which he started when he commenced to build up the Law of Nations, became the most important and gained the greatest influence, so that Grotius appeared to posterity as the Father of the Law of Nature as well as that of the Law of Nations.

Whatever we may nowadays think of this Law of Nature, the fact remains unshaken that for more than two hundred years after Grotius jurists, philosophers, and theologians firmly believed in it. And there is no doubt that, but for the systems of the Law of Nature and the doctrines of its prophets, the modern Constitutional Law and the modern Law of Nations would not be what they actually are. The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. The modern Law of Nations in especial owes its very existence to the theory of the Law of Nature. Grotius did not deny that there existed in his time already a good many customary rules for the international conduct of the States, but he expressly kept them apart from those rules which he considered the outcome of the Law of Nature. He distinguishes, therefore, between the *natural* Law of Nations on the one hand, and, on the other hand, the *customary* Law of Nations, which he calls the *voluntary* Law of Nations. The bulk of Grotius's interest is concentrated upon the natural Law of Nations, since he considered the voluntary of minor importance. But nevertheless he does not quite neglect the voluntary Law of Nations. Although he mainly and chiefly lays down the rules of the natural Law of Nations, he always mentions also voluntary rules concerning the different matters.

Grotius's influence was soon enormous and reached over the whole of Europe. His book [1] went through more than forty-five editions, and many translations have been published.

§ 54. But the modern Law of Nations has another, though minor, founder besides Grotius, and this is an Englishman, Richard Zouche (1590–1660), Professor of Civil Law at Oxford and a Judge of the Admiralty Court. A prolific writer, the book through which he acquired the title of "Second founder of the Law of Nations," appeared in 1650 and bears the title: "Juris et judicii fecialis, sive juris inter gentes, et quaestionum de eodem explicatio, qua, quae ad pacem et bellum inter diversos principes aut populos spectant, ex praecipuis historico jure peritis exhibentur." This little book has rightly been called the first manual of the *positive* Law of Nations. The standpoint of Zouche is totally different from that of Grotius in so far as, according to him, the customary Law of Nations is the most important part of that law, although, as a child of his time, he does not at all deny the existence of a natural Law of Nations. It must be specially mentioned that Zouche is the first who used the term *jus inter gentes* for that new branch of law. Grotius knew very well and says that the Law of Nations is a law *between* the States, but he called it *jus gentium*, and it is due to his influence that until Bentham nobody called the Law of Nations *Inter*national Law. Zouche.

The distinction between the natural Law of Nations, chiefly treated by Grotius, and the customary or voluntary Law of Nations, chiefly treated by Zouche,[2]

[1] See Rivier in Holtzendorff, I. p. 412. The last English translation is that by William Whewell of 1854.

[2] It should be mentioned that already before Zouche, another Englishman, John Selden, in his De jure naturali et gentium

gave rise in the seventeenth and eighteenth centuries to three different schools of writers on the Law of Nations—namely, the "Naturalists," the "Positivists," and the "Grotians."

The Naturalists.

§ 55. "Naturalists," or "Deniers of the Law of Nations," is the appellation of those writers who deny that there is any positive Law of Nations whatever as the outcome of custom or treaties, and who maintain that all Law of Nations is only a part of the Law of Nature. The leader of the Naturalists is Samuel Pufendorf (1632–1694), who occupied the first chair which was founded for the Law of Nature and Nations at a University—namely, that at Heidelberg. Among the many books written by Pufendorf, three are of importance for the science of International Law:—(1) "Elementa jurisprudentiae universalis," 1666; (2) "De jure naturae et gentium," 1672; (3) "De officio hominis et civis juxta legem naturalem," 1673. Starting from the assertion of Hobbes, "De Cive," XIV. 4, that Natural Law is to be divided into Natural Law of individuals and of States, and that the latter is the Law of Nations, Pufendorf[1] adds that outside this Natural Law of Nations no voluntary or positive Law of Nations exists which has the force of real law (*quod quidem legis proprie dictae vim habeat, quae gentes tamquam a superiore profecta stringat*).

The most celebrated follower of Pufendorf is the German philosopher Christian Thomasius (1655–1728), who published in 1688 his "Institutiones juris-

secundum disciplinam ebraeorum (1640), recognised the importance of the positive Law of Nations. The successor of Zouche as a Judge of the Admiralty Court, Sir Leoline Jenkins (1625–1684) ought also to be mentioned. His opinions concerning questions of maritime law and in especial prize law, were of the greatest importance for the development of maritime international law.

[1] De jure naturae et gentium, II. c. 3, § 22.

prudentiae divinae," and in 1705 his "Fundamenta juris naturae et gentium." Of English Naturalists may be mentioned Francis Hutcheson ("System of Moral Philosophy," 1755) and Thomas Rutherford ("Institutes of Natural Law; being the Substance of a Course of Lectures on Grotius read in St. John's College, Cambridge," 1754). Jean Barbeyrac (1674–1744), the learned French translator and commentator of the works of Grotius, Pufendorf, and others, and, further, Jean Jacques Burlamaqui (1694–1748), a native of Geneva, who wrote the "Principes du droit de la nature et des gens," ought likewise to be mentioned.

The Positivists.

§ 56. The "Positivists" are the antipodes of the Naturalists. They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche. The positive writers had not much influence in the seventeenth century, during which the Naturalists and the Grotians carried the day, but their time came in the eighteenth century.

Of seventeenth-century writers, the Germans Rachel and Textor must be mentioned. Rachel published in 1676 his two dissertations, "De jure naturae et gentium," in which he defines the Law of Nations as the law to which a plurality of free States are subjected, and which comes into existence through tacit or express consent of these States (*Jus plurium liberalium gentium pacto sive placito expressim aut tacite initum, quo utilitatis gratia sibi in vicem obligantur*). Textor published in 1680 his "Synopsis juris gentium."

In the eighteenth century the leading Positivists, Bynkershoek, Moser, and Martens, gained an enormous influence.

Cornelius van Bynkershoek (1673–1743), a celebrated Dutch jurist, never wrote a treatise on the Law of Nations, but gained fame through three books dealing with different parts of this Law. He published in 1702 "De dominio maris," in 1721 "De foro legatorum," in 1737 "Quaestionum juris publici libri II." According to Bynkershoek the basis of the Law of Nations is the common consent of the nations which finds its expression either in international custom or in international treaties.

Johann Jakob Moser (1701–1785), a German Professor of Law, published many books concerning the Law of Nations, of which three must be mentioned: (1) "Grundsätze des jetzt üblichen Völkerrechts in Friedenszeiten," 1750; (2) "Grundsätze des jetzt üblichen Völkerrechts in Kriegszeiten," 1752; (3) "Versuch des neuesten europäischen Völkerrechts in Friedens- und Kriegszeiten," 1777–1780. Moser's books are magazines of an enormous number of facts which are of the greatest value for the positive Law of Nations. Moser never fights against the Naturalists, but he is totally indifferent towards the natural Law of Nations, since to him the Law of Nations is positive law only and based on international custom and treaties.

Georg Friedrich von Martens (1756–1821), Professor of Law in the University of Göttingen, also published many books concerning the Law of Nations. The most important is his "Précis du droit des gens moderne de l'Europe," published in 1789, of which William Cobbett published in 1795 at Philadelphia an English translation, and of which as late as

1864 appeared a new edition at Paris with notes by Charles Vergé. Martens began the celebrated collection of treaties which goes under the title "Martens, Recueil des Traités," and is continued to our days.[1] The influence of Martens was great, and even at the present time is considerable. He is not an exclusive Positivist, since he does not deny the existence of natural Law of Nations, and since he sometimes refers to the latter in case he finds a gap in the positive Law of Nations. But his interest is in the positive Law of Nations, which he builds up historically on international custom and treaties.

The Grotians.

§ 57. The "Grotians" stand midway between the Naturalists and the Positivists. They keep up the distinction of Grotius between the natural and the voluntary Law of Nations, but, in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, their interest to both alike. Grotius's influence was so enormous that the majority of the authors of the seventeenth and eighteenth centuries were Grotians, but only two of them have acquired a European reputation—namely, Wolff and Vattel.

Christian Wolff (1679–1754), a German philosopher who was first Professor of Mathematics and Philosophy in the Universities of Halle and Marburg and afterwards returned to Halle as Professor of the Law of Nature and Nations, was seventy years of age when, in 1749, he published his "Jus gentium methodo scientifica pertractatum." In 1750 followed his "Institutiones juris naturae et gentium." Wolff's conception of the Law of Nations is influenced

[1] Georg Friedrich von Martens is not to be confounded with his nephew Charles de Martens, the author of the Causes célèbres de droit des gens and of the Guide diplomatique.

by his conception of the *Civitas gentium maxima*. The fact that there is a Family of Nations in existence is strained by Wolff into the doctrine that the totality of the States forms a world-State above the component member-States, the so-called *civitas gentium maxima*. He distinguishes four different kinds of Law of Nations—namely, the natural, the voluntary, the customary, and that which is expressly created by treaties. The latter two kinds are alterable, and have force only between those single States between which custom and treaties have created them. But the natural and the voluntary Law of Nations are both eternal, unchangeable, and universally binding upon all the States. In contradistinction to Grotius, who calls the customary Law of Nations "voluntary," Wolff names "voluntary" those rules of the Law of Nations which are, according to his opinion, tacitly imposed by the *civitas gentium maxima*, the world-State, upon the member-States.

Emerich de Vattel (1714–1767), a Swiss from Neuchâtel, who entered into the service of Saxony and became her Minister at Berne, did not in the main intend any original work, but undertook the task of introducing Wolff's teachings concerning the Law of Nations into the courts of Europe and to the diplomatists. He published in 1758 his book, "Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains." But it must be specially mentioned that Vattel expressly rejects Wolff's conception of the *civitas gentium maxima* in the preface to his book. Numerous editions of Vattel's book have appeared, and as late as 1863 Pradier-Fodéré re-edited it at Paris. An English translation by Chitty appeared in 1834 and went through several editions.

His influence was very great, and in diplomatic circles his book still enjoys an unshaken authority.

§ 58. Some details concerning the three schools of the Naturalists, Positivists, and Grotians were necessary because these schools are still in existence. I do not, however, intend to give a list of writers on special subjects, and the following list of treatises comprises the more important ones only.

Treatises of the Nineteenth and Twentieth Centuries.

(1) British Treatises.

William Oke Manning: Commentaries on the Law of Nations, 1839; new ed. by Sheldon Amos, 1875.

Archer Polson: Principles of the Law of Nations, 1848; 2nd ed. 1853.

Richard Wildman: Institutes of International Law, 1850.

Sir Robert Phillimore: Commentaries upon International Law, 4 vols., 1854–1861; 3rd ed. 1879–1888.

Sir Travers Twiss: The Law of Nations, etc., 2 vols. 1861–1863; 2nd ed. 1875–1884; French translation, 1887–1889.

Sheldon Amos: Lectures on International Law, 1874.

Sir Edward Shepherd Creasy: First Platform of International Law, 1876.

William Edward Hall: Treatise on International Law, 1880; 5th ed. 1904 (by Atlay).

Sir Henry Sumner Maine: International Law, 1883; 2nd ed. 1894 (Whewell Lectures, not a treatise).

James Lorimer: The Institutes of International Law, 2 vols. 1883–1884; French translation by Nys, 1885.

Leone Levi: International Law, 1888.

T. J. Lawrence: The Principles of International Law, 1895; 3rd ed. 1900.

Thomas Alfred Walker: A Manual of Public International Law, 1895.

Sir Sherston Baker: First Steps in International Law, 1899.

F. E. Smith: International Law, 1900. (One of the Temple Primers.)

John Westlake: International Law, vol. I. (Peace) 1904.

(2) North American Treatises.

James Kent: Commentary on International Law, 1826; English edition by Abdy, Cambridge, 1888.

Henry Wheaton: Elements of International Law, 1836; 8th American ed. by Dana, 1866; 3rd English ed. by Boyd, 1889; 4th English ed. by Atlay, 1904.
Theodore D. Woolsey: Introduction to the Study of International Law, 1860; 5th ed. 1879.
Henry W. Halleck: International Law, 2 vols. 1861; 3rd English ed. by Sir Sherston Baker, 1893.
Francis Wharton: A Digest of the International Law of the United States, 3 vols., 1886. (An official publication.)
George B. Davis: The Elements of International Law, 1887; revised ed. 1899.
Hannis Taylor: A Treatise on International Public Law, 1901.

(3) FRENCH TREATISES.

Funck-Brentano et Albert Sorel: Précis du Droit des Gens, 1877; 2nd ed. 1894.
P. Pradier-Fodéré: Traité de Droit International Public, 7 vols. 1885–1897.
Henry Bonfils: Manuel de Droit International Public, 1894; 4th ed. by Fauchille, 1904.
Frantz Despagnet: Cours de Droit International Public, 1894; 2nd ed. 1899.
Robert Piédelièvre: Précis de Droit International Public, 2 vols. 1894–1895.

(4) GERMAN TREATISES.

Theodor Schmalz: Europäisches Völkerrecht, 1816.
Johann Ludwig Klüber: Droit des Gens moderne, 1819; German ed. under the title of Europäisches Völkerrecht in 1821; last German ed. by Morstadt in 1851, and last French ed. by Ott in 1874.
Friedrich Saalfeld: Handbuch des positiven Völkerrechts, 1833.
August Wilhelm Heffter: Das europäische Völkerrecht der Gegenwart, 1844; 8th ed. by Geffcken, 1888; French translations by Bergson in 1851 and Geffcken in 1883.
Heinrich Bernhard Oppenheim: System des Völkerrechts, 1845; 2nd ed. 1866.
Johann Caspar Bluntschli: Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 1868; 3rd ed. 1878; French translation by Lardy, 1869; 5th ed. 1895.
Adolf Hartmann: Institutionen des praktischen Völkerrechts in Friedenszeiten, 1874; 2nd ed. 1878.

Franz von Holtzendorff: Handbuch des Völkerrechts, 4 vols. 1885–1889. Holtzendorff is the editor and a contributor but there are many other contributors.
August von Bulmerincq: Das Völkerrecht, 1887.
Karl Gareis: Institutionen des Völkerrechts, 1888; 2nd ed. 1901.
E. Ullmann: Völkerrecht, 1898.
Franz von Liszt: Das Völkerrecht, 1898; 3rd ed. 1900.

(5) ITALIAN TREATISES.

Luigi Casanova: Lezioni di diritto internazionale, published after the death of the author by Cabella, 1853; 3rd ed. by Brusa, 1876.
Pasquale Fiore: Trattato di diritto internazionale publico, 1865; 2nd ed. in 3 vols. 1879–1884; French translation by Antoine, 1885.
Giuseppe Carnazza-Amari: Trattato di diritto internazionale di pace, 2 vols. 1867–1875; French translation by Montanari-Pevest, 1881.
Antonio del Bon: Institutioni del diritto publico internazionale, 1868.
Giuseppe Sandona: Trattato di diritto internazionale moderno, 2 vols. 1870.
Gian Battista Pertille: Elementi di diritto internazionale, 2 vols. 1877.
Augusto Pierantoni: Trattato di diritto internazionale, vol. I. 1881. (No further volume has appeared.)

(6) SPANISH AND SPANISH-AMERICAN TREATISES.

Andrés Bello: Principios de derecho de gentes (internacional) 1832, last ed. in 2 vols. by Silva, 1883.
José Maria de Pando: Elementos del derecho internacional, published after the death of the author, 1843–1844.
Antonio Riquelme: Elementos de derecho público internacional etc.; 2 vols. 1849.
Carlos Calvo: Le Droit International etc. (first edition in Spanish, following editions in French), 1868; 5th ed. in 6 vols. 1896.

Amancio Alcorta: Curso de derecho internacional público, vol. I. 1886; French translation by Lehr, 1887.
Marquis de Olivart: Trattato y notas de derecho internacional público, 2 vols. 1887; 4th ed. 1903.

Luis Gestoso y Acosta: Curso de derecho internacional público, 1894.

Miguel Cruchaga: Nociones de derecho internacional, 1899; 2nd ed. 1902.

(7) TREATISES OF AUTHORS OF OTHER NATIONALITIES.

Frederick Kristian Bornemann: Forelæsninger over den positive Folkeret, 1866.

Friedrich von Martens: Völkerrecht, 2 vols. 1883; a German translation by Berghohm of the Russian original. A French translation in 3 vols. appeared in the same year.

Jan Helenus Ferguson: Manual of International Law, etc., 2 vols. 1884. The author is Dutch, but the work is written in English.

Alphonse Rivier: Lehrbuch des Völkerrechts, 1894; 2nd ed. 1899 and the larger work in two vols. under the title: Principes du Droit des Gens, 1896. The author of these two excellent books was a Swiss who taught International Law at the University of Brussels.

H. Matzen: Forelæsninger over den positive Folkeret, 1900.

Ernest Nys: Le droit international, vol. I. 1894. The author of this exhaustive treatise is a Belgian jurist whose researches in the history of the science of the Law of Nations have gained him far-reaching reputation.[1]

The Science of the Law of Nations in the Nineteenth Century, as represented by treatises.

§ 59. The Science of the Law of Nations, as left by the French Revolution, developed progressively during the nineteenth century under the influence of three factors. The first factor is the endeavour, on the whole sincere, of the Powers since the Congress of Vienna to submit to the rules of the Law of Nations. The second factor is the many law-making treaties which arose during this century. And the last, but not indeed the least factor, is the downfall of the theory of the Law of Nature, which after many

[1] This volume of Nys contains treatises as well as monographs, in its pp. 251–328 an exhaustive enumeration of all more important works on International Law, and I have much pleasure in referring my readers to this learned work.

hundreds of years has at last been shaken off during the second half of this century.

When the century opens, the three schools of the Naturalists, the Positivists, and the Grotians are still in the field, but Positivism gains slowly and gradually the upper hand, until at the end it may be said to be victorious without, however, being omnipotent. The most important writer[1] up to 1836 is Klüber, who may be called a Positivist in the same sense as Martens, for he also applies the natural Law of Nations to fill up the gaps of the positive. Wheaton appears in 1836 with his "Elements," and, although an American, at once attracts the attention of the whole of Europe. He may be called a Grotian. And the same may be maintained of Manning, whose treatise appeared in 1839, and is the first that attempts a survey of British practice regarding sea warfare based on the judgments of Sir William Scott (Lord Stowell). Heffter, whose book appeared in 1844, is certainly a Positivist, although he does not absolutely deny the Law of Nature. In exact application of the juristic method, Heffter's book excels all former ones, and all the following authors are in a sense standing on his shoulders. In Phillimore, Great Britain sends in 1854 a powerful author into the arena, who may on the whole be called a Positivist of the same kind as Martens and Klüber. Generations to come will consult Phillimore's volumes on account of the vast material they contain and the sound judgment they exhibit. And the same is valid with regard to Sir Travers Twiss, whose first volume appeared in 1861. Halleck's book, which

[1] I do not intend to discuss the merits of the writers on special subjects, and I mention only the authors of the most important treatises.

appeared in the same year, is of special importance as regards war, because the author, who was a general in the service of the United States, gave to this part his special attention. The next prominent author, the Italian Fiore, who published his system in 1865 and may be called a Grotian, is certainly the most prominent Italian author, and the new edition of his work will for a long time to come be consulted. Bluntschli, the celebrated Swiss-German author, published his book in 1867; it must, in spite of the world-wide fame of its author, be consulted with caution, because it contains many rules which are not yet recognised rules of the Law of Nations. Calvo's book, which first appeared in 1868, contains an invaluable store of facts and opinions, but its juristic basis is not very exact.

From the seventies of the century the influence of the downfall of the theory of the Law of Nature becomes visible in the treatises on the Law of Nations, and therefore real positivistic treatises make their appearance. For the Positivism of Zouche, Bynkershoek, Martens, Klüber, Heffter, Phillimore, and Twiss was no real Positivism, since these authors recognised a natural Law of Nations, although they did not make much use of it. Real Positivism must entirely avoid a natural Law of Nations. We know nowadays that a Law of Nature does not exist. Just as the so-called Natural Philosophy had to give way to real natural science, so the Law of Nature had to give way to jurisprudence, or the philosophy of the positive law. Only a positive Law of Nations can be a branch of the science of law.

The first real positive treatise known to me is Hartmann's "Institutionen des praktischen Völker-

rechts in Friedenszeiten," which appeared in 1874, but is hardly known outside Germany. In 1880 Hall's treatise appeared and at once won the attention of the whole world; it is one of the best books on the Law of Nations that have ever been written.[1] The Russian Martens, whose two volumes appeared in German and French translations in 1883 and at once put their author in the forefront of the authorities, certainly intends to be a real Positivist, but traces of Natural Law are nevertheless now and then to be found in his book. A work of a special kind is that of Holtzendorff, the first volume of which appeared in 1885. Holtzendorff himself is the editor and at the same time a contributor to the work, but there are many other contributors, each of them dealing exhaustively with a different part of the Law of Nations. The copious work of Pradier-Fodéré, which also began to appear in 1885, is far from being positive, although it has its merits. Wharton's three volumes, which appeared in 1886, are not a treatise, but contain the international practice of the United States. In 1894 three French jurists, Bonfils, Despagnet, and Piédelièvre, step into the arena; their treatises are comprehensive and valuable, but not absolutely positive. On the other hand, the English authors Lawrence and Walker, whose treatises appeared in 1895, and Westlake, whose first volume appeared in 1904, are real Positivists, and so are the Swiss-Belgian Rivier, the Germans Ullmann, Liszt, and Gareis, and the American Hannis Taylor.

[1] Lorimer, whose first volume appeared in 1883, is a Naturalist pure and simple.

§ 60. COLLECTION OF TREATIES.

(1) General Collections.

Leibnitz: Codex iuris gentium diplomaticus (1693); Mantissa codicis iuris gentium diplomatici (1700).

Bernard: Recueil des traités, etc. 4 vols. (1700).

Dumont: Corps universel diplomatique, etc., 8 vols. (1726–1731).

Rousset: Supplément au corps universel diplomatique de Dumont, 5 vols. (1739).

Schmauss: Corpus iuris gentium academicum (1730).

Wenck: Codex iuris gentium recentissimi, 3 vols. (1781, 1786, 1795).

Martens: Recueil de Traités d'Alliance, etc., 8 vols. (1791–1808); Nouveau Recueil de Traités d'Alliance, etc., 16 vols. (1817–1842); Nouveaux Suppléments au Recueil de Traités et d'autres Actes remarquables etc., 3 vols. (1839–1842); Nouveau Recueil Général de Traités, Conventions et autres Actes remarquables etc., 20 vols. (1843–1875); Nouveau Recueil Général de Traités et autres Actes relatifs aux Rapports de droit international. Deuxième Série, vol. I. 1876, continued up to date. Present editor, Felix Stoerk, professor in the University of Greifswald in Germany.

Ghillany: Diplomatisches Handbuch, 3 vols. (1855–1868).

Martens et Cussy: Recueil manuel etc., 7 vols. (1846–1857); continuation by Geffcken, 3 vols. (1885–1888).

British and Foreign State Papers: Vol. I. 1814, continued up to date.

Das Staatsarchiv: Sammlung der officiellen Actenstücke zur Geschichte der Gegenwart, vol. I. 1861, continued up to date.

Archives diplomatiques: Recueil mensuel de droit international, de diplomatie et d'histoire, first and second series (1861–1900), third series from 1901 continued up to date (4 vols. yearly).

(2) Collections of English Treaties only.

Jenkinson: Collection of all the Treaties, etc., between Great Britain and other Powers from 1648 to 1783, 3 vols. (1785).

Chalmers: A Collection of Maritime Treaties of Great Britain and other Powers, 2 vols. (1790).

Hertslet: Collection of Treaties and Conventions between Great Britain and other Powers (vol. I. 1820, continued to date).

Treaty Series: Vol. I. 1892, and a volume every year.

§ 61. BIBLIOGRAPHIES.

Ompteda: Litteratur des gesammten Völkerrechts, 2 vols. (1785).

Kamptz: Neue Litteratur des Völkerrechts seit 1784 (1817).

Klüber: Droit des gens moderne de l'Europe (Appendix) (1819).

Mohl: Geschichte und Litteratur der Staatswissenschaften, vol. I. pp. 337-475 (1855).

Rivier: pp. 393-523 of vol. I. of Holtzendorff's Handbuch des Völkerrechts (1885).

Stoerk: Die Litteratur des internationalen Rechts von 1884-1894 (1896).

Olivart: Catalogue d'une bibliothèque de droit international (1899).

Nys: Le droit international, vol. I. (1904), pp. 213-328.

§ 62. PERIODICALS.

Revue de droit international et de législation comparée. It appears in Brussels since 1869, one volume yearly. Present editor: Edouard Rolin.

Revue générale de droit international public. It appears in Paris since 1894, one volume yearly. Founder and present editor, Paul Fauchille.

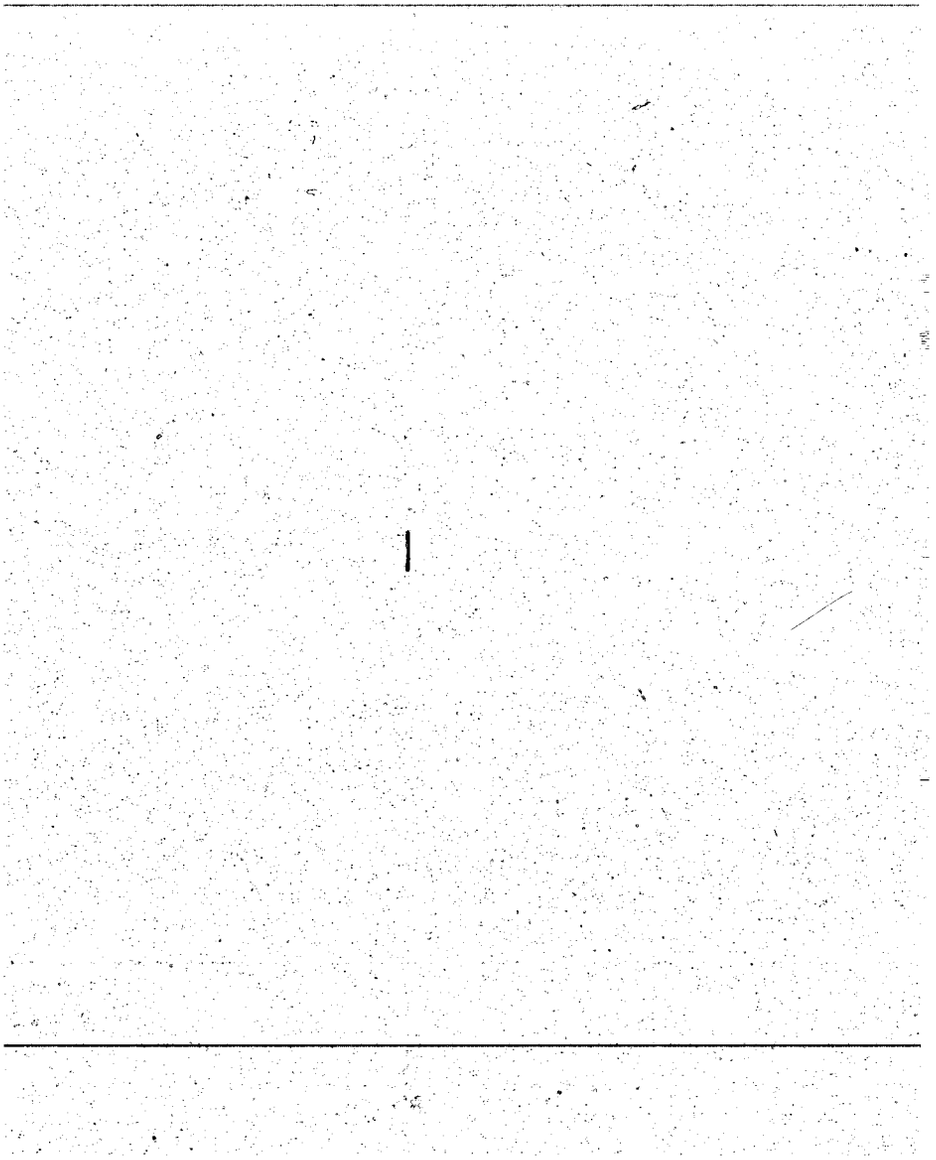
Zeitschrift für internationales privat und öffentliches Recht. It appears in Leipzig since 1891, one volume yearly. Present editor, Theodor Niemeyer.

Annuaire de l'Institut de Droit International, vol. I. 1877. A volume appears after each meeting of the Institute.

Essays and Notes concerning International Law frequently appear also in the Journal du droit international privé et de la Jurisprudence comparée (Clunet), the Archiv für öffentliches Recht, The Law Quarterly Review, The Law Magazine and Review, The Journal of the Society of Comparative Legislation, The American Law Review, the Annalen des deutschen Reiches, the Zeitschrift für das privat- und öffentliche Recht der Gegenwart (Grünhut), the Revue de droit public et de la science politique (Larnaude), the Annales des sciences politiques, the Archivio giuridico.

PART I

THE SUBJECTS OF THE LAW OF NATIONS



CHAPTER I

INTERNATIONAL PERSONS

I

Sovereign States as International Persons

Vattel, I. §§ 1-12—Hall, § 1—Lawrence, § 42—Phillimore, I. §§ 61-69—Twiss, I. §§ 1-11—Taylor, § 117—Walker, § 1—Westlake, I. pp. 1-5, 20-21—Wheaton, §§ 16-21—Ullmann, § 10—Heffter, § 15—Holtzendorff in Holtzendorff, II. pp. 5-11—Bonfils, Nos. 160-164—Despagnet, Nos. 69-74—Pradier-Fodéré, I. Nos. 43-81—Nys, I. pp. 329-356—Rivier, I. § 3—Calvo, I. §§ 39-41—Fiore, I. Nos. 305-309—Martens, I. §§ 53-54.

Real and apparent International Persons

§ 63. The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is, therefore, a member of the Family of Nations, is an International Person. Sovereign States exclusively are International Persons—i.e. subjects of International Law. There are, however, as will be seen, full and not-full Sovereign States. Full Sovereign States are perfect, not-full Sovereign States are imperfect International Persons, for not-full Sovereign States are for some parts only subjects of International Law.

In contradistinction to Sovereign States which are real, there are also apparent, but not real, International Persons—namely, Confederations of States, insurgents recognised as a belligerent Power in a

civil war, and the Holy See. All these are not, as will be seen,[1] real subjects of International Law, but in some points are treated as though they were International Persons, without becoming thereby members of the Family of Nations.

It must be specially mentioned that the character of a subject of the Law of Nations and of an International Person can be attributed neither to monarchs, diplomatic envoys, and private individuals, nor to chartered companies, nations, or races after the loss of their State (as, for instance, the Jews or the Poles), and organised wandering tribes.[2]

Conception of the State.

§ 64. A State proper—in contradistinction to so-called Colonial States—is in existence when a people is settled in a country under its own Sovereign Government. The conditions which must obtain for the existence of a State are therefore four:

There must, first, be a *people*. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.

There must, secondly, be a *country* in which the people has settled down. A wandering people, such as the Jews were whilst in the desert for forty years before their conquest of the Holy Land, is not a State. But it matters not whether the country is small or large; it may consist, as with City States, of one town only.

There must, thirdly, be a *Government*—that is, one

[1] See below, § 88 (Confederations of States), § 106 (Holy See), and Vol. II. §§ 59 and 76 (Insurgents).

[2] Most jurists agree with this opinion, but there are some who disagree. Thus, Heffter (§ 48) claims for monarchs the character of subjects of the Law of Nations, and Lawrence (§§ 42, 54, 55) claims that character for corporations and individuals. The matter will be discussed below in §§ 288, 290 344, 384.

or more persons who are the representatives of the people and rule according to the law of the land. An anarchistic community is not a State.

There must, fourthly and lastly, be a *Sovereign* Government. Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all round, within and without the borders of the country.

Not-full Sovereign States.

§ 65. A State in its normal appearance does possess independence all round and therefore full sovereignty. Yet there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full Sovereign States. All such States as are under the suzerainty or under the protectorate of another State or are member-States of a so-called Federal State, belong to this group. All of them possess supreme authority and independence with regard to a part of the tasks of a State, whereas with regard to another part they are under the authority of another State. Hence it is that the question is disputed whether such not-full Sovereign States can be International Persons and subjects of the Law of Nations at all.[1]

That they cannot be full, perfect, and normal subjects of International Law, there is no doubt. But it is wrong to maintain that they can have no international position whatever and can never be members of the Family of Nations at all. If we look at the

[1] The question will be discussed again below, §§ 89, 91, 93, with regard to each kind of not-full Sovereign States. The object of discussion here is the question whether such States can be considered as International Persons at all. Westlake, I. p. 21, answers it affirmatively by stating: "It is not necessary for a State to be independent in order to be a State of International Law."

matter as it really stands, we observe that they actually often enjoy in many points the rights and fulfil in other points the duties of International Persons. They often send and receive diplomatic envoys or at least consuls, they often conclude commercial or other international treaties, their monarchs enjoy the privileges which according to the Law of Nations the Municipal Laws of the different States must grant to the monarchs of foreign States. No other explanation of these and similar facts can be given except that these not-full Sovereign States are in some way or another International Persons and subjects of International Law. Such imperfect International Personality is, of course, an anomaly; but the very existence of States without full sovereignty is an anomaly in itself. And history teaches that States without full sovereignty have no durability, since they either gain in time full sovereignty or disappear totally as separate States and become mere provinces of other States. So anomalous are these not-full Sovereign States that no hard and fast general rule can be laid down with regard to their position within the Family of Nations, since everything depends upon the special case. What may be said in general concerning all the States without full sovereignty is that their position within the Family of Nations, if any, is always more or less overshadowed by other States. But their partial character of International Persons comes clearly to light when they are compared with so-called Colonial States, such as the Dominion of Canada or the Commonwealth of Australia. Colonial States have no international position whatever; they are, from the standpoint of the Law of Nations, nothing else than colonial portions of the mother country, although they enjoy perfect self-government,

and may therefore in a sense be called States. The deciding factor is that their Governor, who has a *veto*, is appointed by the mother country, and that the Parliament of the mother country could withdraw self-government from its Colonial States and legislate directly for them.

Divisibility of Sovereignty contested.

§ 66. The distinction between States full Sovereign and not-full Sovereign is based upon the opinion that sovereignty is divisible, so that the powers connected with sovereignty need not necessarily be united in one hand. But many jurists deny the divisibility of sovereignty and maintain that a State is either sovereign or not. They deny that sovereignty is a characteristic of every State and of the membership of the Family of Nations. It is therefore necessary to face the conception of sovereignty more closely. And it will be seen that there exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.[1]

Meaning of Sovereignty in the Sixteenth and Seventeenth Centuries.

§ 67. The term Sovereignty was introduced into political science by Bodin in his celebrated book, "De la République," which appeared in 1577. Before Bodin, at the end of the Middle Ages, the word *souverain*[2] was used in France for an authority, political or other, which had no other authority above itself. Thus the highest courts were called

[1] The literature upon sovereignty is extensive. The following authors give a survey of the opinions of the different writers: Dock, Der Souveränitäts-begriff von Bodin bis zu Friedrich dem Grossen, 1897; Merriam, History of the Theory of Sovereignty since Rousseau, 1900; Rehm, Allgemeine Staatslehre, 1899, §§ 10. 16. See also Maine, Early Institutions, pp. 342. 399.

[2] *Souverain* is derived either from the Latin *supcranus*, or from *suprema potestas*.

Cours Souverains. Bodin, however, gave quite a new meaning to the old conception. Being under the influence and in favour of the policy of centralisation initiated by Louis XI. of France (1461–1483), the founder of French absolutism, he defined sovereignty as "the absolute and perpetual power within a State." Such power is the supreme power within a State without any restriction whatever except the Commandments of God and the Law of Nature. No constitution can limit sovereignty, which is an attribute of the king in a monarchy and of the people in a democracy. A Sovereign is above positive law. A contract only is binding upon the Sovereign, because the Law of Nature commands that a contract shall be binding.[1]

The conception of sovereignty thus introduced was at once accepted by writers on politics of the sixteenth century, but the majority of these writers taught that sovereignty could be restricted by a constitution and by positive law. Thus at once a somewhat weaker conception of sovereignty than that of Bodin made its appearance. On the other hand, in the seventeenth century, Hobbes went even beyond Bodin, maintaining[2] that a Sovereign was not bound by anything and had a right over everything, even over religion. Whereas a good many publicists followed Hobbes, others, especially Pufendorf, denied, in contradistinction to Hobbes, that sovereignty includes omnipotence. According to Pufendorf, sovereignty is the supreme power in a State, but not absolute power, and sovereignty may well be constitutionally restricted.[3] But in spite of

[1] See Bodin, De la république, §§ 12–15.
[2] See Hobbes, De cive, c. 6, I. c. 8.
[3] See Pufendorf, De jure naturae et gentium, VII. c. 6, §§ 1–13.

all the differences in defining sovereignty, all authors of the sixteenth and seventeenth centuries agree that sovereignty is indivisible and contains the centralisation of all power in the hands of the Sovereign, whether a monarch or the people itself in a republic. Yet the way for another conception of sovereignty is prepared by Locke, whose "Two Treatises on Government" appeared in 1689, and paved the way for the doctrine that the State itself is the original Sovereign, and that all supreme powers of the Government are derived from this sovereignty of the State.

Meaning of Sovereignty in the Eighteenth Century.

§ 68. In the eighteenth century matters changed again. The fact that the several hundred reigning princes of the member-States of the German Empire had practically, although not theoretically, become more or less independent since the Westphalian Peace, enforced the necessity upon publicists to recognise a distinction between an absolute, perfect, full sovereignty, on the one hand, and, on the other, a relative, imperfect, not-full or half-sovereignty. Absolute and full sovereignty was attributed to those monarchs who enjoyed an unqualified independence within and without their States. Relative and not-full sovereignty, or half-sovereignty, was attributed to those monarchs who were, in various points of internal or foreign affairs of State, more or less dependent upon other monarchs. By this distinction the divisibility of sovereignty was recognised. And when in 1787 the United States of America turned from a Confederation of States into a Federal State, the division of sovereignty between the Sovereign Federal State and the Sovereign member-States appeared. But it cannot be maintained that divisibility of sovereignty was universally recognised in

the eighteenth century. It suffices to mention Rousseau, whose "Contrat Social" appeared in 1762 and defended again the indivisibility of sovereignty. Rousseau's conception of sovereignty is essentially that of Hobbes, since it contains absolute supreme power, but he differs from Hobbes in so far as, according to Rousseau, sovereignty belongs to the people only and exclusively, is inalienable, and therefore cannot be transferred from the people to any organ of the State.

Meaning of Sovereignty in the Nineteenth Century.

§ 69. During the nineteenth century three different factors of great practical importance have exercised their influence on the history of the conception of sovereignty.

The first factor is, that, with the exception of Russia, all civilised Christian monarchies have now turned into more or less constitutional monarchies. Thus identification of sovereignty with absolutism belongs practically to the past, and the fact is now generally recognised that a sovereign monarch may well be restricted in the exercise of his powers by a Constitution and positive law.

The second factor is, that the example of a Federal State set by the United States has been followed by Switzerland, Germany, and others. The Constitution of Switzerland as well as that of Germany declares decidedly that the member-States of the Federal State remain Sovereign States, thus indirectly recognising the divisibility of sovereignty between the member-States and the Federal State according to different matters.

The third and most important factor is, that the science of politics has learned to distinguish between sovereignty of the State and sovereignty of the organ which exercises the powers of the State. The

majority of publicists teach nowadays that neither the monarch, nor Parliament, nor the people is originally Sovereign in a State, but the State itself. Sovereignty, we say nowadays, is a natural attribute of every State as a State. But a State, as a Juristic Person, wants organs to exercise its powers. The organ or organs which exercise for the State powers connected with sovereignty are said to be sovereign themselves, yet it is obvious that this sovereignty of the organ is derived from the sovereignty of the State. And it is likewise obvious that the sovereignty of a State may be exercised by the combined action of several organs, as, for instance, in Great Britain, King and Parliament are the joint administrators of the sovereignty of the State. And it is, thirdly, obvious that a State can, as regards certain matters, have its sovereignty exercised by one organ, and as regards other matters by another organ.

In spite of this condition of things, the old controversy regarding divisibility of sovereignty has by no means died out. It acquired a fresh stimulus, on the one hand, through Switzerland and Germany turning into Federal States, and, on the other, through the conflict between the United States of America and her Southern member-States. The theory of the concurrent sovereignty of the Federal State and its member-States, as defended by "The Federalist" (Alexander Hamilton, James Madison, and John Jay) in 1787, was in Germany taken up by Waitz,[1] whom numerous publicists followed. The theory of the indivisibility of sovereignty was defended by Calhoun,[2] and many European publicists followed him in time.

[1] Politik, 1862. [2] A Disquisition on Government, 1851.

Result of the Controversy regarding Sovereignty.

§ 70. From the foregoing sketch of the history of the conception of sovereignty it becomes apparent that there is not and never was unanimity regarding this conception. It is therefore no wonder that the endeavour has been made to eliminate the conception of sovereignty from the science of politics altogether, and likewise to eliminate sovereignty as a necessary characteristic of statehood, so that States with and without sovereignty would in consequence be distinguishable. It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority. Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs. As there can be no doubt about the fact that there are semi-independent States in existence, it may well be maintained that sovereignty is divisible.

II

Recognition of States as International Persons

Hall, §§ 2 and 26—Lawrence, §§ 56-60—Phillimore, II. §§ 10-23—Taylor, §§ 153-160—Walker, § 1—Westlake, I. pp. 49-58—Wheaton, § 27—Bluntschli, §§ 28-38—Hartmann, § 11—Heffter, § 23—Holtzendorff in Holtzendorff, II. pp. 18-33—Liszt, § 5—Ullmann, §§ 20-21—Bonfils, Nos. 195-213—Despagnet, Nos. 79-85—Pradier-Fodéré, I. Nos. 136-145—Nys, I. pp. 69-115—Rivier, I. § 3—Calvo, I. §§ 87-98—Fiore, I. Nos. 311-320—Martens, I. §§ 63-64—Le Normand, "La reconnaissance internationale et ses diverses applications" (1899).

Recognition a condition of Membership of the Family of Nations.

§ 71. As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not include membership of the Family of Nations. There are States in existence, although their number decreases gradually, which are not, or not

fully, members of that family because their civilisation, if any, does not enable them and their subjects to act in conformity with the principles of International Law. Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members which have been recognised by the body of members already in existence when they were born.[1] For every State that is not already, but wants to be, a member, recognition is therefore necessary. A State is and becomes an International Person through recognition only and exclusively.

Many writers do not agree with this opinion. They maintain that, if a new civilised State comes into existence either by breaking off from an existing recognised State, as Belgium did in 1831, or otherwise, such new State enters of right into the Family of Nations and becomes of right an International Person.[2] They do not deny that practically such recognition is necessary to enable every new State to enter into official intercourse with other States. Yet they assert that theoretically every new State becomes a member of the Family of Nations *ipso facto* by its rising into existence, and that recognition supplies only the necessary evidence for this fact.

If the real facts of international life are taken into consideration, this opinion cannot stand. It is a rule of International Law that no new State has a right towards other States to be recognised by them, and that no State has the duty to recognise a new State. It is generally agreed that a new State before its recognition cannot claim any right which a member

[1] See above, §§ 27 and 28.
[2] See, for instance, Hall, §§ 2 and 26; Ullmann, § 20; Gareis, p. 64; Rivier, I. p. 57.

of the Family of Nations has towards other members. It can, therefore, not be seen what the function of recognition could be if a State entered with its birth really of right into the membership of the Family of Nations. There is no doubt that statehood itself is independent of recognition. International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.

Mode of Recognition.

§ 72. Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an International Person and a member of the Family of Nations. Recognition is given either expressly or tacitly. If a new State asks formally for recognition and receives it in a formal declaration of any kind, it receives express recognition. On the other hand, recognition is tacitly and indirectly given when an old State enters officially into intercourse with the new, be it by sending or receiving a diplomatic envoy,[1] or by concluding a treaty, or by any other act through which it becomes apparent that the new State is actually treated as an International Person.

But no new State has by International Law a right to demand recognition, although practically such recognition cannot in the long run be withheld, because without it there is no possibility of entering into intercourse with the new State. The interests of the old States must suffer quite as much as those of the new State, if recognition is for any length of time refused, and practically these interests in time

[1] Whether the sending of a consul includes recognition is discussed below, § 428.

enforce either express or tacit recognition. History nevertheless records many cases of protracted recognition,[1] and, apart from other proof, it becomes thereby apparent that the granting or the denial of recognition is not a matter of International Law but of international policy.

It must be specially mentioned that recognition by one State is not at all binding upon other States, so that they must follow suit. But in practice such an example, if set by one or more Great Powers and at a time when the new State is really established on a sound basis, will make many other States at a later period give their recognition too.

Recognition under Conditions.

§ 73. Recognition will as a rule be given without any conditions whatever, provided the new State is safely and permanently established. Since, however, the granting of recognition is a matter of policy, and not of law, nothing prevents an old State from making the recognition of a new State dependent upon the latter fulfilling certain conditions. Thus the Powers assembled at the Berlin Congress in 1878 recognised Bulgaria, Montenegro, Servia, and Roumania under the condition only that these States did not[2] impose any religious disabilities on any of their subjects.[3] The meaning of such conditional recognition is not that recognition can be withdrawn in case the condition is not complied with. The nature of the thing makes recognition, if once given, incapable of withdrawal. But conditional recognition, if accepted by the new State, imposes the

[1] See the cases enumerated by Rivier, I. p. 58.

[2] This condition contains a restriction on the personal supremacy of the respective States. See below, § 128.

[3] See arts. 5, 25, 35, and 44 of the Treaty of Berlin of 1878. in Martens, N.R.G. 2nd Ser. III. p. 449.

internationally legal duty upon such State to comply with the condition, failing which a right of intervention is given to the other party for the purpose of making the recognised State comply with the imposed condition.

Recognition timely and precipitate.

§ 74. Recognition is of special importance in those cases where a new State tries to establish itself by breaking off from an existing State in the course of a revolution. And here the question is material whether a new State has really already safely and permanently established itself or only makes efforts to this end without having already succeeded. That in every case of civil war a foreign State can recognise the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands and set up a Government of their own, there is no doubt. But between this recognition as a belligerent Power and the recognition of these insurgents and their part of the country as a new State, there is a broad and deep gulf. And the question is precisely at what exact time recognition of a new State may be given instead of the recognition as a belligerent Power. For an untimely and precipitate recognition as a new State is a violation of the dignity[1] of the mother State, to which the latter need not patiently submit.

In spite of the importance of the question, no hard and fast rule can be laid down as regards the time when it can be said that a State created by revolution has established itself safely and permanently. The characteristic of such safe and permanent esta-

[1] It is frequently maintained that such untimely recognition contains an intervention. But this is not correct, since intervention is (see below, § 134) *dictatorial* interference in the affairs of another State. The question of recognition of the belligerency of insurgents is exhaustively treated by Westlake, I. pp. 50–57.

blishment may be found in the fact either that the revolutionary State has utterly defeated the mother-State, or that the mother-State has ceased to make efforts to subdue the revolutionary State, or even that the mother-State, in spite of its efforts, is apparently incapable of bringing the revolutionary back under its sway. Of course, as soon as the mother-State itself recognises the new State, there is no reason for other States to withhold any longer their recognition, although they have even then no legal obligation to grant it.

The breaking off of the American States from their European mother-State furnishes many illustrative examples. Thus the recognition of the United States by France in 1778 was precipitate. But when in 1782 England herself recognised the independence of the United States, other States could accord recognition too without giving offence to England. Again, when the South American colonies of Spain declared their independence in 1810, no Power recognised the new States for many years. When, however, it became apparent that Spain, although she still kept up her claims, was not able to restore her sway, the United States recognised the new States in 1822, and England followed the example in 1824 and 1825.[1]

State Recognition in contradistinction to other Recognitions.

§ 75. Recognition of a new State must not be confounded with other recognitions. Recognition of insurgents as a belligerent Power has already been mentioned. Besides this, recognition of a change in the form of the government or of change in the title of an old State is a matter of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a

[1] See Gibbs, Recognition: a North American and the South Chapter from the History of the American States, 1863.

foreign State refuses the recognition of a change in the form of the government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly. And if recognition of a new title[1] of an old State is refused, the only consequence is that such State cannot claim any privileges connected with the new title.

III

Changes in the Condition of International Persons

Grotius, II. c. 9, §§ 5-13—Pufendorf, VIII. c. 12—Vattel, I. § 11—Hall, § 2—Halleck, I. pp. 89-92—Phillimore, I. §§ 124-137—Taylor, § 163—Westlake, I. pp. 58-66—Wheaton, §§ 28-32—Bluntschli, §§ 39-53—Hartmann, §§ 12-13—Heffter, § 24—Holtzendorff in Holtzendorff, II. pp. 21-23—Liszt, § 5—Ullmann, §§ 22 and 26—Bonfils, Nos. 214-215—Despagnet, Nos. 86-89—Pradier-Fodéré, I. Nos. 146-157—Nys, I. pp. 399-401—Rivier, I. § 8—Calvo, I. §§ 81-106—Fiore, I. Nos. 321-331—Martens, I. §§ 65-69.

Important in contradistinction to Indifferent Changes.

§ 76. The existence of International Persons is exposed to the flow of things and times. There is a constant and gradual change in their citizens through deaths and births, emigration and immigration. There is a frequent change in those individuals who are at the head of the States, and there is sometimes a change in the form of their governments, or in their dynasties if they are monarchies. There are sometimes changes in their territories through loss or increase of parts thereof, and there are sometimes changes regarding their independence through partial

[1] See below, § 119.

or total loss of the same. Several of these and other changes in the condition and appearance of International Persons are indifferent to International Law, although they may be of great importance for the inner development of the States concerned and directly or indirectly for international policy. Those changes, on the other hand, which are, or may be, of importance to International Law must be divided into three groups according to their influence upon the character of the State concerned as an International Person. For some of these changes affect a State as an International Person, others do not; again, others extinguish a State as an International Person altogether.

Changes not affecting States as International Persons.

§ 77. A State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory. These changes cannot be said to be indifferent to International Law. Although strictly no notification to and recognition by foreign Powers are necessary, according to the Law of Nations, in case of a change in the headship of a State or in its entire dynasty, or if a monarchy becomes a republic or *vice versa*, no official intercourse is possible between the Powers refusing recognition and the State concerned. Although, further, a State can assume any title it likes, it cannot claim the privileges of rank connected with a title if foreign States refuse recognition. And although, thirdly, a State can dispose according to discretion of parts of its territory and acquire as much territory as it likes, foreign Powers may intervene for the purpose of maintaining a balance of power or on account of other vital interests.

But whatever may be the importance of such changes, they neither affect a State as an Inter-

national Person, nor affect the personal identity of the States concerned. Thus, for instance, France retained her personal identity from the time the Law of Nations came into existence until the present day, although she acquired and lost parts of her territory, changed her dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now, finally as it seems, a republic. All her international rights and duties as an International Person remained the very same throughout the centuries in spite of these important changes in her condition and appearance. Even such loss of territory as contains the reduction of a Great Power to a small Power, or such increase of territory and strength as turns a small State into a Great Power, does not affect a State as an International Person. Thus, although through the events of the years 1859–1861 Sardinia acquired the whole territory of the Italian Peninsula and turned into the Great Power of Italy, she remained one and the same International Person.

Changes affecting States as International Persons.

§ 78. Changes which affect States as International Persons are of different character.

(1) As in a Real Union the member-States of the union, although fully independent, make one International Person,[1] two States which hitherto were separate International Persons are affected in that character by entering into a Real Union. For through that change they appear henceforth together as one and the same International Person. And should this union be dissolved, the member-States are again affected, for they now become again separate International Persons.

[1] See below, § 87, where the character of the Real Union is fully discussed.

(2) Other changes affecting States as International Persons are such changes as involve a partial loss of independence on the part of the States concerned. Many restrictions may be imposed upon States without interfering with their independence proper;[1] but certain restrictions involve inevitably a partial loss of independence. Thus if a hitherto independent State comes under the suzerainty of another State and becomes thereby a half-Sovereign State, its character as an International Person is affected. The same is valid with regard to a hitherto independent State which comes under the protectorate of another State. Again, if several hitherto independent States enter into a Federal State, they transfer a part of their sovereignty to the Federal State and become thereby part-Sovereign States. On the other hand, if a vassal State or a State under protectorate is freed from the suzerainty or protectorate, it is thereby affected as an International Person, because it turns now into a full Sovereign State. And the same is valid with regard to a member-State of a Federal State which leaves the union and gains the condition of a full Sovereign State.

(3) States which become permanently neutralised are thereby also affected in their character as International Persons, although their independence remains untouched. But permanent neutralisation alters the condition of a State so much that it thereby becomes an International Person of a particular kind.

Extinction of International Persons.

§ 79. A State ceases to be an International Person when it ceases to exist. Theoretically such extinction of International Persons is possible through emigration

[1] See below, §§ 126–127, where the different kinds of these restrictions are discussed.

or the perishing of the whole population of a State, or through a permanent anarchy within a State. But it is evident that such cases will hardly ever occur in fact. Practical cases of extinction of States are: Merger of one State into another, annexation after conquest in war, breaking up of a State into several States, and breaking up of a State into parts which are annexed by surrounding States.

By voluntarily merging into another State, a State loses all its independence and becomes a mere part of another. In this way the two Principalities of Hohenzollern-Hechingen and Hohenzollern-Sigmaringen merged in 1850 into Prussia. And the same is the case if a State is annexed by another after conquest in war. In this way the Orange Free State and the South African Republic were absorbed by Great Britain in 1901. An example of the breaking up of a State into different States is the division of the Swiss canton of Basle into Basel-Stadt and Basel-Land in 1833. And an example of the breaking up of a State into parts which are annexed by surrounding States, is the absorption of Poland by Russia, Austria, and Prussia in 1795.

IV

Succession of International Persons

Grotius, II. c. 9 and 10—Pufendorf, VIII. c. 12—Hall, §§ 27-29—Phillimore, I. § 137—Halleck, I. pp. 89-92—Taylor, §§ 164-168—Westlake, I. pp. 68-83—Wharton, I. § 5—Wheaton, §§ 28-32—Bluntschli, §§ 47-50—Hartmann, § 12—Heffter, § 25—Holtzendorff in Holtzendorff, II. pp. 33-47—Liszt, § 23—Ullmann, § 23—Bonfils, Nos. 216-233—Despagnet, Nos. 89-102—Pradier-Fodéré, I. Nos. 156-163—Nys, I. pp. 399-401—Rivier, I. § 3, pp. 69-75 and p. 438—Calvo, I. §§ 99-103—Fiore, I. Nos. 349-366—Martens, I. § 67—Appleton, "Des effets des annexions sur les dettes de l'état démembré ou annexé" (1895)—Huber, "Die Staatensuccession" (1898)—Richards in "The Law Magazine and Review," XXVIII. (1903) pp. 139-141.

Common Doctrine regarding Succession of International Persons.

§ 80. Although there is no unanimity among the writers on International Law with regard to the so-called succession of International Persons, nevertheless the following common doctrine can be stated to exist.

A succession of International Persons occurs when one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition.

Universal succession takes place when one International Person is absorbed by another, either through subjugation or through voluntary merger. And universal succession further takes place when a State breaks up into parts which either become separate International Persons of their own or are annexed by surrounding International Persons.

Partial succession takes place, first, when a part of the territory of an International Person breaks off in a revolt and by winning its independence becomes itself an International Person; secondly, when one International Person acquires a part of the territory of another through cession; thirdly, when a hitherto full Sovereign State loses part of its independence

through entering into a Federal State, or coming under suzerainty or under a protectorate, or when a hitherto not-full Sovereign State becomes full Sovereign; fourthly, when an International Person becomes a member of a Real Union or *vice versa*.

Nobody ever maintained that on the successor devolve all the rights and duties of his predecessor. But after stating that a succession takes place, the respective writers try to educe the consequences and to make out what rights and duties do, and what do not, devolve.

Several writers,[1] however, contest the common doctrine and maintain that a succession of International Persons never takes place. Their argument is that the rights and duties of an International Person disappear with the extinguishing Person or become modified according to the modifications an International Person undergoes through losing part of its sovereignty.

How far Succession actually takes place.

§ 81. If the real facts of life are taken into consideration, the common doctrine cannot be upheld. To say that succession takes place in such and such cases and to make out afterwards what rights and duties devolve, shows a wrong method of dealing with the problem. It is certain that no *general* succession takes place according to the Law of Nations. With the extinguishing International Person extinguish its rights and duties as a person. But it is equally wrong to maintain that no succession whatever occurs. For nobody doubts that certain rights and duties actually and really devolve upon an International Person from its predecessor. And since this devolution takes place through the very fact of one International

[1] See Gareis, pp. 66-70, who discusses the matter with great clearness, and Liszt, § 23.

Person following another in the possession of State territory, there is no doubt that, as far as these devolving rights and duties are concerned, a succession of one International Person into the rights and duties of another really does take place. But no general rule can be laid down concerning all the cases in which a succession takes place. These cases must be discussed singly.

Succession in consequence of Absorption.

§ 82. When a State merges voluntarily into another State or when a State is subjugated by another State, the latter remains one and the same International Person and the former becomes totally extinct as an International Person. No succession takes place, therefore, with regard to rights and duties of the extinct State arising either from the character of the latter as an International Person or from its purely political treaties. Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the State which has concluded it. They are personal treaties, and their natural, legal, and necessary presupposition is the existence of the contracting State. But it is controversial whether treaties of commerce, extradition, and the like, of the extinct State remain valid and therefore a succession takes place. The majority of writers correctly, I think, answer the question in the negative, because such treaties are in the main political.

A real succession takes place, however, first, with regard to such international rights and duties of the extinct State as are locally connected with its land, rivers, main roads, railways, and the like. According to the principle *res transit cum suo onere*, treaties of the extinct State concerning boundary lines, repairing of main roads, navigation on rivers, and the like, remain

valid, and all rights and duties arising from such treaties devolve from the extinct on the absorbing State.

A real succession, secondly, takes place with regard to the fiscal property and the fiscal funds of the extinct State. They both accrue to the absorbing State *ipso facto* by the absorption of the extinct State.[1] But the debts of the extinct State must, on the other hand, be taken over by the absorbing State also.[2] The private creditor of an extinct State certainly acquires no right by International Law against the absorbing State, since the Law of Nations is a law between States only and exclusively. But if he is a foreigner, the right of protection due to his home State enables the latter to exercise pressure upon the absorbing State for the purpose of making it fulfil its international duty to take over the debts of the extinct State. Some jurists[3] go so far as to maintain that the succeeding State must take over the debts of the extinct State, even when they are higher than the value of the accrued fiscal property and fiscal funds. But I doubt whether in such cases the practice of the States would follow that opinion. On the other hand, a State which has subjugated

[1] This was recognised by the High Court of Justice in 1866 in the case of the United States *v.* Prioleau. See Snow, Cases on International Law (1902), p. 85.

[2] This is almost generally recognised by the writers on International Law and by the practice of the States. (See Huber, p. 156 and p. 282, note 449.) The Report of the Transvaal Concessions Commission (see British State Papers, South Africa, 1901, Cd. 623), although it declares (p. 7) that "it is clear that a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist," nevertheless agrees that "the modern usage of nations has tended in the acknowledgment of such contracts." It may, however, safely be maintained that not a usage, but a real rule of International Law, based on custom, is in existence with regard to this point. (See Hall, § 29, and Westlake in The Law Quarterly Review, XVII. (1901), pp. 392–401, and now Westlake, I. pp. 74–82.)

[3] See Martens, I. § 67; Heffter, § 25; Huber, p. 158.

another would be obliged[1] to take over even such obligations as have been incurred by the annexed State for the immediate purpose of the war which led to its subjugation.[2]

Succession in consequence of Dismemberment.

§ 83. When a State breaks off into fragments which become States and International Persons themselves, or which are annexed by surrounding States, it becomes extinct as an International Person, and the same rules are valid as regards the case of absorption of one State by another. A difficulty is, however, created when the territory of the extinct State is absorbed by several States. Succession actually takes place here too, first, with regard to the international rights and duties locally connected with those parts of the territory which the respective States have absorbed. Succession, secondly, takes place with regard to the fiscal property and the fiscal funds which each of the several absorbing States finds on the part of the territory it absorbs. And the debts of the extinct State must be taken over. But the case is complicated through the fact that there are several successors to the fiscal property and funds, and the only rule which can be laid down is that proportionate parts of the debts must be taken over by the different successors.

§ 84. When in consequence of war or otherwise

[1] See the Report of the Transvaal Concession Commission, p. 9. which maintains the contrary. Westlake (I. p. 78) adopts the reasoning of this report, but his arguments are not decisive. The lending of money to a belligerent under ordinary mercantile conditions is not prohibited by International Law, although the carriage of such funds in cash on neutral vessels to the enemy falls under the category of carriage of contraband, and can be punished by the belligerents. (See below, Vol. II. § 352.)

[2] The question how far concessions granted by a subjugated State to a private individual or to a company must be upheld by the subjugating State, is difficult to answer in its generality. The merits of each case would seem to have to be taken into consideration. (See Westlake, I. p. 82.)

Succession in case of Separation or Cession.

one State cedes a part of its territory to another, or when a part of the territory of a State breaks off and becomes a State and an International Person of its own, succession takes place with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded or broken off, and with regard to the fiscal property found on that part of the territory. It would only be just, if the successor had to take over a corresponding part of the debt of its predecessor, but no rule of International Law concerning this point can be said to exist, although many treaties have stipulated a devolution of a part of the debt of the predecessor upon the successor.[1] Thus, for instance, arts. 9, 33, 42 of the Treaty of Berlin[2] of 1878 stipulate that Bulgaria, Montenegro, and Servia should take over a part of the Turkish debt.

[1] Many writers, however, maintain that there is such a rule of International Law. (See Huber, Nos. 125–135 and 205, where the respective treaties are enumerated.)

[2] See Martens, N.R.G. 2nd ser III. p. 449.

V

Composite International Persons

Pufendorf, VII. c. 5—Hall, § 4—Westlake, I. pp. 31–37—Phillimore, I. §§ 71–74, 102–105—Twiss, I. §§ 37–60—Halleck, I. pp. 70–74—Taylor, § 120–130—Wheaton, §§ 39–51—Hartmann, § 70—Heffter §§ 20–21—Holtzendorff in Holtzendorff, II. pp. 118–141—Liszt, § 6—Ullmann, §§ 11–15—Bonfils, Nos. 165–174—Despagnet, Nos. 109–126—Pradier-Fodéré, I. Nos. 117–123—Nys, I. pp. 367–378—Rivier, I. §§ 5–6—Calvo, I. §§ 44–61—Fiore, I. Nos. 335–339—Martens, I. §§ 56–59—Pufendorf, "De systematibus civitatum" (1675)—Jellinek, "Die Lehre von den Staatenverbindungen" (1882)—Borel, "Etude sur la souveraineté de l'Etat fédératif" (1886)—Brie, "Theorie der Staatenverbindungen" (1886)—Hart, "Introduction to the Study of Federal Government" in "Harvard Historical Monographs" (1891; comprises an excellent bibliography)—Le Fur, "Etat fédéral et confédération d'Etats" (1896).

Real and apparent Composite International Persons.

§ 85. International Persons are as a rule single Sovereign States. In such single States there is one central political authority as Government which represents the State, within its borders as well as without, in the international intercourse with other International Persons. Such single States may be called *simple* International Persons. And a State remains a simple International Person, although it may grant so much internal independence to outlying parts of its territory that these parts become in a sense States themselves, and thus the whole becomes an Incorporate Union. Great Britain is a simple International Person, although the Dominion of Canada and the Commonwealth of Australia, as well as their member-States, are now States of their own, because Great Britain is alone Sovereign and represents exclusively the British Empire within the Family of Nations.

Historical events, however, have created, in addition to the simple International Persons, *com-*

posite International Persons. A composite International Person is in existence when two or more Sovereign States are linked together in such a way that they take up their position within the Family of Nations either exclusively or at least to a great extent as one single International Person. History has produced two different kinds of such composite International Persons—namely, Real Unions and Federal States. In contradistinction to Real Unions and Federal States, a so-called Personal Union and the union of so-called Confederated States are not International Persons.[1]

States in Personal Union.

§ 86. A Personal Union is in existence when two Sovereign States and separate International Persons are linked together through the accidental fact that they have the same individual as monarch. Thus a Personal Union existed from 1714 to 1837 between Great Britain and Hanover, and from 1815 to 1890 between the Netherlands and Luxemburg. The only Personal Union existing at present is that between Belgium and the Congo Free State since 1885. A Personal Union is not, and is in no point treated as though it were, an International Person, and its two Sovereign member-States remain separate International Persons. Theoretically it is even possible that they make war against each other, although practically this will never occur. If, as sometimes happens, they are represented by one and the same individual as diplomatic envoy, such individual is the

[1] I cannot agree with Westlake (I. p. 37) that "the space which some writers devote to the distinctions between the different kinds of union between States" is "disproportioned . . . to their international importance." Very important questions are connected with these distinctions. The question, for instance, whether a diplomatic envoy sent by Bavaria to this country must be granted the privileges due to a foreign diplomatic envoy depends upon the question whether Bavaria is an International Person in spite of her being a member-State of the German Empire.

envoy of both States at the same time, but not the envoy of the Personal Union.

States in Real Union.

§ 87. A Real Union is in existence when two Sovereign States are by an international treaty, recognised by other Powers, linked together for ever under the same monarch, so that they make one and the same International Person. A Real Union is not a State of its own, but merely a union of two full Sovereign States which together make one single but composite International Person. They form a compound Power, and are by the treaty of union prevented from making war against each other. On the other hand, they cannot make war separately against a foreign Power, nor can war be made against one of them separately. They can enter into separate treaties of commerce, extradition, and the like, but it is always the Union which concludes such treaties for the separate States, as they separately are not International Persons. It is, for instance, Austria-Hungary which concludes an international treaty of extradition between Hungary and a foreign Power. Real Unions at present in existence outside the German Empire are those of Austria-Hungary and Sweden-Norway.

Austria-Hungary became a Real Union in 1723. In 1849, Hungary was united with Austria, but in 1867 Hungary became again a separate Sovereign State and the Real Union was re-established. Their army, navy, and foreign ministry are united. The Emperor-king declares war, makes peace, concludes alliances and other treaties, and sends and receives the same diplomatic envoys for both States.

Sweden-Norway became a Real Union[2] in 1814.

[1] There is a Real Union between Saxe-Coburg and Saxe-Gotha within the German Empire.

[2] This is not universally recog-

The King declares war, makes peace, concludes alliances and other treaties, and sends and receives the same diplomatic envoys for both States. The Foreign Secretary of Sweden manages at the same time the foreign affairs of Norway. Both States have, however, in spite of the fact that they make one and the same International Person, different commercial and naval flags; and it is intended in future to divide also their consular service.

Confederated States (Staatenbund).

§ 88. Confederated States (Staatenbund) are a number of full Sovereign States linked together for the maintenance of their external and internal independence, by a recognised international treaty into a union with organs of its own, which are vested with a certain power over the member-States but not over the citizens of these States. Such a union of Confederated States is no more a State of its own than a Real Union is; it is merely an International Confederation of States, a society of international character, since the member-States remain full Sovereign States and separate International Persons. Consequently, the union of Confederated States is not an International Person, although it is for some parts so treated on account of its representing the compound power of the full Sovereign member-States. The chief and sometimes the only organ of the union is a Diet, where the member-States are represented through diplomatic envoys. The power vested in the Diet is an International Power which does not in the least affect the full sovereignty of the member-States. That power is essentially nothing else than the right of the body of the members to make war

nised. Phillimore, I. § 74, maintains that there is a Personal Union between Sweden and Norway, and Twiss, I. § 40, calls it a Federal Union.

against such a member as will not submit to those commandments of the Diet which are in accordance with the Treaty of Confederation, in all other cases war between the member-States being prohibited.

History has shown that Confederated States represent an organisation which in the long run gives very little satisfaction. It is for that reason that the three important unions of Confederated States of modern times—namely, the United States of America, the German, and the Swiss Confederation—have turned into unions of Federal States. Notable historic Confederations are those of the Netherlands from 1580 to 1795, the United States of America from 1778 to 1787, Germany from 1815 to 1866, Switzerland from 1291 to 1798 and 1815 to 1848, and the Confederation of the Rhine (Rheinbund) from 1806 to 1813. At present there is only one union of Confederated States, if any, in existence—namely, the major Republic of Central America,[1] consisting of the three full Sovereign States of Honduras, Nicaragua, and San Salvador.

Federal States (Bundesstaaten).

§ 89. A Federal State[2] is a perpetual union of several Sovereign States which has organs of its own and is invested with a power, not only over the member-States, but also over their citizens. The union is based, first, on an international treaty of the member-States, and, secondly, on a subsequently accepted constitution of the Federal State. A Federal State is said to be a real State side by side with its member-States because its organs have a

[1] This union dates from 1895. See R.G. II. p. 568, where a translation of the Treaty of Union is given. (See also R.G. III. p. 599 and IV. p. 146.)

[2] The distinction between Confederated States and a Federal State is not at all universally recognised, and the terminology is consequently not at all the same with all writers on International Law.

direct power over the citizens of these member-States. This power was established as a characteristic distinction of a Federal State from Confederated States by American[1] jurists of the eighteenth century, and Kent as well as Story, the two later authorities on the Constitutional Law of the United States, adopted this distinction, which is indeed kept up until to-day by the majority of writers on politics. Now if a Federal State is recognised as a State of its own, side by side with its member-States, it is evident that sovereignty must be divided between the Federal State on the one hand, and, on the other, the member-States. This division is made in this way, that the competence over one part of the objects for which a State is in existence is handed over to the Federal State, whereas the competence over the other part remains with the member-States. Within its competence the Federal State can make laws which bind the citizens of the member-States directly without any interference of these member-States. On the other hand, the member-States are totally independent as far as *their* competence reaches.

For International Law this division of competence is only of interest in so far as it concerns the competence in *international* matters. Since it is always

[1] When in 1787 the draft of the new Constitution of the United States, which had hitherto been Confederated States only, was under consideration by the Congress at Philadelphia, three members of the Congress—namely, Alexander Hamilton, James Madison, and John Jay—made up their minds to write newspaper articles on the draft Constitution with the intention of enlightening the nation which had to vote for the draft. For this purpose they divided the different points among themselves and treated them separately. All these articles, which were not signed with the names of their authors, appeared under the common title "The Federalist." They were later on collected into book-form and have been edited several times. It is especially Nos. 15 and 16 of "The Federalist" which establish the difference between Confederated States and a Federal State in the way mentioned in the text above.

the Federal State which is competent to declare war, make peace, conclude treaties of alliance and other political treaties, and send and receive diplomatic envoys, whereas no member-State can of itself declare war against a foreign State, make peace, conclude alliances and other political treaties, the Federal State, if recognised, is certainly an International Person of its own, with all the rights and duties of a sovereign member of the Family of Nations. On the other hand, the international position of the member-States is not so clear. It is frequently maintained that they have totally lost their position within the Family of Nations. But this opinion cannot stand if compared with the actual facts. Thus, the member-States of the Federal State of Germany have retained their competence to send and receive diplomatic envoys, not only in intercourse with one another, but also with foreign States. Further, the reigning monarchs of these member-States are still treated by the practice of the States as heads of Sovereign States, a fact without legal basis if these States were no longer International Persons. Thirdly, the member-States of Germany as well as of Switzerland have retained their competence to conclude international treaties between themselves without the consent of the Federal State, and they have also retained the competence to conclude international treaties with foreign States as regards matters of minor interest. If these facts are taken into consideration, one is obliged to acknowledge that the member-States of a Federal State can be International Persons in a degree. Full subjects of International Law, International Persons with all the rights and duties regularly connected with the membership of the Family of Nations, they certainly cannot be. Their

position, if any, within this circle is overshadowed by their Federal State, they are part-Sovereign States, and they are, consequently, International Persons for some parts only.

But it happens frequently that a Federal State assumes *in every way* the external representation of its member-States, so that, so far as international relations are concerned, the member-States do not make an appearance at all. This is the case with the United States of America and all those other American Federal States whose Constitution is formed according to the model of that of the United States. Here the member-States are sovereign too, but only with regard to *internal*[1] affairs. All their external sovereignty being absorbed by the Federal State, it is certainly a fact that they are not International Persons at all so long as this condition of things lasts.

This being so, two classes of Federal States must be distinguished according to whether their member-States are or are not International Persons, although Federal States are in any case composite International Persons. And whenever a Federal State comes into existence which leaves the member-States for some parts International Persons, the recognition granted to it by foreign States must include their readiness to recognise for the future, on the one hand, the body of the member-States, the Federal State, as one composite International Person regarding all important matters, and, on the other hand, the single member-States as International Persons with regard to less important matters and side by side

[1] The Courts of the United States of America have always upheld the theory that the United States are sovereign as to all powers of government actually surrendered, whereas each member-State is sovereign as to all powers reserved. (See Merriam, History of the Theory of Sovereignty since Rousseau (1900), p. 163.)

with the Federal State. That such a condition of things is abnormal and illogical cannot be denied, but the very existence of a Federal State besides the member-States is quite as abnormal and illogical.

The Federal States in existence are the following:—The United States of America since 1787, Switzerland since 1848, Germany since 1871, Mexico since 1857, Argentine since 1860, Brazil since 1891, Venezuela since 1893.

VI

Vassal States

Hall, § 4—Westlake, I. pp. 25-27—Lawrence, § 50—Phillimore, I. §§ 85-99—Twiss, I. §§ 22-36, 61-73—Taylor, §§ 140-144—Wheaton, § 37—Bluntschli, §§ 76-77—Hartmann, § 16—Heffter, §§ 19 and 22—Holtzendorff in Holtzendorff, II. pp. 98-117—Liszt, § 6—Ullmann, § 16—Gareis, § 15—Bonfils, Nos. 188-190—Despagnet, Nos. 127-129—Pradier-Fodéré, I. Nos. 109-112—Nys, I. pp. 357-364—Rivier, I. § 4—Calvo, I. §§ 66-72—Fiore, I. No. 341—Martens, I. §§ 60-61—Stubbs, "Suzerainty" (1884)—Baty, "International Law in South Africa" (1900), pp. 48-68—Boghitchévitch, "Halbsouveränität" (1903).

The Union between Suzerain and Vassal State.

§ 90. The union and the relations between a Suzerain and its Vassal State create much difficulty in the science of the Law of Nations. As both are separate States, a union of States they certainly make, but it would be wrong to say that the Suzerain State is, like the Real Union of States or the Federal State, a composite International Person. And it would be equally wrong to maintain either that a Vassal State can be in no way a separate International Person of its own, or that it is an International Person of the same kind as any other State. What makes the matter so complicated, is the fact that a general rule regarding the relation between the

suzerain and vassal, and, further regarding the position, if any, of the vassal within the Family of Nations, cannot be laid down, as everything depends upon the special case. What can and must be said is that there are some States in existence which, although they are independent of another State as regards their internal affairs, are as regards their international affairs either absolutely or for the most part dependent upon another State. They are called half-Sovereign[1] States because they are sovereign within their borders but not without. The full Sovereign State upon which such half-Sovereign States are either absolutely or for the most part internationally dependent, is called the Suzerain State.

Suzerainty is a term which originally was used for the relation between the feudal lord and his vassal; the lord was said to be the suzerain of the vassal, and at that time suzerainty was a term of Constitutional Law. With the disappearance of the feudal system, suzerainty of this kind likewise disappeared. The modern suzerainty scarcely contains rights of the Suzerain State over the Vassal State which could be called constitutional rights. The rights of the Suzerain State over the Vassal are principally international rights only, of whatever they may consist. Suzerainty is by no means sovereignty. If it were, the Vassal State could not be Sovereign in its domestic affairs and could never have any international relations whatever of its own. And why should suzerainty be distinguished from sovereignty if it were a term synonymous with sovereignty? One may correctly maintain that *suzerainty is a kind of international*

[1] In contradistinction to the States which are under suzerainty or protectorate, and which are commonly called *half*-Sovereign States, I call member-States of a Federal State *part*-Sovereign States.

guardianship, since the Vassal State is either absolutely or mainly represented internationally by the Suzerain State.

§ 91. The fact that the relation between the suzerain and the vassal depends always upon the special case, excludes the possibility of laying down a general rule as regards the position of Vassal States within the Family of Nations. It is certain that a Vassal State as such need not have any position whatever within the Family of Nations. In every case in which a Vassal State has absolutely no relation whatever with other States, since the suzerain absorbs these relations entirely, such vassal remains nevertheless a half-Sovereign State on account of its internal independence, but it has no [1] position whatever within the Family of Nations, and consequently is for no part whatever an International Person and a subject of International Law. Yet instances can be given which demonstrate that Vassal States can have some small and subordinate position within that family, and that they must in consequence thereof in some few points be considered as International Persons. Thus Egypt can conclude commercial and postal treaties with foreign States without the consent of suzerain Turkey, and Bulgaria can conclude treaties regarding railways, post, and the like. Thus, further, Bulgaria as well as Egypt can send and receive consuls as diplomatic agents. Thus, thirdly, the former South African Republic, although in the opinion of Great Britain under her suzerainty, could conclude all kinds of treaties with

International Position of Vassal States.

[1] This is the position of the Indian Vassal States of Great Britain, which have no international relations and communications whatever either between themselves or with foreign States. (See Westlake, Chapters, pp. 211–219, and now Westlake, I. pp. 41–43.)

other States, provided Great Britain did not interpose a *veto* within six months after receiving a copy of the draft treaty, and was absolutely independent in concluding treaties with the neighbouring Orange Free State. Again, Egypt possesses since 1898 together with Great Britain *condominium*[1] over the Soudan, which means that both exercise conjointly sovereignty over this territory. Although Vassal States have not the right to make war independently of their suzerain, Bulgaria nevertheless fought a war against the full-Sovereign Servia in 1885, and Egypt conquered conjointly with Great Britain the Soudan in 1898.

How could all these and other facts be explained, if Vassal States could never for some small part be International Persons?

Side by side with these facts stand, of course, other facts which show that for the most part the Vassal State, even if it has some small position of its own within the Family of Nations, is considered a mere portion of the Suzerain State. Thus all international treaties concluded by the Suzerain State are *ipso facto* concluded for the vassal, if an exception is not expressly mentioned or self-evident. Thus, again, war of the suzerain is *ipso facto* war of the vassal. Thus, thirdly, the suzerain bears within certain limits a responsibility for actions of the Vassal State.

Under these circumstances it is generally admitted that the conception of suzerainty lacks juridical precision, and experience teaches that Vassal States do not remain half-Sovereign for long. They either shake off suzerainty and turn into full-Sovereign States, as Roumania, Servia, and Montenegro did in 1878, or they lose their half-sovereignty through annexation, as in the case of the South African

[1] See below, § 171.

Republic in 1901, or merger, as the half-Sovereign Seignory of Kniephausen in Germany merged in 1854 into its suzerain Oldenburg.

Vassal States of importance which are for some parts International Persons are, at present, Bulgaria,[1] Egypt,[2] and Crete.[3] They are all three under Turkish suzerainty, although Egypt is actually under the administration of Great Britain.

VII

States under Protectorate

Hall, §§ 4 and 38*—Westlake, I. pp. 22-24—Lawrence, § 50—Phillimore, I. 75-82—Twiss, I. §§ 22-36—Taylor, §§ 134-139—Wheaton, §§ 34-36—Bluntschli, § 78—Hartmann, § 9—Heffter, §§ 19 and 22—Holtzendorff in Holtzendorff, II. pp. 98-117—Gareis, § 15—Liszt, § 6—Ullmann, § 17—Bonfils, Nos. 176-187—Despagnet, Nos. 130-136—Pradier-Fodéré, I. Nos. 94-108—Nys, I. pp. 364-366—Rivier, I. § 4—Calvo, I. §§ 62-65—Fiore, I. § 341—Martens, I. §§ 60-61—Heilborn, "Das völkerrechtliche Protectorat" (1891)—Engelhardt, "Les Protectorats, etc." (1896)—Gairal, "Le protectorat international" (1896)—Despagnet, "Essai sur les protectorats" (1896)—Boghitchévitch, "Halbsouveränität" (1903).

Conception of Protectorate.

§ 92. Legally and materially different from suzerainty is the relation of protectorate between two States. It happens that a weak State surrenders itself by treaty into the protection of a strong and mighty State in such a way that it transfers the management[4] of all its more important international affairs to the protecting State. Through such treaty

[1] See Holland, The European Concert in the Eastern Question (1885), pp. 277-307.

[2] See Holland, The European Concert in the Eastern Question (1885), pp. 89-205; Grünau, Die staats- und völkerrechtliche Stellung Aegyptens (1903); Cocheris, Situation internationale de l'Egypte et du Soudan (1903). The last two books ought to be read with caution, since they are deeply tinged with Anglophobia.

[3] See Streit in R.G. X. (1903), pp. 399-417.

[4] A treaty of protectorate must not be confounded with a treaty of protection in which one or more strong States promise to protect a weak State without absorbing the international relations of the latter.

an international union is called into existence between the two States, and the relation between them is called protectorate. The protecting State is internationally the superior of the protected State, the latter has with the loss of the management of its more important international affairs lost its full sovereignty and is henceforth only a half-Sovereign State. Protectorate is, however, a conception which, just like suzerainty, lacks exact juristic precision, as its real meaning depends very much upon the special case. Generally speaking, protectorate may, again like suzerainty, be called *a kind of international guardianship*.

International position of States under Protectorate.

§ 93. The position of a State under protectorate within the Family of Nations cannot be defined by a general rule, since it is the treaty of protectorate which indirectly specialises it by enumerating the reciprocal rights and duties of the protecting and the protected State. Each case must therefore be treated according to its own merits. Thus the question whether the protected State can conclude certain international treaties and can send and receive diplomatic envoys, as well as other questions, must be decided from the basis of the individual treaty of protectorate. In any case, recognition of the protectorate on the part of third States is necessary to enable the superior State to represent the protected State internationally. But it is characteristic of the protectorate, in contradistinction to suzerainty, that the protected State always has and retains for some parts a position of its own within the Family of Nations, and that it is always for some parts an International Person and a subject of International Law. It is never in any respect considered a mere portion of the superior State. It is, therefore, not

necessarily a party in a war[1] of the superior State against a third, and treaties concluded by the superior State are not *ipso facto* concluded for the protected State. And, lastly, it can at the same time be under the protectorate of two different States, which, of course, must exercise the protectorate conjointly.

In Europe there are at present only two very small States under protectorate—namely, the republic of Andorra, under the joint protectorate of France and Spain,[2] and the republic of San Marino, an enclosure of Italy, which was formerly under the protectorate of the Papal States and is now under that of Italy. The Principality of Monaco, which was under the protectorate at first of Spain until 1693, afterwards of France until 1815, and then of Sardinia, has now through custom become a full Sovereign State, since Italy has never[3] exercised the protectorate. The Ionian Islands, which were under British protectorate since 1815, merged into the Kingdom of Greece in 1863.

Protectorates outside the Family of Nations.

§ 94. Outside Europe there are numerous States under the protectorate of European States, but all of them are non-Christian States of such a civilisation as would not admit them as full members of the Family of Nations, apart from the protectorate under which they are now. And it may therefore be questioned whether they have any real position within the Family of Nations at all. As the protectorate over them is recognised by third States, the latter are legally prevented from exercising any political influence in these protected States, and, failing special treaty rights, they have no right to

[1] This was recognised by the English Prize Courts during the Crimean War with regard to the Ionian Islands, which were then still under British protectorate. (See Phillimore, I. § 77.)

[2] This protectorate is exercised for Spain by the Bishop of Urgel.

[3] This is a clear case of *desuetudo*.

interfere if the protecting State annexes the protected State and makes it a mere colony of its own, as, for instance, France did with Madagascar in 1896. Protectorates of this kind are actually nothing else than the first step to annexation.[1] Since they are based on treaties with real States, they cannot in every way be compared with the so-called protectorates over African tribes which European States acquire through a treaty with the chiefs of these tribes, and by which the respective territory is preserved for future occupation on the part of the so-called protector.[2] But actually they always lead to annexation, if the protected State does not succeed in shaking off by force the protectorate, as Abyssinia did in 1896 when she shook off the pretended Italian protectorate.

VIII

Neutralised States

Westlake, I. pp. 27-30—Lawrence, §§ 52 and 246—Taylor, § 133—Bluntschli, § 745—Heffter, § 145—Holtzendorff in Holtzendorff, II. pp. 643-646—Gareis, § 15—Liszt, § 6—Ullmann, § 18—Bonfils, Nos. 348-369—Despagnet, Nos. 137-146—Pradier-Fodéré, II. Nos. 1001-1015—Nys, I. pp. 379-398—Rivier, I, § 7—Calvo, IV, §§ 2596-2610—Piccioni's "Essai sur la neutralité perpétuelle" (2nd ed. 1902)—Regnault, "Des effets de la neutralite perpétuelle" (1898)—Tswettcoff, "De la situation juridique des états neutralisés" (1895).

Conception of Neutralised States.

§ 95. A neutralised State is a State whose independence and integrity are for all the future guaranteed by an international convention of the Powers, under the condition that such State binds itself never to take up arms against any other State except for

[1] Examples of such non-Christian States under protectorate are Zanzibar under Great Britain and Tunis under France.

[2] See below, § 226.

defence against attack, and never to enter into such international obligations as could indirectly drag it into war. The reason why a State asks or consents to become neutralised is that it is a weak State and does not want an active part in international politics, being exclusively devoted to peaceable developments of welfare. The reason why the Powers neutralise a weak State may be a different one in different cases. The chief reasons have been hitherto the balance of power in Europe and the interest in keeping up a weak State as a so-called Buffer-State between the territories of Great Powers.

Not to be confounded with neutralisation of States is neutralisation of parts of States,[1] of rivers, canals, and the like, which has the effect that war cannot there be made and prepared.

Act and Condition of Neutralisation.

§ 96. Without thereby becoming a neutralised State, every State can conclude a treaty with another State and undertake the obligation to remain neutral if such other State enters upon war. The act through which a State becomes a neutralised State for all the future is always an international treaty of the Powers between themselves and between the State concerned, by which treaty the Powers guarantee collectively the independence and integrity of the latter State. If all the Great Powers do not take part in the treaty, those which do not take part in it must at least give their tacit consent by taking up an attitude which shows that they agree to the neutralisation, although they do not guarantee it. In guaranteeing the permanent neutrality of a State the contracting Powers enter into the obligation not to violate on their part the independence of the neutral State and to prevent other States from such violation. But the neutral

[1] See below, vol. II. § 72.

State becomes, apart from the guaranty, in no way dependent upon the guarantors, and the latter gain no influence whatever over the neutral State in matters which have nothing to do with the guaranty.

The condition of the neutralisation is that the neutralised State abstains from any hostile action, and further from any international engagement which could indirectly [1] drag it into hostilities against any other State.

International position of Neutralised States.

§ 97. Since a neutralised State is under the obligation not to make war against any other State, except when attacked, and not to conclude treaties of alliance, guaranty, and the like, it is frequently maintained that neutralised States are part-Sovereign only and not International Persons of the same position within the Family of Nations as other States. This opinion has, however, no basis if the real facts and conditions of the neutralisation are taken into consideration. If sovereignty is nothing else than supreme authority, a neutralised State is as fully sovereign as any not neutralised State. It is entirely independent outside as well as inside its borders, since independence does not at all mean boundless liberty of action.[2] Nobody maintains that the guaranteed protection of the independence and integrity of the neutralised State places this State under the protectorate or any other kind of authority of the guarantors. And the condition of the neutralisation to abstain from war, treaties of alliance, and the like, contains restrictions which do in no way

[1] It was, therefore, impossible for Belgium, which was a party to the treaty that neutralised Luxemburg in 1867, to take part in the guarantee of this neutralisation. See Article 2 of the Treaty of London of May 11, 1867: "sous la sanction de la garantie collective des puissances signataires, à l'exception de la Belgique, qui est elle-même un état neutre."

[2] See below, § 126.

destroy the full sovereignty of the neutralised State. Such condition has the consequence only that the neutralised State exposes itself to an intervention by right, and loses the guaranteed protection in case it commits hostilities against another State, enters into a treaty of alliance, and the like. Just as a not-neutralised State which has concluded treaties of arbitration with other States to settle all conflicts between one another by arbitration has not lost part of its sovereignty because it has thereby to abstain from arms, so a neutralised State has not lost a part of its sovereignty through entering into the obligation to abstain from hostilities and treaties of alliance. This becomes quite apparent when it is taken into consideration that a neutralised State not only can conclude treaties of all kinds, except treaties of alliance, guarantee, and the like, but can also have an army and navy[1] and can build fortresses, as long as this is done with the purpose of preparing defence only. Neutralisation does not even exercise an influence upon the rank of a State. Belgium, Switzerland, and Luxemburg are States with royal honours and do not rank behind Great Britain or any other of the guarantors of their neutralisation. Nor is it denied that neutralised States, in spite of their weakness and comparative unimportance, can nevertheless play an important part within the Family of Nations. Although she has no voice where history is made by the sword, Switzerland has exercised great influence with regard to several points of progress in International Law. Thus the Geneva Convention owes its existence to

[1] The case of Luxemburg, which became neutralised under the condition not to keep an armed force with the exception of a police, is an anomaly.

the initiative of Switzerland. The fact that a permanently neutralised State is in many questions a disinterested party makes such State fit to take the initiative where action by a Great Power would create suspicion and reservedness on the part of other Powers.

But neutralised States are and must always be an exception. The Family and the Law of Nations could not be what they are if ever the number of neutralised States should be much increased. It is neither in the interest of the Law of Nations, nor in that of humanity, that all the small States should become neutralised, as thereby the political influence of the few Great Powers would become still greater than it already is. The four neutralised States—namely, Switzerland, Belgium, Luxemburg, and the Congo State—are a product of the nineteenth century only, and it remains to be seen whether neutralisation can stand the test of history.[1]

Switzerland.

§ 98. The Swiss Confederation,[2] which was recognised by the Westphalian Peace of 1648, has pursued a traditional policy of neutrality since that time. During the French Revolution and the Napoleonic wars, however, she did not succeed in keeping up her neutrality. French intervention brought about in 1803 a new Constitution, according to which the single cantons ceased to be independent States and Switzerland turned from a Confederation of States

[1] The fate of the Republic of Cracow, which was created an independent State under the joint protection of Austria, Prussia, and Russia by the Vienna Congress in 1815, and permanently neutralised, but which was annexed by Austria in 1846 (see Nys, I. pp. 383-385), cannot be quoted as an example that neutralised States have no durability. This annexation was only the last act in the drama of the absorption of Poland by her neighbours.

[2] See Schweizer, Geschichte der schweizerischen Neutralität (1895).

into the simple State of the Helvetic Republic, which was, moreover, through a treaty of alliance linked to France. It was not till 1813 that Switzerland became again a Confederation of States, and not till 1815 that she succeeded in becoming permanently neutralised. On March 20, 1815, at the Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, and Russia signed the declaration in which the permanent neutrality of Switzerland was recognised and collectively guaranteed, and on May 27, 1815, Switzerland acceded to this declaration. Article 84 of the Act of the Vienna Congress confirmed this declaration, and an Act, dated November 20, 1815, of the Powers assembled at Paris after the final defeat of Napoleon recognised it again.[1] Since that time Switzerland has always succeeded in keeping up her neutrality. She has built fortresses and organised a strong army for that purpose, and in January 1871, during the Franco-German War, she disarmed a French army of more than 80.000 men who had taken refuge on her territory, and guarded them till after the war.

Belgium.

§ 99. Belgium[2] became neutralised from the moment she was recognised as an independent State in 1831. The Treaty of London, signed on November 15, 1831, by Great Britain, Austria, Belgium, France, Prussia, and Russia, stipulates in its article 7 at the same time the independence and the permanent neutrality of Belgium, and in its article 25 the guaranty of the signatory five Great Powers.[3] And the guaranty was renewed in article 1 of the Treaty of London of April 19, 1839,[4] to which the same

[1] See Martens, N.R., II. pp. 157, 173, 419, 740.
[2] See Descamps, La Neutralité de la Belgique, 1902.
[3] See Martens, N.R., XI. pp. 394 and 404.
[4] See Martens, N.R. XVI. p. 790.

Powers are parties, and which is the final treaty concerning the separation of Belgium from the Netherlands.

Belgium has, just like Switzerland, also succeeded in keeping up her neutrality. She, too, has built fortresses and possesses a strong army.

Luxemburg.

§ 100. The Grand Duchy of Luxemburg[1] was since 1815 in personal union with the Netherlands, but at the same time a member of the Germanic Confederation, and Prussia had since 1856 the right to keep troops in the fortress of Luxemburg. In 1866 the Germanic Confederation came to an end, and Napoleon III. made efforts to acquire Luxemburg by purchase from the King of Holland, who was at the same time Grand Duke of Luxemburg. As Prussia objected to this, it seemed advisable to the Powers to neutralise Luxemburg. A Conference met in London, at which Great Britain, Austria, Belgium, France, Holland and Luxemburg, Italy, Prussia, and Russia were represented, and on May 11, 1867, a treaty was signed for the purpose of the neutralisation, which is stipulated and collectively guaranteed by all the signatory Powers, Belgium as a neutralised State herself excepted, by article 2.[2]

The neutralisation took place, however, under the abnormal condition that Luxemburg is not allowed to keep any armed force, with the exception of a police for the maintenance of safety and order, nor to possess any fortresses. Under these circumstances Luxemburg herself can do nothing for the defence of her neutrality, as Belgium and Switzerland can.

§ 101. The Congo Free State,[3] which was re-

[1] See Wompach, Le Luxembourg neutre (1900).

[2] See Martens, N.R.G. XVIII. p. 448.

[3] Moynier, La fondation de l'Etat indépendant du Congo (1887); Hall, § 26; Westlake, I. p. 30.

The Congo Free State.

cognised as an independent State by the Berlin Congo Conference [1] of 1884–1885, is a permanently neutralised State since 1885, but its neutralisation is imperfect in so far as it is not guaranteed by the Powers. This fact is explained by the circumstances under which this State attained its neutralisation. Article 10 of the General Act of the Congo Conference of Berlin stipulates that the signatory Powers shall respect the neutrality of any territory within the Congo district, provided the Power then or hereafter in possession of the territory proclaims its neutrality. Accordingly, when the Congo Free State was recognised by the Congress of Berlin, the King of the Belgians, as the sovereign of the Congo State, declared [2] it permanently neutral, and this declaration was notified to and recognised by the Powers. Since the Congo Conference did not guarantee the neutrality of the territories within the Congo district, the neutralisation of the Congo Free State is not guaranteed either.

IX

Non-Christian States

Westlake, I. p. 40—Phillimore, I. §§ 27–33—Bluntschli, §§ 1–16—Heffter, § 7—Gareis, § 10—Rivier, I. pp. 13–18—Bonfils, No. 40—Martens, § 41—Nys, I. pp. 122–125—Westlake, Chapters, pp. 114–143.

No essential difference between Christian and other States.

§ 102. It will be remembered from the previous discussion of the dominion [3] of the Law of Nations that this dominion extends beyond the Christian and includes now the Mahometan State of Turkey and

[1] See Protocol 9 of that Conference in Martens, N.R.G., 2nd ser. X. p. 353.

[2] See Martens, N.R.G., 2nd ser. XVI. p. 585.

[3] See above, § 28.

the Buddhistic State of Japan. As all full-Sovereign International Persons are equal to one another, no essential difference exists within the Family of Nations between Christian and non-Christian States. That foreigners residing in Turkey are still under the exclusive jurisdiction of their consuls, is an anomaly based on a restriction on territorial supremacy arising partly from custom and partly from treaties. If Turkey could ever succeed, as Japan did, in introducing such reforms as would create confidence in the impartiality of her Courts of Justice, this restriction would certainly be abolished.

International position of non-Christian States besides Turkey and Japan.

§ 103. Doubtful is the position of all non-Christian States except Turkey and Japan, such as China, Korea, Siam, Persia, and further Abyssinia, although the latter is a Christian State. Their civilisation is essentially so different from that of the Christian States that international intercourse with them of the same kind as between Christian States has been hitherto impossible. And neither their governments nor their population are at present able to fully understand the Law of Nations and to take up an attitude which is in conformity with all the rules of this law. There should be no doubt that these States are not International Persons of the same kind and the same position within the Family of Nations as Christian States. But it is equally wrong to maintain that they are absolutely outside the Family of Nations, and are for no part International Persons. Since they send and receive diplomatic envoys and conclude international treaties, the opinion is justified that such States are International Persons only in some respects—namely, those in which they have expressly or tacitly been received into the Family of Nations. When Christian States begin such inter-

course with these non-Christian States as to send diplomatic envoys to them and receive their diplomatic envoys, and when they enter into treaty obligations with them, they indirectly declare that they are ready to recognise them for these parts as International Persons and subjects of the Law of Nations. But for other parts such non-Christian States remain as yet outside the circle of the Family of Nations, especially with regard to war, and they are for those parts treated by the Christian Powers according to discretion. This condition of things will, however, not last very long. It may be expected that with the progress of civilisation these States will become sooner or later International Persons in the full sense of the term.

X

The Holy See

Hall, § 98—Westlake, I. pp. 37-39—Lawrence, § 143—Phillimore, I. §§ 278-440—Twiss, I. §§ 206-207—Taylor, §§ 277, 278, 282—Wharton, I. § 70, p. 546—Bluntschli, § 172—Heffter, §§ 40-41—Geffcken in Holtzendorff, II. pp. 151-222—Gareis, § 13—Liszt, § 5—Ullmann, § 19—Bonfils, Nos. 370-396—Despagnet, Nos. 147-164—Rivier, I. § 8—Fiore, I. Nos. 520, 521—Martens, I. § 84—Fiore, "Della condizione giuridica internazionale della chiesa e del Papa" (1887)—Bombard, "Le Pape et le droit des gens" (1888)—Imbart-Latour, "La papauté en droit international" (1893).

The former Papal States.

§ 104. When the Law of Nations began to grow up among the States of Christendom, the Pope was the monarch of one of those States—namely, the so-called Papal States. This State owed its existence to Pepin-le-Bref and his son Charlemagne, who established it in gratitude to the Popes Stephen III. and Adrian I., who crowned them as Kings of the Franks. It remained

in the hands of the Popes till 1798, when it became a republic for about three years. In 1801 the former order of things was re-established, but in 1809 it became a part of the Napoleonic Empire. In 1814 it was re-established and remained in existence till 1870, when it was annexed to the Kingdom of Italy. Throughout the existence of the Papal States, the Popes were monarchs and, as such, equals to all other monarchs. Their position was, however, even then anomalous, as their influence and the privileges granted to them by the different States were due, not alone to their being monarchs of a State, but to their being the head of the Roman Catholic Church. But this anomaly did not create any real difficulty, since the privileges granted to the Popes existed within the province of precedence only.

The Italian Law of Guaranty.

§ 105. When, in 1870, Italy annexed the Papal States and made Rome her capital, she had to undertake the task of creating a position for the Holy See and the Pope which was consonant with the importance of the latter to the Roman Catholic Church. It seemed impossible that the Pope should become an Italian subject and that the Holy See should be an institution under the territorial supremacy of Italy. For many reasons no alteration was desirable in the administration by the Holy See of the affairs of the Roman Catholic Church or in the position of the Pope as the inviolable head of that Church. For that purpose the Italian Parliament passed an Act regarding the guaranties granted to the Pope and the Holy See, which is commonly called the "Law of Guaranty." According to this the position of the Pope and the Holy See is in Italy as follows:—

The person of the Pope is sacred and inviolable (article 1). An offence against his person is to be

punished in the same way as an offence against the King of Italy (article 2). He enjoys all the honours of a sovereign, retains the privileges of precedence conceded to him by Roman Catholic monarchs, has the right to keep an armed body-guard of the same strength as before the annexation for the safety of his person and of his palaces (article 3), and receives an allowance of 3,225,000 francs (article 4). The Vatican, the seat of the Holy See, and the palaces where a conclave for the election of a new Pope or where an Oecumenical Council meets, are inviolable, and no Italian official is allowed to enter them without consent of the Holy See (articles 5–8). The Pope is absolutely free in performing all the functions connected with his mission as head of the Roman Catholic Church, and so are his officials (articles 9 and 10). The Pope has the right to send and to receive envoys, who enjoy all the privileges of the diplomatic envoys sent and received by Italy (article 11). The freedom of communication between the Pope and the entire Roman Catholic world is recognised, and the Pope has therefore the right to a post and telegraph office of his own in the Vatican or any other place of residence and to appoint his own post-office clerks (article 12). And, lastly, the colleges and other institutions of the Pope for the education of priests in Rome and the environments remain under his exclusive supervision, without any interference on the part of the Italian authorities.

No Pope has as yet recognised this Italian Law of Guaranty, nor had foreign States an opportunity of giving their express consent to the position of the Pope in Italy created by that law. But practically foreign States as well as the Popes themselves, although the latter have never ceased to protest against the

condition of things created by the annexation of the Papal States, have made use of the provisions[1] of that law. Several foreign States send side by side with their diplomatic envoys accredited to Italy special envoys to the Pope, and the latter sends envoys to several foreign States.

International position of the Holy See and the Pope.

§ 106. The Law of Guaranty is not International but Italian Municipal Law, and the members of the Family of Nations have hitherto not made any special arrangements with regard to the International position of the Holy See and the Pope. And, further, there can be no doubt that since the extinction of the Papal States the Pope is no longer a monarch whose sovereignty is derived from his position as the head of a State. For these reasons many writers[2] maintain that the Holy See and the Pope have no longer any international position whatever according to the Law of Nations, since States only and exclusively are International Persons. But if the facts of international life and the actual condition of things in every-day practice are taken into consideration, this opinion has no basis to stand upon. Although the Holy See is not a State, the envoys sent by her to foreign States are treated by the latter on the same footing with diplomatic envoys as regards exterritoriality, inviolability, and ceremonial privileges, and those foreign States which send envoys to the Holy See claim for them from Italy all the privileges and the position of diplomatic envoys. Further, although the Pope is no longer the head of a State, the privileges due to the head of a monarchical State are still granted to him by foreign States. Of

[1] But the Popes have hitherto never accepted the allowance provided by the Law of Guaranty.

[2] Westlake, I. p. 38, now joins the ranks of these writers.

course, through this treatment the Holy See does not acquire the character of an International Person, nor does the Pope thereby acquire the character of a head of a monarchical State. But for some points the Holy See is actually treated as though she were an International Person, and the Pope is treated actually in every point as though he were the head of a monarchical State. It must therefore be maintained that by custom, by tacit consent of the members of the Family of Nations, the Holy See has a *quasi* international position. This position allows her to claim against all the States treatment on some points as though she were an International Person, and further to claim treatment of the Pope in every point as though he were the head of a monarchical State. But it must be emphasised that, although the envoys sent and received by the Holy See must be treated as diplomatic envoys, they are not such in fact, for they are not agents for international affairs of States, but exclusively agents for the affairs of the Roman Catholic Church. And it must further be emphasised that the Holy See cannot conclude international treaties or claim a vote at international congresses and conferences. The so-called Concordats—that is, treaties between the Holy See and States with regard to matters of the Roman Catholic Church—are not international treaties, although analogous treatment is usually given to them. Even formerly, when the Pope was the head of a State, such Concordats were not concluded with the Papal States, but with the Holy See and the Pope as representatives of the Roman Catholic Church.

Violation of the Holy See and the Pope.

§ 107. Since the Holy See has no power whatever to protect herself and the person of the Pope against violations, the question as to the protection of the

Holy See and the person of the Pope arises. I believe that, since the present international position of the Holy See rests on the tacit consent of the members of the Family of Nations, many a Roman Catholic Power would raise its voice in case Italy or any other State should violate the Holy See or the person of the Pope, and an intervention for the purpose of protecting either of them would have the character of an intervention by right. Italy herself would certainly make such a violation by a foreign Power her own affair, although she has no more than any other Power the legal duty to do so, and although she is not responsible to other Powers for violations of the Personality of the latter by the Holy See and the Pope.

XI

International Persons of the Present Day

European States

§ 108. All the seventy-two European States are, of course, members of the Family of Nations. They are the following:

Great Powers are:

Austria-Hungary.	Great Britain.
France.	Italy.
Germany.	Russia.

Smaller States are:

Denmark.	Roumania.
Greece.	Servia.
Holland.	Spain.
Montenegro.	Sweden-Norway.
Portugal.	Turkey.

Very small, but nevertheless full-Sovereign, States are:

Monaco and Lichtenstein.

Neutralised States are:

Switzerland, Belgium, and Luxemburg.

Half-Sovereign States are:

Andorra (under the protectorate of France and Spain).

San Marino (under the protectorate of Italy).

Bulgaria, Crete (under the suzerainty of Turkey).

Part-Sovereign States are:

(*a*) Member-States of Germany:

Kingdoms: Prussia, Bavaria, Saxony, Würtemberg.

Grand-Duchies: Baden, Hesse, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg.

Dukedoms: Anhalt, Brunswick, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar.

Principalities: Reuss Elder Line, Reuss Younger Line, Lippe, Schaumburg-Lippe, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck.

Free Towns are: Bremen, Lübeck, Hamburg.

(*b*) Member-States of Switzerland:

Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (ob und nid dem Wald), Glarus, Zug, Fribourg, Soleure, Basle (Stadt und Landschaft), Schaffhausen, Appenzell (beider Rhoden), St. Gall, Grisons, Aargau, Thurgau, Tessin, Vaud, Valais, Neuchatel, Geneva.

American states.

§ 109. In America there are twenty-one States which are members of the Family of Nations, but it must be emphasised that the member-States of the five Federal States on the American continent, although they are part-Sovereign, have no footing within the Family of Nations, because the American Federal States, in contradistinction to Switzerland and Germany, absorb all possible international relations of their member-States. But there is a union of Confederated States—namely, the Major Republic of Central America, consisting of Honduras, Nicaragua, and San Salvador, which are all full-Sovereign States.

In North America there are:

The United States of America.
The United States of Mexico.

In Central America there are:

Honduras.
Nicaragua.
San Salvador.
} (The Major Republic of Central America.)

Guatemala.
Panama (since 1903).
San Domingo.
Costa Rica.
Hayti.
Cuba.

In South America there are:

Colombia.
Ecuador.
Peru.
The United States of Venezuela.
The United States of Brazil.
Uruguay.
Bolivia.
Paraguay.
The United States of Argentina.
Chili.

African States.

§ 110. In Africa the Negro Republic of Liberia and the Congo Free State are the only real and full members of the Family of Nations. Egypt and

Tunis are half-Sovereign, the one under Turkish suzerainty, the other under French protectorate. Morocco and Abyssinia are both full-Sovereign States, but for some parts only within the Family of Nations. The Soudan has an exceptional position; being under the *condominium* of Great Britain and Egypt, a footing of its own within the Family of Nations the Soudan certainly has not.

Asiatic States.

§ 111. In Asia only Japan is a full and real member of the Family of Nations. Persia, China, Korea, Siam, and Tibet are for some parts only within that family.

CHAPTER II

POSITION OF THE STATES WITHIN THE FAMILY OF NATIONS

I

International Personality

Vattel, I. §§ 13-25—Hall, § 7—Westlake, I. pp. 293-296—Lawrence, § 69—Phillimore, I. §§ 144-147—Twiss, I. § 106—Wharton, § 60—Bluntschli, §§ 64-81—Hartmann, § 15—Heffter, § 26—Holtzendorff in Holtzendorff, II. pp. 47-51—Gareis, §§ 24-25—Liszt, § 7—Ullmann, § 29—Bonfils, Nos. 235-241—Despagnet, Nos. 165-166—Pradier-Fodéré, I. Nos. 165-195—Rivier, I. § 19—Fiore, I. Nos. 367-371—Martens, I. § 72—Fontenay, "Des droits et des devoirs des Etats entre eux" (1888)—Pillet in R.G.V. (1898), pp. 66 and 236, VI. (1899), p. 503.

The so-called Fundamental Rights.

§ 112. Until the last two decades of the nineteenth century all jurists agreed that the membership of the Family of Nations includes so-called fundamental rights for States. Such rights are chiefly enumerated as the right of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation. It was and is maintained that these fundamental rights are a matter of course and self-evident, since the Family of Nations consists of Sovereign States. But no unanimity exists with regard to the number, the names, and the contents of these alleged fundamental rights. A great confusion exists in this matter, and hardly two text-book writers agree in details with regard to it. This condition of things

has led to a searching criticism of the whole matter, and several writers[1] have in consequence thereof asked that the fundamental rights of States should totally disappear from the treatises on the Law of Nations. I certainly agree with this. Yet it must be taken into consideration that under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years, and that numerous real rights and duties are customarily recognised which are derived from the very membership of the Family of Nations. They are rights and duties which do not rise from international treaties between a multitude of States, but which the States customarily hold as International Persons, and which they grant and receive reciprocally as members of the Family of Nations. They are rights and duties connected with the position of the States within the Family of Nations, and it is therefore only adequate to their importance to discuss them in a special chapter under that heading.

International Personality a Body of Qualities.

§ 113. International Personality is the term which characterises fitly the position of the States within the Family of Nations, since a State acquires International Personality through its recognition as a member. What it really means can be ascertained by going back to the basis[2] of the Law of Nations. Such basis is the common consent of the States that a body of legal rules shall regulate their intercourse with one another. Now a legally regulated intercourse

[1] See Stoerk in Holtzendorff's Encyclopädie der Rechtswissenschaft, 2nd ed. (1890), p. 1291; Jellinek, System der subjectiven öffentlichen Rechte (1892), p. 302; Heilborn, System, p. 279; and others. The arguments of these writers have met, however, considerable resistance, and the existence of fundamental rights of States is emphatically defended by other writers. See Liszt, § 7, and Garcis, §§ 24 and 25. Westlake, I. p. 293, now joins the ranks of those writers who deny the existence of fundamental rights.

[2] See above, § 12.

between Sovereign States is only possible under the condition that a certain liberty of action is granted to every State, and that, on the other hand, every State consents to a certain restriction of action in the interest of the liberty of action granted to every other State. A State that enters into the Family of Nations retains the natural liberty of action due to it in consequence of its sovereignty, but at the same time takes over the obligation to exercise self-restraint and, to restrict its liberty of action in the interest of that of other States. In entering into the Family of Nations a State comes as an equal to equals;[1] it demands a certain consideration to be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy. Recognition of a State as a member of the Family of Nations contains recognition of such State's equality, dignity, independence, and territorial and personal supremacy. But the recognised State recognises in turn the same qualities in other members of that family, and thereby it undertakes responsibility for violations committed by it. All these qualities constitute as a body the International Personality of a State, and International Personality may therefore be said to be the fact, given by the very membership of the Family of Nations, that equality, dignity, independence, territorial and personal supremacy, and the responsibility of every State are recognised by every other State. The States are International Persons because they recognise these qualities in one another and recognise their responsibility for violations of these qualities.

Other Characteristics of

§ 114. But the position of the States within the Family of Nations is not exclusively characterised

[1] See above, § 14.

by these qualities. The States make a community because there is constant intercourse between them. Intercourse is therefore a condition without which the Family of Nations would not and could not exist. Again, there are exceptions to the protection of the qualities which constitute the International Personality of the States, and these exceptions are likewise characteristic of the position of the States within the Family of Nations. Thus, in time of war belligerents have a right to violate one another's Personality in many ways; even annihilation of the vanquished State, through subjugation after conquest, is allowed. Thus, further, in time of peace as well as in time of war, such violations of the Personality of other States are excused as are committed in self-preservation or through justified intervention. And, finally, jurisdiction is also important for the position of the States within the Family of Nations. Intercourse, self-preservation, intervention, and jurisdiction must, therefore, likewise be discussed in this chapter.

the position of the States within the Family of Nations.

II

Equality, Rank, and Titles

Vattel, II. §§ 35-48—Westlake, I. pp. 308-312—Lawrence, §§ 134-140—Phillimore, I. § 147, II. §§ 27-43—Twiss, I. § 12—Halleck, I. pp. 116-140—Taylor, § 160—Wheaton, §§ 152-159—Bluntschli, §§ 81-94—Hartmann, § 14—Heffter, §§ 27-28—Holtzendorff in Holtzendorff, II. pp. 11-14—Ullmann, §§ 27, 28—Bonfils, Nos. 272-278—Despagnet, Nos. 167-171—Pradier-Fodéré, II. Nos. 484-594—Rivier, I. § 9—Calvo, I. §§ 210-259—Fiore, I. Nos. 428-451—Martens, I. §§ 70, 71—Westlake, Chapters, pp. 86-109.

Legal Equality of States.

§ 115. The equality before International Law of all member-States of the Family of Nations is an invariable quality, derived from their International Personality.[1] Whatever inequality may exist between

[1] See above, §§ 14 and 113.

States as regards their size, population, power, degree of civilisation, wealth, and other qualities, they are nevertheless equals as International Persons. The consequence of this legal equality is that, whenever a question arises which has to be settled by the consent of the members of the Family of Nations, every State has a right to a vote, but to one vote only. And legally the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful. Therefore any alteration of an existing rule or creation of a new rule of International Law by a law-making treaty has legal validity for the signatory Powers and those only who later on accede expressly or submit to it tacitly through custom.

To the rule of equality there are three exceptions. First, such half-civilised and similar States as can for some parts[1] only be considered International Persons, are not equals of the full members of the Family of Nations. Secondly, States under suzerainty and under protectorate which are half-Sovereign and under the guardianship[2] of other States with regard to the management of external affairs, are not equals of States which enjoy full sovereignty. And, thirdly, member-States of a Federal State which, because they have transferred parts of their internal and external sovereignty to their Federal State, are part-Sovereign, are likewise not equals of full-Sovereign States. But a general rule concerning the amount of inequality between the equal and the unequal States cannot be laid down, as everything depends upon the special case.

§ 116. Legal equality must not be confounded with political equality. The enormous differences between States as regards their strength are the

[1] See above, § 103. [2] See above, §§ 91 and 93.

result of a natural inequality which, apart from rank and titles, finds its expression in the province of policy. Politically, States are in no manner equals, as there is a difference between the Great Powers and others. Eight States must at present be considered as Great Powers—namely, Great Britain, Austria-Hungary, France, Germany, Italy, and Russia in Europe, the United States in America, and Japan in Asia. All arrangements made by the body of the Great Powers naturally gain the consent of the minor States, and the body of the six Great Powers in Europe is therefore called the European Concert. The Great Powers are the leaders of the Family of Nations, and every progress of the Law of Nations during the past is the result of their hegemony, although the initiative towards the progress was frequently taken by a minor Power.

Political Hegemony of Great Powers.

But, however important the position and the influence of the Great Powers may be, they are by no means derived from a legal basis or rule.[1] It is nothing else than powerful example which makes the smaller States agree to arrangements of the Great Powers. Nor has a State the character of a Great Power by law. It is nothing else than its actual size and strength which makes a State a Great Power. Changes, therefore, often take place. Whereas at the time of the Vienna Congress in 1815 eight States —namely, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia—were still considered Great Powers, their number decreased soon to five, when Portugal, Spain, and Sweden lost that character. But the so-called Pentarchy of the remaining Great Powers turned into a Hexarchy after

[1] This is, however, maintained I. p. 170; Lawrence, p. 241; and by a few writers. See Lorimer, Westlake, I. pp. 308, 309.

the unification of Italy, because the latter became at once a Great Power. The United States rose as a Great Power out of the civil war in 1865, and Japan did the same out of the war with China in 1895. Any day a change may take place and one of the present Great Powers may lose its position, or one of the weaker States may become a Great Power. It is a question of political influence, and not of law, whether a State is or is not a Great Power. Whatever large-sized State establishes an army and navy of such strength that its political influence must be reckoned with by the other Great Powers, becomes a Great Power itself.[1]

Rank of States.

§ 117. Although the States are equals as International Persons, they are nevertheless not equals as regards rank. The differences as regards rank are recognised by International Law, but the legal equality of States within the Family of Nations is thereby as little affected as the legal equality of the citizens is within a modern State where differences in rank and titles of the citizens are recognised by Municipal Law. The vote of a State of lower rank has legally as much weight as that of a State of higher rank. And the difference in rank nowadays no longer plays such an important part as in the past, when questions of etiquette gave occasion for much dispute. It was in the sixteenth and seventeenth century that the rank of the different States was zealously discussed under the heading of *droit de préséance* or *questions de préséance*. The Congress

[1] In contradistinction to the generally recognised political hegemony of the Great Powers, Lawrence (§§ 134-136) and Taylor (§ 69) maintain that the position of the Great Powers is *legally* superior to that of the smaller States, being a "Primacy" or "Overlordship." This doctrine, which professedly seeks to abolish the universally recognised rule of the equality of States, has no sound basis, and confounds political with legal inequality.

at Vienna of 1815 intended to establish an order of precedence within the Family of Nations, but dropped this scheme on account of practical difficulties. Thus the matter is entirely based on custom, which recognises the following three rules:

(1) The States are divided into two classes—namely, States with and States without royal honours. To the first class belong Empires, Kingdoms, Grand Duchies, and the great Republics such as France, the United States of America, Switzerland, the South American Republics, and others. All other States belong to the second class. The Holy See is treated as though it were a State with royal honours. States with royal honours have exclusively the right to send and receive diplomatic envoys of the first class[1] —namely, ambassadors; and their monarchs address one another as "brothers" in their official letters. States with royal honours always precede other States.

(2) Full-Sovereign States always precede those under suzerainty or protectorate.

(3) Among themselves States of the same rank do not precede one another. Empires do not precede kingdoms, and since the time of Cromwell and the first French Republic monarchies do not precede republics. But the Roman Catholic States always concede precedence to the Holy See, and the monarchs recognise among themselves a difference with regard to ceremonials between emperors and kings on the one hand, and, on the other, grand dukes and other monarchs.

The "Alternat."

§ 118. To avoid questions of precedence, on signing a treaty, States of the same rank observe a conventional usage which is called the "Alternat." According to that usage the signatures of the signa-

[1] See below, § 365.

tory States of a treaty alternate in a regular order or in one determined by lot, the representative of each State signing first the copy which belongs to his State. But sometimes that order is not observed, and the States sign either in the alphabetical order of their names in French or in no order at all (*pêle-mêle*).

Titles of States.

§ 119. At the present time, States, save in a few exceptional instances, have no titles, although formerly such titles did exist. Thus the former Republic of Venice as well as that of Genoa was addressed as "Serene Republic," and up to the present day the Republic of San Marino[1] is addressed "Most Serene Republic." Nowadays the titles of the heads of monarchical States are in so far of importance to International Law as they are connected with the rank of the respective States. Since States are Sovereign, they can bestow any titles they like on their heads. Thus, according to the German Constitution of 1871, the Kings of Prussia have the title "German Emperor;" the Kings of England have since 1877 borne the title "Emperor of India;" the King of the Belgians assumed in 1885 the title "Sovereign of the Independent Congo State;" the Prince of Servia assumed in 1881, and that of Roumania in 1882, the title "King." But no foreign State is obliged to recognise such a new title, especially when a higher rank would accrue to the respective State in consequence of such a new title of its head. In practice such recognition will regularly be given when the new title really corresponds with the size and the importance of the respective State.[2] Servia

[1] See Treaty Series, 1900, No. 9.

[2] History, however, reports several cases where recognition was withheld for a long time. Thus the title "Emperor of Russia," assumed by Peter the Great in 1701, was not recognised by France till 1745, by Spain till 1759, nor by Poland till 1764. And the Pope did not recognise the kingly title of Prussia, assumed in 1701, till 1786.

and Roumania had therefore no difficulty in obtaining recognition as kingdoms.

With the titles of the heads of States are connected predicates. Emperors and Kings have the predicate "Majesty," Grand Dukes "Royal Highness," Dukes "Highness," other monarchs "Serene Highness." The Pope is addressed as "Holiness" (*Sanctitas*). Not to be confounded with these predicates, which are recognised by the Law of Nations, are predicates which originally were bestowed on monarchs by the Pope and which have no importance for the Law of Nations. Thus the Kings of France called themselves *Rex Christianissimus* or "First-born Son of the Church," the Kings of Spain have called themselves since 1496 *Rex Catholicus*, the Kings of England since 1513 *Defensor Fidei*, the Kings of Portugal since 1748 *Rex Fidelissimus*, the Kings of Hungary since 1758 *Rex Apostolicus*.

III

Dignity

Vattel, II. §§ 35-48—Lawrence, § 140—Phillimore, II. §§ 27-43—Halleck, I. pp. 124-142—Taylor, § 162—Wheaton, § 160—Bluntschli, §§ 82-83—Hartmann, § 15—Heffter, §§ 32, 102, 103—Holtzendorff in Holtzendorff, II. pp. 64-69—Ullmann, § 29—Bonfils, Nos. 279-284—Despagnet, Nos. 184-186—Pradier-Fodéré, II. Nos. 451-483—Rivier, I. pp. 260-262—Calvo, III. §§ 1300-1302—Fiore, I. Nos. 439-451—Martens, I. § 78.

Dignity a Quality.

§ 120. The majority of text-book writers maintain that there is a fundamental right of reputation and of good name on the part of every State. Such a right, however, does not exist, because no duty corresponding to it can be traced within the Law of Nations. Indeed, the reputation of a State depends

just as much upon behaviour as that of every citizen within its boundaries. A State which has a corrupt government and behaves unfairly and perfidiously in its intercourse with other States will be looked down upon and despised, whereas a State which has an uncorrupt government and behaves fairly and justly in its international dealings will be highly esteemed. No law can give a good name and reputation to a rogue, and the Law of Nations does not and cannot give a right to reputation and good name to such a State as has not acquired them through its attitude. There are some States—*nomina sunt odiosa!*—which indeed justly enjoy a bad reputation.

On the other hand, a State as a member of the Family of Nations possesses dignity as an International Person. Dignity is a quality recognised by other States, and it adheres to a State from the moment of its recognition till the moment of its extinction, whatever behaviour it displays. Just as the dignity of every citizen within a State commands a certain amount of consideration on the part of fellow-citizens, so the dignity of a State commands a certain amount of consideration on the part of other States, since otherwise the different States could not live peaceably in the community which is called the Family of Nations.

Consequences of the Dignity of States.

§ 121. Since dignity is a recognised quality of States as International Persons, all members of the Family of Nations grant reciprocally to one another by custom certain rights and ceremonial privileges. These are chiefly the rights to demand—that their heads shall not be libelled and slandered; that their heads and likewise their diplomatic envoys shall be granted exterritoriality and inviolability when abroad, and at home and abroad in the official

intercourse with representatives of foreign States shall be granted certain titles; that their men-of-war shall be granted exterritoriality when in foreign waters; that their symbols of authority, such as flags and coats of arms, shall not be made improper use of and not be treated with disrespect on the part of other States. Every State must not only itself comply with the duties corresponding to these rights of other States, but must also prevent its subjects from such acts as violate the dignity of foreign States, and must punish them for acts of that kind which it could not prevent. The Municipal Laws of all the States must therefore provide punishment for those who commit offences against the dignity of foreign States,[1] and, if the Criminal Law of the land does not contain such provisions, it is no excuse for failure by the respective States to punish offenders. But it must be emphasised that a State must prevent and punish such acts only as really violate the dignity of a foreign State. Mere criticism of policy, historical verdicts concerning the attitude of States and their rulers, utterances of moral indignation condemning immoral acts of foreign Governments and their monarchs need neither be suppressed nor punished.

Maritime Ceremonials.

§ 122. Connected with the dignity of States are the maritime ceremonials between vessels and between vessels and forts which belong to different States. In former times discord and jealousy existed between the States regarding such ceremonials, since they were

[1] According to the Criminal Law of England, "every one is guilty of a misdemeanour who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary, with the intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs." See Stephen, A Digest of the Criminal Law, article 91.

looked upon as means of keeping up the superiority of one State over another. Nowadays, so far as the Open Sea is concerned, they are considered as mere acts of courtesy recognising the dignity of States. They are the outcome of international usages, and not of International Law, in honour of the national flags. They are carried out by dipping flags or striking sails or firing guns.[1] But so far as the territorial maritime belt is concerned, riparian States can make laws concerning maritime ceremonials to be observed by foreign merchantmen.[2]

IV

Independence and Territorial and Personal Supremacy

Vattel, I. Préliminaires, §§ 15–17—Hall, § 10—Westlake, I. pp. 308–312—Lawrence, §§ 70–73—Phillimore, I. §§ 144–149—Twiss, I. § 20—Halleck, I. pp. 93–113—Taylor, § 160—Wheaton, §§ 72–75—Bluntschli, §§ 64–69—Hartmann, § 15—Heffter, §§ 29 and 31—Holtzendorff in Holtzendorff, II. pp. 36–60—Gareis, §§ 25–26—Ullmann, § 29—Bonfils, Nos. 253–271—Despagnet, Nos. 187–189—Pradier-Fodéré, I. Nos. 287–332—Rivier, I. § 21—Calvo, I. §§ 107–109—Fiore, I. Nos. 372–427—Martens, I. §§ 74, 75—Westlake, Chapters, pp. 86–106.

Independence and Territorial as well as Personal Supremacy as Aspects of Sovereignty.

§ 123. Sovereignty as supreme authority, which is independent of any other earthly authority, may be said to have different aspects. As excluding dependence from any other authority, and in especial from the authority of another State, sovereignty is *independence*. It is *external* independence with regard to the liberty of action outside its borders in the intercourse with other States which a State enjoys. It is *internal* independence with regard to the liberty of action of

[1] See Halleck, I. pp. 124–142, where the matter is treated with all details. See also below, § 257.

[2] See below, § 187.

a State inside its borders. As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is *territorial* supremacy. As comprising the power of a State to exercise supreme authority over its citizens at home and abroad, sovereignty is *personal* supremacy.

For these reasons a State as an International Person possesses independence and territorial and personal supremacy. These three qualities are nothing else than three aspects of the very same sovereignty of a State, and there is no sharp boundary line between them. The distinction is apparent and useful, although internal independence is nothing else than sovereignty comprising territorial supremacy, but viewed from a different point of view.

Consequences of Independence and Territorial and Personal Supremacy.

§ 124. Independence and territorial as well as personal supremacy are not rights, but recognised and therefore protected qualities of States as International Persons. The protection granted to these qualities by the Law of Nations finds its expression in the right of every State to demand that other States abstain themselves, and prevent their organs and subjects, from committing any act which contains a violation of its independence and its territorial as well as personal supremacy.

In consequence of its external independence, a State can manage its international affairs according to discretion, especially enter into alliances and conclude other treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace.

In consequence of its internal independence and territorial supremacy, a State can adopt any Constitution it likes, arrange its administration in a way it thinks fit, make use of legislature as it pleases

organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on. According to the rule, *quidquid est in territorio est etiam de territorio*, all individuals and all property within the territory of a State are under the latter's dominion and sway, and even foreign individuals and property fall at once under the territorial supremacy of a State when they cross its frontier. Foreigners residing in a State can therefore be compelled to pay rates and taxes, and to serve in the police under the same conditions as citizens for the purpose of maintaining order and safety. But foreigners may be expelled, or not received at all. On the other hand, hospitality may be granted to them whatever act they have committed abroad, provided they abstain from making the hospitable territory the basis for attempts against a foreign State. And a State can through naturalisation adopt foreign subjects residing on its territory without the consent of the home State, provided the individuals themselves give their consent.

In consequence of its personal supremacy, a State can treat its subjects according to discretion, and it retains its power even over such subjects as emigrate without thereby losing their citizenship. A State may therefore command its citizens abroad to come home and fulfil their military service, may require them to pay rates and taxes for the support of the home finances, may ask them to comply with certain conditions in case they desire marriages concluded abroad or wills made abroad recognised by the home authorities, can punish them on their return for crimes they have committed abroad.

§ 125. The duty of every State to abstain itself and to prevent its organs and subjects from any act

which contains a violation[1] of another State's independence or territorial and personal supremacy is correlative to the respective right of the other State. It is impossible to enumerate all such actions as might contain a violation of this duty. But it is of value to give some illustrative examples. Thus, in the interest of the independence of other States, a State is not allowed to interfere in the management of their international affairs nor to prevent them from doing or to compel them to do certain acts in their international intercourse. Further, in the interest of the territorial supremacy of other States, a State is not allowed to send its troops, its men-of-war, and its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission.[2] Again, in the interest of the personal supremacy of other States, a State is not allowed to naturalise foreigners residing on its territory without their consent,[3] nor to prevent them from returning home for the purpose of fulfilling military service or from paying rates and taxes to their home State, nor to incite citizens of foreign States to emigration.

Violations of Independence and Territorial and Personal Supremacy.

§ 126. Independence is not boundless liberty of a State to do what it likes without any restriction whatever. The mere fact that a State is a member of the Family of Nations restricts its liberty of action with regard to other States because it is bound not to intervene in the affairs of other States. And

Restrictions upon Independence.

[1] See below, § 155.

[2] But neighbouring States very often give such permission to one another. Switzerland, for instance, allows German Custom House officers to be stationed on two railway stations of Basle for the purpose of examining the luggage of travellers from Basle to Germany.

[3] See, however, below (§ 299), where the fact is stated that some States naturalise a foreigner through the very fact of his taking domicile on their territory.

it is generally admitted that a State can through conventions, such as a treaty of alliance or neutrality and the like, enter into many obligations which hamper it more or less in the management of its international affairs. Independence is a question of degree, and it is therefore also a question of degree whether the independence of a State is destroyed or not by certain restrictions. Thus it is generally admitted that States under suzerainty and under protectorate are so much restricted that they are not fully independent, but half-Sovereign. And the same is the case with the member-States of a Federal State which are part-Sovereign. On the other hand, the restrictions connected with the neutralisation of States does, according to the correct opinion,[1] not destroy their independence, although they cannot make war except in self-defence, cannot conclude alliances, and are in other ways hampered in their liberty of action.

From a political and a legal point of view it is of great importance that the States imposing and those accepting restrictions upon independence should be clear in their intentions. For the question may arise whether these restrictions make the respective State a dependent one. For instance, through article 4 of the Convention of London of 1884 between Great Britain and the former South African Republic stipulating that the latter should not conclude any treaty with any foreign State, the Orange Free State excepted, without approval on the part of Great Britain, the Republic was so much restricted that Great Britain considered herself justified in defending the opinion that the Republic was not an independent State,

[1] See above, § 97.

although the Republic itself and many writers were of a different opinion.[1]

Restrictions upon Territorial Supremacy.

§ 127. Just like independence, territorial supremacy does not give a boundless liberty of action. Thus, by customary International Law every State has a right to demand that its merchantmen can pass through the maritime belt of other States. Thus, further, navigation on so-called international rivers in Europe must be open to merchantmen of all States. Thus, thirdly, foreign monarchs and envoys, foreign men-of-war, and foreign armed forces must be granted exterritoriality. Thus, fourthly, through the right of protection over citizens abroad which is held according to customary International Law by every State, a State cannot treat foreign citizens passing or residing on its territory arbitrarily according to discretion as it might treat its own subjects; it cannot, for instance, compel them to serve in its army or navy. Thus, to give another and fifth example, a State is, in spite of its territorial supremacy, not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance, to stop or to divert the flow of a river which runs from its own into neighbouring territory.

In contradistinction to these restrictions by the customary Law of Nations, a State can through treaties enter into obligations of many a kind without thereby losing its internal independence and territorial supremacy. Thus France by three consecutive treaties of peace—namely, that of Utrecht of

[1] It is of interest to state the fact that, before the last phase of the conflict between Great Britain and the Republic, influential Continental writers stated the suzerainty of Great Britain over the Republic. See Rivier, I. p. 89, and Holtzendorff in Holtzendorff, II. p. 115.

1713, that of Aix-la-Chapelle of 1748, and that of Paris of 1763—entered into the obligation to pull down and not to rebuild the fortifications of Dunkirk.[1] Napoleon I. imposed by the Peace Treaty of Tilsit of 1807 upon Prussia the restriction not to keep more than 42,000 men under arms. Again, article 29 of the Treaty of Berlin of 1878 imposes upon Montenegro the restriction not to possess a navy. There is hardly a State in existence which is not in one point or another restricted in its territorial supremacy by treaties with foreign Powers.

Restrictions upon Personal Supremacy.

§ 128. Personal Supremacy does not give a boundless liberty of action either. Although the citizens of a State remain under its power when abroad, such State is restricted in the exercise of this power with regard to all those matters in which the foreign State on whose territory these citizens reside is competent in consequence of its territorial supremacy. The duty to respect the territorial supremacy of a foreign State must prevent a State from doing all acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. Thus, for instance, a State is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land they reside in.

But a State may also by treaty obligation be for some parts restricted in the liberty of action with regard to its citizens. Thus articles 5, 25, 35, and 44 of the Treaty of Berlin of 1878 restrict the personal supremacy of Bulgaria, Montenegro, Servia,

[1] This restriction was abolished by article 17 of the Treaty of Paris of 1783.

and Roumania in so far as these States are thereby obliged not to impose any religious disabilities on any of their subjects.[1]

V

SELF-PRESERVATION

Vattel, II. §§ 49-53—Hall, §§ 8, 83-86—Westlake, I. pp. 296-304—Phillimore, I. §§ 210-220—Twiss, I. §§ 106-112—Halleck, I. pp. 93-113—Taylor, §§ 401-409—Wheaton, §§ 61-62—Hartmann, § 15—Heffter, § 30—Holtzendorff in Holtzendorff, II. pp. 51-56—Garois, § 25—Liszt, § 7—Ullmann, § 29—Bonfils, Nos. 242-252—Despagnet, Nos. 172-175—Pradier-Fodéré, I. Nos. 211-286—Rivier, I. § 20—Calvo, I. §§ 208-209—Fiore, I. Nos. 452-466—Martens, I. § 73—Westlake, Chapters, pp. 110-125.

Self-preservation an excuse for violations.

§ 129. From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States. Although regularly all the States have reciprocally to respect one another's Personality and are therefore bound not to violate one another, certain violations of another State committed by a State for the purpose of self-preservation are, as an exception, not prohibited by the Law of Nations. Thus, self-preservation is a factor of great importance for the position of the States within the Family of Nations, and most writers maintain that every State has a fundamental right of self-preservation.[2] But nothing of the kind is actually the case, if the real facts of the law are taken into consideration. If every State really had a *right* of self-preservation, all the

[1] See above, § 73.

[2] This right was formerly frequently called *droit de convenance* and was said to exist in the right of every State to act in favour of its interests in case of a conflict between its own and the interests of another State. (See Heffter, § 26.)

States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation. But such duty does not exist. On the contrary, although self-preservation is in certain cases an excuse recognised by International Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repulse them. It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations. But they remain nevertheless violations and can therefore be repulsed. Self-preservation is consequently an excuse, because violations of other States are in certain exceptional cases not prohibited when they are committed for the purpose and in the interest of self-preservation, although they need not patiently be suffered and endured by the States concerned.

What acts of self-preservation are excused.

§ 130. It is frequently maintained that every violation is excused as long as it was caused by the motive of self-preservation, but it becomes more and more recognised that violations of other States in the interest of self-preservation are excused in cases of *necessity* only. Such acts of violence in the interest of self-preservation are exclusively excused as are necessary in self-defence, because otherwise the acting State would have to suffer or have to continue to suffer a violation against itself. If an imminent violation or the continuation of an already commenced violation can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified. When, to give an example, a State is informed that on neighbouring territory a body of armed men is being organised for the purpose of a raid into its

own territory, and when the danger can be removed through an appeal to the authorities of the neighbouring country, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises and the threatened State is justified in invading the neighbouring country and disarming the intending raiders.

The reason of the thing makes it, of course, necessary for every State to judge for itself when it considers a case of necessity has arisen, and it is therefore impossible to lay down a hard and fast rule regarding the question when and when not a State can take recourse to self-help which violates another State. Everything depends upon the circumstances and conditions of the special case, and it is therefore of value to give some historical examples.

Case of the Danish Fleet (1807)

§ 131. After the Peace of Tilsit of 1807 the British Government[1] was cognisant of the provision of some secret articles of this treaty that France should be at liberty to seize the Danish fleet and to make use of it against Great Britain. This plan, when carried out, would have endangered the position of Great Britain, which was then waging war against France. As Denmark was not capable of defending herself against an attack of the French army in North Germany under Bernadotte and Davoust, who had orders to invade Denmark, the British Government requested Denmark to deliver up her fleet to the custody of Great Britain, and promised to restore it after the war. And at the same time the means of defence against French invasion and a guaranty of her whole possessions were offered to Denmark by England. The latter, however,

[1] I follow Hall's (§ 86) summary of the facts.

refused to comply with the British demands, whereupon the British considered a case of necessity in self-preservation had arisen, shelled Copenhagen, and seized the Danish fleet.

Case of Amelia Island.

§ 132. "Amelia Island, at the mouth of St. Mary's River, and at that time in Spanish territory, was seized in 1817 by a band of buccaneers, under the direction of an adventurer named McGregor, who in the name of the insurgent colonies of Buenos Ayres and Venezuela preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe called his Cabinet together in October 1817, and directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels."[1]

Case of the "Caroline."

§ 133. In 1837, during the Canadian rebellion, several hundreds of insurgents got hold of an island in the river Niagara, on the territory of the United States, and with the help of American subjects equipped a boat called the "Caroline" with the purpose of crossing into Canadian territory and bringing material help to the insurgents. The Canadian Government, timely informed of the imminent danger, sent a British force over into the American territory, which obtained possession of the "Caroline," seized her arms, and then sent her adrift down the falls of the Niagara. The United States complained of this British violation of her territorial supremacy, but Great Britain was in a position to prove that her act was necessary in self-preservation, since there was

[1] See Wharton, § 50 a.

not sufficient time to prevent the imminent invasion of her territory through application to the United States Government.[1]

VI

INTERVENTION

Vattel, II. §§ 54-62—Hall, §§ 88-95—Westlake, I. pp. 304-308—Lawrence, § 74-89—Phillimore, I. §§ 390-415A—Halleck, I. pp. 94-109—Taylor, §§ 410-430—Walker, § 7—Wharton, I. §§ 45-72—Wheaton, §§ 63-71—Bluntschli, §§ 474-480—Hartmann, § 17—Heffter, §§ 44-46—Geffcken in Holtzendorff, II. pp. 131-168—Gareis, § 26—Liszt, § 7—Ullmann, §§ 139-140—Bonfils, Nos. 295-323—Despagnet, Nos. 193-216—Pradier-Fodéré, I. Nos. 354-441—Rivier, I. § 31—Calvo, I. §§ 110-206—Fiore, I. Nos. 561-608—Martens, I. § 76—Bernard, "On the Principle of non-Intervention" (1860)—Hautefeuille, "Le principe de non-intervention" (1863)—Stapleton, "Intervention and Non-intervention, or the Foreign Policy of Great Britain from 1790 to 1865" (1866)—Geffcken, "Das Recht der Intervention" (1887)—Kebedgy, "De l'intervention" (1890)—Floecker, "De l'intervention en droit international" (1896).

Conception and character of Intervention.

§ 134. Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Such intervention can take place by right or without a right, but it always concerns the external independence or the territorial or personal supremacy of the respective State, and the whole matter is there-

[1] See Wharton, I. § 50 c, and Hall, § 84. With the case of the "Caroline" is connected the case of Macleod, which will be discussed below, § 446. Hall (§ 86), Martens (I. § 73), and others quote also the case of the "Virginius" as an example of necessity of self-preservation, but it seems that the Spanish Government did not plead self-preservation but piracy as justification of the capture of the vessel. That a vessel sailing under another State's flag can nevertheless be seized on the high seas in case she is sailing to a port of the capturing State for the purpose of an invasion or bringing material help to insurgents, there is no doubt. No better case of necessity of self-preservation could be given, since the danger is imminent and can be frustrated only by capture of the vessel.

fore of great importance for the position of the States within the Family of Nations. That intervention is as a rule forbidden by the Law of Nations which protects the International Personality of the States, there is no doubt. On the other hand, there is just as little doubt[1] that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take place by right, are nevertheless admitted by the Law of Nations and are excused in spite of the violation of the Personality of the respective States they involve.

Intervention can take place in the external as well as in the internal affairs of a State. It concerns in the first case the external independence, and in the second either the territorial or the personal supremacy. But it must be emphasised that intervention proper is always *dictatorial* interference, not interference pure and simple.[2] Therefore intervention must neither be confounded with good offices, nor with mediation, nor with intercession, nor with co-operation, because none of these imply a *dictatorial* interference. Good offices is the name for such acts of friendly Powers interfering in a conflict between two other States as tend to call negotiations into existence for the peaceable settlement of the conflict, and mediation is the name for the direct conduct on the part of a friendly Power of such negotiations.[3] Intercession is the name for the interference consisting in friendly advice given or friendly offers made with regard to the domestic affairs of another State.

[1] The so-called doctrine of non-intervention as defended by some Italian writers (see Fiore, I. No. 565), who deny that intervention is ever justifiable, is a political doctrine without any legal basis whatever.

[2] Many writers constantly commit this confusion.

[3] See below, vol. II. § 9.

And, lastly, co-operation is the appellation of such interference as consists in help and assistance lent by one State to another at the latter's request for the purpose of suppressing an internal revolution. Thus, for example, Russia sent troops in 1849, at the request of Austria, into Hungary to assist Austria in suppressing the Hungarian revolt.

Intervention by Right.

§ 135. It is apparent that such interventions as take place by right must be distinguished from others. Wherever there is no right to intervention, although it may be admissible and excused, an intervention violates either the external independence or the territorial or the personal supremacy. But if an intervention takes place by right, it never contains such a violation, because the right of intervention is always based on a legal restriction upon the independence or territorial or personal supremacy of the State concerned, and because the latter is in duty bound to submit to the intervention. Now a State may have a right of intervention against another State for several grounds. Thus the Suzerain State has a right to intervene in many affairs of the vassal, and the State which holds a protectorate has a right to intervene in all the external affairs of the protected State. Thus, secondly, the right of protection over its citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit. Thus, thirdly, if a State which is restricted by an international treaty in its internal independence or its territorial or personal supremacy, does not comply with the restrictions concerned, the other party or parties have a right to intervene. Thus, fourthly, if an external affair of a State is at the same time by right an affair of another State, the latter has a right to intervene in

case the former deals with that affair unilaterally.[1] Thus, fifthly, if a State in time of peace or war violates those principles of the Law of Nations which are universally recognised, other States have a right to intervene and to make the delinquent submit to the respective principles.[2]

The question is disputed whether a State that has guaranteed by treaty the form of government of a State or the reign of a certain dynasty over the same has a right to intervene in case of change of form of government or of dynasty. In strict law this question is, I think, to be answered in the affirmative,[3] provided the respective treaty of guaranty was concluded between the respective States, and not between their monarchs. And this question has nothing to do with the policy of intervention in the interest of legitimacy adopted in the nineteenth century after the downfall of Napoleon I. by the Powers of the Holy Alliance.

[1] The events of 1878 provide an illustrative example. Russia had concluded the preliminary Peace of San Stefano with defeated Turkey; Great Britain protested because the conditions of this peace were inconsistent with the treaty of Paris of 1856 and the convention of London of 1871, and Russia agreed to the meeting of the Congress of Berlin for the purpose of arranging matters. Had Russia persisted in carrying out the preliminary peace, Great Britain as well as other signatory Powers of the Treaty of Paris and the Convention of London doubtless possessed a right of intervention.

[2] This is universally recognised. If, for instance, a State undertook to extend its jurisdiction over the merchantmen of another State on the high seas, not only would this be an affair between the two States concerned, but all other States would have a *right to* intervene because the freedom of the open sea is a universally recognised principle.

[3] Hall (§ 93) decides the question in the negative. I do not see the reason why a State should not be able to undertake the obligation to retain a certain form of government or dynasty. That historical events can justify such State in considering itself no longer bound by such treaty according to the principle *rebus sic stantibus* (see below, § 539) is another matter.

§ 136. In contradistinction to intervention by right, there are other interventions which must be considered admissible, although they violate the independence or the territorial or personal supremacy of the State concerned, and although such State has by no means any legal duty to submit patiently and suffer the intervention. Of such interventions in default of right there are two kinds generally admitted and excused—namely, such as are necessary in self-preservation and such as are in the interest of the balance of power. Admissibility of Intervention in default of Right.

(1) As regards interventions for the purpose of self-preservation, it is obvious that, if any necessary violation committed in self-preservation of the International Personality of other States is, as shown above (§ 130), excused, such violation must also be excused as is contained in an intervention. And it matters not whether such an intervention exercised in self-preservation is provoked by an actual or imminent intervention on the part of a third State, or by some other incident.

(2) As regards intervention in the interest of the balance of power, it is likewise obvious that it must be excused. An equilibrium between the members of the Family of Nations is an indispensable condition of the very existence of International Law. If the States could not keep one another in check, all Law of Nations would soon disappear, as, naturally, an over-powerful State would tend to act according to discretion instead of according to law. Since the Westphalian Peace of 1648 the principle of balance of power has played a preponderant part in the history of Europe. It found express recognition in 1713 in the Treaty of Peace of Utrecht, it was the guiding star at the Vienna Congress in 1815 when

the map of Europe was re-arranged, at the Congress of Paris in 1856, the Conference of London in 1867, and the Congress of Berlin in 1878. The States themselves and the majority of writers agree upon the admissibility of intervention in the interest of balance of power. Most of the interventions exercised in the interest of the preservation of the Turkish Empire must, in so far as they are not based on treaty rights, be classified as interventions in the interest of balance of power. Examples of this are supplied by collective interventions exercised by the Powers in 1886 for the purpose of preventing the outbreak of war between Greece and Turkey, and in 1897 during the war between Greece and Turkey with regard to the island of Crete.

Intervention in the interest of Humanity.

§ 137. Many jurists maintain that intervention is likewise admissible, or even has a basis of right, when exercised in the interest of humanity for the purpose of stopping religious persecution and endless cruelties in time of peace and war. That the Powers have in the past exercised intervention on these grounds, there is no doubt. Thus Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey, because public opinion was horrified at the cruelties committed during this struggle. And many a time interventions have taken place to stop the persecution of Christians in Turkey. But whether there is really a rule of the Law of Nations which admits such interventions may well be doubted. Yet, on the other hand, it cannot be denied that public opinion and the attitude of the Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognise the rule that interventions in the interests of humanity are admis-

sible provided they are exercised in the form of a *collective* intervention of the Powers.[1]

Intervention *de facto* a Matter of Policy.

§ 138. Careful analysis of the rules of the Law of Nations regarding intervention and the hitherto exercised practice of intervention make it apparent that intervention is *de facto* a matter of policy just like war. This is the result of the combination of several factors. Since, even in the cases in which it is based on a right, intervention is not compulsory, but is solely in the discretion of the State concerned, it is for that reason alone a matter of policy. Since, secondly, every State must decide for itself whether vital interests of its own are at stake and whether a case of necessity in the interest of self-preservation has arisen, intervention is for this part again a matter of policy. Since, thirdly, the question of balance of power is so complicated and the historical development of the States involves gradually an alteration of the division of power between the States, it must likewise be left to the appreciation of every State whether or not it considers the balance of power endangered and, therefore, an intervention necessary. And who can undertake to lay down a hard and fast rule with regard to the amount of inhumanity on the part of a Government to admit of intervention according to the Law of Nations?

No State will ever intervene in the affairs of another, if it has not some important interest in doing so, and it has always been easy for such State to find or pretend some legal justification for an intervention, be it self-preservation, balance of power, or humanity. There is no great danger to the wel-

[1] See Hall, §§ 91 and 95, where the merits of the problem are discussed from all sides. See also below, § 292.

fare of the States in the fact that intervention is *de facto* a matter of policy. Too many interests are common to all the members of the Family of Nations, and too great is the natural jealousy between the Great Powers, for an abuse of intervention on the part of one powerful State without calling other States into the field. Since unjustified intervention violates the very principles of the Law of Nations, and since, as I have stated above (§ 135), in case of a violation of these principles on the part of a State every other State has a right to intervene, any unjustifiable intervention by one State in the affairs of another gives a right of intervention to all other States. Thus it becomes here, as elsewhere, apparent that the Law of Nations is intimately connected with the interests of all the States, and that they must themselves secure the maintenance and realisation of this law. This condition of things tends naturally to hamper more the ambitions of weaker States than those of the single Great Powers, but it seems unalterable.

The Monroe Doctrine.

§ 139. The *de facto* political character of the whole matter of intervention becomes clearly apparent through the so-called Monroe doctrine[1] of the United States of America. This doctrine, in its first appearance, is indirectly a product of the policy of intervention in the interest of legitimacy which the Holy Alliance pursued in the beginning of the nineteenth century after the downfall of Napoleon. The Powers of this alliance were inclined to extend their policy of intervention to America and to assist Spain in regaining her hold over the former Spanish

[1] Wharton, § 57; Dana's Note No. 36 to Wharton, p. 36; Tucker, The Monroe Doctrine (1885); Moore, The Monroe Doctrine (1895); Cespedès, La doctrine de Monroe (1893); Beaumarchais, La doctrine de Monroe (1898); Redaway, The Monroe Doctrine (1898); Pékin, Les États-Unis et la doctrine de Monroe (1900).

colonies in South America which had declared and maintained their independence, and which were recognised as independent Sovereign States by the United States of America. To meet and to check the imminent danger, President James Monroe delivered his celebrated Message to Congress on December 2, 1823. This Message contains two quite different, but nevertheless important, declarations.

(1) In connection with the unsettled boundary lines in the north-west of the American continent, the Message declared "that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonisation by any European Power." This declaration was never recognised by the European Powers, and Great Britain and Russia protested expressly against it. In fact, however, no occupation of American territory has since then taken place on the part of a European State.

(2) In regard to the contemplated intervention of the Holy Alliance between Spain and the South American States, the Message declared that the United States had not intervened, and never would intervene, in wars in Europe, but could not, on the other hand, in the interest of her own peace and happiness, allow the allied European Powers to extend their political system to any part of America and try to intervene in the independence of the South American republics.

(3) Since the time of President Monroe, the Monroe doctrine has gradually been somewhat extended in so far as the United States claims a kind of political hegemony over all the States of the American continent. Whenever a conflict occurs between such an American State and a European Power, the United States is ready to exercise intervention.

Through the civil war her hands were bound in the sixties of the last century, and she could not prevent the combined action of Great Britain, Spain, and France in Mexico. She did, further, not intervene in 1902 when Great Britain, Germany, and Italy took combined action against Venezuela, because she was cognisant of the fact that this action intended merely to make Venezuela comply with her international duties. But she intervened in 1896 in the boundary conflict between Great Britain and Venezuela when Lord Salisbury had sent an *ultimatum* to Venezuela, and she retains the Monroe doctrine as a matter of principle.

Merits of the Monroe Doctrine.

§ 140. The importance of the Monroe doctrine is of a political, not of a legal character. Since the Law of Nations is a law between all the civilised States as equal members of the Family of Nations, the States of the American continent are subjects of the same international rights and duties as the European States. The European States are, as far as the Law of Nations is concerned, absolutely free to acquire territory in America as elsewhere. And the same legal rules are valid concerning intervention on the part of European Powers both in American affairs and in affairs of other States. But it is evident that the Monroe doctrine, as the guiding star of the policy of the United States, is of the greatest *political* importance. And it ought not to be maintained that this policy is in any way inconsistent with the Law of Nations. In the interest of balance of power in the world, the United States considers it a necessity that European Powers should not acquire more territory on the American continent than they actually possess. She considers, further, her own welfare so intimately connected with that of the other American States that she thinks it necessary, in

the interest of self-preservation, to watch closely the relations of these States with Europe and also the relations between these very States, and eventually to intervene in conflicts. Since every State must decide for itself whether and where vital interests of its own are at stake and whether the balance of power is endangered to its disadvantage, and since, as explained above (§ 138), intervention is therefore *de facto* a matter of policy, there is no legal impediment to the United States carrying out a policy in conformity with the Monroe doctrine. This policy hampers indeed the South American States, but with their growing strength it will gradually disappear. For, whenever some of these States become Great Powers themselves, they will no longer submit to the political hegemony of the United States, and the Monroe doctrine will have played its part.

VII

Intercourse

Grotius, II. c. 2, § 13—Vattel, II. §§ 21-26—Hall, § 13—Taylor, § 160—Bluntschli, § 381 and p. 26—Hartmann, § 15—Heffter, §§ 26 and 33—Holtzendorff in Holtzendorff, II. pp. 60-64—Gareis, § 27—Liszt, § 7—Ullmann, § 29—Bonfils, Nos. 285-289—Despagnet, No. 183- Pradier-Fodéré, I. No. 184—Rivier, I. pp. 262-264—Calvo, III. §§ 1303-1305—Fiore, I. No. 370—Martens, I. § 79.

Intercourse a presupposition of International Personality.

§ 141. Many adherents of the doctrine of fundamental rights include therein also a right of intercourse of every State with all others. This right of intercourse is said to contain a right of diplomatic, commercial, postal, telegraphic intercourse, of intercourse by railway, a right of foreigners to travel and reside on the territory of every State,

and the like. But if the real facts of international life are taken into consideration, it becomes at once apparent that such a fundamental right of intercourse does not exist. All the consequences which are said to follow out of the right of intercourse are not at all consequences of a right, but nothing else than consequences of the fact that intercourse between the States is a condition without which a Law of Nations would not and could not exist. The civilised States make a community of States because they are knit together through their common interests and the manifold intercourse which serves these interests. Through the intercourse with one another and with the growth of their common interests the Law of Nations has grown up among the civilised States. Where there is no intercourse there cannot be a community and a law for such community. A State cannot be a member of the Family of Nations and an International Person, if it has no intercourse whatever with at least one or more other States. Varied intercourse with other States is a necessity for every civilised State. The mere fact that a State is a member of the Family of Nations shows that it has various intercourse with other States, for otherwise it would never have become a member of that family. Intercourse is therefore one of the characteristics of the position of the States within the Family of Nations, and it may be maintained that intercourse is a presupposition of the international Personality of every State. But no special right or rights of intercourse exist according to the Law of Nations between the States. It is because such special rights of intercourse do not exist that the States conclude special treaties regarding matters of post, telegraphs, telephones, railways, and commerce.

Most States keep up protective duties to exclude foreign trade from or to hamper it within their own borders in the interest of their home commerce, industry, and agriculture. And although regularly they allow foreigners to travel and to reside on their territory, they can expel every foreign subject according to discretion.

Consequences of Intercourse as a Presupposition of International Personality.

§ 142. Intercourse being a presupposition of International Personality, the Law of Nations favours intercourse in every way. The whole institution of legation serves the interest of intercourse between the States, as does the consular institution. The right of legation,[1] which every full-Sovereign State undoubtedly holds, is held in the interest of intercourse, as is certainly the right of protection over citizens abroad[2] which every State possesses. The freedom of the Open Sea,[3] which has been universally recognised since the end of the first quarter of the nineteenth century, the right of every State to the passage of its merchantmen through the maritime belt[4] of all other States, and, further, freedom of navigation for the merchantmen of all nations on so-called international rivers,[5] are further examples of provisions of the Law of Nations in the interest of international intercourse.

The question is frequently discussed and answered in the affirmative whether a State has the right to require such States as are outside the Family of Nations to open their ports and allow commercial intercourse. Since the Law of Nations is a law between those States only which are members of the Family of Nations, it has certainly nothing to do

[1] See below, § 360.

[2] See below, § 319. The right of protection over citizens abroad is frequently said to be a special right of self-preservation, but it is really a right in the interest of intercourse.

[3] See below, § 259.

[4] See below, § 188.

[5] See below, § 178.

with this question, which is therefore one of mere commercial policy and of morality.

VIII

JURISDICTION

Hall, §§ 62, 75-80—Westlake, I. pp. 236-271—Lawrence, §§ 117-133—Phillimore, I. §§ 317-356—Twiss, I. §§ 157-171—Halleck, I. pp. 186-245—Taylor, §§ 169-171—Wheaton, §§ 77-151—Bluntschli, §§ 388-393—Heffter, §§ 34-39—Bonfils, Nos. 263-266—Rivier, I. § 28—Fiore, I. Nos. 475-588.

Jurisdiction important for the position of the States within the Family of Nations.

§ 143. Jurisdiction is a matter of importance as regards the position of the States within the Family of Nations for several reasons. States possessing independence and territorial as well as personal supremacy can naturally extend or restrict their jurisdiction as far as they like. However, as members of the Family of Nations and International Persons, the States must exercise self-restraint in the exercise of this natural power in the interest of one another. Since intercourse of all kinds takes place between the States and their subjects, the matter ought to be thoroughly regulated by the Law of Nations. But such regulation has as yet only partially grown up. The consequence of both the regulation and non-regulation of jurisdiction is that concurrent jurisdiction of several States can often at the same time be exercised over the same persons and matters. And it can also happen that matters fall under no jurisdiction because the several States which could extend their jurisdiction over these matters refuse to do so, leaving them to each other's jurisdiction.

Restrictions upon Territorial Jurisdiction.

§ 144. As all persons and things within the territory of a State fall under its territorial supremacy, every State has jurisdiction over them. The Law of

Nations, however, gives a right to every State to claim so-called exterritoriality and therefore exemption from local jurisdiction chiefly for its head,[1] its diplomatic envoys,[2] its men-of-war,[3] and its armed forces[4] abroad. And partly by custom and partly by treaty obligations, Eastern non-Christian States, Japan now excepted, are restricted[5] in their territorial jurisdiction with regard to foreign resident subjects of Christian Powers.

Jurisdiction over Citizens abroad.

§ 145. The Law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy. As every State can also exercise jurisdiction over foreigners[6] within its boundaries, such foreigners are often under two concurrent jurisdictions. And, since a State is not obliged to exercise jurisdiction for all matters over foreigners on its territory, and since the home State is not obliged to exercise jurisdiction over its subjects abroad, it may happen that foreigners are actually for some matters under no State's jurisdiction.

Jurisdiction on the Open Sea.

§ 146. As the Open Sea is not under the sway of any State, no State can exercise its jurisdiction there. But it is a rule of the Law of Nations that the vessels and the things and persons thereon remain during the time they are on the Open Sea under the jurisdiction of the State under whose flag they sail.[7] It is another rule of the Law of Nations, that piracy[8] on the Open Sea can be punished by any State, whether the pirate sails under the flag of a State at all or not. Again, in the interest of the safety of the Open Sea,

[1] Details below, §§ 348-353, and 356.
[2] Details below, §§ 385-405.
[3] Details below, §§ 450-451.
[4] Details below, § 445.
[5] Details below, §§ 318 and 440.
[6] See below, § 317.
[7] See below, § 260.
[8] See below, § 278.

every State has the right to order its men-of-war to ask any suspicious merchantman they meet on the Open Sea to show the flag, to arrest foreign merchantmen sailing under its flag without an authorisation for its use, and to pursue into the Open Sea and to arrest there such foreign merchantmen as have committed a violation of its law whilst in its ports or maritime belt.[1] Lastly, in time of war belligerent States have the right to order their men-of-war to visit, search, and eventually capture on the Open Sea all neutral vessels for contraband, breach of blockade, and maritime services to the enemy.

Criminal Jurisdiction over Foreigners in Foreign States.

§ 147. Many States claim jurisdiction and threaten punishments for certain acts committed by a foreigner in foreign countries.[2] States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, forging bank-notes, and the like, or against its citizens, such as murder or arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the committal of such act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of enforcing punishment. The question is, therefore, whether States have a right to jurisdiction over acts of foreigners committed in foreign countries, and whether the home State of such a foreigner has a duty to acquiesce in the latter's punishment in case he comes into the power of these States. The question must be answered in the negative. For at the time such criminal acts are committed the perpetrators are

[1] See below, §§ 265–266.

[2] See Hall, § 62; Westlake, I. pp. 251–253; Lawrence, § 125; Taylor, § 191; Phillimore, I. § 334.

neither under the territorial nor under the personal supremacy of the States concerned. And a State can only require respect for its laws from such foreigners as are permanently or transiently within its territory. No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations, and the right of protection over citizens abroad held by every State would justify it in an intervention in case one of its citizens abroad should be required to stand his trial before the Courts of another State for criminal acts which he did not commit during the time he was under the territorial supremacy of such State.[1] In the only case which is reported—namely, in the case of Cutting—matters were settled according to this view. In 1886, one A. K. Cutting, a subject of the United States, was arrested in Mexico for an alleged libel against one Emigdio Medina, a subject of Mexico, which was published in the newspaper of El Paso in Texas. Mexico maintained that she had a right to punish Cutting because according to her Criminal Law offences committed by foreigners abroad against Mexican subjects are punishable in Mexico. The United States, however, intervened and demanded Cutting's release, which was finally granted.[2]

[1] The Institute of International Law has studied the question at several meetings and in 1883, at its meeting at Munich (see Annuaire, VII. p. 156), among a body of fifteen articles concerning the conflict of the Criminal Laws of different States, adopted the following (article 8):—"Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence or endanger its security and when they are not provided against by the Criminal Law of the territory where they take place." But it must be emphasised that this resolution has value *de lege ferenda* only.

[2] See Taylor, § 192.

CHAPTER III

RESPONSIBILITY OF STATES

I

On State Responsibility in General

Grotius, II. c. 21, § 2—Pufendorf, VIII. c. 6, § 12—Vattel, II. §§ 63-78—Hall, § 65—Halleck, I. pp. 440-444—Wharton, I. § 21—Wheaton, § 32—Bluntschli, § 74—Heffter, §§ 101-104—Holtzendorff in Holtzendorff, II. pp. 70-74—Liszt, § 24—Ullmann, § 74—Bonfils, Nos. 324-332—Piedelièvre, I. pp. 317-322—Pradier-Fodéré, I. Nos. 196-210—Rivier, I. pp. 40-44—Calvo, III. §§ 1261-1298—Fiore, I. Nos. 659-679—Martens, I. § 118—Clunet, "Offenses et actes hostiles commis par particuliers contre un état étranger" (1887).—Triepel, "Völkerrecht und Landesrecht" (1899), pp. 324-381—Anzillotti, "Teoria generale della responsabilità dello stato nel diritto internazionale" (1902)—Rougier, "Les guerres civiles et le droit des gens" (1903), pp. 448-474.

Nature of State Responsibility.

§ 148. It is often maintained that a State, as a sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of a State towards its subjects. Since a State can abolish parts of its Municipal Law and can make new Municipal Law, it can always avoid legal, although not moral, responsibility by a change of Municipal Law. Different from this internal autocracy is the external responsibility of a State to fulfil its international legal duties. Responsibility for such duties is, as will be remembered,[1] a quality of every State as an International Person, without which the Family of Nations could not peaceably exist. Although there is no International Court

[1] See above, § 118.

of Justice which could establish such responsibility and pronounce a fine or other punishment against a State for neglect of its international duties, State responsibility concerning international duties is nevertheless a *legal* responsibility. For a State cannot abolish or create new International Law in the same way as it can abolish or create new Municipal Law. A State, therefore, cannot renounce its international duties unilaterally[1] at discretion, but is and remains legally bound by them. And although there is not and never will be a central authority above the single States to enforce the fulfilment of these duties, there is the legalised self-help of the single States against one another. For every neglect of an international legal duty constitutes an international delinquency,[2] and the violated State can through reprisals or even war compel the delinquent State to comply with its international duties.

Original and vicarious State Responsibility.

§ 149. Now if we examine the various international duties out of which responsibility of a State may rise, we find that there is a necessity for two different kinds of State responsibility to be distinguished. They may be named "original" in contradistinction to "vicarious" responsibility. I name as "original" the responsibility borne by a State for its own—that is, its Government's actions, and for such actions of the lower organs or private individuals as are performed at the Government's command or with its authorisation. But States have to bear another responsibility besides that just mentioned. For States are, according to the Law of Nations, in a sense

[1] See Annex to Protocol I. of Conference of London, 1871, where the Signatory Powers proclaim that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement."

[2] See below, § 151.

responsible for certain acts other than their own—namely, certain unauthorised injurious acts of their organs, of their subjects, and even of such foreigners as are for the time living within their territory. This responsibility of States for acts other than their own I name "vicarious" responsibility. Since the Law of Nations is a law between States only, and since States are the sole exclusive subjects of International Law, individuals are mere objects[1] of International Law, and the latter is unable to confer directly rights and duties upon individuals. And for this reason the Law of Nations must make every State in a sense responsible for certain internationally injurious acts committed by its officials, subjects, and such foreigners as are temporarily resident on its territory.

Essential Difference between Original and Vicarious Responsibility.

§ 150. It is, however, obvious that original and vicarious State responsibility are essentially different. Whereas the one is responsibility of a State for a neglect of its own duty, the other is not. A neglect of international legal duties of a State constitutes an international delinquency. The responsibility which a State bears for such delinquency is especially grave, and requires, apart from other especial consequences, a formal expiatory act, such as an apology at least, by the delinquent State to repair the wrong done. On the other hand, the vicarious responsibility which a State bears requires chiefly compulsion to make those officials or other individuals who have committed internationally injurious acts repair as far as possible the wrong done, and punishment, if necessary, of the wrong-doers. In case a State complies with these requirements, no blame falls upon it on account of such injurious acts. But of course, in case

[1] See below, § 290.

a State refuses to comply with these requirements, it commits thereby an international delinquency, and its hitherto vicarious responsibility turns *ipso facto* into original responsibility.

II

State Responsibility for International Delinquencies

See the literature quoted above at the commencement of § 148.

Conception of International Delinquencies.

§ 151. International delinquency is every injury to another State committed by the head and the Government of a State through neglect of an international legal duty. Equivalent to acts of the head and Government are acts of officials or other individuals commanded or authorised by the head or Government.

An international delinquency is not a crime, because the delinquent State, as a Sovereign, cannot be punished, although compulsion may be exercised to procure a reparation of the wrong done.

International delinquencies in the technical sense of the term must not be confounded either with so-called "Crimes against the Law of Nations" or with so-called "International Crimes." "Crimes against the Law of Nations" in the wording of many Criminal Codes of the single States are such acts of individuals against foreign States as are rendered criminal by these Codes. Of these acts, the gravest are those for which the State on whose territory they are committed bears a vicarious responsibility according to the Law of Nations. "International Crimes," on the other hand, refer to crimes like piracy on the high

seas or slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent.

An international delinquency must, further, not be confounded with discourteous and unfriendly acts. Although such acts may be met by retorsion, they are not illegal and therefore not delinquent acts.

Subjects of International Delinquencies.

§ 152. An international delinquency may be committed by every member of the Family of Nations, be such member a full-Sovereign, half-Sovereign, or part-Sovereign State. Yet, half- and part-Sovereign States can commit international delinquencies in so far only as they have a footing within the Family of Nations, and therefore international duties of their own. And even then the circumstances of each case decide whether the delinquent has to account for its neglect of an international duty directly to the wronged State, or whether it is the full-Sovereign State (suzerain, federal, or protectorate-exercising State) to which the delinquent State is attached that must bear a vicarious responsibility for the delinquency. On the other hand, so-called Colonial States without any footing whatever within the Family of Nations and, further, the member-States of the American Federal States, which likewise lack any footing whatever within the Family of Nations because all their possible international relations are absorbed by the respective Federal States, cannot commit an international delinquency. Thus an injurious act against France committed by the Government of the Commonwealth of Australia or by the Government of the State of California in the United States of America, would not be an international delinquency in the technical sense of the term, but

merely an internationally injurious act for which Great Britain or the United States of America must bear a vicarious responsibility.

State Organs able to commit International Delinquencies.

§ 153. Since States are juristic persons, the question arises, Whose internationally injurious acts are to be considered State acts and therefore international delinquencies? It is obvious that acts of this kind are, first, all such acts as are performed by the heads of States or by the members of Government acting in that capacity, so that their acts appear as State acts. Acts of such kind are, secondly, all acts of officials or other individuals which are either commanded or authorised by Governments. On the other hand, unauthorised acts of corporations, such as Municipalities, or of officials, such as magistrates or even ambassadors, or of private individuals, never constitute an international delinquency. And, further, all acts committed by heads of States and members of Government outside their official capacity, simply as individuals who act for themselves and not for the State, are not international delinquencies either.[1] The States concerned must certainly bear a vicarious responsibility for all such acts, but for that very reason these acts comprise not international delinquencies.

No International Delinquency without Malice or culpable Negligence.

§ 154. An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence. Therefore, an act of a State committed by right or prompted by self-preservation in necessary self-defence does not contain an international delinquency, however injurious it may actually be to another State. And the same is valid in regard to acts of officials or other individuals

[1] See below, §§ 157–158.

committed by command or with the authorisation of a Government.

Objects of International Delinquencies.

§ 155. International delinquencies may be committed against so many different objects that it is impossible to enumerate them. It suffices to give some striking examples. Thus a State may be injured—in regard to its independence through an unjustified intervention; in regard to its territorial supremacy through a violation of its frontier; in regard to its dignity through disrespectful treatment of its head or its diplomatic envoys; in regard to its personal supremacy through forcible naturalisation of its citizens abroad; in regard to its treaty rights through an act violating a treaty. A State may also suffer various injuries in time of war by illegitimate acts of warfare, or by a violation of neutrality on the part of a neutral State in favour of the other belligerent. And a neutral may in time of war be injured in various ways through a belligerent violating neutrality by acts of warfare within the neutral State's territory; for instance, through a belligerent man-of-war attacking an enemy vessel in a neutral port or in neutral territorial waters, or through a belligerent violating neutrality by acts of warfare committed on the Open Sea against neutral vessels.

Legal consequences of International Delinquencies.

§ 156. The nature of the Law of Nations as a law between, not above, Sovereign States excludes the possibility of punishing a State for an international delinquency and of considering the latter in the light of a crime. The only legal consequences of an international delinquency that are possible under existing circumstances are such as create a reparation of the moral and material wrong done. The merits and the conditions of the special cases are, however, so

different that it is impossible for the Law of Nations to prescribe once for all what legal consequences an international delinquency should have. The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such expiatory acts as are necessary for a reparation of the wrong done. What kind of acts these are, depends upon the special case and the discretion of the wronged State. At least a formal apology on the part of the delinquent State will be necessary, and it is obvious that there must be a pecuniary reparation for a material damage. The apology may have to take the form of some ceremonial act, such as a salute to the flag or to the coat of arms of the wronged State, the mission of a special embassy bearing apologies, and the like. A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, on the one hand, and on the other, for such as arise merely from culpable negligence.

When the delinquent State refuses reparation of the wrong done, the wronged State can exercise such means as are necessary to enforce an adequate reparation. In case of international delinquencies committed in time of peace, such means are reprisals [1] (including embargo and pacific blockade) and war as the case may require. On the other hand, in case of international delinquencies committed in time of war through illegitimate acts of warfare on the part of a belligerent, such means are reprisals and the taking of hostages.[2]

[1] See below, vol. II. § 34. [2] See below, vol. II. §§ 248 and 259.

III

State Responsibility for Acts of State Organs

See the literature quoted above at the commencement of § 148.

Responsibility varies with Organs concerned.

§ 157. States must bear vicarious responsibility for all internationally injurious acts of their organs. As, however, these organs are of different kinds and of different position, the actual responsibility of a State for acts of its organs varies with the organs concerned. It is therefore necessary to distinguish between internationally injurious acts of heads of States, members of Government, diplomatic envoys, parliaments, judicial functionaries, administrative officials, and military and naval forces.

Internationally injurious Acts of Heads of States.

§ 158. Such international injurious acts as are committed by heads of States in the exercise of their official functions are here not our concern, because they constitute international delinquencies which have been discussed above (§§ 151–156). But a monarch can, just as any other individual, in his private life commit many internationally injurious acts, and the question is, whether and in what degree a State must bear responsibility for such acts of its head. The position of a head of a State, who is within and without his State neither under the jurisdiction of a Court of Justice nor under any kind of disciplinary control, makes it a necessity for the Law of Nations to claim a certain vicarious responsibility from States for internationally injurious acts committed by their heads in private life. Thus, for instance, when a monarch during his stay abroad commits an act injurious to the property of a foreign subject and refuses adequate reparation, his State may be requested to pay damages on his behalf.

Internationally injurious Acts of Members of Government.

§ 159. As regards internationally injurious acts of members of a Government, a distinction must be made between such acts as are committed by the offenders in their official capacity and other acts. Acts of the first kind constitute international delinquencies, as stated above (§ 153). But members of a Government can in their private life perform as many internationally injurious acts as private individuals, and we must ascertain therefore what kind of responsibility their State must bear for such acts. Now, as members of a Government have not the exceptional position of heads of States and are therefore, under the jurisdiction of the ordinary Courts of Justice, there is no reason why their State should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

Internationally injurious Acts of Diplomatic Envoys.

§ 160. The position of diplomatic envoys who, as representatives of their home State, enjoy the privileges of exterritoriality, gives, on the one hand, a very great importance to internationally injurious acts committed by them on the territory of the receiving State, and, on the other hand, excludes the jurisdiction of the receiving State over such acts. The Law of Nations makes therefore the home State in a sense responsible for all acts of an envoy injurious to the State or its subjects in whose territory he resides. But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged State. Thus, for instance, a crime committed by the envoy on the territory of the receiving State must be punished by his home State, and according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologise

or express its regret for his behaviour, or to pay damages. It must, however, be remembered that such injurious acts as an envoy performs at the command or with the authorisation of the home State, constitute international delinquencies for which the home State bears original responsibility and for which the envoy cannot personally be blamed.

Internationally injurious Attitudes of Parliaments.

§ 161. As regards internationally injurious attitudes of parliaments, it must be kept in mind that, most important as may be the part parliaments play in the political life of a nation, they do not belong to the organs which represent the States in their international relations with other States. Therefore, however injurious to a foreign State an attitude of a parliament may be, it can never constitute an international delinquency. That, on the other hand, all States must bear vicarious responsibility for such attitudes of their parliaments, there can be no doubt. But, although the position of a Government is difficult in such cases, especially in States that have a representative Government, this does not concern the wronged State, which has a right to demand satisfaction and reparation for the wrong done.

Internationally injurious Acts of Judicial Functionaries.

162. Internationally injurious acts committed by judicial functionaries in their private life are in no way different from such acts committed by other individuals. But these functionaries may in their official capacity commit such acts, and the question is how far a State's vicarious responsibility for acts of its judicial functionaries can reasonably be extended in face of the fact that in modern civilised States these functionaries are to a great extent independent of their Government.[1] Undoubtedly,

[1] Wharton, II. §§ 230, comprises abundant and instructive material on this question.

in case of such denial or undue delay of justice by the Courts as is internationally injurious, a State must find means to exercise compulsion against such Courts. And the same is valid with regard to an obvious and malicious act of misapplication of the law by the Courts which is injurious to another State. But if a Court observes its own proper forms of justice and nevertheless pronounces a materially unjust judgment, matters become so complicated that there is hardly a peaceable way in which the injured State can successfully obtain reparation for the wrong done, and eventually war may break out between the respective States.

Internationally injurious Acts of administrative Officials and Military and Naval Forces.

§ 163. Internationally injurious acts committed in the exercise of their official functions by administrative officials and military and naval forces of a State without that State's command or authorisation, are not international delinquencies because they are not State acts. But a State bears a wide, unlimited, and unrestricted vicarious responsibility for such acts because its administrative officials and military and naval forces are under its disciplinary control, and because all acts of such officials and forces in the exercise of their official functions are *prima facie* acts of the respective State. Therefore, a State has, first of all, to disown and disapprove of such acts by expressing its regret or even apologising to the Government of the injured State; secondly, damages must be paid where required; and, lastly, the offenders must be punished according to the merits of the special case.

As regards the question what kind of acts of administrative officials and military and naval forces are of an internationally injurious character, the rule may safely be laid down that such acts of these

subjects are internationally injurious as would constitute international delinquencies when committed by the State itself or with its authorisation. A very instructive case may be quoted as an illustrative example. On September 26, 1887, a German soldier on sentry duty at the frontier near Vexaincourt shot from the German side and killed an individual who was on French territory. As this act of the sentry violated French territorial supremacy, Germany disowned and apologised for it and paid a sum of 50,000 francs to the widow of the deceased as damages. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood.[1]

But it must be specially emphasised that a State never bears any responsibility for losses sustained by foreign subjects through *legitimate* acts of administrative officials and military and naval forces. Individuals who enter foreign territory submit themselves to the law of the land, and their home State has no right to request that they should be otherwise treated than as the law of the land authorises a State to treat its own subjects. Therefore, since the Law of Nations does not prevent a State from expelling foreigners, the home State of an expelled foreigner cannot request the expelling State to pay damages for the losses sustained by the expelled through his having to leave the country. Therefore, further, a State need not make any reparation for losses sustained by a foreigner through legitimate measures taken by administrative officials and military forces in time of war, insurrection,[2] riot, or public calamity

[1] A recent example occurred in 1904, when the Russian Baltic Fleet, on its way to the Far East during the Russo-Japanese war, fired upon the Hull Fishing Fleet off the Dogger Bank. (See below, vol. II. § 5.)

[2] See below, § 167.

such as a fire, an epidemic outbreak of dangerous disease, and the like.

IV

State Responsibility for Acts of Private Persons

See the literature quoted above at the commencement of § 148.

Vicarious in contradistinction to original State Responsibility for Acts of Private Persons.

§ 164. As regards State responsibility for acts of private persons, it is first of all necessary not to confound the original with the vicarious responsibility of States for internationally injurious acts of private persons. International Law imposes the duty upon every State to prevent as far as possible its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States. A State which either intentionally and maliciously or through culpable negligence does not comply with this duty commits an international delinquency for which it has to bear original responsibility. But it is practically impossible for a State to prevent all injurious acts which a private person might commit against a foreign State. It is for that reason that a State must, according to International Law, bear vicarious responsibility for such injurious acts of private individuals as are incapable of prevention.

Vicarious responsibility for Acts of Private Persons relative only.

§ 165. Now, whereas the vicarious responsibility of States for official acts of administrative officials and military and naval forces is unlimited and unrestricted, their vicarious responsibility for acts of private persons is only relative. For their sole duty is to procure satisfaction and reparation for the wronged State as far as possible by punishing the offenders and compelling them to pay damages

where required. Beyond this limit a State is not responsible for acts of private persons; there is in especial no duty of a State itself to pay damages for such acts if the offenders are not able to do it.

Municipal Law for Offences against Foreign States.

§ 166. It is a consequence of the vicarious responsibility of States for acts of private persons that by the Criminal Law of every civilised State punishment is severe for certain offences of private persons against foreign States, such as violation of ambassadors' privileges, libel on heads of foreign States and on foreign envoys, and other injurious acts.[1] In every case that arises the offender must be prosecuted and the law enforced by the Courts of Justice And it is further a consequence of the vicarious responsibility of States for acts of private persons that criminal offences of private persons against foreign subjects—such offences are indirectly offences against the respective foreign States because the latter exercise protection over their subjects abroad —must be punished according to the ordinary law of the land, and that the Civil Courts of Justice of the land must be accessible for claims of foreign subjects against individuals living under the territorial supremacy of such land.

Responsibility for Acts of Insurgents and Rioters.

§ 167. The vicarious responsibility of States for acts of insurgents and rioters is the same as for acts of other private individuals. As soon as peace and order are re-established, such insurgents and rioters as have committed criminal injuries against foreign States must be punished according to the law of the land. The point need not be mentioned at all were it not for the fact that, in several cases of insurrection and riots, claims have been made by foreign

[1] As regards the Criminal Law of England concerning such acts, see Stephen's Digest, articles 96–103.

States against the local State for damages for losses sustained by their subjects through acts of the insurgents or rioters respectively, and that some writers[1] assert that such claims are justified by the Law of Nations. The majority of writers maintain, correctly, I think, that the responsibility of States does not involve the duty to repair the losses which foreign subjects have sustained through acts of insurgents and rioters. Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots just as the risk of the outbreak of other calamities. When they sustain a loss from acts of insurgents or rioters, they may, if they can, trace their losses to the acts of certain individuals, and claim damages from the latter before the Courts of Justice. The responsibility of a State for acts of private persons injurious to foreign subjects reaches only so far that its Courts must be accessible to the latter for the purpose of claiming damages from the offenders, and must punish such of those acts as are criminal. And in States which, as France for instance, have such Municipal Laws as make the town or the county where an insurrection or riot has taken place responsible for the pecuniary loss sustained by individuals during those events, foreign subjects must be allowed to claim damages from the local authorities for losses of such kind. But the State itself never has by International Law a duty to pay such damages.

The practice of the States agrees with this rule laid down by the majority of writers. Although in some cases several States have paid damages for losses of such kind, they have done it, not through compulsion of law, but for political reasons. In

[1] See, for instance, Rivier, II. p. 43.

most cases in which the damages have been claimed for such losses, the respective States have refused to comply with the request.[1] As such claims have during the second half of the nineteenth century frequently been tendered against American States which have repeatedly been the scene of insurrections, several of these States have in commercial and similar treaties which they concluded with other States expressly stipulated[2] that they are not responsible for losses sustained by foreign subjects on their territory through acts of insurgents and rioters.[3]

[1] See the cases in Calvo, III. §§ 1283–1290.

[2] See Martens, N.R.G. IX. p. 474 (Germany and Mexico); XV. p. 840 (France and Mexico); XIX. p. 831 (Germany and Colombia); XXII. p. 308 (Italy and Colombia), and p. 507 (Italy and Paraguay).

[3] The Institute of International Law at its meeting at Neuchatel in 1900 adopted five rules regarding the responsibility of States with regard to this matter. See Annuaire, XVIII. p. 254.

PART II

THE OBJECTS OF THE LAW OF NATIONS



CHAPTER I

STATE TERRITORY

I

On State Territory in General

Vattel, II. §§ 79-83—Hall, § 30—Westlake, I. pp. 84-88—Lawrence, §§ 90-91—Phillimore, I. §§ 150-154—Twiss, I. §§ 140-144—Halleck, I. pp. 150-156—Taylor, § 217—Wheaton, §§ 161-163—Blunstchli, § 277—Hartmann, § 58—Holtzendorff in Holtzendorff, II. pp. 225-232—Gareis, § 18—Liszt, § 9—Ullmann, § 75—Heffter, §§ 65-68—Bonfils, No. 483—Despagnet, Nos. 385-386—Pradier-Fodéré, II. No. 612—Nys, I. pp. 402-412—Rivier, I. pp. 135-142—Calvo, I. §§ 260-262—Fiore, I. Nos. 522-530—Martens, I. § 88—Del Bon, "Proprietà territoriale degli Stati" (1867)—Fricker, "Vom Staatsgebiet" (1867.

Conception of State Territory.

§ 168. State territory is that definite portion of the surface of the globe which is subjected to the sovereignty of the State. A State without a territory is not possible, although the necessary territory may be very small, as in the case of the Free Town of Hamburg, the Principality of Monaco, the Republic of San Marino, or the Principality of Lichtenstein. A wandering tribe, although it has a Government and is otherwise organised, is not a State before it has settled down on a territory of its own.

State territory is also named territorial property of a State. Yet it must be borne in mind that territorial property is a term of Public Law and must not be confounded with private property. The territory of a State is not the property of the

monarch, or of the Government, or even of the people of a State; it is the country which is subjected to the territorial supremacy or the *imperium* of a State. This distinction has, however, in former centuries not been sharply drawn. In spite of the *dictum* of Seneca, "Omnia rex imperio possidet, singuli dominio," the *imperium* of the monarch and the State over the State territory has very often been identified with private property of the monarch or the State. But with the disappearance of absolutism this identification has likewise disappeared. It is for this reason that nowadays, according to the Constitutional Law of most countries, neither the monarch nor the Government is able to dispose of parts of the State territory at will and without the consent of Parliament.[1]

It must, further, be emphasised that the territory of a State is totally independent of the racial character of the inhabitants of the State. The territory is the public property of the State, and not of a nation in the sense of a race. The State community may consist of different nations, as for instance the British or the Swiss or the Austrians.

Different kinds of Territory.

§ 169. The territory of a State may consist of one piece of the surface of the globe only, such as that of Switzerland. Such kind of territory is named "integrate territory" (*territorium clausum*). But the territory of a State may also be dismembered and consist of several pieces, such as that of Great Britain. All States with colonies have a "dismembered territory."

If a territory or a piece of it is absolutely sur-

[1] In English Constitutional Law this point is not settled. The cession of the Island of Heligoland to Germany in 1890 was, however, made conditional on the approval of Parliament. (See Anson, The Law and Custom of the Constitution, II. p. 299.)

rounded by the territory of another State, it is named an "enclosure." Thus the Republic of San Marino is an enclosure of Italy, and Birkenfeld, a piece of the territory of the Grand Duchy of Oldenburg situated on the river Rhine, is an enclosure of Prussia.

Another distinction is that between motherland and colonies. Colonies rank as territory of the motherland, although they may enjoy complete self-government and therefore be called Colonial States. Thus, if viewed from the standpoint of the Law of Nations, the Dominion of Canada and the Commonwealth of Australia are British territory.

As regards the relation between the Suzerain and the Vassal State, it is certain that the vassal is not, in the strict sense of the term, a part of the territory of the suzerain. Bulgaria and Egypt are not Turkish territory, although under Turkish suzerainty. But no general rule can be laid down, as everything depends on the merits of the special case, and as the vassal, even if it has some footing of its own within the Family of Nations, is internationally for the most part considered a mere portion of the Suzerain State.[1]

Importance of State Territory.

§ 170. The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority. State territory is an object of the Law of Nations because the latter recognises the supreme authority of every State within its territory. Whatever person or thing is in or enters into that territory, is *ipso facto* subjected to the supreme authority of the respective State according to the old rules, *Quidquid est in territorio, est etiam de territorio* and *Qui in territorio meo est, etiam meus subditus est.* No foreign authority has any power within the boundaries of the home territory,

[1] See above, § 91.

although foreign Sovereigns and diplomatic envoys enjoy the so-called privilege of exterritoriality, and although the Law of Nations does, and international treaties may, restrict [1] the home authority in many points in the exercise of its sovereignty.

One Territory, one State.

§ 171. The supreme authority which a State exercises over its territory makes it apparent that on one and the same territory can exist one full-Sovereign State only. Two or more full-Sovereign States on one and the same territory are an impossibility. The following four cases, of which the Law of Nations is cognisant, are apparent, but not real, exceptions to this rule.

(1) There is, first, the case of the so-called *condominium*. It happens sometimes that a piece of territory consisting of land or water is under the joint *tenancy* of two or more States, these several States exercising sovereignty conjointly over such piece and the individuals living thereon. Thus Schleswig-Holstein and Lauenburg from 1864 till 1866 were under the *condominium* of Austria and Prussia. Thus, further, Moresnet (Kelmis), on the frontier of Belgium and Prussia, is under the *condominium* of these two States [1] because they have not yet come to an agreement regarding the interpretation of a boundary treaty of 1815 between the Netherlands and Prussia. And since 1898 the Soudan is under the *condominium* of Great Britain and Egypt. It is easy to show that in such cases there are not two States on one and the same territory, but pieces of territory, the destiny of which is not yet decided, and which are meanwhile kept separate from the territories of the interested States under a separate

[1] See above, §§ 126-128.

[2] See Schröder, Das grenz-streitige Gebiet von Moresnet, (1902).

administration. Until a final settlement the interested States do not exercise each an individual sovereignty over these pieces, but they agree upon a joint administration under their conjoint sovereignty.

(2) The second case is that of the administration of a piece of territory by a foreign Power, with the consent of the owner-State. Thus, since 1878 the Turkish provinces of Bosnia and Herzegovina have been under the administration of Austria-Hungary, as likewise since 1878 the Turkish island of Cyprus has been under British administration. In these cases practically a cession of pieces of territory has taken place, although in theory the respective pieces still belong to the former owner-State. Anyhow, it is certain that only one sovereignty is exercised over these pieces—namely, the sovereignty of the State which exercises administration.

(3) The third case is that of a piece of territory leased or pledged by the owner-State to a foreign Power. Thus, China in 1898 leased [1] the district of Kiauchav to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, and Port Arthur to Russia. Thus, further, in 1803 Sweden pledged the town of Wismar [2] to the Grand Duchy of Mecklenburg-Schwerin, and the Republic of Genoa in 1768 pledged the island of Corsica to France. All these cases contain practically, although not theoretically, cession of pieces of territory, and the same statements are valid regarding them as regarding the forementioned cases of foreign administration.

[1] See below, § 216.

[2] This transaction took place for the sum of 1,258,000 thaler, on condition that Sweden, after the lapse of 100 years, should be entitled to take back the town of Wismar on repayment of the money, with 3 per cent. interest per annum. Sweden in 1903 formally waived her right to retake the town.

(4) The fourth case is that of the territory of a Federal State. As a Federal State is considered [1] a State of its own side by side with its single member-States, the fact is apparent that the different territories of the single member-States are at the same time collectively the territory of the Federal State. But this fact is only the consequence of the other illogical fact that sovereignty is divided between a Federal State and its member-States. Two different sovereignties are here by no means exercised over one and the same territory, for so far as the Federal State possesses sovereignty the member-States do not, and *vice versa*.

II

The different Parts of State Territory

Real and Fictional parts of Territory.

§ 172. To the territory of a State belong not only the land within the State boundaries, but also the so-called territorial waters. They consist of the rivers, canals, and lakes which water the land, and, in the case of a State with a seacoast, of the maritime belt and certain gulfs, bays, and straits of the sea. These different kinds of territorial waters will be separately discussed below in §§ 176-197. In contradistinction to these real parts of State territory there are some things that are either in every point or for some part treated as though they were territorial parts of a State. They are fictional and in a sense only parts of the territory. Thus men-of-war and other public vessels on the high seas as well as in foreign territorial waters are essentially in every point

[1] See above, § 89.

treated as though they were floating parts of their home State.[1] And the houses in which foreign diplomatic envoys have their official residence are in many points treated as though they were parts of the home States of the respective envoys.[2] Again, merchantmen on the high seas are for some points treated as though they were floating parts of the territory of the State under whose flag they legitimately sail.[3]

Territorial Subsoil.

§ 173. The subsoil beneath the territorial land and water is of importance on account of telegraph and telephone wires and the like, and further on account of the working of mines and of the building of tunnels. A special part of territory the territorial subsoil is not, although this is frequently asserted. But it is a universally recognised rule of the Law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface.

Territorial Atmosphere.

§ 174. The territorial atmosphere is no more a special part of territory than the territorial subsoil, but it is of importance on account of wires for telegraphs, telephones, electric traction, and the like. It may also in the future be of special importance on account of aëronautism. It certainly cannot belong to an unbounded height to the territory of the State which owns the corresponding part of the surface of the globe, but, on the other hand, the respective State must be allowed to control it and to exercise jurisdiction in it up to a certain height. However, no customary or other rules regarding the territorial atmosphere exist as yet.[4]

[1] See below, § 450.
[2] See below, § 390.
[3] See below, § 264.
[4] The Institute of International Law is studying the matter. (See Annuaire, XIX. See also Holtzendorff, II. p. 230; Fauchille, in R.G. VIII. p. 314; Nys, I. pp. 522-533; Bonfils, Nos. 531-531^{VII}.)

Inalienability of Parts of Territory.

§ 175. It should be mentioned that not every part of territory is alienable by the owner State. For it is evident that the territorial waters are as much inseparable appurtenances of the land as are the territorial subsoil and atmosphere. Only pieces of land together with the appurtenant territorial waters are alienable parts of territory.[1] There is, however, one exception to this, since boundary waters[2] may wholly belong to one of the riparian States, and may therefore be transferred through cession from one to the other riparian State without the bank itself. But it is obvious that this is only an apparent, not a real, exception to the rule that territorial waters are inseparable appurtenances of the land. For boundary waters that are ceded to the other riparian State remain an appurtenance of land, although they are now an appurtenance of the one bank only.

[1] See below, § 185. [2] See below, § 199.

III

RIVERS

Grotius, II. c. 2, §§ 11–15—Pufendorf, III. c. 3, § 8—Vattel, II. §§ 117, 128, 129, 134—Hall, § 39—Westlake, I. pp. 142–159—Lawrence, § 112—Phillimore, I. §§ 125–151—Twiss, I. § 145—Halleck, I. pp. 171–177—Taylor, §§ 233–241—Walker, § 16—Wharton, I. § 30—Wheaton, §§ 192–205—Bluntschli, §§ 314, 315—Hartmann, § 58—Heffter, § 77—Caratheodory in Holtzendorff, II. p. 279–406—Gareis, § 20—Liszt, §§ 9 and 27—Ullmann, §§ 76 and 94—Bonfils, Nos. 520–531—Despagnet, Nos. 461–467—Pradier-Fodéré, II. Nos. 688–755—Nys, I. pp. 438–441—Rivier, I. p. 142 and § 14—Calvo, I. §§ 302–340—Fiore, II. Nos. 755–776—Martens, I. § 102, II. § 57—Delavaud, "Navigation . . . sur les fleuves internationaux" (1885)—Engelhardt, "Du régime conventionnel des fleuves internationaux" (1879), and "Histoire du droit fluvial conventionnel" (1889)—Vernesco, "Des fleuves en droit international" (1888)—Orban, "Étude sur le droit fluvial international" (1896).—Bergès, "Du régime de navigation des fleuves internationaux" (1902).

Rivers State property of Riparian States.

§ 176. Theory and practice agree upon the rule that rivers are part of the territory of the riparian State. Consequently, if a river lies wholly, that is, from its sources to its mouth, within the boundaries of one and the same State, such State owns it exclusively. As such rivers are under the sway of one State only and exclusively, they are named "national rivers." Thus, all rivers of Great Britain are national, and so are, to give some Continental examples, the Seine, Loire, and Garonne, which are French; the Tiber, which is Italian; the Volga, which is Russian. But many rivers do not run through the land of one and the same State only, whether they are so-called "boundary rivers," that is, rivers which separate two different States from each other, or whether they run through several States and are therefore named "not-national rivers." Such rivers are not owned by one State alone. Boundary rivers belong to the

territory of the States they separate, the boundary line[1] running either through the middle of the river or through the middle of the so-called mid-channel of the river. And rivers which run through several States belong to the territories of the States concerned; each State owns that part of the river which runs through its territory.

There is, however, another group of rivers to be mentioned, which comprises all such rivers as are navigable from the Open Sea and at the same time either separate or pass through several States between their sources and their mouths. Such rivers, too, belong to the territory of the different States concerned, but they are nevertheless named "international rivers," because freedom of navigation in time of peace on all of those rivers in Europe and on many of them outside Europe for merchantmen of all nations is recognised by International Law.

Navigation on National, Boundary, and not-National Rivers.

§ 177. There is no rule of the Law of Nations in existence which grants foreign States the right of admittance of their public or private vessels to navigation on national rivers. In the absence of commercial or other treaties granting such a right, every State can exclude foreign vessels from its national rivers or admit them under certain conditions only, such as the payment of a due and the like. The teaching of Grotius (II. c. 2, § 12) that innocent passage through rivers must be granted has not been recognised by the practice of the States, and Bluntschli's assertion (§ 314) that such rivers as are navigable from the Open Sea must in time of peace be open to vessels of all nations, is at best an anticipation of a future rule of International Law which does not as yet exist.

As regards boundary rivers and rivers running

[1] See below, § 199.

through several States, the riparian States can regulate navigation on such parts of these rivers as they own, and they can certainly exclude vessels of non-riparian States altogether unless prevented therefrom by virtue of special treaties.

Navigation on International Rivers.

§ 178. Whereas there is certainly no recognised principle of free navigation on national, boundary, and not-national rivers, a movement for the recognition of free navigation on international rivers set in at the beginning of the nineteenth century. Until the French Revolution towards the end of the eighteenth century, the riparian States of such rivers as are now called international rivers could, in the absence of special treaties, exclude foreign vessels altogether from those parts of the rivers which run through their territory, or admit them under discretionary conditions. Thus, the river Scheldt was wholly shut up in favour of the Netherlands according to article 14 of the Peace Treaty of Munster of 1648 between the Netherlands and Spain. The development of things in the contrary direction begins with a Decree of the French Convention, dated November 16, 1792, which opens the rivers Scheldt and Meuse to the vessels of all riparian States. But it was not until the Vienna Congress[1] in 1815 that the principle of free navigation on the international rivers of Europe by merchantmen of not only the riparian but of all States was proclaimed. The Congress itself realised theoretically that principle in making arrangements[2] for free navigation on the rivers Scheldt, Meuse, Rhine, and on the navigable tributaries of the latter—namely, the rivers Neckar,

[1] Articles 108–117 of the Final Act of the Vienna Congress. (See Martens, N.R., II. p. 427.)

[2] "Règlements pour la libre navigation des rivières." See Martens, N.R. II. p. 434.

Maine, and Moselle—although more than fifty years elapsed before the principle became realised in practice.

The next step was taken by the Peace Treaty of Paris of 1856, which by its article 15[1] stipulated free navigation on the Danube and expressly declared the principle of the Vienna Congress regarding free navigation on international rivers for merchantmen of all nations as a part of "European Public Law." A special international organ for the regulation of navigation on the Danube was created, the so-called European Danube Commission.

A further development took place at the Congo Conference at Berlin in 1884–85, since the General Act[2] of this Conference stipulated free navigation on the rivers Congo and Niger and their tributaries, and created the so-called "International Congo Commission" as a special international organ for the regulation of the navigation of the said rivers.

Side by side with these general treaties, which recognise free navigation on international rivers, stand treaties[3] of several South American States with other States concerning free navigation for merchantmen of all nations on a number of South American rivers. And the Arbitration Court in the case of the boundary dispute between Great Britain and Venezuela decided in 1903 in favour of free navigation for merchantmen of all nations on the rivers Amakourou and Barima.

Thus the principle of free navigation which is a settled fact as regards all European and some African

[1] See Martens, N.R.G. XV. p. 776. The documents concerning navigation on the Danube are collected by Sturdza, Recueil de documents relatifs à la liberté de navigation du Danube, Berlin, 1904.

[2] See Martens, N.R.G., 2nd ser. X. p. 417.

[3] See Taylor, § 238.

international rivers, becomes more and more extended over all other international rivers of the world. But when several writers maintain that free navigation on all international rivers of the world is already a recognised rule of the Law of Nations, they are decidedly wrong, although such a universal rule will certainly be proclaimed in the future. There can be no doubt that as regards the South American rivers the principle is recognised by treaties between a small number of Powers only. And there are examples which show that the principle is not yet universally recognised. Thus by article 4 of the Treaty of Washington of 1854 between Great Britain and the United States the former grants to vessels of the latter free navigation on the river St. Lawrence as a revocable privilege, and article 26 of the Treaty of Washington of 1871 stipulates for vessels of the United States, but not for vessels of other nations, free navigation "for ever" on the same river.[1]

I should mention that the Institute of International Law at its meeting at Heidelberg in 1888 adopted a *Projet de Règlement international de navigation fluviale*,[2] which comprises forty articles.

[1] See Wharton, pp. 81–83, and Hall, § 39.

[2] See Annuaire, IX. p. 182.

IV

Lakes and Land-locked Seas.

Vattel, I. § 294—Hall, § 38—Phillimore, I. §§ 205-205A—Twiss, I. § 181—Halleck, I. p. 170—Bluntschli, § 316—Hartmann, § 58—Heffter, § 77—Caratheodory in Holtzendorff, II. pp. 378-385—Gareis, §§ 20-21—Liszt, § 9—Ullmann, §§ 77 and 94—Bonfils Nos. 495-505—Despagnet, No. 416—Pradier-Fodéré, II. Nos. 630-649—Nys, I. pp. 447-450—Calvo, I. §§ 301, 373, 383—Fiore, II. Nos. 811-813—Martens, I. § 100—Rivier, I. pp. 143-145, 230—Mischeff, "La Mer Noire et les détroits de Constantinople" (1901).

Lakes and land-locked seas State Property of Riparian States.

§ 179. Theory and practice agree upon the rule that such lakes and land-locked seas as are entirely enclosed by the land of one and the same State are part of the territory of this State. Thus the Dead Sea in Palestine is Turkish, the Sea of Aral is Russian, the Lake of Como is Italian territory. As regards, however, such lakes and land-locked seas as are surrounded by the territories of several States, no unanimity exists. The majority of writers consider these lakes and land-locked seas parts of the surrounding territories, but several[1] dissent, asserting that these lakes and seas do not belong to the riparian States, but are free like the Open Sea. The practice of the States seems to favour the opinion of the majority of writers, for special treaties frequently arrange what portions of such lakes and seas belong to the riparian States. Examples are:—The Lake of Constance, which is surrounded by the territories of Germany (Baden, Würtemberg, Bavaria), Austria, and Switzerland (Thurgau and St. Gall); the Lake of Geneva, which belongs to Switzerland and France; the Lakes of Huron, Erie, and Ontario, which belong to British Canada and the United

[1] See, for instance, Calvo, I. § 301; Caratheodory in Holtzendorff, II. p. 378.

States; the Caspian Sea, which belongs to Persia and Russia.[1]

So-called International Lakes and Land-locked Seas.

§ 180. In analogy with so-called international rivers, such lakes and land-locked seas as are surrounded by the territories of several States and are at the same time navigable from the Open Sea, are called "international lakes and land-locked seas." However, although some writers[2] dissent, it must be emphasised that hitherto the Law of Nations has not yet recognised the principle of free navigation on such lakes and seas. The only case in which such free navigation is stipulated is that of the lakes within the Congo district.[3] But there is no doubt that in a near future this principle will be recognised, and practically all so-called international lakes and land-locked seas are actually open to merchantmen of all nations. Good examples of such international lakes and land-locked seas are the fore-named lakes of Huron, Erie, and Ontario.

The Black Sea.

§ 181. It is of interest to give some details regarding the Black Sea. This is a land-locked sea which was undoubtedly wholly a part of Turkish territory as long as the enclosing land was Turkish only, and as long as the Bosphorus and the Dardanelles, the approach to the Black Sea, which are exclusively part of Turkish territory, were not open for merchantmen of all nations. But matters have changed through Russia, Roumania, and Bulgaria having become riparian States. It would be wrong to maintain that now the Black Sea belongs to the territories

[1] But the Caspian Sea is almost entirely under Russian control through the two treaties of Gulistan (1813) and Tourkmantschai (1828). (See Rivier, I. p. 144, and Phillimore, I. § 205.)

[2] See, for instance, Rivier, I. p. 230; Caratheodory in Holtzendorff, II. p. 378; Calvo, I. § 301.

[3] Article 15 of the General Act of the Congo Conference. (See Martens, N.R.G., 2nd ser. X. p. 417.)

of the four States, for the Bosphorus and the Dardanelles, although belonging to Turkish territory, are nevertheless parts of the Mediterranean Sea, and are now open to merchantmen of all nations. The Black Sea is consequently now part of the Open Sea[1] and is not the property of any State. Article 11 of the Peace Treaty of Paris,[2] 1856, neutralised the Black Sea, declared it open to merchantmen of all nations, but interdicted it to men-of-war of the riparian as well as of other States, admitting only a few Turkish and Russian public vessels for the service of their coasts. But although the neutralisation was stipulated "formally and in perpetuity," it lasted only till 1870. In that year, during the Franco-German war, Russia shook off the restrictions of the Treaty of Paris, and the Powers assembled at the Conference of London signed on March 13, 1871, the Treaty of London,[3] by which the neutralisation of the Black Sea and the exclusion of men-of-war therefrom were abolished. But the right of the Porte to forbid foreign men-of-war passage through the Dardanelles and the Bosphorus[4] was upheld by that treaty, as was also free navigation for merchantmen of all nations on the Black Sea.

[1] See below, § 252.
[2] See Martens, N.R.G. XV. p. 775.
[3] See Martens, N.R.G. XVIII. p. 303.
[4] See below, § 197.

V

Canals

Westlake, I. pp. 320-331—Lawrence, § 110, and Essays, pp. 41-162—Phillimore, I. §§ 399 and 207—Caratheodory in Holtzendorff, II. pp. 386-405—Liszt, § 27—Ullmann, § 95—Bonfils, Nos. 511-515—Pradier-Fodéré, II. Nos. 658-660—Nys, I. pp. 475-495—Rivier, I. § 16—Calvo, I. §§ 376-380—Martens, II. § 59—Sir Travers Twiss in R.I. VII. (1875), p. 682, XIV. (1882) p. 572, XVII. (1885), p. 615—Holland, Studies, pp. 270-298—Asser in R.I. XX. (1888), p. 529—Bustamante in R.I. XXVII. (1895), p. 112—Rossignol, "Le Canal de Suez" (1898)—Camand, "Etude sur le régime juridique du Canal de Suez" (1899)—Charles-Roux, "L'isthme et le canal de Suez" (1901).

Canals State Property of Riparian States.

§ 182. That canals are parts of the territories of the respective territorial States is obvious from the fact that they are artificially constructed waterways. And there ought to be no doubt[1] that all the rules regarding rivers must analogously be applied to canals. The matter needs no special mention at all were it not for the interoceanic canals which have been constructed during the second half of the nineteenth century or are contemplated in the future. And as regards one of these, the Emperor William Canal, which connects the Baltic with the North Sea, there is nothing to be said but that it is a canal made mainly for strategic purposes by the German Empire entirely through German territory. Although Germany keeps it open for navigation to vessels of all other nations, she exclusively controls the navigation thereof, and can at any moment exclude foreign vessels at discretion, or admit them upon any conditions she likes, apart from special treaty arrangements to the contrary.

[1] See, however, Holland, Studies, p. 278.

The Suez Canal.

§ 183. The only other interoceanic canal in existence is that of Suez, which connects the Red Sea with the Mediterranean. Already in 1838 Prince Metternich gave his opinion that such a canal, if ever made, ought to become neutralised by an international treaty of the Powers. When, in 1869, the Suez Canal was opened, jurists and diplomatists at once discussed what means could be found to secure free navigation upon it for vessels of all kinds and all nations in time of peace as well as of war. In 1875 Sir Travers Twiss[1] proposed the neutralisation of the canal, and in 1879 the Institute of International Law gave its vote[2] in favour of the protection of free navigation on the canal by an international treaty. In 1883 Great Britain proposed an international conference to the Powers for the purpose of neutralising the canal, but it took several years until an agreement was actualised. This was done by the Convention of Constantinople[3] of October 29, 1888, between Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia, and

[1] See R.I. VII. pp. 682-694.

[2] See Annuaire, III. and IV. vol. I. p. 349.

[3] See Martens, N.R.G., 2nd ser. XV. p. 557. It must, however, be mentioned that Great Britain is a party to the Convention of Constantinople under the reservation that its terms shall not be brought into operation in so far as they would not be compatible with the transitory and exceptional condition in which Egypt is put for the time being in consequence of her occupation by British forces, and in so far as they might fetter the liberty of action of the British Government during the occupation of Egypt. But article 6 of the Declaration respecting Egypt and Morocco signed at London on April 8, 1904, by Great Britain and France (see Parliamentary Papers, France, No. 1 (1904), p. 9), has done away with this reservation, since it stipulates the following:—"In order to ensure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of article 8 of that treaty will remain in abeyance." (See Holland, Studies, p. 293, and Westlake, I. p. 328.)

Turkey. This treaty comprises seventeen articles, whose more important stipulations are the following:—

(1) The canal is open in time of peace as well as of war to merchantmen and men-of-war of all nations. No attempt to restrict this free usage of the canal is allowed in time either of peace or of war. The canal can never be blockaded (article 1).

(2) In time of war, even if Turkey is a belligerent, no act of hostility is allowed either inside the canal itself or within three sea miles from its ports. Men-of-war of the belligerents have to pass through the canal without delay. They may not stay longer than twenty-four hours, a case of absolute necessity excepted, within the harbours of Port Said and Suez, and twenty-four hours must intervene between the departure from those harbours of a belligerent man-of-war and a vessel of the enemy. Troops, munitions, and other war material may neither be shipped nor unshipped within the canal and its harbours. All rules regarding belligerents men-of-war are likewise valid for their prizes (articles 4, 5, 6).

(3) No men-of-war are allowed to be stationed inside the canal, but each Power may station two men-of-war in the harbours of Port Said and Suez. Belligerents, however, are not allowed to station men-of-war in these harbours (article 7). No permanent fortifications are allowed in the canal (article 2).

(4) It is the task of Egypt to secure the carrying out of the stipulated rules, but the consuls of the Powers in Egypt are charged to watch the execution of these rules (articles 8 and 9).

(5) The signatory Powers are obliged to notify the treaty to others and to invite them to accede thereto (article 16).

The Panama Canal.

§ 184. Already in 1850 Great Britain and the United States in the Clayton-Bulwer Treaty[1] of Washington had stipulated free navigation and neutralisation of a canal between the Pacific and the Atlantic Ocean proposed to be constructed by the way of the river St. Juan de Nicaragua and either or both of the lakes of Nicaragua and Managua. In 1881 the building of a canal through the Isthmus of Panama was taken in hand, but in 1888 the works were stopped in consequence of the financial collapse of the Company undertaking its construction. After this the United States came back to the old project of a canal by the way of the river St. Juan de Nicaragua. For the eventuality of the completion of this canal, Great Britain and the United States signed, on February 5, 1900, the Convention of Washington, which stipulated free navigation on and neutralisation of the proposed canal in analogy with the Convention of Constantinople, 1888, regarding the Suez Canal, but ratification was refused by the Senate of the United States. In the following year, however, on November 18, 1901, another treaty was signed and afterwards ratified. This so-called Hay-Pauncefote Treaty applies to a canal between the Atlantic and Pacific Oceans by whatever route may be considered expedient, and its five articles are the following:—

Article 1

The High Contracting Parties agree that the present Treaty shall supersede the aforementioned Convention of April 19, 1850.

[1] See Martens, N.R.G. XV. p. 187. According to its article 8 this treaty was also to be applied to a proposed canal through the Isthmus of Panama.

Article 2

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

Article 3

The United States adopts, as the basis of the neutralisation of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed October 29, 1888, for the free navigation of the Suez Canal, that is to say:—

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised or any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible despatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

Article 4

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralisation or the obligation of the high contracting parties under the present Treaty.

Article 5

The present Treaty shall be ratified by his Britannic Majesty and by the President of the United States, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

In faith whereof the respective Plenipotentiaries have signed this Treaty and thereunto affixed their seals.

Done in duplicate at Washington, the 18th day of November, in the year of Our Lord 1901.

~~(Seal) PAUNCEFOTE.~~
(Seal) JOHN HAY.

On November 18, 1903, a treaty was concluded between the United States and the new Republic of Panama according to which Panama ceded to the United States the land required for the construction of a canal between Colon and Panama, and, further, the land on both sides of the canal to the extent of five miles on either side.[1]

VI

MARITIME BELT

Grotius, II. c. 3 § 13—Vattel, I. §§ 287-290—Hall, §§ 41-42—Westlake, I. pp. 183-192—Lawrence, § 107—Phillimore, I. §§ 197-201—Twiss, I. §§ 144, 190-192—Halleck, I. pp. 157-167—Taylor, §§ 247-250—Walker, § 17—Wharton, § 32—Wheaton, §§ 177-180—Bluntschli, §§ 302, 309-310—Hartmann, § 58—Heffter, § 75—Stoerk in Holtzendorff, II. pp. 409-449—Gareis, § 21—Liszt, § 9—Ullmann, § 76—Bonfils, Nos. 491-494—Despagnet, Nos. 417-423—Pradier-Fodéré, II. Nos. 617-639—Nys, I. pp. 496-520—Rivier, I. pp. 145-153—Calvo, I. §§ 353-362—Fiore, II. Nos. 801-809—Martens, I. § 99—Bynkershoek, "De dominio maris" and "Quæstiones juris publici," I. c. 8—Ortolan, "Diplomatie de la mer" (1856), I. pp. 150-175—Heilborn, System, pp. 37-57—Imbart-Latour, "La mer territoriale, etc." (1889)—Godey, "La mer côtière" (1896)—Schücking, "Das Küstenmeer im internationalen Recht" (1897)—Perels, § 5.

State Property of Maritime Belt contested.

§ 185. Maritime belt is that part of the sea which, in contradistinction to the Open Sea, is under the sway of the riparian States. But no unanimity exists with regard to the nature of the sway of the riparian States. Many writers maintain that such sway is sovereignty, that the maritime belt is a part

[1] See Martens, N. R. G. 2nd ser. xxxi. p. 599.

of the territory of the riparian State, and that the territorial supremacy of the latter extends over its coast waters. Whereas it is nowadays universally recognised that the Open Sea cannot be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the riparian States, although foreign States have a right of innocent passage of their merchantmen through the coast waters.

On the other hand, many writers of great authority emphatically deny the territorial character of the maritime belt and concede to the riparian States, in the interest of the safety of the coast, only certain powers of control, jurisdiction, police, and the like, but not sovereignty.

This is surely erroneous, since the real facts of international life would seem to agree with the first-mentioned opinion only. Its supporters rightly maintain[1] that the universally recognised fact of the exclusive right of the riparian State to appropriate the natural products of the sea in the coast waters, especially the use of the fishery therein, can coincide only with the territorial character of the maritime belt. The argument of their opponents that, if the belt is to be considered a part of State territory, every riparian State must have the right to sell and exchange its coast waters, can properly be met by the statement that territorial waters of all kinds are inalienable appurtenances[2] of the riparian States.

§ 186. Be that as it may, the question arises how

[1] Hall, p. 158. The question is treated with great clearness by Heilborn, System, pp. 37–57, and Schücking, pp. 14–20.

[2] See above, § 175. Bynkershoek's (De Dominio Maris, c. 5) opinion that a riparian State can alienate its maritime belt without the coast itself, is at the present day untenable.

far into the sea those waters extend which are coast waters and are therefore under the sway of the riparian State. Here, too, no unanimity exists upon either the starting line of the belt on the coast or the breadth itself of the belt from such starting line. Breadth of Maritime Belt.

(1) Whereas the starting line is sometimes drawn along high-water mark, many writers draw it along low-water mark. Others draw it along the depths where the waters cease to be navigable; others again along those depths where coast batteries can still be erected, and so on.[1] But the number of those who draw it along low-water mark is increasing. The Institute of International Law[2] has voted in favour of this starting line, and many treaties stipulate the same.

(2) With regard to the breadth of the maritime belt various opinions have in former times been held, and very exorbitant claims have been advanced by different States. And although Bynkershoek's rule that *terrae potestas finitur ubi finitur armorum vis* is now generally recognised by theory and practice, and consequently a belt of such breadth is considered under the sway of the riparian State as is within effective range of the shore batteries, there is still no unanimity on account of the fact that such range is day by day increasing. Since at the end of the eighteenth century the range of artillery was about three miles, or one marine league, that distance became generally recognised as the breadth of the maritime belt. But no sooner was a common doctrine originated than the range of projectiles increased with the manufacture of heavier guns. And although many States in Municipal Laws and International

[1] See Schücking, p. 13. [2] See Annuaire, XIII. p. 329.

Treaties still adhere to a breadth of one marine league, the time will come when by a common agreement of the States such breadth will be very much extended.[1] As regards Great Britain, the Territorial Waters Jurisdiction Act[2] of 1878 (41 and 42 Vict. c. 73) specially recognises the extent of the territorial maritime belt as three miles, or one marine league, measured from the low-water mark of the coast.

Fisheries, Cabotage, Police, and Maritime Ceremonials within the Belt.

§ 187. Theory and practice agree that the riparian State can exclusively reserve the fishery within the maritime belt[3] for its own subjects, whether fish or pearls or amber or other products of the sea are in consideration.

It is likewise agreed that the riparian State can, in the absence of special treaties to the contrary, exclude foreign vessels from navigation and trade along the coast, the so-called cabotage, and reserve this cabotage exclusively for its own vessels.

Again, it is agreed that the riparian State exclusively exercises police and control within its maritime belt in the interest of its custom-house duties, the secrecy of its coast fortifications, and the like. Thus foreign vessels can be ordered to take certain routes and to avoid others.

And it is, lastly, agreed that the riparian State can make laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen as enter its territorial maritime belt.[4]

§ 188. Although the maritime belt is a portion of

[1] The Institute of International Law has voted in favour of six miles, or two marine leagues, as the breadth of the belt. See Annuaire, XIII. p. 328.

[2] See above, § 25, and Maine, p. 39.

[3] All treaties stipulate for the purpose of fishery a three miles wide territorial maritime belt. See, for instance, article 1 of the Hague Convention concerning police and fishery in the North Sea of May 6, 1882. (Martens, N.R.G., 2nd ser. IX. p. 556.)

[4] See Twiss, I. § 194.

the territory of the riparian State and therefore under the absolute territorial supremacy of such State, the belt is nevertheless, according to the practice of all the States, open to merchantmen of all nations for inoffensive navigation, cabotage excepted. Navigation within the Belt.

And it is the common conviction[1] that every State has by customary International Law the *right* to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State. Such right is correctly said to be a consequence of the freedom of the Open Sea, for without this right navigation on the Open Sea by vessels of all nations would in fact be an impossibility. And it is a consequence of this right that no State can levy tolls for the mere passage of foreign vessels through its maritime belt. Although the riparian State may spend a considerable amount of money for the erection and maintenance of light-houses and other facilities for safe navigation within its maritime belt, it cannot make merely passing foreign vessels pay for such outlays. It is only when foreign ships cast anchor within the belt or enter a port that they can be made to pay dues and tolls by the riparian State. Some writers[2] maintain that all nations have the right of inoffensive passage for their merchantmen by usage only, and not by the customary Law of Nations, and that, consequently, in strict law a riparian State can prevent such passage. They are certainly mistaken. An attempt on the part of a riparian State to prevent free navigation through the maritime belt in time of peace would meet with stern opposition on the part of all other States.

But a right of foreign States for their men-of-war to pass unhindered through the maritime belt is

[1] See above, § 142. [2] Kluber, § 76; Pradier-Fodéré, II. No. 628.

not generally recognised. Although many writers assert the existence of such a right, many others emphatically deny it. As a rule, however, in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt. And it may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; and secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war.[1]

Jurisdiction within the Maritime Belt.

§ 189. That the riparian State has exclusive jurisdiction within the belt as regards mere matters of police and control is universally recognised. Thus it can exclude foreign pilots, can make custom-house arrangements, sanitary regulations, laws concerning stranded vessels and goods, and the like. It is further agreed that foreign merchantmen casting anchor within the belt or entering a port, fall at once and *ipso facto* under the jurisdiction of the riparian State. But it is a moot-point whether such foreign vessels as do not stay but merely pass through the belt are for the time being under this jurisdiction. It is for this reason that the British Territorial Waters Jurisdiction Act of 1878 (41 & 42 Vict. c. 73), which claims such jurisdiction, has called forth protests from many writers.[2] The controversy itself can be decided by the practice of the

[1] See below, § 449.

[2] See Perels, pp. 69–77. The Institute of International Law, which at its meeting at Paris in 1894 adopted a body of eleven rules regarding the maritime belt, gulfs, bays, and straits, voted against the jurisdiction of a riparian State over foreign vessels merely passing through the belt. (See Annuaire XIII. p. 328.)

States only. The British Act quoted, the basis of which is, in my opinion, sound and reasonable, is a powerful factor in initiating such a practice; but as yet no common practice of the States can be said to exist.

Zone for Revenue and Sanitary Laws.

§ 190. Different from the territorial maritime belt is the zone of the Open Sea, over which a riparian State extends the operation of its revenue and sanitary laws. The fact is that Great Britain and the United States, as well as other States, possess revenue and sanitary laws which impose certain duties not only on their own but also on such foreign vessels bound to one of their ports as are approaching, but not yet within, their territorial maritime belt.[1] Twiss and Phillimore agree that in strict law these Municipal Laws have no basis, since every State is by the Law of Nations prevented from extending its jurisdiction over the Open Sea, and that it is only the Comity of Nations which admits tacitly the operation of such Municipal Laws as long as foreign States do not object, and provided that no measure is taken within the territorial maritime belt of another nation. I doubt not that in time special arrangements will be made as regards this point through a universal international convention. But I believe that, since Municipal Laws of the above kind have been in existence for more than a hundred years and have not been opposed by other States, a customary rule of the Law of Nations may be said to exist which allows riparian States in the interest of their revenue and sanitary laws to impose certain

[1] See, for instance, the British so-called *Hovering Acts*, 9 Geo. II. c. 35 and 24 Geo. III. c. 47. The matter is treated by Taylor, § 248; Twiss, I. § 190; Phillimore, I. § 198; Halleck, I. p. 157; Stoerk in Holtzendorff, II. pp. 475-478; Perels, § 5 (pp. 25-28). See also Hall, Foreign Powers and Jurisdiction, §§ 108 and 109.

duties on such foreign vessels bound to their ports as are approaching, although not yet within, their territorial maritime belt.

VII

Gulfs and Bays

Vattel, § 291—Hall, § 41—Westlake, I. pp. 183-192—Lawrence, §§ 107-109—Phillimore, I. §§ 196-206—Twiss, I. §§ 181-182—Halleck, I. pp. 165-170—Taylor, §§ 229-231—Walker, § 18—Wharton, I. §§ 27-28—Wheaton, §§ 181-190—Bluntschli, §§ 309-310—Hartmann, § 58—Heffter, § 76—Stoerk in Holtzendorff, II. pp. 419-428—Gareis, § 21—Liszt, § 9—Ullmann, § 77—Bonfils, No. 516—Despagnet, Nos. 414-415—Pradier-Fodéré, II. Nos. 661-681—Nys, I. pp. 441-447—Rivier, I. pp. 153-157—Calvo, I. §§ 366-367—Fiore, II. Nos. 808-815—Martens, I. § 100—Perels, § 5—Schücking, "Das Küstenmeer im internationalen Recht" (1897), pp. 20-24.

Territorial Gulfs and Bays.

§ 191. It is generally admitted that such gulfs and bays as are enclosed by the land of one and the same riparian State, and whose entrance from the sea is narrow enough to be commanded by coast batteries erected on one or both sides of the entrance, belong to the territory of the riparian State even if the entrance is wider than two marine leagues, or six miles.

Some writers maintain that gulfs and bays whose entrance is wider than ten miles, or three and a third marine leagues, cannot belong to the territory of the riparian State, and the practice of some States accords with this opinion. But the practice of other countries, approved by many writers, goes beyond this limit. Thus Great Britain holds the Bay of Conception in Newfoundland to be territorial, although it

goes forty miles into the land and has an entrance fifteen miles wide. And the United States claim the Chesapeake and Delaware Bays, as well as other inlets of the same character, as territorial,[1] although many European writers oppose this claim. The Institute of International Law has voted in favour of a twelve miles wide entrance, but admits the territorial character of such gulfs and bays with a wider entrance as have been considered territorial for more than one hundred years.[2]

As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not. Examples of territorial bays in Europe are: The Zuider Zee is Dutch; the Frische Haff, the Kurische Haff, and the Bay of Stettin, in the Baltic, are German, as is also the Jade Bay in the North Sea. The whole matter calls for an international congress to settle the question once for all which gulfs and bays are to be considered territorial. And it must be specially observed that it is doubtful whether Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers,[3] which include portions of the sea between lines drawn from headland to headland.

Non-territorial Gulfs and Bays.

§ 192. Gulfs and bays surrounded by the land of one and the same riparian State whose entrance is so wide that it cannot be commanded by coast batteries, and, further, all gulfs and bays enclosed by the land of more than one riparian State, however

[1] See Taylor, § 229, and Wharton, I. §§ 27 and 28.

[2] See Annuaire, XIII. p. 329.

[3] Whereas Hall (§ 41, p. 162) says: "England would, no doubt, not attempt any longer to assert a right of property over the King's Chambers," Phillimore (I. § 200) still keeps up this claim; Lawrence (§ 107) is doubtful about the matter, and Westlake (I. p. 188) seems to consider this claim as abandoned. As regards the Narrow Seas, see below, § 194.

narrow their entrance may be, are non-territorial. They are parts of the Open Sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated, and they are in time of peace and war open to vessels of all nations including men-of-war.

Navigation and Fishery in Territorial Gulfs and Bays.

§ 193. As regards navigation and fishery within territorial gulfs and bays, the same rules of the Law of Nations are valid as those for navigation and fishery within the territorial maritime belt. The right of fishery may, therefore, exclusively be reserved for subjects of the riparian State.[1] And navigation, cabotage excepted, must be open to merchantmen of all nations, but foreign men-of-war need not be admitted.

[1] The Hague Convention concerning police and fishery in the North Sea, concluded on May 6, 1882, between Great Britain, Belgium, Denmark, France, Germany, and Holland, reserves in its article 2 the fishery within bays exclusively for subjects of the riparian States within a three miles wide maritime belt only, so that the fishery would be reserved within such bays only as have an entrance not wider than six miles. (See Martens, N.R.G. 2nd ser. IX. p. 556.)

VIII

STRAITS

Vattel, I. § 292—Hall, § 41—Westlake, I. pp. 193-197—Lawrence, §§ 107-109—Phillimore, I. §§ 180-196—Twiss, I. §§ 183, 184, 189—Halleck, I. pp. 165-170—Taylor, §§ 229-231—Walker, § 17—Wharton, §§ 27-29—Wheaton, §§ 181-190—Bluntschli, § 303—Hartmann, § 65—Heffter, § 76—Stoerk in Holtzendorff, II. pp. 419-428—Gareis, § 21—Liszt, §§ 9 and 26—Ullmann, § 77—Bonfils, Nos. 506-511—Despagnet, Nos. 424-427—Pradier-Fodéré, II. Nos. 650-656—Nys, I. pp. 451-474—Rivier, I. pp. 157-159—Calvo, I. §§ 368-372—Fiore, II. Nos. 745-754—Martens, I. § 101—Holland Studies, p. 277.

What Straits are Territorial.

§ 194. All straits which are so narrow as to be under the command of coast batteries erected either on one or both sides of the straits, are territorial. Therefore, straits of this kind which divide the land of one and the same State belong to the territory of such State. Thus the Solent, which divides the Isle of Wight from England, is British, the Dardanelles and the Bosphorus are Turkish. On the other hand, if such narrow strait divides the land of two different States, it belongs to the territory of both, the boundary line running, failing a special treaty making another arrangement, through the mid-channel.[1] Thus the Lymoon Pass, the narrow strait which separates the British island of Hong Kong from the continent, was half British and half Chinese as long as the land opposite Hong Kong was Chinese territory. It would seem that claims of States over wider straits than those which can be commanded by guns from coast batteries, are no longer upheld. Thus Great Britain used formerly to claim the Narrow Seas—namely, the St. George's

[1] See below, § 199.

Channel, the Bristol Channel, the Irish Sea, and the North Channel—as territorial; and Phillimore asserts that the exclusive right of Great Britain over these Narrow Seas is uncontested. But in spite of this assertion it must be emphasised that this right *is* contested, and I believe that Great Britain would now no longer uphold her former claim.[1] At least the Territorial Waters Jurisdiction Act 1878 does not mention it.

Navigation, Fishery, and Jurisdiction in Straits.

§ 195. All rules of the Law of Nations concerning navigation, fishery, and jurisdiction within the maritime belt apply likewise to navigation, fishery, and jurisdiction within straits. Foreign merchantmen, therefore, cannot be excluded; foreign men-of-war must be admitted to such straits as form part of the highways for international traffic;[2] the right of fishery may exclusively be reserved for subjects of the riparian State; and the latter can exercise jurisdiction over all foreign merchantmen passing through the straits. If the narrow strait divides the land of two different States, jurisdiction and fishery are reserved for each riparian State within the boundary line running through the mid-channel or otherwise as by treaty arranged.

The former Sound Dues.

§ 196. The rule that foreign merchantmen must be allowed inoffensive passage through territorial straits without any dues and tolls whatever, had one

[1] See Phillimore, I. § 189, and above, § 191 (King's Chambers). Concerning the Bristol Channel, Hall (§ 41, p. 162, note 2) remarks: "It was apparently decided by the Queen's Bench in Reg. *v.* Cunningham (Bell's Crown Cases, 86) that the whole of the Bristol Channel between Somerset and Glamorgan is British territory; possibly, however, the Court intended to refer only to that portion of the Channel which lies within Steepholm and Flatholm." (See also Westlake, I. p. 188, note 3.)

[2] As, for instance, the Straits of Magellan. These straits were neutralised in 1881—see below, § 568, and vol. II. § 72—by a treaty between Chili and Argentine. See Abribat, Le détroit de Magellan au point de vue international (1902), and Nys, I. pp. 470–474.

exception until the year 1857. From time immemorial, Denmark had not allowed foreign vessels the passage through the two Belts and the Sound, a narrow strait which divides Denmark from Sweden and connects the Kattegat with the Baltic, without payment of a toll, the so-called Sound Dues.[1] Whereas in former centuries these dues were not opposed, they were not considered any longer admissible as soon as the principle of free navigation on the sea became generally recognised, but Denmark nevertheless insisted upon the dues. In 1857, however, an arrangement[2] was completed between the maritime Powers of Europe and Denmark by which the Sound Dues were abolished against a heavy indemnity paid by the signatory States to Denmark. And in the same year the United States entered into a convention[3] with Denmark for the free passage of their vessels, and likewise paid an indemnity. With these dues has disappeared the last witness of former times when free navigation on the sea was not universally recognised.

The Bosphorus and Dardanelles.

§ 197. The Bosphorus and Dardanelles, the two Turkish territorial straits which connect the Black Sea with the Mediterranean, must be specially mentioned.[4] So long as the Black Sea was entirely enclosed by Turkish territory and was therefore a portion of this territory, Turkey could exclude foreign vessels from the Bosphorus and the Dardanelles altogether, unless prevented by special treaties. But when in the eighteenth century Russia became a

[1] See the details, which have historical interest only, in Twiss, I. § 188; Phillimore, I. § 189; Wharton, I. § 29; and Scherer, Der Sundzoll (1845).

[2] The Treaty of Copenhagen of March 14, 1857. (See Martens, N.R.G. XVI. 2nd part, p. 345.)

[3] Convention of Washington of April 11, 1857. (See Martens, N.R.G. XVII. 1st part, p. 210.)

[4] See Holland, The European Concert in the Eastern Question, p. 225, and Perels, p. 29.

riparian State of the Black Sea and the latter, therefore, ceased to be entirely a territorial sea, Turkey, by several treaties with foreign Powers, conceded free navigation through the Bosphorus and the Dardanelles to foreign merchantmen. But she always upheld the rule that foreign men-of-war should be excluded from these straits. And by article 1 of the Convention of London of July 10, 1841, between Turkey, Great Britain, Austria, France, Prussia, and Russia, this rule was once for all accepted. Article 10 of the Peace Treaty of Paris of 1856 and the Convention No. 1 annexed to this treaty, and, further, article 2 of the Treaty of London, 1871, again confirm the rule, and all those Powers which were not parties to these treaties submit nevertheless to it.[1] According to the Treaty of London of 1871, however, the Porte can open the straits in time of peace to the men-of-war of friendly and allied Powers for the purpose, if necessary, of securing the execution of the stipulations of the Peace Treaty of Paris of 1856.

On the whole, the rule has in practice always been upheld by Turkey. Foreign light public vessels in the service of foreign diplomatic envoys at Constantinople can be admitted by the provisions of the Peace Treaty of Paris of 1856. And on several occasions when Turkey has admitted a foreign man-of-war carrying a foreign monarch on a visit to Constantinople, there has been no opposition by the Powers.[2] But when in 1902 Turkey allowed four Russian torpedo destroyers to pass through the Black Sea on the condition that these vessels should be disarmed and sail under the Russian commercial flag,

[1] The United States, although the Convention of London, to she actually acquiesces in the which she is not a party. (See exclusion of her men-of-war, seems Wharton, I. § 29.) not to consider herself bound by

[2] See Perels, p. 30.

Great Britain protested and declared that she reserved the right to demand similar privileges for her men-of-war should occasion arise. As far as I know, however, no other Power has joined Great Britain in this protest.

IX

Boundaries of State Territory

Grotius, II. c. 3, § 18—Vattel, I. § 266—Hall, § 38—Westlake, I. pp. 141-142—Twiss, I. §§ 147-148—Taylor, § 251—Bluntschli, §§ 296-302—Hartmann, § 59—Heffter, § 66—Holtzendorff in Holtzendorff, II. pp. 232-239—Gareis, § 19—Liszt, § 9—Ullmann, § 80—Bonfils, Nos. 486-489—Despagnet, No. 387—Pradier-Fodéré, II. Nos. 759-777—Nys, I. pp. 413-422—Rivier, I. § 11—Calvo, I. §§ 343-352—Fiore, II. Nos. 799-806—Martens, I. § 89.

Natural and Artificial Boundaries.

§ 198. Boundaries of State territory are the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the Open Sea. The course of the boundary lines may or may not be indicated by boundary signs. These signs may be natural or artificial, and one speaks, therefore, of natural in contradistinction to artificial boundaries. *Natural* boundaries may consist of water, a range of rocks or mountains, deserts, forests, and the like. *Artificial* boundaries are such signs as have been purposely put up to indicate the way of the imaginary boundary-line. They may consist of posts, stones, bars, walls,[1] trenches, roads, canals, buoys in water, and the like. It must, however, be borne in mind that the distinction between artificial and

[1] The Romans of antiquity very often constructed boundary walls, and the Chinese Wall may also be cited as an example.

natural boundaries is not sharp, in so far as some natural boundaries can be artificially created. Thus a forest may be planted, and a desert may be created, as was the frequent practice of the Romans of antiquity for the purpose of marking the frontier.

Boundary Waters.

§ 199. Natural boundaries consisting of water must be specially discussed on account of the different kinds of boundary waters. Such kinds are rivers, lakes, land-locked seas, and the maritime belt.

(1) Boundary rivers are such rivers as separate two different States from each other.[1] If such river is not navigable, the imaginary boundary line runs down the middle of the river, following all turnings of the border line of both banks of the river. On the other hand, in a navigable river the boundary line runs through the middle of the so-called *Thalweg*, that is, the mid-channel of the river. It is, thirdly, possible that the boundary line is the *border line* of the river, so that the whole bed belongs to one of the riparian States only.[2] But this is an exception created by treaty or by the fact that a State has occupied the lands on one side of a river at a time prior to the occupation of the lands on the other side by some other State.[3] And it must be remembered that, since a river sometimes changes more or less its course, the boundary line running through the middle or the *Thalweg* or along the border-line is thereby also altered.[4]

[1] This case is not to be confounded with the other, in which a river runs through the lands of two different States. In this latter case the boundary line runs across the river.

[2] See above, § 175.

[3] See Twiss, I. §§ 147 and 148, and Westlake, I. p. 142.

[4] In case a bridge is built over a boundary river, the boundary line runs, failing special treaty arrangements, through the middle of the bridge. As regards the boundary lines running through islands rising in boundary rivers and through the abandoned beds of such rivers, see below, §§ 234 and 235.

(2) Boundary lakes and land-locked seas are such as separate the lands of two or more different States from each other. The boundary line runs through the middle of these lakes and seas, but as a rule special treaties portion off such lakes and seas between riparian States.[1]

(3) The boundary line of the maritime belt is, according to details given above (§ 186), uncertain, since no unanimity prevails with regard to the width of the belt. It is, however, certain that the boundary line runs not nearer to the shore than three miles, or one marine league, from the low-water mark.

(4) In a narrow strait separating the lands of two different States the boundary line runs either through the middle or through the mid-channel,[2] unless special treaties make different arrangements.

Boundary Mountains.

§ 200. Boundary mountains or hills are such natural elevations from the common level of the ground as separate the territories of two or more States from each other. Failing special treaty arrangements, the boundary line runs on the mountain ridge along with the watershed. But it is quite possible that boundary mountains belong wholly to one of the States which they separate.[3]

Boundary Disputes.

§ 201. Boundary lines are, for many reasons, of such vital importance that disputes relating thereto are inevitably very frequent and have often led to war. During the nineteenth century, however, a tendency began to prevail to settle such disputes peaceably. The simplest way in which this can be done is always by a boundary treaty, provided the parties can come to terms. In other cases arbitration can settle the matter, as, for instance, in the

[1] See above, § 170. and above, § 194.
[2] See Twiss, I. §§ 183 and 184. [3] See Fiore, II. No. 866.

Alaska Boundary dispute between Great Britain (representing Canada) and the United States, settled in 1903. Sometimes International Commissions are specially appointed to settle the boundary lines. In this way the boundary lines between Turkey, Bulgaria, Servia, Montenegro, and Roumania were settled after the Berlin Congress of 1878. It sometimes happens that the States concerned, instead of settling the boundary line, keep a strip of land between their territories under their joint tenure and administration, so that a so-called *condominium* comes into existence, as in the case of Moresnet (Kelmis) on the Prusso-Belgian frontier.[1]

Natural Boundaries *sensu politico.*

§ 202. Whereas the term "natural boundaries" in the theory and practice of the Law of Nations means natural signs which indicate the course of boundary lines, the same term is used politically[2] in various different meanings. Thus the French often speak of the river Rhine as their "natural" boundary, as the Italians do of the Alps. Thus, further, the zones within which the language of a nation is spoken are frequently termed that nation's "natural" boundary. Again, the line enclosing such parts of the land as afford great facilities for defence against an attack is often called the "natural" boundary of a State, whether or not these parts belong to the territory of the respective State. It is obvious that all these and other meanings of the term "natural boundaries" are of no importance whatever to the Law of Nations, whatever value they may have politically.

[1] See above, § 171, No. 1. [2] See Rivier, I. p. 166.

X

STATE SERVITUDES

Hall, § 42*—Westlake, I. p. 61—Phillimore, I. §§ 281-283—Twiss, I. § 245—Taylor, § 252—Bluntschli, §§ 353-359—Hartmann, § 62—Heffter, § 43—Holtzendorff in Holtzendorff, II. pp. 242-252—Gareis, § 71—Liszt, §§ 8 and 19—Ullmann, § 88—Bonfils, Nos. 340-344—Despagnet, Nos. 190-192—Pradier-Fodéré, II. Nos. 834-845, 1038—Rivier, I. pp. 296-303—Calvo, III. § 1583—Fiore, I. § 380—Martens, I. §§ 94-95—Clauss, "Die Lehre von den Staatsdienstbarkeiten" (1894)—Fabres, "Des servitudes dans le droit international" (1901).

Conception of State Servitudes.

§ 203. State servitudes are those exceptional and conventional restrictions on the territorial supremacy of a State by which a part or a whole of its territory is in a limited way made to perpetually serve a certain purpose or interest of another State. Thus a State may through a convention be obliged to allow the passage of troops of a neighbouring State, or may in the interest of a neighbouring State be prevented from fortifying a certain town near the frontier.

That State servitudes are or may on occasions be of great importance, there can be no doubt whatever. The vast majority [1] of writers and the practice of the States accept, therefore, the conception of State servitudes, although they do not agree with regard to the definition and the width of the conception, and although, consequently, in many cases the question is disputed whether a certain restriction upon territorial supremacy is or is not a State servitude.

Servitudes must not be confounded [2] with those

[1] The conception of State servitudes is rejected by Bulmerincq (§ 49), Gareis (§ 71), Liszt (§§ 8 and 19), Jellinek (Allgemeine Staatslehre, p. 366).

[2] This is, for instance, done by Heffter (§ 43), Martens (§ 94), and Hall (§ 42*); the latter speaks of the right of innocent use of territorial seas as a servitude.

general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike. These restrictions are named "natural" restrictions of territorial supremacy (*servitutes juris gentium naturales*), in contradistinction to the conventional restrictions (*servitutes juris gentium voluntariae*) which constitute the State servitudes in the technical sense of the term. Thus, for instance, it is not a State servitude, but a "natural" restriction on territorial supremacy, that a State is obliged to admit the free passage of foreign merchantmen through its territorial maritime belt.

Subjects of State Servitudes.

§ 204. Subjects of State servitudes are States only and exclusively, since State servitudes can exist between States only (*territorium dominans* and *territorium serviens*). Formerly some writers[1] maintained that private individuals and corporations were able to acquire a State servitude; but nowadays it is agreed that this is not possible, since the Law of Nations is a law between States only and exclusively. Whatever rights may be granted by a State to foreign individuals and corporations, such rights can never constitute State servitudes.

On the other hand, every State can acquire and grant State servitudes, although some States may, in consequence of their particular position within the Family of Nations, be prevented from acquiring or granting some special kind or another of State servitudes. Thus neutralised States are in many points hampered in regard to acquiring and granting State servitudes, because they have to avoid everything that could drag them indirectly into war. Thus, further, half-Sovereign and part-Sovereign

[1] Bluntschli, § 353; Heffter, § 43.

States may not be able to acquire and to grant certain State servitudes on account of their dependence upon their superior State. But apart from such exceptional cases, even not-full Sovereign States can acquire and grant State servitudes, provided they have any international status at all.

Object of State Servitudes.

§ 205. The object of State servitudes is always the whole or a part of the territory of the State whose territorial supremacy is restricted by any such servitude. Since the territory of a State includes not only the land but also the rivers which water the land, the maritime belt, the territorial subsoil, and the territorial atmosphere, all these can, as well as the service of the land itself, be an object of State servitudes. Thus a State may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another State, or a right to lay telegraph cables through a foreign maritime belt, or a right to build and use a tunnel through a boundary mountain, and the like. And should ever aërostation become so developed as to be of practical utility, a State servitude might be created through a State acquiring a perpetual right to send military aerial vehicles through the territorial atmosphere of a neighbouring State.[1]

Since the object of State servitudes is the territory of a State, all such restrictions upon the territorial supremacy of a State as do not make a part or the whole of its territory itself serve a purpose or an interest of another State are not State servitudes. The territory as the object is the mark of distinction between State servitudes and other restrictions on the territorial supremacy. Thus the perpetual restriction

[1] It need hardly be mentioned that the Open Sea can never be the object of a State servitude, since it is no State's territory.

imposed upon a State by a treaty not to keep an army beyond a certain size is certainly a restriction on territorial supremacy, but is not, as some writers[1] maintain, a State servitude, because it does not make the territory of one State serve an interest of another. On the other hand, when a State submits to a perpetual right enjoyed by another State of passage of troops, or to the duty not to fortify a certain town on the frontier, or to the claim of another State for its subjects to be allowed the fishery within the former's territorial belt;[2] in all these and the like[3] cases the territorial supremacy of a State *is* in such a way restricted that a part or the whole of its territory is made to serve the interest of another State, and such restrictions are therefore State servitudes.[4]

Different kinds of State Servitudes.

§ 206. According to different qualities different kinds of State servitudes must be distinguished.

(1) Affirmative, active, or positive, are those servitudes which give the right to a State to perform

[1] Bluntschli, § 356.

[2] An example of such fishery servitude is the former French fishery rights in Newfoundland which were based on article 13 of the Treaty of Utrecht, 1713, and on the Treaty of Versailles, 1783. See the details regarding the Newfoundland Fishery Dispute, in Phillimore, I. § 195; Clauss, pp. 17-31; Geffcken in R.I. XXII. p. 217; Brodhurst in Law Magazine and Review, XXIV. p. 67. The French literature on the question is quoted in Bonfils, No. 342, *note* 1. The dispute is now settled through France's renunciation of the privileges due to her according to article 13 of the Treaty of Utrecht, which took place by article 1 of the Anglo-French Convention signed in London on April 8, 1904. But France retains, according to article 2 of the latter Convention, the right of fishing for her subjects in certain parts of the territorial waters of Newfoundland.

[3] Phillimore (I. § 283) quotes two interesting State servitudes which belong to the past. According to articles 4 and 10 of the Treaty of Utrecht, 1713, France was, in the interest of Great Britain, not to allow the Stuart Pretender to reside on French territory, and Great Britain was, in the interest of Spain, not to allow Moors and Jews to reside in Gibraltar.

[4] The controverted question whether neutralisation of a State creates a State servitude is answered by Clauss (p. 167) in the affirmative, but by Ullmann (§ 88), correctly, I think, in the negative. But a distinction must be drawn between neutralisation of a whole State and neutralisation of certain parts of a State. In the latter case a State servitude is indeed created.

certain acts on the territory of another State, such as to build and work a railway, to establish a custom-house, to let an armed force pass through a certain territory (*droit d'étape*), or to keep troops in a certain fortress, to use a port or an island as a coaling station, and the like.

(2) Negative, are such servitudes as give a right to a State to demand of another State that the latter shall abstain from exercising its territorial supremacy in certain ways. Thus a State can have a right to demand that a neighbouring State shall not fortify certain towns near the frontier, that another State shall not allow foreign men-of-war in a certain harbour.[1]

(3) Military, are those State servitudes which are acquired for military purposes, such as the right to keep troops in a foreign fortress, or to let an armed force pass through foreign territory, or to demand that a town on foreign territory shall not be fortified, and the like.

(4) Economic, are those servitudes which are acquired for the purpose of commercial interests, traffic, and intercourse in general, such as the right of fisheries in foreign territorial waters, to build a railway on or lay a telegraph cable through foreign territory, and the like.

Validity of State Servitudes.

§ 207. Since State servitudes, in contradistinction to personal rights (rights *in personam*), are rights inherent to the object with which they are connected (rights *in rem*), they remain valid and may be exercised however the ownership of the territory to which they apply may change. Therefore, if, after the creation of a State servitude, the part of the territory

[1] Affirmative State servitudes *faciendo consistere nequit*, has consist *in patiendo*, negative been adopted by the Law of servitudes *in non faciendo*. The Nations.
rule of Roman Law, *servitus in*

affected comes by conquest or cession under the territorial supremacy of another State, such servitude remains in force. Thus, when the Alsatian town of Hüningen became in 1871, together with the whole of Alsace, German territory, the State servitude created by the Treaty of Paris, 1815, that Hüningen should, in the interest of the Swiss Canton of Basle, never be fortified, was not extinguished.[1] Thus, further, when in 1860 the former Sardinian provinces of Chablais and Faucigny became French, the State servitude created by article 92 of the Act of the Vienna Congress, 1815, that Switzerland should have temporarily during war the right to locate troops in these provinces was not extinguished.[2]

It is a very open question whether military State servitudes can be exercised in time of war by a belligerent if the State with whose territory they are connected remains neutral. Must such State, for the purpose of upholding its neutrality, prevent the belligerent from exercising the respective servitude—for instance, the right of passage of troops?[3]

Extinction of State Servitudes.

§ 208. State servitudes are extinguished by agreement between the States concerned, or by express or tacit[4] renunciation on the part of the State in whose interest they were created. They are not, according to the correct opinion, extinguished by reason of the territory involved coming under the territorial supremacy of another State. But it is difficult to understand why, although State servitudes are called into existence through treaties, it is

[1] Details in Clauss, pp. 15-17.

[2] Details in Clauss, pp. 8-15.

[3] This question became practical when in 1900, during the South African war, Great Britain claimed, and Portugal was ready to grant, passage of troops through Portuguese territory in South Africa. (See below, vol. II. § 323, and Clauss, pp. 212-217.)

[4] See Bluntschli, § 359 b. The opposition of Clauss (p. 219) and others to this sound statement of Bluntschli's is not justified.

sometimes maintained that the clause *rebus sic stantibus*[1] cannot be applied in case a vital change of circumstances makes the exercise of a State servitude unbearable. That in such case the restricted State must previously try to come to terms with the State which is the subject of the servitude, is a matter of course. But if an agreement cannot be arrived at on account of the unreasonableness of the other party, the clause *rebus sic stantibus* may well be resorted to.[2] The fact that the practice of the States does not provide any example of an appeal to this clause for the purpose of doing away with a State servitude proves only that such appeal has hitherto been unnecessary

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XI

Modes of acquiring State Territory

Vattel, I. §§ 203-207—Hall, § 31—Westlake, I. pp. 84-116—Lawrence, §§ 92-99—Phillimore, I. §§ 222-225—Twiss, I. §§ 113-139—Halleck, I. p. 154—Taylor, §§ 217-228—Wheaton, §§ 161-163—Bluntschli, §§ 278-295—Hartmann, § 61—Heffter, § 69—Holtzendorff in Holtzendorff, II. pp. 252-255—Gareis, § 76—Liszt, § 10—Ullmann, § 81—Bonfils, No. 532—Despagnet, No. 888—Pradier-Fodéré, II. Nos. 781-787—Rivier, I. § 12—Calvo, I. § 263—Fiore, I. Nos. 838-840—Martens, I. § 90—Heimburger, "Der Erwerb der Gebietshoheit" (1888).

Who can acquire State Territory?

§ 209. Since States only and exclusively are subjects of the Law of Nations, it is obvious that, as far as the Law of Nations is concerned, States[3] solely

[1] See below, § 539.

[2] See Bluntschli, § 359 d, and Pradier-Fodéré, II. No. 845. Clauss (p. 222) and others oppose this sound statement likewise.

[3] There is no doubt that no full Sovereign State is, as a rule, prevented by the Law of Nations from acquiring more territory than it already owns, unless some treaty arrangement precludes it from so doing. It has been asserted (Fauchille, in R.G. II. p. 427) that a neutralised State is *ipso facto*

can acquire State territory. But the acquisition of territory by an existing State and member of the Family of Nations must not be confounded, first, with the foundation of a new State, and, secondly, with the acquisition of such territory and sovereignty over it by private individuals or corporations as lies outside the dominion of the Law of Nations.

(1) Whenever a multitude of individuals, living on or entering into such a part of the surface of the globe as does not belong to the territory of any member of the Family of Nations, constitute themselves as a State and nation on that part of the globe, a new State comes into existence. This State is not, by reason of its birth, a member of the Family of Nations. The formation of a new State is, as will be remembered from former statements,[1] a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new State becomes a member of the Family of Nations and a subject of International Law. As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory was acquired before the recognition.

(2) Not essentially different is the case in which a private individual or a corporation acquires land with sovereignty over it in countries which are not under the territorial supremacy of a member of the Family of Nations. The actual proceeding in all

by its neutralisation prevented from acquiring territory. But this is certainly wrong in its generality, although territory acquired by a neutralised State would not *ipso facto* have the character of neutralised territory, and although it is quite possible that the Powers would intervene and prevent such neutralised State from acquiring a certain piece of land because such acquisition might endanger the permanent neutrality of the said State. (See Rivier, I. p. 172.)

[1] See above, § 71.

such cases is that all such acquisition is made either by occupation of hitherto uninhabited land, for instance an island, or by cession from a native tribe living on the land. Acquisition of territory and sovereignty thereon in such cases takes place outside the dominion of the Law of Nations, and the rules of this law, therefore, cannot be applied. If the individual or corporation which has made the acquisition requires protection by the Law of Nations, they must either declare a new State to be in existence and ask for its recognition by the Powers, as in the case of the Congo Free State,[1] or they must ask a member of the Family of Nations to acknowledge the acquisition as made on its behalf.[2]

Former Doctrine concerning Acquisition of Territory.

§ 210. No unanimity exists among writers on the Law of Nations with regard to the modes of acquiring territory on the part of the members of the Family of Nations. The topic owes its controversial character to the fact that the conception of State territory has undergone a great change since the appearance of the science of the Law of Nations. When Grotius created that science, State territory used to be still, as in the Middle Ages, more or less identified with the private property of the monarch of the State. Grotius and his followers applied, therefore, the rules of Roman Law concerning the acquisition of private property to the acquisition of territory by States.[3] As nowadays, as far as

[1] See above, § 101. The case of Sir James Brooke, who acquired in 1841 Sarawak, in North Borneo, and established an independent State there, whose Sovereign he became, may also be cited. Sarawak is under English protectorate, but the successor of Sir James Brooke is still recognised as Sovereign.

[2] The matter is treated with great lucidity by Helmburger, pp. 44–77, who defends the opinion represented in the text against Sir Travers Twiss (I. Preface, p. x.; also in R.I. xv. p. 547, and xvi. p. 237) and other writers. See also Ullmann, § 82.

[3] See above, § 168. The distinction between *imperium* and

International Law is concerned, every analogy to private property has disappeared from the conception of State territory, the acquisition of territory by a State can mean nothing else than the acquisition of *sovereignty* over such territory. It is obvious that under these circumstances the rules of Roman Law concerning the acquisition of private property can no longer be applied. Yet the fact that they have been applied in the past has left traces which can hardly be obliterated; and they need not be obliterated, since they contain a good deal of truth in agreement with the actual facts. But the different modes of acquiring territory must be taken from the real practice of the States, and not from Roman Law, although the latter's terminology and common-sense basis may be made use of.

What Modes of Acquisition of Territory there are.

§ 211. States as living organisms grow and decrease in territory. If the historical facts are taken into consideration, different reasons may be found to account for the exercise of sovereignty by a State over the different sections of its territory. One section may have been ceded by another State, another section may have come into the possession of the owner in consequence of accretion, a third through subjugation, a fourth through occupation of no State's land. As regards a fifth section, a State may say that it has exercised its sovereignty over the same for so long a period that the fact of having had it in undisturbed possession is a sufficient title of ownership. Accordingly, five modes of acquiring territory may be distinguished, namely: cession, occupation, accretion, subjugation, and prescription.

dominium in Seneca's *dictum* that "omnis rex imperio possidet, sin guli dominio" was well known, and Grotius, II. c. 3, § 4, quotes

it, but the consequences thereof were nevertheless not deduced. (See Westlake, Chapters, pp. 129-133, and Westlake, I. pp. 84-88.)

Most writers recognise these five modes. Some, however, do not recognise prescription; some assert that accretion creates nothing else than a modification of the territory of a State; and some do not recognise subjugation at all, or declare it to be only a special case of occupation. It is for these reasons that some writers recognise only two or three[1] modes of acquiring territory. Be that as it may, all modes, besides the five mentioned, enumerated by some writers, are in fact not special modes, but only special cases of cession.[2]

Original and derivative Modes of Acquisition.

§ 212. The modes of acquiring territory are correctly divided according as the title they give is derived from the title of a prior owner State, or not. Cession is therefore a derivative mode of acquisition, whereas occupation, accretion, subjugation, and prescription are original modes.

[1] Thus, Ullmann (§ 84) and Gareis (§ 70) recognise cession and occupation only, whereas Heimburger (pp. 106–110) and Holtzendorff (II. p. 254) recognise cession, occupation, and accretion only.

[2] See below, § 216. Such alleged special modes are sale, exchange, gift, marriage contract, testamentary disposition, and the like.

XII

Cession

Hall, § 35—Lawrence, § 97—Phillimore, I. §§ 252-273—Twiss, I. § 138—Walker, § 10—Halleck, I. pp. 154-157—Taylor, § 227—Bluntschli, §§ 285-287—Hartmann, § 61—Heffter, §§ 69 and 182—Holtzendorff in Holtzendorff, II. pp. 269-274—Gareis, § 70—Liszt, § 10—Ullmann, §§ 86-89—Bonfils, Nos. 364-371—Despagnet, Nos. 391-400—Pradier-Fodéré, II. Nos. 817-819—Rivier, I. pp. 197-217—Calvo, I. § 266—Fiore, II. §§ 860-861—Martens, I. § 91—Heimburger, "Der Erwerb der Gebietshoheit" (1888) pp. 110-120.

Conception of cession of State Territory.

§ 213. Cession of State territory is the transfer of sovereignty over State territory by the owner State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules[1] for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law.[2] But if such municipal rules contain constitutional restrictions of the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by heads of States or Governments as violate these restrictions are not binding.[3]

Subjects of cession.

§ 214. Since cession is a bilateral transaction, it has two subjects—namely, the ceding and the acquiring State. Both subjects must be States, and only those cessions in which both subjects are States

[1] See above, § 168. [2] See above, § 21. [3] See below, § 497.

are a concern of the Law of Nations. Cessions of territory made to private persons and to corporations[1] by native tribes or by States outside the dominion of the Law of Nations do not fall within the sphere of International Law, neither do cessions of territory by native tribes made to States[2] which are members of the Family of Nations. On the other hand, cession of territory made to a member of the Family of Nations by a State as yet outside that family is real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family.[3]

§ 215. The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State. However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of the land, they cannot be ceded without a piece of land.[4] Object of cession.

The controverted question whether permanently neutralised parts of a not permanently neutralised State can be ceded to another State must be answered in the affirmative,[5] although the Powers certainly can exercise an intervention by right. On the other hand, a permanently neutralised State could not, except in the case of mere frontier regulation, cede a part of its neutralised territory to another State without the consent of the Powers. Nor could a State under suzerainty or protectorate

[1] See above, § 209, No. 2.
[2] See below, §§ 221 and 222.
[3] See above, § 103.
[4] See above, §§ 175 and 185.
[5] Thus in 1860 Sardinia ceded her neutralised provinces of Chablais and Faucigny to France. (See above, § 207.)

cede a part or the whole of its territory to a third State without the consent of the superior State. Thus, the Ionian Islands could not in 1863 have merged in Greece without the consent of Great Britain, which exercised a protectorate over these islands.

Form of cession.

§ 216. The only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war, and the cession may be one with or without compensation.

If a cession of territory is the outcome of war, it is the treaty of peace which stipulates the cession among its other provisions. Such cession is regularly one without compensation, although certain duties may be imposed upon the acquiring State, as, for instance, of taking over a part of the debts of the ceding State corresponding to the extent and importance of the ceded territory, or that of giving the individuals domiciled on the ceded territory the option to retain their old citizenship or, at least, to emigrate.

Cessions which are the outcome of peaceable negotiations may be agreed upon by the interested States from different motives and for different purposes. Thus Austria, during war with Prussia and Italy in 1866, ceded Venice to France as a gift, and some weeks afterwards France on her part ceded Venice to Italy. The Duchy of Courland ceded in 1795 its whole territory to and voluntarily merged thereby in Russia, and in the same way the then Free Town of Mulhouse merged in France in 1798.

Cessions have in the past often been effected by transactions which are analogous to transactions in

private business life. As long as absolutism was reigning over Europe, it was not at all rare for territory to be ceded in *marriage contracts* or by *testamentary dispositions*.[1] In the interest of frontier regulations, but also for other purposes, *exchanges* of territory frequently take place. *Sale* of territory is quite usual; as late as 1868 Russia sold her territory in America to the United States for 7,200,000 dollars, and in 1899 Spain sold the Caroline Islands to Germany for 25,000,000 pesetas. *Pledge* and *lease* are also made use of. Thus, the then Republic of Genoa pledged Corsica to France in 1768, Sweden pledged Wismar to Mecklenburg in 1803; China leased in 1898 Kiaochau to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, and Port Arthur to Russia.[2]

Whatever may be the motive and the purpose of

[1] Phillimore, I. §§ 274-276, enumerates many examples of such cession. The question whether the monarch of a State under absolute government could nowadays by a testamentary disposition cede territory to another State must, I believe, be answered in the affirmative. The case may become practical after the death of King Leopold II. of Belgium, who made in 1889 the following "will:"

"We, Leopold II., King of the Belgians, Sovereign of the Congo Free State, wishing to assure to our beloved country the fruits of the work we have for a long time prosecuted in the African continent, with the generous and devoted assistance of many Belgians; in the conviction that we shall thus contribute to secure for Belgium, she herself being willing, the necessary outlets for her commerce, and shall open fresh channels of industry for her children, declare by these presents that we bequeath and transmit to Belgium, after our death, all our sovereign rights to the Congo Free State, such as have been recognised by the declarations, conventions, and treaties, drawn up since 1884, on the one hand between the International Association of the Congo, and, on the other hand, the Free State, as well as all the property, rights, and advantages accruing from such sovereignty. Until such time as the Legislature of Belgium shall have stated its intentions as to the acceptance of these dispositions, the sovereignty shall be exercised collectively by the council of three administrators of the Free State and by the Governor-General."

[2] See above, § 171, No. 3. Cession may also take place under the disguise of an agreement according to which territory comes under the "administration" of a foreign State. (See above, § 171, No. 2.)

the transaction, and whatever may be the compensation, if any, for the cession, the ceded territory is transferred to the new sovereign with all the international obligations[1] locally connected with the territory (*Res transit cum suo onere*, and *Nemo plus juris transferre potest, quam ipse habet*).

Tradition of the ceded Territory.

§ 217. The treaty of cession must be followed by actual tradition of the territory to the new owner State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such war in the military occupation of the State to which it is now ceded. But the validity of the cession does not depend upon tradition,[2] the cession being completed by ratification of the treaty of cession, and the capability of the new owner to cede the acquired territory to a third State at once without taking actual possession of it.[3] But of course the new owner State cannot exercise its territorial supremacy thereon until it has taken physical possession of the ceded territory.

Veto of third Powers.

§ 218. As a rule, no third Power has the right of *veto* with regard to a cession of territory. Exceptionally, however, such right may exist; it may be that a third Power has by a previous treaty acquired a right of pre-emption concerning the ceded territory, or that some early treaty has created another obstacle to the cession, as, for instance, in the case of permanently neutralised parts of a not-permanently

[1] How far a succession of States takes place in the case of cession of territory has been discussed above, § 84.

[2] This is controversial. Many writers—see, for instance, Rivier, I. p. 203—oppose the opinion presented in the text.

[3] Thus France, to which Austria ceded in 1859 Lombardy, ceded this territory on her part to Sardinia without previously having actually taken possession of it. (See Ullmann, § 86.)

neutralised State.[1] And the Powers have certainly the right of *veto* in case a permanently neutralised State desires to increase its territory by acquiring land through cession from another State.[2] But even where no right of *veto* exists, a third Power might intervene for political reasons. For there is no duty on the part of third States to acquiesce in such cessions of territory as endanger the balance of power or are otherwise of vital importance.[3] And a strong State will practically always interfere in case a cession of such kind is agreed upon as menaces its vital interests. Thus, when in 1867 the then reigning King of Holland proposed to sell Luxemburg to France, the North German Confederation intervened, and the cession was not effected, but Luxemburg became permanently neutralised.

Plebiscite and option.

§ 219. As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto* by the cession subjects of the acquiring State. The hardship involved in the fact that in all cases of cession the inhabitants of the territory lose their old citizenship and are handed over to a new Sovereign whether they like it or not, has created a movement in favour of the claim that no cession shall be valid before the inhabitants have by a plebiscite[4] given their consent to the cession. And several treaties[5] of cession concluded during the nineteenth century stipulate that the cession shall only be valid provided the inhabitants consent to it

[1] See above, § 215.
[2] See above, § 209.
[3] See above, § 136.
[4] See Stoerk, Option und Plebiscite (1879); Rivier, I. p. 204; Freudenthal, Die Volksabstimmung bei Gebietsabtretungen und Eroberungen (1891); Bonfils, No. 570; Despagnet, No. 400; Ullmann, § 87.
[5] See Rivier, I. p. 210, where all these treaties are enumerated.

through a plebiscite. But it is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite. The necessities of international policy may now and then allow or even demand such a plebiscite, but in most cases they will not allow it.

The hardship of the inhabitants being handed over to a new Sovereign against their will can be lessened by a stipulation in the treaty of cession binding the acquiring State to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration. Many treaties of cession concluded during the second half of the nineteenth century contain this stipulation. But it must be emphasised that, failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of foreigners and endanger the safety of the acquiring State. The option to emigrate within a certain period, which is frequently stipulated in behalf of the inhabitants of the ceded territory, is another means of averting the charge that inhabitants are handed over to a new Sovereign against their will. Thus article 2 of the Peace Treaty of Frankfort, 1871, which ended the Franco-German war, stipulated that the French inhabitants of the ceded territory of Alsace and Lorraine should up to October 1, 1872, enjoy the privilege of transferring their domicile from the ceded territory to French soil.[1]

[1] The important question whether subjects of the ceding States who are born on the ceded territory but have their domicile abroad become *ipso facto* by the cession subjects of the acquiring State, must, I think, be answered in the negative. Therefore, Frenchmen born in Alsace but domiciled at the time of the

XIII

Occupation

Hall, §§ 32-34—Westlake, I. pp. 96-111, 119-133—Lawrence, §§ 92-96—Phillimore, I. §§ 236-250—Twiss, I. §§ 118-126—Halleck, I. p. 154—Taylor, §§ 221-224—Walker, § 9—Wharton, I. § 2—Wheaton, §§ 165-174—Bluntschli, §§ 278-283—Hartmann, § 61—Heffter, § 70—Holtzendorff in Holtzendorff, II. pp. 255-266—Gareis, § 70—Liszt, § 10—Ullmann, §§ 82-85—Bonfils, Nos. 536-563—Despagnet, Nos. 401-409—Pradier-Fodéré, II. Nos. 784-802—Rivier, I. pp. 188-197—Calvo, I. §§ 266-282—Fiore, II. Nos. 841-849—Martens, I. § 90—Tartarin, "Traité de l'occupation" (1873)—Westlake, Chapters, pp. 155-187—Heimburger, "Der Erwerb der Gebietshoheit" (1888), pp. 103-155—Salomon, "L'occupation des territoires sans maître" (1889)—Jèze, "Étude théorique et pratique sur l'occupation, etc." (1896).

Conception of Occupation.

§ 220. Occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State. Occupation as a mode of acquisition differs from subjugation[1] chiefly in so far as the conquered and afterwards annexed territory has hitherto belonged to another State. Again, occupation differs from cession in so far as through cession the acquiring State receives sovereignty over the respective territory from the former owner State. In contradistinction to cession, which is a derivative mode of acquisition, occupation is therefore an original mode. And it must be emphasised that occupation can only take place by and for a State;[2] it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance.

cession in Great Britain, have not lost their French citizenship through the cession.

[1] See below, § 236.
[2] See above, § 209.

Object of Occupation.

§ 221. Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, as *e.g.* an island, or inhabited by natives whose community is not to be considered as a State. Even civilised individuals may live and have private property on a territory without any union by them into a State proper which exercises sovereignty over such territory. And natives may live on a territory under a tribal organisation which need not be considered a State proper. But a part or the whole of the territory of any State, even although such State is entirely outside the Family of Nations, is not a possible object of occupation, and it can only be acquired through cession[1] or subjugation. On the other hand, a territory which belonged at one time to a State but has been afterwards abandoned, is a possible object for occupation on the part of another State.[2]

Occupation how effected.

§ 222. Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of and establishing an administration over the territory in the name of and for the acquiring State. Occupation thus effected is *real* occupation, and, in contradistinction to "fictitious" occupation, is named "effective" occupation. Possession and administration are the two essential facts that constitute an effective occupation.

(1) The territory must really be taken into possession by the occupying State. For this purpose it is necessary that the respective State has taken the territory under its sway (*corpus*) with the intention to acquire sovereignty over it (*animus*). This can only be done by a settlement on the territory accompanied by some formal act which

[1] See above, § 210. [2] See below, §§ 228 and 247.

announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty. The necessary formal act is usually performed either by the publication of a proclamation or by the hoisting of a flag. But such formal act by itself constitutes fictitious occupation only, unless there is left on the territory a settlement which is able to keep up the authority of the flag. On the other hand, it is irrelevant whether or not some agreement is made with the natives by which they submit themselves to the sway of the occupying State. Any such agreement is usually neither understood nor appreciated by them, and even if the natives really do understand the meaning, such agreements have a moral value only.[1]

(2) After having, in the aforementioned way, taken possession of a territory, the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If within a reasonable time after the act of taking possession the possessor does not establish some responsible authority which exercises governing functions, there is then no effective occupation, since in fact no sovereignty of a State is exercised over the territory.

Inchoate Title of Discovery.

§ 223. In former times the two conditions of possession and administration which now make the occupation effective were not considered necessary for the acquisition of territory through occupation. In the age of the discoveries, States maintained that the fact of discovering a hitherto unknown territory

[1] If an agreement with natives were legally important, the respective territory would be acquired by cession, and not by occupation. But although it is nowadays quite usual to obtain a cession from a native chief, this is, nevertheless, not cession in the technical sense of the term in International Law; see above, § 214.

was sufficient reason for considering it as acquired through occupation by the State in whose service the discoverer made his explorations. And although later on a real taking possession of the territory was considered necessary for its occupation, it was not until the eighteenth century that the writers on the Law of Nations postulated an *effective* occupation as necessary,[1] and it was not until the nineteenth century that the practice of the States accorded with this postulate. But although nowadays discovery does not constitute acquisition through occupation, it is nevertheless not without importance. It is agreed that discovery gives to the State in whose service it was made an *inchoate* title; it "acts as a temporary bar to occupation by another State"[2] within such a period as is reasonably sufficient for effectively occupying the discovered territory. If such period lapses without any attempt by the discovering State to turn its *inchoate* title into a *real* title of occupation, such inchoate title perishes, and any other State can now acquire the territory by means of an effective occupation.

Notification of Occupation to other Powers.

§ 224. No rule of the Law of Nations exists which makes notification of occupation to other Powers a necessary condition of its validity. But as regards all future occupations on the *African* continent the Powers assembled at the Berlin Congo Conference in 1884–1885 have by article 34 of the General Act of this Conference stipulated that occupation shall be notified to one another, so that such notification is now a condition of the validity of an occupation in Africa. And there is no doubt that in time this rule will either by custom or by

[1] See Vattel, I. § 208. [2] Thus Hall, § 32.

treaty be extended from occupations in Africa to occupations everywhere else.

Extent of Occupation.

§ 225. Since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to reach over so much territory as is effectively occupied. In practice, however, the interested States have neither in the past nor in the present acted in conformity with such a rule; on the contrary, they have always tried to attribute to their occupation a much wider area. Thus it has been maintained that an effective occupation of the land at the mouth of a river is sufficient to bring under the sovereignty of the occupying State the whole territory through which such river and its tributaries run up to the very crest of the watershed.[1] Again, it has been maintained that, when a coast line has been effectively occupied, the extent of the occupation reaches up to the watershed of all such rivers as empty into the coast line.[2] And it has, thirdly, been asserted that effective occupation of a territory extends the sovereignty of the possessor also over neighbouring territories as far as it is necessary for the integrity, security, and defence of the really occupied land.[3] But all these and other fanciful assertions have no basis to rest upon. In truth, no general rule can be laid down beyond the above, that occupation reaches as far as it is effective. How far it is effective, is a question of the special case. It is obvious that when the agent of a State takes posses-

[1] Claim of the United States in the Oregon Boundary dispute (1827) with Great Britain. See Twiss, I. §§ 126 and 127 and his "The Oregon Question examined" (1846); Phillimore, I. § 250; Hall, § 34.

[2] Claim of the United States in their dispute with Spain concerning the boundary of Louisiana (1803), approved of by Twiss, I. § 125.

[3] This is the so-called "right of contiguity," approved of by Twiss, I. §§ 124 and 131.

sion of a territory and makes a settlement on a certain spot of it, he intends thereby to acquire a vast area by his occupation. Everything depends, therefore, upon the fact how far around the settlement or settlements the established responsible authority that governs the territory in the name of the possessor succeeds in gradually extending the established sovereignty. The payment of a tribute on the part of tribes settled far away, the fact that flying columns of the military or the police sweep, when necessary, remote spots, and many other facts, can show how far round the settlements the possessor is really able to assert the established authority. But it will always be difficult to mark exactly in this way the boundary of an effective occupation, since naturally the tendency prevails to extend the sway constantly and gradually over a wider area. It is, therefore, a well-known fact that disputes concerning the boundaries of occupations can only rarely be decided on the basis of strict law; they must nearly always be compromised, whether by a treaty or by arbitration.[1]

Protectorate as Precursor of Occupation.

§ 226. The growing desire to acquire vast territories as colonies on the part of States unable to occupy effectively such territories at once has, in the second half of the nineteenth century, led to the contracting of agreements with the chiefs of natives inhabiting unoccupied territories, by which these chiefs commit themselves to the "protectorate" of States that are members of the Family of Nations. These so-called protectorates are certainly not protectorates in the technical sense of the term desig-

[1] The Institute of International Law, in 1887, at its meeting in Lausanne, adopted a "Projet de déclaration internationale relatif aux occupations de territoires," comprising ten articles; see Annuaire X. p. 201.

nating the relation that exists between a strong and a weak State through a treaty by which the weak State surrenders itself into the protection of the strong and transfers to the latter the management of its more important international relations.[1] Neither can they be compared with the protectorate of members of the Family of Nations exercised over such non-Christian States as are outside that family,[2] because the respective chiefs of natives are not the heads of States, but heads of tribal communities only. Such agreements, although they are named "Protectorates," are nothing else than steps taken to exclude other Powers from occupying the respective territories. They give, like discovery, an inchoate title, and are preparations and precursors of future occupations.

Spheres of influence.

§ 227. The uncertainty of the extent of an occupation and the tendency of every colonising State to extend its occupation constantly and gradually into the interior, the "Hinterland," of an occupied territory, has led several States which have colonies in Africa to secure for themselves "spheres of influence" by international treaties with other interested Powers. Spheres of influence are therefore the names of such territories as are exclusively reserved for future occupation on the part of a Power which has effectively occupied adjoining territories. In this way disputes are avoided for the future, and the interested Powers can gradually extend their sovereignty over vast territories without coming into conflict with other Powers. Thus, to give some examples, Great Britain has concluded treaties regarding spheres of influence with Portugal[3]

[1] See above, §§ 92 and 93.
[2] See above, § 94.
[3] See Martens, N.R.G., 2nd ser. XVIII. p. 558.

in 1890, with Italy[1] in 1891, with Germany[2] in 1886 and 1890, and with France[3] in 1898.[4]

Consequences of Occupation.

§ 228. As soon as a territory is occupied by a member of the Family of Nations, it comes within the sphere of the Law of Nations, because it constitutes a portion of the territory of a subject of International Law. No other Power can acquire it hereafter through occupation, unless the present possessor has either intentionally withdrawn from it or has been successfully driven away by the natives without making efforts, or without capacity, to re-occupy it.[5] On the other hand, the Power which now exercises sovereignty over the occupied territory is hereafter responsible for all events of international importance on the territory. Such Power has in especial to keep up a certain order among the native tribes to restrain them from acts of violence against neighbouring territories, and has eventually to punish them for such acts.

A question of some importance is how far occupation affects private property of the inhabitants of the occupied territory. As according to the modern conception of State territory the latter is not identical with private property of the State, occupation brings a territory under the sovereignty only of the occupying State, and therefore in no wise touches or affects existing private property of the inhabitants. In the age of the discoveries, occupation was indeed considered to include a title to property over the

[1] See Martens, N.R.G., 2nd ser. XVIII. p. 175.

[2] See Martens, N.R.G., 2nd ser. XII. p. 298, and XVI. p. 895.

[3] See Martens, N.R.G., 2nd ser. XXIX. p. 116.

[4] Protectorates and Spheres of Influence are exhaustively treated in Hall, Foreign Powers and Jurisdiction of the British Crown, §§ 92-100; but Hall fails to distinguish between protectorates over Eastern States and protectorates over native tribes.

[5] See below, § 247.

whole occupied land, but nowadays this can no longer be maintained. If, according to the Municipal Law of a State, occupation does give such title to property, there is a conflict between International and Municipal Law which ought not to be upheld.[1]

XIV

Accretion

Grotius, II. c. 8, §§ 8-16—Hall, § 37—Lawrence, § 100—Phillimore, I. §§ 240-241—Twiss, I. §§ 131 and 154—Bluntschli, §§ 294-295—Hartmann, § 61—Heffter, § 69—Holtzendorff in Holtzendorff, II. pp. 266-268—Garcis, § 20—Liszt, § 10—Ullmann, § 81—Bonfils, No. 533—Despagnet, No. 389—Pradier-Fodéré, II. Nos. 803-816—Rivier, I. pp. 179-180—Calvo, I. § 266—Fiore, II. No. 852—Martens, I. § 90—Heimburger, "Der Erwerb der Gebietshoheit" (1888), p. 107.

Conception of Accretion.

§ 229. Accretion is the name for the increase of land through new formations. Such new formations may be a modification only of the existing State territory, as, for instance, where an island rises within such river or a part of it as is totally within the territory of one and the same State; and in such case there is no increase of territory to correspond with the increase of land. On the other hand, many new formations occur which really do enlarge the territory of the State to which they accrue, as, for instance, where an island rises within the maritime belt.[2] And it is a customary rule of the Law of Nations that enlargement of territory, if any, created

[1] See above, §§ 20-25.

[2] Those writers who, as Ullmann, § 81, consider accretion a modification only of the existing territory, overlook this second kind of new formations. Since through the rise of an island within the maritime belt the extent of the latter must now be measured from the shore of such island, the territory of the respective State is indeed enlarged.

through new formations, takes place *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty. Accretion must therefore be considered as a mode of acquiring territory.

Different kinds of Accretion.

§ 230. New formations through accretion may be artificial or natural. They are artificial if they are the outcome of human work. They are natural if they are produced through the operation of nature. And within the circle of natural formations different kinds must again be distinguished—namely, alluvions, deltas, new-born islands, and abandoned river beds.

Artificial Formations.

§ 231. Artificial formations are embankments, breakwaters, dykes, and the like, built along the river or the coast line of the sea. As such artificial new formations along the bank of a boundary river may more or less push the volume of water so far as to encroach upon the other bank of the river, and as no State is allowed to alter the natural condition of its own territory to the disadvantage[1] of the natural conditions of a neighbouring State territory, a State cannot build embankments, and the like, of such kind without a previous agreement with the neighbouring State. But every riparian State of the sea may construct such artificial formations as far into the sea beyond the low-water mark as it likes and thereby gain considerably in land and also in territory, since the extent of the at least three miles wide maritime belt is now to be measured from the extended shore.

Alluvions.

§ 232. Alluvion is the name for an accession of land washed up on the sea-shore or on a river-bank by the waters. Such accession is as a rule produced by a slow and gradual process, but sometimes also

[1] See above, § 127.

through a sudden act of violence, the stream detaching a portion of the soil from one bank of a river, carrying it over to the other bank, and embedding it there so as to be immovable (*avulsio*). Through alluvions the land and also the territory of a State may be considerably enlarged. For, if the alluvion takes place on the shore, the extent of the territorial maritime belt is now to be measured from the extended shore. And, if the alluvion takes place on the one bank of a boundary river, and the course of the river is thereby naturally so altered that the waters in consequence cover a part of the other bank, the boundary line, which runs through the middle or through the mid-channel,[1] may thereby be extended into former territory of the other riparian State.

Deltas.

§ 233. Similar to alluvions are Deltas. Delta is the name for a tract of land at the mouth of a river shaped like the Greek letter Δ, which land owes its existence to a gradual deposit by the river of sand, stones, and earth on one particular place at its mouth. As the Deltas are continually increasing, the accession of land they produce may be very considerable, and such accession is, according to the Law of Nations, considered an accretion to the land of the State to whose territory the mouth of the respective river belongs, although the Delta may be formed outside the territorial maritime belt. It is evident that in the latter case an increase of territory is the result, since the at least three miles wide maritime belt is now to be measured from the shore of the Delta.

New-born Islands.

§ 234. The same and other natural processes which create alluvions on the shore and banks, and Deltas at the mouths of rivers, lead to the birth of new islands. If they rise on the High Seas outside the

[1] See above, § 199, No. 1.

territorial maritime belt, they are no State's land and may be acquired through occupation on the part of any State. But if they rise in rivers, lakes, and within the maritime belt, they are, according to the Law of Nations, considered accretions to the neighbouring land. It is for this reason that such new islands in boundary rivers as rise within the boundary line of one of the riparian States accrue to the land of such State, and that, on the other hand, such islands as rise upon the boundary line are divided into parts by it, the respective parts accruing to the land of the riparian States concerned. If an island rises within the territorial maritime belt, it accrues to the land of the riparian State, and the extent of the maritime belt is now to be measured from the shore of the new-born island.

An illustrative example is the case[1] of the "Anna." In 1805, during war between Great Britain and Spain, the British privateer "Minerva" captured the Spanish vessel "Anna" near the mouth of the River Mississippi. When brought before the British Prize Court, the United States claimed the captured vessel on the ground that she was captured within the American territorial maritime belt. Lord Stowell gave judgment in favour of this claim, because, although it appeared that the capture did actually take place more than three miles off the coast of the continent, the place of capture was within three miles of some small mud-islands composed of earth and trees drifted down into the sea.

Abandoned River-beds.

§ 235. It happens sometimes that a river abandons its bed entirely or dries up altogether. If

[1] See 5 Rob. 373.

such river was a boundary river, the abandoned bed is now the natural boundary. But often the old boundary line cannot be ascertained, and in such cases the boundary line is considered to run through the middle of the abandoned bed, and the portions *ipso facto* accrue to the land of the riparian States, although the territory of one of these States may become thereby enlarged, and that of the other diminished.

XV

SUBJUGATION

Hall, §§ 204-205—Lawrence, § 98—Halleck, II. pp. 467-498—Taylor, § 220—Walker, § 11—Wheaton, § 165—Bluntschli, §§ 287-289, 701, 702—Heffter, § 178—Liszt, § 10—Ullmann, §§ 81 and 169—Bonfils, No. 535—Despagnet, Nos. 395-398—Rivier, I. pp. 181, 182, 436-441—Calvo, V. § 3117, 3118—Fiore, II. No. 863; III. No. 1693—Martens, I. § 91—Holtzendorff, "Eroberung und Eroberungsrecht" (1871)—Heimburger, "Der Erwerb der Gebietshoheit" (1888), pp. 121-132—Westlake in The Law Quarterly Review, XVII. (1901), p. 392.

Conception of Conquest and of Subjugation.

§ 236. Conquest is the taking possession of enemy territory through military force in time of war. Conquest alone does not *ipso facto* make the conquering State the sovereign of the conquered territory, although such territory comes through conquest for the time under the sway of the conqueror. Conquest is only a mode of acquisition if the conqueror has, after having firmly established the conquest, formally annexed the territory. Such annexation makes the enemy State cease to exist, and brings thereby the war to an end. And as such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives a title and is a mode of acquiring

territory.[1] It is, however, quite usual to speak of conquest as a title, and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a belligerent conquers a part of the enemy territory and makes afterwards the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession.[2]

Subjugation in Contradistinction to Occupation.

§ 237. Some writers[3] maintain that subjugation is only a special case of occupation, because, as they assert, through conquest the enemy territory becomes no State's land and the conqueror can acquire it by turning his military occupation into absolute occupation. Yet this opinion cannot be upheld because military occupation, which is conquest, in no way makes enemy territory no State's land. Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror. Annexation turns the conquest into subjugation. It is the very annexation which *uno actu* makes the vanquished State cease to exist and brings the territory under the conqueror's sovereignty. Thus the subjugated territory has not for one moment been no State's land, but comes from the enemy's into the conqueror's sovereignty, although not through cession, but through annexation.

Justification of Subjugation as a Mode of Acquisition.

§ 238. As long as a Law of Nations has been in existence, the States as well as the vast majority of writers have recognised subjugation as a mode of

[1] Concerning the distinction between conquest and subjugation, see below, vol. II. § 264.

[2] See above, §§ 216 and 219.

[3] Holtzendorff, II. p. 255; Ullmann, § 81; Heimburger, p. 128; Salomon, p. 24.

acquiring territory. Its justification lies in the fact that war is a contention between States for the purpose of overpowering one another. States which go to war know beforehand that they risk more or less their very existence, and that it may be a necessity for the victor to annex the conquered enemy territory, be it in the interest of national unity or of safety against further attacks, or for other reasons. Maybe, in some extremely dim and distant future, war will disappear, but, as long as war exists, subjugation will also be recognised. If some writers[1] refuse to recognise subjugation at all as a mode of acquiring territory, they show a lack of insight into the historical development of States and nations.

Subjugation of the whole or of a part of Enemy Territory.

§ 239. Subjugation is as a rule a mode of acquiring the entire enemy territory. The actual process is regularly that the victor destroys the enemy military forces, takes possession of the enemy territory, and then annexes it, although the head and the Government of the extinguished State might have fled, might protest, and still keep up a claim. Thus after the war with Austria and her allies in 1866, Prussia subjugated the territories of the Duchy of Nassau, the Kingdom of Hanover, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Maine, and Great Britain subjugated in 1900 the territories of the Orange Free State and the South African Republic.

But it is possible, although it will nowadays hardly occur, for a State to conquer and annex a part of enemy territory, whether the war ends by a Treaty of Peace in which the vanquished State, without

[1] Bonfils, No. 535; Fiore, II. No. 863 and III. No. 1693. See also Despagnet, Nos. 395-398.

ceding the conquered territory, submits silently[1] to the annexation, or by simple cessation of hostilities.[2]

It must, however, be emphasised that such a mode of acquiring a part of enemy territory is totally different from forcibly taking possession of a part thereof during the continuance of war. Such a conquest, although the conqueror may intend to keep the conquered territory and therefore annex it, is not a title as long as the war has not terminated either actually through simple cessation of hostilities or through a Treaty of Peace. Therefore, the practice, which sometimes prevails, of annexing a conquered part of enemy territory during war cannot be approved. Concerning subjugation either of the whole or of a part of enemy territory, it must be asserted that annexation gives a title only after a *firmly established* conquest. So long as war continues, conquest is not firmly established.[3]

Consequences of Subjugation.

§ 240. Although subjugation is an original mode of acquisition, since the sovereignty of the new acquirer is not derived from that of the former owner State, the new owner State is nevertheless the successor of the former owner State as regards many points which have been discussed above (§ 82). It must be specially mentioned that, as far as the Law of Nations is concerned, the subjugator does not acquire the private property of the inhabitants of the annexed territory. Being now their Sovereign, the subjugating State may indeed impose any burdens it pleases on its new subjects, it may even confiscate their private property, since a Sovereign State can do what it likes with its subjects, but subjugation itself does not touch or affect private property.

[1] See below, vol. II. § 273.

[2] See below, vol. II. § 263.

[3] See below, vol. II. § 60, concerning guerilla war after the termination of real war. Many writers, however, deny that a conquest is firmly established as long as guerilla war is going on.

As regards the national status of the subjects of the subjugated State, doctrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation become *ipso facto* by the subjugation[1] subjects of the subjugator. But the national status of such enemy subjects as are domiciled abroad and do not return, and further of such as leave the country before the annexation or immediately afterwards, is matter of dispute. Some writers maintain that these individuals do in spite of their absence become subjects of the subjugator, others emphatically deny it. Whereas the practice of the United States of America seems to be in conformity with the latter opinion,[2] the practice of Prussia in 1866 was in conformity with the former. Thus in the case of Count Platen-Hallermund, a Cabinet Minister of King George V. of Hanover, who left Hanover with his King before the annexation in 1866 and was in 1868 prosecuted for high treason before the Supreme Prussian Court at Berlin, this Court decided that the accused had become a Prussian subject through the annexation of Hanover.[3] I believe that a distinction must be made between those individuals who leave the country *before*, and those who leave it *after* annexation. The former are not under the sway of the subjugator at the time of annexation, and, since the personal supremacy of their home State terminates with the latter's extinction through annexation, they would seem to be outside the sovereignty of the subjugator. But those individuals who leave the country *after*

[1] The case is similar to that of cession; see above, § 219.

[2] See Halleck, II. p. 476.

[3] See Halleck, II. p. 476, on the one hand, and on the other Rivier, II. p. 436. Valuable opinions of Zachariae and Neumann, who deny that Count Platen was a Prussian subject, are printed in the Deutsche Strafrechts-Zeitung, 1868, pp. 304-320.

annexation leave it at a time when they have become subjects of the new Sovereign, and they therefore remain such subjects even after they have left the country, for there is no rule of the Law of Nations in existence which obliges a subjugator to grant the privilege of emigration [1] to the inhabitants of the conquered territory.

Different from the fact that enemy subjects become through annexation subjects of the subjugator is the question what position they acquire within the subjugating State. This question is one of Municipal, and not of International Law. The subjugator can, if he likes, allow them to emigrate and to renounce their newly acquired citizenship, and the Municipal Law of the subjugating State can put them in any position it likes, can in especial grant or refuse them the same rights as those which its citizens by birth enjoy.

Veto of third Powers.

§ 241. Although subjugation is an original mode of acquiring territory and no third Power has as a rule a right of intervention, the conqueror has not in fact an unlimited possibility of annexation of the territory of the vanquished State. When the balance of power is endangered or when other vital interests are at stake, third Powers can and will intervene, and history records many instances of such interventions. But it must be emphasised that the validity of the title of the subjugator does not depend upon recognition on the part of other Powers. And a mere protest of a third Power is of no legal weight either.

[1] Both Westlake and Halleck state that the inhabitants *must* have a free option to stay or leave the country; but there is no rule of International Law which imposes the duty upon a subjugator to grant this option.

XVI

PRESCRIPTION

Grotius, II. c. 4—Vattel, I. §§ 140-151—Hall, § 36—Westlake, I. pp. 92-94—Lawrence, § 99—Phillimore, I. §§ 251-261—Twiss, I. § 129—Taylor, §§ 218-219—Walker, § 13—Wheaton, § 164—Bluntschli, § 290—Hartmann, § 61—Heffter, § 12—Holtzendorff in Holtzendorff, II. p. 255—Ullmann, § 81—Bonfils, No. 534—Despagnet, No. 390—Pradier-Fodéré, II. Nos. 820-829—Rivier, I. pp. 182-184—Calvo, I. §§ 264-265—Fiore, II. Nos. 850-851—Martens, I. § 90—G. F. Martens, §§ 70-71—Bynkershoek, "Quaestiones juris publici," IV. c. 12—Helmburger, "Der Erwerb der Gebietshoheit" (1888) pp. 140-155.

Conception of Prescription.

§ 242. Since the existence of a science of the Law of Nations there has always been opposition to prescription as a mode of acquiring territory. Grotius rejected the usucaption of the Roman Law, yet adopted the same law's *immemorial* prescription [1] for the Law of Nations. But whereas a good many writers [2] still defend that standpoint, others [3] reject prescription altogether. Again, others [4] go beyond Grotius and his followers and do not require possession from time *immemorial*, but teach that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time.

This opinion would indeed seem to be correct, because it recognises theoretically what actually goes on in practice. There is no doubt that in the practice of the members of the Family of Nations a State is considered to be the lawful owner even of those parts of its territory of which originally it took

[1] See Grotius, II. c. 4, §§ 1, 7, 9.
[2] See, for instance, Heffter, § 12; Martens, § 90.
[3] G. F. Martens, § 71; Klüber, §§ 6 and 125; Holtzendorff, II. p. 255; Ullmann, § 81.
[4] Vattel, II. § 147; Wheaton, § 165; Phillimore, I. § 259; Hall, § 36; Bluntschli, § 290; Pradier-Fodéré, II. No. 825; Bonfils, No. 534, and many others.

possession wrongfully and unlawfully, provided only the possessor has been in undisturbed possession for such a length of time as is necessary to create the general conviction among the members of the Family of Nations that the present condition of things is in conformity with international order. Such prescription cannot be compared with the usucaption of Roman Law because the latter required *bona-fide* possession, whereas the Law of Nations recognises prescription both in cases where the State is in *bona-fide* possession and in cases where it is not. The basis of prescription in International Law is nothing else than general recognition [1] of a fact, however unlawful in its origin, on the part of the members of the Family of Nations. And prescription in International Law may therefore be defined as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.* Thus, prescription in International Law has the same rational basis as prescription in Municipal Law—namely, the creation of stability of order.

Prescription how effected.

§ 243. From the conception of prescription, as above defined, it becomes apparent that no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription. Everything depends upon the merits of the individual case. As long as

[1] This is pointed out with great lucidity by Heimburger, pp. 151–155; he rejects, however, prescription as a mode of acquiring territory, maintaining that there is a customary rule of International Law in existence according to which recognition can make good originally wrongful possession.

other Powers keep up protests and claims, neither is the actual exercise of sovereignty undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually ripen into that condition which is in conformity with international order. The question, at what time and under what circumstances such a condition of things arises, is not one of law but of fact. The question, for instance, whether Prussia, Austria, and Russia have now a good title by prescription to hold their respective formerly Polish territories, although the three partitions of Poland were wrongful and unlawful acts, must, I doubt not, be answered in the affirmative. For all the members of the Family of Nations have now silently acquiesced in the present condition of things, although as late as 1846 Great Britain and France protested against the annexation of the Republic of Cracow on the part of Austria. In spite of the fact that the Polish nation has not yet given up its hope of seeing a Polish State re-established on the former Polish territory, the general conviction among the members of the Family of Nations is that the present condition of things is in conformity with international order. When, to give another example, a State which originally held an island *mala fide* under the title by occupation, knowing well that this land had already been occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among the members of the Family of

Nations that the present condition of things is in conformity with international order. These examples show why a certain number of years[1] cannot be, once for all, fixed to create the title by prescription. There are indeed immeasurable and imponderable circumstances and influences besides the mere run of time[2] at work to create the conviction on the part of the members of the Family of Nations that in the interest of stability of order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ.

XVII

Loss of State Territory

Hall, § 34—Phillimore, I. §§ 284-295—Holtzendorff in Holtzendorff, II. pp. 274-279—Gareis, § 70—Liszt, § 10—Ullmann, § 89—Pradier-Fodéré, II. Nos. 850-852—Rivier, I. § 13—Fiore, II. No. 865—Martens, I. § 92.

Six modes of losing State Territory.

§ 244. To the five modes of acquiring sovereignty over territory correspond five modes of losing it—namely, cession, dereliction, operation of nature, subjugation, prescription. But there is a sixth mode of losing territory—namely, revolt. No special details are necessary with regard to loss of territory through

[1] Vattel (II. § 151) suggests that the members of the Family of Nations should enter into an agreement stipulating the number of years necessary for prescription, and David Dudley Field proposes the following rule (52) in his Outlines of an International Code: "The uninterrupted possession of territory or other property for fifty years by a nation excludes the claim of every other nation."

[2] Heffter's (§ 12) dictum, "Hundert Jahre Unrecht ist noch kein Tag Recht" is met by the fact that it is not the operation of time alone, but the co-operation of other circumstances and influences which creates the title by prescription.

subjugation, prescription, and cession, except that it is of some importance to repeat here that the historical cases of pledging, leasing, and giving territory to another State to administer are in fact, although not in theory, nothing else than cessions[1] of territory. But operation of nature, revolt, and dereliction must be specially discussed.

Operation of Nature.

§ 245. Operation of nature as a mode of losing corresponds to accretion as a mode of acquiring territory. Just as through accretion a State may become enlarged, so it may become diminished through the disappearance of land and other operations of nature. And the loss of territory through operation of nature takes place *ipso facto* by such operation. Thus, if an island near the shore disappears through volcanic action, the extent of the maritime territorial belt of the respective riparian State is hereafter to be measured from the low-water mark of the shore of the continent, instead of from the shore of the former island. Thus, further, if through a piece of land being detached by the current of a river from one bank and carried over to the other bank, the river alters its course and covers now part of the land on the bank from which such piece became detached, the territory of one of the riparian States may decrease through the boundary line being *ipso facto* transferred to the present middle or mid-channel of the river.

Revolt.

§ 246. Revolt followed by secession is a mode of losing territory to which no mode of acquisition corresponds.[2] Revolt followed by secession has,

[1] See above, §§ 171 and 216.

[2] The possible case where a province revolts, secedes from the mother country, and, after having successfully defended itself against the attempts of the latter to reconquer it, unites itself with the territory of another State, is a case of merger by cession of the whole territory.

as history teaches, frequently been a cause of loss of territory. Thus the Netherlands fell away from Spain in 1579, Belgium from the Netherlands in 1830, the United States of America from Great Britain in 1776, Brazil from Portugal in 1822, the former Spanish South American States from Spain in 1810, Greece from Turkey in 1830, Cuba from Spain in 1898, Panama from Colombia in 1903. The question at what time a loss of territory through revolt is consummated cannot be answered once for all, since no hard and fast rule can be laid down regarding the time when it can be said that a State broken off from another has established itself safely and permanently. The matter has, as will be remembered, been treated above (§ 74), in connection with recognition. It may well happen that, although such a seceded State is already recognised by a third Power, the mother country does not consider the territory to be lost and succeeds in reconquering it.

Derelliction.

§ 247. Dereliction as a mode of losing corresponds to occupation as a mode of acquiring territory. Dereliction frees a territory from the sovereignty of the present owner State. Dereliction is effected through the owner State's complete abandonment of the territory with the intention of withdrawing from it for ever, thus relinquishing sovereignty over it. Just as occupation[1] requires, first, the actual taking into possession (*corpus*) of territory and, secondly, the intention (*animus*) to acquire sovereignty over it, so dereliction requires, first, actual abandonment of a territory, and, secondly, the intention to give up sovereignty over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability

[1] See above, § 222.

to retake possession of the territory. Thus, for instance, if the rising of natives forces a State to withdraw from a territory, such territory is not derelict as long as the former possessor is able and makes efforts to retake possession. It is only when a territory is really derelict, that any State may acquire it through occupation.[1] History knows of several such cases. But very often, when such occupation of derelict territory occurs, the former owner protests and tries to prevent the new occupier from acquiring it.[2]

[1] See above, § 228.

[2] See Hall, § 34, where the case of Santa Lucia and that of Delagoa Bay are discussed.

CHAPTER II

THE OPEN SEA

I

Rise of the Freedom of the Open Sea

Grotius, II. c. 2, § 3—Pufendorf, IV. c. 5, § 5—Vattel, I. §§ 279-286—Hall, § 40—Westlake, I. pp. 161-162—Phillimore, I. §§ 172-179—Taylor, §§ 242-246—Walker, Science, pp. 163-171—Wheaton, §§ 186-187—Hartmann, § 64—Heffter, § 73—Stoerk in Holtzendorff, II. pp. 483-490—Bonfils, Nos. 573-576—Despagnet, No. 410—Pradier-Fodéré, II. Nos. 871-874—Calvo, I. §§ 347-352—Fiore, II. Nos. 718-726—Martens, I. § 97—Perels, § 4—Azuni, "Diritto maritimo" (1796), 1, c. I. Article III.—Cauchy, "Le droit maritime international considéré dans ses origines," 2 vols. (1862)—Nys, "Les origines du droit international" (1894), pp. 377-388—Castel, "Du principe de la liberté des mers" (1900), pp. 1-15.

Former Claims to Control over the Sea.

§ 248. In antiquity and the first half of the Middle Ages navigation on the Open Sea was free to everybody. According to Ulpianus,[1] the sea is open to everybody by nature, and, according to Celsus,[2] the sea, like the air, is common to all mankind. Since no Law of Nations in the modern sense of the term existed during antiquity and the greater part of the Middle Ages, no importance is to be attached to the pronouncement of Antoninus Pius, Roman Emperor from 138 to 161:—"Being[3] the Emperor of the world, I am consequently the law of the sea." Nor

[1] L. 13, pr. D. VIII. 4: mari nibus ut aeris.
quod natura omnibus patet.
[2] L. 3 D. XLIII. 8: Maris communem usum omnibus homi-
[3] L. 9 D. XIV. 2: ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης.

is it of importance that the Emperors of the old German Empire, who were considered to be the successors of the Roman Emperors, styled themselves among other titles "King of the Ocean." Real claims to sovereignty over parts of the Open Sea begin, however, to be made in the second half of the Middle Ages. And there is no doubt whatever that at the time when the modern Law of Nations gradually rose it was the conviction of the States that they could extend their sovereignty over certain parts of the Open Sea. Thus, the Republic of Venice was recognised as the Sovereign over the Adriatic Sea, and the Republic of Genoa as the Sovereign of the Ligurian Sea. Portugal claimed sovereignty over the whole of the Indian Ocean and of the Atlantic south of Morocco, Spain over the Pacific and the Gulf of Mexico, both Portugal and Spain basing their claims on two Papal Bulls promulgated by Alexander VI. in 1493, which divided the new world between these Powers. Sweden and Denmark claimed sovereignty over the Baltic, Great Britain over the Narrow Seas, the North Sea, and the Atlantic from the North Cape to Cape Finisterre.

These claims have been more or less successfully asserted for several hundreds of years. They were favoured by a number of different circumstances, such as the maintenance of an effective protection against piracy for instance. And numerous examples can be adduced which show that such claims have more or less been recognised. Thus, Frederick III., Emperor of Germany, had in 1478 to ask the permission of Venice for a transportation of corn from Apulia through the Adriatic Sea.[1] Thus, Great Britain in the seventeenth century compelled

[1] See Walker, History, I. p. 163.

foreigners to take out an English licence for fishing in the North Sea; and when in 1636 the Dutch attempted to fish without such licence, they were attacked and compelled to pay £30,000 as the price for the indulgence.[1] Again, when Philip II. of Spain was in 1554 on his way to England to marry Queen Mary, the British Admiral, who met him in the "British Seas," fired on his ship for flying the Spanish flag. And the King of Denmark, when returning from a visit to James I. in 1606, was forced by a British captain, who met him off the mouth of the Thames, to strike the Danish flag.

Practical Expression of claims to Maritime Sovereignty.

§ 249. Maritime sovereignty found expression in maritime ceremonials at least. Such State as claimed sovereignty over a part of the Open Sea required foreign vessels navigating on that part to honour its flag as a symbol of recognition of its sovereignty. So late as 1805 the British Admiralty Regulations contained an order[2] to the effect that "when any of His Majesty's ships shall meet with the ships of any foreign Power within His Majesty's Seas (which extend to Cape Finisterre), it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonour to be done to His Majesty."

But apart from maritime ceremonials maritime sovereignty found expression in the levying of tolls from foreign ships, in the interdiction of fisheries to foreigners, and in the control or even the prohibition of foreign navigation. Thus, Portugal and Spain

[1] This and the two following examples are quoted by Hall, § 40.
[2] Quoted by Hall, § 40.

attempted, after the discovery of America, to keep foreign vessels altogether out of the seas over which they claimed sovereignty. The magnitude of this claim created an opposition to the very existence of such rights. English, French, and Dutch explorers and traders navigated on the Indian Ocean and the Pacific in spite of the Spanish and Portuguese interdictions. And when, in 1680, the Spanish ambassador Mendoza lodged a complaint with Queen Elizabeth against Drake for having made his famous voyage to the Pacific, Elizabeth answered that vessels of all nations could navigate on the Pacific, since the use of the sea and the air is common to all, and that no title to the ocean can belong to any nation, since neither nature nor regard for the public use permits any possession of the ocean.[1]

Grotius's Attack on Maritime Sovereignty.

§ 250. Queen Elizabeth's attitude was the germ out of which grew gradually the present freedom of the Open Sea. Twenty-nine years after her answer to Mendoza, in 1609, appeared Grotius's book[2] "Mare liberum." The intention of Grotius was to show that the Dutch had a right of navigation and commerce with the Indies in spite of the Portuguese interdictions. He contends that the sea cannot be State property, because it cannot really be taken into possession through occupation,[3] and that

[1] See Walker, History, I. p. 161. It is obvious that this attitude of Queen Elizabeth was in no way the outcome of the conviction that really no State could claim sovereignty over a part of the Open Sea. For she herself did not think of dropping the British claims to sovereignty over the "British Seas." Her arguments against the Spanish claims were made in the interest of the growing commerce and navigation of England, and any one daring to apply the same arguments against England's claims would have incurred her royal displeasure.

[2] Its full title is: Mare liberum, seu de jure quod Batavis competit ad Indicana commercia Dissertatio.

[3] See below, § 259.

consequently the sea is by nature free from the sovereignty of any State.[1] The attack of Grotius was met by several authors of different nations. Gentilis defends Spanish and English claims in his "Advocatio Hispanica," which appeared in 1613. Likewise, in 1613 William Welwod defends the English claims in his book, "De dominio maris." John Selden wrote his "Mare Clausum sive de dominio maris" in 1618, but it was not printed until 1635. Sir John Burroughs published in 1653 his book, "The Sovereignty of the British Seas proved by Records, History, and the Municipal Laws of this Kingdom." And in defence of the claims of the Republic of Venice Paolo Sarpi published in 1676 his book "Del dominio del mare Adriatico." The most important of these books defending maritime sovereignty is that of Selden. King Charles I., by whose command Selden's "Mare Clausum" was printed in 1635, was so much impressed by it that he instructed in 1619 his ambassador in the Netherlands to complain of the audacity of Grotius and to request that the author of the "Mare liberum" should be punished.[2]

The general opposition to Grotius's bold attack on maritime sovereignty prevented his immediate victory. Too firmly established were the then recognised claims to sovereignty over certain parts of the Open Sea for the novel principle of the freedom of the sea to supplant them. Progress was made regarding one point only—namely, freedom of navigation of the sea. England had never pushed her claims so far as to attempt the prohibition of free navigation on the

[1] Grotius was by no means the first author who defended the freedom of the sea. See Nys, Les Origines du Droit International, pp. 381 and 382.

[2] See Phillimore, I. § 182.

so-called British Seas. And although Venice succeeded in keeping up her control of navigation on the Adriatic till the middle of the seventeenth century, it may be said that in the second half of that century navigation on all parts of the Open Sea was practically free for vessels of all nations. But with regard to other points claims to maritime sovereignty continued to be kept up. Thus the Netherlands had by article 4 of the Treaty of Westminster, 1674, to acknowledge that their vessels had to salute the British flag within the "British Seas" as a recognition of British maritime sovereignty.[1]

Gradual Recognition of the Freedom of the Open Sea.

§ 251. In spite of opposition, the work of Grotius was not to be undone. All prominent writers of the eighteenth century take up again the case of the freedom of the Open Sea, making a distinction between the maritime belt which is to be considered under the sway of the riparian States, and, on the other hand, the High Seas, which are under no State's sovereignty. The leading author is Bynkershoek, whose standard work, "De dominio maris," appeared in 1702. Vattel, G. F. de Martens, Azuni, and others follow the lead. And although Great Britain upheld her claim to the salute due to her flag within the "British Seas" throughout the eighteenth and at the beginning of the nineteenth century, the principle of the freedom of the Open Sea became more and more vigorous with the growth of the navies of other States; and at the end of the first quarter of the nineteenth century this principle became universally recognised in theory and practice. Great Britain silently dropped her claim to the salute due to her flag, and with it her claim to maritime

[1] See Hall, § 40, p. 152, note 1.

sovereignty, and became now a champion of the freedom of the Open Sea. When, in 1821, Russia, who was then still the owner of Alaska in North America, attempted to prohibit all foreign ships from approaching the shore of Alaska within one hundred Italian miles, Great Britain and the United States protested in the interest of the freedom of the Open Sea, and Russia dropped her claims in conventions concluded with the protesting Powers in 1824 and 1825. And when, after Russia had sold Alaska in 1867 to the United States, the latter made regulations regarding the killing of seals within Behring Sea, claiming thereby jurisdiction and control over a part of the Open Sea, a conflict arose in 1886 with Great Britain, which was settled by arbitration[1] in 1893 in favour of the freedom of the Open Sea.

II

Conception of the Open Sea

Field, article 53—Westlake, I. p. 160—Rivier, I. pp. 234-235—Pradier-Fodéré, II. No. 868—Ullmann, § 90—Stoerk in Holtzendorff, II. p. 483.

Discrimination between Open Sea and Territorial Waters.

§ 252. Open Sea or High Seas[2] is the coherent body of salt water all over the greater part of the globe, with the exception of the maritime belt and the territorial straits, gulfs, and bays, which are parts of the sea, but not parts of the Open Sea. Wherever there is a salt-water sea on the globe, it is part of the Open Sea, provided it is not isolated

[1] See below, § 284.

[2] Field defines in article 53: "The High Seas are the ocean, and all connecting arms and bays or other extensions thereof not within the territorial limits of any nation whatever."

from, but coherent with, the general body of salt water extending over the globe, and provided that the salt water approach to it is navigable and open to vessels of all nations. The enclosure of a sea by the land of one and the same State does not matter, provided such a navigable connection of salt water as is open to vessels of all nations exists between such sea and the general body of salt water, even if that navigable connection itself be part of the territory of one or more riparian States. Whereas, therefore, the Dead Sea is Turkish and the Aral Sea is Russian territory, the Sea of Marmora belongs to the Open Sea, although it is surrounded by Turkish land and although the Bosphorus and the Dardanelles are Turkish territorial straits, because these are now open to merchantmen of all nations. For the same reason the Black Sea[1] is now part of the Open Sea. On the other hand, the Sea of Azoff is not part of the Open Sea, but Russian territory, although there exists a navigable connection between it and the Black Sea. The reason is that this connection, the Strait of Kertch, is not according to the Law of Nations open to vessels of all nations, since the Sea of Azoff is less a sea than a mere gulf of the Black Sea.[2]

Clear Instances of Parts of the Open Sea.

§ 253. It is not necessary and not possible to particularise every portion of the Open Sea. It is sufficient to state instances which clearly indicate the extent of the Open Sea. To the Open Sea belong, of course, all the so-called oceans—namely, the Atlantic, Pacific, Indian, Arctic, and Antarctic. But the branches of the oceans, which go under special names, and, further, the branches of these branches,

[1] See above, § 181.

[2] So say Rivier, I. p. 237, and Martens, I. § 97; but Stoerk in Holtzendorff, II. p. 513, declares that the Sea of Azoff is part of the Open Sea.

which again go under special names, belong likewise to the Open Sea. Examples of these branches are: the North Sea, the English Channel, and the Irish Sea; the Baltic Sea, the Gulf of Bothnia, the Gulf of Finland, the Kara Sea,[1] and the White Sea; the Mediterranean and the Ligurian, Tyrrhenian, Adriatic, Ionian, Marmora, and Black Seas; the Gulf of Guinea; the Mozambique Channel; the Arabian Sea and the Red Sea; the Bay of Bengal, the China Sea, the Gulf of Siam, and the Gulf of Tonking; the Eastern Sea, the Yellow Sea, the Sea of Japan, and the Sea of Okhotsk; Behring Sea; the Gulf of Mexico and the Caribbean Sea; Baffin's Bay.

It will be remembered that it is doubtful as regards many gulfs and bays whether they belong to the Open Sea or are territorial.[2]

III

The Freedom of the Open Sea

Hall, § 75—Westlake, I. pp. 160-166—Lawrence, § 120—Twiss, I. §§ 172-173—Taylor, § 242—Wheaton, § 187—Bluntschli, §§ 304-308—Heffter, § 94—Stoerk in Holtzendorff, II. pp. 483-498—Ullmann, § 90—Bonfils, Nos. 572-577—Pradier-Fodéré, II. Nos. 874-881—Rivier, I. § 17—Calvo, I. § 346—Fiore, II. Nos. 724, 727—Martens, I. § 97—Perels, § 4—Testa, pp. 63-66—Ortolan, "Diplomatie de la mer" (1856), I. pp. 119-149—De Burgh, "Elements of Maritime International Law" (1868), pp. 1-24—Castel, "Du principe de la liberté des mers" (1900) pp. 37-80.

Meaning of the Term "Freedom of the Open Sea."

§ 254. The term "Freedom of the Open Sea" indicates the rule of the Law of Nations that the Open Sea is not and never can be under the

[1] The assertion of some Russian publicists that the Kara Sea is Russian territory is refuted by Martens, I. § 97.

[2] See above, § 191.

sovereignty of any State whatever. Since, therefore, the Open Sea is not the territory of any State, no State has regularly a right to exercise its legislation, administration, jurisdiction, or police[1] over parts of the Open Sea. Since, further, the Open Sea can never be under the sovereignty of any State, no State has a right to acquire parts of the Open Sea through occupation,[2] for, as far as the acquisition of territory is concerned, the Open Sea is what Roman Law calls *res extra commercium*. But although the Open Sea is not the territory of any State, it is nevertheless an object of the Law of Nations. The very fact alone of such a rule exempting the Open Sea from the sovereignty of any State whatever shows this. But there are other reasons. For if the Law of Nations were to content itself with the rule which excludes the Open Sea from possible State property, the consequence would be a condition of lawlessness and anarchy on the Open Sea. To obviate such lawlessness, customary International Law contains some rules which guarantee a certain legal order on the Open Sea in spite of the fact that it is not the territory of any State.

Legal Provisions for the Open Sea.

§ 255. This legal order is created through the co-operation of the Law of Nations and the Municipal Laws of such States as possess a maritime flag. The following rules of the Law of Nations are universally recognised, namely:—First, that every State which has a maritime flag must lay down rules according to

[1] See, however, above, § 190, concerning the zone for Revenue and Sanitary Laws.

[2] Following Grotius (II. c. 3, § 13) and Bynkershoek (De dominio maris, c. 8), some writers (for instance, Phillimore, I. § 203) maintain that any part of the Open Sea covered for the time by a vessel is by occupation to be considered as the temporary territory of the vessel's flag State. And some French writers go even beyond that and claim a certain zone round the respective vessel as temporary territory of the flag State. But this is an absolutely superfluous fiction. (See Stoerk in Holtzendorff, II. p. 494; Rivier, I. p. 238; Perels, pp. 37–39.)

which vessels can claim to sail under its flag, and must furnish such vessels with some official voucher authorising them to make use of its flag; secondly, that every State has a right to punish all such foreign vessels as sail under its flag without being authorised to do so; thirdly, that all vessels with their persons and goods are, whilst on the Open Sea, considered under the sway of the flag State; fourthly, that every State has a right to punish piracy on the Open Seas even if committed by foreigners, and that, with a view to the extinction of piracy, men-of-war of all nations can require all suspect vessels to show their flag.

These customary rules of International Law are, so to say, supplemented by Municipal Laws of the maritime States comprising provisions, first, regarding the conditions to be fulfilled by vessels for the purpose of being authorised to sail under their flags; secondly, regarding the details of jurisdiction over persons and goods on board vessels sailing under their flags; thirdly, concerning the order on board ship and the relations between the master, the crew, and the passengers; fourthly, concerning punishment of ships sailing without authorisation under their flags.

The fact that each maritime State has a right to legislate for its own vessels gives it a share in keeping up a certain order on the Open Sea. And such order has been turned into a more or less general order since the large maritime States have concurrently made more or less concordant laws for the conduct of their vessels on the Open Sea.

Freedom of the Open Sea and war.

§ 256. Although the Open Sea is free and not the territory of any State, it may nevertheless in its whole extent become the theatre of war, since the region of

war is not only the territories of the belligerents, but likewise the Open Sea, provided that one of the belligerents at least is a Power with a maritime flag.[1] Men-of-war of the belligerents may fight a battle in any part of the Open Sea where they meet, and they may capture all enemy merchantmen they meet on the Open Sea. And, further, the jurisdiction and police of the belligerents become through the outbreak of war in so far extended over vessels of other States, that belligerent men-of-war may now visit, search, and capture neutral merchantmen for breach of blockade, contraband, and the like.

However, certain parts of the Open Sea can become neutralised and thereby be excluded from the region of war. Thus, the Black Sea became neutralised in 1856 through article 11 of the Peace Treaty of Paris stipulating:—"La Mer Noire est neutralisée: ouverte à la marine marchande de toutes les nations, ses eaux et ses ports sont formellement et à perpétuité interdites au pavillon de guerre, soit des puissances riveraines, soit de tout autre puissance." Yet this neutralisation of the Black Sea was abolished[2] in 1871 by article 1 of the Treaty of London, and no other part of the Open Sea is at present neutralised.

Navigation and ceremonials on the Open Sea.

§ 257. The freedom of the Open Sea involves perfect freedom of navigation for vessels of all nations, whether men-of-war, other public vessels, or merchantmen. It involves, further, absence of compulsory maritime ceremonials on the Open Sea. According to the Law of Nations, no rights whatever of salute exist between vessels meeting on the Open Sea. All so-called maritime ceremonials on the Open Sea[3] are

[1] Concerning the distinction between theatre and region of war, see below, vol. II. § 70.

[2] See above, § 181.

[3] But not within the maritime belt or other territorial waters. (See above, §§ 122 and 187.)

a matter either of courtesy and usage or of special conventions and Municipal Laws of those States under whose flags vessels sail. There is in especial no right of any State to require a salute from foreign merchantmen for its men-of-war.[1]

The freedom of the Open Sea involves likewise freedom of inoffensive passage[2] through the maritime belt for merchantmen of all nations, and also for men-of-war of all nations in so far as the part concerned of the maritime belt forms a part of the highways for international traffic. Without such freedom of passage, navigation on the Open Sea by vessels of all nations would be a physical impossibility.

Claim of States to Maritime Flag.

§ 258. Since no State can exercise protection over vessels that do not sail under its flag, and since every vessel must, in the interest of the order and safety of the Open Sea, sail under the flag of a State, the question has been raised whether not only maritime States but also such States as are not riparian States of the Sea have a claim to a maritime flag. There ought to be no doubt that the freedom of the Open Sea involves a claim of every State, whether or not riparian of the Sea, to a maritime flag. At present no such non-riparian State actually has a maritime flag, and all vessels belonging to subjects of such non-riparian States sail under the flag of a maritime State. But any day might bring a change. The question as to the claim to a maritime flag on the part of a non-maritime State was discussed in Switzerland. When, in 1864, Swiss merchants in Trieste, Smyrna, Hamburg, and St. Petersburg applied to the

[1] That men-of-war can on the Open Sea ask suspicious foreign merchantmen to show their flags has nothing to do with ceremonials, but with the supervision of the Open Sea in the interest of its safety. (See below, § 266.)

[2] See above, § 188.

Swiss Bundesrath for permission to have their vessels sailing under the Swiss flag, the Bundesrath was ready to comply with the request, but the Swiss Parliament, the Bundesversammlung, refused the necessary consent. In 1889 and 1891 new applications of the same kind were made, but Switzerland again refused to have a maritime flag.[1] She had no doubt that she had a claim to such flag, but was aware of the difficulties arising from the fact that, having no seaports of her own, vessels sailing under her flag would in many points have to depend upon the goodwill of the maritime Powers.[2]

Such States as have a maritime flag as a rule have a war flag different from their commercial flag; some States, however, have one and the same flag for both their navy and their mercantile marine. But it must be mentioned that a State can by an international convention be restricted to a mercantile flag only, such State being prevented from having a navy. This is the position of Montenegro[3] according to article 30 of the Treaty of Berlin of 1878.

Rationale for the Freedom of the Open Sea.

§ 259. Grotius and many writers who follow[4] him establish two facts as the reason for the freedom of the Open Sea. They maintain, first, that a part of the Open Sea could not effectively be occupied by a Navy and could therefore not be brought under the actual sway of any State. And they assert, secondly, that Nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible, and, therefore, sufficient for all.[5] The last argument has nowadays

[1] See Salis, Schweizerisches Bundesrecht (1891), vol. I. p. 234.

[2] The question is discussed by Calvo, I. § 427, and Twiss, I. §§ 197 and 198.

[3] See above, § 127.

[4] See, for instance, Twiss, I. § 172, and Westlake, I. p. 160.

[5] See Grotius, II. c. 2, § 3.

hardly any value, especially for those who have freed themselves from the fanciful rules of the so-called Law of Nature. And the first argument is now without basis in face of the development of the modern navies, since the number of public vessels which the different States possess at present would enable many a State to occupy effectively one part or another of the Open Sea. The real reason for the freedom of the Open Sea is represented in the motive which led to the attack against maritime sovereignty, and in the purpose for which such attack was made—namely, the freedom of intercourse, and especially commerce, between the States which are severed by the Sea. The Sea being an international highway which connects distant lands, it is the common conviction that it should not be under the sway of any State whatever. It is in the interest of free intercourse [1] between the States that the principle of the freedom of the Open Sea has become universally recognised and will always be upheld.[2]

[1] See above, § 142.

[2] Connected with the reason for the freedom of the Open Sea is the merely theoretical question whether the vessels of a State could through an international treaty be prevented from navigating on the whole or on certain parts of the Open Sea. See Pradier-Fodéré, II. Nos. 881-885, where this point is exhaustively discussed.

IV

Jurisdiction on the Open Sea

Vattel, II. § 80—Hall, § 45—Westlake, I. pp. 166-176—Lawrence, § 120—Halleck, p. 438—Taylor, §§ 262-267—Walker, § 20—Wheaton, § 106—Bluntschli, §§ 317-352—Heffter, §§ 78-80—Stoerk in Holtzendorff, II. pp. 518-550—Liszt, § 26—Bonfils, Nos. 578-580, 597-613—Despagnet, Nos. 431-439—Pradier-Fodéré, V. Nos. 2376-2470—Rivier, I. § 18—Calvo, I. §§ 385-473—Fiore, II. Nos. 730-742—Martens, II. §§ 55-56—Perels, § 12—Testa, pp. 98-112—Ortolan, "Diplomatie de la mer" (1856), II. 254-326—Hall, "Foreign Powers and Jurisdiction of the British Crown" (1894), §§ 106-109.

Jurisdiction on the Open Sea mainly connected with Flag.

§ 260. Jurisdiction on the Open Sea is in the main connected with the maritime flag under which vessels sail. This is the consequence of the fact stated above [1] that a certain legal order is created on the Open Sea through the co-operation of rules of the Law of Nations with rules of the Municipal Laws of such States as possess a maritime flag. But two points must be emphasised. The one is that this jurisdiction is not jurisdiction over the Open Sea as such, but only over vessels, persons, and goods on the Open Sea. And the other is that jurisdiction on the Open Sea is, although mainly, not exclusively connected with the flag under which vessels sail, because men-of-war of all nations have, as will be seen,[2] certain powers over merchantmen of all nations. The points which must therefore be here discussed singly are—the claim of vessels to sail under a certain flag, ship-papers, the name of vessels, the connection of vessels with the territory of the flag State, the safety of traffic on the Open Sea, the powers of men-of-war over merchantmen of all nations, and, lastly, shipwreck.

[1] See above, § 255. [2] See below, § 266.

Claim of Vessels to sail under a certain Flag.

§ 261. The Law of Nations does not include any rules regarding the claim of vessels to sail under a certain maritime flag, but imposes the duty upon every State having a maritime flag to stipulate by its own Municipal Laws the conditions to be fulfilled by those vessels which wish to sail under its flag. In the interest of order on the Open Sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the Open Sea is freedom for such vessels only as sail under the flag of a State. But a State is absolutely independent in framing the rules concerning the claim of vessels to its flag. It can in especial authorise such vessels to sail under its flag as are the property of foreign subjects; but such foreign vessels sailing under its flag fall thereby under its jurisdiction. The different States have made different rules concerning the sailing of vessels under their flags.[1] Some, as Great Britain [2] and Germany, allow only such vessels to sail under their flags as are the exclusive property of their citizens or of corporations established on their territory. Others, as Argentina, admit vessels which are the property of foreigners. Others again, as France, admit vessels which are in part the property of French citizens.

But no State can allow such vessel to sail under its flag as already sails under the flag of another State. Just as a vessel not sailing under the flag of a State, so a vessel sailing under the flags of two different States does not enjoy any protection whatever. Nor is protection enjoyed by such vessel as sails under the flag of a State which, like Switzerland, has no

[1] See Calvo, I. §§ 393-423, where the respective Municipal Laws of most countries are quoted.

[2] See section 1 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

maritime flag. Vessels belonging to persons who are subjects of States without a maritime flag must obtain authority to sail under some other State's flag, if they wish to enjoy protection on the Open Sea. And any vessel, although the property of foreigners, which sails without authority under the flag of a State, may be captured by the men-of-war of such State, prosecuted, punished, and confiscated.

Ship Papers.

§ 262. All States with a maritime flag are by the Law of Nations obliged to make private vessels sailing under their flags carry on board so-called ship papers, which serve the purpose of identification on the Open Sea. But neither the number nor the kind of such papers is prescribed by International Law, and the Municipal Laws of the different States differ much on this subject.[1] But, on the other hand, they agree as to the following papers:—

(1) An official voucher authorising the vessel to sail under its flag. This voucher consists of a Certificate of Registry, in case the flag State possesses, like Great Britain and Germany for instance, a register of its mercantile marine; in other cases the voucher consists of a "Passport," "Sea-letter," "Sea-brief," or of some other document serving the purpose of showing the vessel's nationality.

(2) The Muster Roll. This is a list of all the members of the crew, their nationality, and the like.

(3) The Log Book. This is a full record of the voyage, with all nautical details.

(4) The Manifest of Cargo. This is a list of the cargo of a vessel, with details concerning the number and the mark of each package, the names of the shippers and the consignees, and the like.

[1] See Holland, Manual of Naval Prize Law, §§ 178–194, where the papers required by the different maritime States are enumerated.

(5) The Bills of Lading. These are duplicates of the documents which the master of the vessel hands over to the shipper of the goods at shipment.

(6) The Charter Party, if the vessel is chartered. This is the contract between the owner of the ship, who lets it wholly or in part, and the charterer, the person who hires it.

Names of Vessels.

§ 263. Every State must register the names of all private vessels sailing under its flag, and it must make them bear their names visibly, so that every vessel may be identified from a distance. No vessel must be allowed to change her name without permission and fresh registration.[1]

Territorial Quality of Vessels on the Open Sea.

§ 264. It is a customary rule of the Law of Nations that men-of-war and other public vessels of any State are, whilst on the Open Sea as well as in foreign territorial waters, in every point considered as though they were floating parts of their home States.[2] Private vessels are only considered as though they were floating portions of the flag State in so far as they remain whilst on the Open Sea in principle under the exclusive jurisdiction of the flag State. Thus the birth of a child, a will or business contract made, a crime committed on board ship, and the like, are considered as happening on the territory and therefore under the territorial supremacy of the flag[3] State. But although they appear in this respect as though they were, private vessels are in fact not floating portions of the flag State. For in time of war belligerent men-of-war can visit, search, and capture neutral private vessels on

[1] As regards Great Britain, see sect. 47 of the Merchant Shipping Act, 1894.

[2] See above, § 172, and below, §§ 447-451.

[3] Since, however, individuals abroad remain under the personal supremacy of their home State, nothing can prevent a State from legislating as regards such of its citizens as sail on the Open Sea on board a foreign vessel.

the Open Sea for breach of blockade, contraband, and the like, and in time of peace men-of-war of all nations have certain powers[1] over merchantmen of all nations.

Safety of Traffic on the Open Sea.

§ 265. No rules of the Law of Nations exist for the purpose of preventing collisions, saving lives after collisions, and the like, but every State possessing a maritime flag has legislated for the conduct on the Open Sea of vessels sailing under its flag concerning signalling, piloting, courses, collisions, and the like. Although every State can legislate on these matters independently of other States, more and more corresponding rules have been put into force by all the States during the second half of the nineteenth century, following the lead given by Great Britain through section 25 of the Merchant Shipping Act Amendment Act of 1862, the "Regulations for preventing Collisions at Sea" which accompany this Act, and, further, Sections 16 to 20 of the Merchant Shipping Act, 1873.[2] And the "Commercial Code of Signals for the Use of all Nations," published by Great Britain in 1857, has been adopted by all maritime States. In 1889 the so-called Maritime Conference took place at Washington, at which eighteen maritime States were represented and which recommended a body of rules for preventing collisions at sea to be adopted by the single States,[3] and a revision of the Code of Signals. These regulations were revised in 1890 by a British Committee appointed by the Board of Trade,[4] and,

[1] See below, § 266. The question of the territoriality of vessels is ably discussed by Hall, §§ 76–79.

[2] See 25 & 26 Vict. c. 63; 36 & 37 Vict. c. 83. The matter is now dealt with by Sections 418–421 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

[3] See Martens, N.R.G., 2nd ser. XII. p. 416.

[4] See Martens, N.R.G., 2nd ser. XXII. p. 113.

after some direct negotiations between the Governments, most maritime States have made corresponding regulations by their Municipal Laws.[1] And a new and revised edition of "The International Code of Signals" was published by the British Board of Trade, in conformity with arrangements with other maritime Powers, in 1900, and is now in general use.[2]

Powers of Men-of-war over Merchantmen of all Nations.

§ 266. Although the freedom of the Open Sea and the fact that vessels on the Open Sea remain under the jurisdiction of the flag State exclude as a rule the exercise of any State's authority over foreign vessels, there are certain exceptions in the interest of all maritime nations. These exceptions are the following:

(1) Blockade and Contraband. In time of war belligerents can blockade not only enemy ports and territorial coast waters, but also parts of the Open Sea adjoining those ports and waters, and neutral merchantmen attempting to break such a blockade can be confiscated. And, further, in time of war belligerent men-of-war can visit, search, and eventually seize neutral merchantmen for contraband, and the like.

(2) Verification of Flag. It is a universally recognised customary rule of International Law that men-of-war of all nations have, to maintain the safety of the Open Sea against piracy, the power to require suspicious private vessels on the Open Sea to show their flag.[3] But such vessels must be

[1] Latest British Regulations, 1896.

[2] The matter of collision at sea is exhaustively treated by Prien, Der Zusammenstoss von Schiffen nach den Gesetzen des Erdballs (2nd ed. 1899).

[3] So-called "Droit d'enquête" or "Vérification du pavillon." This power of men-of-war has given occasion to much dispute and discussion, but in fact nobody denies that in case of grave suspicion this power does exist. (See Twiss, I. § 193; Hall, § 81, p. 276; Fiore, II. Nos. 732-736; Perels, § 17; Taylor, § 266; Bonfils, No. 519.)

suspicious, and, since a vessel may be a pirate although she shows a flag, she may eventually be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag. It is, however, quite obvious that this power of men-of-war must not be abused, and that the home State is responsible for damages in case a man-of-war stops and visits a foreign merchantman without sufficient ground of suspicion. The right of every State to punish piracy on the Open Sea will be treated below, §§ 272–280.

(3) So-called Right of Pursuit. It is a universally recognised customary rule that men-of-war of a riparian State can pursue into the Open Sea, seize, and bring back into a port for trial any foreign merchantman that has violated the law whilst in the territorial waters of the State in question. But such pursuit into the Open Sea is permissible only if commenced while the merchantman is still in the said territorial waters or has only just escaped thence, and the pursuit must stop as soon as the merchantman passes into the maritime belt of a foreign State.[1]

(4) Abuse of Flag. It is another universally recognised rule that men-of-war of every State may seize and bring to a port of their own for punishment any foreign vessel sailing under the flag of such State without authority.[2] Accordingly, Great Britain has,

[1] See Hall, § 80.

[2] The four exceptions mentioned in the text above are based on universally recognised customary rules of the Law of Nations. It is, of course, possible for several States to enter into treaty agreements according to which their men-of-war acquire certain powers over each other's merchantmen on the Open Sea. According to such agreements, which are, however, not universal, the following additional exceptions may be enumerated:

(1) In the interest of the suppression of the slave trade, the signatory Powers of the General Act of the Brussels Conference of 1890, to which all the larger

by section 69 of the Merchant Shipping Act, 1894, enacted:—"If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right."

How Verification of Flag is effected.

§ 267. A man-of-war which meets a suspicious merchantman not showing her colours and wishes to verify the same, hoists her own flag and fires a blank cartridge. This is a signal for the other vessel to hoist her flag in reply. If she takes no notice of the signal, the man-of-war fires a shot across her bows. If the suspicious vessel, in spite of this warning, still declines to hoist her flag, the suspicion becomes so grave that the man-of-war may compel her to bring to for the purpose of visiting her and thereby verifying her nationality.

How Visit is effected.

§ 268. The intention to visit may be communicated to a merchantman either by hailing or by the "informing gun"—that is, by firing either one or two blank cartridges. If the vessel takes no notice of this communication, a shot may be fired across her bows as a signal to bring to, and, if this also has no effect, force may be resorted to. After the vessel has been brought to, either an officer is sent on board for

maritime Powers belong, have, by articles 20–65, stipulated that their men-of-war shall have the power, in certain parts of the Open Sea where slave traffic still continues, to stop every suspect vessel under 500 tons.

(2) In the interest of the Fisheries in the North Sea, special cruisers of the riparian Powers control all fishing vessels and bumboats. (See below, §§ 282 and 283.)

(3) In the interest of Transatlantic telegraph cables, men-of-war of the signatory Powers of the treaty for the protection of such cables have certain powers over merchantmen. (See below, § 287.)

the purpose of inspecting her papers, or her master is ordered to bring his ship papers for inspection on board the man-of-war. If the inspection proves the papers to be in order, a memorandum of the visit is made in the log-book, and the vessel is allowed to proceed on her course.

How Search is effected.

§ 269. Search is naturally a measure which visit must always precede. It is because the visit has given no satisfaction that search is instituted. Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being compelled to render any assistance whatever except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to the cargo. If the search proves everything to be in order, the searchers have carefully to replace everything removed, a memorandum of the search is to be made in the log-book, and the searched vessel is to be allowed to proceed on her course.

How Arrest is effected.

§ 270. Arrest of a vessel takes place either after visit and search have shown her liable thereto, or after she has committed some act which alone already justifies her seizure. Arrest is effected through the commander of the arresting man-of-war appointing one of her officers and a part of her crew to take charge of the arrested vessel. Such officer is responsible for the vessel and her cargo, which latter must be kept safe and intact. The arrested vessel, either accompanied by the arresting vessel or not, must be brought to such harbour as is determined by the cause of the arrest. Thus, neutral or enemy ships seized in time of war are always to be brought into a harbour of the flag State of the captor. And the same is the case in

time of peace, when a vessel is seized because her flag cannot be verified or because she was sailing under no flag at all. On the other hand, when a fishing vessel or a bumboat is arrested in the North Sea, she is always to be brought into a harbour of her flag State and handed over to the authorities there.[1]

Shipwreck and Distress on the Open Sea.

§ 271. It is at present the general conviction on the part of the States that goods and persons shipwrecked on the Open Sea do not thereby lose the protection of the flag State of the shipwrecked vessel. No State is allowed to recognise appropriation of abandoned vessels and other derelicts on the Open Sea by those of its subjects who take possession thereof. But every State can by its Municipal Laws enact that those of its subjects who take possession of abandoned vessels and of shipwrecked goods need not restore them to their owners without salvage, whether the act of taking possession took place on the actual Open Sea or within territorial waters and on shore of the respective State.

As regards vessels in distress on the Open Sea, some writers[2] maintain that men-of-war must render assistance even to foreign vessels in distress. But it is impossible to say that there is a customary or conventional rule of the Law of Nations in existence which imposes upon all States the duty of instructing their men-of-war to render assistance to foreign vessels in distress, although many States order by Municipal Regulations their men-of-war to render such assistance, and although morally every vessel is bound to render assistance to another vessel in distress.

[1] See below, §§ 282 and 283.
[2] See, for instance, Perels, § 25, and Fiore, II. No. 732.

V

PIRACY

Hall, §§ 81-82—Westlake, I. pp. 177-182—Lawrence, § 122—Phillimore, I. §§ 356-361—Twiss, I. §§ 177 and 193—Halleck, I. pp. 444-450—Taylor, §§ 188-189—Walker, § 21—Wheaton, §§ 122-124—Bluntschli, §§ 343-350—Heffter, § 104—Gareis in Holtzendorff, II. pp. 571-581—Gareis, § 58—Liszt, § 26—Ullmann, § 93—Bonfils, Nos. 592-594—Pradier-Fodéré, V. Nos. 2491-2515—Rivier, I. pp. 248-261—Calvo, I. §§ 485-512—Fiore, I. Nos. 494-495—Perels, §§ 16-17—Testa, pp. 90-97—Ortolan, "Diplomatie de la mer" (1856), I. pp. 231-253.

Conception of Piracy.

§ 272. Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the Open Sea against another vessel with intent to plunder (*animo furandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered by this narrow definition, and yet they are practically treated as though they were cases of piracy. Thus, if the members of the crew revolt and convert the ship and the goods thereon to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Thus, secondly, if unauthorised acts of violence, such as murder of persons on board the attacked vessel or destruction of goods thereon, are committed on the Open Sea without intent to plunder, such acts are practically considered to be piratical. Under these circumstances several writers,[1] correctly, I think, oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder. But no unanimity exists among

[1] Hall, § 81; Lawrence § 122; Bluntschli, § 343; Liszt, § 26; Calvo, § 485.

these very writers concerning a fit definition of piracy, and the matter is therefore very controversial. If a definition is desired which really covers all such acts as are practically treated as piratical, piracy must be defined as *every unauthorised act of violence against persons or goods committed on the Open Sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.*

Already, before a Law of Nations in the modern sense of the term was in existence, a pirate was considered an outlaw, a "hostis humani generis." According to the Law of Nations the act of piracy makes the pirate lose his national character, and thereby the protection of his home State; and his vessel, although she may formerly have possessed a claim to sail under a certain State's flag, loses such claim. Piracy is a so-called "international crime;"[1] the pirate is considered the enemy of every State, and can be brought to justice anywhere.

Private Ships as Subjects of Piracy.

§ 273. Private vessels only[2] can commit piracy. A man-of-war or other public ship, as long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag State, which has to punish the commander and to pay damages where required. But if a man-of-war or other public ship of a State revolts and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence now committed by her are indeed piratical acts. A *privateer* is not a pirate as long as her acts of violence are confined to enemy vessels, because such acts are authorised by the belligerent in whose

[1] See above, § 151.

[2] Piracy committed by the mutinous crew will be treated below, § 274.

services she is acting. And it matters not that the privateer is originally a neutral vessel.[1] But if a neutral vessel were to take Letters of Marque from both belligerents, she would be considered a pirate.

Doubtful is the case where a privateer in a civil war has received her Letters of Marque from the insurgents, and, further, the case where during a civil war men-of-war join the insurgents before the latter have been recognised as a belligerent Power. It is evident that the legitimate Government will treat such ships as pirates; but third Powers ought not to do so, as long as these vessels do not commit any act of violence against ships of these third Powers. Thus, in 1873, when an insurrection broke out in Spain, Spanish men-of-war stationed at Carthagena fell into the hands of the insurgents, and the Spanish Government proclaimed these vessels pirates, England, France, and Germany instructed the commanders of their men-of-war in the Mediterranean not to interfere as long as these insurgent vessels abstained from acts of violence against the lives and property of their subjects.[2]

It must be emphasised that the motive and the purpose of such acts of violence do not alter their piratical character, since the intent to plunder (*animus furandi*) is not required. Thus, for instance, if a private neutral vessel without Letters of Marque during war out of hatred of one of the belligerents were to attack and to sink vessels of such belligerent without plundering at all, she would nevertheless be considered as a pirate.

§ 274. The crew or the whole or a part of the passengers who revolt on the Open Sea and convert the vessel and her goods to their own use, commit

Mutinous Crew and Passengers as Subjects of Piracy.

[1] See details regarding this controversial point in Hall, § 81.

[2] See Calvo, I. §§ 497–901, and Hall, § 82.

thereby piracy, whether the vessel is private or public. But a simple act of violence alone on the part of crew or passengers does not constitute in itself the crime of piracy, at least not as far as International Law is concerned. If, for instance, the crew were to murder the master on account of his cruelty and afterwards carry on the voyage, they would be murderers, but not pirates. They are pirates only when the revolt is directed not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.

Object of Piracy.

§ 275. The object of piracy is any public or private vessel, or the persons or the goods thereon, whilst on the Open Sea. In the regular case of piracy the pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate whether he does so or kills the crew and appropriates the ship, or sinks her. On the other hand, it does not matter if the cargo is not the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention to keep him for the purpose of a high ransom, his act is piracy. It is likewise piracy if he stops a vessel for the purpose of killing a certain person only on board, although he may afterwards free vessel, crew, and cargo.

That a possible object of piracy is not only another vessel, but also the very ship on which the crew and passenger navigate, is an inference from the statements above in § 274.

Piracy how effected.

§ 276. Piracy is effected by any unauthorised act of violence, be it direct application of force or

intimidation through menace. The crew or passengers who, for the purpose of converting a vessel and her goods to their own use, force the master through intimidation to steer another course, commit piracy as well as those who murder the master and steer the vessel themselves. And a ship which, through the threat of sinking her if she were to refuse, forces another ship to deliver up her cargo or a person on board, commits piracy as well as the ship which attacks another vessel, kills her crew, and thereby gets hold of her cargo or a person on board.

The act of violence need not be consummated to constitute the crime of piracy. The mere attempt, such as attacking or even chasing only for the purpose of attack, by itself comprises piracy. On the other hand, it is doubtful whether persons cruising in armed vessels with the intention of committing piracies are liable to be treated as pirates before they have committed a single act of violence.[1]

Where Piracy can be committed.

§ 277. Piracy as an "international crime" can be committed on the Open Sea only. Piracy in territorial coast waters has quite as little to do with International Law as other robberies on the territory of a State. Some writers[2] maintain that piracy need not necessarily be committed on the Open Sea, but that it suffices that the respective acts of violence are committed by descent from the Open Sea. They maintain, therefore, that if "a body of pirates land on an island unappropriated by a civilised Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of

[1] See Stephen, Digest of the Criminal Law, article 104.

[2] Hall, § 81; Lawrence, § 122; Westlake, I. p. 177.

commonplace professional piracy." With this opinion I cannot agree. Piracy is, and always has been, a crime against the safety of traffic on the Open Sea, and therefore it cannot be committed anywhere else than on the Open Sea.

Jurisdiction over Pirates, and their Punishment.

§ 278. A pirate and his vessel lose *ipso facto* by an act of piracy their national character and the protection of their flag State. Every maritime State has by a customary rule of the Law of Nations the right to punish pirates. And the vessels of all nations, whether men-of-war, other public vessels, or merchantmen,[1] can on the Open Sea[2] chase, attack, seize, and bring the pirate home for trial and punishment by the Courts of their own country. In former times it was said to be a customary rule of International Law that pirates could at once after seizure be hanged or drowned by the captor. But this cannot now be upheld, although some writers assert that it is still the law. It would seem that the captor may execute pirates on the spot only when he is not able to bring them safely into a port for trial; but Municipal Law may, of course, interdict such execution. Concerning the punishment for piracy, the Law of Nations lays down the rule that it may be capital. But it need not be, the Municipal Law of the different States being competent to order any less severe punishment. Nor does the Law of Nations make it a duty for every maritime State to punish all pirates.[3]

[1] A few writers (Gareis in Holtzendorff, II. p. 575; Liszt, § 26; Ullmann, § 93) maintain, however, that men-of-war only have the power to seize the pirate.

[2] If a pirate is chased on the Open Sea and flees into the territorial maritime belt, the pursuers may follow, attack, and arrest the pirate there; but they must give him up to the authorities of the riparian State.

[3] Thus, according to the German Criminal Code, piracy committed by foreigners against foreign vessels cannot be punished by

That men-of-war of all nations have, with a view to insuring the safety of traffic, the power of verifying the flags of suspicious merchantmen of all nations, has already been stated above (§ 266, No. 2).

Pirata non mutat dominium.

§ 279. The question as to the property in the seized piratical vessels and the goods thereon has been the subject of much controversy. During the seventeenth century, the practice of several States conceded such vessel and goods to the captor as a premium. But during the eighteenth century the rule *pirata non mutat dominium* became more and more recognised. Nowadays the conviction would seem to be general that ship and goods have to be restored to their proprietors, and may be conceded to the captor only when the real ownership cannot be ascertained. In the first case, however, a certain percentage of the value is very often conceded to the captor as a premium and an equivalent for his expenses (so-called *droit de recousse*.[1]) Thus, according to British Law,[2] a salvage of 12½ per cent. is to be paid to the captor of the pirate.

Piracy according to Municipal Law.

§ 280. Piracy, according to the Law of Nations, which has been defined above (§ 272) as every unauthorised act of violence against persons or goods committed on the Open Sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel, must not be confounded with the conception of piracy

German Courts (see Perels, § 17). From article 104 of Stephen's Digest of the Criminal Law, there seems to be no doubt that according to English Law all pirates are liable to be punished.

[1] See details regarding the question as to the piratical vessels and goods in Pradier-Fodéré, V Nos. 2496–2499.

[2] See section 5 of the "Act to repeal an Act of the Sixth Year of King George the Fourth, for encouraging the Capture or Destruction of Piratical Ships, &c." (13 & 14 Vict. ch. 26).

according to the different Municipal Laws.[1] The single States may confine themselves to punishing as piracy a narrower circle of acts of violence than that which the Law of Nations defines as piracy. On the other hand, they may punish their subjects as pirates for a much wider circle of acts. Thus, for instance, according to the Criminal Law of England,[2] every English subject is *inter alia* deemed to be a pirate who gives aid or comfort upon the sea to the King's enemies during a war, or who transports slaves on the High Seas.

However, since a State cannot on the Open Sea enforce its Municipal Laws against others than its own subjects, no State can treat such foreign subjects on the Open Sea as pirates as are not pirates according to the Law of Nations. Thus, when in 1858, before the abolition of slavery in America, British men-of-war molested American vessels suspected of carrying slaves, the United States objected and rightly complained.[3]

[1] See Calvo, §§ 488-492; Lawrence, § 123; Pradier-Fodéré, V. Nos. 2501 and 2502.

[2] See Stephen, Digest of the Criminal Law, articles 104-117.

[3] See Wharton, III. § 327, pp. 142 and 143; and Taylor, § 190.

VI

Fisheries in the Open Sea

Grotius, II. c. 3, § 4—Vattel, I. § 287—Hall, § 27—Lawrence, § 111—Phillimore, I. §§ 181-195—Twiss. I. § 185—Taylor, §§ 249-250—Wharton, II. §§ 300-308—Wheaton, §§ 167-171—Bluntschli, § 307—Stoerk in Holtzendorff, II. pp. 504-507—Gareis, § 62—Liszt, § 34—Ullmann, § 92—Bonfils, Nos. 581-582, 595—Pradier-Fodéré, V. Nos. 2446-2458—Rivier, I. pp. 243-245—Calvo, I. §§ 357-364—Fiore, II. Nos. 728-729—Martens, I. § 98—Perels, § 20—Hall, "Foreign Powers and Jurisdiction" (1894), § 107—David, "La pêche maritime au point de vue international" (1897).

Fisheries in the Open Sea free to all Nations.

§ 281. Whereas the fisheries in the territorial maritime belt can be reserved by the riparian State for its own subjects, it is an inference of the freedom of the Open Sea that the fisheries thereon are open [1] to vessels of all nations. Since, however, vessels

[1] Denmark silently, by fishing regulations of 1872, dropped her claim to an exclusive right of fisheries within twenty miles of the coast of Iceland. (See Hall, § 40, p. 153, note 2.) A case of a particular kind would seem to be the pearl fishery off Ceylon, which extends to a distance of twenty miles from the shore and for which regulations are in force which are enforced against foreign as well as British subjects. The claim on which these regulations are based is one "to the products of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subject of property and jurisdiction." See Hall, Foreign Powers and Jurisdiction, (1894), p. 243, note 1. See also Westlake, I. p. 186, who says: "The case of the pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that it has a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under State protection, as that off the British island of Ceylon, or that in the Persian Gulf which is protected by British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character the pearl fishery will be territorial even though the shallowness of the water may allow it to be practised beyond the limit which the State in question generally fixes for the littoral sea, as in the case of Ceylon it is practised beyond the three miles limit generally recognised by Great Britain. 'Qui doutera,' says Vattel (I. § 28), 'que les pêcheries de Bahrein et de Ceylon ne puissent légitimement tomber en propriété?' And the territorial nature of the industry will carry with it, as being necessary for its protection, the territorial character of the spot."

remain whilst on the Open Sea under the jurisdiction of their flag State, every State possessing a maritime flag can legislate concerning the exercise of fisheries on the Open Sea on the part of vessels sailing under its flag. And for the same reason a State can by an international agreement renounce its fisheries on certain parts of the Open Sea, and accordingly interdict its vessels from exercising fisheries there. If certain circumstances and conditions make it advisable to restrict and regulate the fisheries on some parts of the Open Sea, the Powers are therefore able to create restrictions and regulations for that purpose through international treaties. Such treaties have been concluded—first, with regard to the fisheries in the North Sea and the suppression of the liquor trade among the fishing vessels in that Sea; secondly, with regard to the seal fisheries in the Behring Sea; thirdly, with regard to the fisheries around the Faröe Islands and Iceland.

Fisheries in the North Sea.

§ 282. For the purpose of regulating the fisheries in the North Sea, an International Conference took place at the Hague in 1881 and again in 1882, at which Great Britain, Belgium, Denmark, France, Germany, Holland, and Sweden-Norway were represented, and on May 6, 1882, the International Convention for the Regulation of the Police of the Fisheries in the North Sea outside the territorial waters[1] was signed by the representatives of all these States, Sweden-Norway excepted, to which the option of joining later on is given. This treaty contains the following stipulations:[2]—

(1) All the fishing vessels of the signatory Powers must be registered, and the registers have to be

[1] Martens, N.R.G. 2nd ser. IX. p. 556.

[2] The matter is exhaustively treated by Rykere, Le régime

exchanged between the Powers (article 5). Every vessel has to bear visibly in white colour on black ground its number, name, and the name of its harbour (articles 6–11). Every vessel must bear an official voucher of her nationality (articles 12–13).

(2) To avoid conflicts between the different fishing vessels, very minute interdictions and injunctions are provided (articles 14–25).

(3) The supervision of the fisheries by the fishing vessels of the signatory Powers is exercised by special cruisers of these Powers (article 26). With the exception of those contraventions which are specially enumerated by article 27, all these cruisers are competent to verify all contraventions committed by the fishing vessels of all the signatory Powers (article 28). For that purpose they have the right of visit, search, and arrest (article 29). But a seized fishing vessel is to be brought into a harbour of her flag State and to be handed over to the authorities there (article 30). All contraventions are to be tried by the Courts of the State to which the contravening vessels belong (article 36); but in cases of a trifling character the matter can be compromised on the spot by the commanders of the special public cruisers of the Powers (article 33).

Bumboats in the North Sea

§ 283. Connected with the regulation of the fisheries is the abolition of the liquor trade among the fishing vessels in the North Sea. Since serious quarrels and difficulties were caused through bumboats and floating grog-shops selling intoxicating

légal de la pêche maritime dans la Mer de Nord (1901). To carry out the obligations undertaken by her in the Convention for the regulation of the fisheries in the North Sea, Great Britain enacted in 1883 the "Act to carry into effect an International Convention concerning the Fisheries in the North Sea, and to amend the Laws relating to British Sea Fisheries" (46 & 47 Vict. ch. 22.)

liquors to the fishermen, an International Conference took place at the Hague in 1886, where the signatory Powers of the Hague Convention concerning the fisheries in the North Sea were represented. And on November 16, 1887, the International Convention concerning the Abolition of the Liquor Traffic among the fishermen in the North Sea was signed by the representatives of these Powers—namely, Great Britain, Belgium, Denmark, France, Germany, and Holland. This treaty[1] was, however, not ratified until 1894, and France did not ratify it at all. It contains the following stipulations:[2]—

It is interdicted to sell spirituous drinks to persons on board of fishing vessels, and these persons are prohibited from buying such drinks (article 2). Bumboats, which wish to sell provisions to fishermen, must be licensed by their flag State and must fly a white flag[3] with the letter S in black in the middle (article 3). The special cruisers of the Powers which supervise the fisheries in the North Sea are likewise competent to supervise the treaty stipulations concerning bumboats; they have the right to ask for the production of the proper licence, and eventually the right to arrest the vessel (article 7). But arrested vessels must always be brought into a harbour of their flag State, and all contraventions are to be tried by Courts of the flag State of the contravening vessel (articles 2, 7, 8).

Seal Fisheries in Behring Sea.

§ 284. In 1886 a conflict arose between Great Britain and the United States through the seizure and confiscation of British-Columbian vessels which had

[1] See Martens, N.R.G., 2nd ser. XIV. p. 540, and XXII. p. 563. The matter is treated by Guillaume in R.I., XXVI. (1894), p. 488.

[2] This flag was agreed upon in the Protocol concerning the ratification of the Convention. (See Martens, N.R.G., 2nd ser. XXII. p. 565.)

hunted seals in the Behring Sea outside the American territorial belt, infringing regulations made by the United States concerning seal fishing in that sea. Great Britain and the United States concluded an arbitration treaty[1] concerning this conflict in 1892, according to which the arbitrators should not only settle the dispute itself, but also (article 7) "determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary" in the interest of the preservation of the seals. The Arbitration Tribunal, which assembled and gave its award[2] at Paris in 1893, imposed the duty upon both parties to forbid to their subjects the killing of seals within a zone of sixty miles around the Pribiloff Islands; the killing of seals at all between May 1 and July 31 each year; seal-fishing with nets, firearms, and explosives; seal-fishing in other than specially licensed sailing vessels. Both parties in 1894 carried out this task imposed upon them.[3] The other maritime Powers were at the same time asked by the United States to submit voluntarily to the regulations made for the parties by the arbitrators, but only Italy[4] has agreed to this. Thus the matter is not yet settled by the majority of Powers, but I have no doubt that in time the United States will succeed in getting the consent of all other maritime Powers.[5]

Fisheries around the Faröe Islands and Iceland.

§ 285. For the purpose of regulating the fisheries outside territorial waters around the Faröe Islands and Iceland, Great Britain and Denmark signed

[1] See Martens, N.R.G., 2nd ser. XVIII. p. 587.

[2] See Martens, N.R.G., 2nd ser. XXI. p. 439.

[3] See the Behring Sea Award Act, 1894 (57 Vict. c. 2).

[4] See Martens, N.R.G., 2nd ser. XXII. p. 624.

[5] The award of the arbitrators of the Behring Sea dispute is discussed by Barclay in R.I., XXV. (1893), p. 417, and Engelhardt in R.I., XXVI. (1894), p. 386, and R.G., V. (1898), pp. 193 and 347.

on June 24, 1901, the Convention of London,[1] whose stipulations are for the most part literally the same as those of the International Convention for the Regulation of the Fisheries in the North Sea, concluded at the Hague in 1882.[2] The additional article of this Convention of London stipulates that any other State whose subjects fish around the Faröe Islands and Iceland may accede to it.

VII

Telegraph Cables in the Open Sea

Bonfils, No. 583—Pradier-Fodéré, V. No. 2548—Rivier, I. pp. 244 and 386—Fiore, II. No. 822—Stoerk in Holtzendorff, II. pp. 507-508—Liszt, § 29—Ullmann, § 92—Lauterbach, "Die Beschädigung unterseeischer Telegraphenkabel" (1889)—Landois, "Zur Lehre vom völkerrechtlichen Schutz der submarinen Telegraphenkabel" (1894)—Jouhannaud, "Les câbles sous-marins" (1904)—Renault in R.I., XII. (1880), p. 251, XV. (1883), p. 17.

Telegraph cables in the Open Sea admitted.

§ 286. It is a consequence of the freedom of the Open Sea that no State can prevent another from laying telegraph and telephone cables in any part of the Open Sea, whereas no State need allow this within its territorial maritime belt. As numerous submarine cables have been laid, the question as to their protection arose. Already in 1869 the United States proposed an international convention for this purpose, but the matter dropped in consequence of the outbreak of the Franco-German war. The Institute of International Law took the matter up in 1879[3] and recommended an international agreement. In 1882 France invited the Powers to an International Conference at Paris for the purpose of regulating the protection of sub-

[1] See Treaty Series, No. 5, 1903. [2] See above, § 282.
[3] See Annuaire, III. pp. 351-394.

marine cables. This conference met in October 1882, again in October 1883, and produced the "International Convention for the Protection of Submarine Telegraph Cables" which was signed at Paris on April 16, 1884.[1]

The signatory Powers are:—Great Britain, Argentina, Austria-Hungary, Belgium, Brazil, Colombia, Costa Rica, Denmark, San Domingo, France, Germany, Greece, Guatemala, Holland, Italy, Persia, Portugal, Roumania, Russia, Salvador, Servia, Spain, Sweden-Norway, Turkey, the United States, and Uruguay. Colombia and Persia did not ratify the treaty, but, on the other hand, Japan acceded to it later on.

International Protection of Submarine Telegraph Cables.

§ 287. The protection afforded to submarine telegraph cables finds its expression in the following stipulations of this international treaty:—

(1) Intentional or culpably negligent breaking or damaging of a cable in the Open Sea is to be punished by all the signatory Powers,[2] except in the case of such damage having been caused in the effort of self-preservation (article 2).

(2) Ships within sight of buoys indicating cables which are being laid or which are damaged must keep at least a quarter of a nautical mile distant (article 6).

(3) For dealing with infractions of the interdictions and injunctions of the treaty the Courts of the flag State of the infringing vessel are exclusively competent (article 8).

(4) Men-of-war of all signatory Powers have a right to stop and to verify the nationality of merchantmen of all nations which are suspected of

[1] See Martens, N.R.G., 2nd ser. XI. p. 281.

[2] See the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49).

having infringed the regulations of the treaty (article 10).

(5) All stipulations are made for the time of peace only and in no wise restrict the action of belligerents during time of war.[1]

[1] See below, vol. II. § 214.

CHAPTER III

INDIVIDUALS

I

Position of Individuals in International Law

Lawrence, § 55—Taylor, § 171—Heffter, § 58—Stoerk in Holtzendorff, II. pp. 585-592—Gareis, § 53—Liszt, § 11—Ullmann, § 96—Bonfils, Nos. 397-409—Despagnet, No. 328—Pradier-Fodéré, I. Nos. 43-49—Fiore, II. Nos. 568-712—Martens, I. §§ 85-86—Jellinek, "System der subjectiven öffentlichen Rechte" (1892), pp. 310-314—Heilborn, System, pp. 58-138—Kaufmann, "Die Rechtskraft des Internationalen Rechtes" (1899).

Importance of Individuals to the Law of Nations.

§ 288. The importance of individuals to the Law of Nations is just as great as that of territory, for the individuals are the personal basis of every State. Just as a State cannot exist without a territory, so it cannot exist without a multitude of individuals who are its subjects and who, as a body, make the people or the nation. The individuals belonging to a State can and do come in various ways in contact with foreign States in time of peace as well as of war. The Law of Nations is therefore obliged to provide certain rules regarding the individuals.

Individuals never Subjects of the Law of Nations.

§ 289. Now, what is the position of indviduals in International Law according to these rules? Since the Law of Nations is a law between States only and exclusively, States only and exclusively[1] are subjects of the Law of Nations. How is it, then, that,

[1] See above, §§ 13 and 63.

although individuals are not subjects of the Law of Nations, they have certain rights and duties in conformity with or according to International Law? Have not monarchs and other heads of States, diplomatic envoys, and even simple citizens certain rights according to the Law of Nations whilst on foreign territory? If we look more closely into these rights, it becomes quite obvious that they are not given to the favoured individuals by the Law of Nations directly. For how could International Law, which is a law between States, give rights to individuals concerning their relations to a State? What the Law of Nations really does concerning individuals, is that it imposes the duty upon all the members of the Family of Nations to grant certain privileges to such foreign heads of States and diplomatic envoys and certain rights to such foreign citizens as are on their territory. And, corresponding to this duty, every State has by the Law of Nations a right to demand that its head, its diplomatic envoys, and its simple citizens be granted certain rights by foreign States when on their territory. Foreign States granting these rights to foreign individuals do this by their Municipal Laws, and these rights are, therefore, not international rights, but rights derived from Municipal Laws. International Law is indeed the background of these rights in so far as the duty to grant them is imposed upon the single States by International Law. It is therefore quite correct to say that the individuals have these rights in conformity with or according to International Law, if it is only remembered that these rights would not exist had the single States not created them by their Municipal Law.

And the same is valid as regards special rights of

individuals in foreign countries according to special international treaties between two or more Powers. Although such treaties mostly speak of rights which individuals shall have as derived from the treaties themselves, this is nothing more than an inaccuracy of language. In fact, such treaties do not create these rights, but they impose the duty upon the contracting States to call these rights into existence by their Municipal Laws.[1]

Again, in those rare cases in which States stipulate by international treaties certain favours for individuals other than their own subjects, these individuals do not acquire any international rights out of these treaties. The latter impose the duty only upon the State whose subjects these individuals are to call those favours into existence by its Municipal Law. Thus, for example, when articles 5, 25, 35, and 44 of the Treaty of Berlin, 1878, made it a condition of the recognition of Bulgaria, Montenegro, Servia, and Roumania, that these States should not impose any religious disability upon their subjects, the latter did not thereby acquire any international rights. Another instructive example[2] is furnished by article 5 of the Peace Treaty of Prague, 1866, between Prussia and Austria, which stipulated that the northern district of Schleswig should be ceded by Prussia to Denmark in case the inhabitants should by a plebiscite vote in favour of such cession. Austria, no doubt, intended to secure by this stipulation for the inhabitants of North Schleswig the opportunity of voting in favour of their union with Denmark. But these inhabitants did not thereby acquire any inter-

[1] The whole matter is treated with great lucidity by Jellinek, System der subjectiven öffentlichen Rechte (1892), pp. 310–314, and Heilborn, System, pp. 58–138.

[2] See Heilborn, System, p. 67.

national right. Austria herself acquired only a right to insist upon Prussia granting to the inhabitants the opportunity of voting for the union with Denmark. Prussia, however, intentionally neglected her duty, Austria did not insist upon her right, and finally relinquished it by the Treaty of Vienna of 1878.[1]

Individuals Objects of the Law of Nations.

§ 290. But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations. They appear as such from many different points of view. When, for instance, the Law of Nations recognises personal supremacy of every State over its subjects at home and abroad, these individuals appear just as much objects of the Law of Nations as the territory of the States does in consequence of the recognised territorial supremacy of the States. When, secondly, the recognised territorial supremacy of every State comprises certain powers over foreign subjects within its boundaries without their home State's having a right to interfere, these individuals appear again as objects of the Law of Nations. And, thirdly, when according to the Law of Nations any State may seize and punish foreign pirates on the Open Sea, or when belligerents may seize and punish neutral blockade-runners and carriers of contraband on the Open Sea without their home State's having a right to interfere, individuals appear here too as objects of the Law of Nations.[2]

[1] It ought to be mentioned that the opinion presented in the text concerning the impossibility for individuals to be subjects of International Law, which is now mostly upheld, is vigorously opposed by Kaufmann, Die Rechtskraft des internationalen Rechtes (1899), §§ 1-4. His arguments have, however, not found favour with other authors.

[2] Westlake, Chapters, p. 2, and Lawrence (§ 55) maintain that in these cases individuals appear as *subjects* of International Law, but I cannot understand upon what

§ 291. If, as stated, individuals are never subjects but always objects of the Law of Nations, then nationality is the link between this law and individuals. It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations. This is a fact which has its consequences over the whole area of International Law.[1] Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, there being no State which would be competent to take their case in hand. As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever upon a State to abstain from maltreating to any extent such stateless individuals.[2] On the other hand, if individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right. It is for this reason that the question of nationality is a very important one for the Law of Nations, and that individuals enjoy benefits from this law not as human beings but as subjects of such States as are members of the Family of Nations. And so distinct is the position of subjects of these members from the position of stateless individuals and from subjects of States outside the Family of Nations, that it has been correctly characterised as a kind of international "indigenousness," a *Völkerrechts-Indigenat*.[3] Just as municipal citizenship procures for an individual the enjoyment of the benefits of the Municipal Laws, so this inter-

Nationality the Link between Individuals and the Law of Nations.

argument this assertion is based. The correct standpoint is taken up by Lorimer, II. p. 131, and Holland, Jurisprudence, p. 341.

[1] See below, § 294.

[2] See below, § 312.

[3] See Stoerk in Holtzendorff, II. p. 588.

national "indigenousness," which is a necessary inference from municipal citizenship, procures the enjoyment of the benefits of the Law of Nations.

The Law of Nations and the Rights of Mankind.

§ 292. Several writers[1] maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind without regarding whether an individual be stateless or not and whether he be a subject of a member-State of the Family of Nations or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising any religion one likes, the right of emigration, and the like. But such rights do not in fact enjoy any guarantee whatever from the Law of Nations,[2] and they cannot enjoy such guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this law. But there are certain facts which cannot be denied at the background of this erroneous opinion. The Law of Nations is a product of Christian civilisation and represents a legal order which binds States, chiefly Christian, into a community. It is therefore no wonder that ethical ideas which are some of them the basis of, others a development from, Christian morals, have a tendency to require the help of International Law for their realisation. When the Powers stipulated at the Berlin Congress of 1878 that the Balkan States should be recognised only under the condition that they did not impose any religious disabilities on their subjects, they lent their arm to the realisation of such an idea. Again, when the Powers after the beginning of the nineteenth

[1] Bluntschli, §§ 360-363 and 370; Martens, I. §§ 85 and 86; Fiore, I. Nos. 684-712; Bonfils, No. 397, and others.

[2] The matter is treated with great lucidity by Heilborn, System, pp. 83-138.

century agreed to several international arrangements in the interest of the abolition of the slave trade,[1] they fostered the realisation of another of these ideas. And the innumerable treaties between the different States as regards extradition of criminals, commerce, navigation, copyright, and the like, are inspired by the idea of affording ample protection to life, health, and property of individuals. Lastly, there is no doubt that, should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention[2] for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation. However, a guarantee of the so-called rights of mankind cannot be found in all these and other facts. Nor do the actual conditions of life to which certain classes of subjects are forcibly submitted within certain States show that the Law of Nations really comprises such guarantee.[3]

[1] It is incorrect to maintain that the Law of Nations has abolished slavery, but there is no doubt that the conventional Law of Nations has tried to abolish the slave trade. Three important general treaties have been concluded for that purpose during the nineteenth century since the Vienna Congress—namely, (1) the Treaty of London, 1841, between Great Britain, Austria, France, Prussia, and Russia; (2) the General Act of the Congo Conference of Berlin, 1885, whose article 9 deals with the slave trade; (3) the General Act of the anti-slavery Conference of Brussels, 1890, which is signed by Great Britain, Austria-Hungary, Belgium, the Congo Free State, Denmark, France, Germany, Holland, Italy, Luxemburg, Persia, Portugal, Russia, Spain, Sweden, Norway, the United States, Turkey, and Zanzibar.

[2] See above, § 137.

[3] The reader may think of the sad position of the Jews within the Russian Empire. The treatment of the native Jews in Roumania, although the Powers have, according to the spirit of article 44 of the Treaty of Berlin of 1878, a right of intervention, shows even more clearly that the Law of Nations does not guarantee what are called rights of mankind. (See below, p. 366, note 2.)

II

NATIONALITY

Vattel, I. §§ 220-226—Hall, §§ 66 and 87—Westlake, I. pp. 213, 231-233—Halleck, I. p. 401—Taylor, §§ 172-178—Bluntschli, §§ 364-380—Stoerk in Holtzendorff, II. pp. 630-650—Garcis, § 54—Liszt, § 11—Ullmann, § 97—Bonfils, Nos. 433-454—Despagnet, Nos. 329-333—Pradier-Fodéré, III. No. 1645—Rivier, I. p. 303—Calvo, II. §§ 539-540—Fiore, I. Nos. 644-658, 684-717—Martens, I. §§ 85-87—Hall, "Foreign Powers and Jurisdiction" (1894), § 14—Cogordan, "La nationalité au point de vue des rapports internationaux" (2nd ed. 1896).

Conception of Nationality.

§ 293. Nationality of an individual is his quality of being a subject of a certain State and therefore its citizen. It is not for International but for Municipal Law to determine who is and who is not to be considered a subject. And therefore it matters not, as far as the Law of Nations is concerned, that Municipal Laws may distinguish between different kinds of subjects—for instance, those who enjoy full political rights and are on that account named citizens, and those who are less favoured and are on that account not named citizens. Nor does it matter that according to the Municipal Laws a person may be a subject of a part of a State, for instance of a colony, but not a subject of the mother country, provided only such person appears as a subject of the mother country as far as the latter's international relations are concerned. Thus, a person naturalised in a British Colony is for all international purposes a British subject, although he may not have the right of a British subject within the United Kingdom itself.[1] For all international purposes, all distinctions

[1] See below, § 307, and Hall, decision of the French Cour de Cassation according to which Foreign Powers and Jurisdiction, § 20, who quotes, however, a naturalisation in a British Colony

made by Municipal Laws between subjects and citizens and between different kinds of subjects have neither theoretical nor practical value, and the terms "subject" and "citizen" are, therefore, synonymously made use of in the theory and practice of International Law.

But it must be emphasised that nationality as citizenship of a certain State must not be confounded with nationality as membership of a certain nation in the sense of a race. Thus, all Englishmen, Scotchmen, and Irishmen are, despite their different nationality as regards their race, of British nationality as regards their citizenship. Thus, further, although all Polish individuals are of Polish nationality *qua* race, they have been, since the partition of Poland at the end of the eighteenth century between Russia, Austria, and Prussia, either of Russian, Austrian, or German nationality *qua* citizenship.

Function of Nationality.

§ 294. It will be remembered that nationality is the link between the individuals and the benefits of the Law of Nations.[1] This function of nationality becomes apparent with regard to individuals abroad, or property abroad of individuals who themselves are within the territory of their home State. Through one particular right and one particular duty of every State towards all other States this function of nationality becomes most conspicuous. The right is that of protection over its citizens abroad which every State holds and occasionally vigorously exercises towards other States; it will be discussed in detail below, § 319. The duty, on the other hand, is that of receiving on its territory such citizens as are not allowed to remain[2] on the territory of other States.

does not constitute a real naturalisation. But this decision is based on the Code Civil of France and has nothing to do with the Law of Nations. See also Westlake, I. pp. 231–233.

[1] See above, § 291.

[2] See below, § 326.

Since no State is obliged by the Law of Nations to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The home State of those expelled cannot refuse to receive them on the home territory, the expelling States having a claim on the home State that the latter do receive the expelled individuals.[1]

So-called *Protégés* and *de facto* Subjects.

§ 295. Although nationality alone is the regular means through which individuals can derive benefit from the Law of Nations, there are two exceptional cases in which individuals may come under the international protection of a State without these individuals being really its subjects. It happens, first, that a State undertakes by an international agreement the diplomatic protection of another State's citizens abroad, and in this case the protected foreign subjects are named "*protégés*" of the protecting States. Such agreements are either concluded for a permanency in case of a small State, as Switzerland for instance, having no diplomatic envoy in a certain foreign country where many of its subjects reside, or in time of war only, a belligerent handing over the protection of its subjects in the enemy State to a neutral State.

It happens, secondly, that a State promises diplomatic protection within the boundaries of Turkey

[1] Beyond the right of protection and the duty to receive expelled citizens at home, the powers of a State over its citizens abroad in consequence of its personal supremacy illustrate the function of nationality. (See above, § 124.) Thus, the home State can tax citizens living abroad in the interests of home finance, can request them to come home for the purpose of rendering military service, can punish them for crimes committed abroad, can categorically request them to come home for good (so-called *jus avocandi*). And no State has a right forcibly to retain foreign citizens called home by their home State, or to prevent them from paying taxes to their home State, and the like.

and other Oriental countries to certain natives in the service of its embassy or consulate. Such protected natives are called "*de facto* subjects" of the protecting State. Their case is quite an anomalous one, based on custom and treaties, and no special rules of the Law of Nations are in existence concerning such *de facto* subjects. Every State which takes such *de facto* subjects under its protection can act according to its discretion,[1] and there is no doubt that as soon as these Oriental States have reached a level of civilisation equal to that of the Western members of the Family of Nations, the whole institution of the *de facto* subjects will disappear.

Nationality and Emigration.

§ 296. As emigration comprises the voluntary removal of an individual from his home State with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, it is obvious that emigrants may well retain their nationality. Emigration is in fact entirely a matter of internal legislation of the different States. Every State can fix for itself the conditions under which emigrants lose or retain their nationality, as it can also prohibit emigration altogether, or can at any moment request those who have emigrated to return to their former home, provided the emigrants have retained their nationality of birth. And it must be specially emphasised that the Law of Nations does not and cannot grant a right of emigration to every individual, although it is frequently maintained that it is a "natural" right of every individual to emigrate from his own State.

[1] Concerning the exercise of protection in Morocco a treaty was concluded in 1880 (see Martens, N.R.G., 2nd ser. VI. p. 624), which is signed by Morocco, Great Britain, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Portugal, Spain, Sweden-Norway, and the United States.

III

Modes of Acquiring and Losing Nationality

Vattel, I. §§ 212-219—Hall, §§ 67-72—Westlake, I. pp. 213-220—Lawrence, §§ 114-115—Halleck, I. pp. 402-418—Taylor, §§ 176-183—Walker, § 19—Bluntschli, §§ 364-373—Hartmann, § 81—Heffter, § 59—Stoerk in Holtzendorff, II. pp. 592-630—Gareis, § 55—Liszt, § 11—Ullmann, §§ 98 and 100—Bonfils, Nos. 417-432—Despagnet, Nos. 334-339—Pradier-Fodéré, III. Nos. 1646-1691—Rivier, I. pp. 303-306—Calvo, II. §§ 541-654, VI. §§ 92-117—Martens, II. §§ 44-48—Foote, "Private International Jurisprudence" (3rd ed. 1904), pp. 1-52—Dicey, "Conflict of Laws" (1896), pp. 173-204—Martitz, "Das Recht der Staatsangehörigkeit im internationalen Verkehr" (1885)—Lapradelle, "De la nationalité d'origine" (1893)—Berney, "La nationalité à l'Institut de Droit International" (1897).

In 1893 the British Government addressed a circular to its representatives abroad requesting them to send in a report concerning the laws relating to nationality and naturalisation in force in the respective foreign countries. These reports have been collected and presented to Parliament. They are printed in Martens, N.R.G. 2nd ser. XIX. pp. 515-760.

Five Modes of Acquisition of Nationality.

§ 297. Although it is for Municipal Law to determine who is and who is not a subject of a State, it is nevertheless of interest for the theory of the Law of Nations to ascertain how nationality can be acquired according to the Municipal Law of the different States. The reason of the thing presents five possible modes of acquiring nationality, and, although no State is obliged to recognise all five, all States practically nevertheless do recognise them. They are birth, naturalisation, reintegration, subjugation, and cession.

Acquisition of Nationality by Birth.

§ 298. The first and chief mode of acquiring nationality is by birth, for the acquisition of nationality by another mode is exceptional only, since the vast majority of mankind acquires nationality by birth and does not change it afterwards. But no

uniform rules exist according to the Municipal Law of the different States concerning this matter. Some States, as Germany and Austria, have adopted the rule that descent alone is the decisive factor,[1] so that a child born of their subjects becomes *ipso facto* by birth their subject likewise, be the child born at home or abroad. According to this rule, illegitimate children acquire the nationality of their mother. Other States, such as Argentina, have adopted the rule that the territory on which birth occurs is exclusively the decisive factor.[2] According to this rule every child born on the territory of such State, whether the parents be citizens or foreigners, becomes a subject of such State, whereas a child born abroad is foreign, although the parents may be subjects. Again, other States, as Great Britain[3] and the United States, have adopted a mixed principle, since, according to their Municipal Law, not only children of their subjects born at home or abroad become their subjects, but also such children of foreign parents as are born on their territory.

Acquisition of Nationality through Naturalisation.

§ 299. The most important mode of acquiring nationality besides birth is that of naturalisation in the wider sense of the term. Through naturalisation a person who is a foreigner by birth acquires the nationality of the naturalising State. According to the Municipal Law of the different States naturalisation may take place through six different acts—namely, marriage, legitimation, option, acquisition of domicile, appointment as Government official, grant on application. Thus, according to the Municipal Law of most States, a foreign female person marrying

[1] *Jus sanguinis.*
[2] *Jus soli.*
[3] See details concerning British law on this point in Hall, Foreign Powers and Jurisdiction (1894), § 14.

a subject of such State becomes thereby *ipso facto* naturalised. Thus, further, according to the Municipal Law of several States, an illegitimate child born of a foreign mother, and therefore a foreigner itself, becomes *ipso facto* naturalised through the father marrying the mother and thereby legitimating the child.[1] Thus, thirdly, according to the Municipal Law of some States, which declare children of foreign parents born on their territory to be foreigners, such children, if they make, after having come of age, a declaration that they intend to be subjects of the country of their birth, become *ipso facto* by such option naturalised. Again, fourthly, some States, such as Venezuela, let a foreigner become naturalised *ipso facto* by his taking his domicile[2] on their territory. Some States, fifthly, let a foreigner become naturalised *ipso facto* on appointment as a Government official. And, lastly, in all States naturalisation may be procured through a direct act on the part of the State granting nationality to a foreigner who has applied for it. This last kind of naturalisation is naturalisation in the narrower sense of the term; it is the most important for the Law of Nations, and, whenever one speaks of naturalisation pure and simple, such naturalisation through direct grant on application is meant; it will be discussed in detail below, §§ 303–307.

Acquisition of Nationality through Redintegration.

§ 300. The third mode of acquiring nationality is that by so-called redintegration or resumption. Such individuals as have been natural-born subjects of a State, but have lost their original nationality through

[1] British law has not adopted this rule.

[2] It is doubtful (see Hall, § 64) whether the home State of such individuals naturalised against their will must submit to this *ipso facto* naturalisation. See above, § 125, where the rule has been stated that in consideration of the personal supremacy of the home State over its citizens abroad no State can naturalise foreigners against their will.

naturalisation abroad or for some other cause, may recover their original nationality on their return home. One speaks in this case of redintegration or resumption in contradistinction to naturalisation, the favoured person being redintegrated and resumed into his original nationality. Thus, according to Section 10 of the Naturalisation Act,[1] 1870, a widow being a natural-born British subject, who has lost her British nationality through marriage with a foreigner, may at any time during her widowhood obtain a certificate of readmission to British nationality. And according to Section 8 of the same Act, a British-born individual who has lost his British nationality through being naturalised abroad, may, if he returns home, obtain a certificate of readmission to British nationality.

Acquisition of Nationality through Subjugation and Cession.

§ 301. The fourth and fifth modes of acquiring nationality are by subjugation after conquest and by cession of territory, the inhabitants of the subjugated as well as of the ceded territory acquiring *ipso facto* by the subjugation or cession the nationality of the State which acquires the territory. These modes of acquisition of nationality are modes settled by the customary Law of Nations; it will be remembered that details concerning this matter have been given above, §§ 219 and 240.

Seven modes of losing Nationality.

§ 302. Although it is left in the discretion of the different States to determine the grounds on which individuals lose their nationality, it is nevertheless of interest for the theory of the Law of Nations to take notice of these grounds. Seven modes of losing nationality must be stated to exist according to the reason of the thing, although all seven are by no means recognised by all the States. These modes

[1] 33 Vict. c. 14.

are :—Release, deprivation, long-continued emigration, option, naturalisation abroad, subjugation, and cession.

(1) Release. Some States, as Germany, give their citizens the right to ask to be released from their nationality. Such release, if granted, denationalises the released individual.

(2) Deprivation. According to the Municipal Law of some States a citizen may lose his nationality through deprivation as a punishment. Thus, a Russian loses his nationality as a punishment on entry into foreign military service or on emigration without permission of the Government.

(3) Long-continued emigration. Some States have legislated that such citizens as have emigrated and stayed abroad for some length of time lose their nationality. Thus, a German ceases to be a German subject through the mere fact that he has emigrated and stayed abroad for ten years without having undertaken the necessary step for the purpose of retaining his nationality.

(4) Option. Some States, as Great Britain, which declare a child born of foreign parents on their territory to be their natural-born subject, although it becomes at the same time according to the Municipal Law of the home State of the parents a subject of such State, give the right to such child to make, after coming of age, a declaration that it desires to cease to be a citizen. Such declaration of alienage creates *ipso facto* the loss of nationality.

(5) Naturalisation abroad. Many States, such as Great Britain in contradistinction to Germany, let the nationality of their subjects extinguish *ipso facto* by their naturalisation abroad, be it through marriage, grant on application, or otherwise. States

which act otherwise do not object to their citizens acquiring another nationality besides that which they already possess.

(6) Subjugation and cession. It is a universally recognised customary rule of the Law of Nations that the inhabitants of subjugated as well as ceded territory lose their nationality and acquire that of the State which annexes the territory.[1]

IV

Naturalisation in Especial

Vattel, I. § 214—Hall, §§ 71-71*—Westlake, § I. pp. 225-230—Lawrence, §§ 115-116—Phillimore, I. §§ 325-332—Halleck, I. pp. 403-410—Taylor, §§ 181-182—Walker, § 19—Wharton, II. §§ 173-183—Wheaton, § 85—Bluntschli, §§ 371-372—Ullmann, §§ 98-99—Pradier-Fodéré, III. Nos. 1656-1659—Calvo, II. §§ 581-646—Martens, II. §§ 47-48—Stoicesco, "Étude sur la naturalisation" (1875)—Folleville, "Traité de la naturalisation" (1880)—Delécaille, "De la naturalisation" (1893)—Hart, in the "Journal of the Society of Comparative Legislation," new series, vol. II. (1900), pp. 11-26.

Conception and Importance of Naturalisation.

§ 303. Naturalisation in the narrower sense of the term—in contradistinction to naturalisation *ipso jacto* through marriage, legitimation, option, domicile, and Government office (see above, § 399)—must be defined as reception of a foreigner into the citizenship of a State through a formal act on application of the favoured individual. International Law does not provide any such rules for such reception, but it recognises the natural competence of every State as a Sovereign to increase its population through naturali-

[1] See above, § 301, concerning the option sometimes given to inhabitants of ceded territory to retain their former nationality; see above, § 219.

sation, although a State might by its Municipal Law be prevented from making use of this natural competence.[1] In spite, however, of the fact that naturalisation is a domestic affair of the different States, it is nevertheless of special importance to the theory and practice of the Law of Nations. This is the case because naturalisation is effected through a special grant of the naturalising State, and regularly involves either a change or a multiplication of nationality, facts which can be and have been the source of grave international conflicts. In the face of the fact that millions of citizens emigrate every year from their home countries for good with the intention of settling in foreign countries, where the majority of them becomes sooner or later naturalised, the international importance of naturalisation cannot be denied.

Object of Naturalisation.

§ 304. The object of naturalisation is always a foreigner. Some States will naturalise such foreigners only as are stateless because they never have been citizens of another State or because they have renounced or have been released from or deprived of the citizenship of their home State. But other States, as Great Britain, naturalise also such foreigners as are and remain subjects of their home State. Most States naturalise such person only as has taken his domicile in their country, has been residing there for some length of time, and intends to remain in their country for good. And, according to the Municipal Law of many States, naturalisation of a married individual includes that of his wife and children under age. But, although every foreigner may be naturalised, no foreigner has, according to the Municipal Law of most States, a claim to become naturalised, naturalisa-

[1] But there is, as far as I know, no civilised State in existence which abstains altogether from naturalising foreigners.

tion being a matter of discretion of the Government, which can refuse it without giving any reasons.

Conditions of Naturalisation.

§ 305. If granted, naturalisation makes a foreigner a citizen. But it is left to the discretion of the naturalising State to grant naturalisation under any conditions it likes. Thus, for example, Great Britain grants naturalisation on the sole condition that the naturalised foreigner shall not be deemed to be a British subject when within the limits of the foreign State of which he has been a subject previously to his naturalisation, unless at the time of naturalisation he has ceased to be a subject of that State. And it must be specially mentioned that naturalisation need not give a foreigner absolutely the same rights as are possessed by natural-born citizens. Thus it is well known that a naturalised subject of the United States of America can never be elected President.[1]

Effect of Naturalisation upon previous Citizenship.

§ 306. Since the Law of Nations does not comprise any rules concerning naturalisation, the effect of naturalisation upon previous citizenship is exclusively a matter of the Municipal Law of the States concerned. Some States, as Great Britain,[2] have legislated that one of their subjects becoming naturalised abroad loses thereby his previous nationality; but other States, as Germany, have not done this. Further, some States, as Great Britain again, deny every effect to the naturalisation granted by them to a foreigner whilst he is staying on the territory of the State whose subject he was previously to his

[1] A foreigner naturalised in Great Britain by Letters of Denization does not acquire the same rights as a natural-born British subject. See Hall, Foreign Powers and Jurisdiction, (1894) § 22.

[2] Formerly Great Britain upheld the rule *nemo potest exuere patriam*, but Section 6 of the Naturalisation Act, 1870, does away with that rule.

naturalisation, unless at the time of naturalisation he was no longer a subject of such State. But other States do not make this provision. Be that as it may, there can be no doubt that a person who is naturalised abroad and returns for a time or for good into the country of his origin, can be held responsible[1] for all acts done there at the time before his naturalisation abroad.

Naturalisation in Great Britain.

§ 307. The present law of Great Britain concerning Naturalisation is mainly contained in the Naturalisation Acts of 1870, 1874, and 1895.[2] Foreigners may on their application become naturalised by a certificate of naturalisation in case they have resided in the United Kingdom or have been in the service of the British Crown for a term of not less than five years, and in case they have the intention to go on residing within the United Kingdom or serving under the Crown. But naturalisation may be refused without giving a reason therefor (section 7). British possessions may legislate on their own account concerning naturalisation (section 16), and persons so naturalised are for all international purposes[3] British subjects. Where the Crown enters into a convention with a foreign State to the effect that the subjects of such State who have been naturalised in Great Britain may divest themselves of their status as British subjects, such naturalised British subjects can through a declaration of alienage shake off the acquired British nationality (section 3). Naturalisation of the husband includes that of his

[1] Many instructive cases concerning this matter are reported by Wharton, II. §§ 180 and 181. See also Hall, § 71, where details concerning the practice of many States are given with regard to their subjects naturalised abroad.

[2] 33 Vict. c. 14; 35 and 36 Vict. c. 39; 58 & 59 Vict. c. 43.

[3] See Hall, Foreign Powers and Jurisdiction, §§ 20 and 21, especially concerning naturalisation in India.

wife, and naturalisation of the father, or mother in case she is a widow, includes naturalisation of such children as have during infancy become resident in the United Kingdom at the time of their father's or mother's naturalisation (section 10). Neither the case of children who are not resident within the United Kingdom or not resident with their father in the service of the Crown abroad at the time of the naturalisation of their father or widowed mother, nor the case of children born abroad after the naturalisation of the father is mentioned in the Naturalisation Act. It is, therefore, to be taken for granted that such children are not[1] British subjects, except children born of a naturalised father abroad in the service of the Crown.[2]

Not to be confounded with naturalisation proper is naturalisation through *denization* by means of Letters Patent under the Great Seal. This way of making a foreigner a British subject is based on a very ancient practice [3] which has not yet become obsolete. Such denization requires no previous residence within the United Kingdom. "A person may be made a denizen without ever having set foot upon British soil. There have been, and from time to time there no doubt will be, persons of foreign nationality to whom it is wished to entrust functions which can only be legally exercised by British subjects. In such instances, the condition of five years' residence in the United Kingdom would generally be prohibitory. The difficulty can be avoided by the issue of Letters of Denization; and it is believed that on one or two occasions letters have in fact been issued with

[1] See Hall, Foreign Powers and Jurisdiction, § 19.

[2] See Naturalisation Act, 1895 (58 & 59 Vict. c. 43).

[3] See Hall, Foreign Powers and Jurisdiction, § 22.

the view of enabling persons of foreign nationality to exercise British consular jurisdiction in the East." (Hall.)

V

Double and Absent Nationality

Hall, § 71—Westlake, I. pp. 221-225—Lawrence, § 116—Halleck, I. pp. 410-413—Taylor, § 183—Wheaton, § 85 (Dana's note)—Bluntschli, §§ 373-374—Hartmann, § 82—Heffter, § 59—Stoerk in Holtzendorff, II. pp. 650-655—Ullmann, § 98—Bonfils, No. 422—Pradier-Fodéré, III. Nos. 1660-1665—Rivier, I. pp. 304-306—Calvo, II. §§ 647-654—Martens, II. § 46.

Possibility of Double and Absent Nationality.

§ 308. The Law of Nations having no rule concerning acquisition and loss of nationality beyond this, that nationality is lost and acquired through subjugation and cession, and, on the other hand, the Municipal Laws of the different States differing in many points concerning this matter, the necessary consequence is that an individual may own two different nationalities as easily as none at all. The points to be discussed here are therefore: how double nationality occurs, the position of individuals with double nationality, how absent nationality occurs, the position of individuals destitute of nationality, and, lastly, means of redress against difficulties arising from double and absent nationality.

It must, however, be specially mentioned that the Law of Nations is concerned with such cases only of double and absent nationality as are the consequences of conflicting Municipal Laws of several absolutely different States. Such cases as are the consequence of the Municipal Laws of a Federal State or of a State which, as Great Britain, is an Incorporate Union, fall outside the scope of the Law of Nations.

Thus the fact that, according to the law of Germany, a German can be at the same time a subject of several member-States of the German Empire, or can be a subject of this Empire without being a subject of one of its member-States, does as little concern the Law of Nations as the fact that an individual can be a subject of a British Colonial State without at the same time being a subject of the United Kingdom. For internationally such individuals appear as subjects of such Federal State or Incorporate Union, whatever their position may be inside these Unions of States.

How Double Nationality occurs.

§ 309. An individual may own double nationality knowingly or unknowingly, and with or without intention. And double nationality may be produced by every mode of acquiring nationality. Even birth can vest a child with double nationality. Thus, every child born in Great Britain of German parents acquires at the same time British and German nationality, for such child is British according to British, and German according to German Municipal Law. Double nationality can likewise be the result of marriage. Thus, a Venezuelan woman marrying an Englishman acquires according to British law British nationality, but according to Venezuelan law she does not lose her Venezuelan nationality. Legitimation of illegitimate children can produce the same effect. Thus, an illegitimate child of a German born in England of an English mother is a British subject according to British and German law, but if after the birth of the child the father marries the mother and remains a resident in England, he thereby legitimates the child according to German law, and such child acquires thereby German nationality without losing its British nationality, although the mother

does lose her British nationality.[1] Again, double nationality may be the result of option. Thus, a child born in France of German parents acquires German nationality, but if, after having come of age, it acquires French nationality by option through making the declaration necessary according to French Municipal Law, it does not thereby, according to German Municipal Law, lose its German nationality. It is not necessary to give examples of double nationality caused by taking domicile abroad, accepting foreign Government office, and redintegration, and it suffices merely to draw attention to the fact that naturalisation in the narrower sense of the term is frequently a cause of double nationality, since individuals may apply for and receive naturalisation in a State without thereby losing the nationality of their home State.

Position of Individuals with Double Nationality.

§ 310. Individuals owning double nationality bear in the language of diplomatists the name *sujets mixtes*. The position of such "mixed subjects" is awkward on account of the fact that two different States claim them as subjects, and therefore their allegiance. In case a serious dispute arises between these two States which leads to war, an irreconcilable conflict of duties is created for these unfortunate individuals. It is all very well to say that such conflict is a personal matter which concerns neither the Law of Nations nor the two States in dispute. As far as an individual has, through naturalisation, option, and the like, acquired his double nationality, one may say that he has placed himself in that awkward position by intentionally and knowingly acquiring a second without being released from his original

[1] This is the consequence of Section 10, Nos. 1 and 3, of the Naturalisation Act, 1870.

nationality. But those who are natural-born *sujets mixtes* in most cases do not know thereof before they have to face the conflict, and their difficult position is not their own fault.

Be that as it may, there is no doubt that each of the States which claim such an individual as subject is internationally competent to do this, although they cannot claim him against one another, since each of them correctly maintains that he is its subject.[1] But against third States each of them appears as his Sovereign, and it is therefore possible that each of them can exercise its right of protection over him within third States.

How Absent Nationality occurs.

§ 311. An individual may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be stateless. Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality because according to German law it does not acquire German, and according to British law it does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are them-

[1] I cannot agree with the statement in its generality made by Westlake, I. p. 221:—"If, for instance, a man claimed as a national both by the United Kingdom and by another country should contract in the latter a marriage permitted by its laws to its subjects, an English Court would have to accept him as a married man." If this were correct, the marriage of a German who, without having given up his German citizenship, has become naturalised in Great Britain and has afterwards married his niece in Germany, would have to be recognised as legal by the English Courts. The correct solution seems to me to be that such marriage is legal in Germany, but not legal in England, because British law does not admit the marriage between uncle and niece. The case is different when a German who married his niece in Germany becomes afterwards naturalised in England; in this case English Courts would have to recognise the marriage as legal because German law does not object to a marriage between uncle and niece, and because the marriage was concluded before the man became a British subject.

selves, according to German law, stateless. But statelessness may take place after birth. All individuals who have lost their original nationality without having acquired another are in fact destitute of nationality.

Position of Individuals destitute of Nationality.

§ 312. That stateless individuals are in so far objects of the Law of Nations as they fall under the territorial supremacy of the State on whose territory they live there is no doubt whatever. But since they do not own a nationality, the link[1] by which they could derive benefits from International Law is missing, and thus they lack any protection whatever as far as this law is concerned. The position of such individuals destitute of nationality may be compared to vessels on the Open Sea not sailing under the flag of a State, which likewise do not enjoy any protection whatever. In practice, stateless individuals are in most States treated more or less as though they were subjects of foreign States, but as a point of international legality there is no restriction whatever upon a State's maltreating them to any extent.[2]

Redress against Difficulties arising from Double and Absent Nationality.

§ 313. Double as well as absent nationality of individuals has from time to time created many difficulties for the States concerned. As regards the remedy for such difficulties, it is comparatively easy to meet those created by absent nationality. If the number of stateless individuals increases much within a certain State, the latter can require them to

[1] See above, § 291.

[2] The position of the Jews in Roumania furnishes a sad example. According to Municipal Law they are, with a few exceptions, considered as foreigners for the purpose of avoiding the consequences of article 44 of the Treaty of Berlin, 1878, according to which no religious disabilities may be imposed by Roumania upon her subjects. But as these Jews are not subjects of any other State, Roumania compels them to render military service, and actually treats them in every way according to discretion without any foreign State being able to exercise a right of protection over them. See Rey in R.G., X. (1903), pp. 460–526, and above, p. 347, note 3.

apply for naturalisation or to leave the country; it can even naturalise them by Municipal Law against their will, as no other State will and has a right to interfere, and as, further, the very fact of the existence of individuals destitute of nationality is a blemish in Municipal as well as in International Law. Much more difficult is it, however, to find, within the limits of the present rules of the Law of Nations, means of redress against conflicts arising from double nationality. Very grave disputes indeed have occasionally occurred between States on account of individuals who were claimed as subjects by both sides. Thus, in 1812, a time when England still kept to her old rule that no natural-born English subject could lose his nationality, the United States went to war with England because the latter impressed Englishmen naturalised in America from on board American merchantmen, claiming the right to do so, as according to her law these men were still English citizens. Thus, further, Prussia frequently had during the sixties of the last century disputes with the United States on account of Prussian individuals who, without having rendered military service at home, had emigrated to America to become there naturalised and had afterwards returned to Prussia.[1] Again,

[1] The case of Martin Koszta ought here to be mentioned, details of which are reported by Wharton, II. § 175, and Hall, § 72. Koszta was a Hungarian subject who took part in the revolutionary movement of 1848, escaped to the United States, and intended to become naturalised there. After remaining nearly two years in the United States, but before he was really naturalised, he visited Turkey, and while at Smyrna he was seized by Austrian officials and taken on board an Austrian man-of-war with the intention to bring him to Austria, to be there punished for his part in the revolution of 1848. The American Consul demanded his release, but Austria maintained that she had a right to arrest Koszta according to treaties between her and Turkey. Thereupon the American man-of-war "Saint Louis" threatened to attack the Austrian man-of-war in case she would not give up her prisoner, and an arrangement was made that Koszta should be delivered into

during the time of the revolutionary movements in Ireland in the last century before the Naturalisation Act of 1870 was passed, disputes arose between Great Britain and the United States on account of such Irishmen as took part in these revolutionary movements after having become naturalised in the United States.[1] It would seem that the only way in which all the difficulties arising from double and absent nationality could really be done away with is for all the Powers to agree upon an international convention according to which they undertake the obligation to enact by their Municipal Law such corresponding rules regarding acquisition and loss of nationality as make the very occurrence of double and absent nationality impossible.[2]

the custody of the French Consul at Smyrna until the matter was settled between the United States and Austrian Governments. Finally, Austria consented to Koszta's being brought back to America. Although Koszta was not yet naturalised, the United States claimed a right of protection over him, since he had taken his domicile on her territory with the intention to become there naturalised in due time.

[1] The United States have, through the so-called "Bancroft Treaties," attempted to overcome conflicts arising out of double nationality. The first of these treaties was concluded in 1868 with the North German Confederation, the precursor of the present German Empire, and signed on behalf of the United States by her Minister in Berlin, George Bancroft. (See Wharton, II. §§ 149 and 179.) In the same and the following year treaties of the same kind were concluded with many other States. A treaty of another kind, but with the same object, was concluded between the United States and Great Britain on May 13, 1870. (See Martens, N.R.G., XX. p. 524.) All these treaties stipulate that naturalisation in one of the contracting States shall be recognised by the other, whether the naturalised individual has or has not previously been released from his original citizenship. And they further stipulate that such naturalised individuals, in case they return after naturalisation into their former home State and take their residence there for some years, either *ipso facto* become again subjects of their former home State and cease to be naturalised abroad (as the Bancroft Treaties), or can be reinstated in their former citizenship, and cease thereby to be naturalised abroad (as the treaty with Great Britain).

[2] The Institute of International Law has studied the matter, and formulated at its meeting in Venice in 1896 six rules, which, if adopted on the part of the different States, would do away with many of the difficulties. (See Annuaire, XV. p. 270.)

VI

Reception of Foreigners and Right of Asylum

Vattel, II. § 100—Hall, §§ 63 64—Westlake, I. pp. 208-210—Lawrence, §§ 117-118—Phillimore, I. §§ 365-370—Twiss, I. § 238—Halleck, I. pp. 452 454—Taylor, § 186—Walker, § 19—Wharton, II. § 206—Wheaton, § 115, and Dana's Note—Bluntschli, §§ 381-398—Hartmann, §§ 84-85, 89—Heffter, §§ 61-63—Stoerk in Holtzendorff, II. pp. 637-650—Gareis, § 57—Liszt, § 25—Ullmann, §§ 102-103—Bonfils, Nos. 441-446—Despagnet, Nos. 340-362—Rivier, I. pp. 307-309—Calvo, II. §§ 701-706, VI. 119—Martens, II. § 46.

No Obligation to admit Foreigners.

§ 314. Many writers [1] maintain that every member of the Family of Nations is bound by International Law to admit all foreigners into its territory for all lawful purposes, although they agree that every State could exclude certain classes of foreigners. This opinion is generally held by those who assert that there is a fundamental right of intercourse between States. It will be remembered [2] that no such fundamental right exists, but that intercourse is a characteristic of the position of the States within the Family of Nations and therefore a presupposition of the international personality of every State. A State, therefore, cannot exclude foreigners altogether from its territory without violating the spirit of the Law of Nations and endangering its very membership of the Family of Nations. But no State actually does exclude foreigners altogether. The question is only whether an international legal duty can be said to exist for every State to admit all unobjectionable foreigners to all parts of its territory. And it is this duty which must be denied as far as the customary Law of Nations is concerned. It must be emphasised that, apart from general conventional arrangements,

[1] See, for instance, Bluntschli, § 381, and Liszt, § 25.
[2] See above, § 141.

as, for instance, those concerning navigation on international rivers, and apart from special treaties of commerce, friendship, and the like, no State can claim the right for its subjects to enter into and reside on the territory of a foreign State. The reception of foreigners is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude foreigners from the whole or any part of its territory. And it is only an inference from this competence that the United States and other States [1] have made special laws according to which paupers and criminals, as well as diseased and other objectionable aliens, are prevented from entering their territory. Every State is and must remain master in its own house, and such mastership is of especial importance with regard to the admittance of foreigners. Of course, if a State excluded all subjects of one State only, this would constitute an unfriendly act, against which retorsion would be admissible; but it cannot be denied that a State is competent to do this, although in practice such wholesale exclusion will never happen. Hundreds of treaties of commerce and friendship exist between the members of the Family of Nations according to which they are obliged to receive each other's unobjectionable subjects, and thus practically the matter is settled, although in strict law every State is competent to exclude foreigners from its territory.[2]

Reception of Foreigners under conditions.

§ 315. It is obvious that, if a State need not receive foreigners at all, it can, on the other hand,

[1] The Aliens Bill brought in by the British Government in 1904 has not been passed by Parliament, but a similar bill will again be introduced in 1905.

[2] The Institute of International Law has studied the matter, and adopted at its meeting at Geneva in 1892 (see Annuaire, XII. p. 219) a body of forty-one articles concerning the admission and expulsion of foreigners; articles 6–13 deal with the admittance of foreigners.

receive them under certain conditions only. Thus, for example, Russia does not admit foreigners without passports, and if the foreigner adheres to the Jewish faith he has to submit to a number of special restrictions. Thus, further, during the time Napoleon III. ruled in France, every foreigner entering French territory from the sea or from neighbouring land was admitted only after having stated his name, nationality, and the place he intended to go to. Some States, as Switzerland, make a distinction between such foreigners as intend to settle down in the country and such as intend to travel only in the country; no foreigner is allowed to settle in the country without having asked and received a special authorisation on the part of the Government, whereas the country is unconditionally open to all mere travelling foreigners.

So-called Right of Asylum.

§ 316. The fact that every State exercises territorial supremacy over all persons on its territory, whether they are its subjects or foreigners, excludes the prosecution of foreigners thereon by foreign States. Thus, a foreign State is, provisionally at least, an asylum for every individual who, being prosecuted at home, crosses its frontier. In the absence of extradition treaties stipulating the contrary, no State is by International Law obliged to refuse admittance into its territory to such a fugitive or, in case he has been admitted, to expel him or deliver him up to the prosecuting State. On the contrary, States have always upheld their competence to grant asylum if they choose to do so. Now the so-called right of asylum is certainly not a right of the foreigner to demand that the State into whose territory he has entered with the intention of escaping prosecution from some other State should grant protection and

asylum. For such State need not grant them. The so-called right of asylum is nothing but the competence mentioned above of every State, and inferred from its territorial supremacy, to allow a prosecuted foreigner to enter and to remain on its territory under its protection, and to grant thereby an asylum to him. Such fugitive foreigner enjoys the hospitality of the State which grants him asylum; but it might be necessary to place him under surveillance, or even to intern him at some place in the interest of the State which is prosecuting him. For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State. And if a State grants asylum to a prosecuted foreigner, this duty becomes of special importance.

VII

Position of Foreigners after Reception

Vattel, I. § 213, II. §§ 101-115—Hall, §§ 63 and 87—Westlake, I. pp. 211-212, 313-316—Lawrence, §§ 117-118—Phillimore, I. §§ 332-339—Twiss, I. § 163—Taylor, §§ 173, 187, 201-203—Walker, § 19—Wharton, II. §§ 201-205—Wheaton, §§ 77-82—Bluntschli, §§ 385-393—Hartmann, §§ 84-85—Heffter, § 62—Stoerk in Holtzendorff, II. pp. 637-650—Gareis, § 57—Liszt, § 25—Ullmann, § 102—Bonfils, Nos. 447-454—Despagnet, Nos. 340-362—Rivier, I. pp. 309-311—Calvo, II. §§ 701-706—Martens, II. § 46.

Foreigners subjected to Territorial Supremacy.

§ 317. With his entrance into a State, a foreigner, unless he belongs to the class of those who enjoy so-called exterritoriality, falls at once under such State's territorial supremacy, although he remains at the same time under the personal supremacy of his home State. Such foreigner is therefore under the jurisdiction of the State in which he stays, and is responsible to such State for all acts he commits on

its territory. He is further subjected to all administrative arrangements of such State which concern the very locality where the foreigner is. If in consequence of a public calamity, such as the outbreak of a fire or an infectious disease, certain administrative restrictions are enforced, they can be enforced against all foreigners as well as against citizens. But apart from jurisdiction and mere local administrative arrangements, both of which concern all foreigners alike, a distinction must be made between such foreigners as are merely travelling and stay, therefore, only temporarily on the territory, and such as take their residence there either for good or for some length of time. A State has wider power over foreigners of the latter kind; it can make them pay rates and taxes, and can even compel them in case of need, under the same conditions as citizens, to serve in the local police and the local fire brigade for the purpose of maintaining public order and safety. On the other hand, a foreigner does not fall under the personal supremacy of the local State; therefore he cannot be made to serve in its army or navy, and cannot, like a citizen, be treated according to discretion.

Foreigners in Eastern Countries.

§ 318. The rule that foreigners fall under the territorial supremacy of the State they are in, finds an exception in Turkey and, further, in such other Eastern States, like China, as are, in consequence of their deficient civilisation, only for some parts members of the Family of Nations. Foreigners who are subjects of Christian States and enter into the territory of such Eastern States, remain wholly under the jurisdiction[1] of their home State. This exceptional condition of things is based, as regards Turkey, on custom and treaties which are called Capitulations,

[1] See below, § 440.

as regards other Eastern States on treaties only.[1] Jurisdiction over foreigners in these countries is exercised by the consuls of their home States, which have enacted special Municipal Laws for that purpose. Thus, Great Britain has enacted so-called Foreign Jurisdiction Acts at several times, which are now all consolidated in the Foreign Jurisdiction Act of 1890.[2] It must be specially mentioned that Japan has since 1899 ceased to belong to the Eastern States in which foreigners are exempt from local jurisdiction.

Foreigners under the Protection of their Home State.

§ 319. Although foreigners fall at once under the territorial supremacy of the State they enter, they remain nevertheless under the protection of their home State. By a universally recognised customary rule of the Law of Nations every State holds a right of protection[3] over its citizens abroad, to which corresponds the duty of every State to treat foreigners on its territory with a certain consideration which will be discussed below, §§ 320–322. The question here is only when and how this right of protection can be exercised. Now there is certainly, as far as the Law of Nations is concerned, no duty incumbent upon a State to exercise its protection over its citizens abroad. The matter is absolutely in the discretion of every State, and no foreigner has by International Law, although he may have it by Municipal Law, a right to demand protection from his home State. Often for political reasons States have in certain cases refused the exercise of their

[1] See Twiss, I. § 163, who enumerates many of these treaties; see also Phillimore, I. §§ 336-339, and Hall, Foreign Powers and Jurisdiction, §§ 59-91.

[2] 53 & 54 Vict. c. 37.

[3] This right has, I believe, grown up in furtherance of intercourse between the members of the Family of Nations (see above, § 142); Hall (§ 87) and others deduce this indubitable right from the "fundamental" right of self-preservation.

right of protection over citizens abroad. Be that as it may, every State *can* exercise this right when one of its subjects is wronged abroad in his person or property, either by the State itself on whose territory such person or property is for the time, or by such State's officials or citizens without such State's interfering for the purpose of making good the wrong done.[1] And this right can be realised in several ways. Thus, a State whose subjects are wronged abroad can diplomatically insist upon the wrong-doers being punished according to the law of the land and upon damages, if necessary, being paid to its subjects concerned. It can, secondly, exercise retorsion and reprisals for the purpose of making the other State comply with its demands. It can, further, exercise intervention, and it can even go to war when necessary. And there are other means besides those mentioned. It is, however, quite impossible to lay down hard and fast rules as regards the question, in which way and how far in every case the right of protection ought to be exercised. Everything depends upon the merits of the individual case and must be left to the discretion of the State concerned. The latter will have to take into consideration whether the wronged foreigner was only travelling through or had settled down in the country, whether his behaviour has been provocative or not, how far the foreign Government identified itself with the acts of officials or subjects, and the like.

Protection to be afforded to Foreigners' Persons and Property.

§ 320. Under the influence of the right of protection over its subjects abroad which every State holds, and the corresponding duty of every State to

[1] Concerning the responsibility of a State for internationally injurious acts of its own, its organs and other officials, and its subjects, see above, §§ 151–167. The right of protection over citizens abroad is in detail discussed by Hall, § 87, and Westlake, I. pp. 313–320.

treat foreigners on its territory with a certain consideration, a foreigner, provided he owns a nationality at all, cannot be outlawed in foreign countries, but must be afforded such protection of his person and property as is enjoyed by a citizen. The home State of the foreigner has by its right of protection a claim upon such State as allows him to enter its territory that such protection should be afforded. In consequence thereof every State is by the Law of Nations compelled to grant to foreigners equality before the law with its citizens as far as safety of person and property is concerned.[1] A foreigner must in especial not be wronged in person or property by the officials and Courts of a State. Thus, the police must not arrest him without just cause, custom-house officials must treat him civilly, Courts of Justice must treat him justly and in accordance with the law. Corrupt administration of the law against natives is no excuse for the same against foreigners, and no Government can cloak itself with the judgment of corrupt judges.

How far Foreigners can be treated according to Discretion.

§ 321. Apart from protection of person and property, every State can treat foreigners according to discretion, those points excepted concerning which discretion is restricted through international treaties between the States concerned. Thus, a State can exclude foreigners from certain professions and trades; it can, as Great Britain did formerly and Russia does even to-day, exclude them from holding real property; it can, as again Great Britain[2] did in former times, compel them to have their names registered for the purpose of keeping them under control, and the like. It must, however, be stated

[1] But not otherwise.

[2] See an Act for the Registration of Aliens, &c., 1836 (6 & 7 William IV. c. 11).

that there is a tendency within all the States which are members of the Family of Nations to treat admitted foreigners more and more on the same footing as citizens, political rights and duties, of course, excepted. Thus, for instance, with the only exception that a foreigner cannot be sole or part owner of a British ship, foreigners having taken up their domicile in this country are for all practical purposes treated by the law [1] of the land on the same footing as British subjects.

Departure from the Foreign Country.

§ 322. Since a State holds territorial only, but not personal supremacy over a foreigner within its boundaries, it can never under any circumstances prevent him from leaving its territory, provided he has fulfilled his local obligations, as payment of rates and taxes, of fines, of private debts, and the like. And a foreigner leaving a State can take all his property away with him, and a tax for leaving the country or tax upon the property he takes away with him [2] cannot be levied. And it must be specially mentioned that since the beginning of the nineteenth century the so-called *droit d'aubaine* belongs to the past; this is the name of the right, which was formerly frequently exercised, of a State to confiscate the whole estate of a foreigner deceased on its territory.[3] But if a State levies estate duties in the case of a citizen dying on its territory, as Great Britain does according to the Finance Act [4] of 1894, such duties can likewise be levied in case of a foreigner dying on its territory.

[1] That foreigners cannot now any longer belong to the Bar or to the London Stock Exchange, is an outcome not of British Municipal Law, but of regulations of the Inns of Court and the Stock Exchange.

[2] So-called *gabella emigrationis*.

[3] See details in Wheaton, § 82. The *droit d'aubaine* was likewise named *jus albinagii*.

[4] 57 & 58 Vict. c. 30. Estate duty is levied in Great Britain in

VIII

Expulsion of Foreigners

Hall, § 63—Westlake, I. p. 210—Phillimore, I. § 364—Halleck, I. pp. 460-461—Taylor, § 186—Walker, § 19—Wharton, II. § 206—Bluntschli, §§ 383-384—Stoerk in Holtzendorff, II. pp. 646-656—Ullmann, § 102—Bonfils, No. 442—Despagnet, Nos. 347-348—Pradier-Fodéré, III. Nos. 1857-1859—Rivier, I. pp. 311-314—Calvo, VI. §§ 119-125—Martens, I. § 79—Bleteau, "De l'asile et de l'expulsion" (1886)—Berc, "De l'expulsion des étrangers" (1888)—Féraud-Giraud, "Droit d'expulsion des étrangers" (1889)—Langhard, "Das Recht der politischen Fremdenausweisung" (1891)—Rolin-Jacquemyns in R.I., XX. (1888), pp. 499 and 615.

Competence to expel Foreigners.

§ 323. Just as a State is competent to refuse admittance to a foreigner, so it is in conformity with its territorial supremacy competent to expel at any moment a foreigner who has been admitted into its territory. And it matters not whether the respective individual is only on a temporary visit or has settled down for professional or business purposes on that territory, having taken his domicile thereon. Such States, of course, as have a high appreciation of individual liberty and abhor arbitrary powers of Government will not readily expel foreigners. Thus, the British Government has no power to expel even the most dangerous foreigner without an Act of Parliament making provision for such expulsion. And in Switzerland, article 70 of the Constitution empowers the Government to expel such foreigners only as endanger the internal and external safety of the land. But many States are in no way prevented

the case also of such foreigner dying abroad as leaves movable property in the United Kingdom without having ever been resident there. As far as the Law of Nations is concerned, it is doubtful whether Great Britain is competent to claim estate duties in such cases.

by their Municipal Law from expelling foreigners according to discretion, and examples of arbitrary expulsion of foreigners, who had made themselves objectionable to the respective Governments, are numerous in the past and the present.

On the other hand, it cannot be denied that, especially in the case of expulsion of a foreigner who has been residing within the expelling State for some length of time and has established a business there, the home State of the expelled individual is by its right of protection over citizens abroad justified in making diplomatic representations to the expelling State and asking for the reasons for the expulsion. But as in strict law a State can expel even domiciled foreigners without so much as giving the reasons, the refusal of the expelling State to supply the reasons for expulsion to the home State of the expelled foreigner does not constitute an illegal, although a very unfriendly, act. And there is no doubt that every expulsion of a foreigner without just cause is, in spite of its international legality, an unfriendly act, which can rightfully be met with retorsion.

Just Causes of Expulsion of Foreigners.

§ 324. On account of the fact that retorsion might be justified, the question is of importance what just causes of expulsion of foreigners there are. As International Law gives no detailed rules regarding expulsion, everything is left to the discretion of the single States and depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of war and in time of peace. A belligerent may consider it convenient to expel all enemy subjects residing or temporarily staying within his territory. And, although such a measure may be very hard and cruel, the opinion is general that such expulsion is

justifiable.[1] As regards expulsion in time of peace, on the other hand, the opinions of writers as well as of States naturally differ much. Such State as expels a foreigner will hardly admit not having had a just cause. Some States, as Belgium[2] since 1885, possess Municipal Laws determining just causes for the expulsion of foreigners, and such States' discretion concerning expulsion is, of course, more or less restricted. But many States do not possess such laws, and are, therefore, totally at liberty to consider a cause as justifying expulsion or not. The Institute of International Law at its meeting at Geneva in 1892 adopted a body of forty-one articles concerning the admittance and expulsion of foreigners, and in article 28 thereof enumerated nine just causes for expulsion in time of peace.[3] I doubt whether the States will ever come to an agreement about just causes of expulsion. The fact cannot be denied that a foreigner is more or less a guest in the foreign land, and the question under what conditions such guest makes himself objectionable to his host cannot once for all be answered by the establishment of a body of rules. So much is certain, that with the gradual disappearance of despotic views in the different States, and with the advance of true constitutionalism guaranteeing individual liberty and freedom of opinion and speech, expulsion of foreigners, especially for political reasons, will become less frequent. Expulsion will, however, never disappear totally, because it may well be justified. Thus, for example,

[1] Thus in 1870, during the Franco-German war, the French expelled all Germans from France, and the former South African Republic expelled in 1899, during the Boer war, almost all British subjects. See below, vol. II. § 100.

[2] See details in Rivier, I. p. 312.

[3] See Annuaire, XII. p. 223. Many of these causes, as conviction for crimes, for instance, are certainly just causes, but others are doubtful.

Prussia after the annexation of the formerly Free Town of Frankfort-on-the-Main, was certainly justified in expelling those individuals who, for the purpose of avoiding military service in the Prussian Army, had by naturalisation become Swiss citizens without giving up their residence at Frankfort.

Expulsion how effected.

§ 325. Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the Government directing a foreigner to leave the country. Expulsion must therefore be effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand, especially when expulsion is meted out to a domiciled foreigner. And the home State of the expelled, by its right of protection over its citizens abroad, may well insist upon such forbearance and indulgence. But this is valid as regards the first expulsion only. Should the expelled refuse to leave the territory voluntarily or, after having left, return without authorisation, he may be arrested, punished, and forcibly brought to the frontier.

Reconduction in Contradistinction to Expulsion.

§ 326. In many Continental States destitute foreigners, foreign vagabonds, suspicious foreigners without papers of legitimation, foreign criminals who have served their punishment, and the like, are without any formalities arrested by the police and reconducted to the frontier. There is no doubt that the competence for such reconduction, which is often called *droit de renvoi*, is an inference from the territorial supremacy of every State, for there is no reason whatever why a State should not get rid of such undesirable foreigners as speedily as possible. But although such reconduction is materially not much different from expulsion, it nevertheless differs much from this in form, since expulsion is an order

to leave the country, whereas reconduction is forcible conveying away of foreigners.[1] The home State of such reconducted foreigners has the duty to receive them, since, as will be remembered,[2] a State cannot refuse to receive such of its subjects as are expelled from abroad. Difficulties arise, however, sometimes concerning the reconduction of such foreign individuals as have lost their nationality through long-continued absence[3] from home without having acquired another nationality abroad. Such cases are a further example of the fact that the very existence of stateless individuals is a blemish in Municipal as well as International Law.[4]

IX

Extradition

Hall, §§ 13 and 63—Westlake, I. pp. 241-251—Lawrence, §§ 132-133—Phillimore, I. §§ 365-389D—Twiss, I. § 236—Halleck, I. pp. 257-268—Taylor, §§ 205-211—Walker, § 19—Wharton, II. §§ 268-282 Wheaton, §§ 115-121—Bluntschli, §§ 394-401—Hartmann, § 89—Heffter, § 63—Lammasch in Holtzendorff, III. pp. 454-566—Liszt, § 32—Ullmann, §§ 113-117—Bonfils, Nos. 455-481—Despagnet, Nos. 289-315—Pradier-Fodéré, III. Nos. 1863-1893—Rivier, I. pp. 348-357—Calvo, II. §§ 949-1071—Martens, II. §§ 91-98—Spear, "The Law of Extradition" (1879)—Lammasch, "Auslieferungspflicht und Asylrecht" (1887)—Martitz, "Internationale Rechtshilfe in Strafsachen," 2 vols. (1888 and 1897)—Moore, "Treatise on Extradition" (1891)—Hawley, "The Law of International Extradition" (1893)—Clark, "The Law of Extradition" (3rd ed. 1903)—Biron and Chalmers, "The Law and Practice of Extradition" (1903)—See the French, German, and Italian literature concerning extradition quoted by Fauchille in Bonfils, No. 455.

Extradition no legal duty.

§ 327. Extradition is the delivery of a prosecuted individual to the State on whose territory he has

[1] Rivier, I. p. 308, correctly distinguishes between reconduction and expulsion, but Phillimore, I. § 364, seems to confound both.

[2] See above, § 294.

[3] See above, § 302, No. 3.

[4] It ought to be mentioned that many States have, either by special treaties or in their treaties of commerce, friendship, and the like, stipulated proper treatment of each other's destitute subjects on each other's territory.

committed a crime by the State on whose territory the criminal is for the time staying. Although Grotius[1] holds that every State has the duty either to punish itself or to surrender to the prosecuting State such individuals within its boundaries as have committed a crime abroad, and although there is as regards the majority of such cases an important interest of civilised mankind that this should be done, this rule of Grotius has never been adopted by the States and has, therefore, never become a rule of the Law of Nations. On the contrary, the States have always upheld their competence to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases excepted which fall under the stipulations of special extradition treaties, if any. There is, therefore, no universal rule of customary International Law in existence which commands[2] extradition.

Extradition Treaties how arisen.

§ 328. Since, however, modern civilisation demands categorically extradition of criminals as a rule, numerous treaties have been concluded between the single States stipulating the cases in which extradition shall take place. According to these treaties, individuals prosecuted for more important crimes, political crimes excepted, are actually always surrendered to the prosecuting State, if not punished locally. But this solution of the problem of extradition is a product of the nineteenth century only. Before the eighteenth century extradition of ordinary criminals

[1] II. c. 21, § 4.

[2] Clarke, l.c. pp. 1–15, tries to prove that a duty to extradite criminals does exist, but the result of all his labour is that he finds that the refusal of extradition is "a serious violation of the moral obligations which exist between civilised States" (see p. 14). But nobody has ever denied this as far as the regular criminal is concerned. The question is only whether an international *legal* duty exists to surrender a criminal. And this *legal* duty the States have always denied.

hardly occurred, although the States used then frequently to surrender to each other political fugitives, heretics, and even emigrants, either in consequence of special treaties stipulating the surrender of such individuals, or voluntarily without such treaties. Matters began to undergo a change in the eighteenth century, for then treaties between neighbouring States stipulated frequently the extradition of ordinary criminals besides that of political fugitives, conspirators, military deserters, and the like. Vattel[1] is able to assert in 1758 that murderers, incendiaries, and thieves are regularly surrendered by neighbouring States to each other. But general treaties of extradition between all the members of the Family of Nations did not exist in the eighteenth century, and there was hardly a necessity for such general treaties, since traffic was not so developed as nowadays and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of a neighbouring State. When, however, in the nineteenth century, with the appearance of railways and Transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries. It was then and thereby that the conviction was forced upon the States of civilised humanity that it was in their common interest to surrender ordinary criminals regularly to each other. General treaties of extradition became, therefore, a necessity, and the single States succeeded in concluding such treaties with each other. There is no civilised State in existence nowadays which has not concluded such treaties with the majority of the other civilised States. And the consequence is that, although no universal rule of International Law commands it, extradition

[1] II. § 76.

of criminals between the States is an established fact based on treaties.

Municipal Extradition Laws.

§ 329. Some States, however, were unwilling to depend entirely upon the discretion of their Governments as regards the conclusion of extradition treaties and the procedure in extradition cases. They have therefore enacted special Municipal Laws which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases. These Municipal Laws[1] furnish the basis for extradition treaties to be concluded. The first in the field with such an extradition law was Belgium in 1833, which remained, however, for far more than a generation quite isolated. It was not until 1870 that England followed the example given by Belgium. English public opinion was for many years against extradition treaties at all, considering them as a great danger to individual liberty and to the competence of every State to grant asylum to political refugees. This country possessed, therefore, before 1870 a few extradition treaties only, which moreover were in many points inadequate. But in 1870 the British Government succeeded in getting Parliament to pass the Extradition Act.[2] This Act, which was amended by another in 1873[3] and a third in 1895,[4] has furnished the basis for extradition treaties of Great Britain with thirty-five other States.[5] Belgium

[1] See Martitz, Internationale Rechtshilfe, I. pp. 747-818, where the history of all these laws is sketched and their text is printed.

[2] 33 & 34 Vict. c. 52.

[3] 36 & 37 Vict. c. 60.

[4] 58 & 59 Vict. c. 33. On the history of extradition in Great Britain before the Extradition Act, 1870, see Clarke, pp. 126-166.

[5] The full text of these treaties is printed by Clarke, as well as Biron and Chalmers. Not to be confounded with extradition of criminals to foreign States is extradition within the British Empire from one part of the British dominions to another. This matter is regulated by the Fugi-

enacted a new extradition law in 1874. Holland enacted such a law in 1875, Luxemburg in the same year, Argentina in 1885, the Congo Free State in 1886, Peru in 1888, Switzerland in 1892.

Such States as possess no extradition laws and whose written Constitution does not mention the matter, leave it to their Governments to conclude extradition treaties according to their judgment. And in these countries the Governments are competent to extradite an individual even if no extradition treaty exists.

Object of Extradition.

§ 330. Since extradition is the delivery of an incriminated individual to the State on whose territory he has committed a crime by the State on whose territory he is for the time staying, the object of extradition can be any individual, whether he is a subject of the prosecuting State, or of the State which is required to extradite him, or of a third State. Many States, however, as France and most other States of the European continent, have adopted the principle never to extradite one of their subjects to a foreign State, but to punish themselves subjects of their own for grave crimes committed abroad. Other States, as Great Britain and the United States, have not adopted this principle, and do extradite such of their subjects as have committed a grave crime abroad. Thus Great Britain surrendered in 1879 to Austria, where he was convicted and hanged,[1] one Tourville, a British subject, who, after having

tive Offenders Act, 1881 (44 & 45 Vict. c. 169).

[1] This case is all the more remarkable, as (see 24 & 25 Vict. c. 100, § 9) the criminal law of England extends over murder and manslaughter committed abroad by English subjects, and as, according to article 3 of the extradition treaty between England and Austria-Hungary of 1873, the contracting parties are in no case under obligation to extradite their own subjects.

murdered his wife in the Tyrol, had fled home to England.

And it must be emphasised that the object of extradition is an individual who has committed a crime abroad, whether or not he was physically present during the commission of the criminal act on the territory of the State where the crime was committed. Thus, in 1884, Great Britain surrendered one Nillins to Germany, who, by sending from Liverpool forged bills of exchange to a merchant in Germany as payment for goods ordered, was considered to have committed forgery and to have obtained goods by false pretences in Germany.[1]

Extraditable Crimes.

§ 331. Unless a State is restricted by an extradition law, it can grant extradition for any crime as it thinks fit. And unless a State is bound by an extradition treaty, it can refuse extradition for any crime. Such States as possess extradition laws frame their extradition treaties conformably therewith and specify in those treaties all the crimes for which they are willing to grant extradition. And no person is to be extradited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition. As regards Great Britain, the following are extraditable crimes according to the Extradition Act of 1870:—Murder and manslaughter; counterfeiting and uttering counterfeit money; forgery and uttering what is forged; embezzlement and larceny; obtaining goods or money by false pretences; crimes by bankrupts against bankruptcy laws; fraud by a bailee, banker, agent, factor, trustee, or by a director, or member, or public officer

[1] See Clarke, l. c. pp. 177 and 262, who, however, disapproves o this surrender.

of any company; rape; abduction; child stealing; burglary and housebreaking; arson; robbery with violence; threats with intent to extort; piracy by the Law of Nations; sinking or destroying a vessel at sea; assaults on board ship on the High Seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy against the authority of the master on board a ship on the High Seas. The Extradition Act of 1873 added the following crimes to the list:—Kidnapping, false imprisonment, perjury, and subornation of perjury.

Political criminals are, as a rule, not extradited,[1] and according to many extradition treaties military deserters and such persons as have committed offences against religion are likewise excluded from extradition.

Effectuation and Condition of Extradition.

§ 332. Extradition is granted only if asked for, and after the formalities have taken place which are stipulated in the treaties of extradition and the extradition laws, if any. It is effected through the handing over of the criminal by the police of the extraditing State to the police of the prosecuting State. But it must be emphasised that, according to all extradition treaties, it is a condition that the extradited individual shall be tried and punished for those crimes exclusively for which his extradition has been asked and granted.[2] If an extradited individual is nevertheless tried and punished for another crime, the extraditing State has a right of intervention.

[1] See below, §§ 333-340.

[2] It ought to be mentioned that the Institute of International Law in 1880, at its meeting in Oxford (see Annuaire, V. p. 117), adopted a body of twenty-six rules concerning extradition.

X

Principle of Non-extradition of Political Criminals

Westlake, I. pp. 247-248—Lawrence, § 133—Taylor, § 212—Wharton, II. § 272—Bluntschli, § 396—Hartmann, § 89—Lammasch in Holtzendorff, III. pp. 485-510—Liszt, § 32—Ullmann, § 115—Rivier, I. pp. 351-357—Calvo, II. §§ 1034-1036—Martens, II. § 96—Bonfils, Nos. 466-467—Despagnet, No. 304—Pradier-Fodéré, III. Nos. 1871-1873—Soldan, "L'extradition des criminels politiques" (1882)—Martitz, "Internationale *Rechtshilfe in Strafsachen*," vol. II. (1897), pp. 134-707—Lammasch, "Auslieferungspflicht und Asylrecht" (1887), pp. 203-355—Grivaz, "Nature et effets du principe de l'asyle politique" (1895).

How Non-extradition of Political Criminals became the Rule.

§ 333. Before the French Revolution[1] the term "political crime" was unknown in either the theory or the practice of the Law of Nations. And the principle of non-extradition of political criminals was likewise non-existent. On the contrary, whereas extradition of ordinary criminals was, before the eighteenth century at least, hardly ever stipulated, treaties very often stipulated the extradition of individuals who had committed such deeds as are nowadays termed "political crimes," and such individuals were frequently extradited even when no treaty stipulated it.[2] And writers in the sixteenth and seventeenth centuries did not at all object to such practice on the part of the States; on the contrary, they frequently approved of it.[3] It is indirectly due to the French Revolution that matters gradually underwent a change, since this event was the starting-point for the revolt in the nineteenth century against

[1] I follow in this section for the most part the summary of the facts given by Martitz, l. c. II. pp. 134-184.

[2] So Grotius, II. c. 21, § 5, No. 5.

[3] Martitz, l. c. II. p. 177, gives a list of important extraditions of political criminals which took place between 1648 and 1789.

despotism and absolutism throughout the western part of the European continent. It was then that the term "political crime" arose, and article 120 of the French Constitution of 1793 granted asylum to foreigners exiled from their home country "for the cause of liberty." On the other hand, the French emigrants, who had fled from France to escape the Reign of Terror, found an asylum in foreign States. However, the modern principle of non-extradition of political criminals even then did not conquer the world. Until 1830 political criminals frequently were extradited. But public opinion in free countries began gradually to revolt against such extradition, and Great Britain was its first opponent. The fact that several political fugitives were surrendered by the Governor of Gibraltar to Spain created a storm of indignation in Parliament in 1815, where Sir James Mackintosh proclaimed the principle that no nation ought to refuse asylum to political fugitives. And in 1816 Lord Castlereagh declared that there could be no greater abuse of the law than by allowing it to be the instrument of inflicting punishment on foreigners who had committed political crimes only. The second in the field was Switzerland, the asylum for many political fugitives from neighbouring countries, when, after the final defeat of Napoleon, the reactionary Continental monarchs refused the introduction of constitutional reforms which were demanded by their peoples. And although, in 1823, Switzerland was forced by the threats of the reactionary leading Powers of the Holy Alliance to restrict somewhat the asylum afforded by her to individuals who had taken part in the unsuccessful political revolts in Naples and Piedmont, the principle of non-extradition went on fighting its way. The question as to that asylum was discussed

with much passion in the press of Europe. And although the principle of non-extradition was far from becoming universally recognised, that discussion fostered its growth indirectly. A practical proof thereof is that in 1830 even Austria and Prussia, two of the reactionary Powers of that time, refused Russia's demand for the extradition of fugitives who had taken part in the Polish Revolution of that year. And another proof thereof is that at about the same time, in 1829, a celebrated dissertation [1] by a Dutch jurist made its appearance, in which the principle of non-extradition of political criminals was for the first time defended with juristic arguments and on a juristic basis.

On the other hand, a reaction set in in 1833, when Austria, Prussia, and Russia concluded treaties which remained in force for a generation, and which stipulated that henceforth individuals who had committed crimes of high treason and *lèse-majesté*, or had conspired against the safety of the throne and the legitimate Government, or had taken part in a revolt, should be surrendered to the State concerned. The same year, however, is epoch-making in favour of the principle of non-extradition of political criminals, for in 1833 Belgium enacted her celebrated extradition law, the first of its kind, being the very first Municipal Law which expressly interdicted the extradition of foreign political criminals. As Belgium, which had seceded from the Netherlands in 1830 and became recognised and neutralised by the Powers in 1831, owed her very existence to revolt, she felt the duty of making it a principle of her Municipal Law to grant asylum to foreign political fugitives, a principle which was for the first time put

[1] H. Provó Kluit, *De deditione profugorum.*

into practice in the treaty of extradition concluded in 1834 between Belgium and France. The latter, which to the present day has no municipal extradition law, has nevertheless henceforth always in her extradition treaties with other Powers stipulated the principle of non-extradition of political criminals. And the other Powers followed gradually. Even Russia had to give way, and since 1867 this principle is to be found in all extradition treaties of Russia with other Powers, that with Spain of 1888 excepted. It is due to the stern attitude of Great Britain, Switzerland, Belgium, France, and the United States that the principle has conquered the world. These countries, in which individual liberty is the very basis of all political life, and constitutional government a political dogma of the nation, watched with abhorrence the methods of government of many other States between 1815 and 1860. These Governments were more or less absolute and despotic, repressing by force every endeavour of their subjects to obtain individual liberty and a share in the government. Thousands of the most worthy citizens and truest patriots had to leave their country for fear of severe punishment for political crimes. Great Britain and the other free countries felt in honour bound not to surrender such exiled patriots to the persecution of their Governments, but to grant them an asylum.

Difficulty concerning the Conception of Political Crime.

§ 334. Although the principle became and is generally [1] recognised that political criminals shall not be extradited, serious difficulties exist concerning the conception of "political crime." Such conception is of great importance, as the extradition of a criminal may depend upon it. It is unnecessary

[1] See, however, below, § 340, concerning the reactionary movement in the matter.

here to discuss the numerous details of the controversy. It suffices to state that whereas many writers call such crime "political" as was committed from a political motive, others call "political" any crime committed for a political purpose; again, others recognise such crime only as "political" as was committed from a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term "political crime" to certain offences against the State only, as high treason, *lèse-majesté*, and the like. To the present day all attempts have failed to formulate a satisfactory conception of the term, and the reason of the thing will, I believe, for ever exclude the possibility of finding a satisfactory conception and definition. The difficulty is caused through the so-called "relative political crimes" or *délits complexes*—namely, those complex cases in which the political offence comprises at the same time an ordinary crime, such as murder, arson, theft, and the like. Some writers deny categorically that such complex crimes are political; but this opinion is wrong and dangerous, since indeed many honourable political criminals would have to be extradited in consequence thereof. On the other hand, it cannot be denied that many cases of complex crimes, although the deed may have been committed from a political motive or for a political purpose, are such as ought not to be considered political. Such cases have roused the indignation of the whole civilised world, and have indeed endangered the very value of the principle of non-extradition of political criminals. Three practical attempts have therefore been made to deal with such complex crimes without violating this principle.

The so-called Belgian *Attentat* Clause.

§ 335. The first attempt was the enactment of the so-called *attentat* clause by Belgium in 1856,[1] following the case of Jacquin in 1854. A French manufacturer named Jules Jacquin, domiciled in Belgium, and a foreman of his factory named Célestin Jacquin, who was also a Frenchman, tried to cause an explosion on the railway line between Lille and Calais with the intention of murdering the Emperor Napoleon III. France requested the extradition of the two criminals, but the Belgian Court of Appeal had to refuse the surrender on account of the Belgian extradition law interdicting the surrender of political criminals. To provide for such cases in the future, Belgium enacted in 1856 a law amending her extradition law and stipulating that murder of the head of a foreign Government or of a member of his family should not be considered a political crime. Gradually all European States, with the exception of England, Italy, and Switzerland, have adopted that *attentat* clause, and a great many Continental writers urge its adoption by the whole of the civilised world.

The Russian Project of 1881.

§ 336. Another attempt to deal with complex crimes without detriment to the principle of non-extradition of political criminals was made by Russia in 1881. Influenced by the murder of the Emperor Alexander II. in that year, Russia invited the Powers to hold an International Conference at Brussels for the consideration of the proposal that thenceforth no murder or attempt to murder ought to be considered as a political crime. But the Conference did not take place, since Great Britain as well as France declined to take part in it.[2] Thus the development of things had come to a standstill, many States having

[1] See details in Martitz, l. c. II. p. 372.

[2] See details in Martitz, l. c. II. p. 479.

adopted, others declining to adopt, the Belgian clause, and the Russian proposal having fallen through.

The Swiss Solution of the Problem in 1892.

§ 337. Eleven years later, in 1892, Switzerland attempted a solution of the problem on a new basis. In that year Switzerland enacted an extradition law whose article 10 recognises the non-extradition of political criminals, but lays down the rule at the same time that political criminals shall nevertheless be surrendered in case the chief feature of the offence wears more the aspect of an ordinary than of a political crime, and that the decision concerning the extraditability of such criminals rests with the "Bundesgericht," the highest Swiss Court of Justice. This Swiss rule contains a better solution of the problem than the Belgian *attentat* clause in so far as it allows the circumstances of the special case to be taken into consideration. And the fact that the decision is taken out of the hands of the Government and transferred to the highest Court of the country, denotes likewise a remarkable progress. For the Government cannot now be blamed whether extradition is granted or refused, the decision of an independent Court of Justice being a certain guarantee that an impartial view of the circumstances of the case has been taken.[1]

Rationale for the Principle of Non-extradition of Political Criminals.

§ 338. The numerous attempts against the lives of heads of States, as the two attempts against the late Emperor William I. of Germany, the murder of Alexander II. of Russia in 1881, of President Carnot of France in 1894, of King Humbert of Italy in 1900, and the frequency of anarchistic crimes, have

[1] It ought to be mentioned that the Institute of International Law at its meeting at Geneva in 1892 (see Annuaire, XII. p. 182) adopted four rules concerning extradition of political criminals, but I do not think that these rules give on the whole much satisfaction.

shaken the value of the principle of non-extradition of political criminals in the opinion of the civilised world, as illustrated by the three practical attempts described above to meet certain difficulties. It is, consequently, no wonder that some writers[1] plead openly and directly for the abolition of this principle, maintaining that it was only the product of abnormal times and circumstances such as were in existence during the first half of the nineteenth century, and that with their disappearance the principle is likely to do more harm than good. And indeed it cannot be denied that the application of the principle in favour of some criminals, such as the anarchistic murderers and bomb-throwers, could only be called an abuse. But the question is whether, apart from such exceptional cases, the principle itself is still to be considered as justified or not.

Without doubt the answer must be in the affirmative. I readily admit that every political crime is by no means an honourable deed, which as such deserves protection. Still, political crimes are committed by the best of patriots, and, what is of more weight, they are in many cases a consequence of oppression on the part of the respective Governments. They are comparatively infrequent in free countries, where there is individual liberty, where the nation governs itself, and where, therefore, there are plenty of legal ways to bring grievances before the authorities. A free country can never agree to surrender foreigners to their prosecuting home State for deeds done in the interest of the same freedom and liberty which the subjects of such free country enjoy. For individual liberty and self-government of nations are demanded by modern civilisation, and their gradual realisation

[1] See, for instance, Rivier, I. p. 354.

over the whole globe is conducive to the welfare of the human race.

Political crimes may certainly be committed in the interest of reaction as well as in the interest of progress, and reactionary political criminals may have occasion to ask for asylum as well as progressive political criminals. The principle of non-extradition of political criminals indeed extends its protection over the former too, and this is the very point where the value of the principle reveals itself. For no State has a right to interfere with the internal affairs of another State, and, if a State were to surrender reactionary political criminals but not progressive ones, the prosecuting State of the latter could indeed complain and consider the refusal of extradition an unfriendly act. If, however, non-extradition is made a general principle which finds its application in favour of political criminals of every kind, no State can complain if extradition is refused. Have not reactionary States the same faculty of refusing the extradition of reactionary political criminals as free States have of refusing the extradition of progressive political criminals?

Now, many writers agree upon this point, but maintain that such arguments meet the so-called purely political crimes only, and not the relative or complex political crimes, and they contend, therefore, that the principle of non-extradition ought to be restricted to the former crimes only. But to this I cannot assent. No revolt happens without such complex crimes taking place, and the individuals who commit them may indeed deserve the same protection as other political criminals. And, further, although I can under no circumstances approve of murder, can never sympathise with a murderer, and can never pardon

his crime, it may well be the case that the murdered official or head of a State has by inhuman cruelty and oppression himself whetted the knife which cut short his span of life. On the other hand, the mere fact that a crime was committed for a political purpose may well be without any importance in comparison with its detestability and heinousness. Attempts on heads of States, such, for example, as the murders of Presidents Lincoln and Carnot or of Alexander II. of Russia and Humbert of Italy, are as a rule, and all anarchistic crimes are without any exception, crimes of that kind. Criminals who commit such crimes ought under no circumstances to find protection and asylum, but ought to be surrendered for the purpose of receiving their just and appropriate punishment.

How to avoid Misapplication of the Principle of Non-extradition of Political Criminals.

§ 339. The question, however, is how to sift the chaff from the wheat, how to distinguish between such political criminals as deserve an asylum and such as do not. The difficulties are great and partly insuperable as long as we do not succeed in finding a satisfactory conception of the term "political crime." But such difficulties are only partly, not wholly, insuperable. The step taken by the Swiss extradition law of 1892 is so far in advance as to meet a great many of the difficulties. There is no doubt that the adoption of the Swiss rule by all the other civilised States would improve matters more than the universal adoption of the so-called Belgian *attentat* clause. The fact that according to Swiss law each case of complex political crime is unravelled and obtains the verdict of an independent Court according to the very circumstances, conditions, and requirements under which it occurred, is of the greatest value. For it enables every case

to be met in such a way as it deserves, without exposing and compromising the Government, and without sacrificing the principle of non-extradition of political criminals as a valuable rule. With the charge made by some writers[1] that the Swiss law does not give criteria for the guidance of the Court in deciding whether extradition for complex crimes should be granted or not, I cannot agree. In my opinion, the very absence of such criteria proves the superiority of the Swiss clause to the Belgian *attentat* clause. On the one hand, the latter is quite insufficient, for it restricts its stipulations to murder of heads of States and members of their families only. But I see no reason why individuals guilty of any murder—as provided by the Russian proposal—or who have committed other crimes, such as arson, theft, and the like, should not be surrendered in case the political motive or purpose of the crime is of no importance in comparison with the crime itself. On the other hand, the Belgian clause goes too far, since exceptional cases of murder of heads of States from political motives or for political purposes might occur which do not deserve extradition. The Swiss clause, however, with its absence of fixed distinctions between such complex crimes as are extraditable, and such as are not, permits the consideration of the circumstances, conditions, and requirements under which a complex crime was committed. It is true that the responsibility of the Court of Justice which has to decide whether such a complex crime is extraditable is great. But it is to be taken for granted that such Court will give its decision with impartiality, fairness, and justice. And it need not be feared that such

[1] See, for instance, Martitz, l. c. II. pp. 533–539.

Court will grant asylum to a murderer, incendiary, and the like, unless convinced that the deed was really political.

Reactionary Extradition Treaties.

§ 340. Be that as it may, the present condition of matters is a danger to the very principle of non-extradition of political criminals. Under the influence of the excitement caused by numerous criminal attempts in the last quarter of the nineteenth century, a few treaties have already been concluded which make a wide breach in this principle. It is Russia which is leading the reaction. This Power in 1885 concluded treaties with Prussia and Bavaria which stipulate the extradition of all individuals who have made an attack on the life, the body, or the honour[1] of a monarch, or of a member of his family, or who have committed any kind of murder or attempt to murder. And the extradition treaty between Russia and Spain of 1888 goes even further and abandons the principle of non-extradition of political criminals altogether. Fortunately, the endeavour of Russia to abolish this principle altogether has not succeeded. In her extradition treaty with Great Britain of 1886 she had to adopt it without any restriction, and in her extradition treaties with Portugal of 1887, with Luxemburg of 1892, and with the United States and Holland of 1893, she had to adopt it with a restrictive clause similar to the Belgian *attentat* clause.

[1] Thus, even for *lèse-majesté* extradition must be granted.

PART III

ORGANS OF THE STATES FOR THEIR INTERNATIONAL RELATIONS



CHAPTER I

HEADS OF STATES, AND FOREIGN OFFICES

I

Position of Heads of States according to International Law

Hall, § 97—Phillimore, II. §§ 101 and 102—Bluntschli, §§ 115-125—Holtzendorff in Holtzendorff, II. pp. 77-81—Ullmann, § 30—Rivier, I. § 32—Fiore, II. No. 1097—Bonfils, No. 632—Bynkershoek, "De foro legatorum" (1721), c. III. § 13.

Necessity of a Head for every State.

§ 341. As a State is an abstraction from the fact that a multitude of individuals live in a country under a Sovereign Government, every State must have a head as its highest organ, which represents it within and without its borders in the totality of its relations. Such head is the monarch in a monarchy and a president or a body of individuals, as the Bundesrath of Switzerland, in a republic. The Law of Nations prescribes no rules as regards the kind of head a State may have. Every State is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution it likes and of changing such Constitution according to its discretion. Some kind or other of a head of the State is, however, necessary according to International Law, as without a head there is no State in existence, but an anarchy.

§ 342. In case the head of a State changes, it is

Recognition of Heads of States.

usual to notify this fact to other States. The latter usually recognise the new head through some formal act, such as a congratulation, for example. But neither such notification nor recognition is strictly necessary according to International Law, as an individual becomes head of a State, not through the recognition of other States, but through Municipal Law. Such notification and recognition are, however, of legal importance. For through notification a State declares that the individual concerned is its highest organ, and has by Municipal Law the power to represent the State in the totality of its international relations. And through recognition the other States declare that they are ready to negotiate with such individual as the highest organ of his State. But recognition of a new head by other States is in every respect a matter of discretion. Neither has a State the right to demand from other States the recognition of its new head, nor has any State a right to refuse such recognition. Thus Russia, Austria, and Prussia refused until 1848 recognition to Isabella Queen of Spain, who had come to the throne as an infant in 1833. But in the long run recognition can practically not be withheld, for without it international intercourse is impossible, and States with self-respect will exercise retorsion if recognition is refused to the heads they have chosen. Thus, when, after the unification of Italy in 1861, Mecklenburg and Bavaria refused the recognition of Victor Emanuel as King of Italy, Count Cavour revoked the *exequatur* of the consuls of these States in Italy.

But it must be emphasised that recognition of a new head of a State by no means implies the recognition of such head as the legitimate head

of the State in question. Recognition is in fact nothing else than the declaration of other States that they are ready to deal with a certain individual as the highest organ of the particular State, and the question remains totally undecided whether such individual is or is not to be considered the legitimate head of that State.

Competence of Heads of States.

§ 343. The head of a State, as its chief organ and representative in the totality of its international relations, acts for his State in the latter's international intercourse, with the consequence that all his legally relevant international acts are considered acts of his State. His competence to perform such acts is termed *jus repraesentationis omnimodae*. It comprises in substance chiefly: reception and mission of diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace. But it is a question of the special case, how far this competence is independent of Municipal Law. For heads of States exercise this competence for their States and as the latter's representatives, and not in their own right. If a head of a State should, for instance, ratify a treaty without the necessary approval of his Parliament, he would go beyond his powers, and therefore such treaty would not be binding upon his State.[1]

On the other hand, this competence is certainly independent of the question whether a head of a State is the legitimate head or a usurper. The mere fact that an individual is for the time being the head of a State makes him competent to act as such head, and his State is legally bound by his acts. It may, however, be difficult to decide whether a certain individual is or is not the head of

[1] See below, § 497.

a State, for after a revolution some time always elapses before matters are settled.

Heads of States Objects of the Law of Nations.

§ 344. Heads of States are never subjects[1] of the Law of Nations. The position a head of a State has according to International Law is due to him, not as an individual, but as the head of his State. His position is derived from international rights and duties of his State, and not from international rights of his own. Consequently, all rights possessed by heads of States abroad are not international rights, but rights which must be granted to them by the Municipal Law of the foreign State on whose territory foreign heads of States are temporarily staying, and such rights must be granted in compliance with international rights of the home States of the respective heads. Thus, heads of States are not subjects but objects of International Law, and in this regard are like any other individual.

Honours and Privileges of Heads of States.

§ 345. All honours and privileges of heads of States due to them by foreign States are derived from the fact that dignity is a recognised quality of States as members of the Family of Nations and International Persons.[2] Concerning such honours and privileges, International Law distinguishes between monarchs and heads of republics. This distinction is the necessary outcome of the fact that the position of monarchs according to the Municipal Law of monarchies is totally different from the position of heads of republics according to the Municipal Law of the republics. For monarchs are sovereigns, but heads of republics are not.

[1] But Heffter (§ 48) maintains the contrary, and Phillimore (II. § 100) designates monarchs *mediately and derivatively* as subjects of International Law. The matter is treated in detail above, §§ 13 and 288-290; see also below, § 384.

[2] See above, § 121.

II

MONARCHS

Vattel, I. §§ 28-45; IV. § 108—Hall, § 49—Lawrence, § 126—Phillimore, II. §§ 108-113—Taylor, § 129—Bluntschli, §§ 126-153—Heffter, §§ 48-57—Ullmann, §§ 31-32—Rivier, I. § 33—Calvo, III. §§ 1454-1479—Fiore, II. Nos. 1098-1102—Bonfils, Nos. 633-647—Pradier-Fodéré, III. Nos. 1564-1591.

Sovereignty of Monarchs.

§ 346. In every monarchy the monarch appears as the representative of the sovereignty of the State and thereby becomes a Sovereign himself, a fact which is recognised by International Law. And the difference between the Municipal Laws of the different States regarding this point matters in no way. Consequently, International Law recognises all monarchs as equally sovereign, although the difference between the constitutional positions of the monarchs is enormous, if looked upon in the light of the rules laid down by the Municipal Laws of the different States. Thus, the Emperor of Russia, who is an absolute monarch, and the King of England, who is sovereign in Parliament only, and therefore far from absolute, are indifferently sovereign according to International Law.

Consideration due to Monarchs at home.

§ 347. Not much need be said as regards the consideration due to a monarch from other States when within the boundaries of his own State. Foreign States have to give him his usual and recognised predicates[1] in all official communications. Every monarch must be treated as a peer of other monarchs, whatever difference in title and actual power there may be between them.

Consideration due to Monarchs abroad.

§ 348. As regards, however, the consideration due to a monarch abroad from the State on whose terri-

[1] Details as regards the predicates of monarchs are given above, § 119.

tory he is staying in time of peace and with the consent and the knowledge of the Government, details must necessarily be given. The consideration due to him consists in honours, inviolability, and exterritoriality.

(1) In consequence of his character of Sovereign, his home State has the right to demand that certain ceremonial honours be rendered to him, the members of his family, and the members of his retinue. He must be addressed by his usual predicates. Military salutes must be paid to him, and the like.

(2) As his person is sacrosanct, his home State has a right to insist that he be afforded special protection as regards personal safety, the maintenance of personal dignity, and the unrestrained intercourse with his Government at home. Every offence against him must be visited with specially severe penalties. On the other hand, he must be exempt from every kind of criminal jurisdiction. The wife of a Sovereign must be afforded the same protection and exemption.

(3) He must be granted so-called exterritoriality conformably with the principle: "*Par in parem non habet imperium*," according to which one Sovereign cannot have any power over another Sovereign. He must, therefore, in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff.[1] The house where he has taken his residence must enjoy the same exterritoriality as the official residence of an ambassador; no policeman or other official must be allowed to enter

[1] See Phillimore, II. § 113 A, where several cases tried by English Courts are discussed, in which foreign Sovereigns appeared as plaintiffs.

it without his permission. Even if a criminal takes refuge in such residence, the police must be prevented from entering it, although, if the criminal's surrender is deliberately refused, the Government may request the recalcitrant Sovereign to leave the country and then arrest the criminal. If a foreign Sovereign has property in a foreign country, such property is under the latter's jurisdiction. But as soon as such Sovereign takes his residence on the property, it must become exterritorial for the time being. Further, a Sovereign staying in a foreign country must be allowed to perform all his own governmental acts and functions, except when his country is at war with a third State and the State in which he is staying remains neutral. And, lastly, a Sovereign must be allowed, within the same limits as at home, to exercise civil jurisdiction over the members of his retinue. In former times even criminal jurisdiction over the members of his suite was very often claimed and conceded, but this is now antiquated.[1] The wife of a Sovereign must likewise be granted exterritoriality, but not other members of a Sovereign's family.[2]

However, exterritoriality is in the case of a foreign Sovereign, as in any other case, a fiction only, which is kept up for certain purposes within certain limits. Should a Sovereign during his stay within a foreign State abuse his privileges, such State is not obliged to bear such abuse tacitly and quietly, but can request him to leave the country. And when a

[1] A celebrated case happened in 1657 in France, when Christina, Queen of Sweden, although she had already abdicated, sentenced her chamberlain, Monaldeschi, to death, and had him executed by her bodyguard.

[2] See Rivier, I. p. 121, and Bluntschli, § 154; but, according to Bluntschli, exterritoriality need not in strict law be granted even to the wife of a Sovereign.

foreign Sovereign commits acts of violence or such acts as endanger the internal or external safety of the State, the latter can put him under restraint to prevent further acts of the same kind, but must at the same time bring him as speedily as possible to the frontier.

The Retinue of Monarchs abroad.

§ 349. The position of the individuals who accompany a monarch during his stay abroad is a matter of dispute. Some publicists maintain that the home State can claim the privilege of exterritoriality as well for the members of his suite as for the Sovereign himself, but others deny this.[1] I believe that the opinion of the former is correct, since I cannot see any reason why a Sovereign abroad should as regards the members of his suite be in an inferior position to a diplomatic envoy.[2]

Monarchs travelling incognito.

§ 350. Hitherto the case only has been treated where a monarch is staying in a foreign country with the official knowledge of the latter's Government. Such knowledge may be held in the case of a monarch travelling *incognito*, and he enjoys then the same privileges as if travelling not *incognito*. The only difference is that many ceremonial observances, which are due to a monarch, are not rendered to him when travelling *incognito*. But the case may happen that a monarch is travelling in a foreign country *incognito* without the latter's Government having the slightest knowledge thereof. Such monarch cannot then of course be treated otherwise than as any other foreign individual, but he can at any time make known his real character and assume the privileges due to him. Thus the late King William of Holland, when travelling *incognito* in Switzerland in 1873, was

[1] See Bluntschli, § 154, and Hall, § 49, in contradistinction to Martens, I. § 83.

[2] See below, §§ 401-405.

condemned to a fine for some slight contravention, but the sentence was not carried out, as he gave up his *incognito*.

Deposed and Abdicated Monarchs.

§ 351. All privileges mentioned must be granted to a monarch only as long as he is really the head of a State. As soon as he is deposed or has abdicated, he is no longer a Sovereign. Therefore in 1870 and 1872 the French Courts permitted, because she was deposed, a civil action against Queen Isabella of Spain, then living in Paris, for money due to the plaintiffs. Nothing, of course, prevents the Municipal Law of a State from granting the same privileges to a foreign deposed or abdicated monarch as to a foreign Sovereign, but the Law of Nations does not exact any such courtesy.

Regents.

§ 352. All privileges due to a monarch are also due to a Regent, at home or abroad, whilst he governs on behalf of an infant, or of a King who is through illness incapable of exercising his powers. And it matters not whether such Regent is a member of the King's family and a Prince of royal blood or not.

Monarchs in the service or subjects of Foreign Powers.

§ 353. When a monarch accepts any office in a foreign State, when he serves, for instance, in a foreign army, as the monarchs of the small German States have formerly frequently done, he submits to such State as far as the duties of the office are concerned, and his home State cannot claim any privileges for him that otherwise would be due to him.

When a monarch is at the same time a subject of another State, distinction must be made between his acts as a Sovereign on the one hand and his acts as a subject on the other. For the latter, the State whose subject he is has jurisdiction over him, but not for the former. Thus, in 1836, the Duke of Cumberland became King of Hanover, but at the

same time he was by hereditary title an English Peer and therefore an English subject. And in 1844, in the case *Duke of Brunswick* v. *King of Hanover*, the Master of the Rolls held that the King of Hanover was liable to be sued in the Courts of England in respect of any acts done by him as an English subject.[1]

III

Presidents of Republics

Bluntschli, § 134—Stoerk in Holtzendorff, II. p. 661—Ullmann, § 32—Rivier, I. § 33—Martens, I. § 80.

Presidents not Sovereigns.

§ 354. In contradistinction to monarchies, in republics the people itself, and not a single individual, appears as the representative of the sovereignty of the State, and accordingly the people styles itself the Sovereign of the State. And it will be remembered that the head of a republic may consist of a body of individuals, such as the Bundesrath in Switzerland. But in case the head is a President, as in France and the United States of America, such President represents the State, at least in the totality of its international relations. He is, however, not a Sovereign, but a citizen and subject of the very State whose head he is as President.

Position of Presidents in general.

§ 355. Consequently, his position at home and abroad cannot be compared with that of monarchs, and International Law does not empower his home State to claim for him the same, but only similar, consideration as that due to a monarch. Neither at home nor abroad, therefore, does a president of a

[1] See Phillimore, II. § 109.

republic appear as a peer of monarchs. Whereas all monarchs are in the style of the Court phraseology considered as though they were members of the same family, and therefore address each other in letters as "my brother," a president of a republic is usually addressed in letters from monarchs as "my friend." His home State can certainly at home and abroad claim such honours for him as are due to its dignity, but no such honours as must be granted to a Sovereign monarch.

Position of Presidents abroad.

§ 356. As to the position of a president when abroad, writers on the Law of Nations do not agree. Some[1] maintain that, since a president is not a Sovereign, his home State can never claim for him the same privileges as for a monarch, and especially that of exterritoriality. Others[2] make a distinction whether a president is staying abroad in his official capacity as head of a State or for his private purposes, and they maintain that his home State could only in the first case claim exterritoriality for him. Others[3] again will not admit any difference in the position of a president abroad from that of a monarch abroad. How the States themselves think as regards the position of the exterritoriality of presidents of republics abroad cannot be ascertained, since to my knowledge no case has hitherto occurred in practice from which a conclusion may be drawn. But practice seems to have settled the question of ceremonial honours due to a president officially abroad; they are such as correspond to the rank of his home State, and not such as are due to a monarch. As regards exterritoriality, I believe that future contin-

[1] Ullmann, § 32; Rivier, I. p. 423; Stoerk in Holtzendorff, II. p. 658.

[2] Martens, I. § 80; Bluntschli, § 134.

[3] Despagnet, No. 254; Bonfils, No. 632; Hall, § 97.

gencies will create the practice on the part of the States of granting this privilege to presidents and members of their suite in a similar way as to monarchs. I cannot see that there is any danger in such a grant. And nobody can deny that, if exterritoriality is not granted, all kinds of friction and even conflicts might arise. Although not Sovereigns, presidents of republics fill for the time being a sublime office, and the grant of exterritoriality to them is a tribute paid to the dignity of the States they represent.

IV

Foreign Offices

Heffter, § 201—Geffcken in Holtzendorff, III. p. 668—Ullmann, § 33—Rivier, I. § 34—Bonfils, Nos. 648-651.

Position of the Secretary for Foreign Affairs.

§ 357. As a rule nowadays no head of a State, be he a monarch or a president, negotiates directly and in person with a foreign Power, although this happens occasionally. The necessary negotiations are regularly conducted by the Foreign Office, an office which since the Westphalian Peace has been in existence in every civilised State. The chief of this office, the Secretary for Foreign Affairs, who is a Cabinet Minister, directs the foreign affairs of the State in the name of the head and with the latter's consent; he is the middleman between the head of the State and other States. And although many a head of a State directs in fact all the foreign affairs himself, the Secretary for Foreign Affairs is nevertheless the person through whose hands all transactions must pass. Now, as regards the position of such Foreign Secretary at home, it is the Municipal Law of a

State which regulates this. International Law defines his position regarding international intercourse with other States. He is the chief over all the ambassadors of the State, over its consuls, and over its other agents in matters international. It is he who either in person or through the envoys of his State approaches foreign States for the purpose of negotiating matters international. And again it is he whom foreign States through their Foreign Secretaries or their envoys approach for the like purpose. He is present when Ministers hand in their credentials to the head of the State. All documents of importance regarding foreign matters are signed by him or his substitute, the Under-Secretary for Foreign Affairs. It is, therefore, usual to notify the appointment of a new Foreign Secretary of a State to such foreign States as are represented within its boundaries by diplomatic envoys; the new Foreign Secretary himself makes this notification.

CHAPTER II

DIPLOMATIC ENVOYS

I

THE INSTITUTION OF LEGATION

Phillimore, II. §§ 143-153—Taylor, § 274—Twiss, § 199—Geffcken in Holtzendorff, III. pp. 605-618—Rivier, I. § 35—Ullmann, § 34—Martens, II. § 6—Gentilis, "De legationibus libri III." (1585)—Wicquefort, "L'Ambassadeur et ses fonctions" (1680)—Bynkershoek, "De foro legatorum" (1721)—Garden, "Traité complet de diplomatie" (3 vols. 1833)—Mirus, "Das Europäische Gesandtschaftsrecht" (2 vols. 1847)—Charles de Martens, "Le guide diplomatique" (2 vols. 1832; 6th ed. by Geffcken, 1866)—Montague Bernard, "Four Lectures on Subjects connected with Diplomacy" (1868), pp. 111-162 (3rd Lecture)—Alt, "Handbuch des Europäischen Gesandtschaftsrechts" (1870)—Pradier-Fodéré, "Cours de droit diplomatique" (2 vols. 1881)—Krauske, "Die Entwickelung der ständigen Diplomatie," etc. (1885). Lehr, "Manuel théorique et pratique des agents diplomatiques" (1888).

Development of Legations.

§ 358. Legation as an institution for the purpose of negotiating between different States is as old as history, whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity, where no such law as the modern International Law was known, ambassadors enjoyed everywhere a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct. Yet permanent legations were unknown till very late in the Middle Ages. The fact that the Popes had permanent representatives—so-called *apocrisiarii* or *responsales*—at the Court of the Frankish Kings and

at Constantinople until the final separation of the Eastern from the Western Church, ought not to be considered as the first example of permanent legations, as the task of these papal representatives had nothing to do with international affairs, but with those of the Church only. It was not until the thirteenth century that the first permanent legations made their appearance. The Italian Republics, and Venice in especial, created the example[1] by keeping representatives stationed at one another's capitals for the better negotiation of their international affairs. And in the fifteenth century these Republics began to keep permanent representatives in Spain, Germany, France, and England. Other States followed the example. Special treaties were often concluded stipulating permanent legations, such as in 1520, for instance, between the King of England and the Emperor of Germany. From the end of the fifteenth century England, France, Spain, and Germany kept up permanent legations at one another's Courts. But it was not until the second half of the seventeenth century that permanent legations became a general institution, the Powers following the example of France under Louis XIV. and Richelieu. It ought to be specially mentioned that Grotius[2] thought permanent legations to be wholy unnecessary. The course of events has, however, shown that Grotius's views as regards permanent legations were short-sighted. Nowadays the Family of Nations could not exist without them, as they are the channel through which nearly the whole, and certainly all important, official intercourse of the States flows.

[1] See Nys, Les Origines du droit international (1894), p. 295.

[2] De jure belli ac pacis, II. c. 28, § 3: "Optimo autem jure rejici possunt, quae nunc in usu sunt, legationes assiduae, quibus cum non sit opus, docet mos antiquus, cui illae ignoratae."

Diplomacy.

§ 359. The rise of permanent legations created the necessity for a new class of State officials, the so-called diplomatists; yet it was not until the end of the eighteenth century that the terms "diplomatist" and "diplomacy" came into general use. And although the art of diplomacy is as old as official intercourse between States, such a special class of officials as are now called diplomatists did not and could not exist until permanent legations had become a general institution. In this as in other cases the office has created the class of men necessary for it. International Law has nothing to do with the education and general character of these officials. Every State is naturally competent to create its own rules, if any, as regards these points. Nor has International Law anything to do with *diplomatic usages*, although these are more or less of importance, as they may occasionally grow into customary rules of International Law. But I would notice one of these usages—namely, that as regards the *language* which is in use in diplomatic intercourse. This language was formerly Latin, but through the political ascendency of France under Louis XIV. it is now French. However, this is a usage of diplomacy only, and not a rule of International Law.[1] Each State can use its own language in all official communications to other States, and States which have the same language regularly do so in their intercourse with each other. But between States of different tongues and, further, at Conferences and Congresses, it is convenient to make use of a language which is generally known. This is nowadays French, but nothing could prevent diplomatists from dropping French at any moment and adopting another language instead.

[1] See Mirus, Das Europäische Gesandtschaftsrecht, I. §§ 266-268.

II

Right of Legation

Grotius, II. c. 18—Vattel, IV. §§ 55-68—Hall, § 98—Phillimore, II. §§ 115-139—Taylor, §§ 285-288—Twiss, §§ 201-202—Wheaton, §§ 206-209—Bluntschli, §§ 159-165—Heffter, § 200—Geffcken in Holtzendorff, III. pp. 620-631—Ullmann, § 35—Rivier, I. § 35—Bonfils, Nos. 658-667—Pradier-Fodéré, II. Nos. 1225-1256—Fiore, II. Nos. 1112-1117—Calvo, III. §§ 1321-1325—Martens, II. §§ 7-8.

Conception of Right of Legation.

§ 360. Right of legation is the right of a State to send and receive diplomatic envoys. The right to send such envoys is termed *active* right of legation, in contradistinction to the *passive* right of legation, as the right to receive such envoys is termed. Some writers[1] on International Law assert that no right but a mere competence to send and receive diplomatic envoys exists according to International Law, maintaining that no State is bound by International Law to send or receive such envoys. But this is certainly wrong in its generality. A State is obviously bound neither to send diplomatic envoys nor to receive *permanent* envoys. On the other hand, the very existence[2] of the Family of Nations makes it necessary for the members or some of the members to negotiate occasionally on certain points. Such negotiation would be impossible in case one member could always and under all circumstances refuse to receive an envoy from the other members. The duty of every member to listen, under ordinary circumstances, to a message from another brought by a diplomatic envoy is, therefore, an outcome of its very membership of the Family of Nations, and this

[1] See, for instance, Wheaton, § 207; Hoilborn, System, p. 182.
[2] See above, § 141.

duty corresponds to the right of every member to send such envoys. But the exercise of the active right of legation is discretionary. No State need send diplomatic envoys at all, although practically all States do at least occasionally send such envoys, and most States send permanent envoys to many other States. The passive right of legation is discretionary as regards the reception of *permanent* envoys only.

What States possess the Right of Legation.

§ 361. Not every State, however, possesses the right of legation. Such right pertains chiefly to full-Sovereign States,[1] for other States possess this right under certain conditions only.

(1) Half-Sovereign States, such as States under the suzerainty or the protectorate of another State, can as a rule neither send nor receive diplomatic envoys. Thus, Bulgaria and Egypt are destitute of such right, and the Powers are represented in these States only by consuls or agents without diplomatic character. But there may be exceptions to this rule. Thus, according to the Peace Treaty of Kainardgi of 1774 between Russia and Turkey, the two half-Sovereign principalities of Moldavia and Wallachia had the right of sending Chargés d'Affaires to foreign Powers. Thus, further, the late South African Republic, which was a State under British suzerainty in the opinion of Great Britain, used to keep permanent diplomatic envoys at several foreign States.

(2) Part-Sovereign member States of a Federal State may or may not have the right of legation

[1] It should be emphasised that the Holy See, which is in some respects treated as though an International Person, can send and receive *envoys*, who must in every respect be considered as though they were diplomatic envoys. That they are actually not diplomatic envoys, although so treated, becomes apparent from the fact that they are not *agents* for international affairs of States, but exclusively for affairs of the Roman Catholic Church. (See above, § 106.)

besides the Federal State. It is the constitution of the Federal State which regulates this point. Thus, the member-States of Switzerland and of the United States of America have no right of legation, but those of the German Empire certainly have. Bavaria, for example, sends and receives several diplomatic envoys.

Right of Legation by whom exercised

§ 362. As, according to International Law, a State is represented in its international relations by its head, it is he who acts in the exercise of his State's right of legation. But Municipal Law may, just as it designates the person who is the head of the State, impose certain conditions and restrictions upon the head as regards the exercise of such right. And the head himself may, provided that it is sanctioned by the Municipal Law of his State, delegate[1] the exercise of such right to any representative he chooses.

It may, however, in consequence of revolutionary movements, be doubtful who the real head of a State is, and in such cases it remains in the discretion of foreign States to make their choice. But it is impossible for foreign States to receive diplomatic envoys from both claimants to the headship of the same State, or to send diplomatic envoys to both of them. And as soon as a State has recognised the head of a State who came into his position through a revolution, it can no longer keep up diplomatic relations with the former head.

It should be mentioned that a revolutionary party which is recognised as a belligerent Power has nevertheless no right of legation, although foreign States may negotiate with such party in an informal way

[1] See Phillimore, II. §§ 126-133, where several interesting cases of such delegation are discussed.

through political agents without diplomatic character, to provide for the temporal security of the persons and property of their subjects within the territory under the actual sway of such party. Such revolutionary party as is recognised as a belligerent Power is in some points only treated as though it were a subject of International Law; but it is not a State, and there is no reason why International Law should give it the right to send and receive diplomatic envoys.

It should further be mentioned that neither an abdicated nor a deposed head has a right to send and receive diplomatic envoys.[1]

III

Kinds and Classes of Diplomatic Envoys

Vattel, IV. § 69-75—Phillimore, II. §§ 211-224—Twiss, I. §§ 204-209—Heffter, § 208—Geffcken in Holtzendorff, III. pp. 635-646—Calvo, III. §§ 1326-1336—Bonfils, Nos. 668-676—Pradier-Fodéré, III. §§ 1277-1290—Rivier, I. pp. 443-453.

Envoys Ceremonial and Political.

§ 363. Two different kinds of diplomatic envoys are to be distinguished—namely, such as are sent for political negotiations and such as are sent for the purpose of ceremonial function or notification of changes in the headship. For States very often send special envoys to one another on occasion of coronations, weddings, funerals, jubilees, and the like; and it is also usual to send envoys to announce a fresh accession to the throne. Such envoys ceremonial have the same standing as envoys political for real

[1] See Phillimore, II. §§ 124-125, where the case of Bishop Ross, ambassador of Mary Queen of Scots, is discussed.

State negotiations. Among the envoys political, again, two kinds are to be distinguished—namely, first, such as are permanently or temporarily accredited to a State for the purpose of negotiating with such State, and, second, such as are sent to represent the sending State at a Congress or Conference. The latter are not, or need not be, accredited to the State on whose territory the Congress or Conference takes place, but they are nevertheless diplomatic envoys and enjoy all the privileges of such envoys as regards exterritoriality and the like which concern the inviolability and safety of their persons and the members of their suites.

Classes of Diplomatic Envoys.

§ 364. Diplomatic envoys accredited to a State differ in class. These classes did not exist in the early stages of International Law. But during the sixteenth century a distinction between two classes of diplomatic envoys gradually arose, and at about the middle of the seventeenth century, after permanent legations had come into general vogue, two such classes became generally recognised—namely, extraordinary envoys, called Ambassadors, and ordinary envoys, called Residents; Ambassadors being received with higher honours and taking precedence of the other envoys. Disputes arose frequently regarding precedence, and the States tried in vain to avoid them by introducing during the eighteenth century another class—namely, the so-called Ministers Plenipotentiary. At last the Powers assembled at the Vienna Congress came to the conclusion that the matter ought to be settled by an international understanding, and they agreed, therefore, on March 19, 1815, upon the establishment of three different classes—namely, first, Ambassadors; second, Ministers Plenipotentiary and Envoys Extraordinary; third, Chargés d'Affaires. And

the five Powers assembled at the Congress of Aix-la-Chapelle in 1818 agreed upon a fourth class—namely, Ministers Resident, to rank between Ministers Plenipotentiary and Chargés d'Affaires. All the other States either expressly or tacitly accepted these arrangements, so that nowadays the four classes are an established order. Although their privileges are materially the same, they differ in rank and honours, and they must therefore be treated separately.

Ambassadors.

§ 365. Ambassadors form the first class. Only States enjoying royal honours[1] are entitled to send and to receive Ambassadors, as also is the Holy See, whose first-class envoys are called *Nuncios*, or *Legati a latere* or *de latere*. Ambassadors are considered to be personal representatives of the heads of their States and enjoy for this reason special honours. Their chief privilege—namely, that of negotiating with the head of the State personally—has, however, little value nowadays, as almost all the States have constitutional government to a certain extent, which necessitates that all the important business should go through the hands of a Foreign Secretary.

Ministers Plenipotentiary and Envoys Extraordinary.

§ 366. The second class, the Ministers Plenipotentiary and Envoys Extraordinary, to which also belong the Papal Internuncios, are not considered to be personal representatives of the heads of their States. Therefore they do not enjoy all the special honours of the Ambassadors, and have not the privilege of treating with the head of the State personally. But otherwise there is no difference between these two classes.

Ministers Resident.

§ 367. The third class, the Ministers Resident, enjoy fewer honours and rank below the Ministers Plenipotentiary. But beyond the fact that Ministers

[1] See above, § 117, No. 1.

Resident do not enjoy the title "Excellency," there is no difference between them and the Ministers Plenipotentiary.

Chargés d'Affaires.

§ 368. The fourth class, the Chargés d'Affaires, differs chiefly in one point from the first, second, and third class—namely, in so far as its members are accredited from Foreign Office to Foreign Office, whereas the members of the other classes are accredited from head of State to head of State. The Chargés d'Affaires enjoy, therefore, much less honours than the other diplomatic envoys. It must be specially mentioned that a distinction is made between a Chargé d'Affaires and a Chargé des Affaires. The latter is a member of a legation whom the head of the legation delegates for the purpose of taking his place during his absence on leave. Such a Chargé des Affaires ranks below the Chargés d'Affaires.

The Diplomatic Corps.

§ 369. All the Diplomatic Envoys accredited to the same State form, according to a diplomatic usage, a body which is styled the "Diplomatic Corps." The head of this body, the so-called "Doyen," is the Papal Nuncio, or, in case there is no Nuncio accredited, the oldest Ambassador, or, failing Ambassadors, the oldest Minister Plenipotentiary, and so on. As the Diplomatic Corps is not a body legally constituted, it performs no legal functions, but it is nevertheless of great importance, as it watches over the privileges and honours due to diplomatic envoys.

IV

Appointment of Diplomatic Envoys

Vattel, IV. §§ 76–77—Phillimore, II. §§ 227–231—Twiss, I. §§ 212–214—Ullmann, § 38—Calvo, III. §§ 1343–1345—Bonfils, Nos. 677–680—Wheaton, §§ 217–220.

Person and Qualification of the Envoy.

§ 370. International Law has no rules as regards the qualification of the individuals whom a State can appoint as diplomatic envoys, the States being naturally competent to act according to discretion, although of course there are many qualifications a diplomatic envoy must possess to fill his office successfully. The Municipal Laws of many States comprise, therefore, many details as regards the knowledge and training which a candidate for a permanent diplomatic post must possess, whereas regarding envoys ceremonial even the Municipal Laws have no provisions at all. The question is sometimes discussed whether females[1] might be appointed envoys. History relates a few cases of female diplomatists. Thus, for example, Louis XIV. of France accredited in 1646 Madame de Guébriant ambassador to the Court of Poland. During the last two centuries, however, no such case has to my knowledge occurred, although I doubt not that International Law does not prevent a State from sending a female as diplomatic envoy. But under the present circumstances many States would refuse to receive her.

Letter of Credence, Full Powers, Passports.

§ 371. The appointment of an individual as a diplomatic envoy is announced to the State to which he is accredited in certain official papers to be handed in by the envoy to the receiving State. *Letter of*

[1] See Mirus, Das europäische Gesandtschaftsrecht, I. §§ 127–128, and Phillimore, II. § 134.

Credence is the designation of the document in which the head of the State accredits a permanent ambassador or minister to a foreign State. Every such envoy receives a sealed Letter of Credence and an open copy. As soon as the envoy has arrived at the place of his designation, he sends the copy to the Foreign Office to make his arrival officially known. The sealed original, however, is handed in personally by the envoy to the head of the State to whom he is accredited. Chargés d'Affaires receive a Letter of Credence too, but as they are accredited from Foreign Office to Foreign Office, their Letter of Credence is signed, not by the head of their home State, but by its Foreign Office. Now a permanent diplomatic envoy needs no other empowering document in case he is not entrusted with any task outside the limits of the ordinary business of a permanent legation. But in case he is entrusted with any such task, as, for instance, if any special treaty or convention is to be negotiated, he requires a special empowering document—namely, the so-called *Full Powers* (*Pleins Pouvoirs*). They are given in Letters Patent signed by the head of the State, and they are either limited or unlimited Full Powers, according to the requirements of the case. Such diplomatic envoys as are sent, not to represent their home State permanently, but on an extraordinary mission such as representation at a Congress, negotiation of a special treaty, and other transactions, receive Full Powers only, and no Letter of Credence. Every permanent or other diplomatic envoy is also furnished with so-called *Instructions* for the guidance of his conduct as regards the objects of his mission. But such Instructions are a matter between the Envoy and his home State exclusively, and they have therefore, although they

may otherwise be very important, no importance for International Law. Every permanent diplomatic envoy receives, lastly, *Passports* for himself and his suite specially made out by the Foreign Office. These Passports the envoy after his arrival deposits at the Foreign Office of the State to which he is accredited, where they remain until he himself asks for them because he desires to leave his post, or until they are returned to him on his dismissal.

Combined Legations.

§ 372. As a rule, a State appoints different individuals as permanent diplomatic envoys to different States, but sometimes a State appoints the same individual as permanent diplomatic envoy to several States. As a rule, further, a diplomatic envoy represents one State only. But occasionally several States appoint the same individual as their envoy, so that one envoy represents several States.

Appointment of several Envoys.

§ 373. In former times States used frequently[1] to appoint more than one permanent diplomatic envoy as their representative in a foreign State. Although this would hardly occur nowadays, there is no rule against such a possibility. And even now it happens frequently that States appoint several envoys for the purpose of representing them at Congresses and Conferences. In such cases one of the several envoys is appointed senior, to whom the others are subordinate.

[1] See Mirus, l. c. I. §§ 117-119.

V

Reception of Diplomatic Envoys

Vattel, IV. §§ 65-67—Hall, § 98—Phillimore, II. §§ 133-139—Twiss, I. §§ 202-203—Taylor, §§ 285-290—Martens, II. § 8—Calvo, III. §§ 1353-1356—Pradier-Fodéré, III. §§ 1253-1260—Fiore, II. Nos. 1118-1120—Rivier, I. pp. 455-457.

Duty to receive Diplomatic Envoys.

§ 374. Every member of the Family of Nations that possesses the passive right of legation is under ordinary circumstances bound to receive diplomatic envoys accredited to itself from other States for the purpose of negotiation. But the duty extends neither to the reception of permanent envoys nor to the reception of temporary envoys under all circumstances.

(1) As regards permanent envoys, it is a generally recognised fact that a State is as little bound to receive them as it is to send them. Practically, however, every full-Sovereign State which desires its voice to be heard among the States receives and sends permanent envoys, as without such it would, under present circumstances, be impossible for a State to have any influence whatever in international affairs. It is for this reason that Switzerland, which in former times abstained entirely from sending permanent envoys, has abandoned her former practice and nowadays sends and receives several. The insignificant Principality of Lichtenstein is, as far as I know, the only full-Sovereign State which neither sends nor receives one single permanent legation.

But a State may receive a permanent legation from one State and refuse to do so from another. Thus, the Protestant States never *received* a permanent

legation from the Popes, even when the latter were heads of a State, and they still observe this rule, although one or another of them, such as Prussia for example, keeps a permanent legation at the Vatican.

(2) As regards temporary envoys, it is likewise a generally recognised fact among those writers who assert the duty of a State to receive under ordinary circumstances temporary envoys that there are exceptions to that rule. Thus, for example, a State which knows beforehand the object of a mission and does not wish to negotiate thereon can refuse to receive the mission. Thus, further, a belligerent can refuse[1] to receive a legation from the other belligerent, as war involves the rupture of all peaceable relations.

Refusal to receive a certain Individual.

§ 375. But the refusal to receive an envoy must not be confounded with the refusal to receive a certain individual as envoy. A State may be ready to receive a permanent or temporary envoy, but may object to the individual selected for that purpose. International Law gives no right to a State to insist upon the reception of such individual appointed by it as diplomatic envoy. Every State can refuse to receive as envoy a person objectionable to itself. And a State refusing an individual envoy is neither compelled to specify what kind of objection it has, nor to justify its objection. Thus, for example, most States refuse to receive one of their own subjects as an envoy from a foreign State.[2] Thus, again, the King

[1] But this is not generally recognised. See Vattel, IV. § 67; Phillimore, II. § 138; and Pradier-Fodéré, III. No. 1255.

[2] In case a State receives one of its own subjects as diplomatic envoy of a foreign State, it has to grant him all the privileges of such envoys, including exterritoriality. See *Macartney* v. *Garbutt*, L.R. 24 Q.B.D. 368. Article 15 of the Règlement sur les Immunités Diplomatiques, adopted in 1895 by the Institute of International

of Hanover refused in 1847 to receive a minister appointed by Prussia, because the individual was of the Roman Catholic faith. Italy refused in 1885 to receive Mr. Keiley as ambassador of the United States of America because he had in 1871 protested against the annexation of the Papal States. And when the United States sent the same gentleman as ambassador to Austria, the latter refused him reception on the ground that his wife was said to be a Jewess. Although, as is apparent from these examples, no State has a right to insist upon the reception of a certain individual as envoy, in practice States are often offended when reception is refused. Thus, in 1832 England did not cancel for three years the appointment of Sir Stratford Canning as ambassador to Russia, although the latter refused reception, and the post was practically vacant. In 1885, when, as above mentioned, Austria refused reception to a certain ambassador of the United States, the latter did not appoint another, although the rejected individual resigned, and the legation was for several years left to the care of a Chargé d'Affaires. To avoid such conflicts it is the good practice of many States never to appoint an individual as envoy without having ascertained beforehand whether the individual would be *persona grata*. And it is a customary rule of International Law that a State which does not object to the appointment of a certain individual, although its opinion has been asked beforehand, is bound to receive such individual.

Mode and Solemnity of Reception.

§ 376. In case a State does not object to the reception of a person as diplomatic envoy accredited to itself, his actual reception takes place as soon as he

Law (see Annuaire, XIV. p. 244), denies, however, to such an individual exemption from jurisdiction. See Phillimore, II. § 135, and Twiss, I. § 203.

has arrived at the place of his designation. But the mode of reception differs according to the class the envoy belongs to. If he be one of the first, second, or third class, it is the duty of the head of the State to receive him solemnly in a so-called public audience with all the usual ceremonies. For that purpose the envoy sends a copy of his credentials to the Foreign Office, which arranges a special audience with the head of the State for the envoy, when he delivers in person his sealed credentials.[1] If the envoy be a Chargé d'Affaires only, he is received in audience by the Secretary of Foreign Affairs, to whom he hands his credentials. Through the formal reception the envoy becomes officially recognised and can officially commence to exercise his functions. But such of his privileges as exterritoriality and the like, which concern the safety and inviolability of his person, he must be granted even before his official reception, as his character as diplomatic envoy is considered to date, not from the time of his official reception, but from the time when his credentials were handed to him on leaving his home State, his passports furnishing sufficient proof of his diplomatic character.

Reception of Envoys to Congresses and Conferences.

§ 377. It must be specially observed that all these details regarding the reception of diplomatic envoys accredited to a State do not apply to the reception of envoys sent to represent different States at a Congress or Conference. As such envoys are not accredited to the State on whose territory the Congress or Conference takes place, such State has no competence to refuse the reception of the appointed envoys, and no formal and official reception of the latter by the head of the State takes place. The

[1] Details concerning reception of envoys are given by Twiss, I. § 215, and Rivier, I. p. 467.

appointing States merely notify the appointment of their envoys to the Foreign Office of the State on whose territory the transactions take place, the envoys call upon the Foreign Secretary after their arrival to introduce themselves, and they are courteously received by him. They do not, however, hand in to him their Full Powers, but reserve them for the first meeting of the Congress or Conference, where they produce them in exchange with one another.

VI

Functions of Diplomatic Envoys

Rivier, I. § 37—Ullmann, § 39—Bonfils, Nos. 681-683—Pradier-Fodéré, III. §§ 1346-1376.

On Diplomatic Functions in general.

§ 378. A distinction must be made between functions of permanent envoys and of envoys for temporary purposes. The functions of the latter, who are either envoys ceremonial or such envoys political as temporarily only are accredited for the purpose of some definite negotiations or as representatives at Congresses and Conferences, are clearly demonstrated by the very purpose of their appointment. It is the functions of the permanent envoys which demand a closer consideration. These regular functions may be grouped together under the heads of negotiation, observation, and protection. But besides these regular functions a diplomatic envoy may be charged with other miscellaneous functions.

Negotiation.

§ 379. A permanent ambassador or other envoy represents his home State in the totality of its international relations not only with the State to which he is accredited, but also with other States. He is the

mouthpiece of the head of his home State and its Foreign Secretary as regards communications to be made to the State to which he is accredited. He likewise receives communications from the latter and reports them to his home State. In this way not only are international relations between these two States fostered and negotiated upon, but such international affairs of other States as are of general interest to all or a part of the members of the Family of Nations are also discussed. Owing to the fact that all the more important Powers keep permanent legations accredited to one another, a constant exchange of views in regard to affairs international is taking place between them.

Observation.

§ 380. But these are not all the functions of permanent diplomatic envoys. Their task is, further, to observe attentively every occurrence which might affect the interest of their home States, and to report such observations to their Governments. It is through these reports that every member of the Family of Nations is kept well informed in regard to the army and navy, the finances, the public opinion, the commerce and industry of foreign countries. And it must be specially emphasised that no State that receives diplomatic envoys has a right to prevent them from exercising their function of observation.

Protection.

§ 381. A third task of diplomatic envoys is the protection of the persons, property, and interests of such subjects of their home States as are within the boundaries of the State to which they are accredited. If such subjects are wronged without being able to find redress in the ordinary way of justice, and ask the help of the diplomatic envoy of their home State, he must be allowed to afford them protection. It is for the Municipal Law and regulations of his home

State, and not for International Law, to prescribe to an envoy the limits within which he has to afford protection to his compatriots.

Miscellaneous Functions.

§ 382. Negotiation, observation, and protection are tasks common to all diplomatic envoys of every State. But a State may order its permanent envoys to perform other tasks, such as the registration of deaths, births, and marriages of subjects of the home State, legalisation of their signatures, making out of passports for them, and the like. But in doing this a State must be careful not to order its envoys to perform such tasks as are by the law of the receiving State exclusively reserved to its own officials. Thus, for instance, a State whose laws compel persons who intend marriage to conclude it in presence of its registrars, need not allow a foreign envoy to legalise a marriage of compatriots before its registration by the official registrar. So, too, a State need not allow a foreign envoy to perform an act which is reserved for its jurisdiction, as, for instance, the examination of witnesses on oath.

Envoys not to interfere in Internal Politics.

§ 383. But it must be specially emphasised that envoys must not interfere with the internal political life of the State to which they are accredited. It certainly belongs to their functions to watch the political events and the political parties with a vigilant eye and to report their observations to their home States. But they have no right whatever to take part in that political life itself, to encourage a certain political party, or to threaten another. If nevertheless they do so, they abuse their position. And it matters not whether an envoy acts thus on his own account or on instructions from his home State. No strong self-respecting State will allow a foreign envoy to exercise such interference, but will either

request his home State to recall him and appoint another individual in his place or, in case his interference is very flagrant, hand him his passports and therewith dismiss him. History records many instances of this kind,[1] although in many cases it is doubtful whether the envoy concerned really abused his office for the purpose of interfering with internal politics.

VII

Position of Diplomatic Envoys

Diplomatic Envoys objects of International Law.

§ 384. Diplomatic envoys are just as little subjects of International Law as heads of States are; and the arguments regarding the position of such heads[2] must also be applied to the position of diplomatic envoys, which is given to them by International Law not as individuals but as representative organs of their States. It is derived, not from personal rights, but from rights and duties of their home States and the receiving States. All the privileges which are possessed by diplomatic envoys according to International Law are not rights given to them by International Law, but rights given by the Municipal Law of the receiving States in compliance with an international right of their home States. For International Law gives a right to every State to demand for its diplomatic envoys certain privileges from the Municipal Law of a foreign State. Thus, a diplomatic envoy is not a subject but an

[1] See Hall (§ 98**) and Taylor (§ 322), who both discuss a number of cases, especially that of Lord Sackville, who received his passports in 1888 from the United States of America for an alleged interference in the Presidential election.

[2] See above, § 344.

object of International Law, and in this regard like any other individual.

Privileges due to Diplomatic Envoys.

§ 385. Privileges due to diplomatic envoys, apart from ceremonial honours, have reference to their inviolability and to their so-called exterritoriality. The reasons why these privileges must be granted are that diplomatic envoys are representatives of States and of their dignity,[1] and, further, that they could not exercise their functions perfectly unless they enjoyed such privileges. For it is obvious that, were they liable to ordinary legal and political interference like other individuals and thus more or less dependent on the good-will of the Government, they might be influenced by personal considerations of safety and comfort to such a degree as would materially hamper the exercise of their functions. It is equally clear that liability to interference with their full and free intercourse with their home States through letters, telegrams, and couriers would wholly nullify their *raison d'être*. In this case it would be impossible for them to send independent and secret reports to or receive similar instructions from their home States. From the consideration of these and various cognate reasons their privileges seem to be inseparable attributes of the very existence of diplomatic envoys.[2]

[1] See above, § 121.

[2] The Institute of International Law, at its meeting at Cambridge in 1895, discussed the privileges of diplomatic envoys, and drafted a body of seventeen rules in regard thereto. (See Annuaire, XIV. p. 240.)

VIII

Inviolability of Diplomatic Envoys

Vattel, IV. §§ 80–107—Hall, §§ 50, 98*—Phillimore, II. §§ 154–175—Twiss, I. §§ 216–217—Ullmann, § 40—Geffcken in Holtzendorff, III. pp. 648–654—Rivier, I. § 38—Bonfils, Nos. 684–699—Pradier-Fodéré, III. §§ 1382–1393—Fiore, II. Nos. 1127–1143—Calvo, III. §§ 1480–1498—Martens, II. § 11—Crouzet, "De l'inviolabilité . . . des agents diplomatiques" (1875).

Protection due to Diplomatic Envys.

§ 386. Diplomatic envoys are just as sacrosanct as heads of States. They must, therefore, on the one hand, be afforded special protection as regards the safety of their persons, and, on the other hand, they must be exempted from every kind of criminal jurisdiction of the receiving States. Now the protection due to diplomatic envoys must find its expression not only in the necessary police measures for the prevention of offences, but also in specially severe punishments to be inflicted on offenders. Thus, according to English Criminal Law,[1] every one is guilty of a misdemeanour who, by force or personal restraint, violates any privilege conferred upon the diplomatic representatives of foreign countries, or who[2] sets forth or prosecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign country or the person of a servant of any such representative is arrested or imprisoned. The protection of diplomatic envoys is not restricted to their own person, but must be extended to the members of their family and suite, to their official residence, their furniture, carriages, papers, and likewise to their intercourse with their home States by letters, telegrams, and special messengers.

[1] See Stephen's Digest, articles 96–97.
[2] 7 Anne, c. XII. §§ 3–6.

Exemption from Criminal Jurisdiction.

§ 387. As regards the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of International Law agree nowadays[1] upon the fact that the receiving States have no right, under any circumstances whatever, to prosecute and punish diplomatic envoys. But the question is not settled among writers on International Law whether the commands and injunctions of the laws of the receiving States concern diplomatic envoys at all, so that the latter have to comply with such commands and injunctions, although the fact is established that they can never be prosecuted and punished for any breach.[2] This question ought to be decided in the negative, for a diplomatic envoy must in no point be considered under the legal authority of the receiving State. But this does not mean that a diplomatic envoy must have a right to do what he likes. The presupposition of the privileges he enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the Municipal Law as do not restrict him in the effective exercise of his functions. In case he acts and behaves otherwise, and disturbs thereby the internal order of the State, the latter will certainly request his recall or send him back at once.

History records many cases of diplomatic envoys who have conspired against the receiving States, but have nevertheless not been prosecuted. Thus, in 1584, the Spanish Ambassador Mendoza in England

[1] In former times there was no unanimity among publicists. (See Phillimore, II. § 154.)

[2] The point is thoroughly discussed by Beling, "Die strafrechtliche Bedeutung der Exterritorialität" (1896), pp. 71-90.

plotted to depose Queen Elizabeth; he was ordered to leave the country. In 1587 the French Ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth; he was simply warned not to commit a similar act again. In 1654 the French Ambassador in England, De Bass, conspired against the life of Cromwell; he was ordered to leave the country within twenty-four hours.[1]

Limitation of Inviolability.

§ 388. As diplomatic envoys are sacrosanct, the principle of their inviolability is generally recognised. But there is one exception. For if a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or in case he conspires against the receiving State and the conspiracy can be made futile only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home. Thus in 1717 the Swedish Ambassador Gyllenburg in London, who was an accomplice in a plot against King George I., was arrested and his papers were searched. In 1718 the Spanish Ambassador Prince Cellamare in France was placed in custody because he organised a conspiracy against the French Government.[2] And it must be emphasised that a diplomatic envoy cannot make it a point of complaint if injured in consequence of his own unjustifiable behaviour, as for instance in attacking an individual who in self-defence retaliates, or in unreasonably or wilfully placing himself in dangerous or awkward positions, such as in a disorderly crowd.[3]

[1] These and other cases are discussed by Phillimore, II. §§ 160–165.

[2] Details regarding these cases are given by Phillimore, II. §§ 166 and 170.

[3] See article 6 of the rules regarding diplomatic immunities

IX

Exterritoriality of Diplomatic Envoys

Vattel, IV. §§ 80-119—Hall, §§ 50, 52, 53—Westlake, I. pp. 263-273—Phillimore, II. §§ 176-210—Taylor, §§ 299-315—Twiss, I. §§ 217-221—Ullmann, § 40—Geffcken in Holtzendorff, III. pp. 654-659—Rivier, I. 38—Bonfils, Nos. 700-721—Pradier-Fodéré, III. §§ 1396-1495—Fiore, II. Nos. 1145-1163—Calvo, III. §§ 1499-1531—Martens, II. §§ 12-14—Gottschalck, "Die Exterritorialität der Gesandten" (1878)—Heyking, "L'exterritorialité" (1889)—Odier, "Des privilèges et immunités des agents diplomatiques" (1890)—Vercamer, "Des franchises diplomatiques et spécialement de l'exterritorialité" (1891)—Droin, "L'exterritorialité des agents diplomatiques" (1895).

Reason and Fictional Character of Exterritoriality.

§ 389. The exterritoriality which must be granted to diplomatic envoys by the Municipal Laws of all the members of the Family of Nations is not, as in the case of sovereign heads of States, based on the principle *par in parem non habet imperium*, but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, the control, and the like of the receiving States. Exterritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term "Exterritoriality" is nevertheless valuable, because it demonstrates clearly the fact that envoys must in most points be treated as though they were not within the territory of the receiving States.[1] And the so-called exterritoriality of envoys is actualised by a body of privileges which must be severally discussed.

adopted by the Institute of International Law at its meeting at Cambridge in 1895 (Annuaire, XIV. p. 240).

[1] With a few exceptions (see Droin, L'exterritorialité des agents diplomatiques (1895), pp. 32-43), all publicists accept the term and the fiction of exterritoriality.

Immunity of Domicile.

§ 390. The first of these privileges is immunity of domicile, the so-called *Franchise de l'hôtel*. The present immunity of domicile has developed from the former condition of things, when the official residences of envoys were in every point considered to be outside the territory of the receiving States, and when this exterritoriality was in many cases even extended to the whole quarter of the town in which such a residence was situated. One used then to speak of a *Franchise du quartier* or the *Jus quarteriorum*. And an inference from this *Franchise du quartier* was the so-called right of asylum, the envoys claiming the right to grant asylum within the boundaries of their residential quarters to every individual who took refuge there.[1] But already in the seventeenth century most States opposed this *Franchise du quartier*, which totally disappeared in the eighteenth century, leaving behind, however, the claim of the envoys to grant asylum within their official residences. Thus, when in 1726 the Duke of Ripperda, first Minister to Philip V. of Spain, who was accused of high treason and had taken refuge in the residence of the English ambassador in Madrid, was forcibly arrested there by order of the Spanish Government, the British Government complained of this act as a violation of International Law.[2] Twenty-one years later, in 1747, occurred a similar case in Sweden. A merchant named Springer was accused of high treason and took refuge in the house of the English ambassador at Stockholm. On the refusal of the English

[1] Although this right of asylum was certainly recognised by the States in former centuries, it is of interest to state that Grotius did not consider it postulated by International Law, for he says of this right (II. c. 18, § 8): "Ex concessione pendet ejus apud quem agit. Istud enim juris gentium non est." See also Bynkershoek, De foro legat. c. 21.

[2] See Martens, Causes Célèbres, I. p. 178.

envoy to surrender Springer, the Swedish Government surrounded the embassy with troops and ordered the carriage of the envoy, when leaving the embassy, to be followed by mounted soldiers. At last Springer was handed over to the Swedish Government under protest, but England complained and called back her ambassador, as Sweden refused to make the required reparation.[1] As these two examples show, the right of asylum, although claimed and often conceded, was nevertheless not universally recognised. During the nineteenth century all remains of it vanished, and when in 1867 the French envoy in Lima claimed it, the Peruvian Government refused to concede it.

Nowadays the official residences of envoys are *in a sense and for some points only* considered as though they were outside the territory of the receiving States. For the immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to the officers of justice, police, revenue, and the like, of the receiving States without the special consent of the respective envoys. Therefore, no act of jurisdiction or administration of the receiving Governments can take place within these residences, except by special permission of the envoys. And the stables and carriages of the envoys are considered to be parts of their residences. But such immunity of domicile is granted only in so far as it is necessary for the independence and inviolability of the envoys and the inviolability of their official documents and archives. If an envoy abuses this immunity, the receiving Government need not bear it passively. There is, therefore, no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals or to other

[1] See Martens, Causes Célèbres, II. p. 52.

individuals not belonging to his suite.[1] Of course, an envoy need not deny the entrance to criminals who want to take refuge in the embassy. But he must surrender them to the prosecuting Government at its request, and, if he refuses, any measures may be taken to induce him to do so, apart from such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and eventually the criminal may even forcibly be taken out of the embassy. But such measures of force are justifiable only if the case is an urgent one, and after the envoy has in vain been required to surrender the criminal. Further, if a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of exterritoriality, the criminal must be surrendered to the local Government. The case of Nikitschenkow, which occurred in Paris in 1867, is an instance thereof. Nikitschenkow, a Russian subject not belonging to the Russian Embassy, made an attempt on and wounded a member of that embassy within its official residence. The French police were called in and arrested the criminal. The Russian Government required his extradition, maintaining that, as the crime was committed inside the Russian Embassy, it fell exclusively under Russian jurisdiction; but the French Government refused extradition and Russia dropped her claim.

Again, an envoy has no right to seize a subject of his home State who is within the boundaries of the receiving State and keep him under arrest inside the embassy with the intention of bringing him away

[1] But according to Hall (§ 52) the custom of granting asylum to political refugees in the houses of the envoys still exists in the Spanish-American Republics. See also Westlake, I. p. 272, and Moore, Asylum in Legations and Consulates, and in Vessels (1892).

into the power of his home State. An instance thereof is the case of the Chinaman Sun Yat Sen which occurred in London in 1896. This was a political refugee from China living in London. He was induced to enter the house of the Chinese Legation and kept under arrest there in order to be conveyed forcibly to China, the Chinese envoy contending that, as the house of the legation was Chinese territory, the English Government had no right to interfere. But the latter did interfere, and Sun Yat Sen was released after several days.

Exemption from Criminal and Civil Jurisdiction.

§ 391. The second privilege of envoys in reference to their exterritoriality is their exemption from criminal and civil jurisdiction. As their exemption from criminal jurisdiction is also a consequence of their inviolability, it has already been discussed,[1] and we have here to deal with their exemption from civil jurisdiction only. No civil action of any kind can be brought against them in the Civil Courts of the receiving States as regards debts and the like. They cannot be arrested for debts, nor can their furniture, their carriages, their horses, and the like, be seized for debts. They cannot be prevented from leaving the country for not having paid their debts, nor can their passports be refused to them on the same account. Thus, when in 1772 the French Government refused the passports to Baron de Wrech, the envoy of the Landgrave of Hesse-Cassel at Paris, for not having paid his debts, all the other envoys in Paris complained of this act of the French Government as a violation of International Law.[2] But the rule that an envoy is exempt from the civil jurisdiction has

[1] See above, §§ 387-388.
[2] See Martens, Causes Célèbres, II. p. 110.

certain exceptions. If an envoy enters an appearance to an action against himself, further, if he himself brings an action under the jurisdiction of the receiving State, the courts of the latter have civil jurisdiction in such cases over the envoy. And the same is valid as regards real property held within the boundaries of the receiving State by an envoy, not in his official character, but as a private individual, and as regards mercantile [1] ventures he might engage in on the territory of the receiving State.

Exemption from Subpœna as witness.

§ 392. The third privilege of envoys in reference to their exterritoriality is exemption from subpœna as witnesses. No envoy can be obliged, or even required, to appear as a witness in a civil or criminal or administrative Court, nor is an envoy obliged to give evidence before a Commissioner sent to his house. If, however, an envoy chooses for himself to appear as a witness or to give evidence of any kind, the Courts can make use of such evidence. A remarkable case of this kind is that of the Dutch envoy Dubois in Washington, which happened in 1856. A case of homicide occurred in the presence of M. Dubois, and, as his evidence was absolutely necessary for the trial, the Foreign Secretary of the United States asked Dubois to appear before the Court as a witness, recognising the fact that Dubois had no duty to do so. When Dubois, on the advice of all the other diplomatic envoys in Washington, refused to comply with this desire, the United States brought the matter before the Dutch Government. The latter, however, approved of Dubois' refusal, but authorised him to give evidence under oath before the American

[1] English Municipal Law diction to foreign envoys. (See grants, however, even in such cases, exemption from local juris- Westlake, I. p. 267.)

Foreign Secretary. As, however, such evidence would have had no value at all according to the local law, Dubois' evidence was not taken, and the Government of the United States asked the Dutch Government to recall him.[1]

Exemption from Police.

§ 393. The fourth privilege of envoys in reference to their exterritoriality is exemption from the police of the receiving States. Orders and regulations of the police do in no way bind them. On the other hand, this exemption from police does not contain the privilege of an envoy to do what he likes as regards matters which are regulated by the police. Although such regulations can in no way bind him, an envoy enjoys the privilege of exemption from police under the presupposition that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is, therefore, expected to comply voluntarily with all such commands and injunctions of the local police as, on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community. Of course, he cannot be punished if he acts otherwise, but the receiving Government may request his recall or even be justified in other measures of such a kind as do not injure his inviolability. Thus, for instance, if in time of plague an envoy were not voluntarily to comply with important sanitary arrangements of the local police, and if there were great danger in delay, a case of necessity would be created and the receiving Government would be justified in the exercise of reasonable pressure upon the envoy.

§ 394. The fifth privilege of envoys in reference to

[1] See Wharton, I. § 98, and Calvo, III. § 1520.

Exemption from Taxes and the like.

their exterritoriality is exemption from taxes and the like. As an envoy, through his exterritoriality, is considered not to be subjected to the territorial supremacy of the receiving State, he must be exempt from all direct personal taxation and therefore need not pay either income-tax or other direct taxes. As regards rates, it is necessary to draw a distinction. Payment of rates imposed for local objects from which an envoy himself derives benefit, such as sewerage, lighting, water, night-watch, and the like, can be required of the envoy, although this is often[1] not done. Other rates, however, such as poor-rates and the like, he cannot be requested to pay. As regards customs duties, International Law does not claim the exemption of envoys therefrom. Practically and by courtesy, however, the Municipal Laws of many States allow diplomatic envoys within certain limits the entry free of duty of goods intended for their own private use. If the house of an envoy is the property of his home State or his own property, the house need not be exempt from property tax, although it is often so by the courtesy of the receiving State. Such property tax is not a personal and direct, but an indirect tax.

Right of Chapel.

§ 395. A sixth privilege of envoys in reference to their exterritoriality is the so-called Right of Chapel (*Droit de chapelle* or *Droit du culte*). This is the privilege of having a private chapel for the practice of his own religion, which must be granted to an envoy by the Municipal Law of the receiving State. A privilege of great worth in former times, when

[1] "It has been held in England that the payment of local rates cannot be enforced by suit or distress against a member of a mission," says Westlake, I. p. 268, who quotes the cases of *Parkinson* v. *Potter* (16 Q.B. 152) and *Macartney* v. *Garbut* (L. R., 24 Q.B.D. 368).

freedom of religious worship in most States was unknown, it has at present an historical value only. But it has not disappeared, and might become again of actual importance in case a State should in the future give way to reactionary intolerance. It must, however, be emphasised that the right of chapel must only comprise the privilege of religious worship in a private chapel inside the official residence of the envoy. No right of having and tolling bells need be granted. The privilege includes the office of a chaplain, who must be allowed to perform every religious ceremony within the chapel, such as baptism and the like. It further includes permission to all the compatriots of the envoy, even if they do not belong to his retinue, to take part in the service. But the receiving State need not allow its own subjects to take part therein.

Self-jurisdiction.

§ 396. The seventh and last privilege of envoys in reference to their exterritoriality is self-jurisdiction within certain limits. As the members of his retinue are considered exterritorial, the receiving State has no jurisdiction over them, and the home State may therefore delegate such civil and criminal jurisdiction to the envoy. But no receiving State is required to grant self-jurisdiction to an ambassador beyond a certain reasonable limit. Thus, an envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like. But no civilised State would nowadays allow an envoy himself to try a member of his retinue. This was done in former centuries. Thus, in 1603, Sully, who was sent by Henri IV. of France on a special mission to England, called together a

French jury in London and had a member of his retinue condemned to death for murder. The convicted man was handed over for execution to the English authorities, but James I. reprieved him.[1]

X

Position of Diplomatic Envoys as regards Third States

Vattel, IV. §§ 84-86—Hall, §§ 99-101—Phillimore, II. §§ 172-175—Taylor, §§ 293-295—Twiss, I. § 222—Wheaton, §§ 242-247—Ullmann, § 42—Geffcken in Holtzendorff, III. pp. 665-668—Heffter, § 207—Rivier, § 39—Pradier-Fodéré, III. § 1394—Fiore, II. Nos. 1143-1144—Calvo, III. §§ 1532-1539.

Possible Cases.

§ 397. Although, when an individual is accredited as diplomatic envoy by one State to another, these two States only are directly concerned in his appointment, the question must be discussed, what position such envoy has as regards third States in those cases in which he comes in contact with them. Several such cases are possible. An envoy may, first, travel through the territory of a third State to reach the territory of the receiving State. Or, an envoy accredited to a belligerent State and living on the latter's territory may be found there by the other belligerent who militarily occupies such territory. And, lastly, an envoy accredited to a certain State might interfere with the affairs of a third State.

Envoy travelling through Territory of third State.

§ 398. If an envoy travels through the territory of a third State incognito or for his pleasure only, there is no doubt that he cannot claim any special privileges whatever. He is in exactly the same position as any other foreign individual travelling

[1] See Martens, Causes Célèbres, I. p. 391. See also the two cases reported by Calvo, III. § 1545.

on this territory, although by courtesy he might be treated with particular attention. But matters are different when an envoy on his way from his own State to the State of his destination travels through the territory of a third State. If the sending and the receiving States are not neighbours, the envoy probably has to travel through the territory of a third State. Now, as the institution of legation is a necessary one for the intercourse of States and is firmly established by International Law, there ought to be no doubt whatever that such third State must grant the right of innocent passage (*jus transitus innoxii*) to the envoy, provided that it is not at war with the sending or the receiving State. But no other privileges,[1] especially those of inviolability and exterritoriality need be granted to the envoy. And the right of innocent passage does not include the right to stop on the territory longer than is necessary for the passage. Thus, in 1854, the French Government did not allow the United States envoy, Soulié, who had landed at Calais on his way to Madrid, to stop in France, because he was a French refugee naturalised in the United States.[2] And it must be specially remarked that no right of passage need be granted if the third State is at war with the sending or receiving State. The envoy of a belligerent, who travels through the territory of the other belligerent to reach the place of his destination, may be seized and treated as a prisoner of war. Thus, in 1744, when the French Ambassador, Maréchal de Belle-Isle, on his way to Berlin, passed through the territory of Hanover, which country was then, together with

[1] The matter, which has always been disputed, is fully discussed by Twiss, I. § 222, who also quotes the opinion of Grotius, Bynkershoek, and Vattel.

[2] See Wharton, I. § 97.

England, at war with France, he was made a prisoner of war and sent to England.

Envoy found by Belligerent on occupied Enemy Territory.

§ 399. When in time of war a belligerent occupies the capital of an enemy State and finds there envoys of other States, these envoys do not lose their diplomatic privileges as long as the State to which they are accredited is in existence. As military occupation does not extinguish a State subjected thereto, such envoys do not cease to be envoys. On the other hand, they are not accredited to the belligerent who has taken possession of the territory by military force, and the question is not settled yet by International Law how far the occupying belligerent has to respect the inviolability and exterritoriality granted to such envoys by the law of the land in compliance with a demand of International Law. It may safely be maintained that he must grant them the right to leave the occupied territory. But must he likewise grant them the right to stay? Has he to respect their immunity of domicile and their other privileges in reference to their exterritoriality? Neither customary rules nor international conventions exist as regards these questions, which must, therefore, be treated as open. The only case which occurred concerning this problem is that of Mr. Washburne, ambassador of the United States in Paris during the siege of that town in 1870 by the Germans. This ambassador claimed the right of sending a messenger with despatches to London in a sealed bag through the German lines. But the Germans refused to grant that right, and did not alter their decision although the Government of the United States protested.[1]

§ 400. There is no doubt that an envoy must not

[1] See Wharton, I. § 97.

interfere with the affairs of the State to which he is accredited and a third State. If he nevertheless does interfere, he enjoys no privileges whatever against such third State. Thus, in 1734, the Marquis de Monti, the French envoy in Poland, who took an active part in the war between Poland and Russia, was made a prisoner of war by the latter and not released till 1736, although France protested.[1]

Envoy interfering with affairs of a third State.

XI

The Retinue of Diplomatic Envoys

Vattel, IV. §§ 120-124—Hall, § 51—Phillimore, II. §§ 186-193—Twiss, I. § 218—Ullmann, §§ 37, 41—Geffcken in Holtzendorff, III. pp. 660-661—Heffter, § 221—Rivier, I. pp. 458-461—Pradier-Fodéré, III. §§ 1472-1486—Fiore, II. Nos. 1163-1168—Calvo, III. §§ 1348-1350—Martens, II. § 16.

§ 401. The individuals accompanying an envoy officially, or in his private service, or as members of his family, or as couriers, compose his retinue. The members of the retinue belong, therefore, to four different classes. All those individuals who are officially attached to an envoy are members of the legation and are appointed by the home State of the envoy. To this first class belong the Councillors, Attachés, Secretaries of the Legation; the Chancellor of the Legation and his assistants; the interpreters, and the like; the chaplain, the doctor, and the legal advisers, provided that they are appointed by the home State and sent specially as members of the legation. A list of these members of legation is handed over by the envoy to the Secretary for

Different Classes of Members of Retinue.

[1] See Martens, Causes Célèbres, I. p. 207.

Foreign Affairs of the receiving State and is revised from time to time. The Councillors and Secretaries of Legation are personally presented to the Secretary for Foreign Affairs, and very often also to the head of the receiving State. The second class comprises all those individuals who are in the private service of the envoy and of the members of legation, such as servants of all kinds, the private secretary of the envoy, the tutor and the governess of his children. The third class consists of the members of the family of the envoy—namely, his wife, children, and such of his other near relatives as live within his family and under his roof. And, lastly, the fourth class consists of the so-called couriers. They are the bearers of despatches sent by the envoy to his home State, who on their way back also bear despatches from the home State to the envoy. Such couriers are attached to most legations for the guarantee of the safety and secrecy of the despatches.

Privileges of Members of Legation.

§ 402. It is a generally recognised [1] rule of International Law that the members of a legation are as inviolable and exterritorial as the envoy himself. They must, therefore, be granted by the receiving State exemption from criminal and civil jurisdiction, exemption from police,[2] subpœna as witness, and taxes. They are considered, like the envoy himself, to retain their domicile within their home State. Children born to them during their stay within the receiving State are considered born on the territory of the home State. And it must be emphasised that it is

[1] Some authors, however, plead for an abrogation of this rule (See Martens, II. § 16.)

[2] A case of this kind occurred in 1904 in the United States. Mr. Gurney, Secretary of the British Legation at Washington, was fined by the police magistrate of Lee, in Massachusetts, for furiously driving a motor-car. But the judgment was afterwards annulled, and the fine imposed remitted.

not within the envoy's power to waive these privileges of the members of legation.

Privileges of Private Servants.

§ 403. It is a customary rule of International Law that the receiving State must grant to all persons in the private service of the envoy and of the members of his legation, provided such persons are not subjects of the receiving State, exemption from civil and criminal jurisdiction.[1] But the envoy can disclaim these exemptions, and these persons cannot then claim exemption from police, immunity of domicile, and exemption from taxes. Thus, for instance, if such a private servant commits a crime outside the residence of his employer, the police can arrest him; he must, however, be at once released if the envoy does not waive the exemption from criminal jurisdiction.

Privileges of Family of Envoy.

§ 404. Although the wife of the envoy, his children, and such of his near relatives as live within his family and under his roof belong to his retinue, there is a distinction to be made as regards their privileges. His wife must certainly be granted all his privileges in so far as they concern inviolability and exterritoriality. As regards, however, his children and other relatives, no general rule of International Law can safely be said to be generally recognised, but that they must be granted exemption from civil and criminal jurisdiction. But even this rule was formerly not generally recognised. Thus, when in 1653 Don Pantaleon Sá, the brother of the Portuguese ambassador in London and a member of his

[1] This rule seems to be everywhere recognised except in this country. When, in 1827, a coachman of Mr. Gallatin, the American Minister in London, committed an assault outside the embassy, he was arrested in the stable of the embassy and charged before a local magistrate, and the British Foreign Office refused to recognise the exemption of the coachman from the local jurisdiction. (See Wharton, I. § 94, and Hall, § 50.)

suite, killed an Englishman named Greenway, he was arrested, tried in England, found guilty, and executed.[1]

Privileges of Couriers of Envoy.

§ 405. To insure the safety and secrecy of the diplomatic despatches they bear, couriers must be granted exemption from civil and criminal jurisdiction and afforded special protection during the exercise of their office. It is particularly important to observe that they must have the right of innocent passage through *third* States, and that, according to general usage, those parts of their luggage which contain diplomatic despatches and are sealed with the official seal must not be opened and searched. It is usual to provide couriers with special passports for the purpose of their legitimation.

XII

Termination of Diplomatic Mission

Vattel, IV. §§ 125-126—Hall, § 98**—Phillimore, II. §§ 237-241—Taylor, §§ 320-323—Wheaton, §§ 250-251—Ullmann, § 43—Heffter, §§ 223-226—Rivier, I. § 40—Bonfils, Nos. 730-732—Pradier-Fodéré, III. §§ 1515-1535—Fiore, II. Nos. 1169-1175—Calvo, III. §§ 1363-1367—Martens, II. § 17.

Termination in contradistinction to Suspension.

§ 406. A diplomatic mission may come to an end from eleven different causes—namely, accomplishment of the object for which the mission was sent; expiration of such Letters of Credence as were given to an envoy for a specific time only; recall of the envoy by the sending State; his promotion to a higher class; the delivery of passports to him by the receiving State; request of the envoy for his passports on

[1] The case is discussed by Phillimore, II. § 169.

account of ill-treatment; war between the sending and the receiving State; constitutional changes in the headship of the sending or receiving State; revolutionary change of government of the sending or receiving State; extinction of the sending or receiving State; and, lastly, death of the envoy. These events must be treated singly on account of their peculiarities. But the termination of diplomatic missions must not be confounded with their suspension. Whereas from the foregoing eleven causes a mission comes actually to an end, and new Letters of Credence are necessary, a suspension does not put an end to the mission, but creates an interval during which the envoy, although he remains in office, cannot exercise his office. Suspension may be the result of various causes, as, for instance, a revolution within the sending or receiving State. Whatever the cause may be, an envoy enjoys all his privileges during the duration of the suspension.

Accomplishment of Object of Mission.

§ 407. A mission comes to an end through the fulfilment of its objects in all cases of missions for special purposes. Such cases may be ceremonial functions like representation at weddings, funerals, coronations; or notification of changes in the headship of a State, or representation of a State at Conferences and Congresses; and other cases. Although the mission is terminated through the accomplishment of its object, the envoys enjoy all their privileges on their way home.

Expiration of Letter of Credence.

§ 408. If a Letter of Credence for a specified time only is given to an envoy, his mission terminates with the expiration of such time. A temporary Letter of Credence may, for instance, be given to an individual for the purpose of representing a State diplomatically during the interval between the recall

of an ambassador and the appointment of his successor.

Recall.

§ 409. The mission of an envoy, be he permanently or only temporarily appointed, terminates through his recall by the sending State. If this recall is not caused by unfriendly acts of the receiving State but by other circumstances, the envoy receives a Letter of Recall from the head, or, in case he is only a Chargé d'Affaires, from the Foreign Secretary of his home State, and he hands this letter over to the head of the receiving State in a solemn audience, or to the Foreign Secretary in the case of a Chargé d'Affaires. In exchange for the Letter of Recall the envoy receives his passports and a so-called *Lettre de récréance*, a letter in which the head of the receiving State (or the Foreign Secretary) acknowledges the Letter of Recall. Although therewith his mission ends, he enjoys nevertheless all his privileges on his home journey. A recall may be caused by the resignation of the envoy, by his transference to another post, and the like. It may, secondly, be caused by the outbreak of a conflict between the sending and the receiving State which leads to a rupture of diplomatic intercourse, and under these circumstances the sending State may order his envoy to ask for his passports and depart at once without handing in a Letter of Recall. And, thirdly, a recall may result from a request of the receiving State by reason of real or alleged misconduct of the envoy. Such request of recall may lead to a rupture of diplomatic intercourse, if the receiving State insists upon the recall, although the sending State does not recognise the act of his envoy as misconduct.[1]

[1] Notable cases of recall of envoys are reported by Taylor, § 322, and Hall, § 98**.

Promotion to a higher Class.

§ 410. When an envoy remains at his post, but is promoted to a higher class—for instance, when a Chargé d'Affaires is created a Minister Resident or a Minister Plenipotentiary is created an Ambassador—his original mission technically ends, and he receives therefore a new Letter of Credence.

Delivery of Passports.

§ 411. A mission may terminate, further, through the delivery of his passports to an envoy by the receiving State. The reason for such dismissal of an envoy may either be gross misconduct on his part or a quarrel between the sending and the receiving State which leads to a rupture of diplomatic intercourse.

Request for Passports.

§ 412. Without being recalled, an envoy may on his own account ask for his passports and depart in consequence of ill-treatment by the receiving State. This may or may not lead to a rupture of diplomatic intercourse.

Outbreak of War.

§ 413. When war breaks out between the sending and the receiving State before their envoys accredited to each other are recalled, their mission comes nevertheless to an end. They receive their passports, but they must be granted nevertheless their privileges on their way home.[1]

Constitutional Changes.

§ 414. If the head of the sending or receiving State is a Sovereign, his death or abdication terminates the missions sent and received by him, and all envoys remaining at their posts must receive new Letters of Credence. But if they receive new Letters of Credence, no change in seniority is considered to have taken place from the order before the change. And during the time between the termination of the missions and the arrival of new Letters of Credence

[1] See below, vol. II. § 98.

they enjoy nevertheless all the privileges of diplomatic envoys.

As regards the influence of constitutional changes in the headship of republics on the missions sent or received, no certain rule exists.[1] Everything depends, therefore, upon the merits of the special case.

Revolutionary Changes of Government.

§ 415. A revolutionary movement in the sending or receiving State which creates a new government, changing, for example, a republic into a monarchy or a monarchy into a republic, or deposing a Sovereign and enthroning another, terminates the missions. All envoys remaining at their posts must receive new Letters of Credence, but no change in seniority takes place if they receive them. It happens that in cases of revolutionary changes of government foreign States for some time neither send new Letters of Credence to their envoys nor recall them, watching the course of events in the meantime and waiting for more proof of a real settlement. In such cases the envoys are, according to an international usage, granted all the privileges of diplomatic envoys, although in strict law they have ceased to be this. In cases of recall subsequent to revolutionary changes, the protection of subjects of the recalling States remains in the hands of their consuls, since the consular office[2] does not come to an end through constitutional or revolutionary changes in the headship of a State.

Extinction of sending or receiving State.

§ 416. If the sending or receiving State of a mission is extinguished by voluntary merger into another State or through annexation in consequence

[1] Writers on International Law differ concerning this point. See, for instance, Ullmann, § 43, in contradistinction to Rivier, I. p. 517.

[2] See below, § 438.

of conquest, the mission terminates *ipso facto*. In case of annexation of the receiving State, there can be no doubt that, although the annexing State will not consider the envoys received by the annexed State as accredited to itself, it must grant those envoys the right to leave the territory of the annexed State unmolested and to take their archives away with them. In case of annexation of the sending State, the question arises what becomes of the archives and legational property of the missions of the annexed State accredited to foreign States. This question is one on the so-called succession[1] of States. The annexing State acquires, *ipso facto*, by the annexation the property in those archives and other legational goods, such as the hotels, furniture, and the like. But as long as the annexation is not notified and recognised, the receiving States have no duty to interfere.

Death of Envoy.

§ 417. A mission ends, lastly, by the death of the envoy. As soon as an envoy is dead, his effects, and especially his papers, must be sealed. This is done by a member of the dead envoy's legation, or, if there be no such members, by a member of another legation accredited to the same State. The local Government must not interfere, unless at the special request by the home State of the deceased envoy.

Although the mission and therefore the privileges of the envoy come to an end by his death, the members of his family who resided under his roof and the members of his suite enjoy their privileges until they leave the country. But a certain time may be fixed for them to depart, and on its expira-

[1] See above, § 82.

tion they lose their privilege of exterritoriality. It must be specially mentioned that the Courts of the receiving State have no jurisdiction whatever over the goods and effects of the deceased envoy, and that no death duties can be demanded.

CHAPTER III

CONSULS

I

The Institution of Consuls

Hall, § 105—Phillimore, II. §§ 243-246—Halleck, I. p. 369—Taylor, §§ 325-326—Twiss, I. § 223—Ullmann, §§ 44-45—Bulmerincq in Holtzendorff, II. pp. 687-695—Heffter, §§ 241-242—Rivier, I. § 41—Calvo, III. §§ 1368-1372—Bonfils, Nos. 731-743—Pradier-Fodéré, IV. §§ 2034-2043—Martens, II. §§ 18-19—Fiore, II. Nos. 1176-1178—Warden, "A Treatise on the Origin, Nature, etc., of the Consular Establishment" (1814)—Cussy, "Règlements consulaires des principaux États maritimes" (1851)—H. B. Oppenheim, "Handbuch der Consulate aller Länder" (1854)—Clercq et Vallat, "Guide pratique des consulats" (5th ed. 1898)—Salles, "L'institution des consulats, son origine, etc." (1898).

Development of the Institution of Consuls.

§ 418. The roots of the consular institution go back to the second half of the Middle Ages. In the commercial towns of Italy, Spain, and France the merchants used to appoint by election one or more of their fellow-merchants as arbitrators in commercial disputes, who were called *Juges Consuls* or *Consuls Marchands*. When, between and after the Crusades, Italian, Spanish, and French merchants settled down in the Eastern countries, founding factories, they brought the institution of consuls with them, the merchants belonging to the same nation electing their own consul. The competence of these consuls became, however, more and more enlarged through treaties, so-called "Capitulations," between

the home States of the merchants and the Mohammedan monarchs on whose territories these merchants had settled down.[1] The competence of the consuls comprised at last the whole civil and criminal jurisdiction over, and protection of, the privileges, the life, and the property of their countrymen. From the East the institution of consuls was transferred to the West. Thus, in the fifteenth century Italian consuls existed in the Netherlands and in London, English consuls in the Netherlands, Sweden, Norway, Denmark, Italy (Pisa). These consuls in the West exercised, just as those in the East, exclusive civil and criminal jurisdiction over the merchants of their nationality. But the position of the consuls in the West decayed in the beginning of the seventeenth century through the influence of the rising permanent legations on the one hand, and, on the other, from the fact that everywhere foreign merchants were brought under the civil and criminal jurisdiction of the State in which they resided. This change in their competence altered the position of consuls in the Christian States of the West altogether. Their functions now shrank into a general supervision of the commerce and navigation of their home States, and into a kind of protection of the commercial interests of their countrymen. Consequently, they did not receive much notice in the seventeenth and eighteenth centuries, and it was not until the nineteenth century that the general development of international commerce, navigation, and shipping drew the attention of the Governments again to the value and importance of the institution of consuls. The institution was now systematically developed. The positions of the consuls, their

[1] See Twiss, I. §§ 253–263.

functions, and their privileges, were the subjects of stipulations either in commercial treaties or in special consular treaties,[1] and the single States enacted statutes regarding the duties of their consuls abroad, such as the Consular Act passed by England in 1826.[2]

General Character of Consuls.

§ 419. Nowadays consuls are agents of States residing abroad for purposes of various kinds, but mainly in the interests of the commerce and navigation of the appointing State. As they are not diplomatic representatives, they do not enjoy the privileges of diplomatists. Nor have they, ordinarily, anything to do with intercourse between their home State and the State they reside in. But these rules have exceptions. Consuls of Christian Powers in non-Christian States, Japan now excepted, have retained their former competence and exercise full civil and criminal jurisdiction over their countrymen. And sometimes consuls are charged with the tasks which are regularly fulfilled by diplomatic representatives. Thus, in States under suzerainty the Powers are frequently represented by consuls, who transact all the business otherwise transacted by diplomatic representatives, and who have, therefore, often the title of "Diplomatic Agents." Thus, too, on occasions small States, instead of accrediting diplomatic envoys to another State, send only a consul thither, who combines the consular functions with those of a diplomatic envoy. It must, however, be emphasised that consuls thereby neither become diplomatic envoys, although they may have the title of "Diplomatic Agents," nor enjoy the diplomatic envoys' privileges, if such privileges are not specially

[1] Phillimore, II. § 255, gives a list of such treaties.
[2] 6 Geo. IV. c. 87.

provided for by treaties between the home State and the State they reside in. Different, however, is the case in which a consul is at the same time accredited as Chargé d'Affaires, and in which, therefore, he combines two different offices; for as Chargé d'Affaires he is a diplomatic envoy and enjoys all the privileges of such an envoy, provided he has received a Letter of Credence.

II

Consular Organisation

Hall, "Foreign Powers and Jurisdiction," § 13—Phillimore, II. §§ 253-254—Halleck, I. p. 371—Taylor, § 528—Ullmann, § 47—Bulmerincq, in Holtzendorff, III. pp. 695-701—Rivier, I. § 41—Calvo, III. §§ 1373-1376—Bonfils, Nos. 743-748—Pradier-Fodéré, IV. §§ 2050-2055—Martens, II. § 20—"General Instructions for His Majesty's Consular Officers" (1893).

Different kinds of Consuls.

§ 420. Consuls are of two kinds. They are either specially sent and paid for the administration of their consular office (*Consules missi*), or they are appointed from individuals, in most cases merchants, residing in the district for which they are to administer the consular office (*Consules electi*).[1] Consuls of the first kind, who are so-called professional consuls and are always subjects of the sending State, have to devote their whole time to the consular office. Consuls of the second kind, who may or may not be subjects of the sending State, administer the consular office besides following their ordinary callings. Some States, such as France, appoint professional consuls only; most States, however, appoint Consuls of both kinds according to the importance of the

[1] To this distinction corresponds in the British Consular Service the distinction between "Consular Officers" and "Trading Consular Officers."

consular districts. But there is a general tendency with most States to appoint professional consuls for important districts.

No difference exists between the two kinds of consuls as to their general position according to International Law. But, naturally, a professional consul enjoys actually a greater authority and a more important social position, and consular treaties often stipulate special privileges for professional consuls.

Consular Districts

§ 421. As the functions of consuls have a more or less local character, most States appoint several consuls on the territory of the other larger States, limiting the duties of the different consuls within certain districts of such territories or even within a certain town or port only. Such consular districts as a rule concide with provinces of the State in which the consuls administer their offices. The different consuls appointed by a State for different districts of the same State are independent of each other and conduct their correspondence directly with the Foreign Office of their home State, the agents-consular exoepted, who correspond with their nominators only. The extent of the districts is agreed upon between the home State of the consul and the admitting State. Only the consul appointed for a particular district is entitled to exercise consular functions within its boundaries, and to him only the local authorities have to grant the consular privileges, if any.

Different Classes of Consuls

§ 422. Four classes of consuls are generally distinguished according to rank: consuls-general, consuls, vice-consuls, and agents-consular. Consuls-general are appointed either as the head of several consular districts, and have then several consuls subordinate

to themselves, or as the head of one very large consular district. Consuls are usually appointed for smaller districts, and for towns or even ports only. Vice-consuls are such assistants of consuls-general and consuls as themselves possess the consular character and take, therefore, the consul's place in regard to the whole consular business; they are, according to the Municipal Law of some States, appointed by the consul, subject to the approbation of his home State. Agents-consular are agents with consular character appointed, subject to the approbation of the home Government, by a consul-general or consul for the exercise of certain parts of the consular functions in certain towns or other places of the consular district. Agents-consular are not independent of the appointing consul, and do not correspond directly with the home State, as the appointing consul is responsible for the agents-consular to his Government. The so-called Proconsul is not a consul, but a *locum tenens* of a consul only during the latter's temporary absence or illness; he possesses, therefore, consular character for such time only as he actually is the *locum tenens*.

The British Consular Service consists of the following six ranks: (1) Agents and consuls-general, commissioners and consuls-general; (2) consuls-general; (3) consuls; (4) vice-consuls; (5) consular agents; (6) proconsuls. In the British Consular Service proconsuls only exercise, as a rule, the notarial functions of a consular officer.

Consuls subordinate to Diplomatic Envoys.

§ 423. Although consuls conduct their correspondence directly with their home Government, they are nevertheless, according to the Municipal Law of their home State and according to International Law, subordinate to the diplomatic envoy of their home

Government accredited to the State in which they administer the consular offices. The diplomatic envoy has full authority and control over the consuls. He can give instructions and orders, which they have to execute. In doubtful cases they have to ask his advice and instructions. On the other hand, the diplomatic envoy has to protect the consuls in case they are injured by the local Government.

III

Appointment of Consuls

Hall, § 105—Phillimore, II. § 250—Halleck, I. p. 371—Ullmann, § 48—Bulmerincq in Holtzendorff, III. pp. 702-706—Rivier, I. § 41—Calvo, III. §§ 1378-1384—Bonfils, Nos. 749-752—Pradier-Fodéré, IV. §§ 2056-2067—Fiore, II. Nos. 1181-1182—Martens, II. § 21.

Qualification of Candidates.

§ 424. International Law has no rules in regard to the qualifications of an individual whom a State can appoint consul. Many States, however, possess such rules in their Municipal Law as far as professional consuls are concerned. The question, whether female consuls could be appointed, cannot be answered in the negative, but, on the other hand, no State is obliged to grant female consuls the *exequatur*, and many States would at present certainly refuse it.

No State obliged to admit Consuls.

§ 425. According to International Law a State is not at all obliged to admit consuls. But the commercial interests of all the States are so powerful that practically every State must admit consuls of foreign Powers, as a State which refused such admittance would in its turn not be allowed to have its own consuls abroad. The commercial and consular treaties between two States stipulate as a rule that the contracting States shall have the right to appoint consuls in

all those parts of each other's country in which consuls of third States are already or shall in future be admitted. Consequently, a State cannot refuse admittance to a consul of one State for a certain district if it admits a consul of another State. But as long as a State has not admitted any other State's consul for a district, it can refuse admittance to a consul of the State anxious to organise consular service in that district. Thus, for instance, Russia refused for a long time for political reasons to admit consuls in Warsaw.

What kind of States can appoint Consuls.

§ 426. There is no doubt that it is within the faculty of every full-Sovereign State to appoint consuls. As regards not full-Sovereign States, everything depends upon the special case. As foreign States can appoint consuls in States under suzerainty, it cannot be doubted that, provided the contrary is not specially stipulated between the vassal and the suzerain State, and provided the vassal State is not one which has no position within the Family of Nations,[1] a vassal State is in its turn competent to appoint consuls in foreign States. In regard to member-States of a Federal State it is the Constitution of the Federal State which settles the question. Thus, according to the Constitution of Germany, the Federal State is exclusively competent to appoint consuls, in contradistinction to diplomatic envoys who may be sent and received by every member-State of the German Empire.

Mode of Appointment and of Admittance.

§ 427. Consuls are appointed through a patent or commission, the so-called *Lettre de provision*, of the State whose consular office they are intended to administer. Vice-consuls are sometimes, and agents-consular are always, appointed by the consul, subject

[1] See above, § 91.

to the approval of the home State. Admittance of consuls takes place through the so-called *exequatur*, granted by the head of the admitting State. The diplomatic envoy of the appointing State hands the patent of the appointed consul on to the Secretary for Foreign Affairs for communication to the head of the State, and the *exequatur* is given either in a special document or by means of the word *exequatur* written across the patent. But the *exequatur* can be refused for personal reasons. Thus, in 1869 England refused the *exequatur* to an Irishman named Haggerty, who was naturalised in the United States and appointed American consul for Glasgow. And the *exequatur* can be withdrawn for personal reasons at any moment. Thus, in 1834 France withdrew it from the Prussian consul at Bayonne for having helped in getting into Spain supplies of arms for the Carlists.

Appointment of Consuls includes Recognition.

§ 428. As the appointment of consuls takes place in the main for commercial purposes only, and has merely local importance without any political consequences, it is maintained[1] that a State does not indirectly recognise a newly created State *ipso facto* by appointing a consul to a district in such State. This opinion, however, does not agree with the facts of international life. Since no consul can exercise his functions before he has handed over his patent to the local State and received the latter's *exequatur*, it is evident that thereby the appointing State enters into such formal intercourse with the admitting State as indirectly[2] involves recognition.

[1] Hall, §§ 26[a] and 105.

[2] See above, § 72.

IV

Functions of Consuls

Hall, § 105—Phillimore, II. §§ 257-260—Taylor, § 327—Halleck, I. pp. 380-385—Ullmann, § 51—Bulmerincq in Holtzendorff, III. pp. 738-749—Rivier, I. § 42—Calvo, III. §§ 1421-1429—Bonfils, Nos. 762-771—Pradier-Fodéré, IV. §§ 2069-2113—Fiore, II. Nos. 1184-1185—Martens, II. § 23.

On Consular Functions in general.

§ 429. Although consuls are appointed chiefly in the interest of commerce, industry, and navigation, they are nevertheless charged with various functions for other purposes. Custom, commercial and consular treaties, Municipal Laws, and Municipal Consular Instructions contain detailed rules in regard to these functions. They may be grouped under the heads of fosterage of commerce and industry, supervision of navigation, protection, notarial functions.

Fosterage of Commerce and Industry.

§ 430. As consuls are appointed in the interest of commerce and industry, they must be allowed by the receiving State to watch over the execution of the commercial treaties of their home State, to send reports to the latter in regard to everything which can influence the development of its commerce and industry, and to give such information to the merchants and manufacturers of the appointing State as is necessary for the protection of their interests. The Municipal Laws of the different States and their Consular Instructions comprise detailed rules on these consular functions which are of the greatest importance. Consular reports, on the one hand, and consular information to members of the commercial world, on the other, have in the past and the present rendered valuable assistance to the development of the commerce and industry of their home States.

§ 431. Another task of consuls consists in supervision of the navigation of the appointing State. A consul at a port must be allowed to keep his eye on all merchantmen sailing under the flag of his home State which enter the port, to control and legalise their ship papers, to exercise the power of inspecting them on their arrival and departure, to settle disputes between the master and the crew or the passengers. He assists sailors in distress, undertakes the sending home of shipwrecked crews and passengers, attests averages. It is neither necessary nor possible to enumerate all the duties and powers of consuls in regard to supervision of navigation. Consular and commercial treaties, on the one hand, and, on the other, Municipal Laws and Consular Instructions, comprise detailed rules regarding these consular functions. It should, however, be added that consuls must assist in every possible way any public vessel of their home State which enters their port, if the commander so requests. But consuls have no power of supervision over such public vessels. Supervision of Navigation.

§ 432. The protection which consuls must by the receiving State be allowed to provide for the subjects of the appointing State is a very important task. For that purpose consuls keep a register, in which these subjects can have their names and addresses recorded. They make out passports, they have to render a certain assistance and help to paupers and the sick, to litigants before the Courts. If a foreign subject is wronged by the local authorities, his consul has to give him advice and help, and has eventually to interfere on his behalf. If a foreigner dies, his consul may be approached for securing the property and for rendering all kind of assistance and help to Protection.

the family of the deceased. As a rule, a consul exercises protective functions over subjects of the appointing State only; but the latter may charge him with the protection of subjects of other States which have not nominated a consul for his district.

Notarial Functions.

§ 433. Very important, too, are the notarial and the like functions with which consuls are charged. They attest and legalise signatures, examine witnesses and administer oaths for the purpose of procuring evidence for the Courts and other authorities of the appointing State. They conclude marriages of the latter's subjects, take charge of their wills, legalise their adoptions, register their births and deaths. They provide authorised translations for the local as well as for the home authorities, and furnish attestations of many kinds. All consular functions of this kind, too, are specialised by Municipal Laws and Consular Instructions. But it should be emphasised that whereas fosterage of commerce, supervision of navigation, and protection are functions the exercise of which must, according to a customary rule of International Law, be granted to consuls by the receiving States, their notarial functions need not be permitted by the admitting State in the absence of treaty stipulations.

V

Position and Privileges of Consuls

Hall, § 105—Phillimore, II. §§ 261-271—Halleck, I. pp. 371-379—Taylor, §§ 326, 332-333—Ullmann, §§ 50, 52—Bulmerincq in Holtzendorff, III. pp. 710-720—Rivier, I. § 42—Calvo, III. §§ 1385-1420—Bonfils, Nos. 753-761—Pradier-Fodéré, IV. §§ 2114-2121—Fiore, II. No. 1183—Martens, II. § 22—Bodin, "Les immunités consulaires" (1899).

Position.

§ 434. Like diplomatic envoys, consuls are simply objects of International Law. Such rights as they have are granted to them by Municipal Laws in compliance with the rights of the appointing States according to International Law.[1] As regards their position, it should nowadays be an established and uncontested fact that consuls do not enjoy the position of diplomatic envoys, since no Christian State actually grants to foreign consuls the privileges of diplomatic envoys. On the other hand, it would be incorrect to maintain that their position is in no way different from that of any other individual living within the consular district. Since they are appointed by foreign States and have received the *exequatur*, they are publicly recognised by the admitting State as agents of the appointing State. Of course, consuls are not diplomatic representatives, for they do not represent the appointing States in the totality of their international relations, but for a limited number of tasks and for local purposes only. Yet they bear a recognised public character, in contradistinction to mere private individuals, and, consequently, their position is different from that of

[1] See above, § 384.

mere private individuals. This is certainly the case with regard to professional consuls, who are officials of their home State and are specially sent to the foreign State for the purpose of administering the consular office. But in regard to non-professional consuls it must likewise be maintained that the admitting State by granting the *exequatur* recognises their official position towards itself, which demands at least a special protection of their persons and residences. The official position of consuls, however, does not involve direct intercourse with the Government of the admitting State. Consuls are appointed for *local* purposes only, and they have, therefore, direct intercourse with the *local authorities* only. If they want to approach the Government itself, they can do so only through the diplomatic envoy, to whom they are subordinate.

Consular Privileges.

§ 435. From the undoubted official position of consuls no universally recognised privileges of importance emanate as yet. Apart from the special protection due to consuls according to International Law, there is neither a custom nor a universal agreement between the Powers to grant them important privileges. Such privileges as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations of a Commercial or Consular Treaty between the sending and the admitting State. I doubt not that in time the Powers will agree upon a universal treaty in regard to the position and privileges of consuls.[1] Meanwhile, it is of interest to take notice of some of the more important stipulations which are to be found in the innumerable treaties

[1] The Institute of International Law at its meeting at Venice in 1896 adopted a *Règlement sur les immunités consulaires* comprising twenty-one articles. See Annuaire, XV. p. 304.

between the different States in regard to consular privileges:

(1) A distinction is very often made between professional and non-professional consuls in so far as the former is accorded more privileges than the latter.

(2) Although consuls are not exempt from the local civil and criminal jurisdiction, the latter is in regard to professional consuls often limited to crimes of a more serious character.

(3) In many treaties it is stipulated that consular archives shall be inviolable from search or seizure. Consuls are therefore obliged to keep their official documents and correspondence separate from their private papers.

(4) Inviolability of the consular buildings is also sometimes stipulated, so that no officer of the local police, Courts, and so on, can enter these buildings without special permission of the consul. But it is then the duty of consuls to surrender criminals who have taken refuge in these buildings.

(5) Professional consuls are often exempt from all kinds of rates and taxes, from the liability to have soldiers quartered in their houses, from the duty to appear in person as witnesses before the Courts. In the latter case either consuls have to send in their evidence in writing, or their evidence may be taken by a commission on the premises of the consulate.

(6) Consuls of all kinds have the right to put up the arms of the appointing State over the door of the consular building and to hoist the national flag.

VI

Termination of Consular Office

Hall, § 105—Ullmann, § 49—Bulmerincq in Holtzendorff, III. 708—Rivier, I. § 41—Calvo, III. §§ 1382, 1383, 1450—Bonfils, No. 775—Fiore, II. No. 1187—Martens, II. § 21.

Undoubted Causes of Termination.

§ 436. Death of the consul, withdrawal of the *exequatur*, recall or dismissal, and, lastly, war between the appointing and the admitting State, are universally recognised causes of termination of the consular office. When a consul dies or war breaks out, the consular archives must not be touched by the local authorities. They remain either under the care of an *employé* of the consulate, or a consul of another State takes charge of them until the successor of the deceased arrives or peace is concluded.

Doubtful causes of Termination.

§ 437. It is not certain in practice whether the office of a consul terminates when his district, through cession, conquest followed by annexation, or revolt, becomes the property of another State. The question ought to be answered in the affirmative, because the *exequatur* given to such consul originates from a Government which now no longer possesses the territory. A practical instance of this question occurred in 1836, when Belgium, which was then not yet recognised by Russia, declared that she would henceforth no longer treat the Russian consul Aegi at Antwerp as consul, because he was appointed before the revolt and had his *exequatur* granted by the Government of the Netherlands. Although Belgium gave way in the end to the urgent remonstrances of Russia, her original attitude was legally correct.

Change in the Headship of

§ 438. It is universally recognised that, in contradistinction to a diplomatic mission, the consular

States no Cause of Termination.

office does not come to an end through a change in the headship of the appointing or the admitting State. Neither a new patent nor a new *exequatur* is therefore necessary whether another king comes to the throne or a monarchy turns into a republic, and the like.

VII

Consuls in Non-Christian States

Tarring, "British Consular Jurisdiction in the East" (1887)—Hall, "Foreign Powers and Jurisdiction," §§ 64-85—Hallock, I. pp. 385-398—Phillimore, II. §§ 272-277—Taylor, §§ 331-333—Twiss, I. § 136—Wheaton, § 110—Ullmann, §§ 54-55—Bulmerincq in Holtzendorff, III. pp. 720-738—Rivier, I. § 43—Calvo, III. §§ 1431-1449—Bonfils, Nos. 776-791—Pradier-Fodéré, IV. 2122-2138—Martens, II. §§ 24-26—Martens, "Konsularwesen und Konsularjurisdiction im Orient" (German translation from the Russian original by Sieveking, 1874)—Bruillat, "Etude historique et critique sur les juridictions consulaires" (1898)—Lippmann, "Die Konsularjurisdiction im Orient" (1898)—Vergé, "Des consuls dans les pays d'occident" (1903).

Position of Consuls in non-Christian States.

§ 439. Fundamentally different from their regular position is that of consuls in non-Christian States, with the single exception of Japan. In the Christian countries of the West alone consuls have, as has been stated before (§ 418), lost jurisdiction over the subjects of the appointing States. In the Mohammedan States consuls not only retained their original jurisdiction, but the latter became by-and-by so extended through the so-called Capitulations that the competence of consuls comprised soon the whole civil and criminal jurisdiction, the power of protection of the privileges, the life, and property of their countrymen, and even the power to expel one of their countrymen for bad conduct. And custom

and treaties secured to consuls inviolability, exterritoriality, ceremonial honours, and miscellaneous other rights, so that there is no doubt that their position is materially the same as that of diplomatic envoys. From the Mohammedan countries this position of consuls has been extended and transferred to China, Japan, Korea, Persia, and other non-Christian countries, but in Japan the position of consuls shrank in 1899 into that of consuls in Christian States.

Consular Jurisdiction in non-Christian States.

§ 440. International custom and treaties lay down the rule only that all the subjects of Christian States residing in non-Christian States shall remain under the jurisdiction of the home State as exercised by their consuls.[1] It is a matter for the Municipal Laws of the different Christian States to organise this consular jurisdiction. All States have therefore enacted statutes dealing with this matter. As regards Great Britain, several Orders in Council and the Foreign Jurisdiction Act (53 & 54 Vict., c. 37) of 1890 are now the legal basis of the consular jurisdiction. The working of this consular jurisdiction is, however, not satisfactory in regard to the so-called mixed cases. As the national consul has exclusive jurisdiction over the subjects of his home State, he exercises this jurisdiction also in cases in which the plaintiff is a native or a subject of another Christian State, and which are therefore called mixed cases.

International Courts in Egypt.

§ 441. To overcome in some points the disadvantages of the consular jurisdiction, an interesting experiment is being made in Egypt. On the initiative of the Khedive, most of the Powers in 1875 agreed upon an organisation of International Courts in Egypt for mixed cases.[2] These Courts began

[1] See above, § 318.

[2] See Holland, The European Concert in the Eastern Question, *pp. 101–102.*

their functions in 1876. They are in the main competent for mixed civil cases, mixed criminal cases of importance remaining under the jurisdiction of the national consuls. There are three International Courts of first instance—namely, at Alexandria, Cairo, and Ismailia (formerly at Zagazig), and one International Court of Appeal at Alexandria. The tribunals of first instance are each composed of three natives and four foreigners, the Court of Appeal is composed of four natives and seven foreigners.

Exceptional Character of Consuls in non-Christian States.

§ 442. There is no doubt that the present position of consuls in non-Christian States is in every point an exceptional one, which does not agree with the principles of International Law otherwise universally recognised. But the position is and must remain a necessity as long as the civilisation of non-Christian States has not developed their ideas of justice in accordance with the Christian ideas, so as to preserve the life, property, and honour of foreigners before native Courts. Japan is an example of the readiness of the Powers to consent to the withdrawal of consular jurisdiction in non-Christian States as soon as they have reached a certain level of civilisation.

CHAPTER IV

MISCELLANEOUS AGENCIES

I

Armed Forces on Foreign Territory

Hall, §§ 54, 56, 102—Halleck, I. pp. 477-479—Phillimore, I. § 341—Taylor, § 131—Twiss, I. § 165—Wheaton, § 99—Westlake, I. p. 255—Stoerk in Holtzendorff, II. pp. 664-666—Rivier, I. pp. 333-335—Calvo, III. § 1560—Fiore, I. Nos. 528-529.

Armed Forces State Organs.

§ 443. Armed forces are organs of the State which maintains them, because such forces are created for the purpose of maintaining the independence, authority, and safety of the State. And in this respect it matters not whether armed forces are at home or abroad, for they are organs of their home State even when on foreign territory, provided only they are there in the service of their State and not for their own purposes. For if a body of armed soldiers enters foreign territory without orders from or otherwise in the service of its State, but on its own account, be it for pleasure or for the purpose of committing acts of violence, it is no longer an organ of its State.

Occasions for Armed Forces abroad.

§ 444. Besides war, there are several occasions for armed forces to be on foreign territory in the service of their home State. Thus, a State may have a right to keep troops in a foreign fortress or to send troops through foreign territory. Thus, further, a State which has been victorious in war with another may,

after the conclusion of peace, occupy a part of the territory of its former opponent as a guarantee for the execution of the Treaty of Peace. After the Franco-German war, for example, the Germans in 1871 occupied a part of the territory of France until the final instalments of the indemnity for the war costs of five milliards of francs were paid. It may also be a case of necessity for the armed forces of a State to enter foreign territory and commit acts of violence there, such as the British did in the case of the "Caroline."[1]

Position of Armed Forces abroad

§ 445. Whenever armed forces are on foreign territory in the service of their home State, they are considered exterritorial and remain, therefore, under the jurisdiction of the latter. A crime committed by a member of the force on foreign territory cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of its home State.[2] This is, however, valid only in case the crime is committed either within the place where the force is stationed, or anywhere else where the criminal was on duty. If, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the latter, not on duty but for recreation and pleasure, and then and there commit a crime, the local authorities are competent to punish them.

Case of McLeod.

§ 446. An excellent example of the position of armed forces abroad is furnished by the case of McLeod,[3] which occurred in 1841. Alexander

[1] See above, § 133, and below, § 446.

[2] This is nowadays the opinion of the vast majority of writers on International Law. There are, however, still a few dissenting authorities, such as Bar (Lehrbuch des internationalen Privat- und Strafrecht (1892), p. 351), and Rivier (I. p. 333.)

[3] See Wharton, I. § 21.

McLeod, who was a member of the British force sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the "Caroline," a boat equipped for crossing into Canadian territory and taking help to the Canadian insurgents, came in 1841 on business to the State of New York, and was arrested and indicted for the killing of one Amos Durfee, a citizen of the United States, on occasion of the capture of the "Caroline." The English Ambassador at Washington demanded the release of McLeod, on the ground that he was at the time of the alleged crime a member of a British armed force sent into the territory of the United States by the Canadian Government acting in a case of necessity. McLeod was not released, but had to take his trial; he was, however, acquitted. It is of importance to quote a passage in the reply of Mr. Webster, the Secretary of Foreign Affairs of the United States, to a note of the British Ambassador concerning this affair. The passage runs thus:—"The Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not . . . to be holden personally responsible in the ordinary tribunals for their participation in it."

II

Men-of-war in Foreign Waters

Hall, §§ 54-55—Halleck, I. pp. 215-230—Lawrence, §§ 128-129—Phillimore, II. §§ 344-350—Westlake, pp. 256-259—Taylor, § 261—Twiss, I. § 165—Wheaton, § 100—Bluntschli, § 321—Stoerk in Holtzendorff, II. pp. 434 and 446—Perels, §§ 11, 14, 15—Heilborn, System, pp. 248-279—Rivier, I. pp. 333-335—Bonfils, Nos. 614-623—Calvo, III. §§ 1550-1559—Fiore, I. Nos. 547-550—Testa, p. 86.

Men-of-war State Organs.

§ 447. Men-of-war are State organs just as armed forces are, a man-of-war being in fact a part of the armed forces of a State. And respecting their character as State organs, it matters nought whether men-of-war are at home or in foreign territorial waters or on the High Seas. But it must be emphasised that men-of-war are State organs only as long as they are manned and under the command of a responsible officer, and, further, as long as they are in the service of a State. A shipwrecked man-of-war abandoned by her crew is no longer a State organ, nor does a man-of-war in revolt against her State and sailing for her own purposes retain her character as an organ of a State. On the other hand, public vessels in the service of the police and the Custom House of a State; further, private vessels chartered by a State for the transport of troops and war materials; and, lastly, vessels carrying a head of a State and his suite exclusively, are also considered State organs, and are, consequently, in every point treated as though they were men-of-war.

Proof of Character as Men-of-war.

§ 448. The character of a man-of-war or of any other vessel treated as a man-of-war is, in the first instance, proved by her outward appearance, such vessels flying the war flag and the pennant of their States. If, nevertheless, the character of the vessel

seems doubtful, her commission, duly signed by the authorities of the State which she appears to represent, supplies a complete proof of her character as a man-of-war. And it is by no means necessary to prove that the vessel is really the property of the State, the commission being sufficient evidence of her character. Vessels chartered by a State for the transport of troops or for the purpose of carrying its head are indeed not the property of such State, although they bear, by virtue of their commission, the same character as men-of-war.[1]

Occasions for Men-of-war abroad.

§ 449. Whereas armed forces in time of peace have no occasion to be abroad, cases of a special right from a convention and cases of necessity excepted, men-of-war of all maritime States possessing a navy are constantly crossing the High Seas in all parts of the world for all kinds of purposes. Occasions for men-of-war to sail through foreign territorial waters and to enter foreign ports necessarily arise therefrom. And a special convention between the flag-State and the riparian State is not necessary to enable a man-of-war to enter and sail through foreign territorial waters and to enter a foreign port. All territorial waters and ports of the civilised States are, as a rule, quite as much open to men-of-war as to merchantmen of all nations, provided they are not excluded by special international stipulations or special Municipal Laws of the riparian States. On the other hand, it must be emphasised that, provided special international stipulations or special treaties between the flag-State and the riparian State do not prescribe the contrary in regard to one port or another and in regard to certain territorial waters,

[1] Privateers used to enjoy the same character and exemptions as men-of-war.

a State is in strict law always competent to exclude men-of-war from all or certain of its ports, and from those territorial waters which do not serve as highways for international traffic.[1] And a State is, further, always competent to impose what conditions it thinks necessary upon men-of-war which it allows to enter its ports, provided these conditions do not deny to men-of-war their universally recognised privileges.

Position of Men-of-war in foreign waters.

§ 450. The position of men-of-war in foreign waters is characterised by the fact that they are called "floating" portions of the flag-State. For at the present time a customary rule of International Law is universally recognised that the owner State of the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag-State.[2] Consequently, a man-of-war, with all persons and goods on board, remains under the jurisdiction of her flag-State even during her stay in foreign waters. No official of the riparian State is allowed to board the vessel without special permission of the commander. Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the

[1] The matter is controversial. See above, § 188, and Westlake, I. p. 192, in contradistinction to Hall, § 42.

[2] This rule became universally recognised during the nineteenth century only. On the change of doctrines formerly held in this country and the United States of America, see Hall, § 54, and Lawrence, § 128. English and American Courts recognise now the exterritoriality of foreign public vessels. Thus, in the case of the "Exchange" (7 Cranch, 116), the Supreme Court of the United States recognised the fact that the latter had no jurisdiction over this French man-of-war. In the case of the "Constitution," an American man-of-war, the High Court of Admiralty in 1879 held that foreign public ships cannot be sued in English Courts for salvage (L.R., 4 P.D. 39). And in the case of the "Parlement Belge" (L.R., 5 P.D. 197) the Court of Appeal, affirmed by the House of Lords, in 1878 held that foreign public vessels cannot be sued in English Courts for damages for collision.

commander and the other home authorities. Individuals who are subjects of the riparian State and are only temporarily on board may, although they need not, be taken to the home country of the vessel, to be there punished if they commit a crime on board. Even individuals who do not belong to the crew, and who after having committed a crime on the territory of the riparian State have taken refuge on board, cannot be forcibly taken out of the vessel; if the commander refuses their surrender, it can be obtained only by means of diplomacy from the home State.

On the other hand, men-of-war cannot do what they like in foreign waters. They are expected voluntarily to comply with the laws of the riparian States with regard to order in the ports, the places for casting anchor, sanitation and quarantine, customs, and the like. A man-of-war which refuses to do so can be expelled, and, if on such or other occasions she commits acts of violence against the officials of the riparian State or against other vessels, steps may be taken against her to prevent further acts of violence. But it must be emphasised that even by committing acts of violence a man-of-war does not fall under the jurisdiction of the riparian State. Only such measures are allowed against her as are necessary to prevent her from further acts of violence.

Position of Crew when on Land abroad.

§ 451. Of some importance is the controversial question respecting the position of the commander and the crew of a man-of-war in foreign ports when they are on land. The majority of publicists distinguish[1] between a stay on land in the service of the

[1] There are, however, several writers on International Law who do not make this distinction, and who maintain that commanders or members of the crew whilst ashore are in every case under the local jurisdiction. See, for instance, Hall, § 55; Phillimore, II. § 346; Testa, p. 109.

man-of-war and a stay for other purposes. The commander and members of the crew on land officially in the service of their vessel, to buy provisions or to make other arrangements respecting the vessel, remain under the exclusive jurisdiction of their home State, even for crimes they commit on the spot. Although they may, if the case makes it necessary, be arrested to prevent further violence, they must at once be surrendered to the vessel. On the other hand, if they are on land not officially, but for purposes of pleasure and recreation, they are under the territorial supremacy of the riparian State like any other foreigners, and they may be punished for crimes committed ashore.

III

Agents without Diplomatic or Consular Character

Hall, §§ 103-104*—Bluntschli, §§ 241-243—Ullmann, §§ 56-57—Heffter, § 222—Rivier, I. § 44—Calvo, III. §§ 1337-1339—Fiore, II. Nos. 1188-1191—Martens, II. § 5.

Agents lacking diplomatic or consular character.

§ 452. Besides diplomatic envoys and consuls, States may and do send various kinds of agents abroad—namely, public political agents, secret political agents, spies, commissaries, bearers of despatches. Their position is not the same, but varies according to the class they belong to, and they must therefore be severally treated.

Public Political Agents.

§ 453. Public political agents are agents sent by one Power to another for political negotiations of different kinds. They may be sent for a permanency or for a limited time only. As they are not invested

with diplomatic character, they do not receive a Letter of Credence, but a letter of recommendation or commission only. They may be sent by one full-Sovereign State to another, but also by and to insurgents recognised as a belligerent Power, and by and to States under suzerainty. Public (or secret) political agents without diplomatic character are, in fact, the only means for personal political negotiations with such insurgents and States under suzerainty.

As regards the position and privileges of such agents, it is obvious that they enjoy neither the position nor the privileges of diplomatic envoys.[1] But, on the other hand, they have a public character, being admitted as public political agents of a foreign State. They must, therefore, certainly be granted a special protection, but no distinct rules concerning special privileges to be granted to such agents seem to have grown up in practice. Inviolability of their persons and official papers ought to be granted to them.[2]

Secret Political Agents.

§ 454. Secret political agents may be sent for the same purposes as public political agents. But two kinds of secret political agents must be distinguished. An agent may be secretly sent to another Power with a letter of recommendation and admitted by that Power. Such agent is a secret one in so far as third Powers do not know, or are not supposed to know, of his existence. As he is, although secretly, admitted by the receiving State, his position is essentially the same as that of a public political agent. On the

[1] Heffter, § 222, is, as far as I know, the only publicist who maintains that agents not invested with diplomatic character must nevertheless be granted the privileges of diplomatic envoys.

[2] Ullmann, § 56, and Rivier, I. § 40, maintain that they *must* be granted the privilege of inviolability to the same extent as diplomatic envoys.

other hand, an agent may be secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is fulfilling his task. Such agent has no recognised position whatever according to International Law. He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State. He may be expelled at any moment if he becomes troublesome, and he may be criminally punished if he commits a political or ordinary crime. Such secret agents are often abroad for the purpose of watching the movements of political refugees or partisans, or of Socialists, Anarchists, Nihilists, and the like. As long as such agents do not turn into so-called *agents provocateurs*, the local authorities will not interfere.

Spies.

§ 455. Spies are secret agents of a State sent abroad[1] for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all States constantly or occasionally send spies abroad, and although it is neither morally nor politically and legally considered wrong to send spies, such agents have, of course, no recognised position whatever according to International Law, since they are not agents of States for their international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. And the spy cannot legally excuse himself by pleading that he only executed the orders of his Government. The latter, on the other hand,

[1] Concerning spies in time of war, see below, vol. II. §§ 159 and 210.

will never interfere, since it cannot officially confess to having commissioned a spy.

Commissaries.

§ 456. Commissaries are agents sent with a letter of recommendation or commission by one State to another for negotiations, not of a political but of a technical or administrative character only. Such commissaries are, for instance, sent and received for the purpose of arrangements between the two States as regards railways, post, telegraphy, navigation, delineation of boundary lines, and so on. A distinct practice of guaranteeing certain privileges to such commissaries has not grown up, but inviolability of their persons and official papers ought to be granted to them, as they are officially sent and received for official purposes. Thus Germany, in 1887, in the case of the French officer of police Schnaebélé, who was invited by local German functionaries to cross the German frontier for official purposes and then arrested, recognised the rule that a safe-conduct is tacitly granted to foreign officials when they enter officially the territory of a State with the consent of the local authorities, although Schnaebélé was not a commissary sent by his Government to the German Government.

Bearers of Despatches.

§ 457. Individuals commissioned to carry official despatches from a State to its head or to diplomatic envoys abroad are agents of such State. Despatch-bearers who belong to the retinue of diplomatic envoys as their couriers must enjoy, as stated above (§ 405), exemption from civil and criminal jurisdiction and a special protection in the State to which the envoy is accredited, and a right of innocent passage through third States. But bearers of official despatches who are not in the retinue of the diplomatic envoys employing them must nevertheless be granted

inviolability for their person and official papers, provided they possess special passports stating their official character as despatch-bearers. And the same is valid respecting bearers of despatches between the head of a State who is temporarily abroad and his Government at home.

IV

International Commissions

Rivier, I. pp. 564-566—Ullmann, § 58—Gareis, §§ 51-52—Liszt, § 16.

Permanent in Contradistinction to Temporary Commissions.

§ 458. A distinction must be made between temporary and permanent international commissions. The former consist of commissaries delegated by two or more States to arrange all kinds of non-political matters, such as railways, post, telegraphy, navigation, boundary lines, and the like. Such temporary commissions dissolve as soon as their purpose is realised.[1] Besides temporary commissions, there are, however, permanent commissions in existence. They have been instituted by the Powers in the interest of free navigation on two international rivers and the Suez Canal; further, in the interest of international sanitation; thirdly, in the interest of the foreign creditors of several States unable to pay the interest on their

[1] The position of their members has been discussed above, § 456. Quite novel institutions are the International Commissions of Inquiry recommended by the Hague Peace Conference of 1899. Articles 9 to 14 of the Hague Convention for the peaceful adjustment of international differences provide that, in international differences involving neither honour nor vital interests, and arising from a difference of opinion on matters of fact, the parties should institute an International Commission of Inquiry; this commission to present a report to the parties, which shall be limited to a statement of the facts. (See below, vol. II. § 5.)

stocks; and, lastly, concerning the treatment of sugar.

Commissions in the interest of Navigation.

§ 459. Four international commissions have been instituted in the interest of navigation—namely, two for the river Danube, one for the Congo river, and one for the Suez Canal.

1. With regard to the navigation on the Danube, the European Danube Commission was instituted by article 16 of the Peace Treaty of Paris in 1856. This commission, whose members are appointed by the signatory Powers of the Treaty of Paris, was reconstituted by the Berlin Conference in 1878 and again by the Conference of London in 1883. The commission is totally independent of the territorial Governments, its rights are clearly defined, and its members, offices, and archives enjoy the privilege of inviolability. The competence of the European Danube Commission comprehends the Danube from Ibraila downwards to its mouth.[1]

2. The above-mentioned London Conference of 1883 has sanctioned regulations[2] in regard to the navigation and river-police of the Danube from the Iron Gates down to Ibraila, and has, by article 96 of these regulations, instituted the Mixed Commission of the Danube for the observance of the regulations. The members of this Commission are delegates from Austria-Hungary, Bulgaria, Roumania, Servia, and the European Danube Commission—one member from each.[3]

3. The Powers represented at the Berlin Congo Conference of 1884 have sanctioned certain regulations in regard to navigation on the Congo river, and have, by articles 17–21 of the General Act of

[1] Details in Twiss, I. §§ 150–152.
[2] Martens, N.R.G., 2nd ser. IX. p. 394.
[3] Details in Twiss, § 152.

the Conference, instituted an International Commission of the Congo for the observance of these regulations. This Commission, in which every signatory Power may be represented by one member, is totally independent of the territorial Governments, and its members, offices, and archives enjoy the privilege of inviolability.[1]

4. By article 8 of the Treaty of Constantinople of 1888 in regard to the neutralisation of the Suez Canal, a Commission was instituted for the supervision of the execution of that treaty. The Commission consists of all the consuls of the signatory Powers in Egypt.[2]

Commissions in the Interest of Sanitation.

§ 460. Three international commissions in the interest of sanitation are in existence. For the purpose of supervising the sanitary arrangements in connection with the navigation on the lower part of the Danube, the International Council of Sanitation was instituted at Bucharest in 1881.[3] The *Conseil supérieur de santé* at Constantinople has the task of supervising the arrangements concerning cholera and plague. The *Conseil sanitaire maritime et quarantenaire* at Alexandria has similar tasks and is subject to the control of the *Conseil supérieur de santé* at Constantinople.[4]

Commissions in the Interest of Foreign Creditors.

§ 461. Three international commissions in the interest of foreign creditors are in existence—namely, in Turkey since 1878, in Egypt since 1880, and in Greece since 1897.[5]

[1] Details in Calvo, I. § 334. According to Liszt, § 16, II. 2, this Commission has never been appointed.

[2] See above, § 183.

[3] See Article 6 of the *Acte additionnel à l'Acte public du 2 novembre 1865 pour la navigation des embouchures du Danube*, signed on May 28, 1881; Martens, N.R.G. 2nd ser. VIII. p. 207.

[4] Details in Liszt, § 16, III.

[5] See Murat, *Le contrôle international sur les finances de l'Egypte, de la Grèce et de la Turquie* (1899).

Permanent Commission concerning Sugar.

§ 462. According to article 7 of the Brussels Convention concerning bounties on sugar, a permanent commission was instituted in 1902 at Brussels.[1]

V

International Offices

Rivier, I. pp. 564-566—Ullmann, § 58—Liszt, § 17—Gareis, § 52—Descamps, "Les offices internationaux et leur avenir" (1894).

Character of International Offices.

§ 463. During the second half of the nineteenth century a great number of States constituted by international treaties so-called unions for non-political purposes. The business of these unions is transacted by international offices created specially for that purpose. The functionaries of these offices enjoy, however, ordinarily no privilege whatever. There are at present nine international offices in existence, exclusive of the International Bureau of Arbitration,[2] which, although an international office, has no relation with those here discussed.

International Telegraph Office.

§ 464. In 1868 was created the international telegraph office of the International Telegraph Union at Berne. It is administered by four functionaries under the supervision of the Swiss Bundesrath. It edits the "Journal Télégraphique" in French.[3]

International Post Office.

§ 465. The pendant of the international telegraph office is the international post office of the Universal Postal Union at Berne, founded in 1874. It is administered by seven functionaries under the supervision of the Swiss Bundesrath and edits a monthly, "L'Union Postale," in French, German, and English.[4]

[1] See below, § 591.
[2] See below, § 474.
[3] See below, § 580.
[4] See below, § 579.

International Office of Weights and Measures.

§ 466. The States which have introduced the metric system of weights and measures created in 1875 the international office of weights and measures in Paris. Of functionaries there are a director and several assistants. Their task is the custody of the international prototypes of the mètre and kilogramme and the comparison of the national prototypes with the international.[1]

International Office for the Protection of Works of Literature and Art and of Industrial Property.

§ 467. In 1883 an International Union for the Protection of Industrial Property, and in 1886 an International Union for the Protection of Works of Literature and Art, were created, with an international office in Berne. There are a secretary-general and three assistants, who edit a monthly, "Le Droit d'Auteur," in French.[2]

International Maritime Office at Zanzibar.

§ 468. For the purpose of abolishing the slave trade the Brussels Conference of 1890 created an international maritime office at Zanzibar. Every signatory Power has a right to be represented at this office by a delegate.

International Office of Customs Tariffs.

§ 469. The International Union for the Publication of Customs Tariffs, concluded in 1890, has created an international office at Brussels. There are a director, a secretary, and ten translators. The office edits the "Bulletin des Douanes" in French, German, English, Italian, and Spanish.[3]

Central Office of International Transports.

§ 470. Nine States—namely, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Luxemburg, Russia, Switzerland—entered in 1890 into an international convention in regard to transports and freights on railways and have created the "Office Central des Transports Internationaux" at Berne.[4]

[1] See below, § 582.
[2] See below, §§ 583-584.
[3] See below, § 585.
[4] See below, § 581.

Permanent Office of the Sugar Convention.

§ 471. The States which concluded on March 5, 1902, at Brussels the Convention concerning bounties on sugar [1] have, in compliance with article 7 of this Convention, instituted a permanent office at Brussels. The task of this office, which is attached to the permanent commission,[2] also instituted by article 7, is to collect, translate, and publish information of all kinds respecting legislation on and statistics of sugar.

VI

The International Court of Arbitration

Organisation of Court in general.

§ 472. In compliance with articles 20 to 29 of the Hague Convention for the peaceful adjustment of international differences, the signatory Powers in 1900 organised the International Court of Arbitration at the Hague. This organisation comprises three distinct bodies—namely, the Permanent Administrative Council of the Court, the International Bureau of the Court, and the Court of Arbitration itself. But a fourth body must also be distinguished—namely, the tribunal to be constituted for the decision of every case.

The Permanent Council.

§ 473. The Permanent Council (article 28) consists of the diplomatic envoys of the signatory Powers accredited to the Netherlands and of the Dutch Secretary for Foreign Affairs, who acts as president of the Council. At least nine Powers must be represented at the Council. The task of the latter is the control of the International Bureau of the Court, the appointment, suspension, and dismissal of the *em-*

[1] See below, § 591. [2] See above, § 462.

ployés of the bureau, and the decision of all questions of administration with regard to the operations of the Court. The Council has, further, the task of furnishing the signatory Powers with a report of the proceedings of the Court, the working of the administration, and the expenses. At meetings duly summoned, the presence of five members is sufficient to give the Council power to deliberate, and its decisions are taken by a majority of votes.

The International Bureau.

§ 474. The International Bureau (article 22) serves as the Registry for the Court. It is the intermediary for communications relating to the meetings of the Court. It has the custody of the archives and the conduct of all the administrative business of the Court. The signatory Powers have to furnish the Bureau with a certified copy of every stipulation concerning arbitration arrived at between them, and of any award concerning them rendered by a special tribunal, &c. The Bureau is (article 26) authorised to place its premises and its staff at the disposal of the signatory Powers for the work of any special[1] tribunal of arbitration not constituted within the International Court of Arbitration. The expense (article 29) of the Bureau is borne by the signatory Powers in the proportion established for the International Office of the International Postal Union.

The Court of Arbitration.

§ 475. The Court of Arbitration (article 23) consists of a large number of individuals "of recognised competence in questions of International Law, enjoying the highest moral reputation," selected and appointed by the signatory Powers. No more than four members may be appointed by one Power, but two or more Powers may unite in the appointment of one or more members, and the same individual may

[1] See below, vol. II. § 20.

be appointed by different Powers. Every member is appointed for a term of six years, but his appointment may be renewed. The place of a resigned or deceased member is to be refilled by the respective Powers. The names of the members of the Court thus appointed are enrolled upon a general list, which is to be kept up to date and communicated to all the signatory Powers. The Court thus constituted has jurisdiction over all cases of arbitration, unless there shall be an agreement between the parties for a special tribunal of arbitrators not selected from the list of the members of the Court (article 21).

The Deciding Tribunal.

§ 476. The Court of Arbitration does not as a body decide the cases brought before it, but a tribunal is created for every special case by selection of a number of arbitrators from the list of the members of the Court. This tribunal (article 24) may be created directly by agreement of the parties. If this is not done, the tribunal is formed in the following manner. Each party selects two names from the list, and the four arbitrators so appointed choose a fifth as umpire and president. If the votes of the four are equal, the parties entrust to a third Power the choice of the umpire.

If the parties cannot agree in their choice of such third Power, each party nominates a different Power, and the umpire is chosen by the united action of the Powers thus nominated. After this is done, the tribunal is constituted, and the parties communicate to the International Bureau of the Court the names of the members of the tribunal, which meets at the time fixed by the parties. The members of the tribunal must be granted the privileges of diplomatic envoys when discharging their duties outside their own country. The tribunal sits ordinarily at the Hague,

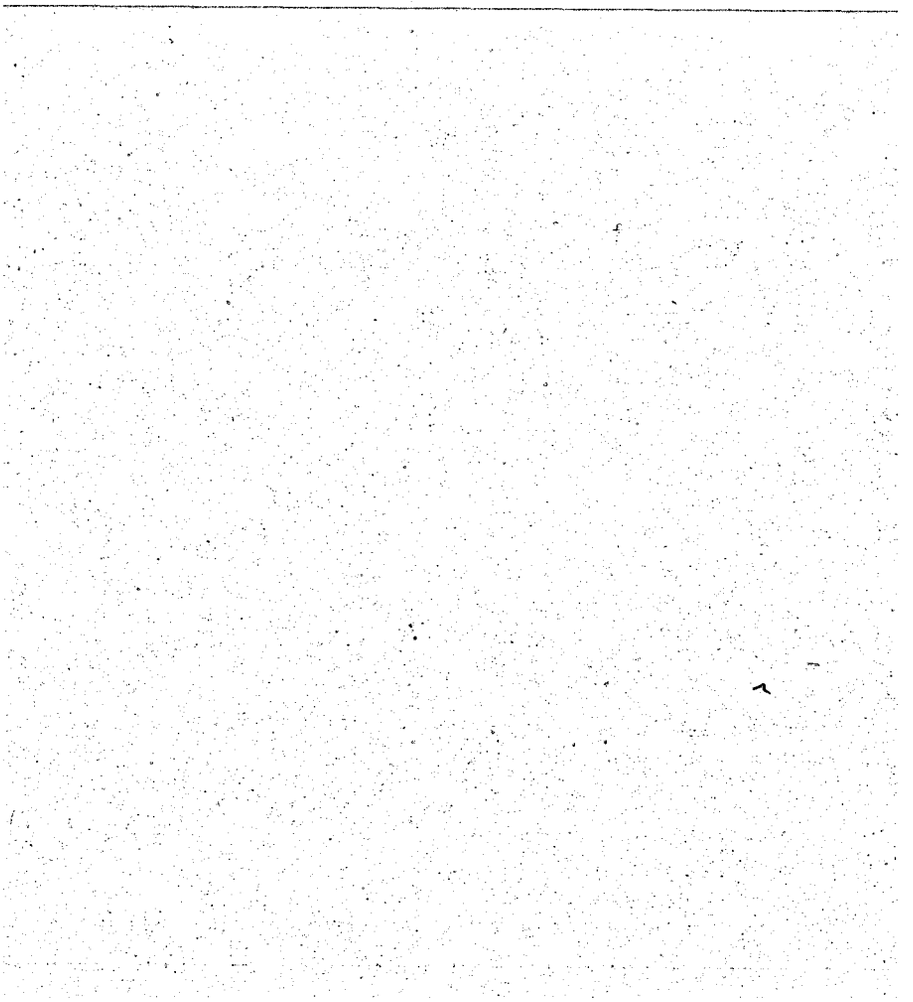
and, except in case of *force majeure*, the place of session can only be altered by the tribunal with the assent of the parties (article 25). But the parties can from the beginning designate another place than the Hague as the venue of the tribunal (article 36). The expenses of the tribunal are paid by the parties in equal shares (article 57).[1]

[1] The procedure to be followed by and before the tribunal is described below, vol. II. § 27.



PART IV

INTERNATIONAL TRANSACTIONS



CHAPTER I

ON INTERNATIONAL TRANSACTIONS IN GENERAL

I

NEGOTIATION

Heffter, §§ 234-239—Geffcken in Holtzendorff, III. pp. 668-676—Liszt, § 20—Ullmann, § 59—Bonfils, Nos. 792-795—Pradier-Fodéré, III. Nos. 1354-1362—Rivier, II. § 45—Calvo, III. §§ 1316-1320, 1670-1673.

Conception of Negotiation.

§ 477. International negotiation is the term for such intercourse between two or more States as is initiated and directed for the purpose of effecting an understanding between them on matters of interest. Since civilised States form a body interknitted through their interests, such negotiation is constantly going on in some shape or other. No State of any importance can abstain from it in practice. There are many other international transactions,[1] but negotiation is by far the most important of them. And it must be emphasised that negotiation as a means of amicably settling conflicts between two or more States is only a particular kind of negotiation, although it will be specially discussed in another part of this work.[2]

Parties to Negotiation.

§ 478. International negotiations can be conducted by all such States as have a standing within the Family of Nations. Full-Sovereign States are, therefore, the regular subjects of international negotiation.

[1] See below, §§ 486-490.

[2] See below vol. II. §§ 4-6.

But it would be wrong to maintain that half- and part-Sovereign States can never be parties to international negotiations. For they can indeed conduct negotiations on those points concerning which they have a standing within the Family of Nations. Thus, for instance, Bulgaria can, in spite of her being a half-Sovereign State only, negotiate with foreign States independently of Turkey on several matters.[1] But so-called colonial States, as the Dominion of Canada, can never be parties to international negotiations; any necessary negotiation for a colonial State must be conducted by the mother-State to which it internationally belongs.[2]

It must be specially mentioned that such negotiation as is conducted between a State, on the one hand, and, on the other, a party which is not a State, is not *international* negotiation, although such party may reside abroad. Thus, negotiations of a State with the Pope and the Holy See are not international negotiations, although all the formalities connected with international negotiations are usually in this case observed. Thus, too, negotiations on the part of States with a body of foreign bankers and contractors concerning a loan, the building of a railway, the working of a mine, and the like, are not international negotiations.

Purpose of Negotiation.

§ 479. Negotiations between States may have various purposes. The purpose may be an exchange of views only on some political question or other; but it may also be an arrangement as to the line of action to be taken in future with regard to a certain point,

[1] See above, § 91.

[2] The demand on the part of many influential Canadian politicians, expressed after the verdict of the Arbitration Court in the Alaska Boundary dispute, that Canada should have the power of making treaties independently of Great Britain, includes necessarily the demand to become in some respects a Sovereign State.

or a settlement of differences, or the creation of international institutions, such as the Universal Postal Union for example, and so on. Of the greatest importance are those negotiations which aim at an understanding between members of the Family of Nations respecting the very creation of rules of International Law by international conventions. Since the Vienna Congress at the beginning of the nineteenth century negotiations between the Powers for the purpose of defining, creating, or abolishing rules of International Law have frequently and very successfully been conducted.[1]

Negotiations by whom conducted.

§ 480. International negotiations are conducted by the organs which represent the negotiating States. The heads of these States may conduct the negotiations in person, either by letters or by a personal interview. Serious negotiations have in the past been conducted by heads of States, and, although this is comparatively seldom done, there is no reason to believe that personal negotiations between heads of States will not occur in future.[2] Heads of States may also personally negotiate with diplomatic or other agents commissioned for that purpose by other States. Ambassadors, as diplomatic agents of the first class, must, according to International Law, have even the right to approach in person the head of the State to which they are accredited for the purpose of negotiation.[3] The rule, however, is that negotiation between States concerning more important matters is conducted by their Secretaries for Foreign Affairs, with the help either of their diplomatic envoys or of agents without diplomatic character and so-called commissaries.[4]

[1] See below, §§ 555–568.
[2] See below, § 495.
[3] See above, § 365.
[4] Negotiations between armed

Form of Negotiation.

§ 481. The Law of Nations ignores any particular form in which international negotiations must necessarily be conducted. Such negotiations may, therefore, take place *viva voce* or through the exchange of written representations and arguments or both. The more important negotiations are regularly conducted through the diplomatic exchange of written communications, as only in this way can misunderstandings be avoided, which easily arise during *viva-voce* negotiations. Of the greatest importance are the negotiations which take place through congresses and conferences.[1]

During *viva-voce* negotiations it happens sometimes that a diplomatic envoy negotiating with the Secretary for Foreign Affairs reads out a letter received from his home State. In such case it is usual to leave a copy of the letter at the Foreign Office. If a copy is refused, the Secretary for Foreign Affairs can on his part refuse to hear the letter read. Thus in 1825 Canning refused to listen to a Russian communication to be read to him by the Russian Ambassador in London with regard to the independence of the former Spanish colonies in South America, because this Ambassador was not authorised to leave a copy of the communication at the British Foreign Office.[2]

End and Effect of Negotiation.

§ 482. Negotiations may and often do come to an end without any effect whatever on account of the parties failing to agree. On the other hand, if negotiations lead to an understanding, the effect may be twofold. It may consist either in a satisfactory exchange of views and intentions, and the parties are

forces of belligerents are regularly conducted by soldiers. See below, vol. II. §§ 220-240.

[1] See below, § 483.

[2] As regards the language used during negotiation, see above, § 359.

then in no way, legally at least, bound to abide by such views and intentions, or to act on them in the future; or in an agreement on a treaty, and then the parties are legally bound by the stipulations of such treaty. Treaties are of such importance that it is necessary to discuss them in a special chapter.[1]

II

Congresses and Conferences

Phillimore, II. §§ 39-40—Twiss, II. § 8—Taylor, §§ 34-36—Bluntschli, § 12—Heffter, § 242—Geffcken in Holtzendorff, III. pp. 679-684—Ullmann, §§ 60-61—Bonfils, Nos. 796-814—Despagnet, Nos. 484-488—Pradier-Fodéré, VI. Nos. 2593-2599—Rivier, II. § 46—Calvo, III. §§ 1674-1681—Fiore, II. Nos. 1216-1224—Martens, I. § 52—Charles de Martens, "Guide Diplomatique," vol. I. § 58—Pradier-Fodéré, "Cours de droit diplomatique" (1881), vol. II. pp. 372-424—Zaleski, "Die völkerrechtliche Bedeutung der Congresse" (1874).

Conception of Congresses and Conferences.

§ 483. International congresses and conferences are formal meetings of the representatives of several States for the purpose of discussing matters of international interest and coming to an agreement concerning these matters. As far as language is concerned, the term "congress" as well as "conference" may be used for the meetings of the representatives of only two States, but regularly congresses or conferences denote such bodies only as are composed of the representatives of a greater number of States. Several writers[2] allege that there are characteristic differences between a congress and a conference. But all such alleged differences vanish in face of the

[1] See below, §§ 491-554.
[2] See, for instance, Martens, I. § 52, and Fiore, II. §§ 1216-1224.

fact that the Powers, when summoning a meeting of representatives, name such body either congress or conference indiscriminately. It is not even correct to say that the more important meetings are named congresses, in contradistinction to conferences, for the Hague Peace Conference of 1898 was, in spite of its grand importance, denominated a conference.

Much more important than the mere terminological difference between congress and conference is the difference of the representatives who attend the meeting. For it may be that the heads of the States meet at a congress or conference, or that the representatives consist of diplomatic envoys and Secretaries for Foreign Affairs of the Powers. But, although congresses and conferences of heads of States have been held in the past and might at any moment be held again in the future, there can be no doubt that the most important matters are treated by congresses and conferences consisting of diplomatic representatives of the Powers.

Parties to Congresses and Conferences.

§ 484. Congresses and conferences not being organised by customary or conventional International Law, no rules exist with regard to the parties of a congress or conference. Everything depends upon the purpose for which a congress or a conference meets, and upon the Power which invites other Powers to the meeting. If it is intended to settle certain differences, it is reasonable that all the States concerned should be represented, for a Power which is not represented need not consent to the resolutions of the congress. If the creation of new rules of International Law is intended, at least all full-Sovereign members of the Family of Nations ought to be represented. To the Peace Conference at the Hague, nevertheless, only the majority of States were

invited to send representatives, the South American Republics not being invited at all.

It is frequently maintained that only full-Sovereign States can be parties to congresses and conferences. This is certainly not correct, as here, too, everything depends upon the merits of the special case. As a rule, full-Sovereign States only are parties, but there are exceptions. Thus, Bulgaria, a vassal under Turkish suzerainty, was a party to the Hague Peace Conference, although without a vote. There is no reason to deny the rule that half- and part-Sovereign States can be parties to congresses and conferences in so far as they are able to negotiate internationally.[1] Such States are, in fact, frequently asked to send representatives to such congresses and conferences as meet for non-political matters.

But no State can be a party which has not been invited, or admitted at its own request. If a Power thinks it fitting that a congress or conference should meet, it invites such other Powers as it pleases. The invited Powers may accept under the condition that certain other Powers should or should not be invited or admitted. Those Powers which have accepted the invitation become parties if they send representatives. Each party may send several representatives, but they have only one vote, given by the senior representative for himself and his subordinates.

Procedure at Congresses and Conferences.

§ 485. After the place and time of meeting have been arranged—such place may be neutralised for the purpose of securing the independence of the deliberations and discussions—the representatives meet and constitute themselves by exchanging their commissions and electing a president and other

[1] See above, § 478.

officers. It is usual, but not obligatory, for the Secretary for Foreign Affairs of the State within which the congress meets to be elected president. If the difficulty of the questions on the programme makes it advisable, special committees are appointed for the purpose of preparing the matter for discussion by the body of the congress. In such discussion all representatives can take part. After the discussion follows the voting. The motion must be carried unanimously to consummate the task of the congress, for the vote of the majority has no power whatever in regard to the dissenting parties. But it is possible that the majority considers the motion binding for its members. A protocol is to be kept for all the discussions and the voting. If the discussions and votings lead to a final result upon which the parties agree, all the points agreed upon are drawn up in an Act, which is signed by the representatives and which is called the Final Act or the General Act of the congress or conference. A party can make a declaration or a reservation in signing the Act for the purpose of excluding a certain interpretation of the Act in the future. And the Act may expressly stipulate freedom for States which were not parties to accede to it in future.

III

TRANSACTIONS BESIDES NEGOTIATION

Bluntschli, § 84—Hartmann, § 91—Gareis, § 77—Liszt, § 20.

Different kinds of Transaction.

§ 486. International transaction is the term for every act on the part of a State in its intercourse with other States. Besides negotiation, which has been discussed above in §§ 477–482, there are eleven other kinds of international transactions which are of legal importance—namely, declaration, notification, protest, renunciation, recognition, intervention, retorsion, reprisals, pacific blockade, war, and subjugation. Recognition has already been discussed above in §§ 71–75, as has also intervention in §§ 134–138, and, further, subjugation in §§ 236–241. Retorsion, reprisals, pacific blockade, and war will be treated in the second volume of this work. There are, therefore, here to be discussed only the remaining four transactions—namely, declaration, notification, protest, and renunciation.

Declaration.

§ 487. The term "declaration" is used in three different meanings. It is, first, sometimes used as the title of a body of stipulations of a treaty according to which the parties engage themselves to pursue in future a certain line of conduct. The Declaration of Paris, 1856, and the Declaration of St. Petersburg, 1868, are instances of this. Declarations of this kind differ in no respect from treaties.[1] One speaks, secondly, of declarations when States communicate to other States or *urbi et orbi* an explanation and justification of a line of conduct pursued by them in the past, or an explanation

[1] See below, § 508.

of views and intentions concerning certain matters. Declarations of this kind may be very important, but they hardly comprise transactions out of which rights and duties of other States follow. But there is a third kind of declarations out of which rights and duties do follow for other States, and it is this kind which comprises a specific international transaction, although the different declarations belonging to this group are by no means of a uniform character. Declarations of this kind are declarations of war, declarations on the part of belligerents concerning the goods they will condemn as contraband, declarations at the outbreak of war on the part of third States that they will remain neutral, and others.

Notification.

§ 488. Notification is the technical term for the communication to other States of the knowledge of certain facts and events of legal importance. In principle, no notification is obligatory, but in fact it frequently takes place, because States cannot be considered subject to certain duties without the knowledge of the facts and events which give rise to these duties. Thus it is usual to notify to other States changes in the headship and in the form of government of a State, the outbreak of war, the establishment of a Federal State, a blockade, an annexation after conquest, the appointment of a new Secretary for Foreign Affairs, and the like. But although notification is as a rule not obligatory, there are some exceptions to the rule. Thus, according to article 56 of the Hague Convention for the peaceful adjustment of international differences, in case a number of States are parties to a treaty and two of the parties are at variance concerning the interpretation of such treaty and agree to have the

difference settled by arbitration, they have to notify this agreement to all other parties to the treaty. Thus, too, according to article 34 of the General Act of the Berlin Congo Conference of 1885, notification of new occupations and the like on the African coast is obligatory.

Protest.

§ 489. Protest is a formal communication on the part of a State to another that it objects to an act performed or contemplated by the latter. A protest serves the purpose of preservation of rights, or of making it known that the protesting State does not acquiesce in and does not recognise certain acts. A protest can be lodged with another State concerning acts of the latter which have been notified to the former or which have otherwise become known. On the other hand, if a State acquires knowledge of an act which it considers internationally illegal and against its rights, and nevertheless does not protest, such attitude implies renunciation of such rights, provided a protest would have been necessary to preserve a claim. It may further happen that a State at first protests, but afterwards either expressly [1] or tacitly acquiesces in the act. And it must be emphasised that under certain circumstances and conditions a simple protest on the part of a State without further action is not in itself sufficient to preserve the rights in behalf of which the protest was made.[2]

Renunciation.

§ 490. Renunciation is the deliberate abandonment of rights. It can be given *expressis verbis* or tacitly.

[1] Thus by section 2 of the Declaration concerning Siam, Madagascar, and the New Hebrides, which is embodied in the Anglo-French Agreement of April 8, 1904, Great Britain withdrew the protest which she had raised against the introduction of the Customs tariff established at Madagascar after the annexation to France (see below, p. 594).

[2] See below, § 539, concerning the withdrawal of Russia from article 59 of the Treaty of Berlin, 1878, stipulating the freedom of the port of Batoum.

If, for instance, a State by occupation takes possession of an island which has previously been occupied by another State,[1] the latter tacitly renounces its rights by not protesting as soon as it receives knowledge of the fact. Renunciation plays a prominent part in the amicable settlement of differences between States, either one or both parties frequently renouncing their claims for the purpose of coming to an agreement. But it must be specially observed that mere silence on the part of a State does not imply renunciation; this occurs only when a State remains silent, although a protest is necessary to preserve a claim.

[1] See above, § 247.

CHAPTER II

TREATIES

I

Character and Function of Treaties

Vattel, II. §§ 152, 153, 157, 163—Hall, § 107—Phillimore, II. § 44—Twiss, I. §§ 224-233—Taylor, §§ 341-342—Bluntschli, § 402—Heffter, § 81—Despagnet, Nos. 444-445—Pradier-Fodéré, II. Nos. 888-919—Rivier, II. pp. 33-40—Calvo, III. §§ 1567-1584—Fiore, II. Nos. 976-982—Martens, I. § 103—Bergbohm, "Staatsverträge und Gesetze als Quellen des Völkerrechts" (1877)—Jellinek, "Die rechtliche Natur der Staatenverträge" (1880)—Laghi, "Teoria dei trattati internazionali" (1882)—Buonamici, "Dei trattati internazionali" (1888)—Nippold, "Der völkerrechtliche Vertrag" (1894)—Triepel, "Völkerrecht und Landesrecht" (1899), pp. 27-90.

Conception of Treaties.

§ 491. International treaties are conventions or contracts between two or more States concerning various matters of interest. Even before a Law of Nations in the modern sense of the term was in existence, treaties used to be concluded between States. And although in those times treaties were neither based on nor were themselves a cause of an International Law, they were nevertheless considered sacred and binding on account of religious and moral sentiment. However, since the manifold intercourse of modern times did not then exist between the different States, treaties did not discharge such all-important functions in the life of humanity as they do now.

Different kinds of Treaties.

§ 492. These important functions are manifest if attention is given to the variety of international treaties which exist nowadays and are day by day

concluded for innumerable purposes. In regard to State property, treaties are concluded of cession, of boundary, and many others. Alliances, treaties of protection, of guarantee, of neutrality, of peace are concluded for political purposes. Various purposes are served by consular treaties, commercial[1] treaties, treaties in regard to the post, telegraphs, and railways, treaties of copyright and the like, of jurisdiction, of extradition, monetary treaties, treaties in regard to measures and weights, to rates, taxes, and custom-house duties, treaties on the matter of sanitation with respect to epidemics, treaties in the interest of industrial labourers, treaties with regard to agriculture and industry. Again, various purposes are served by treaties concerning warfare, mediation, arbitration, and so on.

I do not intend to discuss the question of classification of the different kinds of treaties, for hitherto all attempts[2] at such classification have failed. But there is one distinction to be made which is of the greatest importance and according to which the whole body of treaties is to be divided into two classes. For treaties may, on the one hand, be concluded for the purpose of confirming, defining, or abolishing existing customary rules, and of establishing new rules for the Law of Nations. Treaties of this kind ought to be termed *law-making* treaties. On the other hand, treaties may be concluded for all kinds of other purposes. Law-making treaties as a source of rules of International Law have been

[1] They frequently embody the so-called *most favoured nation clause*. See below, § 622.

[2] Since the time of Grotius the science of the Law of Nations has not ceased attempting a satisfactory classification of the different kinds of treaties. See Heffter, §§ 88–91; Bluntschli, §§ 442–445; Martens, I. § 113; Ullmann, § 70; Wheaton, § 268 (following Vattel, II. § 169); Rivier, II. pp. 106–118; Westlake, I. p. 283, and many others.

discussed above (§ 18); the most important of these treaties will be considered below (§§ 556–568).

Binding Force of Treaties.

§ 493. The question as to the reason of the binding force of international treaties always was, and still is, very much disputed. That all those publicists who deny the legal character of the Law of Nations deny likewise a legally binding force in international treaties is obvious. But even among those who acknowledge the legal character of International Law, unanimity by no means exists concerning this binding force of treaties. The question is all the more important as everybody knows that treaties are frequently broken, rightly according to the opinion of the one party, and wrongly according to the opinion of the other. Many publicists find the binding force of treaties in the Law of Nature, others in religious and moral principles, others[1] again in the self-restraint exercised by States in becoming a party to a treaty. Some writers[2] assert that it is the contracting parties' own will which gives binding force to their treaties, and others[3] teach that such binding force is to be found *im Rechtsbewusstsein der Menschheit*—that is, in the idea of right innate in man. I believe that the question can satisfactorily be dealt with only by dividing it into several different questions and by answering those questions *seriatim*.

First, the question is to be answered why treaties are legally binding. The answer must categorically be that this is so because there exists a customary rule of International Law that treaties are binding.

Then the question might be put as to the cause

[1] So Hall, § 107; Jellinek, Staatenverträge, p. 31; Nippold, § 11.

[2] So Triepel, Völkerrecht und Landesrecht (1899), p. 82.

[3] So Bluntschli, § 410.

of the existence of such customary rule. The answer must be that such rule is the product of several joint causes. Religious and moral reasons require such a rule quite as much as the interest of the States, for no law could exist between nations if such rule did not exist. All causes which have been and are still working to create and maintain an International Law are at the background of this question.

And, thirdly, the question might be put how it is possible to speak of a legally binding force in treaties without a judicial authority to enforce their stipulations. The answer must be that the binding force of treaties, although it is a legal force, is not the same as the binding force of contracts according to Municipal Law, since International Law is a weaker law, and for this reason less enforceable, than Municipal Law. But just as International Law does not lack legal character in consequence of the fact that there is no central authority[1] above the States which could enforce it, so international treaties are not deficient of a legally binding force because there is no judicial authority for the enforcement of their stipulations.

[1] See above, § 5.

II

Parties to Treaties

Vattel, II. §§ 154-156, 206-212—Hall, § 108—Westlake, I. p. 279—Phillimore, II. §§ 48-49—Halleck, I. pp. 275-278—Taylor, §§ 361-365—Wheaton, §§ 265-267—Bluntschli, §§ 403-409—Heffter, §§ 84-85—Ullmann, § 63—Bonfils, No. 818—Despagnet, No. 447—Pradier-Fodéré, II. Nos. 1058-1068—Rivier, II. pp. 45-48—Calvo, III. §§ 1616-1618—Fiore, II. Nos. 984-1000—Martens, I. § 104—Nippold, l. c. pp. 104-112.

The Treaty-making Power.

§ 494. The so-called right of making treaties is not a right of a State in the technical meaning of the term, but a mere competence attaching to sovereignty. A State possesses, therefore, treaty-making power only so far as it is sovereign. Full-Sovereign States may become parties to treaties of all kinds, being regularly competent to make treaties on whatever objects they please. Not-full Sovereign States, however, can become parties to such treaties only according to their competence to conclude. It is impossible to lay down a hard and fast rule concerning such competence of all not-full Sovereign States. Everything depends upon the special case. Thus, the constitutions of Federal States comprise provisions with regard to the competence, if any, of the member-States to conclude international treaties among themselves as well as with foreign States.[1] Thus, again, it

[1] According to articles 7 and 9 of the Constitution of Switzerland the Swiss member-States are competent to conclude non-political treaties among themselves, and, further, such treaties with foreign States as concern matters of police, of local traffic, and of State economics. According to article 11 of the Constitution of the German Empire, the German member-States are competent to conclude treaties concerning all such matters as do not, in conformity with article 4 of the Constitution, belong to the competence of the Empire. On the other hand, according to article 1, section 10, of the Constitution of the United States of America, the member-States are incompetent either to conclude treaties among themselves or with foreign States.

depends upon the special relation between the suzerain and the vassal how far the latter possesses the competence to enter into treaties with foreign States: ordinarily a vassal can conclude treaties concerning such matters as railways, extradition, commerce, and the like.

Treaty-making Power exercised by Heads of States.

§ 495. The treaty-making power of the States is exercised by their heads, either personally or through representatives appointed by these heads. The Holy Alliance of Paris, 1814, was personally concluded by the Emperors of Austria and Russia and the King of Prussia. And when, on June 24, 1859, the Austrian army was defeated at Solferino, the Emperors of Austria and France met on July 11, 1859, at Villafranca and agreed in person on preliminaries of peace. Yet, as a rule, heads of States do not act in person, but authorise representatives to act for them. Such representatives receive a written commission, known as powers or full powers, which authorises them to negotiate in the name of the respective heads of States. They also receive oral or written, open or secret instructions. But, as a rule, they do not conclude a treaty finally, for all treaties concluded by such representatives are in principle not valid before ratification.[1] If they conclude a treaty by exceeding their powers or acting contrary to their instructions, the treaty is not a real treaty and not binding upon the State they represent. A treaty of such a kind is called a *sponsio* or *sponsiones*. *Sponsiones* may become a real treaty and binding upon the State through the latter's approval. Nowadays, however, the difference between real treaties and *sponsiones* is less important than in former times, when the custom was not yet general in favour of

[1] See below, § 510.

the necessity of ratification for the validity of treaties. If nowadays representatives exceed their powers, their States can simply refuse ratification of the *sponsio*.

Minor Functionaries exercising Treaty-making Power.

§ 496. For some non-political purposes of minor importance, certain minor functionaries are recognised as competent to exercise the treaty-making power of their States. Such functionaries are *ipso facto* by their offices and duties competent to enter into certain agreements without the requirement of ratification. Thus, for instance, in time of war, military and naval officers in command can enter into agreements concerning a suspension of arms, the surrender of a fortress, the exchange of prisoners, and the like. But it must be emphasised that treaties of this kind are valid only when these functionaries have not exceeded their powers.

Constitutional Restrictions.

§ 497. Although the heads of States are regularly, according to the Law of Nations, the organs that exercise the treaty-making power of the States, constitutional restrictions imposed upon the heads concerning the exercise of this power are nevertheless of importance for the Law of Nations. Such treaties concluded by heads of States or representatives authorised by these heads as violate constitutional restrictions are not real treaties and do not bind the State concerned, because the representatives have exceeded their powers in concluding the treaties.[1] Such constitutional restrictions, although they are not of great importance in Great Britain,[2] play a prominent part in the Constitutions of most countries. Thus, according to article 8 of the

[1] The whole matter is discussed with great lucidity by Nippold, l. c. pp. 127-164.

[2] See Anson, The Law and Custom of the Constitution, II. (2nd ed.), pp. 297-300.

French Constitution, the President exercises the treaty-making power; but peace treaties and such other treaties as concern commerce, finance, and some other matters, are not valid without the co-operation of the French Parliament. Again, according to articles 1, 4, and 11 of the Constitution of the German Empire, the Emperor exercises the treaty-making power; but such treaties as concern the frontier, commerce, and several other matters, are not valid without the co-operation of the Bundesrath and the Reichstag.[1]

Mutual Consent of the Contracting Parties.

§ 498. A treaty being a convention, mutual consent of the parties is necessary. Mere proposals made by one party and not accepted by the other are, therefore, not binding upon the proposer. Without force are also pollicitations which contain mere promises without acceptance by the party to whom they were made. Not binding are, lastly, so-called *punctationes*, mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty. But such *punctationes* must not be confounded either with a preliminary treaty or with a so-called *pactum de contrahendo*. A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later on. Such preliminary treaty is a real treaty and therefore binding upon the parties. A *pactum de contrahendo* requires likewise the mutual consent of the parties. It is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties. The difference between *punctationes* and a

[1] According to article 2, section 2, of the Constitution of the United States, the President can only conclude treaties with the consent of the Senate.

pactum de contrahendo is, that the latter stipulates an obligation of the parties to settle the respective points by a treaty, whereas the former does not.

Freedom of Action of consenting Representatives.

§ 499. As a treaty will lack binding force without real consent, absolute freedom of action on the part of the contracting parties is required. It must, however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty. The phrase "freedom of action" applies only to the *representatives* of the contracting States. It is *their* freedom of action in consenting to a treaty which must not have been interfered with and which must not have been excluded by other causes. A treaty concluded through intimidation exercised against the representatives of either party or concluded by intoxicated or insane representatives is not binding upon the party so represented. But a State which was forced by circumstances to conclude a treaty containing humiliating terms has no right afterwards to shake off the obligations of such treaty on the ground that its freedom of action was interfered with at the time. This must be emphasised, because in practice cases of similar repudiation have constantly occurred. A State may, of course, hold itself justified by political necessity in shaking off such obligations, but this does not alter the fact that such action is a breach of law.

Delusion and Error in Contracting Parties.

§ 500. Although a treaty was concluded with the real consent of the parties, it is nevertheless not binding if the consent was given in error, or under a delusion produced by a fraud of the other contracting

party. If, for instance, a boundary treaty were based upon an incorrect map or a map fraudulently altered by one of the parties, such treaty would by no means be binding. Although there is freedom of action in such cases, consent has been given under circumstances which render the treaty null and void.

III

Objects of Treaties

Vattel, II. §§ 160-162, 166—Hall, § 108—Phillimore, II. § 51—Walker, § 30—Bluntschli, §§ 410-416—Heffter, § 83—Ullmann, § 67—Bonfils, No. 819—Despagnet, No. 454—Pradier-Fodéré, II. Nos. 1080-1083—Rivier, II. pp. 57-63—Fiore, II. Nos. 1001-1004—Martens, I. § 110—Jellinek, "Die rechtliche Natur der Staatenverträge," pp. 59-60—Nippold, l. c. pp. 181-190.

Objects in general of Treaties.

§ 501. The object of treaties is always an obligation, whether mutual between all the parties or unilateral on the part of one only. Speaking generally, the object of treaties can be an obligation concerning any matter of interest for States. Since there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty. However, the Law of Nations prohibits some obligations from becoming objects of treaties, so that such treaties as comprise obligations of this kind are from the very beginning null and void.[1]

[1] The voidance *ab origine* of these treaties must not be confounded with voidance of such treaties as are valid in their inception, but become afterwards void on some ground or other. (See below, §§ 541-544.)

Obligations of Contracting Parties only can be Object.

§ 502. Obligations to be performed by a State other than a contracting party cannot be the object of a treaty. A treaty stipulating such an obligation would be null and void. But with this must not be confounded the obligation undertaken by one of the contracting States to exercise an influence upon another State to perform certain acts. The object of a treaty with such a stipulation is an obligation of one of the contracting States, and the treaty is therefore valid and binding.

An Obligation inconsistent with other Obligations cannot be an Object.

§ 503. Such obligation as is inconsistent with obligations from treaties previously concluded by one State with another cannot be the object of a treaty with a third State. Thus, in 1878, when after the war Russia and Turkey concluded the preliminary Treaty of Peace of San Stefano, which was inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, England protested,[1] and the Powers met at the Congress of Berlin to arrange matters by mutual consent.

Object must be physically possible.

§ 504. An obligation to perform a physical impossibility[2] cannot be the object of a treaty. If perchance a State entered into a convention stipulating an obligation of that kind, no right to claim damages for non-fulfilment of the obligation would arise for the other party, such treaty being legally null and void.

Immoral Obligations.

§ 505. It is a customarily recognised rule of the Law of Nations that immoral obligations cannot be the object of an international treaty. Thus, an alliance for the purpose of attacking a third State without provocation is from the beginning not binding. It cannot be denied that many treaties stipulating immoral obligations have been concluded and

[1] See Martens, N.R.G. 2nd ser. III. p. 257.
[2] See below, § 542.

executed in the past, but this does not alter the fact that such treaties were legally not binding upon the contracting parties. It must, however, be taken into consideration that the question as to what is immoral is often controversial. An obligation which is considered immoral by other States may not necessarily appear immoral to the contracting parties, and there is no Court that can decide the controversy.

Illegal Obligations.

§ 506. It is a unanimously recognised customary rule of International Law that obligations which are at variance with universally recognised principles of International Law cannot be the object of a treaty. If, for instance, a State entered into a convention with another State not to interfere in case the latter should appropriate a certain part of the Open Sea, or should command its vessels to commit piratical acts on the Open Sea, such treaty would be null and void, because it is a principle of International Law that no part of the Open Sea can be appropriated, and that it is the duty of every State to interdict to its vessels the commission of piracy on the High Seas.

IV

Form and Parts of Treaties

Grotius, II. c. 15 § 5—Vattel, II. § 153—Hall, § 109—Westlake, I. pp. 279-281—Wheaton, § 253—Bluntschli, §§ 417-427—Hartmann, §§ 46-47—Heffter, §§ 87-91—Ullmann, § 68—Bonfils, Nos. 821-823—Pradier-Fodéré, II. Nos. 1084-1099—Rivier, II. pp. 64-68—Fiore, II. Nos. 1004-1006—Martens, I. § 112—Jellinek, "Die rechtliche Natur der Staatenverträge," p. 56—Nippold, l. c. pp. 178-181.

No necessary Form of Treaties.

§ 507. The Law of Nations includes no rule which prescribes a necessary form of treaties. A treaty is, therefore, concluded as soon as the mutual consent

of the parties becomes clearly apparent. Such consent must always be given expressly, for a treaty cannot be concluded by tacit consent. But it matters not whether an agreement is made in writing, orally, or by symbols. Thus, in time of war, the exhibition of a white flag symbolises the proposal of an agreement as to a brief truce for the purpose of certain negotiations, and the acceptance of the proposal on the part of the other side through the exhibition of a similar symbol establishes a convention as binding as any written treaty. Thus, too, history tells of an oral treaty of alliance, secured by an oath, concluded in 1697 at Pillau between Peter the Great of Russia and Frederick III., Elector of Brandenburg.[1] Again, treaties are sometimes concluded through an exchange of diplomatic notes between the Secretaries for Foreign Affairs of two States or through the exchange of personal letters between the heads of two States. However, as a matter of reason, treaties usually take the form of a written[2] document signed by duly authorised representatives of the contracting parties.

Acts, Conventions, Declarations.

§ 508. International agreements which take the form of a written agreement are, besides treaties, sometimes termed *Acts*, sometimes *Conventions*, sometimes *Declarations*.[3] But there is no essential difference between them, and their binding force upon the contracting parties is the same whatever be their name. The Geneva Convention, the Declaration of Paris, and the final act of the Vienna Congress are as binding

[1] See Martens, I. § 112.

[2] The only writer who nowadays insists upon a *written* agreement for a treaty to be valid is, as far as I know, Bulmerincq (§ 56). But although all important treaties are naturally concluded in writing, the example of the agreements concluded between armed forces in time of war either orally or through symbols proves that the written form is not absolutely necessary.

[3] See above, § 487.

as any agreement which goes under the name of *Treaty*.

Parts of Treaties.

§ 509. Since International Law lays down no rules concerning the form of treaties, there exist no rules concerning the arrangement of the parts of written treaties. But the following order is usually observed. A first part, the so-called *preamble*, comprises the names of the heads of the contracting States, of their duly authorised representatives, and the motives for the conclusion of the treaty. A second part consists of the primary stipulations in numbered articles. A third part consists of miscellaneous stipulations concerning the duration of the treaty, its ratification, the accession of third Powers, and the like. The last part comprises the signatures of the representatives. But this order is by no means necessary. Sometimes, for instance, the treaty itself does not contain the very stipulations upon which the contracting parties have agreed, such stipulations being placed in an annex to the treaty. It may also happen that a treaty contains secret stipulations in an additional part, which is not made public with the bulk of the stipulations.[1]

[1] The matter is treated with all details by Pradier-Fodéré, II. §§ 1086-1096.

V

Ratification of Treaties

Grotius, II. c. 11, § 12—Pufendorf, III. c. 9, § 2—Vattel, II. § 156—Hall, § 110—Westlake, I. pp. 279-280—Lawrence, § 152—Phillimore, II. § 52—Twiss, I. § 214—Halleck, I. pp. 276-277—Taylor, §§ 364-367—Walker, § 30—Wharton, II, §§ 131-131 A—Wheaton, §§ 256-263—Bluntschli, §§ 420-421—Heffter, § 87—Gessner in Holtzendorff, III. pp. 15-18—Ullmann, § 66—Bonfils, Nos. 824-831—Pradier-Fodéré, II. Nos. 1100-1119—Rivier, II. § 50—Calvo, III. §§ 1627-1636—Fiore, II. No. 994—Martens, I. §§ 105-108—Wicquefort, "L'Ambassadeur et ses fonctions" (1680), II. Section XV.—Jellinek, "Die rechtliche Natur der Staatenverträge," pp. 53-56—Nippold, l. c. pp. 123-125—Wegmann, "Die Ratifikation von Staatsverträgen" (1892).

Conception and Function of Ratification.

§ 510. Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives. Although a treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, its binding force is regularly suspended till ratification is given. The function of ratification is, therefore, that it makes the treaty binding, and that, if it is refused, the treaty falls to the ground. As long as ratification is not given, the treaty is, although concluded, not perfect. Many writers[1] maintain that, as a treaty is not binding without ratification, it is the latter which really contains the mutual consent and really concludes the treaty. Before ratification, they maintain, there is no treaty concluded, but a mere mutual proposal agreed to to conclude a treaty. But this opinion does not accord with the real facts.[2] For the representatives are authorised and intend to

[1] See, for instance, Ullmann, § 66; Jellinek, p. 55; Nippold, p. 123; Wegmann, p. 11.

[2] The matter is very ably discussed by Rivier, II. pp. 74-76.

conclude a treaty by their signatures. The contracting States have always taken the standpoint that a treaty is concluded as soon as their mutual consent is clearly apparent. They have always made a distinction between their consent given by representatives and their ratification to be given afterwards, they have never dreamt of confounding both and considering their ratification their consent. It is for that reason that a treaty cannot be ratified in part, that no alterations of the treaty are possible through the act of ratification, that a treaty may be tacitly ratified by its execution, that a treaty always is dated from the day when it was duly signed by the representatives and not from the day of its ratification, that there is no essential difference between such treaties as want and such as do not want ratification.

Rationale for the Institution of Ratification.

§ 511. The rationale for the institution of ratification is another argument for the fact that the conclusion of the treaty by the representatives is to be distinguished from the confirmation given by the respective States through ratifying it. The reason is that States want to have an opportunity of re-examining not the single stipulations, but the whole effect of the treaty upon their interests. These interests may be of various kinds. They may undergo a change immediately after the signing of the treaty by the representatives. They may appear to public opinion in a different light from that in which they appear to the Governments, so that the latter want to reconsider the matter. Another reason is that treaties on many important matters are, according to the Constitutional Law of most States, not valid without some kind of consent of Parliaments. Governments must therefore have an opportunity of withdrawing

from a treaty in case Parliaments refuse their recognition. These two reasons have made, and still make, the institution of ratification a necessity for International Law.

Ratification regularly, but not absolutely, necessary.

§ 512. But ratification, although necessary in principle, is not always essential. Although it is now a universally recognised customary rule of International Law that treaties are regularly in need of ratification, even if the latter was not expressly stipulated, there are exceptions to the rule. For treaties concluded by such State functionaries[1] as have within certain narrow limits, *ipso facto* by their office, the power to exercise the treaty-making competence of their State do not want ratification, but are binding at once when they are concluded, provided the respective functionaries have not exceeded their powers. Further, treaties concluded by heads of States in person do not want ratification provided that they do not concern matters in regard to which constitutional restrictions[2] are imposed upon heads of States. And, lastly, it may happen that the contracting parties stipulate expressly, for the sake of a speedy execution of a treaty, that it shall be binding at once without ratifications being necessary. Thus, the Treaty of London of July 15, 1840, between Great Britain, Austria, Russia, Prussia, and Turkey concerning the pacification of the Turko-Egyptian conflict was accompanied by a secret protocol,[3] signed by the representatives of the parties, according to which the treaty was at once, without being ratified, to be executed. For the Powers were, on account of the victories of Mehemet Ali, very anxious to settle the conflict as quickly as possible.

[1] See above, § 496. [2] See above, § 497.
[3] See Martens, N.R.G., I. p. 163.

But it must be emphasised that renunciation of ratification is valid only if given by representatives duly authorised to make such renunciation. If the representatives have not received a special authorisation to dispense with ratification, then renunciation is not binding upon the States which they represent.

Space of Time for Ratification.

§ 513. No rule of International Law exists for the space of time within which ratification must be given or refused. If such space of time is not specially stipulated by the contracting parties in the very treaty, a reasonable space of time must be presumed as mutually granted. Without doubt, a refusal to ratify must be presumed from an unreasonable lapse of time without ratification having been made. In most cases, however, treaties which are in need of ratification contain nowadays a clause stipulating the reservation of ratification, and at the same time a space of time within which ratification shall take place.

Refusal of Ratification.

§ 514. The question now requires attention whether ratification can be refused on just grounds only or according to discretion. Formerly[1] it was maintained that ratification could not be refused in case the representatives had not exceeded their powers or violated their secret instructions. But nowadays there is probably no publicist who maintains that a State is in any case *legally*[2] bound not to refuse

[1] See Grotius, II. c. 11, § 12; Bynkershoek, Quaestiones juris publici, II. 7; Wicquefort, L'Ambassadeur, II. 15; Vattel, II. § 156; G. F. von Martens, § 48.

[2] This must be maintained in spite of Wegmann's (p. 32) assertion that a customary rule of the Law of Nations has to be recognised that ratification can regularly not be refused. The hair-splitting scholasticism of this writer is illustrated by a comparison between his customary rule for the non-refusal of ratification as arbitrarily constructed by himself, and the opinion which he (p. 11) emphatically defends that a treaty is concluded only by ratification.

ratification. Yet many insist that a State is, except for just reasons, in principle *morally* bound not to refuse ratification. I cannot, however, see the value of such a moral in contradistinction to a legal duty. The fact upon which everybody agrees is that International Law does in no case impose a duty of ratification upon a contracting party. A State refusing ratification will always have reasons for such line of action which appear just to itself, although they may be unjust in the eyes of others. In practice, ratification is given or withheld at discretion. But in the majority of cases, of course, ratification is never refused. A State which often and apparently wantonly refused ratification of treaties would lose all credit in international negotiations and would soon feel the consequences. On the other hand, it is impossible to lay down hard and fast rules respecting just and unjust causes of refusal of ratification. The interests at stake are so various, and the circumstances which must influence a State are so imponderable, that it must be left to the discretion of every State to decide the question for itself. Numerous examples of important treaties which have not found ratification can be given. It suffices to mention the Hay-Pauncefote Treaty between the United States and Great Britain regarding the proposed Nicaragua Canal, signed on February 5, 1900, which was ratified with modifications by the Senate of the United States, this being equivalent to refusal of ratification.

Form of Ratification.

§ 515. No rule of International Law exists which prescribes a necessary form of ratification. Ratification can therefore be given as well tacitly as expressly. Tacit ratification takes place when a State begins the execution of a treaty without

expressly ratifying it. Further, ratification may be given orally or in writing, although I am not aware of any case in which ratification was given orally. For it is usual for ratification to take the form of a document duly signed by the heads of the States concerned and their Secretaries for Foreign Affairs. It is usual to draft as many documents as there are parties to the convention, and to exchange these documents between the parties. Sometimes the whole of the treaty is recited *verbatim* in the ratifying documents, but sometimes only the title, preamble, and date of the treaty, and the names of the signatory representatives are cited. As ratification is the necessary confirmation only of an already existing treaty, the essential requirement in a ratifying document is merely that it refer clearly and unmistakeably to the treaty to be ratified. The citation of title, preamble, date, and names of the representatives is, therefore, quite sufficient to satisfy that requirement, and I cannot agree with those writers who maintain that the whole of the treaty ought to be recited *verbatim*.

Ratification by whom effected.

§ 516. Ratification is effected by those organs which exercise the treaty-making power of the States. These organs are regularly the heads of the States, but they can, according to the Municipal Law of some States, delegate the power of ratification for some parts of the globe to other representatives. Thus, the Viceroy of India is empowered to ratify treaties with certain Asiatic monarchs in the name of the King of Great Britain and Emperor of India, and the Governor-General of Turkestan has the same power for the Emperor of Russia.

In case the head of a State ratifies a treaty, although the necessary constitutional requirements

have not been previously fulfilled, as, for instance, in the case in which a treaty has not received the necessary approval from the Parliament of the said State, the question arises whether such ratification is valid or null and void. Many writers[1] maintain that such ratification is nevertheless valid. But this opinion is not correct, because it is clearly evident that in such a case the head of the State has exceeded his powers, and that, therefore, the State concerned cannot be held to be bound by the treaty.[2] The conflict between the United States and France in 1831, frequently quoted in support of the opinion that such ratification is valid, is not in point. It is true that the United States insisted on payment of the indemnity stipulated by a treaty which had been ratified by the King of France without having received the necessary approval of the French Parliament, but the United States did not maintain that the ratification was valid; she insisted upon payment because the French Government had admitted that such indemnity was due to her.[3]

Ratification cannot be partial and conditional.

§ 517. It follows from the nature of the ratification as a necessary confirmation of a treaty already concluded that ratification must be either given or refused, no conditional or partial ratification being possible. That occasionally a State tries to modify a treaty in ratifying it will not be denied, yet conditional[4] ratification is no ratification at all, but equivalent to refusal of ratification. Nothing, of

[1] See, for instance, Martens, § 107, and Rivier, II. p. 185.

[2] See above, § 497, and Nippold, p. 147.

[3] See Wharton, II. § 131 A, p. 20.

[4] The exclusion, by inserting the term *exclu*, of article 10 of the Hague Convention of 1899 for the adaptation of the Geneva Convention to maritime warfare must not be taken as an example of a partial ratification. The fact is that the signatory Powers agreed, *before the ratification was given*, that article 10 should

course, prevents the other contracting party from entering into fresh negotiations in regard to such modifications; but it must be emphasised that such negotiations are negotiations for a new treaty, the old treaty having become null and void through its conditional ratification. On the other hand, no obligation exists for such party to enter into fresh negotiations, it being a fact that conditional ratification is identical with refusal of ratification, whereby the treaty falls to the ground. Thus, for instance, when the United States Senate on December 20, 1900, in ratifying the Hay-Pauncefote Treaty as regards the Nicaragua Canal, accepted modifying amendments, Great Britain did not accept the amendments and considered the treaty unratified.

Effect of Ratification.

§ 518. The effect of ratification is the binding force of the treaty. But the question arises whether the effect of ratification is retroactive, so that the treaty appears to be binding from the date when it is duly signed by the representatives. No unanimity exists among publicists as regards this question. As in all important cases treaties themselves stipulate the date from which they are to take effect, the question is chiefly of theoretical interest. The fact that ratification imparts the binding force to a treaty seems to indicate that ratification has regularly no retroactive effect. Different, however, is of course the case in which the contrary is expressly stipulated in the very treaty, and, again, the case when a treaty contains such stipulations as shall at once be executed, without waiting for the necessary ratification. Be this as it may, ratification makes

be excluded. This agreement vention thus altered was then altered the signed convention as ratified. regards one point, and the con-

a treaty binding only if the original consent was not given in error or under a delusion.[1] If, however, the ratifying State discovers such error or delusion and ratifies the treaty nevertheless, such ratification makes the treaty binding. And the same is valid as regards a ratification given to a treaty although the ratifying State knows that its representatives have exceeded their powers by concluding the treaty.

VI

Effect of Treaties

Hall, § 114—Lawrence, § 154—Halleck, I. pp. 279-281—Taylor, §§ 370-373—Wharton, II. § 137—Wheaton, § 266—Bluntschli, §§ 415-416—Hartmann, § 49—Heffter, § 94—Bonfils, Nos. 845-848—Despagnet, Nos. 456-457—Pradier-Fodéré, II. Nos. 1151-1155—Rivier, II. pp. 119-122—Calvo, III. §§ 1643-1648—Fiore, II. Nos. 1008-1009—Martens, I. §§ 65 and 114—Nippold, l. c. pp. 151-160.

Effect of Treaties upon Contracting Parties.

§ 519. By a treaty the contracting parties are in the first place concerned. The effect of the treaty upon them is that they are bound by its stipulations, and that they must execute it in all its parts. No distinction can be made between more and less important parts of the treaty as regards its execution. Whatever may be the importance or the insignificance of a part of a treaty, it must be executed with good faith, for the binding force of a treaty covers equally all its parts and stipulations.

Effect of Treaties upon the Subjects of the Parties.

§ 520. It must be emphasised that the binding force of a treaty concerns the contracting States only, and not their subjects. As International Law is a law between States only and exclusively, treaties

[1] See above, § 500.

can have effect upon States and can bind States only and exclusively. If treaties contain stipulations with regard to rights and duties of the contracting States' subjects,[1] courts, officials, and the like, these States have to take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like. It may be that according to the Municipal Laws of some countries the official publication of a treaty concluded by the Government is sufficient for this purpose, but in other countries other steps are necessary, such, for example, as special statutes to be passed by the respective Parliaments.[2]

Effect of Changes in Government upon Treaties.

§ 521. As treaties are binding upon the contracting States, changes in the government or even in the form of government of one of the parties can regularly have no influence whatever upon the binding force of treaties. Thus, for instance, a treaty of alliance concluded by a State with constitutional government remains valid, although the Ministry may change. And no head of a State can shirk the obligations of a treaty concluded by his State under the government of his predecessor. Even when a monarchy turns into a republic, or *vice versa*, treaty obligations regularly remain the same. For all such changes and alterations, important as they may be, do not alter the person of the State which concluded the treaty. If, however, a treaty stipulation essentially presupposes a certain form of government, then a change in such form makes such stipulation void, because its execution has become impossible.[3]

[1] See above, § 289.

[2] The distinction between International and Municipal Law as discussed above (§§ 20-25) is the basis from which the question must be decided whether international treaties have a direct effect upon the officials and subjects of the contracting parties.

[3] See below, § 542.

Effect of Treaties upon third States.

§ 522. As a rule, a treaty concerns the contracting States only; neither rights nor duties regularly arise out of a treaty for third States which are not parties to the treaty. But sometimes treaties have indeed an effect upon third States. Such an effect is always produced when a treaty touches previous treaty rights of third States. Thus, for instance, a commercial treaty conceding more favourable conditions than hitherto have been conceded by the parties thereto has an effect upon all such third States as have previously concluded commercial treaties containing the so-called *most-favoured-nation clause* with one of the contracting parties.

The question arises whether in exceptional cases third States can acquire rights out of such treaties as were specially concluded for the purpose of creating such rights not only for the contracting parties but also for third States. Thus, the Hay-Pauncefote Treaty between Great Britain and the United States of 1901 stipulates that the Panama Canal to be built shall be open to vessels of commerce and of war of all nations, although Great Britain and the United States only are parties. Again, article 5 of the Boundary Treaty of Buenos Ayres of September 15, 1881, stipulates that the Straits of Magellan shall be open to vessels of all nations, although Argentina and Chili only are parties. I believe that the question must be answered in the negative, and nothing prevents the contracting parties from altering such a treaty without the consent of third States, provided the latter have not in the meantime acquired such rights through the unanimous tacit consent of all concerned.

VII

Means of securing Performance of Treaties

Vattel, II. §§ 235-261—Hall, § 115—Lawrence, § 154—Phillimore, II. §§ 54-63 A—Bluntschli, §§ 425-441—Heffter, §§ 96-99—Geffcken in Holtzendorff, III. pp. 85-90—Ullmann, § 71—Bonfils, Nos. 838-844—Despagnet, Nos. 460-461—Pradier-Fodéré, II. Nos. 1156-1169—Rivier, II. pp. 94-97—Calvo, III. §§ 1638-1642—Fiore, II. Nos. 1018-1019—Martens, I. § 115—Nippold, l. c. pp. 212-227.

What means have been in use.

§ 523. As there is no international institution which could enforce the performance of treaties, and as history teaches that treaties have frequently been broken, various means of securing performance of treaties have been made use of. The more important of these means are oaths, hostages, pledges, occupation of territory, guarantee. Nowadays these means, which are for the most part obsolete, have no longer great importance on account of the gratifying fact that all the States are now much more conscientious and faithful as regards their treaty obligations than in former times.

Oaths.

§ 524. Oaths are a very old means of securing the performance of treaties, which was constantly made use of not only in antiquity and the Middle Ages, but also in modern times. For in the sixteenth and seventeenth centuries all important treaties were still secured through oaths. During the eighteenth century the custom of securing treaties through oaths gradually died out, the last example being the treaty o alliance between France and Switzerland in 1777, which was solemnly confirmed by the oaths of both parties in the Cathedral at Solothurn. The employment of oaths for securing treaties was of great value in the times of absolutism, when little difference used to be made between the State and its monarch. The more the

distinction grew into existence between the State as the subject of International Law on the one hand, and the monarch as the temporary chief organ of the State on the other hand, the more such oaths fell into disuse. For an oath can exercise its force on the individual only who takes it, and not on the State for which it is taken.

Hostages.

§ 525. Hostages are as old a means of securing treaties as oaths, but they have likewise, for ordinary purposes[1] at least, become obsolete, because they have practically no value at all. The last case of a treaty secured through hostages is the Peace of Aix-la-Chapelle of 1748, in which hostages were stipulated to be sent by England to France for the purpose of securing the restitution of Cape Breton Island to the latter. The hostages sent were Lords Sussex and Cathcart, who remained in France till July 1749.

Pledge.

§ 526. The pledging of movable property by one of the contracting parties to the other for the purpose of securing the performance of a treaty is possible, but has not frequently occurred. Thus, Poland is said to have pledged her crown jewels once to Prussia.[2] The pledging of movables is nowadays quite obsolete, although it might on occasion be revived.

Occupation of Territory.

§ 527. Occupation of territory, such as a fort or even a whole province, as a means of securing the performance of a treaty, has frequently been made use of with regard to the payment of large sums of money due to a State out of a treaty. Nowadays such occupation is only resorted to in connection with treaties of peace stipulating the payment of a war indemnity. Thus, the preliminary peace treaty of

[1] Concerning hostages nowadays taken in time of war, see below, vol. II. §§ 258–259.

[2] See Phillimore, II. § 55.

Versailles in 1871 stipulated that Germany should have the right to keep certain parts of France under military occupation until the final payment of the war indemnity of five milliards of francs.

Guarantee.

§ 528. The best means of securing treaties, and one which is still in use generally, is the guarantee of such other States as are not directly affected by the treaty. Such guarantee is a kind of accession[1] to the guaranteed treaty, and a treaty in itself—namely, the promise of the guarantor eventually to do what is in his power to compel the contracting party or parties to execute the treaty.[2] Guarantee of a treaty is a species only of guarantee in general, which will be discussed below, §§ 574–576.

VIII

Participation of Third States in Treaties

Hall, § 114—Wheaton, § 288—Hartmann, § 51—Heffter, § 88—Bonfils, Nos. 832–834—Despagnet, No. 457—Pradier-Fodéré, II. Nos. 1127–1150—Rivier, II. pp. 89–93—Calvo, III. §§ 1621–1626—Fiore, II. Nos. 1025–1031—Martens, I. § 111.

Interest and Participation to be distinguished.

§ 529. Ordinarily a treaty creates rights and duties between the contracting parties exclusively. Nevertheless, third States may be interested in such treaties, for the common interests of the members of the Family of Nations are so interlaced that few treaties between single members can be concluded in which third States have not some kind of interest. But such

[1] See below, § 532.

[2] Nippold (p. 266) proposes that a universal treaty of guarantee should be concluded between all the members of the Family of Nations guaranteeing for the present and the future all international treaties. I do not believe that this well-meant proposal is feasible.

interest, all-important as it may be, must not be confounded with participation of third States in treaties. Such participation can occur in five different forms—namely, good offices, mediation, intervention, accession, and adhesion.[1]

Good Offices and Mediation.

§ 530. A treaty may be concluded with the help of the good offices or through the mediation of a third State, whether these offices be asked for by the contracting parties or be exercised spontaneously by a third State. Such third State, however, does not necessarily, either through good offices or through mediation, become a real party to the treaty, although this might be the case. A great many of the most important treaties owe their existence to the good offices or mediation of third Powers. The difference between good offices and mediation will be discussed below, vol. II. § 9.

Intervention.

§ 531. A third State may in such a way participate in a treaty that it interposes dictatorially between two States negotiating a treaty and requests them to drop or to insert certain stipulations. Such intervention does not necessarily make the interfering State a real party to the treaty. Instances of such intervention are the protest on the part of Great Britain against the preliminary peace treaty concluded in 1878 at San Stefano[2] between Russia and Turkey, and that on the part of Russia, Germany, and France in 1895 against the peace treaty of Shimonoseki[3] between Japan and China.

[1] That certain treaties concluded by the suzerain are *ipso facto* concluded for the vassal State does not make the latter participate in such treaties. Nor is it correct to speak of participation of a third State in a treaty when a State becomes party to a treaty through the fact that it has given a mandate to another State to contract on its behalf.

[2] See above p. 184.

[3] See *R.G.* II. pp. 457-463. Details concerning intervention have been given above, § 134-138; see also below, vol. II. § 50.

Accession.

§ 532. Of accession there are two kinds. Accession is termed, first, the formal entrance of a third State into an existing treaty so that such State becomes a party to the treaty with all rights and duties arising therefrom. Such accession can take place only with the consent of the original contracting parties, and accession always constitutes a treaty of itself. Very often the contracting parties stipulate expressly that the treaty shall be open to the accession of a certain State. And the so-called law-making treaties, as the Declaration of Paris or the Geneva Convention for example, regularly stipulate the option of accession of all such States as have not been originally contracting parties.

But there is, secondly, another kind of accession possible. For a State may enter into a treaty between other States for the purpose of guarantee.[1] This kind of accession makes the acceding State a party to the treaty too; but the rights and duties of the acceding State are different from the rights and duties of the other parties, for the former is a guarantor only, whereas the latter are directly affected by the treaty.

Adhesion.

§ 533. Adhesion is termed such entrance of a third State into an existing treaty as takes place either with regard only to a part of the stipulations or with regard only to certain principles laid down in the treaty. Whereas through accession a third State becomes a party to the treaty with all the rights and duties arising from it, through adhesion a third State becomes a party only to such parts or principles of the treaty as it has adhered to. But it must be emphasised that the distinction between accession and adhesion is one made in theory, to which practice

[1] See above, § 528.

does not always correspond. Often treaties speak of accession of third States where in fact adhesion only is meant, and *vice versa*. Thus, article 4 of the Hague Convention with respect to the laws and customs of war on land stipulates the possibility of future *adhesion* of non-signatory Powers, although accession is meant.

IX

Expiration and Dissolution of Treaties

Vattel, II. §§ 198-205—Hall, § 116—Westlake, I. pp. 284-286—Lawrence, § 154—Halleck, I. pp. 293-296—Taylor, §§ 394-399—Wharton, II. § 137 A—Wheaton, § 275—Bluntschli, §§ 450-461—Heffter, § 99—Ullmann, § 73—Bonfils, Nos. 855-860—Despagnet, Nos. 462-465—Pradier-Fodéré, II. Nos. 1200-1218—Rivier, II. § 55—Calvo, III. §§ 1662-1668—Fiore, II. Nos. 1047-1052—Martens, I. § 117—Jellinek, "Die rechtliche Natur der Staatenverträge," pp. 62-64—Nippold, l. c. pp. 235-248—Olivi, "Sull' estinzione dei trattati internazionali" (1883).

Expiration and Dissolution in Contradistinction to Fulfilment.

§ 534. The binding force of treaties may terminate in four different ways, because a treaty may either expire, or be dissolved, or become void, or be cancelled.[1] The grounds of expiration of treaties are, first, expiration of the time for which a treaty was concluded, and, secondly, occurrence of a resolutive condition. Of grounds of dissolution of treaties there are three—namely, mutual consent, withdrawal by notice, and vital change of circumstances. In contradistinction to expiration and dissolution as well as to voidance and cancellation,

[1] The distinction made in the text between fulfilment, expiration, dissolution, voidance, and cancellation of treaties is, as far as I know, nowhere sharply drawn, although it would seem to be of considerable importance. Voidance and cancellation will be discussed below, §§ 540-544 and 545-549.

fulfilment of treaties does not terminate their binding force. A treaty whose obligation has been fulfilled is as valid as before, although it is now of historical interest only.

Expiration through Expiration of Time.

§ 535. All such treaties as are concluded for a certain period of time only, expire with the expiration of such time, unless they are renewed or prolonged for another period. Such time-expiring treaties are frequently concluded, and no notice is necessary for their expirations, except when specially stipulated.

A treaty, however, may be concluded for a certain period of time only, but with the additional stipulation that the treaty shall after the lapse of such period be valid for another such period, unless one of the contracting parties gives notice in due time.

Expiration through Resolutive Condition.

§ 536. Different from time-expiring treaties are such as are concluded under a resolutive condition, which means under the condition that they shall at once expire with the occurrence of certain circumstances. As soon as these circumstances arise, the treaties expire.

Mutual Consent.

§ 537. A treaty, although concluded for ever or for a period of time which has not yet expired, may nevertheless always be dissolved by mutual consent of the contracting parties. Such mutual consent can become apparent in three different ways.

First, the parties can expressly and purposely declare that a treaty shall be dissolved. Or, secondly, they can conclude a new treaty concerning the same objects as those of a former treaty without any reference to the latter, although the two treaties are inconsistent with each other; in such a case it is obvious that the treaty previously concluded was dissolved by tacit mutual consent. Or, thirdly, if the treaty is such as imposes obligations upon one

of the contracting parties only, the other party can renounce its rights. Dissolution by renunciation is a case of dissolution by mutual consent, since acceptance of the renunciation is necessary.

Withdrawal by Notice.

§ 538. Treaties, provided they are not such as are concluded for ever, may also be dissolved by withdrawal, after notice by one of the parties. Many treaties stipulate expressly the possibility of such withdrawal, and as a rule contain details in regard to form and period in which notice is to be given for the purpose of withdrawal. But there are other treaties which, although they do not expressly stipulate the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties. To that class belong all such treaties as are either not expressly concluded for ever or apparently not intended to set up an everlasting condition of things. Thus, for instance, a commercial treaty or a treaty of alliance not concluded for a fixed period only can always be dissolved after notice, although not expressly stipulated. Treaties, however, which are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things, and, further, treaties concluded for a certain period of time only, are regularly not notifiable, although they can be dissolved by mutual consent of the contracting parties.

It must be emphasised that all treaties of peace and all boundary treaties belong to this class. It cannot be denied that history records innumerable cases in which treaties of peace have not established an everlasting condition of things, since one or both of the contracting States took up arms again as soon as they recovered from the exhausting effect of the previous war. But this

does not prove either that such treaties can be dissolved through giving notice, or that they are, as far as International Law at least is concerned, not intended to create an everlasting condition of things.

Vital Change of Circumstances.

§ 539. Although, as just stated, treaties concluded for a certain period of time, and such treaties as are apparently intended or expressly contracted for the purpose of setting up an everlasting condition of things, cannot in principle be dissolved by withdrawal of one of the parties, there is an exception to this rule. For it is an almost universally recognised fact that vital changes of circumstances may be of such a kind as to justify a party in notifying an unnotifiable treaty. The vast majority of publicists, as well as all the Governments of the members of the Family of Nations, agree that all treaties are concluded under the tacit condition *rebus sic stantibus*. That this condition involves a certain amount of danger cannot be denied, for it can be, and indeed frequently has been, abused for the purpose of hiding the violation of treaties behind the shield of law, and of covering shameful wrong with the mantle of righteousness. But all this cannot alter the fact that this exceptional condition is as necessary for International Law and international intercourse as the very rule *pacta sunt servanda*. When, for example, the existence or the necessary development of a State stands in an unavoidable conflict with such State's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and the necessary requirements of the nation are the primary duties of every State. No State would consent to any such treaty as would hinder it in the fulfilment of these primary duties. The consent of a

State to a treaty presupposes a conviction that such treaty is not fraught with danger to its existence and development, and implies a condition that, if by an unforeseen change of circumstances the obligations stipulated in the treaty should imperil the said State's existence and necessary development, the treaty, although by its nature unnotifiable, should nevertheless be notifiable.

The danger of the clause *rebus sic stantibus* is to be found in the elastic meaning of the term "vital changes of circumstances," as, after all, a State must in every special case judge for itself whether there is or is not a vital change of circumstances justifying its withdrawal from an unnotifiable treaty. On the other hand, the danger is counterbalanced by the fact that the frequent and unjustifiable use of the clause *rebus sic stantibus* by a State would certainly destroy all its credit among the nations.

Be that as it may, it is generally agreed that every change of circumstances by no means justifies a State in making use of the clause. All agree that, although treaty obligations may through a change of circumstances become disagreeable, burdensome, and onerous, they must nevertheless be discharged. All agree, further, that a change of government and even a change in the form of a State, such as the turning of a monarchy into a republic and *vice versa*, does not alone and in itself justify a State in notifying such a treaty as is by its nature unnotifiable. On the other hand, all agree in regard to many cases in which the clause *rebus sic stantibus* could justly be made use of. Thus, for example, if a State enters into a treaty of alliance for a certain period of time, and if before the expiration of the alliance a change of circumstances occurs, so that now

the alliance endangers the very existence of one of the contracting parties, all will agree that the clause *rebus sic stantibus* would justify such party in notifying the treaty of alliance.

A certain amount of disagreement as to the cases in which the clause might or might not be justly applied will of course always remain. But the fact is remarkable that during the nineteenth century not many cases of the application of the clause have occurred. And the States and public opinion everywhere have come to the conviction that the clause *rebus sic stantibus* ought not to give the right to a State to liberate itself from the obligations of a treaty, but only the claim to be released from these obligations by the other parties to the treaty. When, in 1870, during the Franco-German War, Russia declared her withdrawal from such stipulations of the Treaty of Paris of 1856 as concerned the neutralisation of the Black Sea and the restriction imposed upon Russia in regard to men-of-war in that sea, Great Britain protested, and a conference was held in London in 1871. Although by a treaty signed on March 13, 1871, this conference, consisting of the signatory Powers of the Treaty of Paris—namely, Austria, England, France, Germany, Italy, Russia, and Turkey—complied with the wishes of Russia and abolished the neutralisation of the Black Sea, it adopted in a protocol[1] of January 17, 1871, the following declaration:—"Que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des parties contractantes, au moyen d'une entente amicale."

[1] See Martens, N.R.G. XVIII. p. 278.

In spite of this declaration, signed also by herself, Russia in 1886 notified her withdrawal from article 59 of the Treaty of Berlin of 1878 stipulating the freedom of the port of Batoum.[1] The signatory Powers of the Treaty of Berlin seem to have tacitly consented, with the exception of Great Britain, which protested. Thus the standard value of the declaration of the Conference of London of 1871 has become doubtful again.

X

Voidance of Treaties

See the literature quoted at the commencement of § 534.

Grounds of Voidance.

§ 540. A treaty, although it has neither expired nor been dissolved, may nevertheless lose its binding force by becoming void.[2] And such voidance may have different grounds—namely, extinction of one of the two contracting parties, impossibility of execution, realisation of the purpose of the treaty otherwise than by fulfilment, and, lastly, extinction of such object as was concerned in a treaty.

Extinction of one of the two Contracting Parties.

§ 541. All treaties concluded between two States become void through the extinction of one of the contracting parties, provided they do not devolve upon such State as succeeds to the extinct State. That some treaties devolve upon the successor has been shown above (§ 82), but many treaties do not. On this ground all political treaties, such as treaties of alliance, guarantee, neutrality, and the like, become void.

[1] See Martens, N.R.G. 2nd ser. XIV. p. 170.

[2] But such voidance must not be confounded with the voidance of a treaty from its very beginning. (See above, § 501.)

Impossibility of Execution.

§ 542. All treaties whose execution becomes impossible subsequently to their conclusion are thereby rendered void. A frequently quoted example is that of three States concluding a treaty of alliance and subsequent war breaking out between two of the contracting parties. In such case it is impossible for the third party to execute the treaty, and it becomes void.[1] It must, however, be added that the impossibility of execution may be temporary only, and that then the treaty is not void but suspended only.

Realisation of Purpose of Treaty other than by Fulfilment.

§ 543. All treaties whose purpose is realised otherwise than by fulfilment become void. For example, a treaty concluded by two States for the purpose of inducing a third State to undertake a certain obligation becomes void if the third State voluntarily undertakes the same obligation before the two contracting States have had an opportunity of approaching the third State with regard to the matter.

Extinction of such Object as was concerned in a Treaty.

§ 544. All treaties whose obligations concern a certain object become void through the extinction of such object. Treaties, for example, concluded in regard to a certain island become void when such island disappears through the operation of nature, as likewise do treaties concerning a third State when such State merges in another.

[1] See also above, § 521, where the case is mentioned that a treaty essentially presupposes a certain form of government, and for this reason cannot be executed when this form of government undergoes a change.

XI

Cancellation of Treaties

See the literature quoted at the commencement of § 534.

Grounds of Cancellation.

§ 545. A treaty, although it has neither expired, nor been dissolved, nor become void, may nevertheless lose its binding force by cancellation. Causes of cancellation are fourfold—namely, inconsistency with International Law created subsequently to the conclusion of the treaty, violation by one of the contracting parties, subsequent change of status of one of them, and war.

Inconsistency with subsequent International Law.

§ 546. Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through a progressive development of International Law they become inconsistent with the latter. Through the abolition of privateering among the signatory Powers of the Declaration of Paris of 1856, for example, all treaties between some of these Powers based on privateering as a recognised institution of International Law were *ipso facto* cancelled. But it must be emphasised that subsequent Municipal Law can certainly have no such influence upon existing treaties. On occasions, indeed, subsequent Municipal Law creates for a State a conflict between its treaty obligations and such law. In such case this State must endeavour to obtain a release by the other contracting party from these obligations.

Violation by one of the Contracting Parties.

§ 547. Violation of a treaty by one of the contracting States does not *ipso facto* cancel such treaty, but it is in the discretion of the other party to cancel it on the ground of violation. There is no unanimity among writers on International Law in regard to

this point, in so far as a minority makes a distinction between essential and non-essential stipulations of the treaty, and maintains that violation of essential stipulations only creates a right for the other party to cancel the treaty. But the majority of writers rightly oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential stipulations, that the binding force of a treaty protects non-essential stipulations as well as essential ones, and that it is for the faithful party to consider for itself whether violation of a treaty, even in its least essential parts, justifies the cancelling of the treaty. The case, however, is different when a treaty expressly stipulates that it should not be considered broken by violation of merely one or another part of it. And it must be emphasised that the right to cancel the treaty on the ground of its violation must be exercised in due time after the violation has become known. If the Power possessing such right does not exercise it in due time, it must be taken for granted that such right has been waived. A mere protest, such as the protest of England in 1886 when Russia withdrew from article 59 of the Treaty of Berlin of 1878, stipulating the freedom of the port of Batoum, neither constitutes a cancellation nor reserves the right of cancellation.

Subsequent Change of Status of one of the Contracting Parties.

§ 548. A cause which *ipso facto* cancels treaties is such subsequent change of status of one of the contracting States as transforms it into a dependency of another State. As everything depends upon the merits of each case, no general rule can be laid down as regards the question when such change of status must be considered to have taken place, and, further, as regards the other question as to the kind

of treaties cancelled by such change. Thus, for example, when a State becomes a member of a Federal State, it is obvious that all its treaties of alliance are *ipso facto* cancelled, for in a Federal State the power of making war rests with the Federal State, and not with the single members. And the same is valid as regards a hitherto full-Sovereign State which comes under the suzerainty of another State. On the other hand, a good many treaties retain their binding force in spite of such a change in the status of a State, all such treaties, namely, as concern matters in regard to which the State has not lost its sovereignty through the change. For instance, if the constitution of a Federal State stipulates that the matter of extradition remains fully in the competence of the member-States, all treaties of extradition of members concluded with third States previous to their becoming members of the Federal State retain their binding force.

War.

§ 549. How far war is a general ground of cancellation of treaties is not quite settled. Details on this point will be given below, vol. II. § 99.

XII

Renewal, Reconfirmation, and Redintegration of Treaties

Vattel, II. § 199—Hall, § 117—Taylor, § 400—Hartmann, § 51—Ullmann, § 73—Bonfils, Nos. 851-854—Pradier-Fodéré, II. Nos. 1191-1199—Rivier, II. pp. 143-146—Calvo, III. §§ 1637, 1666, 1669—Fiore, II. Nos. 1048-1049.

Renewal of Treaties.

§ 550. Renewal of treaties is the term for the prolongation of such treaties before their expiration as were concluded for a definite period of time only. Renewal

can take place through a new treaty, and the old treaty may then as a body or in parts only be renewed. But the renewal can also take place automatically, many treaties concluded for a certain period stipulating expressly that they are considered renewed for another period in case neither of the contracting parties has given notice.

Reconfirmation.

§ 551. Reconfirmation is the term for the express statement made in a new treaty that a certain previous treaty, whose validity has or might have become doubtful, is still, and remains, valid. Reconfirmation takes place after such changes of circumstances as might be considered to interfere with the validity of a treaty; for instance, after a war as regards such treaties as have not been cancelled by the outbreak of war. Reconfirmation can be given to the whole of a previous treaty or to parts of it only. Sometimes reconfirmation is given in this very precise way, that a new treaty stipulates that a previous treaty shall be incorporated in itself. It must be emphasised that in such a case those parties to the new treaty which have not been parties to the previous treaty do not now become so by its reconfirmation, the latter applying to the previous contracting parties only.

Redintegration.

§ 552. Treaties which have lost their binding force through expiration or cancellation may regain it through redintegration. A treaty becomes redintegrated by the mutual consent of the contracting parties regularly given in a new treaty. Thus it is usual for treaties of peace to redintegrate all those treaties cancelled through the outbreak of war whose stipulations the contracting parties do not want to alter.

Without doubt, redintegration does not necessarily take place by a treaty, as theoretically it must be

considered possible for the contracting parties to tacitly redintegrate an expired or cancelled treaty by a line of conduct which indicates apparently their intention to redintegrate the treaty. However, I do not know of any instance of such tacit redintegration.

XIII

Interpretation of Treaties

Grotius, II. c. 16—Vattel, II. § 320—Hall, §§ 111-112—Phillimore, II. §§ 64-95—Halleck, I. pp. 296-304—Taylor, §§ 373-393—Walker, § 31—Wheaton, § 287—Heffter, § 95—Ullmann, § 72—Bonfils, Nos. 835-837—Pradier-Fodéré, II. Nos. 1171-1189—Rivier, II. pp. 122-125—Calvo, III. §§ 1649-1660—Fiore, II. Nos. 1032-1046—Martens, I. § 116—Westlake, I. pp. 282-283.

Authentic Interpretation, and the Compromise Clause.

§ 553. Neither customary nor conventional rules of International Law exist concerning interpretation of treaties. Grotius and the later authorities applied the rules of Roman Law respecting interpretation in general to interpretation of treaties. On the whole, such application is correct in so far as those rules of Roman Law are full of common sense. But it must be emphasised that interpretation of treaties is in the first instance a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree that an interpretation based on scientific grounds can ask a hearing. And these scientific grounds can be no other than those provided by jurisprudence. The best means of settling questions of interpretation, provided the parties cannot come to terms, is arbitration, as the appointed arbitrators will apply the general rules of jurisprudence. Now in regard to interpretation given by the parties them-

selves, there are two different ways open to them. They may either agree informally upon the interpretation and execute the treaty accordingly. Or they may make an additional new treaty and stipulate therein such interpretation of the previous treaty as they choose. In the latter case one speaks of "authentic" interpretation in analogy with the authentic interpretation of Municipal Law given expressly by a statute. Nowadays treaties very often contain the so-called "compromise clause" as regards interpretation—namely, the clause that, in case the parties should not agree on questions of interpretation, these questions shall be settled by arbitration. Italy and Switzerland regularly endeavour to insert that clause in their treaties.

Rules of Interpretation which recommend themselves.

§ 554. It is of importance to enumerate some rules of interpretation which recommend themselves, because everybody agrees upon their suitability.

(1) All treaties must be interpreted according to their reasonable in contradistinction to their literal sense. An excellent example illustrating this rule is the following, which is quoted by several writers:—In the interest of Great Britain the Treaty of Peace of Utrecht of 1713 stipulated in its article 9 that the port and the fortification of Dunkirk should be destroyed and never be rebuilt. France complied with this stipulation, but at the same time began building an even larger port at Mardyck, a league off Dunkirk. Great Britain protested on the ground that France in so acting was violating the reasonable, although not the literal, sense of the Peace of Utrecht, and France recognised in the end this interpretation and discontinued the building of the new port.

(2) The terms used in a treaty must be interpreted according to their usual meaning in the language of

every-day life, provided they are not expressly used in a certain technical meaning or another meaning is not apparent from the context.

(3) It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty, and something not inconsistent with generally recognised principles of International Law and with previous treaty obligations towards third States. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with general recognised principles of International Law and with previous treaty obligations towards third States.

(4) The principle *in dubio mitius* must be applied in interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, the meaning is to be preferred which is less onerous for the obliged party, or which interferes less with the parties' territorial and personal supremacy, or which contains less general restrictions upon the parties.

(5) Previous treaties between the same parties, and treaties between one of the parties and third parties, may be alluded to for the purpose of clearing up the meaning of a stipulation.

(6) If there is a discrepancy between the clear meaning of a stipulation, on the one hand, and, on the other, the intentions of one of the parties declared during the negotiations preceding the signing of a treaty, the decision must depend on the merits of the special case. If, for instance, the discrepancy

was produced through a mere clerical error or by some other kind of mistake, it is obvious that an interpretation is necessary in accordance with the real intentions of the contracting parties.[1]

[1] The whole matter of interpretation of treaties is dealt with in an admirable way by Phillimore II. §§ 64-95.

CHAPTER III

IMPORTANT GROUPS OF TREATIES

I

IMPORTANT LAW-MAKING TREATIES

Important Law-making Treaties a product of the Nineteenth Century.

§ 555. Although law-making treaties[1] have been concluded since International Law came into existence, it was not until the nineteenth century that such law-making treaties existed as are of world-wide importance. Although at the Congress at Münster and Osnabrück all the then existing European Powers, with the exception of Great Britain, Russia, and Poland, were represented, the Westphalian Peace of 1648, to which France, Sweden, and the States of the German Empire were parties, and which recognised the independence of Switzerland and the Netherlands on the one hand, and, on the other, the practical sovereignty of the then existing 355 States of the German Empire, was not of world-wide importance, in spite of the fact that it contains various law-making stipulations. And the same may be said with regard to all other treaties of peace between 1648 and 1815. The first law-making treaty of world-wide importance was the Final Act of the Vienna Congress, 1815, and the last, as yet, is the Treaty of Washington of 1901. But it must be

[1] Concerning the conception of law-making treaties, see above §§ 18 and 492.

particularly noted that not all of these are *pure* law-making treaties, since many contain other stipulations besides those which are law-making.

Final Act of the Vienna Congress.

§ 556. The Final Act of the Vienna Congress,[1] signed on June 9, 1815, by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden-Norway, comprises law-making stipulations of world-wide importance concerning four points—namely, first, the perpetual neutralisation of Switzerland (article 118, No. 11); secondly, free navigation on so-called international rivers (articles 108–117); thirdly, the abolition of the negro slave trade (article 118, No. 15); fourthly, the different classes of diplomatic envoys (article 118, No. 16).

Protocol of the Congress of Aix-la-Chapelle.

§ 557. The Protocol of November 21 of the Congress of Aix-la-Chapelle,[2] 1818, signed by Great Britain, Austria, France, Prussia, and Russia, contains the important law-making stipulation concerning the establishment of a fourth class of diplomatic envoys, the so-called "Ministers Resident," to rank before the Chargés d'Affaires.

Treaty of London of 1831.

§ 558. The Treaty of London[3] of November 15, 1831, signed by Great Britain, Austria, France, Prussia, and Russia, comprises in its article 7 the important law-making stipulation concerning the perpetual neutralisation of Belgium.

Declaration of Paris.

§ 559. The Declaration of Paris[4] of April 13, 1856, signed by Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, is a pure law-making treaty of the greatest importance, stipulating four

[1] Martens, N.R., p. 379. See Angeberg, Le congrès de Vienne et les traités de 1815 (4 vols., 1863). See Angeberg, l. c.

[2] Martens, N.R., IV. p. 648.

[3] Martens, N.R., XI. p. 390. See Descamps, La neutralité de la Belgique (1902).

[4] Martens, N.R.G., XV. p. 767.

rules with regard to sea warfare—namely, that privateering is abolished; that the neutral flag covers enemy goods with the exception of contraband of war; that neutral goods, contraband excepted, cannot be confiscated even when sailing under the enemy flag; that a blockade must be effective to be binding.

Through accession during 1856, the following other States have become parties to this treaty: Argentina, Belgium, Brazil, Chili, Denmark, Ecuador, Greece, Guatemala, Hayti, Holland, Peru, Portugal, Sweden-Norway, and Switzerland. Japan acceded in 1886.

Geneva Convention.

§ 560. The Geneva Convention[1] of August 22, 1864, signed originally by Switzerland, Baden, Belgium, Denmark, France, Holland, Italy, Prussia, and Spain, is a pure law-making treaty for the amelioration of the condition of the wounded of armies in the field. Apart from the member-States of Germany, the following other States have become parties to the treaty through accession: Great Britain, Argentina, Austria-Hungary, Bolivia, Bulgaria, Chili, Congo Free State, Greece, Guatemala, Honduras, Japan, Korea, Luxemburg, Montenegro, Nicaragua, Persia, Peru, Portugal, Roumania, Russia, Salvador, Servia, Siam, Sweden-Norway, Turkey, United States of America, Uruguay, Venezuela. A treaty containing additional[2] articles to the Geneva Convention was signed at Geneva on October 20, 1868, but was not ratified. The Final Act of the Hague Peace Conference of 1900 contains a convention for the adapta-

[1] Martens, N.R.G., XVIII. p. 607. See Lueder, Die Genfer Convention (1876), and Münzel, Untersuchungen über die Genfer Convention (1901).

[2] Martens, N.R.G., XVIII. p. 612.

tion to sea warfare of the principles of the Geneva Convention.

Treaty of London of 1867.

§ 561. The Treaty of London[1] of May 11, 1867, signed by Great Britain, Austria, Belgium, France, Holland, Italy, Prussia, and Russia, comprises in its article 2 the important law-making stipulation concerning the perpetual neutralisation of Luxemburg.

Declaration of St. Petersburg.

§ 562. The Declaration of St. Petersburg[2] of November 29, 1868, signed by Great Britain, Austria-Hungary, Belgium, Denmark, France, Greece, Holland, Italy, Persia, Portugal, Prussia and other German States, Russia, Sweden-Norway, Switzerland, and Turkey—Brazil acceded later on—is a pure law-making treaty. It stipulates that projectiles of a weight below 400 grammes (14 ounces) which are either explosive or charged with inflammable substances shall not be made use of in war.

Treaty of Berlin of 1878.

§ 563. The Treaty of Berlin[3] of July 13, 1878, signed by Great Britain, Austria-Hungary, France, Germany, Italy, Russia, and Turkey, is law-making with regard to Bulgaria, Montenegro, Roumania, and Servia. It is of great importance in so far as the present phase of the solution of the Near Eastern Question arises therefrom.

General Act of the Congo Conference.

§ 564. The General Act of the Congo Conference[4] of Berlin of February 26, 1885, signed by Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Holland, Italy, Portugal, Russia, Spain, Sweden-Norway, Turkey, and the United States of

[1] Martens, N.R.G., XVIII. 445. See Wampach, Le Luxembourg Neutre (1900).

[2] Martens, N.R.G., XVIII. p. 474.

[3] Martens, N.R.G., 2nd ser. III. p. 449. See Mulas, Il congresso di Berlino (1878).

[4] Martens, N.R.G., 2nd ser. X. p. 414. See Patzig, Die afrikanische Conferenz und der Congostaat (1885).

America, is a law-making treaty of great importance, stipulating: freedom of commerce within the basin of the river Congo for all nations; prohibition of slave-transport within that basin; neutralisation of Congo Territories; freedom of navigation on the rivers Congo and Niger for merchantmen of all nations; and, lastly, the obligation of the signatory Powers to notify to one another all future occupations on the coast of the African continent.

Treaty of Constantinople of 1888.

§ 565. The Treaty of Constantinople[1] of October 29, 1888, signed by Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Russia, Spain, and Turkey, is a pure law-making treaty stipulating the permanent neutralisation of the Suez Canal and the freedom of navigation thereon for vessels of all nations.

General Act of the Brussels Anti-Slavery Conference.

§ 566. The General Act of the Brussels Anti-Slavery Conference,[2] signed on July 2, 1890, by Great Britain, Austria-Hungary, Belgium, the Congo Free State, Denmark, France, Germany, Holland, Italy, Persia, Portugal, Russia, Sweden-Norway, Spain, Turkey, the United States of America, and Zanzibar, is a law-making treaty of great importance which stipulates a system of measures for the suppression of slave-trade in Africa, and, incidentally, restrictive measures concerning the spirit-trade in certain parts of Africa.

Final Act of the Hague Peace Conference.

§ 567. The Final Act of the Hague Peace Conference[3] of July 29, 1899, is a pure law-making treaty of vast importance, and comprises, besides three conven-

[1] Martens, N.R.G., 2nd ser. XV. p. 557. See above, § 183.

[2] Martens, N.R.G., 2nd ser. XVI. p. 3, and XXV. p. 543. See Lentner, Der afrikanische Sklavenhandel und die Brüsseler Conferenzen (1891).

[3] Martens, N.R.G., 2nd ser. XXVI. p. 920. See Holls, The Peace Conference at the Hague (1900), and Mérignhac, La Conférence internationale de la Paix (1900).

tions of minor importance, which are styled "Declarations," three separate conventions—namely, a convention for the peaceful adjustment of international differences, a convention concerning the law of land warfare, and a convention for the adaptation to maritime warfare of the principles of the Geneva Convention. The Powers which took part in the conference are the following: Great Britain, Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Greece, Holland, Italy, Japan, Luxemburg, Mexico, Montenegro, Persia, Portugal, Roumania, Russia, Servia, Siam, Spain, Sweden-Norway, Switzerland, Turkey, and the United States of America. All these Powers are parties to the three conventions, with the following exceptions: Switzerland refused to sign the second convention, and Sweden-Norway, although she signed, refused to ratify it; China and Turkey signed all three conventions, but did not ratify any of them.

Treaty of Washington of 1901.

§ 568. The so-called Hay-Pauncefote Treaty of Washington[1] between Great Britain and the United States of America, signed November 18, 1901, is, although law-making between the parties only, nevertheless of world-wide importance because it neutralises permanently the Panama Canal of the future and stipulates free navigation thereon for vessels of all nations.[2]

[1] See Treaty Series, 1902, No. 6.

[2] It ought to be mentioned that article 5 of the Boundary Treaty of Buenos Ayres, signed by Argentina and Chili on September 15, 1881—see Martens, N.R.G., 2nd ser. XII. p. 491—contains a law-making stipulation of world-wide importance, because it neutralises the Straits of Magellan for ever and declares them open to vessels of all nations. See above, p. 250, note 2, and below, vol. II. § 72.

II

ALLIANCES

Grotius, II. c. 15—Vattel, III. §§ 78-102—Twiss, I. § 246—Taylor, §§ 347-349—Wheaton, §§ 278-285—Bluntschli, §§ 446-449—Heffter, § 92—Geffcken in Holtzendorff, III. pp. 115-139—Lisst, § 37—Bonfils, Nos. 871-881—Pradier-Fodéré, II. Nos. 934-967—Rivier, II. pp. 111-116—Calvo, III. §§ 1587-1588—Fiore, II. No. 1094—Martens, I. § 113—Rolin-Jacquemyns in R.I. XX. (1888), pp. 5-35.

Conception of Alliances.

§ 569. Alliances in the strict sense of the term are treaties of union between two or more States for the purpose of defending each other against an attack in war, or of jointly attacking third States, or for both purposes. The term "alliance" is, however, often made use of in a wider sense, and it comprises in such cases treaties of union for various purposes. Thus, the so-called "Holy Alliance," concluded in 1815 between the Emperors of Austria and Russia and the King of Prussia, which almost all of the Sovereigns of Europe afterwards joined, was a union for such vague purposes that it cannot be called an alliance in the strict sense of the term.

History relates innumerable alliances between the different States. They have always played, and still play, an important part in politics. For the present the triple alliance between Germany, Austria, and Italy since 1879 and 1882, the alliance between Russia and France since 1899, and that between Great Britain and Japan since 1902 are illustrative examples.[1]

[1] The following is the text of the Anglo-Japanese treaty of alliance:—

The Governments of Great Britain and Japan, actuated solely by a desire to maintain the *status quo* and general peace in the extreme East, being moreover specially interested in maintaining the independence and territorial integrity of the Empire of China and the Empire of Corea, and in securing equal opportunities in those countries for the commerce

Parties to Alliances.

§ 579. Subjects of alliances are said to be full-Sovereign States only. But the fact cannot be denied that alliances have been concluded by States under suzerainty. Thus, the convention between

and industry of all nations, hereby agree as follows:—

ARTICLE I.

The High Contracting Parties, having mutually recognised the independence of China and of Corea, declare themselves to be entirely uninfluenced by any aggressive tendencies in either country. Having in view, however, their special interests, of which those of Great Britain relate principally to China, while Japan, in addition to the interests which she possesses in China, is interested in a peculiar degree politically, as well as commercially and industrially, in Corea, the High Contracting Parties recognise that it will be admissible for either of them to take such measures as may be indispensable in order to safeguard those interests if threatened either by the aggressive action of any other Power, or by disturbances arising in China or Corea, and necessitating the intervention of either of the High Contracting Parties for the protection of the lives and property of its subjects.

ARTICLE II.

If either Great Britain or Japan, in the defence of their respective interests as above described, should become involved in war with another Power, the other High Contracting Party will maintain a strict neutrality, and use its efforts to prevent other Powers from joining in hostilities against its ally.

ARTICLE III.

If in the above event any other Power or Powers should join in hostilities against that ally, the other High Contracting Party will come to its assistance and will conduct the war in common, and make peace in mutual agreement with it.

ARTICLE IV.

The High Contracting Parties agree that neither of them will, without consulting the other, enter into separate arrangements with another Power to the prejudice of the interests above described.

ARTICLE V.

Whenever, in the opinion of either Great Britain or Japan, the above-mentioned interests are in jeopardy, the two Governments will communicate with one another fully and frankly.

ARTICLE VI.

The present Agreement shall come into effect immediately after the date of its signature, and remain in force for five years from that date.

In case neither of the High Contracting Parties should have notified twelve months before the expiration of the said five years the intention of terminating it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it. But if, when the date fixed for its expiration arrives, either ally is actually engaged in war, the alliance shall, *ipso facto*, continue until peace is concluded.

In faith whereof the Undersigned, duly authorised by their respective Governments, have signed this Agreement, and have affixed thereto their seals.

Done in duplicate at London, the 30th January, 1902.

Roumania, which was then under Turkish suzerainty, and Russia of April 16, 1877, concerning the passage of Russian troops through Roumanian territory in case of war with Turkey, was practically a treaty of alliance.[1] Thus, further, the former South African Republic, although, according to the views of the British Government at least, a half-Sovereign State under British suzerainty, concluded an alliance with the former Orange Free State by treaty of March 17, 1897.[2]

A neutralised State can be the subject of an alliance for the purpose of defence, whereas the entrance into an offensive alliance on the part of such State would involve a breach of its neutrality.

Different kinds of Alliances.

§ 571. An alliance may be, as already mentioned, offensive or defensive, or both. All three may be either general alliances, in which case the allies are united against any possible enemy whatever, or particular alliances against one or more individual enemies. Alliances may, further, be either permanent or temporary, and in the latter case they expire with the period of time for which they were concluded. As regards offensive alliances, it must be emphasised that they are valid only when their object is not immoral.[3]

Conditions of Alliances

§ 572. Alliances may contain all sorts of conditions. The most important are the conditions regarding the assistance to be rendered. It may be that assistance is to be rendered with the whole or a limited part of the military and naval forces of the allies, or with the whole or a limited part of their military or with the whole or a limited part of their

[1] See Martens, N.R.G., 2nd ser. XXV. p. 327.
[2] See Martens, N.R.G., 2nd ser. III. p. 182.
[3] See above, § 505.

naval forces only. Assistance may, further, be rendered in money only, so that one of the allies is fighting with his forces while the other supplies a certain sum of money for their maintenance. A treaty of alliance of such a kind must not be confounded with a simple treaty of subsidy. If two States enter into a convention that one of the parties shall furnish the other permanently in time of peace and war with a limited number of troops in return for a certain annual payment, such convention is not an alliance, but a treaty of subsidy only. But if two States enter into a convention that in case of war one of the parties shall furnish the other with a limited number of troops, be it in return for payment or not, such convention really constitutes an alliance. For every convention concluded for the purpose of lending succour in time of war implies an alliance. It is for this reason that the above-mentioned treaty of 1877 (§ 570) between Russia and Roumania concerning the passage of Russian troops through Roumanian territory in case of war against Turkey was really a treaty of alliance.

Casus Fœderis.

§ 573. *Casus fœderis* is the event upon the occurrence of which it becomes the duty of one of the allies to render the promised assistance to the other. Thus in case of a defensive alliance the *casus fœderis* occurs when war is declared or commenced against one of the allies. Treaties of alliance very often define precisely the event which shall be the *casus fœderis*, and then the latter is less exposed to controversy. But, on the other hand, there have been enough alliances concluded without such specialisation, and, consequently, later on disputes have arisen between the parties as to the *casus fœderis*.

III

Treaties of Guarantee and of Protection

Vattel, II. §§ 235-239—Hall, § 113—Phillimore, II. §§ 56-63—Twiss, I. § 249—Halleck, I. p. 285—Taylor, §§ 350-353—Wheaton, § 278—Bluntschli, §§ 430-439—Heffter, § 97—Geffcken in Holtzendorff, III. pp. 85-112—Bonfils, Nos. 882-893—Pradier-Fodéré, II. Nos. 969-1020—Rivier, II. pp. 97-105—Calvo, III. §§ 1584-1585—Martens, I. § 115—Neyron, "Essai historique et politique sur les garanties" (1779)—Milovanovitch, "Des traités de garantie en droit international" (1888).

Conception and Objects of Guarantee Treaties.

§ 574. Treaties of guarantee are conventions by which one of the parties engages to do what is in its power to secure a certain object to the other party. Guarantee treaties may be mutual or unilateral. They may be concluded by two States only, or by a number of States jointly, and in the latter case the single guarantors may give their guarantee severally or collectively or both. And the guarantee may be for a certain period of time only or permanent.

The possible objects of guarantee treaties are numerous.[1] It suffices to give the following chief examples: the performance of a particular act on the part of a certain State, as the discharge of a debt or the cession of a territory; certain rights of a State; the undisturbed possession of the whole or a particular part of the territory; a particular form of Constitution; a certain status, as permanent neutrality (Switzerland, Belgium, Luxemburg) or independence; a particular dynastic succession; fulfilment of a treaty concluded by a third State.[2]

[1] What an important part treaties of guarantee play in politics may be seen from a glance at Great Britain's guarantee treaties. See Munro, England's Treaties of Guarantee, in The Law Magazine and Review, VI. (1880-1881), p. 160.

[2] See above, § 528.

Effect of Treaties of Guarantee.

§ 575. The effect of guarantee treaties is the creation of the duty of the guarantors to do what is in their power to secure the guaranteed objects. The compulsion to be applied by a guarantor for that purpose depends upon the circumstances; it may eventually be war. But the duty of the guarantor to render even by compulsion the promised assistance to the guaranteed depends upon many conditions and circumstances. Thus, first, the guaranteed must request the guarantor to render his assistance. When, for instance, the possession of a certain part of its territory is guaranteed to a State which after its defeat in a war with a third State accepts the condition of peace to cede such piece of territory to the victor without having requested the intervention of the guarantor, the latter has neither a right nor a duty to interfere. Thus, secondly, the guarantor must at the critical time be able to render the required assistance. When, for instance, its hands are tied through waging war against a third State, or when it is so weak through internal troubles or other factors that its interference would expose it to a serious danger, it is not bound to fulfil the request for assistance. So too, when the guaranteed has not complied with previous advice as to the line of its behaviour given by the guarantor, it is not the latter's duty to render assistance afterwards.

It is impossible to state all the circumstances and conditions upon which the fulfilment of the duty of the guarantor depends, as every case must be judged upon its own merits. And it is certain that more frequently than in other cases changes in political constellations and the general developments of events may involve such vital change of circum-

stances as to justify[1] a State in repudiating its interference in spite of a treaty of guarantee. It is for this reason that treaties of guarantee to secure permanently a certain object to a State are naturally of a more or less precarious value for the latter. The practical value, therefore, of a guarantee treaty, whatever may be its formal character, would seem to extend as a rule to the early years only of its existence while the original conditions still obtain.

Effect of Collective Guarantee.

§ 576. In contradistinction to treaties constituting a guarantee on the part of one or more States severally, the effect of treaties constituting a *collective* guarantee on the part of several States requires special consideration. On June 20, 1867, Lord Derby maintained[2] in the House of Lords concerning the collective guarantee of the neutralisation of Luxemburg by the Powers that in case of a collective guarantee each guarantor had only the duty to act according to the treaty when all the other guarantors were ready to act likewise; that, consequently, if one of the guarantors themselves should violate the neutrality of Luxemburg, the duty to act according to the treaty of collective guarantee would not accrue to the other guarantors. This opinion is certainly not correct,[3] and I do not know of any publicist who would or could approve of it. There ought to be no doubt that in a case of collective guarantee one of the guarantors alone cannot be considered bound to act according to the treaty of guarantee. For a collective guarantee can have the meaning only that the guarantors should act in a body. But if one of the guarantors themselves violates the object of his own guarantee, the body of the guarantors remains, and

[1] See above, § 539.
[2] Hansard, vol. 183, p. 150.
[3] See Hall, § 113, and Bluntschli, § 440.

it is certainly their duty to act against such faithless co-guarantor. If, however, the majority, and therefore the body of the guarantors, were to violate the very object of their guarantee, the duty to act against them would not accrue to the minority.

Yet different is the case in which a number of Powers have *collectively and severally* guaranteed a certain object. Then not only as a body but also individually, it is their duty to interfere in any case of violation of the object of guarantee.

Treaties of Protection.

§ 577. Different from guarantee treaties are treaties of protection. Whereas the former constitute the guarantee of a certain object to the guaranteed, treaties of protection are treaties by which strong States simply engage to protect weaker States without any guarantee whatever. A treaty of protection must, however, not be confounded with a treaty of protectorate.[1]

IV

Unions concerning Common Non-Political Interests

Descamps, "Les offices internationaux et leur avenir" (1894)—Moynier, Les Bureaux internationaux des Unions universelles" (1892)—Poinsard, "Les Unions et ententes internationales" (2nd ed. 1901).

Common in Contradistinction to Particular Interests.

§ 578. The development of international intercourse has called into existence innumerable treaties for the purpose of satisfying economic and other non-political interests of the different States. Each nation concludes treaties of commerce, of navigation, of jurisdiction, and of many other kinds with most

[1] See above, § 92.

of the other nations, and tries in this way more or less successfully to foster its own interests. Many of these interests are of so particular a character and depend upon such individual circumstances and conditions that they can only be satisfied and fostered by special treaties from time to time concluded by each State with other States. Yet experience has shown that the different States have also many non-political interests in common which can better be satisfied and fostered by a general treaty between a great number of States than by special treaties singly concluded between the different parties. Such general treaties have, therefore, since the second half of the nineteenth century, more and more come into being, and it is certain that their number will in time increase. The number of States which are parties to these general treaties varies, of course, and whereas some of them will certainly become in time universal international treaties in the same way as the treaty which is the basis of the Universal Postal Union, others will never reach that stage. But all of them are general treaties in so far as a lesser or greater number of States are parties.

Universal Postal Union.

§ 579. Whereas formerly the different States severally concluded treaties concerning postal arrangements, twenty-one States entered on October 9, 1874, at Berne, into a general postal convention[1] for the purpose of creating a General Postal Union. This General turned into the Universal Postal Union through the Convention of Paris[2] of June 1, 1878, to which thirty States were parties. This convention has several times been revised by the congresses of the Union, which have to meet every five years. The

[1] See Martens, N.R.G., 2nd ser. I. p. 651.
[2] See Martens, N.R.G., 2nd ser. III. p. 699.

last revision took place at the Congress of Washington, 1897, where on June 15 a new universal postal convention was signed by fifty States, but by and-by other States acceded, so that now more than sixty States are members of the Union. This Union possesses an International Office[1] seated at Berne.[2]

Universal Telegraph Union.

§ 580. A general telegraphic convention was already concluded at Paris on May 17, 1865, and in 1868 an International Telegraph Office[3] was instituted at Berne. In time more and more States joined, and the basis of the Union is now the Convention of St. Petersburg[4] of July 28, 1875, which has several times been amended, the last time at Berlin[5] on September 17, 1885. That the Union will one day become universal there is no doubt, but as yet, although called "Universal" Telegraphic Union, only about thirty States are members.

Concerning the general treaty of March 14, 1884, for the protection of submarine telegraph cables,[6] see above, § 287.

Union concerning Railway Transports and Freights.

§ 581. A general convention[7] was concluded on October 14, 1890, at Berne, concerning railway transports and freights. The parties—namely, Austria, Belgium, France, Germany, Holland, Italy, Luxemburg, Russia, and Switzerland—form a Union for this purpose, although the term "Union" is not

[1] See above, § 465.

[2] See Fischer, Post und Telegraphie im Weltverkehr (1879); Schröter, Der Weltpostverein (1900); Rolland, De la correspondance postale et télégraphique dans les relations internationales (1901).

[3] See above, § 464. Fischer, Die Telegraphie und das Völkerrecht (1876).

[4] See Martens, N.R.G., 2nd ser. III. p. 614.

[5] See Martens, N.R.G., 2nd ser. XII. p. 205.

[6] See Martens, N.R.G., 2nd ser XI. p. 281.

[7] See Martens, N.R.G., 2nd ser. XIX. p. 289.

made use of. The Union possesses an International Office[1] at Berne.

Convention concerning the Metric System

§ 582. A general convention[2] was concluded on May 20, 1875, for the purpose of instituting an International Office[3] of Weights and Measures at Paris. The original parties were—Argentina, Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Italy, Peru, Portugal, Russia, Spain, Sweden-Norway, Switzerland, Turkey, the United States of America, and Venezuela. Great Britain, Japan, Mexico, Roumania, and Servia acceded later on.

Union Protection of Industrial Property.

§ 583. On March 20, 1883, the Convention of Paris[4] was signed for the purpose of creating an international union for the Protection of Industrial Property. The original members were: Belgium, Brazil, France, Holland, Guatemala, Italy, Portugal, Salvador, Servia, Spain, and Switzerland. Great Britain, Japan, Ecuador, Mexico, the United States of America, Sweden-Norway, Germany, and Cuba acceded later on. This Union has an International Office[5] at Berne. The object of the Union is the protection of patents, trade-marks, and the like; on April 14, 1891, at Madrid, it agreed to an arrangement concerning the registration of trade-marks.[6]

Union Protection of Works of Literature and Art.

§ 584. On September 9, 1886, the Convention of Berne[7] was signed for the purpose of creating an

[1] See above, § 470. Kaufmann, Die mitteleuropäischen Eisenbahnen und das internationale öffentliche Recht (1893); Rosenthal, Internationales Eisenbahnfrachtrecht (1894); Magne, Des raccordements internationaux de chemins de fer etc. (1901); Eger, Das internationale Uebereinkommen über den Eisenbahnfrachtverkehr (2nd ed. 1903).

[2] See Martens, N.R.G., 2nd ser. I. p. 663.

[3] See above, § 466.

[4] See Martens, N.R.G., 2nd ser. X. p. 133.

[5] See above, § 467.

[6] See Martens. N.R.G., 2nd ser. XXII. p. 208. Pelletier et Vidal-Noguet, La convention d'Union pour la protection de la propriété industrielle du 20 mars 1883 et les conférences de révision postérieures (1902).

[7] See Martens, N.R.G., 2nd ser. XII. p. 173.

international Union for the Protection of Works of Art and Literature. The Union has an International Office[1] at Berne. The original members were: Great Britain, Belgium, France, Germany, Hayti, Italy, Liberia, Spain, Switzerland, and Tunis. Denmark, Japan, Luxemburg, Monaco, and Sweden-Norway acceded later on. An additional Act[2] to the convention was signed at Paris on May 4, 1896. To comply with the convention, Parliament passed in 1886 the "Act[3] to amend the law respecting international and colonial copyright."

Union for the Publication of Customs Tariffs.

§ 585. On July 5, 1890, the Convention of Brussels was signed for the purpose of creating an international Union for the Publication of Customs Tariffs.[4] The Union has an International Office[5] at Brussels, which publishes the customs tariffs of the various States of the globe. The members of the Union are the following States: Great Britain, Argentina, Austria-Hungary, Belgium, Bolivia, Chili, the Congo Free State, Costa Rica, Denmark, France, Greece, Guatemala, Hayti, Holland, Italy, Mexico, Nicaragua, Paraguay, Peru, Portugal, Roumania, Russia, Salvador, Siam, Spain, Switzerland, Turkey, the United States of America, Uruguay, and Venezuela.

Conventions concerning Private International Law.

§ 586. On November 14, 1896, was signed the Convention of the Hague for the purpose of establishing uniform rules concerning several matters of the so-called Private International Law.[6] The original parties were: Belgium, France, Holland, Italy, Luxemburg, Portugal, Spain, and Switzerland. Austria-

[1] See above, § 467. Orelli, Der internationale Schutz des Urheberrechts (1887); Thomas, La convention littéraire et artistique internationale etc. (1894).

[2] See Martens, N.R.G., 2nd ser. XXIV. p. 758.

[3] 49 & 50 Vict. c. 33.

[4] See Martens, N.R.G., 2nd ser. XVIII. p. 558.

[5] See above, § 469.

[6] See Martens, N.R.G., 2nd ser. XXIII. p. 398.

Hungary, Denmark, Germany, Roumania, Sweden-Norway, and Russia acceded later on. The same States, with the exception of Denmark, Russia, and Norway (but not Sweden, which is a party), signed on June 12, 1902, at the Hague, three other conventions [1] for the purpose of regulating conflicts of laws concerning marriage, concerning divorce, and concerning guardianship over infants.

Phylloxera Conventions.

§ 587. Owing to the great damage done to grapes through phylloxera epidemics, a general convention [2] for the prevention of the extension of such epidemics was concluded on September 17, 1878, at Berne. Its place was afterwards taken by the convention [3] signed at Berne on November 3, 1881. The original members were: Austria-Hungary, France, Germany, Italy, Portugal, Spain, and Switzerland. Belgium, Holland, Luxemburg, Roumania, and Servia acceded later on.

Sanitary Conventions.

§ 588. In the interest of international public health, two general treaties have been concluded concerning the cholera, and one concerning the plague. The two Cholera Conventions were signed at Dresden on April 15, 1893, and at Paris on April 3, 1894; an additional Declaration was signed at Paris on October 30, 1899.[4] The Plague Convention was signed at Venice on March 19, 1897, and an additional Declaration on January 24, 1900, at Rome.[5]

Monetary Unions.

§ 589. On December 23, 1865, Belgium, France,

[1] See Martens, N.R.G., 2nd ser. XXXI. pp. 26 and 706.

[2] See Martens, N.R.G., 2nd ser. VI. p. 261.

[3] See Martens, N.R.G., 2nd ser. VIII. p. 435.

[4] See Martens, N.R.G., 2nd ser. XIX. p. 239, and XXIV. p. 517.

[5] See Martens, N.R.G., 2nd ser. XXVIII. p. 339, and XXIX. p. 495. Attention should be drawn to a very valuable suggestion made by Ullmann in R.I. XI. (1879), p. 527, and in R.G. IV. (1897), p. 437. Bearing in mind the fact that frequently in time of war epidemics break out in consequence of insufficient disinfection of the battlefields, Ullmann suggests a general convention instituting neutral sanitary commissions whose duty would be to take all necessary sanitary measures after a battle.

Italy, and Switzerland signed the Convention of Paris which created the so-called "Latin Monetary Union" between the parties; Greece acceded in 1868.[1] This convention was three times renewed and amended—namely, in 1878, 1885, and 1893.[2]

Another Monetary Union is that entered into by Denmark, Sweden, and Norway by the Convention of Copenhagen[3] of May 27, 1873.

On November 22, 1892, the International Monetary Conference[4] met at Brussels, where the following States were represented: Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Greece, Holland, Italy, Mexico, Portugal, Roumania, Spain, Sweden-Norway, Switzerland, Turkey, and the United States of America. The deliberations of this conference had, however, no practical result.

Convention for Preservation of Wild Animals in Africa.

§ 590. In behalf of the preservation of wild animals, birds, and fish in Africa, the Convention of London[5] was signed on May 19, 1900, by Great Britain, the Congo Free State, France, Germany, Italy, Portugal, and Spain.

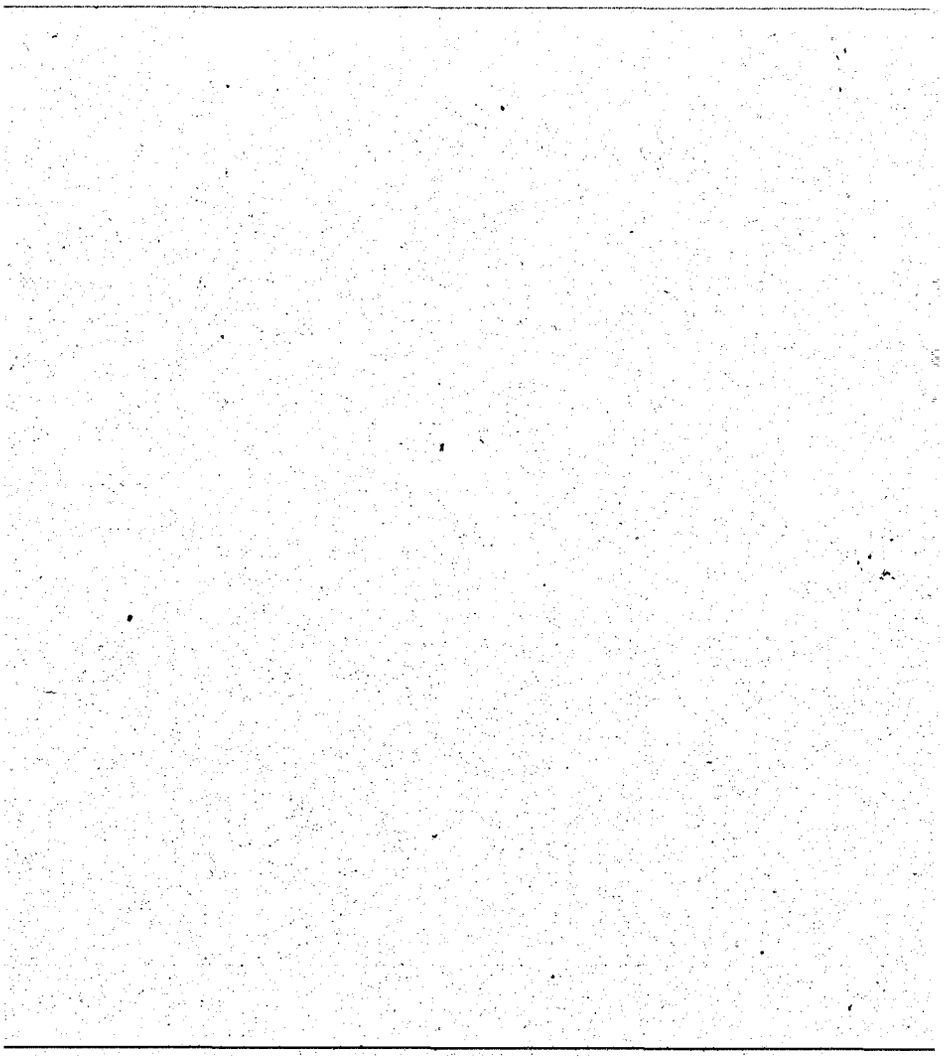
Convention concerning Bounties on Sugar.

§ 591. On March 5, 1902, the Convention of Brussels[6] was signed concerning the abolition of bounties on the production and exportation of sugar. The original parties were: Great Britain, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Spain, and Sweden-Norway. Luxemburg, Peru, and Russia acceded later on. A Permanent Commission[7] was established at Brussels for the purpose of supervising the execution of the convention.

[1] See Martens, N.R.G., XX. pp. 688 and 694.
[2] See Martens, N.R.G., 2nd ser. IV. p. 725, XI. p. 65, XXI. p. 285.
[3] See Martens, N.R.G., 2nd ser. I. p. 290.
[4] See Martens, N.R.G., 2nd ser. XXIV. pp. 167–478.
[5] See Martens, N.R.G., 2nd ser. XXX. p. 430.
[6] See Martens, N.R.G., 2nd ser. XXXI. p. 272.
[7] See above, §§ 462 and 471.

APPENDIX

THE ANGLO-FRENCH AGREEMENT OF APRIL 8, 1904



I

DECLARATION RESPECTING EGYPT AND MOROCCO

Article I

His Britannic Majesty's Government declare that they have no intention of altering the political status of Egypt.

The Government of the French Republic, for their part declare that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British occupation or in any other manner, and that they give their assent to the draft Khedivial Decree annexed[1] to the present Arrangement, containing the guarantees considered necessary for the protection of the interests of the Egyptian bondholders, on the condition that, after its promulgation, it cannot be modified in any way without the consent of the Powers Signatory of the Convention of London of 1885.

It is agreed that the post of Director-General of Antiquities in Egypt shall continue, as in the past, to be entrusted to a French *savant*.

The French schools in Egypt shall continue to enjoy the same liberty as in the past.

Article II

The Government of the French Republic declare that they have no intention of altering the political status of Morocco.

His Britannic Majesty's Government, for their part, recognise that it appertains to France, more particularly as a Power whose dominions are conterminous for a great distance with those of Morocco, to preserve order in that country, and to provide assistance for the purpose of all administrative, economic, financial, and military reforms which it may require.

[1] Not printed in this Appendix.

They declare that they will not obstruct the action taken by France for this purpose, provided that such action shall leave intact the rights which Great Britain, in virtue of Treaties, Conventions, and usage, enjoys in Morocco, including the right of coasting trade between the ports of Morocco enjoyed by British vessels since 1901.

ARTICLE III

His Britannic Majesty's Government, for their part, will respect the rights which France, in virtue of Treaties, Conventions, and usage, enjoys in Egypt, including the right of coasting trade between Egyptian ports accorded to French vessels.

ARTICLE IV

The two Governments, being equally attached to the principle of commercial liberty both in Egypt and Morocco, declare that they will not, in those countries, countenance any inequality either in the imposition of customs duties or other taxes, or of railway transport charges.

The trade of both nations with Morocco and with Egypt shall enjoy the same treatment in transit through the French and British possessions in Africa. An Agreement between the two Governments shall settle the conditions of such transit and shall determine the points of entry.

This mutual engagement shall be binding for a period of thirty years. Unless this stipulation is expressly denounced at least one year in advance, the period shall be extended for five years at a time.

Nevertheless, the Government of the French Republic reserve to themselves in Morocco, and His Britannic Majesty's Government reserve to themselves in Egypt, the right to see that the concessions for roads, railways, ports, &c., are only granted on such conditions as will maintain intact the authority of the State over these great undertakings of public interest.

ARTICLE V

His Britannic Majesty's Government declare that they will use their influence in order that the French officials now in the Egyptian service may not be placed under conditions less advantageous than those applying to the British officials in the same service.

The Government of the French Republic, for their part,

would make no objection to the application of analogous conditions to British officials now in the Moorish service.

ARTICLE VI

In order to insure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of Article VIII. of that Treaty will remain in abeyance.

ARTICLE VII

In order to secure the free passage of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou.

This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean.

ARTICLE VIII

The two Governments, inspired by their feeling of sincere friendship for Spain, take into special consideration the interests which that country derives from her geographical position and from her territorial possessions on the Moorish coast of the Mediterranean. In regard to these interests the French Government will come to an understanding with the Spanish Government.

The agreement which may be come to on the subject between France and Spain shall be communicated to His Britannic Majesty's Government.

ARTICLE IX

The two Governments agree to afford to one another their diplomatic support, in order to obtain the execution of the clauses of the present Declaration regarding Egypt and Morocco.

In witness whereof His Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the

British Dominions beyond the Seas, Emperor of India, and His Majesty's Principal Secretary of State for Foreign Affairs, duly authorised for that purpose, have signed the present Declaration and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

II

CONVENTION SIGNED AT LONDON, APRIL 8, 1904

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the President of the French Republic, having resolved to put an end, by a friendly Arrangement, to the difficulties which have arisen in Newfoundland, have decided to conclude a Convention to that effect, and have named as their respective Plenipotentiaries:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, the Most Honourable Henry Charles Keith Petty-Fitzmaurice, Marquess of Lansdowne, His Majesty's Principal Secretary of State for Foreign Affairs; and

The President of the French Republic, His Excellency Monsieur Paul Cambon, Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India;

Who, after having communicated to each other their full powers, found in good and due form, have agreed as follows, subject to the approval of their respective Parliaments:—

Article I

France renounces the privileges established to her advantage by Article XIII. of the Treaty of Utrecht, and confirmed or modified by subsequent provisions.

Article II

France retains for her citizens, on a footing of equality with

British subjects, the right of fishing in the territorial waters on that portion of the coast of Newfoundland comprised between Cape St. John and Cape Rav, passing by the north: this right shall be exercised during the usual fishing season closing for all persons on October 20 of each year.

The French may therefore fish there for every kind of fish, including bait and also shell fish. They may enter any port or harbour on the said coast and may there obtain supplies or bait and shelter on the same conditions as the inhabitants of Newfoundland, but they will remain subject to the local Regulations in force; they may also fish at the mouths of the rivers, but without going beyond a straight line drawn between the two extremities of the banks, where the river enters the sea.

They shall not make use of stake-nets or fixed engines without permission of the local authorities.

On the above-mentioned portion of the coast, British subjects and French citizens shall be subject alike to the laws and Regulations now in force, or which may hereafter be passed for the establishment of a close time in regard to any particular kind of fish, or for the improvement of the fisheries. Notice of any fresh laws or Regulations shall be given to the Government of the French Republic three months before they come into operation.

The policing of the fishing on the above-mentioned portion of the coast, and for prevention of illicit liquor traffic and smuggling of spirits, shall form the subject of Regulations drawn up in agreement by the two Governments.

Article III

A pecuniary indemnity shall be awarded by His Britannic Majesty's Government to the French citizens engaged in fishing or the preparation of fish on the "Treaty Shore," who are obliged, either to abandon the establishments they possess there, or to give up their occupation, in consequence of the modification introduced by the present Convention into the existing state of affairs.

This indemnity cannot be claimed by the parties interested unless they have been engaged in their business prior to the closing of the fishing season of 1903.

Claims for indemnity shall be submitted to an Arbitral Tribunal, composed of an officer of each nation, and, in the event of disagreement, of an Umpire appointed in accordance

with the procedure laid down by Article XXXII. of the Hague Convention. The details regulating the constitution of the Tribunal and the conditions of the inquiries to be instituted for the purpose of substantiating the claims, shall form the subject of a special Agreement between the two Governments.

ARTICLE IV

His Britannic Majesty's Government, recognising that, in addition to the indemnity referred to in the preceding Article, some territorial compensation is due to France in return for the surrender of her privilege in that part of the Island of Newfoundland referred to in Article II., agree with the Government of the French Republic to the provisions embodied in the following Articles :—

ARTICLE V

The present frontier between Senegambia and the English Colony of the Gambia shall be modified so as to give to France Yarbutenda and the lands and landing-places belonging to that locality.

In the event of the river not being open to maritime navigation up to that point, access shall be assured to the French Government at a point lower down on the River Gambia, which shall be recognised by mutual agreement as being accessible to merchant ships engaged in maritime navigation.

The conditions which shall govern transit on the River Gambia and its tributaries, as well as the method of access to the point that may be reserved to France in accordance with the preceding paragraph, shall form the subject of future agreement between the two Governments.

In any case, it is understood that these conditions shall be at least as favourable as those of the system instituted by application of the General Act of the African Conference of February 26, 1885, and of the Anglo-French Convention of June 14, 1898, to the English portion of the basin of the Niger.

ARTICLE VI

The group known as the Îles de Los, and situated opposite Konakry, is ceded by His Britannic Majesty to France.

ARTICLE VII

Persons born in the territories ceded to France by Articles V.

and VI. of the present Convention may retain British nationality by means of an individual declaration to that effect, to be made before the proper authorities by themselves, or, in the case of children under age, by their parents or guardians.

The period within which the declaration of option referred to in the preceding paragraph must be made shall be one year, dating from the day on which French authority shall be established over the territory in which the persons in question have been born.

Native laws and customs now existing will, as far as possible, remain undisturbed.

In the Îles de Los, for a period of thirty years from the date of exchange of the ratifications of the present Convention, British fishermen shall enjoy the same rights as French fishermen with regard to anchorage in all weathers, to taking in provisions and water, to making repairs, to transhipment of goods, to the sale of fish, and to the landing and drying of nets, provided always that they observe the conditions laid down in the French Laws and Regulations which may be in force there.

ARTICLE VIII

To the east of the Niger the following line shall be substituted for the boundary fixed between the French and British possessions by the Convention of June 14, 1898, subject to the modifications which may result from the stipulations introduced in the final paragraph of the present Article.

Starting from the point on the left bank of the Niger laid down in Article III. of the Convention of June 14, 1898, that is to say, the median line of the Dallul Mauri, the frontier shall be drawn along this median line until it meets the circumference of a circle drawn from the town of Sokoto as a centre, with a radius of 160,932 mètres (100 miles). Thence it shall follow the northern arc of this circle to a point situated 5 kilomètres south of the point of intersection of the above-mentioned arc of the circle with the route from Dosso to Matankari *via* Maouréde.

Thence it shall be drawn in a direct line to a point 20 kilomètres north of Konni (Birni-N'Kouni), and then in a direct line to a point 15 kilomètres south of Maradi, and thence shall be continued in a direct line to the point of intersection of the parallel of 13° 20′ north latitude with a meridian passing 70 miles to the east of the second intersection of the 14th degree

of north latitude and the northern arc of the above-mentioned circle.

Thence the frontier shall follow in an easterly direction the parallel of 13° 20′ north latitude until it strikes the left bank of the River Komadugu Waubé (Komadougou Ouobé), the thalweg of which it will then follow to Lake Chad. But, if before meeting this river the frontier attains a distance of 5 kilomètres from the caravan route from Zinder to Yo, through Sua Kololua (Soua Kololoua), Adeber, and Kabi, the boundary shall then be traced at a distance of 5 kilomètres to the south of this route until it strikes the left bank of the River Komadugu Waubé (Komadougou Ouobé), it being nevertheless understood that, if the boundary thus drawn should happen to pass through a village, this village, with its lands, shall be assigned to the Government to which would fall the larger portion of the village and its lands. The boundary will then, as before, follow the thalweg of the said river to Lake Chad.

Thence it will follow the degree of latitude passing through the thalweg of the mouth of the said river up to its intersection with the meridian running 35′ east of the centre of the town of Kouka, and will then follow this meridian southwards until it intersects the southern shore of Lake Chad.

It is agreed, however, that, when the Commissioners of the two Governments at present engaged in delimiting the line laid down in Article IV. of the Convention of June 14, 1898, return home and can be consulted, the two Governments will be prepared to consider any modifications of the above frontier line which may seem desirable for the purpose of determining the line of demarcation with greater accuracy. In order to avoid the inconvenience to either party which might result from the adoption of a line deviating from recognised and well-established frontiers, it is agreed that in those portions of the projected line where the frontier is not determined by the trade routes, regard shall be had to the present political divisions of the territories so that the tribes belonging to the territories of Tessaoua-Maradi and Zinder shall, as far as possible, be left to France, and those belonging to the territories of the British zone shall, as far as possible, be left to Great Britain.

It is further agreed that, on Lake Chad, the frontier line shall, if necessary, be modified so as to assure to France a communication through open water at all seasons between her possessions on the north-west and those on the south-east of the Lake, and a portion of the surface of the open waters of

the Lake at least proportionate to that assigned to her by the map forming Annex 2 of the Convention of June 14, 1898.

In that portion of the River Komadugu which is common to both parties, the populations on the banks shall have equal rights of fishing.

ARTICLE IX

The present Convention shall be ratified, and the ratifications shall be exchanged, at London, within eight months, or earlier if possible.

In witness whereof His Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and His Majesty's Principal Secretary of State for Foreign Affairs, duly authorised for that purpose, have signed the present Convention and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

III

DECLARATION CONCERNING SIAM, MADAGASCAR, AND THE NEW HEBRIDES

I.—SIAM

The Government of His Britannic Majesty and the Government of the French Republic confirm Articles 1 and 2 of the Declaration signed in London on January 15, 1896, by the Marquess of Salisbury, then Her Britannic Majesty's Principal Secretary of State for Foreign Affairs, and Baron de Courcel, then Ambassador of the French Republic at the Court of Her Britannic Majesty.

In order, however, to complete these arrangements, they declare by mutual agreement that the influence of Great Britain shall be recognised by France in the territories situated to the west of the basin of the River Menam, and that the influence of France shall be recognised by Great Britain in the territories situated to the east of the same region, all the Siamese posses-

sions on the east and south-east of the zone above described and the adjacent islands coming thus henceforth under French influence, and, on the other hand, all Siamese possessions on the west of this zone and of the Gulf of Siam, including the Malay Peninsula and the adjacent islands, coming under English influence.

The two Contracting Parties, disclaiming all idea of annexing any Siamese territory, and determined to abstain from any act which might contravene the provisions of existing Treaties, agree that, with this reservation, and so far as either of them is concerned, the two Governments shall each have respectively liberty of action in their spheres of influence as above defined.

II.—Madagascar

In view of the Agreement now in negotiation on the questions of jurisdiction and the postal service in Zanzibar, and on the adjacent coast, His Britannic Majesty's Government withdraw the protest which they had raised against the introduction of the Customs Tariff established at Madagascar after the annexation of that island to France. The Government of the French Republic take note of this Declaration.

III.—New Hebrides

The two Governments agree to draw up in concert an Arrangement which, without involving any modification of the political *status quo*, shall put an end to the difficulties arising from the absence of jurisdiction over the natives of the New Hebrides.

They agree to appoint a Commission to settle the disputes of their respective nationals in the said islands with regard to landed property. The competency of this Commission and its rules of procedure shall form the subject of a preliminary Agreement between the two Governments.

In witness whereof His Britannic Majesty's Principal Secretary of State for Foreign Affairs and His Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, duly authorised for that purpose, have signed the present Declaration and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

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