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INTERNATIONAL LAW

BY THE SAME AUTHOR

INTERNATIONAL LAW

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INTERNATIONAL LAW

A TREATISE

VOL. II.

WAR AND NEUTRALITY

SECOND EDITION

BY

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Transcriber's Note: Original spelling variations have not been standardized. Links have been provided to the first volume of this two-volume work, see International Law. A Treatise. Vol. I--Peace. Second Edition, by Lassa Oppenheim, M.A., LL.D., gutenberg ebooks 41046. Although we verify the

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PREFACE

TO THE SECOND EDITION

The course of events since 1906, when the second volume of this work first made its appearance, and the results of further research have necessitated, as in the case of the first volume, the thorough revision of the text, the rewriting of many portions, and the discussion of a number of new topics. The additions to this volume are even more numerous than those to the first, with the consequence that, in spite of the typographical devices explained in the preface to the second edition of the first volume, the text of this volume has been increased by one hundred pages. The increase is, in some measure, due to the fact that the thirteen Conventions of the Second Hague Peace Conference, and, further, the Declaration of London, are fully discussed and expounded. But the increase is also due to the fact that a number of other new topics have been discussed; I will only mention the questions whether enemy subjects have *persona standi in judicio* (§ 100*a*), and whether trading with enemy subjects is permitted (§ 101).

The system of the work, with but occasional slight alterations in arrangement and the headings of the sections, remains the same. In those cases, however, in which a portion had to be entirely rewritten—as, for instance, that on Enemy Character, that on Commencement of War, and that
[Pg vi] on Unneutral Service—the arrangement of the topics differs from that in the first edition, and the headings of the sections also differ. Apart from many new sections, a whole chapter treating of the proposed International Prize Court has been added at the end of the volume.

Since some of the Conventions produced by the Second Peace Conference, and, further, the Declaration of London, have not yet been ratified, the task of the writer of a comprehensive treatise on International Law is very difficult: he must certainly not treat the rules in these unratified documents as law, but, on the other hand, he must not ignore them. For this reason the right method seemed to be to give everywhere the law hitherto prevailing, and to give also the changes in the law which are proposed by these unratified documents. I venture to hope that this method will enable the reader to form a judgment of his own with regard to the merits of the Declaration of London. I have not concealed my conviction that the ratification of this Declaration would mark great progress in the development of International Law, since it offers a common agreement upon a number of subjects concerning which there has been hitherto much discord both in theory and practice. But I have endeavoured to put the matter impartially before the reader, and I have taken special care to draw attention to very numerous points which have not been settled by the Declaration of London.

In revising and rewriting this volume I have remained true to the principle of impartiality, neither taking the part of any one nation, nor denouncing any other. The discredit which International Law concerning War and Neutrality suffers in the minds of certain sections of the public is largely due to the fact that many writers have not in the past approached the subject with that impartial and truly international spirit which is indispensable for its proper treatment.

[Pg vii] Many friends of the book have asked that the second edition might, in the Appendix, offer an English translation of the French texts concerned. I was prepared to accede to their request, but had to abstain from doing so on account of the fact that the addition of a translation would have made the volume too bulky for convenience; the new Conventions of the Second Hague Peace Conference, the Declaration of London together with the Report of the Drafting Committee of the Naval Conference of London, the Naval Prize Bill of 1911, and the Geneva Convention Act of 1911, all of which necessarily had to be added, having increased the Appendix very considerably.

It has been the aim of my assistants and myself to make the quotations in this and the preceding volume as correct as possible. However, considering that there are many thousands of citations, it would be a miracle if there were not numerous mistakes and misprints in them, in spite of the great care which has been bestowed upon the matter. I shall be most grateful, therefore, if readers will kindly draw my attention to any inaccuracy they may notice.

My thanks are once more due to reviewers and readers who have drawn my attention to mistakes and misprints in the first edition; and I am again indebted to Miss B. M. Rutter and Mr. C. F. Pond for their valuable assistance in reading the proofs and in drawing up the Table of Cases and the alphabetical Index.

L. OPPENHEIM.

WHEWELL HOUSE,
CAMBRIDGE,
[Pg viii] *June 1, 1912.*

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ABBREVIATIONS

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

The books referred to in the bibliography and notes are, as a rule, quoted with their full titles and the date of their publication. But certain books, periodicals, and Conventions which are very

often referred to throughout this work are quoted in an abbreviated form, as follows:—

A.J. = The American Journal of International Law.

Annuaire = Annuaire de l'Institut de Droit International.

Ariga = Ariga, La Guerre Russo-Japonaise (1908).

Barboux = Barboux, Jurisprudence Du Conseil Des Prises Pendant La Guerre De 1870-71 (1871).

Barclay, = Barclay, Problems of International Practice Problems and Diplomacy (1907).

Bernsten = Bernsten, Das Seekriegsrecht (1911).

Bluntschli = Bluntschli, Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 3rd ed. (1878).

Boeck = Boeck, De La Propriété Privée Ennemie Sous Pavillon Ennemi (1882).

Boidin = Boidin, Les Lois De La Guerre et Les Deux Conférences De La Haye (1908).

Bonfils = Bonfils, Manuel De Droit International Public, 6th ed. by Fauchille (1912).

Bordwell = Bordwell, The Law of War between Belligerents (1908).

Bulmerincq = Bulmerincq, Das Völkerrecht (1887).

Calvo = Calvo, Le Droit International, etc., 5th ed., 6 vols. (1896).

Convention I. = Hague Convention for the pacific settlement of international disputes.

Convention II. = Hague Convention respecting the limitation of the employment of force for the recovery of contract debts.

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Convention III. = Hague Convention relative to the commencement of hostilities.

Convention IV. = Hague Convention concerning the laws and customs of war on land.

Convention V. = Hague Convention respecting the rights and duties of neutral Powers and persons in war on land.

Convention VI. = Hague Convention relative to the status of enemy merchantmen at the outbreak of hostilities.

Convention VII. = Hague Convention relative to the conversion of merchantmen into men-of-war.

Convention VIII. = Hague Convention concerning the laying of automatic submarine contact mines.

Convention IX. = Hague Convention respecting bombardment by naval forces in time of war.

Convention X. = Hague Convention for the adaptation of the principles of the Geneva Convention to maritime war.

Convention XI. = Hague Convention concerning certain restrictions on the exercise of the right of capture in maritime war.

Convention XII. = Hague Convention concerning the establishment of an International Prize Court.

Convention XIII. = Hague Convention respecting the rights and duties of neutral Powers in maritime war.

Despagnet = Despagnet, Cours De Droit International Public, 4th ed. by de Boeck (1910).

Deuxième Conférence, = Deuxième Conférence Internationale De Actes La Paix, Actes et Documents, 3 vols. (1908-1909).

Dupuis = Dupuis, Le Droit De La Guerre Maritime D'après Les Doctrines Anglaises Contemporaines (1899).

Dupuis, Guerre = Dupuis, Le Droit De La Guerre Maritime D'après Les Conférences de la Haye et de Londres (1911).

Field = Field, Outlines of an International Code, 2 vols. (1872-1873).

Fiore = Fiore, Nouveau Droit International Public, deuxième édition, traduite de l'Italien et annotée par Antoine, 3 vols. (1885).

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Fiore, Code = Fiore, Le Droit International Codifié, nouvelle édition, traduite de l'Italien par Antoine (1911).

Gareis = Gareis, Institutionen des Völkerrechts, 2nd ed. (1901).

Gessner = Gessner, Le Droit Des Neutres Sur Mer (1865).

Grotius = Grotius, De Jure Belli ac Pacis (1625).

Hague = Hague Regulations respecting the Laws Regulations and Customs of War on Land, adopted by the Hague Peace Conference of 1907.

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).

Hautefeuille = Hautefeuille, Des Droits Et Des Devoirs Des Nations Neutres En Temps De Guerre Maritime, 3 vols. 2nd ed. (1858).

Heffter = Heffter, Das Europäische Völkerrecht der Gegenwart, 8th ed. by Geffcken (1888).

Heilborn, Rechte = Heilborn, Rechte und Pflichten der Neutralen Staaten in Bezug auf die während des Krieges auf ihr Gebiet übertretenden Angehörigen einer Armee und das dorthin gebrachte Kriegsmaterial der Kriegführenden Parteien (1888).

Heilborn, System = Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896).

Higgins = Higgins, The Hague Peace Conferences (1909).

Holland, Prize = Holland, A Manual of Naval Prize Law Law (1888).

Holland, Studies = Holland, Studies in International Law (1898).

Holland, Jurisprudence = Holland, The Elements of Jurisprudence, 6th ed. (1893).

Holland, War = Holland, The Laws of War on Land (1908).

Holtzendorff = Holtzendorff, Handbuch des Völkerrechts, 4 vols. (1885-1889).

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Kleen = Kleen, Lois et Usages De La Neutralité, 2 vols. (1900).

Klüber = Klüber, Europäisches Völkerrecht, 2nd ed. by Morstadt (1851).

Kriegsbrauch = Kriegsbrauch im Landkriege (1902). (Heft 31 der kriegsgeschichtlichen Einzelschriften, herausgegeben vom Grossen Generalstabe, Kriegsgeschichtliche Abtheilung I.).

Land Warfare = Edmonds and Oppenheim, Land Warfare. An Exposition of the Laws and Usages of War on Land for the

Guidance of Officers of His Majesty's Army (1912).

Lawrence = Lawrence, The Principles of International Law, 4th ed. (1910).

Lawrence, Essays = Lawrence, Essays on some Disputed Questions of Modern International Law (1884).

Lawrence, War = Lawrence, War and Neutrality in the Far East, 2nd ed. (1904).

Lémonon = Lémonon, La Seconde Conférence De La Paix (1908).

Liszt = Liszt, Das Völkerrecht, 6th ed. (1910).

Longuet = Longuet, Le Droit Actuel De La Guerre Terrestre (1901).

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, 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. }

Martens. N.R.G. 3rd Ser. } These are the abbreviated quotations of the different parts of Martens, Recueil de Traités (see p. 102 of vol. i.), which are in common use.

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Martens, Causes = Martens, Causes Célèbres du Droit des Célèbres Gens, 5 vols., 2nd ed. (1858-1861).

Mérignhac = Mérignhac, Les Lois Et Coutumes De La Guerre Sur Terre (1903).

Meurer = Meurer, Die Haager Friedenskonferenz, 2 vols. (1905-1907).

Moore = Moore, A Digest of International Law, 8 vols., Washington (1906).

Moore, Arbitrations = Moore, History and Digest of the Arbitrations to which the United States have been a Party, 6 vols. (1898).

Nippold = Nippold, Die Zweite Haager Friedenskonferenz, 2 vols. (1908-1911).

Nys = Nys, Le Droit International, vol. i. (1904).

Ortolan = Ortolan, Règles Internationales et Diplomatie de la Mer, 2 vols., 3rd ed. (1856).

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).

Pillet = Pillet, Les Lois Actuelles De La Guerre (1901).

Pistoye et Duverdy = Pistoye et Duverdy, Traité Des Prises Maritimes, 2 vols. (1854-1859).

Pradier-Fodéré = Pradier-Fodéré, Traité De Droit International Public, 8 vols. (1885-1906).

Pufendorf = Pufendorf, De Jure Naturae et Gentium (1672).

R.G. = Revue Générale De Droit International Public.

R.I. = Revue De Droit International Et De Législation Comparée.

Rivier = Rivier, Principes Du Droit Des Gens, 2 vols. (1896).

Scott, Conferences = Scott, The Hague Peace Conferences of 1899 and 1907, vol. i. (1909).

Spaight = Spaight, War Rights on Land (1911).

Takahashi = Takahashi, International Law applied to the Russo-Japanese War (1908).

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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. (1884, 1875).

Ullmann = Ullmann, Völkerrecht, 2nd ed. (1908).

U.S. Naval War = The Laws and Usages of War at Sea, published Code on June 27, 1900, by the Navy Department, Washington, for the use of the U. S. Navy and for the information of all concerned.

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).

Wehberg, = Wehberg, Kommentar zu dem Haager Kommentar Abkommen betreffend die friedliche Erledigung internationaler Streitigkeiten (1911).

Westlake = Westlake, International Law, 2 vols. (1904-1907).

Westlake, = Westlake, Chapters on the Principles of Chapters 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).

Zorn = Zorn, Das Kriegsrecht zu Lande in seiner neuesten Gestaltung (1906).

Z.V. = Zeitschrift für Völkerrecht und Bundesstaatsrecht.

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PART I

SETTLEMENT OF STATE DIFFERENCES

CHAPTER I

AMICABLE SETTLEMENT OF STATE DIFFERENCES

I

STATE DIFFERENCES AND THEIR AMICABLE SETTLEMENT IN GENERAL

Twiss, II. §§ 1-3—Ullmann, §§ 148-150—Bulmerincq in Holtzendorff, IV. pp. 5-12—Heffter, §§ 105-107—Rivier, II. § 57—Bonfils, No. 930—Despagnet, No. 469—Pradier-Fodéré, IV. Nos. 2580-2583—Calvo, III. §§ 1670-1671—Martens, II. §§ 101-102—Fiore, II. Nos. 1192-1198, and Code, No. 1246—Wagner, *Zur Lehre von den Streiterledigungsmitteln des Völkerrechts* (1900.)

Legal and political International Differences.

§ 1. International differences can arise from a variety of grounds. Between the extremes of a simple and comparatively unimportant act of discourtesy committed by one State against another, on the one hand, and, on the other, so gross an insult as must necessarily lead to war, there are many other grounds varying in nature and importance. State differences are correctly divided into legal and political. Legal differences arise from acts for which States have to bear responsibility, be it acts of their own or of their Parliaments, judicial and administrative officials, armed forces, or individuals living on their territory.[1] Political differences are the result of a conflict of political interests. But although this distinction is certainly theoretically correct and of practical importance, frequently in practice a sharp line cannot be drawn. For in many cases [Pg 4] States either hide their political interests behind a claim for an alleged injury, or make a positive, but comparatively insignificant, injury a pretext for the carrying out of political ends. Nations which have been for years facing each other armed to the teeth, waiting for a convenient moment to engage in hostilities, are only too ready to obliterate the boundary line between legal and political differences. Between such nations a condition of continuous friction prevails which makes it difficult, if not impossible, in every case which arises to distinguish the legal from the political character of the difference.

[1] See above, vol. I. § 149.

International Law not exclusively concerned with Legal Differences.

§ 2. It is often maintained that the Law of Nations is concerned with legal differences only, political differences being a matter not of law but of politics. Now it is certainly true that only legal differences can be settled by a juristic decision of the underlying juristic question, whatever may be the way in which such decision is arrived at. But although political differences cannot be the objects of juristic decision, they can be settled short of war by amicable or compulsive means. And legal differences, although within the scope of juristic decision, can be of such kinds as to prevent the parties from submitting them to such decision, without being of a nature that they cannot be settled peaceably at all. Moreover, although the distinction between legal and political differences is certainly correct in theory and of importance in practice, nevertheless, in practice, a sharp line frequently cannot be drawn, as has just been pointed out. Therefore the Law of Nations is not exclusively concerned with legal differences, for in fact all amicable means of settling legal differences are likewise means of settling political differences, and so are two of the compulsive means of settling differences—namely, pacific blockade and intervention.

Amicable in contradistinction to compulsive settlement of Differences.

§ 3. Political and legal differences can be settled either by amicable or by compulsive means. [Pg 5] There are four kinds of amicable means—namely, negotiation between the parties, good offices of third parties, mediation, and arbitration.[2] And there are also four kinds of compulsive means—namely, retorsion, reprisals (including embargo), blockade, and intervention of third States. No State is allowed to make use of compulsive means before negotiation has been tried, but there is no necessity for the good offices or mediation of third States, and eventually arbitration,[3] to be tried beforehand also. Frequently, however, States nowadays make use of the so-called Compromise Clause[4] in their treaties, stipulating thereby that any differences arising between the contracting parties with regard to matters regulated by, or to the interpretation of, the respective treaties shall be settled through the amicable means of arbitration to the exclusion of all compulsive means. And there are even a few examples of States which have concluded treaties stipulating that all differences, without exception, that might arise between them should be amicably settled by arbitration.[5] These exceptions, however, only confirm the rule that no international legal duty exists for States to settle their differences amicably through arbitration, or even to try to settle them in this way, before they make use of compulsive means.

[2] Some writers (see Hall, § 118, and Heilborn, *System*, p. 404) refuse to treat negotiation, good offices, and mediation as means of settling differences, because they cannot find that these means are of any legal value, it being in the choice of the parties whether or not they agree to make use of them. They forget, however, the enormous political value of these means, which alone well justifies their treatment; moreover, there are already some positive legal rules in existence concerning these means—see Hague Arbitration Treaty, articles 2-7 and 9-36—and others will in time, no doubt, be established.

[3] Except in the case of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. See Convention II.; above, vol. I. § 135, p. 192; and below, § 19.

[4] See above, vol. I. § 553.

[Pg 6] [5] See below, § 17.

II

NEGOTIATION

Twiss, II. § 4—Lawrence, § 220—Moore, VII. § 1064—Taylor, §§ 359-360—Heffter, § 107—Bulmerincq in Holtzendorff, IV. pp. 13-17—Ullmann, § 151—Bonfils, Nos. 931-932—Despagnet, Nos. 470 and 477—Pradier-Fodéré, VI. Nos. 2584-2587—Rivier, II. § 57—Calvo, III. §§ 1672-1680—Martens, II. § 103—Nys, III. pp. 56-58.

In what Negotiation consists.

§ 4. The simplest means of settling State differences, and that to which States always resort before they make use of other means, is negotiation. It consists in such acts of intercourse between the parties as are initiated and directed for the purpose of effecting an understanding and thereby amicably settling the difference that has arisen between them.[6] Negotiation as a rule begins by a State complaining of a certain act, or lodging a certain claim with another State. The next step is a statement from the latter making out its case, which is handed over to the former. It may be that the parties come at once to an understanding through this simple exchange of statements. If not, other acts may follow according to the requirements of the special case. Thus, for instance, other statements may be exchanged, or a conference of diplomatic envoys, or even of the heads of the States at variance, may be arranged for the purpose of discussing the differences and preparing the basis for an understanding.

[6] See above, vol. I. §§ 477-482, where the international transaction of negotiation in general is discussed.

International Commissions of Inquiry.

§ 5. The contracting Powers of the Hague Convention for the peaceful settlement of international differences deem it expedient and desirable that, if the ordinary diplomatic
[Pg 7] negotiation has failed to settle such differences as do not involve either honour or vital interests, the parties should, so far as circumstances allow, institute an International Commission of Inquiry[7] for the purpose of elucidating the facts underlying the difference by an impartial and conscientious investigation. The Convention of 1899 had only six articles (9-14) on the subject. The Second Conference of 1907, profiting by the experience gained by the Commission of Inquiry in the Dogger Bank[8] case, the first and as yet only occasion on which a Commission of Inquiry was instituted, remodelled the institution, and Convention I. treats of the subject in twenty-eight articles (9-36). The more important stipulations are the following:—

(1) The Commissions are to be constituted by a special treaty of the parties, which is to determine the facts to be examined, the manner and period within which the Commission is to be
[Pg 8] formed, the extent of the powers of the Commissioners, the place where the Commission is to meet and whether it may remove to another place, the languages to be used by the Commission and parties, and the like (articles 9-10). If the treaty does not determine the place where the Commission is to sit, it shall sit at the Hague; if the treaty does not specify the languages to be used, the question shall be decided by the Commission; and if the treaty does not stipulate the manner in which the Commission is to be formed, it shall be formed in the manner determined by articles 45 and 57 of Convention I. (articles 11-12). The parties may appoint Assessors, Agents, and Counsel (articles 10, 13, 14).

(2) The International Bureau of the Permanent Court of Arbitration acts as Registry for the Commissions which sit at the Hague; but if they sit elsewhere, a Secretary-General is to be appointed whose office serves as Registry (articles 15-16).

(3) The parties may agree upon the rules of procedure to be followed by the Commission, but if they do not provide such rules themselves, the rules of procedure, comprised in articles 19-32 are applicable (article 17), and, in any case, the Commission is to settle such details of the procedure as are either not covered by the treaty of the parties or by articles 19-32, and is to arrange all the formalities required for dealing with the evidence (article 18).

(4) The Report of the Commission is to be signed by all its members; but if a member refuses to sign, the fact is to be mentioned, and the validity of the Report is not thereby affected (article 33). The Report of the Commission is read in open Court, the Agents and Counsel of the parties being present or duly summoned to attend; a copy of the Report is furnished to each party (article 34). This Report is absolutely limited to a statement of the facts, it has in no way the
[Pg 9] character of an Arbitral Award, and it leaves to the parties entire freedom as to the effect to be given to the statement of the facts (article 35).

(5) Each party pays its own expenses and an equal share of the expenses of the Commission (article 36).

[7] See Herr, *Die Untersuchungskommissionen der Haager Friedenskonferenzen* (1911); Meurer, I. pp. 129-165; Higgins, pp. 167-170; Lémonon, pp. 77-91: Wehberg, *Kommentar*, pp. 21-46; Nippold, I. pp. 23-35; Scott, *Conferences*, pp. 265-273; Politis in *R.G.* XIX. (1912), pp. 149-188.

[8] On October 24, 1904, during the Russo-Japanese war, the Russian Baltic fleet, which was on its way to the Far East, fired into the Hull fishing fleet off the Dogger Bank, in the North Sea, whereby two fishermen were killed and considerable damage was done to several trawlers. Great Britain demanded from Russia not only an apology and ample damages, but also severe punishment of the officer responsible for the outrage. As Russia maintained that the

firing was caused by the approach of some Japanese torpedo-boats, and that she could therefore not punish the officer in command, the parties agreed upon the establishment of an International Commission of Inquiry, which, however, was charged not only to ascertain the facts of the incident but also to pronounce an opinion concerning the responsibility for the incident and the degree of blame attaching to the responsible persons. The Commission consisted of five naval officers of high rank—namely, one British, one Russian, one American, one French, and one Austrian, who sat at Paris in February 1905. The report of the Commission states that no torpedo-boats had been present, that the opening of fire on the part of the Baltic fleet was not justifiable, that Admiral Rojdestvensky, the commander of the Baltic fleet, was responsible for the incident, but that these facts were "not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky or of the *personnel* of his squadron." In consequence of the last part of this report Great Britain could not insist upon any punishment to be meted out to the responsible Russian Admiral, but Russia paid a sum of £65,000 to indemnify the victims of the incident and the families of the two dead fishermen. See Martens, *N.R.G.* 2nd Ser. XXXIII. (1906), pp. 641-716, And Mandelstam in *R.G.* XII. (1905), pp. 161 and 351.

Effect of Negotiation.

§ 6. The effect of negotiation can be to make it apparent that the parties cannot come to an amicable understanding at all. But frequently the effect is that one of the parties acknowledges the claim of the other party. Again, sometimes negotiation results in a party, although it does not acknowledge the opponent's alleged rights, waiving its own rights for the sake of peace and for the purpose of making friends with the opponent. And, lastly, the effect of negotiation can be a compromise between the parties. Frequently the parties, after having come to an understanding, conclude a treaty in which they embody the terms of the understanding arrived at through negotiation. The practice of everyday life shows clearly the great importance of negotiation as a means of settling international differences. The modern development of international traffic and transport, the fact that individuals are constantly travelling on foreign territories, the keen interest taken by all powerful States in colonial enterprise, and many other factors, make the daily rise of differences between States unavoidable. Yet the greater number of such differences
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are settled through negotiation of some kind or other.

III

GOOD OFFICES AND MEDIATION

Maine, pp. 207-228—Phillimore, III. §§ 3-5—Twiss, II. § 7—Lawrence, § 220—Moore, VII. §§ 1065-1068—Taylor, §§ 359-360—Wheaton, § 73—Bluntschli, §§ 483-487—Heffter, §§ 107-108—Bulmerincq in Holtzendorff, IV. pp. 17-30—Ullmann, §§ 152-153—Bonfils, Nos. 932[1]-943[1]—Despagnet, Nos. 471-476—Pradier-Fodéré, VI. Nos. 2588-2593—Mérignhac, I. pp. 429-447—Rivier, II. § 58—Nys, III. pp. 59-61—Calvo, III. §§ 1682-1705—Fiore, III. Nos. 1199-1201, and Code, Nos. 1248-1293—Martens, II. § 103—Holls, *The Peace Conference at the Hague* (1900), pp. 176-203—Zamfiresco, *De la médiation* (1911)—Politis in *R.G.* XVII. (1910), pp. 136-163.

Occasions for Good Offices and Mediation.

§ 7. When parties are not inclined to settle their differences by negotiation, or when they have negotiated without effecting an understanding, a third State can procure a settlement through its good offices or its mediation, whether only one or both parties have asked for the help of the third State or the latter has spontaneously offered it. There is also possible a collective mediation, several States acting at the same time as mediators. It is further possible for a mediatorial Conference or Congress to meet for the purpose of discussing the terms of an understanding between the conflicting parties. And it must be especially mentioned that good offices and mediation are not confined to the time before the differing parties have appealed to arms; they can also be offered and sought during hostilities for the purpose of bringing the war to an end. It is during war in particular that good offices and mediation are of great value, neither of the belligerents as a rule being inclined to open peace negotiations on his own account.

Right and duty of offering, requesting, and rendering Good Offices and Mediation.

§ 8. As a rule, no duty exists for a third State to offer its good offices or mediation, or to respond to a request of the conflicting States for such, nor is it, as a rule, the duty of the
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conflicting parties themselves to ask or to accept a third State's good offices and mediation. But by special treaty such duty can be stipulated. Thus, for instance, by article 8 of the Peace Treaty of Paris of March 30, 1856, between Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey, it was stipulated that, in case in the future such difference as threatened peace should arise between Turkey and one or more of the signatory Powers, the parties should be obliged,[9] before resorting to arms, to ask for the mediation of the other signatory Powers. Thus, further, article 12 of the General Act of the Berlin Congo Conference of 1885 stipulates that, in case a serious difference should arise between some of the signatory Powers as regards the Congo territories, the parties should, before resorting to arms, be obliged to ask the other signatory Powers for their mediation. And lately the Hague Conventions for the peaceful settlement of international differences have laid down some stipulations respecting the right and duty of good offices and mediation, which will be found below in § 10.

[9] But Italy did not comply with this stipulation before she declared war against Turkey in September 1911.

Good Offices in contradistinction to Mediation.

§ 9. Diplomatic practice frequently does not distinguish between good offices and mediation. But although good offices can easily develop into mediation, they must not be confounded with it. The difference between them is that, whereas good offices consist in various kinds of action

tending to call negotiations between the conflicting States into existence, mediation consists in a direct conduct of negotiations between the differing parties on the basis of proposals made by the mediator. Good offices seek to induce the conflicting parties, who are either not at all inclined to negotiate with each other or who have negotiated without effecting an understanding, to enter
[Pg 12] or to re-enter into such negotiations. Good offices can also consist in advice, in submitting a proposal of one of the parties to the other, and the like, but they never take part in the negotiations themselves. On the other hand, the mediator is the middleman who does take part in the negotiations. He makes certain propositions on the basis of which the States at variance may come to an understanding. He even conducts the negotiations himself, always anxious to reconcile the opposing claims and to appease the feeling of resentment between the parties. All the efforts of the mediator may often, of course, be useless, the differing parties being unable or unwilling to consent to an agreement. But if an understanding is arrived at, the position of the mediator as a party to the negotiation, although not a participator in the difference, frequently becomes clearly apparent either by the drafting of a special act of mediation which is signed by the States at variance and the mediator, or by the fact that in the convention between the conflicting States, which stipulates the terms of their understanding, the mediator is mentioned.

Good Offices and Mediation according to the Hague Arbitration Convention.

§ 10. The Hague Convention for the peaceful settlement of international differences[10] undertakes in articles 2-8 the task of making the signatory Powers have recourse more frequently than hitherto to good offices and mediation; it likewise recommends a new and particular form of mediation. Its rules are the following:—

[10] See Meurer, I. pp. 104-128; Higgins, p. 167; Barclay, *Problems*, pp. 191-197; Lémonon, pp. 69-73; Wehberg, *Kommentar*, pp. 10-21; Nippold, I. pp. 21-22; Scott, *Conferences*, pp. 256-265.

(1) The contracting Powers agree to have recourse, before they appeal to arms, as far as circumstances allow, to good offices or mediation (article 2). And independently of this recourse,
[Pg 13] they consider it expedient and desirable that contracting Powers who are strangers to the dispute should, on their own initiative, offer their good offices or mediation (article 3). A real legal duty to offer good offices or mediation is not thereby created; only the expediency and desirability of such offer are recognised. In regard to the legal duty of conflicting States to ask for good offices or mediation, it is obvious that, although literally such duty is agreed upon, the condition "as far as circumstances allow" makes it more or less illusory, as it is in the discretion of the parties to judge for themselves whether or not the circumstances of the special case allow their having recourse to good offices and mediation.

(2) The contracting Powers agree that (article 3) a right to offer good offices or mediation exists for those of them who are strangers to a dispute, and that this right exists also after the conflicting parties have appealed to arms. Consequently, every contracting Power, when at variance with another, be it before or after the outbreak of hostilities, is in duty bound to receive an offer made for good offices or mediation, although it need not accept such offer. And it is especially stipulated that the exercise of the right to offer good offices or mediation may never be regarded by the conflicting States as an unfriendly act (article 3). It is, further, stipulated that the contracting Powers consider it their duty in a serious conflict to remind the parties of the Permanent Court of Arbitration, and that the advice to have recourse to this Court may only be considered as an exercise of good offices (article 48, paragraphs 1 and 2). And, finally, in case of dispute between two Powers, one of them may always address to the International Bureau of the Permanent Court of Arbitration a note containing a declaration that it would be ready to submit the dispute to arbitration, whereupon the Bureau must at once inform the other Power of this
[Pg 14] declaration (article 48, paragraphs 3 and 4).

(3) Mediation is defined (article 4) as reconciliation of the opposing claims and appeasement of the feelings of resentment between the conflicting States, and it is specially emphasised that good offices and mediation have exclusively the character of advice.

(4) The acceptance of mediation—and, of course, of good offices, which is not mentioned—does not (article 7) have the effect of interrupting, delaying, or hindering mobilisation or other preparatory measures for war, or of interrupting military operations when war has broken out before the acceptance of mediation, unless there should be an agreement to the contrary.

(5) The functions of the mediator are at an end (article 5) when once it is stated, either by one of the conflicting parties or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

(6) A new and particular form of mediation is recommended by article 8. Before appealing to arms the conflicting States choose respectively a State as umpire, to whom each intrusts the mission of entering into direct communication with the umpire chosen by the other side for the purpose of preventing the rupture of pacific relations. The period of the mandate extends, unless otherwise stipulated, to thirty days, and during such period the conflicting States cease from all direct communication on the matter in dispute, which is regarded as referred exclusively to the mediating umpires, who must use their best efforts to settle the difference. Should such mediation not succeed in bringing the conflicting States to an understanding, and should, consequently, a definite rupture of pacific relations take place, the chosen umpires are jointly charged with the task of taking advantage of any opportunity to restore peace.

Value of Good Offices and Mediation.

[Pg 15] § 11. The value of good offices and mediation for the amicable settlement of international

conflicts, be it before or after the parties have appealed to arms, cannot be over-estimated. Hostilities have been frequently prevented through the authority and the skill of mediators, and furiously raging wars have been brought to an end through good offices and mediation of third States.[11] Nowadays the importance of these means of settlement of international differences is even greater than in the past. The outbreak of war is under the circumstances and conditions of our times no longer a matter of indifference to all except the belligerent States, and no State which goes to war knows exactly how far such war may affect its very existence. If good offices and mediation are interposed at the right moment, they will in many cases not fail to effect a settlement of the conflict. The stipulations of the Hague Convention for the peaceful adjustment of differences have greatly enhanced the value of good offices and mediation by giving a legal right to Powers, strangers to the dispute, to offer their good offices and mediation before and during hostilities.

[11] See the important cases of mediation discussed by Calvo, III. §§ 1684-1700, and Bonfils, Nos. 936-942. From our own days the case of the Dogger Bank incident of 1904 may be quoted as an example, for it was through the mediation of France that Great Britain and Russia agreed upon the establishment of an International Commission of Inquiry. (See p. 7, note 2.) And the good offices of the President of the United States of America were the means of inducing Russia and Japan, in August 1905, to open the negotiations which actually led to the conclusion of the Peace of Portsmouth on September 5, 1905.

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IV

ARBITRATION

Grotius, II. c. 23, § 8—Vattel, II. § 329—Hall, § 119—Westlake, I. pp. 332-356—Lawrence, § 221—Phillimore, III. §§ 3-5—Twiss, II. § 5—Taylor, §§ 357-358—Wharton, III. § 316—Moore, VII. §§ 1069-1080—Bluntschli, §§ 488-498—Heffter, § 109—Bulmerincq in Holtzendorff, IV. pp. 30-58—Ullmann, §§ 154-156—Bonfils, Nos. 944-969—Despagnet, Nos. 722-741—Pradier-Fodéré, VI. Nos. 2602-2630—Mérignhac, I. pp. 448-485—Rivier, II. § 59—Calvo, III. §§ 1706-1806—Fiore, II. Nos. 1202-1215, and Code, Nos. 1294-1380—Nys, III. pp. 65-80—Martens, II. § 104—Rouard de Card, *L'arbitrage international* (1876)—Mérignhac, *Traité théorique et pratique de l'arbitrage* (1895)—Moore, *History and Digest of the Arbitrations to which the United States has been a Party*, 6 vols. (1898)—Darby, *International Arbitration*, 4th ed. (1904)—Dumas, *Les sanctions de l'arbitrage international* (1905), and in A.J. V. (1911), pp. 934-957—Nippold, Die *Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten* (1907)—Reinsch in A.J. V. (1911), pp. 604-614—Scott, *Conferences*, pp. 188-253—Lapradelle et Politis, *Recueil des arbitrages internationaux*, I. (1798-1855), (1905)—Fried, *Handbuch der Friedensbewegung*, 2nd ed. (1911), pp. 135-184—Morris, *International Arbitration and Procedure* (1911)—Balch, *International Courts of Arbitration* (4th ed., with an introduction and additional notes by Thomas Willing Balch, 1912).

Conception of Arbitration.

§ 12. Arbitration is the name for the determination of differences between States through the verdict of one or more umpires chosen by the parties. As there is no central political authority above the Sovereign States, and no such International Court as could exercise jurisdiction over them, State differences, unlike differences between private individuals, cannot as a rule be obligatorily settled in courts of justice. The only way in which a settlement of State differences through a verdict may be arrived at is by the conflicting States voluntarily consenting to submit themselves to a verdict of one or more umpires chosen by themselves for that purpose.

Treaty of Arbitration.

§ 13. It is, therefore, necessary for such conflicting States as intend to have the conflict determined by arbitration to conclude a treaty by which they agree to this course. Such treaty of arbitration involves the obligation of both parties to submit in good faith to the decision of the
[Pg 17] arbitrators. Frequently a treaty of arbitration will be concluded after the outbreak of a difference, but it also frequently happens that States concluding treaties stipulate therein by the so-called Compromise Clause,[12] that any difference arising between the parties respecting matters regulated by such treaty shall be determined by arbitration. Two or more States can also conclude a so-called general treaty of arbitration, or treaty of permanent arbitration, stipulating that all or certain kinds of differences in future arising between them shall be settled by this method. Thus article 7 of the Commercial Treaty between Holland and Portugal[13] of July 5, 1894, contains such a general treaty of arbitration, as it stipulates arbitration not only for differences respecting matters of commerce, but for all kinds of differences arising in the future between the parties, provided these differences do not concern their independence or autonomy. Until the Hague Peace Conference of 1899, however, general treaties of arbitration were not numerous. But public opinion everywhere was aroused in favour of general arbitration treaties through the success of this conference, with the result that from 1900 to the present day many general arbitration treaties have been concluded.[14]

[12] See above, § 3.

[13] See Martens, *N.R.G.* 2nd Ser. XXII. p. 590.

[14] See below, § 17.

Who is to arbitrate?

§ 14. States which conclude an arbitration treaty have to agree upon the arbitrators. If they choose a third State as arbitrator, they have to conclude a treaty (*receptum arbitri*) with such State, by which they appoint the chosen State and by which such State accepts the appointment. The appointed State chooses on its own behalf those umpires who actually serve as arbitrators. It

[Pg 18] can happen that the conflicting States choose a head of a third State as arbitrator. But such head never himself investigates the matter; he chooses one or more individuals, who make a report and propose a verdict, which he pronounces. And, further, the conflicting States may agree to entrust the arbitration to any other individual or to a body of individuals, a so-called Arbitration Committee or Commission. Thus the arbitration of 1900 in regard to the Venezuelan Boundary Dispute between Great Britain, Venezuela, and the United States was conducted by a Commission, sitting at Paris, consisting of American and English members and the Russian Professor von Martens as President. And the Alaska Boundary Dispute between Great Britain and the United States was settled in 1903, through the award of a Commission, sitting at London, consisting of American and Canadian members, with Lord Alverstone, Lord Chief Justice of England, as President.

On what principles Arbitrators proceed and decide.

§ 15. The treaty of arbitration must stipulate the principles according to which the arbitrators have to give their verdict. These principles may be the general rules of International Law, but they may also be the rules of any Municipal Law chosen by the conflicting States, or rules of natural equity, or rules specially stipulated in the treaty of arbitration for the special case.[15] And it can also happen that the treaty of arbitration stipulates that the arbitrators shall compromise the conflicting claims of the parties without resorting to special rules of law. The treaty of arbitration, further, as a rule, stipulates the procedure to be followed by the arbitrators who are investigating and determining the difference. If a treaty of arbitration does not lay down rules of procedure, the arbitrators themselves have to work out such rules and to communicate them to the parties.

[15] See below, § 335, concerning the "Three rules of Washington."

Binding force of Arbitral Verdict.

[Pg 19] § 16. An arbitral verdict is final if the arbitration treaty does not stipulate the contrary, and the verdict given by the arbitrators is binding upon the parties. As, however, no such central authority exists above the States as could execute the verdict against a State refusing to submit, it is in such a case the right of the other party to enforce the arbitral decision by compulsion. Yet it is obvious that an arbitral verdict is binding only under the condition[16] that the arbitrators have in every way fulfilled their duty as umpires and have been able to find their verdict in perfect independence. Should they have been bribed or not followed their instructions, should their verdict have been given under the influence of coercion of any kind, or should one of the parties have intentionally and maliciously led the arbitrators into an essential material error, the arbitral verdict would have no binding force whatever. Thus the award given in 1831 by the King of Holland in the North-Eastern Boundary Dispute between Great Britain and the United States of America was not considered binding by the parties because the arbitrator had transgressed his powers.[17] For the same reason, Bolivia refused in 1910 to submit to the award of the President of Argentina in her boundary dispute with Peru.[18] And in October 1910, the Permanent Court of Arbitration at the Hague, deciding the case of the United States of America against the United States of Venezuela concerning the claims of the Orinoco Steamship Company, annulled,[19] with regard to certain points, a previous arbitration award given by Mr. Barge.

[16] See Donker Curtius and Nys in *R.I.* 2nd Ser. XII. (1910), pp. 5-34 and 595-641.

[17] See Moore, VII. § 1082, and Moore, *Arbitrations*, I. pp. 81-161.

[18] See Fiore in *R.G.* XVII. (1910), pp. 225-256.

[19] See Martens, *N.R.G.* 3rd Ser. IV. (1911), p. 79.

What differences can be decided by Arbitration.

[Pg 20] § 17. It is often maintained that every possible difference between States could not be determined by arbitration, and, consequently, efforts are made to distinguish those groups of State differences which are determinable by arbitration from others. Now although all States may never consent to have all possible differences decided by arbitration, theoretically there is no reason for a distinction between differences decidable and undecidable through arbitration. For there can be no doubt that, the consent of the parties once given, every possible difference might be settled through arbitration, either by the verdict being based on rules of International Law, or rules of natural equity, or by opposing claims being compromised. But, differing from the theoretical question as to what differences are and are not determinable by arbitration, is the question as to what kind of State differences *ought* always to be settled in this manner. The latter question has been answered by article 38 (formerly 16) of the Hague Convention for the peaceful adjustment of international differences, the contracting Powers therein recognising arbitration as the most efficacious, and at the same time the most equitable, means of determining differences of a judicial character in general, and in especial differences regarding the interpretation or application of international treaties. But future experience must decide whether the signatory Powers will in practice always act according to this distinction.

However this may be, when, in 1903, Great Britain and France, following the suggestion of this article 38 (formerly 16), concluded a treaty in which they agreed to settle by arbitration all such differences of a legal nature as do not affect their vital interests, their independence, or their honour, many other States followed the lead. Great Britain, in the same and the following years, entered into such arbitration treaties with Spain, Italy, Germany, Sweden, Norway, Portugal, Switzerland, Austria-Hungary, Holland, Denmark, the United States of America, Colombia, and

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Brazil. All these agreements were concluded for five years only, but those which have since expired have all been renewed for another period of five years.

Yet there is a flaw in all these treaties, because the decision as to whether a difference is of a legal nature or not, is left to the discretion of the parties. Cases have happened in which one of the parties has claimed to have a difference settled by arbitration on account of its legal nature, whereas the other party has denied the legal nature of the difference and, therefore, refused to go to arbitration. For this reason the arbitration treaties signed on August 3, 1911, between the United States of America and Great Britain and between the United States of America and France are epoch making, since article 3 provides that, in cases where the parties disagree as to whether or not a difference is subject to arbitration under the treaty concerned, the question shall be submitted to a joint High Commission of Inquiry; and that, if all, or all but one, of the members of such Commission decide the question in the affirmative, the case shall be settled by arbitration. Article 3 has, however, been struck out by the American Senate, with the consequence that these treaties have lost their intrinsic value, even should they be ratified.

It should be mentioned that, whereas most arbitration treaties limit arbitration in one or more ways, exempting cases which concern the independence, the honour, or the vital interests of the parties, Argentina[20] and Chili in 1902, Denmark and Holland in 1903, Denmark and Holland in 1905, Denmark and Portugal in 1907, Argentina and Italy in 1907, the Central American
[Pg 22] Republics of Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador in 1907, Italy and Holland in 1907 entered into general arbitration treaties according to which all differences without any exception shall be settled by arbitration.[21]

[20] Earlier than this, on July 23, 1898—see Martens, *N.R.G.* 2nd Ser. XXIX. p. 137—Argentina and Italy, and on November 9, 1899—see Martens, *N.R.G.* 2nd Ser. XXXII. (1905), p. 404—Argentina and Paraguay had concluded treaties according to which all differences without exception shall be settled by arbitration. See also above, § 3, concerning the Compromise Clause.

[21] A list of all the arbitration treaties which have been entered into by the several States since the First Hague Peace Conference of 1899, is to be found in Fried, *op. cit.* p. 185.

Value of Arbitration.

§ 18. There can be no doubt that arbitration is, and every day becomes more and more, of great importance. History proves that in antiquity and during the Middle Ages arbitration was occasionally[22] made use of as a peaceable means of settling international differences. But, although an International Law made its appearance in modern times, during the sixteenth, seventeenth, and eighteenth centuries very few cases of arbitration occurred. It was not until the end of the eighteenth century that arbitration was frequently made use of. There are 177 cases from 1794 to the end of 1900.[23] This number shows that the inclination of States to agree to arbitration has increased, and there can be no doubt that arbitration has a great future. States and the public opinion of the whole world become more and more convinced that there are a good many international differences which may well be determined by arbitration without any danger whatever to the national existence, independence, dignity, and prosperity of the States concerned. A net of so-called Peace Societies has spread over the whole world, and their members unceasingly work for the promotion of arbitration. The Parliaments of several countries have repeatedly given their vote in favour of arbitration; and the Hague Peace Conference of
[Pg 23] 1899 created a Permanent Court of Arbitration, a step by which a new epoch of the development of International Law was inaugurated. It is certain that arbitration will gradually increase its range, although the time is by no means in sight when all international differences will find their settlement by arbitration.

[22] See examples in Calvo, III. §§ 1707-1712, and in Nys, *Les origines du droit international* (1894), pp. 52-61.

[23] See La Fontaine's *Histoire sommaire et chronologique des arbitrages internationaux* in *R.I.* 2nd Ser. IV. pp. 349, 558, 623. See also Scott, *Conferences*, pp. 188-252.

The novel institution of the Permanent Court of Arbitration at the Hague stands at present in the cross-fire of impatient pacifists and cynical pessimists. Because a number of wars have been fought since the establishment of the Permanent Court, impatient pacifists are in despair and consider the institution of the Court of Arbitration a failure, whereas cynical pessimists triumphantly point to the fact that the millennium would seem to be as far distant as ever. The calm observer of the facts who possesses insight in the process of historical development, has no cause to despair, for, compared with some generations ago, arbitration is an established force which daily gains more power and influence. And when once a real International Court[24] of justice is established side by side with the Permanent Court of Arbitration, the chances of arbitration will be greatly increased.

[24] See above, vol. I. § 476*b*.

V

ARBITRATION ACCORDING TO THE HAGUE CONVENTION

Ullmann, §§ 155-156—Bonfils, Nos. 953[1]-955[1]—Despagnet, Nos. 742-746*bis*—Mérignhac, I. pp. 486-539—Holls, *The Peace Conference at the Hague* (1900)—Martens, *La conférence de la paix à la Haye* (1900)—Mérignhac, *La conférence internationale de la paix* (1900)—Fried, *Die zweite Haager Konferenz* (1908)—Meurer, I. pp. 299-372—Scott, *Conferences*, pp. 286-385—Higgins, pp. 164-179—Lémonon, pp. 188-219—Nippold, I. pp. 36-231—Wehberg, *Kommentar*, pp. 46-164.

Arbitral Justice in general.

[Pg 24] § 19. Of the 97 articles of the Hague Convention for the peaceful adjustment of international differences, no fewer than 44—namely, articles 37-90—deal with arbitration in three chapters, headed "On Arbitral Justice," "On the Permanent Court of Arbitration," and "On Arbitral Procedure." The first chapter, articles 37-40, contains rules on arbitral justice in general, which, however, with one exception, are not of a legal but of a merely doctrinal character. Thus the definition in article 37, first paragraph, "International arbitration has for its object the determination of controversies between States by judges of their own choice and upon the basis of respect for law," is as doctrinal as the assertion of article 38: "In questions of a judicial character, and especially in questions regarding the interpretation or application of International Treaties or Conventions, arbitration is recognised by the contracting Powers as the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic methods. Consequently it would be desirable that, in disputes regarding the above-mentioned questions, the contracting Powers should, if the case arise, have recourse to arbitration, in so far as circumstances permit." And the provision of article 39, that an agreement of arbitration may be made respecting disputes already in existence or arising in the future and may relate to every kind of controversy or solely to controversies of a particular character, is as doctrinal as the reservation of article 40, which runs: "Independently of existing general or special treaties imposing the obligation to have recourse to arbitration on the part of any of the contracting Powers, these Powers reserve to themselves the right to conclude, either before the ratification of the present Convention or afterwards, new general or special agreements with a view to extending obligatory arbitration to all cases which they consider
[Pg 25] possible to submit to it." The only rule of legal character is that of article 37 (second paragraph), enacting the already existing customary rule of International Law, that "the agreement of arbitration implies the obligation to submit in good faith to the arbitral sentence."

On the signatory Powers no obligation whatever to submit any difference to arbitration is imposed. Even differences of a judicial character, and especially those regarding the interpretation or application of treaties, for the settlement of which the signatory Powers, in article 38, acknowledge arbitration as the most efficacious and at the same time the most equitable method, need not necessarily be submitted to arbitration.

Yet the principle of compulsory arbitration for a limited number of international differences was by no means negatived by the Hague Peace Conferences, especially not by the Second Conference.

The principle found, firstly, indirect recognition by the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.[25] Since article I of this Convention stipulates that recourse to the employment of force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals is not allowed unless the debtor State refuses arbitration, compulsory arbitration has in this instance been victorious.

[25] See above, vol. I. § 135, p. 192, where the so-called Drago doctrine is likewise discussed.

Secondly, although it was not possible to agree upon some stipulation embodying compulsory arbitration for a number of differences in Convention I., the principle itself was fully recognised, and the Final Act of the Second Peace Conference includes, therefore, the Declaration that the
[Pg 26] Conference "is unanimous (1) in admitting the principle of compulsory arbitration; (2) in declaring that certain disputes, in particular those relating to the interpretation and application of international agreements, may be submitted to compulsory arbitration without any restriction."

The above shows reasonable grounds for the hope and expectation that one of the future Peace Conferences will find a way out of the difficulty and come to an agreement stipulating compulsory arbitration for a limited number of international differences.[26]

[26] See Scott, *Conferences*, pp. 319-385, where the proceedings of both the First and Second Peace Conferences concerning compulsory arbitration are sketched in a masterly and very lucid style.

Arbitration Treaty and appointment of Arbitrators.

§ 20. According to article 52 the conflicting States which resort to arbitration shall sign a special Act, the *Compromis*, in which is clearly defined: the subject of the dispute; the time allowed for appointing the arbitrators; the form, order, and time in which the communications referred to in article 63 of Convention I. must be made; the amount of the sum which each party must deposit in advance to defray the expenses; the manner of appointing arbitrators (if there be occasion); any special powers which may eventually belong to the Tribunal, where it shall meet, the languages to be used, and any special conditions upon which the parties may agree. Should, however, the conflicting States prefer it, the Permanent Court at the Hague is competent to draw up and settle the *Compromis*, and the Court is likewise in some other cases competent to settle the *Compromis* (articles 53-54). The parties may agree to have recourse to the Permanent Court of Arbitration which was instituted by the Hague Convention and regarding which details have been given above, Vol. I., §§ 472-476, but they may also assign the arbitration to one or several arbitrators chosen by them either from the members of the Permanent Court of Arbitration or
[Pg 27] elsewhere (article 55). If they choose a head of a State as arbitrator, the whole of the arbitral procedure is to be determined by him (article 56). If they choose several arbitrators, an umpire is to preside, but in case they have not chosen an umpire, the arbitrators are to elect one of their own number as president (article 57). If the *Compromis* is settled by a Commission, as contemplated by article 54 of Convention I., and in default of an agreement to the contrary, the Commission itself shall form the Arbitration Tribunal (article 58). In case of death, resignation, or

disability of one of the arbitrators from any cause, his place is to be filled in accordance with the method of his appointment (article 59). The place of session of the arbitrators is to be determined by the parties; but if they fail to do it, the place of session is to be the Hague, and the place of session may not be changed by the arbitrators without the consent of the parties; the Tribunal may only sit in the territory of a third State with the latter's consent (article 60). The International Bureau of the Court at the Hague is authorised to put its offices and its staff at the disposal of the contracting Powers in case the parties have preferred to bring their dispute before arbitrators other than the Permanent Court of Arbitration (article 47).

Procedure of and before the Arbitral Tribunal.

§ 21. The parties may agree upon such rules of arbitral procedure as they like. If they fail to stipulate special rules of procedure, the following rules are valid, whether the parties have brought their case before the Permanent Court of Arbitration or have chosen other arbitrators (article 51):—

(1) The parties may appoint counsel or advocates for the defence of their rights before the tribunal. They may also appoint delegates or special agents to attend the tribunal for the purpose of serving as intermediaries between them and the tribunal. The members of the Permanent
[Pg 28] Court, however, may not act as agents, counsel, or advocates except on behalf of the Power which has appointed them members of the Court (article 62).

(2) The tribunal selects the languages for its own use and for use before it, unless the *Compromis* has specified the languages to be employed (article 61).

(3) As a rule the arbitral procedure is divided into the two distinct phases of written pleadings and oral discussions. The written pleadings consist of the communication by the respective agents to the members of the tribunal and to the opposite party of cases, counter-cases, and, if necessary, replies; the parties must annex thereto all papers and documents relied on in the case. This communication is to be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the *Compromis* (article 63). A duly certified copy of every document produced by one party must be communicated to the other party (article 64). Unless special circumstances arise, the tribunal does not meet until the pleadings are closed (article 65).

(4) Upon the written pleadings follows the oral discussion in Court; it consists of the oral development of the pleas of the parties (article 63, last paragraph). The discussions are under the direction of the president of the tribunal, and are public only if it be so decided by the tribunal with the consent of the parties. Minutes with regard to the discussion are to be drawn up by secretaries appointed by the president, and only these official minutes, which are signed by the president and one of the secretaries, are authentic (article 66). During the discussion in Court the agents and counsel of the parties are authorised to present to the tribunal orally all the arguments they may think expedient in support of their case. They are likewise authorised to raise objections and to make incidental motions, but the decisions of the tribunal on these
[Pg 29] objections and motions are final and cannot form the subject of any further discussion (articles 70, 71). Every member of the tribunal may put questions to the agents and counsel of the parties and demand explanations from them on doubtful points, but neither such questions nor other remarks made by members of the tribunal may be regarded as expressions of opinion by the tribunal in general or the respective member in particular (article 72). The tribunal may always require from the agents of the parties all necessary explanations and the production of all acts, and in case of refusal the tribunal takes note of it in the minutes (articles 69).

When the competence of the tribunal is doubted on one or more points, the tribunal itself is authorised to decide whether it is or is not competent, by means of interpretation of the *Compromis* as well as the other papers and documents which may be adduced in the matter, and by means of the application of the principles of law (article 73).

During the discussion in Court—article 67 says, "After the close of the pleadings"—the tribunal is competent to refuse admittance to all such fresh acts and documents as one party may desire to submit to the tribunal without the consent of the other party (article 67). Consequently, the tribunal must admit fresh acts and documents when both parties agree to their submission. On the other hand, the tribunal is always competent to take into consideration fresh papers and documents to which its attention is drawn by the agents or counsel of the parties, and in such cases the tribunal may require production of the papers and documents, but it is at the same time obliged to make them known to the other party (article 68).

The parties must supply the tribunal, within the widest limits they may think practicable, with
[Pg 30] all the information required for deciding the dispute (article 75). For the service of all notices by the tribunal in the territory of a third contracting Power, the tribunal applies direct to the Government of such Power. The same rule is valid in the case of steps being necessary in order to procure evidence on the spot. The requests for this purpose are to be executed by the Power concerned with the means at its disposal according to its Municipal Law; they may not be rejected unless the Power concerned considers them of such a nature as to impair its own sovereign rights or its safety. Instead, however, of making a direct application to a third Power, the tribunal is always entitled to have recourse to the intermediary of the Power on whose territory it sits (article 76).

As soon as the agents and counsel of the parties have submitted all explanations and evidence in support of their case, the president declares the discussion closed (article 77).

Arbitral Award.

§ 22. The arbitral award is given after a deliberation which has taken place behind closed doors, and the proceedings remain secret (article 78). The members of the tribunal vote, and the majority of the votes makes the decision of the tribunal. The decision, accompanied by a statement of the considerations upon which it is based, is to be drawn up in writing, to recite the names of the arbitrators, and to be signed by the president and the registrar or the secretary acting as the registrar (article 79). The verdict is read out at a public meeting of the tribunal, the agents and counsel of the parties being present or having been duly summoned to attend (article 80).

Binding force of Awards.

§ 23. The award, when duly pronounced and notified to the agents of the parties, decides the dispute finally and without appeal (article 81). Any dispute arising between the parties as to the
[Pg 31] interpretation or execution of the award must, in default of an agreement to the contrary, be submitted to the tribunal which pronounced it (article 82). The parties may, however, beforehand stipulate in the *Compromis* the possibility of an appeal. In such case, and the *Compromis* failing to stipulate the contrary, the demand for a rehearing of the case must be addressed to the tribunal which pronounced the award. The demand for a rehearing of the case may only be made on the ground of the discovery of some new fact such as may exercise a decisive influence on the award, and which at the time when the discussion was closed was unknown to the tribunal as well as to the appealing party. Proceedings for a rehearing may only be opened after a decision of the tribunal expressly stating the existence of a new fact of the character described, and declaring the demand admissible on this ground. The treaty of arbitration must stipulate the period of time within which the demand for a rehearing must be made (article 83).—

The Hague Convention contains no stipulation whatever with regard to the question whether the award is binding under all circumstances and conditions, or whether it is only binding when the tribunal has in every way fulfilled its duty and has been able to find its verdict in perfect independence. But it is obvious that the award has no binding force whatever if the tribunal has been bribed or has not followed the parties' instructions given by the treaty of agreement; if the award was given under the influence of undue coercion; or, lastly, if one of the parties has intentionally and maliciously led the tribunal into an essential material error. (See above, § 16).

Award binding upon Parties only.

§ 24. The award[27] is binding only upon the parties to the proceedings. But when there is a
[Pg 32] question of interpreting a convention to which other States than the States at variance are parties, the conflicting States have to inform all the contracting Powers of such convention in good time. Each of these States has a right to intervene in the case before the tribunal, and, if one or more avail themselves of this right, the interpretation contained in the award is as binding upon them as upon the conflicting parties (article 84).

[27] The awards hitherto given are enumerated above, vol. I. § 476, p. 521, but the case of Italy *v.* Peru (Canevaro claim, May 3, 1912) must now be added.

Costs of Arbitration.

§ 25. Each party pays its own expenses and an equal share of those of the tribunal[28] (article 85).

[28] See details in Wehberg, *Kommentar*, pp. 155-158.

Arbitration by Summary Procedure.

§ 25*a*. With a view to facilitating the working of arbitration in disputes of minor importance admitting an abbreviated procedure, the contracting Powers propose the following rules for a summary procedure exclusively in writing:—

Each of the conflicting parties appoints an arbitrator, and these arbitrators need not necessarily be members of the Permanent Court of Arbitration. The two arbitrators thus appointed choose a third as umpire, who need not be a member of the Permanent Court either. But if they cannot agree upon an umpire, each of them proposes two candidates taken from the general list of the Permanent Court of Arbitration exclusive of such members as are either appointed by the conflicting States or are their nationals, and it is to be determined by lot which of the candidates shall be the umpire. This umpire presides over the tribunal which gives its decisions by a majority of votes (article 87). In the absence of an agreement concerning the matter, the tribunal settles the time within which the two parties must submit their respective cases to it (article 88). Each party is represented by an agent who serves as intermediary between the tribunal and his party (article 89). The proceedings are conducted exclusively in
[Pg 33] writing. Each party, however, is entitled to ask that witnesses and experts should be called, and the tribunal has the right to demand oral explanations from the agents as well as from the experts and witnesses whose appearance in Court it may consider useful (article 90). Articles 52 to 85 of Convention I. apply so far as they are not inconsistent with the rules laid down in articles 87 to 90 (article 80).

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CHAPTER II

COMPULSIVE SETTLEMENT OF STATE DIFFERENCES

I

ON COMPULSIVE MEANS OF SETTLEMENT OF STATE DIFFERENCES IN GENERAL

Lawrence, § 136—Westlake, II. p. 6—Phillimore, III. § 7—Pradier-Fodéré, VI. No. 2632—Despagnet, No. 483—Fiore, II. No. 1225, and Code, Nos. 1381-1385—Taylor, § 431—Nys, III. pp. 83-94.

Conception and kinds of Compulsive Means of Settlement.

§ 26. Compulsive means of settlement of differences are measures containing a certain amount of compulsion taken by a State for the purpose of making another State consent to such settlement of a difference as is required by the former. There are four different kinds of such means in use—namely, retorsion, reprisals (including embargo), pacific blockade, and intervention. But it must be mentioned that, whereas every amicable means of settling differences might find application in every kind of difference, not every compulsive means is applicable in every difference. For the application of retorsion is confined to political, and that of reprisals to legal differences.

Compulsive Means in contradistinction to War.

§ 27. War is very often enumerated among the compulsive means of settling international differences. This is in a sense correct, for a State might make war for no other purpose than that of compelling another State to settle a difference in the way required before war was declared. Nevertheless, the characteristics of compulsive means of settling international differences make [Pg 35] it a necessity to draw a sharp line between these means and war. It is, firstly, characteristic of compulsive means that, although they frequently consist of harmful measures, they are neither by the conflicting nor by other States considered as acts of war, and consequently all relations of peace, such as diplomatic and commercial intercourse, the execution of treaties, and the like, remain undisturbed. Compulsive means are in theory and practice considered peaceable, although not amicable, means of settling international differences. It is, further, characteristic of compulsive means that they are even at their worst confined to the application of certain harmful measures only, whereas belligerents in war may apply any amount and any kinds of force, with the exception only of those methods forbidden by International Law. And, thirdly, it is characteristic of compulsive means that their application must cease as soon as their purpose is realised by the compelled State declaring its readiness to settle the difference in the way requested by the compelling State; whereas, war once broken out, a belligerent is not obliged to lay down arms if and when the other belligerent is ready to comply with the request made before the war. As war is the *ultima ratio* between States, the victorious belligerent is not legally prevented from imposing upon the defeated any conditions he likes.

Compulsive Means in contradistinction to an Ultimatum and Demonstrations.

§ 28. The above-described characteristics of compulsive means for the settlement of international differences make it necessary to mention the distinction between such means and an *ultimatum*. The latter is the technical term for a written communication by one State to another which ends amicable negotiations respecting a difference, and formulates, for the last time and categorically, the demands to be fulfilled if other measures are to be averted. An [Pg 36] *ultimatum* is, theoretically at least, not a compulsion, although it can practically exercise the function of a compulsion, and although compulsive means, or even war, can be threatened through the same communication in the event of a refusal to comply with the demand made.[29] And the same is valid with regard to withdrawal of diplomatic agents, to military and naval demonstrations, and the like, which some publicists[30] enumerate among the compulsive means of settlement of international differences. Although these steps may contrive, indirectly, the settlement of differences, yet they do not contain in themselves any compulsion.

[29] See Pradier-Fodéré, VI. No. 2649, and below, § 95.

[30] See Taylor, §§ 431, 433, 441; Moore, VII. §§ 1089, 1091, 1099; Pradier-Fodéré, VI. No. 2633.

II

RETORSION

Vattel, II. § 341—Hall, § 120—Westlake, II. p. 6—Phillimore, III. § 7—Twiss II. § 10—Taylor, § 435—Wharton, III. § 318—Moore, VII. § 1090—Wheaton, § 290—Bluntschli, § 505—Heffter, § 110—Bulmerincq in Holtzendorff, IV. pp. 59-71—Ullmann, § 159—Bonfils, Nos. 972-974—Despagnet, Nos. 484-486—Pradier-Fodéré, VI. Nos. 2634-2636—Rivier, II. § 60—Calvo, III. § 1807—Fiore, II. Nos. 1226-1227, and Code, Nos. 1386-1390—Martens, II § 105.

Conception and Character of Retorsion.

§ 29. Retorsion is the technical term for the retaliation of discourteous or unkind or unfair and inequitable acts by acts of the same or a similar kind. Retorsion has nothing to do with international delinquencies, as it is not a means of compulsion in the case of legal differences,

but only in the case of certain political differences. The act which calls for retaliation is not an illegal act; on the contrary, it is an act that is within the competence of the doer.[31] But a State [Pg 37] can commit many legislative, administrative, or judicial acts which, although they are not internationally illegal, contain a discourtesy or unfriendliness to another State or are unfair and inequitable. If the State against which such acts are directed considers itself wronged thereby, a political difference is created which might be settled by retorsion.

[31] For this reason—see Heilborn, *System*, p. 352, and Wagner, *Zur Lehre von den Streiterledigungsmitteln des Völkerrechts* (1900), pp. 53-60—it is correctly maintained that retorsion, in contradistinction to reprisals, is not of legal, but only of political importance. Nevertheless, a system of the Law of Nations must not omit the matter of retorsion altogether, because retorsion is in practice an important means of settling political differences.

Retorsion, when justified.

§ 30. The question when retorsion is and when it is not justified is not one of law, and is difficult to answer. The difficulty arises from the fact that retorsion is a means of settling such differences as are created, not by internationally illegal, but by discourteous or unfriendly or unfair and inequitable acts of one State against another, and that naturally the conceptions of discourtesy, unfriendliness, and unfairness cannot be defined very precisely. It depends, therefore, largely upon the circumstances and conditions of the special cases whether a State will or will not consider itself justified in making use of retorsion. In practice States have frequently made use of retorsion in cases of unfair treatment of their citizens abroad through rigorous passport regulations, exclusion of foreigners from certain professions, the levy of exorbitant protectionist or fiscal duties; further, in cases of refusal of the usual mutual judicial assistance, refusal of admittance of foreign ships to harbours, and in similar cases.

Retorsion, how exercised.

§ 31. The essence of retorsion consists in retaliation for a noxious act by an act of the same kind. But a State in making use of retorsion is by no means confined to acts of the same kind as those complained of, acts of a similar kind being equally admissible. However, acts of retorsion [Pg 38] are confined to acts which are not internationally illegal. And, further, as retorsion is made use of only for the purpose of compelling a State to alter its discourteous, unfriendly, or unfair behaviour, all acts of retorsion ought at once to cease when such State changes its behaviour.

Value of Retorsion.

§ 32. The value of retorsion as a means of settling certain international differences consists in its compulsory force, which has great power in regulating the intercourse of States. It is a commonplace of human nature, and by experience constantly confirmed, that evil-doers are checked by retaliation, and that those who are inclined to commit a wrong against others are often prevented by the fear of it. Through the high tide of Chauvinism, Protectionism, and unfriendly feelings against foreign nations, States are often tempted to legislative, administrative, and judicial acts against other States which, although not internationally illegal, nevertheless endanger friendly relations and intercourse within the Family of Nations. The certainty of retaliation is the only force which can make States resist the temptation.

III

REPRISALS

Grotius, III. c. 2—Vattel, II. §§ 342-354—Bynkershoek, *Quaestiones jur. publ.* I. c. 24—Hall, § 120—Lawrence, §§ 136-137—Westlake, II. pp. 7-11—Twiss, II. §§ 11-22—Moore, VII. §§ 1095, 1096-1098—Taylor, §§ 436-437—Wharton, III. §§ 318-320—Wheaton, §§ 291-293—Bluntschli, §§ 500-504—Heffter, §§ 111-112—Bulmerincq in Holtzendorff, IV. pp. 72-116—Ullmann, § 160—Bonfils, Nos. 975-985—Despagnet, Nos. 487-495—Pradier-Fodéré, VI. Nos. 2637-2647—Rivier, II. § 60—Nys, III. pp. 84-91—Calvo, III. §§ 1808-1831—Fiore, II. Nos. 1228-1230, and Code, Nos. 1391-1399—Martens, II. § 105—Lafargue, *Les représailles en temps de paix* (1899)—Ducrocq, *Représailles en temps de paix* (1901), pp. 5-57, 175-232—Westlake in *The Law Quarterly Review*, XXV. (1909), pp. 127-137.

Conception of Reprisals in contradistinction to Retorsion.

§ 33. Reprisals is the term applied to such injurious and otherwise internationally illegal acts of [Pg 39] one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency. Whereas retorsion consists in retaliation of discourteous, unfriendly, unfair, and inequitable acts by acts of the same or a similar kind, and has nothing to do with international delinquencies, reprisals are acts, otherwise illegal, performed by a State for the purpose of obtaining justice for an international delinquency by taking the law into its own hands. It is, of course, possible that a State retaliates in consequence of an illegal act committed against itself by the performance of an act of a similar kind. Such retaliation would be a retorsion in the ordinary sense of the term, but it would not be retorsion in the technical meaning of the term as used by those writers on International Law who correctly distinguish between retorsion and reprisals.

Reprisals admissible for all International Delinquencies.

§ 34. Reprisals are admissible not only, as some writers[32] maintain, in case of denial or delay

of justice, or of any other internationally interdicted ill-treatment of foreign citizens, but in every case of an international delinquency for which the injured State cannot get reparation through negotiation,[33] be it ill-treatment of its subjects abroad through denial or delay of justice or otherwise, or be it non-compliance with treaty obligations, violation of the dignity of a foreign State, violation of foreign territorial supremacy, or any other internationally illegal act.

[32] See, for instance, Twiss, II. § 19.

[33] As regards reprisals for the non-payment of contract-debts, see below, § 41.

Thus, to give an example, Great Britain, in the case of the Sicilian Sulphur Monopoly, performed acts of reprisal against the Two Sicilies in 1840 for a violation of a treaty. By the treaty of commerce of 1816 between the Two Sicilies and Great Britain certain commercial
[Pg 40] advantages were secured to Great Britain. When, in 1838, the Neapolitan Government granted a Sulphur Monopoly to a company of French and other foreign merchants, Great Britain protested against this violation of her treaty rights, demanded the revocation of the monopoly, and, after the Neapolitan Government had declined to comply with this demand, laid an *embargo* on Sicilian ships in the harbour of Malta and ordered her fleet in the Mediterranean to seize Sicilian ships by way of reprisal. A number of vessels were captured, but were restored after the Sicilies had, through the mediation of France, agreed to withdraw the grant of the Sulphur Monopoly.

Again, when in 1908 de Castro, the President of Venezuela, dismissed M. de Reuss, the Dutch Minister Resident at Caracas, Holland considered this step a violation of her dignity and sent cruisers into Venezuelan waters with the intention of resorting to reprisals. These cruisers captured the Venezuelan coast-guard ship *Alexis* outside Puerto Cabello, and another Venezuelan public vessel, both of which, however, were restored in 1909, when de Castro was deposed, and the new President opened negotiations with Holland and settled the conflict.

Reprisals admissible for International Delinquencies only.

§ 35. Reprisals are admissible in the case of international delinquencies only and exclusively. As internationally injurious acts on the part of administrative and judicial officials, armed forces, and private individuals are not *ipso facto* international delinquencies, no reprisals are admissible in the case of such acts if the responsible State complies with the requirements of its vicarious responsibility.[34] Should, however, a State refuse to comply with these requirements, its vicarious responsibility would turn into original responsibility, and thereby an international delinquency would be created for which reprisals are indeed admissible.

[Pg 41] [34] See above, vol. I. §§ 149 and 150.

The reprisals ordered by Great Britain in the case of Don Pacifico are an illustrative example of unjustified reprisals, because no international delinquency was committed. In 1847 a riotous mob, aided by Greek soldiers and gendarmes, broke into and plundered the house of Don Pacifico, a native of Gibraltar and an English subject living at Athens. Great Britain claimed damages from Greece without previous recourse by Don Pacifico to the Greek Courts. Greece refused to comply with the British claim, maintaining correctly that Don Pacifico ought to institute an action for damages against the rioters before the Greek Courts. Great Britain continued to press her claim, and finally in 1850 blockaded the Greek coast and ordered, by way of reprisal, the capture of Greek vessels. The conflict was eventually settled by Greece paying £150 to Don Pacifico. It is generally recognised that England had no right to act as she did in this case. She could have claimed damages directly from the Greek Government only after the Greek Courts had denied satisfaction to Don Pacifico.[35]

[35] See above, vol. I. § 167. The case is reported with all its details in Martens, *Causes Célèbres*, V. pp. 395-531.

Reprisals, by whom performed.

§ 36. Acts of reprisal may nowadays be performed only by State organs such as armed forces, or men-of-war, or administrative officials, in compliance with a special order of their State. But in former times private individuals used to perform acts of reprisal. Such private acts of reprisal seem to have been in vogue in antiquity, for there existed a law in Athens according to which the relatives of an Athenian murdered abroad had, in case the foreign State refused punishment or extradition of the murderer, the right to seize and to bring before the Athenian Courts three citizens of such foreign State (so-called ἀνδροληψία). During the Middle Ages, and even in
[Pg 42] modern times to the end of the eighteenth century, States used to grant so-called "Letters of Marque" to such of their subjects as had been injured abroad either by a foreign State itself or its citizens without being able to get redress. These Letters of Marque authorised the bearer to acts of self-help against the State concerned, its citizens and their property, for the purpose of obtaining satisfaction for the wrong sustained. In later times, however, States themselves also performed acts of reprisal. Thereby acts of reprisal on the part of private individuals fell more and more into disuse, and finally disappeared totally with the end of the eighteenth century. The distinction between general and special reprisals, which used formerly to be drawn, is based on the fact that in former times a State could either authorise a single private individual to perform an act of reprisal (*special* reprisals), or command its armed forces to perform all kinds of such acts (*general* reprisals). The term "General Reprisals" is by Great Britain nowadays used for the authorisation of the British fleet to seize in time of war all enemy ships and goods. Phillimore (III. § 10) cites the following Order in Council of March 27, 1854: "Her Majesty having determined to afford active assistance to her ally, His Highness the Sultan of the Ottoman Empire, for the protection of his dominions against the encroachments and unprovoked aggression of His Imperial Majesty the Emperor of All the Russias, Her Majesty is therefore pleased, by and with

the advice of Her Privy Council, to order, and it is hereby ordered, that general reprisals be granted against the ships, vessels, and goods of the Emperor of All the Russias, and of his subjects, or others inhabiting within any of his countries, territories or dominions, so that Her Majesty's fleets may lawfully seize all ships, vessels, and goods," &c.

Objects of Reprisals.

[Pg 43] § 37. An act of reprisal may be performed against anything and everything that belongs or is due to the delinquent State or its citizens. Ships sailing under its flag may be seized, treaties concluded with it may be suspended, a part of its territory may be militarily occupied, goods belonging to it or to its citizens may be seized, and the like. Thus in 1895 Great Britain ordered a fleet to land forces at Corinto and to occupy the custom-house and other Government buildings as an act of reprisal against Nicaragua; again, in 1901 France ordered a fleet to seize the island of Mitylene as an act of reprisal against Turkey; and in 1908 Holland ordered a squadron to seize two public Venezuelan vessels as an act of reprisal against Venezuela.[36] The persons of the officials and even of the private citizens of the delinquent State are not excluded from the possible objects of reprisals. Thus, when in 1740 the Empress Anne of Russia arrested without just cause the Baron de Stackelberg, a natural-born Russian subject, who had, however, become naturalised in Prussia by entering the latter's service, Frederick II. of Prussia seized by way of reprisal two Russian subjects and detained them until Stackelberg was liberated. But it must be emphasised that the only act of reprisal admissible with regard to foreign officials or citizens is arrest; they must not be treated like criminals, but like hostages, and under no condition or circumstance may they be executed or subjected to punishment of any kind.

[36] See above, § 34.

The rule that anything and everything belonging to the delinquent State may be made the object of reprisals has, however, exceptions; for instance, individuals enjoying the privilege of exterritoriality while abroad, such as heads of States and diplomatic envoys, may not be made the [Pg 44] object of reprisals, although this has occasionally been done in practice.[37] In regard to another exception—namely, public debts of such State as intends performing reprisals—unanimity does not exist either in theory or in practice. When Frederick II. of Prussia in 1752, by way of negative reprisals for an alleged injustice of British Prize Courts against Prussian subjects, refused the payment of the Silesian loan due to English creditors, Great Britain, in addition to denying the question that there was at all a just cause for reprisals, maintained that public debts may not be made the object of reprisals. English jurists and others, as, for instance, Vattel (II. § 344), consent to this, but German writers dissent.[38]

[37] See the case reported in Martens, *Causes Célèbres*, I. p. 35.

[38] See Phillimore, III. § 22, in contradistinction to Heffter, § 111, note 5. The case is reported with all its details in Martens, *Causes Célèbres*, II. pp. 97-168. The dispute was settled in 1756—see below, § 437—through Great Britain paying an indemnity of £20,000.

Positive and Negative Reprisals.

§ 38. Reprisals can be positive or negative. One speaks of positive reprisals when such acts are performed as would under ordinary circumstances involve an international delinquency. On the other hand, negative reprisals consist of refusals to perform such acts as are under ordinary circumstances obligatory; when, for instance, the fulfilment of a treaty obligation or the payment of a debt is refused.

Reprisals must be proportionate.

§ 39. Reprisals, be they positive or negative, must be in proportion to the wrong done and to the amount of compulsion necessary to get reparation. For instance, a State would not be justified in arresting by way of reprisal thousands of foreign subjects living on its territory whose home State had injured it through a denial of justice to one of its subjects living abroad. But it would in such case be justified in ordering its own Courts to deny justice to all subjects of such foreign State, or in ordering its fleet to seize several vessels sailing under the latter State's flag, or in suspending its commercial treaty with such State.

Embargo.

[Pg 45] § 40. A kind of reprisal, which is called *Embargo*, must be specially mentioned. This term of Spanish origin means detention, but in International Law it has the technical meaning of detention of ships in port. Now, as by way of reprisal all acts, otherwise illegal, may be performed, there is no doubt that ships of the delinquent State may be prevented from leaving the ports of the injured State for the purpose of compelling the delinquent State to make reparation for the wrong done.[39]

[39] Thus in 1840—see above, § 34—Great Britain laid an embargo on Sicilian ships.

The matter would not need special mention were it not for the fact that *embargo* by way of reprisal is to be distinguished from detention of ships for other reasons. According to a now obsolete[40] rule of International Law, conflicting States could, when war was breaking out or impending, lay an *embargo* on, and appropriate each other's merchantmen. Another kind of *embargo* is the so-called *arrêt de prince*[41]—that is, a detention of foreign ships for the purpose of preventing them from spreading news of political importance. And there is, thirdly, an *embargo* arising out of the so-called *jus angariæ*—that is, the right of a belligerent State to seize and make use of neutral property in case of necessity, under the obligation to compensate the neutral

owner of such property. States have in the past[42] made use of this kind of *embargo* when they had not enough ships for the necessary transport of troops, ammunition, and the like.

[40] See, however, below, § 102*a* and article 1 of Convention VI., which only stipulates that it is *desirable* that enemy vessels in the port of a belligerent at the outbreak of war should be allowed to depart freely; see also article 2 of Convention VI.

[41] See Steck, *Versuch über Handels-und Schiffahrts-Verträge* (1782), p. 355; Caumont, *Dictionnaire universel de droit maritime* (1867), pp. 247-265; Calvo, III. § 1277; Pradier-Fodéré, V. p. 719; Holtzendorff, IV. pp. 98-104.

[42] See below, § 364.

These kinds of international *embargo* must not be confounded with the so-called *civil embargo*
[Pg 46] of English Municipal Law[43]—namely, the order of the Sovereign to English ships not to leave English ports.

[43] See Phillimore, III. § 26.

Reprisals to be preceded by Negotiations and to be stopped when Reparation is made.

§ 41. Like all other compulsive means of settling international differences, reprisals are admissible only after negotiations have been conducted in vain for the purpose of obtaining reparation from the delinquent State. In former times, when States used to authorise private individuals to perform special reprisals, treaties of commerce and peace frequently stipulated for a certain period of time, for instance three or four months, to elapse after an application for redress before the grant of Letters of Marque by the injured State.[44] Although with the disappearance of special reprisals this is now antiquated, a reasonable time for the performance of a reparation must even nowadays be given. On the other hand, reprisals must at once cease when the delinquent State makes the necessary reparation. Individuals arrested must be set free, goods and ships seized must be handed back, occupied territory must be evacuated, suspended treaties must again be put into force, and the like.

[44] See Phillimore, III. § 14.

It must be specially mentioned that in the case of recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals, reprisals by means of armed forces can, according to article 1 of Convention II., only be resorted to in case the debtor State refuses to go to arbitration.

Reprisals during Peace in contradistinction to Reprisals during War.

§ 42. Reprisals in time of peace must not be confounded with reprisals between belligerents. Whereas the former are resorted to for the purpose of settling a conflict without going to war, the latter[45] are retaliations to force an enemy guilty of a certain act of illegitimate warfare to comply with the laws of war.

[45] See below, § 247.

Value of Reprisals.

[Pg 47] § 43. The value of reprisals as a means of settling international differences is analogous to the value of retorsion. States will have recourse to reprisals for such international delinquencies as they think insufficiently important for a declaration of war, but too important to be entirely overlooked. That reprisals are rather a rough means for the settlement of differences, and that the institution of reprisals can give and has in the past given occasion to abuse in case of a difference between a powerful and a weak State, cannot be denied. On the other hand, as there is no Court and no central authority above the Sovereign States which could compel a delinquent State to give reparation, the institution of reprisals can scarcely be abolished. The influence in the future of the existence of a Permanent Court of Arbitration remains to be seen. If all the States would become parties to the Hague Convention for the peaceful adjustment of international differences, and if they would have recourse to the Permanent Court of Arbitration at the Hague in all cases of an alleged international delinquency which affects neither their national honour nor their vital interests and independence, acts of reprisal would almost
[Pg 48] disappear.

IV

PACIFIC BLOCKADE

Hall, § 121—Lawrence, § 138—Westlake, II. pp. 11-18—Taylor, § 444—Moore, VII. § 1097—Bluntschli, §§ 506-507—Heffter, § 112—Bulmerincq in Holtzendorff, IV. pp. 116-127—Ullmann, § 162—Bonfils, Nos. 986-994—Despagnet, Nos. 496-498—Pradier-Fodéré, V. Nos. 2483-2489, VI. No. 2648—Rivier, II. § 60—Nys, III. pp. 91-94—Calvo, III. §§ 1832-1859—Fiore, II. No. 1231, and Code, Nos. 1404-1414—Martens, II. 105—Holland, *Studies*, pp. 151-167—Deane, *The Law of Blockade* (1870), pp. 45-48—Fauchille, *Du blocus maritime* (1882), pp. 37-67—Falcke, *Die Hauptperioden der sogenannten Friedensblockade* (1891), and in the *Zeitschrift für Internationales Recht*, XIX. (1909), pp. 63-175—Barès, *Le blocus pacifique* (1898)—Ducrocq, *Représailles en temps de paix* (1901), pp. 58-174—Hogan, *Pacific Blockade* (1908)—Söderquist, *Le Blocus Maritime* (1908)—Staudacher, *Die Friedensblockade* (1909)—Westlake in *The Law Quarterly Review*, XXV. (1909), pp. 13-23.

Development of practice of Pacific Blockade.

§ 44. Before the nineteenth century blockade was only known as a measure between belligerents in time of war. It was not until the second quarter of the nineteenth century that the

first case occurred of a so-called pacific blockade—that is, a blockade during time of peace—as a compulsive means of settling international differences; and all such cases are either cases of intervention or of reprisals.[46] The first case, one of intervention, happened in 1827, when, during the Greek insurrection, Great Britain, France, and Russia intervened in the interest of the independence of Greece and blockaded those parts of the Greek coast which were occupied by Turkish troops. Although this blockade led to the battle of Navarino, in which the Turkish fleet
[Pg 49] was destroyed, the Powers maintained, nevertheless, that they were not at war with Turkey. In 1831, France blockaded the Tagus as an act of reprisal for the purpose of exacting redress from Portugal for injuries sustained by French subjects. Great Britain and France, exercising intervention for the purpose of making Holland consent to the independence of revolting Belgium, blockaded in 1833 the coast of Holland. In 1838, France blockaded the ports of Mexico as an act of reprisal, but Mexico declared war against France in answer to this pacific blockade. Likewise as an act of reprisal, and in the same year, France blockaded the ports of Argentina; and in 1845, conjointly with Great Britain, France blockaded the ports of Argentina a second time. In 1850, in the course of her differences with Greece on account of the case of Don Pacifico,[47] Great Britain blockaded the Greek ports, but for Greek vessels only. Another case of intervention was the pacific blockade instituted in 1860 by Sardinia, in aid of an insurrection against the then Sicilian ports of Messina and Gaeta, but the following year saw the conversion of the pacific blockade into a war blockade. In 1862 Great Britain by way of reprisal for the plundering of a wrecked British merchantman, blockaded the Brazilian port of Rio de Janeiro. The blockade of the island of Formosa by France during her differences with China in 1884 and that of the port of Menam by France during her differences with Siam in 1893 are likewise cases of reprisals. On the other hand, cases of intervention are the blockade of the Greek coast in 1886 by Great Britain, Austria-Hungary, Germany, Italy, and Russia, for the purpose of preventing Greece from making war against Turkey; and further, the blockade of the island of Crete in 1897
[Pg 50] by the united Powers. The last case occurred in 1902, when Great Britain, Germany, and Italy blockaded, by way of reprisal, the coast of Venezuela.[48]

[46] A blockade instituted by a State against such portions of its own territory as are in revolt is not a blockade for the purpose of settling international differences. It has, therefore, in itself nothing to do with the Law of Nations, but is a matter of internal police. I cannot, therefore, agree with Holland, who, in his *Studies in International Law*, p. 138, treats it as a pacific blockade *sensu generali*. Of course, necessity of self-preservation only can justify a State that has blockaded one of its own ports in preventing the egress and ingress of *foreign* vessels. And the question might arise whether compensation ought not to be paid for losses sustained by foreign vessels so detained.

[47] See above, § 35.

[48] This blockade, although ostensibly a war blockade for the purpose of preventing the ingress of foreign vessels, was nevertheless essentially a pacific blockade. See Holland, in *The Law Quarterly Review*, XIX. (1903), p. 133; Parliamentary Papers, Venezuela, No. 1 (Venezuela), Correspondence respecting the Affairs of Venezuela.

Admissibility of Pacific Blockade.

§ 45. No unanimity exists among international lawyers with regard to the question whether or not pacific blockades are admissible according to the principles of the Law of Nations. There is no doubt that the theory of the Law of Nations forbids the seizure and sequestration of vessels other than those of the blockaded State caught in an attempt to break a pacific blockade. For even those writers who maintain the admissibility of pacific blockade assert that vessels of third States cannot be seized. What is controverted is the question whether according to International Law the coast of a State may be blockaded at all in time of peace. From the first recorded instance to the last, several writers[49] of authority have negatived the question. On the other hand, many writers have answered the question in the affirmative, differing among themselves regarding the one point only whether or not vessels sailing under the flag of third States could be prevented from entering or leaving pacifically blockaded ports. The Institute of International Law in 1887 carefully studied, and at its meeting in Heidelberg discussed, the question, and finally voted a declaration[50] in favour of the admissibility of pacific blockades. Thus the most influential body of theorists has approved what had been established before by practice. There ought to be no doubt that the numerous cases of pacific blockade which have occurred during the nineteenth
[Pg 51] century have, through tacit consent of the members of the Family of Nations, established the admissibility of pacific blockades for the settlement of political as well as of legal international differences.

[49] The leader of these writers is Hautefeuille, *Des Droits et des Devoirs des Nations Neutres* (2nd ed. 1858, pp. 272-288).

[50] See *Annuaire*, IX. (1887), pp. 275-301.

Pacific Blockade and vessels of third States.

§ 46. It has already been stated that those writers who admit the legality of pacific blockades are unanimous regarding the fact that no right exists for the blockading State to seize and sequestrate such ships of third States as try to break a pacific blockade. Apart from this, no unanimity exists with regard to the question of the relation between a pacific blockade and ships of third States. Some German writers[51] maintain that such ships have to respect the blockade, and that the blockading State has a right to stop such ships of third States as try to break a pacific blockade. The vast majority of writers, however, deny such right. There is, in fact, no rule of International Law which could establish such a right, as pacific in contradistinction to belligerent blockade is a mere matter between the conflicting parties. The declaration of the Institute of International Law in favour of pacific blockade contains, therefore, the condition: "Les navires de pavillons neutres peuvent entrer librement malgré le blocus."

[51] See Heffter, § 112; Perels, § 30.

The practice of pacific blockade has varied with regard to ships of third States. Before 1850 ships of third States were expected to respect a pacific blockade, and such ships of these States as tried to break it were seized, but were restored at the termination of the blockade, yet without any compensation. When in 1850 Great Britain, and likewise when in 1886 Great Britain, Austria, Germany, Italy, and Russia blockaded the Greek ports, these ports were only closed for Greek ships, and others were allowed to pass through. And the same was the case during the blockade
[Pg 52] of Crete in 1897. On the other hand, in 1894, France, during a conflict with China, blockaded the island of Formosa and tried to enforce the blockade against ships of third States. But Great Britain declared that a pacific blockade could not be enforced against ships of third States, whereupon France had to drop her intended establishment of a pacific blockade and had to consider herself at war with China. And when in 1902 Great Britain, Germany, and Italy instituted a blockade against Venezuela, they declared it a war blockade[52] because they intended to enforce it against vessels of third States.

[52] That this blockade was essentially a pacific blockade I have already stated above, p. 50, note 1.

Pacific Blockade and vessels of the blockaded State.

§ 47. Theory and practice seem nowadays to agree upon the rule that the ships of a pacifically blockaded State trying to break the blockade may be seized and sequestrated. But they may not be condemned and confiscated, as they have to be restored at the termination of the blockade. Thus, although the Powers which had instituted a blockade against Venezuela in 1902 declared it a war blockade, all Venezuelan public and private ships seized were restored after the blockade was raised.

Manner of Pacific Blockade.

§ 48. Pacific blockade is a measure of such enormous consequences that it can be justified only after the failure of preceding negotiations for the purpose of settling the questions in dispute. And further, as blockade, being a violation of the territorial supremacy of the blockaded State, is *prima facie* of a hostile character, it is necessary for such State as intends in time of peace to blockade another State to notify its intention to the latter and to fix the day and hour for the establishment of the blockade. And, thirdly, although the Declaration of Paris of 1856 enacting that a blockade to be binding must be effective concerns blockades in time of war only, there can
[Pg 53] be no doubt that pacific blockades ought to be likewise effective. The declaration of the Institute of International Law in favour of pacific blockade contains, therefore, the condition: "Le blocus pacifique doit être déclaré et notifié officiellement, et maintenu par une force suffisante."

Value of Pacific Blockade.

§ 49. As the establishment of a pacific blockade has in various instances not prevented the outbreak of hostilities, the value of a pacific blockade as a means of non-hostile settlement of international differences is doubted and considered uncertain by many writers. But others agree, and I think they are right, that the institution of pacific blockade is of great value, be it as an act of reprisal or of intervention. Every measure which is suitable and calculated to prevent the outbreak of war must be welcomed, and experience shows that pacific blockade is, although not universally successful, a measure of this kind. That it can give, and has in the past given, occasion for abuse in case of a difference between a strong and a weak Power is no argument against it, as the same is valid with regard to reprisals and intervention in general, and even to war. And although it is naturally a measure which will scarcely be made use of in case of a difference between two powerful naval States, it might nevertheless find application with success against a powerful naval State if exercised by the united navies of several Powers.[53]

[53] The following is the full text of the declaration of the Institute of International Law referred to above, § 45:

"L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit de gens que sous les conditions suivantes:

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

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

"3. Les navires de la puissance bloquée qui ne respectent pas un pareil blocus, peuvent être séquestrés. Le blocus ayant cessé, ils doivent être restitués avec leurs cargaisons à leurs propriétaires, mais sans dédommagement à aucun titre."

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V

INTERVENTION

See the literature quoted above in vol. I. at the commencement of § 134.

Intervention in contradistinction to Participation in a difference.

§ 50. Intervention as a means of settling international differences is only a special kind of intervention in general, which has already been discussed.[54] It consists in the dictatorial interference of a third State in a difference between two States for the purpose of settling the difference in the way demanded by the intervening State. This dictatorial interference takes place for the purpose of exercising a compulsion upon one or both of the parties in conflict, and must be distinguished from such attitude of a State as makes it a party to the very conflict. If two

States are in conflict and a third State joins one of them out of friendship or from any other motive, such third State does not exercise an intervention as a means of settling international differences, but becomes a party to the conflict. If, for instance, an alliance exists between one of two States in conflict and a third, and if eventually, as war has broken out in consequence of the conflict, such third State comes to the help of its ally, no intervention in the technical sense of the term takes place. A State intervening in a dispute between two other States does not become a party to their dispute, but is the author of a new imbroglio, because such third State dictatorially requests those other States to settle their difference in a way to which both, or at any rate one of them, objects. An intervention, for instance, takes place when, although two States in conflict have made up their minds to fight it out in war, a third State dictatorially requests them to settle their dispute through arbitration.

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[54] See above, vol. I. §§ 134-138.

Intervention, in the form of dictatorial interference, must, further, be distinguished from such efforts of a State as are directed to induce the States in conflict to settle their difference amicably by proffering its good offices or mediation, or by giving friendly advice. It is, therefore, incorrect when some jurists[55] speak of good offices and the like as an "amicable" in contradistinction to a "hostile" intervention.

[55] Thus, for instance, Rivier, II. § 58. See also above, vol. I. § 134.

Mode of Intervention.

§ 51. Intervention in a difference between two States is exercised through a communication of the intervening State to one or both of the conflicting States with a dictatorial request for the settlement of the conflict in a certain way, for instance by arbitration or by the acceptance of certain terms. An intervention can take place either on the part of one State alone or of several States collectively. If the parties comply with the request of the intervening State or States, the intervention is terminated. If, however, one or both of the parties fail to comply with the request, the intervening State will either withdraw its intervention or proceed to the performance of acts more stringent than a mere request, such as pacific blockade, military occupation, and the like. Even war can be declared for the purpose of an intervention. Of special importance are the collective interventions exercised by several great Powers in the interest of the balance of power and of humanity.[56]

[56] See above, vol. I. §§ 136 and 137.

Time of Intervention.

§ 52. An intervention in a difference between two States can take place at any time from the moment a conflict arises till the moment it is settled, and even immediately after the settlement. In many cases interventions have taken place before the outbreak of war between two States for

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the purpose of preventing war; in other cases third States have intervened during a war which had broken out in consequence of a conflict. Interventions have, further, taken place immediately after the peaceable settlement of a difference, or after the termination of war by a treaty of peace or by conquest, on the grounds that the conditions of the settlement or the treaty of peace were against the interests of the intervening State, or because the latter would not consent to the annexation of the conquered State by the victor.[57]

[57] With regard to the question of the right of intervention, the admissibility of intervention in default of a right, and to all other details concerning intervention, the reader must be referred above, vol. I. §§ 135-138.

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PART II

WAR

CHAPTER I

ON WAR IN GENERAL

I

CHARACTERISTICS OF WAR

Grotius, I. c. 1, § 2—Vattel, III. §§ 1-4, 69-72—Hall, §§ 15-18—Westlake, II. pp. 1-6—Lawrence, § 135—Lorimer, II. pp. 18-28—Manning, pp. 131-133—Phillimore, III. § 49—Twiss, II. §§ 22-29—Taylor, §§ 449-451—Wheaton, § 295—Bluntschli, §§ 510-514—Heffter, §§ 113-114—Lueder in Holtzendorff, IV. pp. 175-198—Klüber, §§ 235-237—G. F. Martens, II. § 263—Ullmann, § 165—Bonfils, Nos. 1000-1001—Despagnet, Nos. 499-505—Pradier-Fodéré, VI. Nos. 2650-2660—Rivier, II. § 61—Nys, III. pp. 95-117—Calvo, IV. §§ 1860-1864—Fiore, III. Nos. 1232-1268—Martens, II. § 106—Westlake, *Chapters*, pp. 258-264—Heilborn, *System*, pp. 321-332—Rettich, *Zur Theorie und Geschichte des Rechts zum Kriege* (1888), pp. 3-140—Wiesse, *Le Droit international appliqué aux guerres civiles* (1898)—Rougier, *Les guerres civiles et le droit des gens* (1903)—Higgins, *War and the Private Citizen* (1912), pp. 3-72.

War no illegality.

§ 53. As within the boundaries of the modern State an armed contention between two or more citizens is illegal, public opinion has become convinced that armed contests between citizens are inconsistent with Municipal Law. Influenced by this fact, impatient pacifists, as well as those innumerable individuals who cannot grasp the idea of a law between Sovereign States, frequently consider war and law inconsistent. They quote the fact that wars are frequently waged by States as a proof against the very existence of an International Law. It is not difficult to show the absurdity of this opinion. As States are Sovereign, and as consequently no central authority can exist above them able to enforce compliance with its demands, war cannot, under the existing
[Pg 60]
conditions and circumstances of the Family of Nations, always be avoided. International Law recognises this fact, but at the same time provides regulations with which belligerents have to comply. Although with the outbreak of war peaceable relations between the belligerents cease, there remain certain mutual legal obligations and duties. Thus war is not inconsistent with, but a condition regulated by, International Law. The latter at present cannot and does not object to States which are in conflict waging war upon each other instead of peaceably settling their difference. But if they choose to go to war they have to comply with the rules laid down by International Law regarding the conduct of war and the relations between belligerents and neutral States. That International Law, if it could forbid war altogether, would be a more perfect law than it is at present there is no doubt. Yet eternal peace is an impossibility in the conditions and circumstances under which mankind at present live and will have to live for a long time to come, although eternal peace is certainly an ideal of civilisation which will slowly and gradually be realised.

Conception of War.

§ 54. War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases. War is a fact recognised, and with regard to many points regulated, but not established, by International Law. Those writers[58] who define war as the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, forget that wars have often been waged by both parties engaged for political reasons only; they confound a possible but not at all necessary
[Pg 61]
cause of war with the conception of war. A State may be driven into war because it cannot otherwise get reparation for an international delinquency, and such State may then maintain that it exercises by war nothing else than legally recognised self-help. But when States are driven into or deliberately wage war for political reasons, no legally recognised act of self-help is in such case performed by the war. And the same laws of war are valid, whether wars are waged on account of legal or of political differences.

[58] See, for instance, Vattel, III. § 1; Phillimore, III. § 49; Twiss, II. § 26; Bluntschli, § 510; Bulmerincq, § 92.

War a contention.

§ 55. In any case, it is universally recognised that war is a *contention*, which means, *a violent struggle through the application of armed force*. For a war to be in existence, two or more States must actually have their armed forces fighting against each other, although the commencement of a war may date back to its declaration or some other unilateral initiative act. Unilateral acts of force performed by one State against another without a previous declaration of war may be a cause of the outbreak of war, but are not war in themselves, as long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers the particular acts as acts of war. Thus it comes about that acts of force performed by one State against another by way of reprisal or during a pacific blockade in the case of an intervention are not necessarily initiative acts of war. And even acts of force illegally performed by one State against another, such, for instance, as occupation of a part of its territory, are not acts of war so long as they are not met with acts of force from the other side, or at least with a declaration from the latter that it considers the particular acts as acts of war. Thus, when Louis XIV. of France, after the Peace of Nimeguen, instituted the so-called Chambers of Reunion and in 1680 and 1681 seized the territory of the then Free Town of Strassburg and other parts of the
[Pg 62]
German Empire without the latter's offering armed resistance, these acts of force, although doubtless illegal, were not acts of war.

War a contention between States.

§ 56. To be considered war, the contention must be going on *between States*. In the Middle Ages wars were known between private individuals, so-called private wars, and wars between corporations, as the Hansa for instance, and between States. But such wars have totally disappeared in modern times. It may, of course, happen that a contention arises between the armed forces of a State and a body of armed individuals, but such contention[59] is not war. Thus the contention between the Raiders under Dr. Jameson and the former South African Republic in January 1896 was not war. Nor is a contention with insurgents or with pirates a war. And a so-called civil war[60] need not be from the beginning nor become at all a war in the technical sense of the term according to International Law. On the other hand, to an armed contention between a suzerain and its vassal[61] State the character of war ought not to be denied, for both parties are States, although the fact that the vassal makes war against the suzerain may, from the standpoint of Constitutional Law, be considered rebellion. And likewise an armed contention between a full Sovereign State and a State under the suzerainty of another State, as, for instance, the contention between Servia and Bulgaria[62] in 1885, is war. Again, an armed contention between one or more member-States of a Federal State and the latter ought to be considered as war in the

technical sense of the term, according to International Law, although, according to the
[Pg 63] constitution of Federal States, war between the member-States as well as between any member-State and the Federal State itself is illegal, and recourse to arms by a member-State may therefore correctly, from the standpoint of the constitution, be called rebellion. Thus the War of Secession within the United States between the Northern and the Southern member-States in 1861-1865 was real war.

[59] Some publicists maintain, however, that a contention between a State and the armed forces of a party fighting for public rights must be considered as war. See, for instance, Bluntschli, § 113, and Fiore, III. § 1265.

[60] See below, § 59.

[61] See below, § 75.

[62] Bulgaria was at that time still a vassal State under Turkish suzerainty.

War a contention between States through armed forces.

§ 57. It must be emphasised that war nowadays is a contention of States *through their armed forces*. Those private subjects of the belligerents who do not directly or indirectly belong to the armed forces do not take part in the armed contention: they do not attack and defend, and no attack is therefore made upon them. This fact is the result of an evolution of practices totally different from those in vogue in former times. During antiquity and the greater part of the Middle Ages war was a contention between the whole of the populations of the belligerent States. In time of war every subject of one belligerent, whether an armed and fighting individual or not, whether man or woman, adult or infant, could be killed or enslaved by the other belligerent at will. But gradually a milder and more discriminative practice grew up, and nowadays the life and liberty of such private subjects of belligerents as do not directly or indirectly belong to their armed forces are safe, as is also, with certain exceptions, their private property.

This is a generally admitted fact. But opinions disagree as to the general position of such private subjects in time of war. The majority of the European continental writers for the last three generations have propagated the doctrine that no relation of enmity exists between belligerents and such private subjects, or between the private subjects of the respective belligerents. This doctrine goes back to Rousseau, *Contrat Social*, I. c. 4. In 1801, on the occasion
[Pg 64] of the opening of the French Prize Court, the famous lawyer and statesman Portalis adopted Rousseau's[63] doctrine by declaring that war is a relation between States and not between individuals, and that consequently the subjects of the belligerents are only enemies as soldiers, not as citizens. And although this new doctrine did not, as Hall (§ 18) shows, spread at once, it has since the second half of the nineteenth century been proclaimed on the European continent by the majority of writers. British and American-English writers, however, have never adopted this doctrine, but have always maintained that the relation of enmity between the belligerents extends also to their private citizens.

[63] See Lassudrie-Duchêne, *Jean Jacques Rousseau et le droit des gens* (1906).

I think, if the facts of war are taken into consideration without prejudice, there ought to be no doubt that the British and American view is correct.[64] It is impossible to sever the citizens from their State, and the outbreak of war between two States cannot but make their citizens enemies. But the point is unworthy of dispute, because it is only one of terms without any material consequences.[65] For, apart from the terminology, the parties agree in substance upon the rules of the Law of Nations regarding such private subjects as do not directly or indirectly belong to the armed forces.[66] Nobody doubts that such private individuals are safe as regards their life and liberty, provided they behave peacefully and loyally; and that, with certain exceptions, their private property must not be touched. On the other hand, nobody doubts that, according to a
[Pg 65] generally recognised custom of modern warfare, the belligerent who has occupied a part or the whole of his opponent's territory, and who treats such private individuals leniently according to the rules of International Law, may punish them for any hostile act, since they do not enjoy the privileges of members of armed forces. Although, on the one hand, International Law by no means forbids, and, as a law between States, is not competent to forbid, private individuals to take up arms against an enemy, it gives, on the other hand, the right to the enemy to treat hostilities committed by private[67] individuals as acts of illegitimate warfare. A belligerent is under a duty to respect the life and liberty of private enemy individuals, but he can carry out this duty under the condition only that these private individuals abstain from hostilities against himself. Through military occupation in war such private individuals fall under the authority[68] of the occupant, and he may therefore demand that they comply with his orders regarding the safety of his forces. The position of private enemy individuals is made known to them through the proclamations which the commander-in-chief of an army occupying the territory usually publishes. Thus General Sir Redvers Buller, when entering the territory of the South African Republic in 1900, published the following proclamation:

"The troops of Queen Victoria are now passing through the Transvaal. Her Majesty does not make war on individuals, but is, on the contrary, anxious to spare them as far as may be possible the horrors of war. The quarrel England has is with the Government, not with the people, of the
[Pg 66] Transvaal. Provided they remain neutral, no attempt will be made to interfere with persons living near the line of march; every possible protection will be given them, and any of their property that it may be necessary to take will be paid for. But, on the other hand, those who are thus allowed to remain near the line of march must respect and maintain their neutrality, and the residents of any locality will be held responsible, both in their persons and property, if any damage is done to railway or telegraph, or any violence done to any member of the British forces in the vicinity of their home."

[64] See Boidin, pp. 32-44.

[65] But many continental writers constantly make use of Rousseau's *dictum* in order to defend untenable positions. See Oppenheim, *Die Zukunft des Völkerrechts* (1911), pp. 59-61.

[66] See Breton, *Les non-belligérants: Leurs devoirs, leurs droits, et la question des otages* (1904).

[67] See below, § 254.

[68] The first edition of this work was wrong in stating that through military occupation private enemy individuals fall under the *territorial supremacy* of the occupant. Since military occupation by no means vests sovereignty in the occupant, but only actual authority, this authority may not be called *territorial supremacy*.

It must be emphasised that this position of private individuals of the hostile States renders it inevitable that commanders of armies which have occupied hostile territory should consider and mark as criminals all such private individuals of the enemy as commit hostile acts, although such individuals may act from patriotic motives and may be highly praised for their acts by their compatriots. The high-sounding and well-meant words of Baron Lambermont, one of the Belgian delegates at the Conference of Brussels of 1874—"Il y a des choses qui se font à la guerre, qui se feront toujours, et que l'on doit bien accepter. Mais il s'agit ici de les convertir en lois, en prescriptions positives et internationales. Si les citoyens doivent être conduits au supplice pour avoir tenté de défendre leur pays au péril de leur vie, il ne faut pas qu'ils trouvent inscrits sur le poteau au pied duquel ils seront fusilés l'article d'un traité signé par leur propre gouvernement qui d'avance les condamnait à mort"—have no *raison d'être* in face of the fact that according to a generally recognised customary rule of International Law hostile acts on the part of private individuals are not acts of legitimate warfare, and the offenders may be treated and punished as
[Pg 67]
war-criminals. Even those writers[69] who object to the term "criminals" do not deny that such hostile acts by private individuals, in contradistinction to hostile acts by members of the armed forces, may be severely punished. The controversy whether or not such acts may be styled "crimes" is again only one of terminology; materially the rule is not at all controverted.[70]

[69] See, for instance, Hall, § 18, p. 74, and Westlake, *Chapters*, p. 262.

[70] It is of value to quote articles 20-26 of the *Instructions for the Government of Armies of the United States in the Field*, which the War Department of the United States published in 1863 during the War of Secession with the Southern member-States:

(20) "Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civil existence that men live in political, continuous societies, forming organised units, called States or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war."

(21) "The citizen or native of a hostile country is thus an enemy as one of the constituents of the hostile State or nation, and as such is subjected to the hardships of war."

(22) "Nevertheless, as civilisation has advanced during the last centuries, so has likewise advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit."

(23) "Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."

(24) "The almost universal rule in remote times was ... that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was ... the exception."

(25) "In modern regular wars ... protection of the inoffensive citizens of the hostile country is the rule; privation and disturbance of private relations are the exceptions."

(26) "Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious Government or rulers, and they may expel every one who declines to do so. But, whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives."

War a contention between States for the purpose of overpowering each other.

§ 58. The last, and not the least important, characteristic of war is its purpose. It is a contention between States for the purpose of overpowering each other. This purpose of war is not to be confounded with the ends[71] of war, for, whatever the ends of war may be, they can only be realised by one belligerent overpowering the other. Such a defeat as compels the vanquished to
[Pg 68]
comply with any demand the victor may choose to make is the purpose of war. Therefore war calls into existence the display of the greatest possible power and force on the part of the belligerents, rouses the passion of the nations in conflict to the highest possible degree, and endangers the welfare, the honour, and eventually the very existence of both belligerents. Nobody can predict with certainty the result of a war however insignificant one side may seem to be. Every war is a risk and a venture. Every State which goes to war knows beforehand what is at stake, and it would never go to war were it not for its firm, though very often illusory, conviction of its superiority in strength over its opponent. Victory is necessary in order to overpower the enemy; and it is this necessity which justifies all the indescribable horrors of war, the enormous sacrifice of human life and health, and the unavoidable destruction of property and devastation of territory. Apart from special restrictions imposed by the Law of Nations upon belligerents, all kinds and all degrees of force may be, and eventually must be, made use of in war in the interest and under the compulsion of its purpose, and in spite of their cruelty and the utter misery they entail. As war is a struggle for existence between States, no amount of individual suffering and misery can be regarded; the national existence and independence of the struggling State is a higher consideration than any individual well-being.

[71] See below, § 66.

Civil War.

§ 59. The characteristics of war as developed above must help to decide the question whether so-called civil wars are war in the technical meaning of the term. It has already been stated above (in § 56) that an armed contention between member-States of a Federal State and the latter and between a suzerain and its vassal ought to be considered as war because both parties
[Pg 69] are real States, although the Federal State as well as the suzerain may correctly designate it as a rebellion. Such armed contentions may be called civil wars in a wider sense of the term. In the proper sense of the term a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State, or when a large portion of the population of a State rises in arms against the legitimate Government. As war is an armed contention between *States*, such a civil war need not be from the beginning, nor become at all, war in the technical sense of the term. But it may become war through the recognition of each of the contending parties or of the insurgents as the case may be, as a belligerent Power.[72] Through this recognition a body of individuals receives an international position in so far as it is for some parts and in some points treated as though it were a subject[73] of International Law. Such recognition may be granted by the very State within the boundaries of which the civil war broke out, and then other States will in most cases, although they need not, likewise recognise a state of war as existing and bear the duties of neutrality. But it may happen that other States recognise insurgents as a belligerent Power before the State on whose territory the insurrection broke out so recognises them. In such case the insurrection is war in the eyes of these other States, but not in the eyes of the legitimate Government.[74] Be that as it may, it must be specially observed that, although a civil war becomes war in the technical sense of the term by recognition, this recognition has a lasting effect only when the insurgents succeed in getting their independence established through the defeat of the legitimate Government and a consequent treaty of peace which recognises their independence. Nothing, however, prevents the
[Pg 70] State concerned, after the defeat of the insurgents and reconquest of the territory which they had occupied, from treating them as rebels according to the Criminal Law of the land, for the character of a belligerent Power received through recognition is lost *ipso facto* by their defeat and the re-occupation by the legitimate Government of the territory occupied by them.

[72] See below, §§ 76 and 298.

[73] See above, vol. I. § 63.

[74] See below, § 298.

Guerilla War.

§ 60. The characteristics of war as developed above are also decisive for the answer to the question whether so-called guerilla war is real war in the technical sense of the term. Such guerilla war must not be confounded with guerilla tactics during a war. It happens during war that the commanders send small bodies of soldiers wearing their uniform to the rear of the enemy for the purpose of destroying bridges and railways, cutting off communications and supplies, attacking convoys, intercepting despatches, and the like. This is in every way legal, and the members of such bodies, when captured, enjoy the treatment due to enemy soldiers. It happens, further, that hitherto private individuals who did not take part in the armed contention take up arms and devote themselves mainly to similar tactics. According to the former rules of International Law such individuals, when captured, under no condition enjoyed the treatment due to enemy soldiers, but could be treated as criminals and punished with death. According to article 1 of the Regulations concerning war on land adopted by the Hague Conferences of 1899 and 1907 such guerilla fighters enjoy the treatment of soldiers under the four conditions that they (1) do not act individually, but form a body commanded by a person responsible for his subordinates, (2) have a fixed distinctive emblem recognisable at a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws of war.[75]

[Pg 71] [75] See also article 2 of the Hague Regulations.

On the other hand, one speaks of guerilla war or petty war when, after the defeat and the capture of the main part of the enemy forces, the occupation of the enemy territory, and the downfall of the enemy Government, the routed remnants of the defeated army carry on the contention by mere guerilla tactics. Although hopeless of success in the end, such petty war can go on for a long time thus preventing the establishment of a state of peace in spite of the fact that regular war is over and the task of the army of occupation is no longer regular warfare. Now the question whether such guerilla war is real war in the strict sense of the term in International Law must, I think, be answered in the negative, for two reasons. First, there are no longer the forces of two States in the field, because the defeated belligerent State has ceased to exist through the military occupation of its territory, the downfall of its established Government, the capture of the main part and the routing of the remnant of its forces. And, secondly, there is no longer in progress a contention between armed forces. For although the guerilla bands are still fighting when attacked, or when attacking small bodies of enemy soldiers, they try to avoid a pitched battle, and content themselves with the constant harassing of the victorious army, the destroying of bridges and railways, cutting off communications and supplies, attacking convoys, and the like, always in the hope that some event or events may occur which will induce the victorious army to withdraw from the conquered territory. But if guerilla war is not real war, it is obvious that in strict law the victor need no longer treat the guerilla bands as a belligerent Power and the captured members of those bands as soldiers. It is, however, not advisable that the victor should
[Pg 72] cease such treatment as long as those bands are under responsible commanders and observe themselves the laws and usages of war. For I can see no advantage or reason why, although in strict law it could be done, those bands should be treated as criminals. Such treatment would

only call for acts of revenge on their part, without in the least accelerating the pacification of the country. And it is, after all, to be taken into consideration that those bands act not out of criminal but patriotic motives. With patience and firmness the victor will succeed in pacifying these bands without recourse to methods of harshness.

II

CAUSES, KINDS, AND ENDS OF WAR

Grotius, I. c. 3; II. c. 1; III. c. 3—Pufendorf, VIII. c. 6, § 9—Vattel, III. §§ 2, 5, 24-50, 183-187—Lorimer, II. pp. 29-48—Phillimore, III. §§ 33-48—Twiss, II. §§ 26-30—Halleck, I. pp. 488-519—Taylor, §§ 452-454—Wheaton, §§ 295-296—Bluntschli, §§ 515-521—Heffter, § 113—Lueder in Holtzendorff, IV. pp. 221-236—Klüber, §§ 41, 235, 237—G. F. Martens, §§ 265-266—Ullmann, § 166—Bonfils, Nos. 1002-1005—Despagnet, No. 506—Pradier-Fodéré, VI. Nos. 2661-2670—Rivier, II. p. 219—Nys, III. pp. 106-114—Calvo, IV. §§ 1866-1896—Fichte, *Ueber den Begriff des wahrhaften Krieges* (1815)—Rettich, *Zur Theorie und Geschichte des Rechts zum Kriege* (1888), pp. 141-292—Peyronnard, *Des causes de la guerre* (1901).

Rules of Warfare independent of Causes of War.

§ 61. Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral States. This being the case, the question as to the causes of war is of minor importance for the Law of Nations, although not for international
[Pg 73] ethics. The matter need not be discussed at all in a treatise on International Law were it not for the fact that many writers maintain that there are rules of International Law in existence which determine and define just causes of war. It must, however, be emphasised that this is by no means the case. All such rules laid down by writers on International Law as recognise certain causes as just and others as unjust are rules of writers, but not rules of International Law based on international custom or international treaties.

Causes of War.

§ 62. The causes of war are innumerable. They are involved in the fact that the development of mankind is indissolubly connected with the national development of States. The millions of individuals who as a body are called mankind do not face one another individually and severally, but in groups as races, nations, and States. With the welfare of the races, nations, and States to which they belong the welfare of individuals is more or less identified. And it is the development of races, nations, and States that carries with it the causes of war. A constant increase of population must in the end force upon a State the necessity of acquiring more territory, and if such territory cannot be acquired by peaceable means, acquisition by conquest alone remains. At certain periods of history the principle of nationality and the desire for national unity gain such a power over the hearts and minds of the individuals belonging to the same race or nation, but living within the boundaries of several different States, that wars break out for the cause of national unity and independence. And jealous rivalry between two or more States, the awakening of national ambition, the craving for rich colonies, the desire of a land-locked State for a sea coast, the endeavour of a hitherto minor State to become a world-Power, the ambition of
[Pg 74] dynasties or of great politicians to extend and enlarge their influence beyond the boundaries of their own State, and innumerable other factors, have been at work ever since history was first recorded in creating causes of war, and these factors likewise play their part in our own times. Although one must hope that the time will come when war will entirely disappear, there is no possibility of seeing this hope realised in the near future. The first necessities of the disappearance of war are that the surface of the earth should be shared between States of the same standard of civilisation, and that the moral ideas of the governing classes in all the States of the world should undergo such an alteration and progressive development as would create the conviction that decisions of international courts of justice and awards of arbitrators are alone adequate means for the settlement of international disputes and international political aims. So long as these first necessities are not realised, war will as heretofore remain the *ultima ratio* of international politics.

Just Causes of War.

§ 63. However this may be, it often depends largely upon the standpoint from which they are viewed whether or no causes of war are to be called just causes. A war may be just or unjust from the standpoint of both belligerents, or just from the standpoint of one and utterly unjust from the standpoint of the other. The assertion that whereas all wars waged for political causes are unjust, all wars waged for international delinquencies are just, if there be no other way of getting reparation and satisfaction, is certainly incorrect because too sweeping. The evils of war are so great that, even when caused by an international delinquency,[76] war cannot be justified if the
[Pg 75] delinquency be comparatively unimportant and trifling. And, on the other hand, under certain circumstances and conditions many political causes of war may correctly be called just causes. Only such individuals as lack insight into history and human nature can, for instance, defend the opinion that a war is unjust which has been caused by the desire for national unity or by the desire to maintain the balance of power which under the present conditions and circumstances is the basis of all International Law. Necessity for a war implies its justification, whatever may be the cause. In the past many wars have undoubtedly been waged which were unjust from

whatever standpoint they may be viewed. Yet the number of wars diminishes gradually every year, and the majority of the European wars since the downfall of Napoleon I. were wars that were, from the standpoint of at any rate one of the belligerents, necessary and therefore just wars.

[76] See above, vol. I. §§ 151-156.

Causes in contradistinction to Pretexts for War.

§ 64. Be that as it may, causes of war must not be confounded with pretexts for war. A State which makes war against another will never confess that there is no just cause for war, and it will therefore, when it has made up its mind to make war for political reasons, always look out for a so-called just cause. Thus frequently the apparent reason of a war is only a pretext behind which the real cause is concealed. If two States are convinced that war between them is inevitable, and if consequently they face each other armed to the teeth, they will find at the suitable time many a so-called just cause plausible and calculated to serve as a pretext for the outbreak of the war which was planned and resolved upon long ago. The skill of politics and diplomacy are nowhere more needed than on the occasion of a State's conviction that it must go to war for one reason or another. Public opinion at home and abroad is often not ripe to appreciate the reason and not prepared for the scheme of the leading politicians, whose task it is to realise their plans with the [Pg 76] aid of pretexts which appear as the cause of war, whereas the real cause does not become apparent for some time.

Different kinds of War.

§ 65. Such writers on International Law as lay great stress upon the causes of war in general and upon the distinction between just causes and others, also lay great stress upon the distinction between different kinds of war. But as the rules of the Law of Nations are the same[77] for the different kinds of war that may be distinguished, this distinction is in most cases of no importance. Apart from that, there is no unanimity respecting the kinds of war, and it is apparent that, just as the causes of war are innumerable, so innumerable kinds of war can be distinguished. Thus one speaks of offensive and defensive, or religious, political, dynastic, national, civil wars; of wars of unity, independence, conquest, intervention, revenge, and of many other kinds. As the very name which each different kind of war bears always explains its character no further details are necessary respecting kinds of war.

[77] See above, § 61.

Ends of War.

§ 66. The cause or causes of a war determine at its inception the ends of such war. The ends of war must not be confounded with the purpose of war.[78] Whereas the purpose of war is always the same—namely, the overpowering and utter defeat of the opponent—the ends of war may be different in each case. Ends of war are those objects for the realisation of which a war is made.[79] In the beginning of the war its ends are determined by its cause or causes, as already said. But these ends may undergo alteration, or at least modification, with the progress and development [Pg 77] of the war. No moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was made. If war has once broken out the very national existence of the belligerents is more or less at stake. The risk the belligerents run, the exertion they make, the blood and wealth they sacrifice, the reputation they gain or lose through the changing fortune and chances of war—all these and many other factors work or may work together to influence the ends of a war so that eventually there is scarcely any longer a relation between them and the causes of the war. If war really were, as some writers maintain,[80] the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, no such alteration of the ends of war could take place without at once setting in the wrong such belligerent as changes the ends for which the war was initiated. But history shows that nothing of the kind is really the case, and the existing rules of International Law by no means forbid such alteration or modification of the ends of a war. This alteration or modification of the ends is the result of an alteration or modification of circumstances created during the progress of war through the factors previously mentioned; it could not be otherwise, and there is no moral, legal, or political reason why it should be otherwise. And the natural jealousy between the members of the Family of Nations, their conflicting interests in many points, and the necessity of a balance of power, are factors of sufficient strength to check the political dangers which such alteration of the ends of a war may eventually involve.

[78] Ends of war must likewise not be confounded with aims of land and sea warfare; see below, §§ 103 and 173.

[79] See Bluntschli, § 536; Lueder in Holtzendorff, IV. p. 364; Rivier, II. p. 219.

[Pg 78] [80] See above, § 54.

III

THE LAWS OF WAR

Hall, § 17—Westlake, *Chapters*, pp. 232-235—Maine, pp. 122-159—Phillimore, III. § 50—Taylor, § 470—Walker, *History*, I. §§ 106-108—Heffter, § 119—Lueder in Holtzendorff, IV. pp. 253-333—Ullmann, §§ 167 and 170—Bonfils, Nos. 1006-1013—Despagnet, Nos. 508-510—Pradier-Fodéré, VIII. Nos. 3212-3213—Rivier, II. pp. 238-242—Nys, III. pp. 160-164—Calvo, IV. §§ 1897-1898—Fiore, III. Nos. 1244-1260—Martens, II. § 107—Longuet, p. 12—Bordwell, pp. 100-196—Spaight, pp. 1-19—*Kriegsbrauch*, p. 2—*Land Warfare*, §§ 1-7—

Holland, *Studies*, pp. 40-96.

Origin of the Laws of War.

§ 67. Laws of War are the rules of the Law of Nations respecting warfare. The roots of the present Laws of War are to be traced back to practices of belligerents which arose and grew gradually during the latter part of the Middle Ages. The unsparing cruelty of the war practices during the greater part of the Middle Ages began gradually to be modified through the influence of Christianity and chivalry. And although these practices were cruel enough during the fifteenth, sixteenth, and seventeenth centuries, they were mild compared with those of still earlier times. Decided progress was made during the eighteenth, and again during the nineteenth century, after the close of the Napoleonic wars, especially in the years from 1850 to 1900. The laws of war evolved in this way: isolated milder practices became by-and-by usages, so-called *usus in bello*, manner of warfare, *Kriegs-Manier*, and these usages through custom and treaties turned into legal rules. And this evolution is constantly going on, for, besides the recognised Laws of War, there are usages in existence which have a tendency to become gradually legal rules of warfare. The whole growth of the laws and usages of war is determined by three principles. There is, first, the principle that a belligerent should be justified in applying any amount and any kind of force
[Pg 79] which is necessary for the realisation of the purpose of war—namely, the overpowering of the opponent. There is, secondly, the principle of humanity at work, which says that all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted to a belligerent. And, thirdly and lastly, there is at work the principle of chivalry which arose in the Middle Ages and introduced a certain amount of fairness in offence and defence, and a certain mutual respect. And, in contradistinction to the savage cruelty of former times, belligerents have in modern times come to the conviction that the realisation of the purpose of war is in no way hampered by indulgence shown to the wounded, the prisoners, and the private individuals who do not take part in the fighting. Thus the influence of the principle of humanity has been and is still enormous upon the practice of warfare. And the methods of warfare, although by the nature of war to a certain degree cruel and unsparing, become less cruel and more humane every day. But it must be emphasised that the whole evolution of the laws and usages of war could not have taken place but for the institution of standing armies, which dates from the fifteenth century. The humanising of the practices of war would have been impossible without the discipline of standing armies; and the important distinction between members of armed forces and private individuals could not have arisen without the existence of standing armies.

The latest Development of the Laws of War.

§ 68. The latest and the most important development of the Laws of War was produced through general treaties concluded between the majority of States since the beginning of the second part of the nineteenth century. The following are the treaties concerned:—

[Pg 80] (1) The Declaration of Paris of April 16, 1856, respecting warfare on sea. It abolishes privateering, recognises the principles that the neutral flag covers enemy goods and that neutral goods under an enemy flag cannot be seized, and enacts the rule that a blockade in order to be binding must be effective. The Declaration is signed by seven States, but eighteen others acceded in course of time.

(2) The Geneva Convention of August 22, 1864, for the amelioration of the condition of wounded soldiers in armies in the field, which originally was signed by only nine States, but to which in course of time all the civilised States—except Costa-Rica, Lichtenstein, and Monaco!—have acceded. A treaty containing a number of additional articles to the Convention was signed at Geneva on October 20, 1868, but was never ratified. A new Geneva Convention was signed on July 6, 1906, by thirty-five States, and several others have already acceded. There is no doubt that the whole civilised world will soon be a party to this new Geneva Convention. The principles of the Geneva Convention were adapted to maritime warfare by Conventions (see below, No. 8) of the First and Second Hague Peace Conferences.

(3) The Declaration of St. Petersburg of December 11, 1868, respecting the prohibition of the use in war of projectiles under 400 grammes (14 ounces) which are either explosive or charged with inflammable substances. It is signed by seventeen States.

(4) The Convention enacting "Regulations respecting the Laws of War on Land," agreed upon at the First Peace Conference of 1899.

The history of this Convention may be traced back to the *Instructions for the Government of Armies of the United States in the Field* which the United States published on April 14, 1863,
[Pg 81] during the War of Secession. These instructions, which were drafted by Professor Francis Lieber, of the Columbia College of New York, represent the first endeavour to codify the Laws of War, and they are even nowadays of great value and importance. In 1874 an International Conference, invited by the Emperor Alexander II. of Russia, met at Brussels for the purpose of discussing a draft code of the Laws of War on Land as prepared by Russia. The body of the articles agreed upon at this Conference, and known as the "Brussels Declarations," have, however, never become law, as ratification was never given by the Powers. But the Brussels Declarations were made the basis of deliberations on the part of the Institute of International Law, which at its meeting at Oxford in 1880 adopted a Manual[81] of the Laws of War consisting of a body of 86 rules under the title *Les Lois de la Guerre sur Terre*, and a copy of this draft code was sent to all the Governments of Europe and America. It was, however, not until the Hague Peace Conference of 1899 that the Powers reassembled to discuss again the codification of the Laws of War. At this

Conference the Brussels Declarations were taken as the basis of the deliberations; but although the bulk of its articles was taken over, several important modifications were introduced in the Convention, which was finally agreed upon and ratified, only a few Powers abstaining from ratification.

[81] See *Annuaire*, V. pp. 157-174.

The Second Peace Conference of 1907 has revised this Convention, and its place is now taken by Convention IV. of the Second Peace Conference. The Convention,[82] as the preamble expressly
[Pg 82] states, does not aim at giving a complete code of the Laws of War on Land, and cases beyond its scope still remain the subject of customary rules and usages. Further, it does not create universal International Law, as article 2 of the Convention expressly stipulates that the Regulations shall be binding upon the contracting Powers only in case of war between two or more of them, and shall cease to be binding in case a non-contracting Power takes part in the war. But, in spite of this express stipulation, there can be no doubt that in time the Regulations will become universal International Law. For all the Powers represented at the Second Peace Conference signed the Convention, except China, Spain, and Nicaragua, although some States made certain reservations. Nicaragua has since acceded, and it is certain that the outstanding States will in time also accede.

[82] For brevity's sake the Hague Convention enacting Regulations regarding the laws and customs of war on land will be referred to in the following pages as the *Hague Regulations*. It is, however, of importance to observe that the Hague Regulations, although they are intended to be binding upon the belligerents, are only the basis upon which the signatory Powers have to frame instructions for their forces. Article 1 declares: "The high contracting parties shall issue instructions to their armed land forces, which shall be in conformity with the Regulations respecting the Laws of War on Land annexed to the present Convention." The British War Office, therefore, published in 1912, a guide, *Land Warfare: an Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army*, written by order of His Majesty's Secretary of War by Colonel Edmonds and Professor Oppenheim, in which the Hague Regulations are systematically set out; their full text is published in Appendix 6 of the guide. But it should be mentioned that the British War Office had already in 1903 published a manual, drafted with great precision and clearness by Professor Holland, for the information of the British forces, comprising "The Laws and Customs of War on Land, as defined by the Hague Convention of 1899." See also Holland, *The Laws of War on Land (Written and Unwritten)*, Oxford, 1908.

(5) The Declaration concerning expanding (dumdum) bullets; see below, § 112.

(6) The Declaration concerning projectiles and explosives launched from balloons; see below, § 114.

(7) The Declaration concerning projectiles diffusing asphyxiating or deleterious gases; see below, § 113.

(8) The Convention for the adaptation to sea warfare of the principles of the Geneva Convention, produced by the First and revised by the Second Peace Conference.

(9) The Convention of 1907 concerning the opening of hostilities (Second Peace Conference).

[Pg 83] (10) The Convention of 1907 concerning the status of enemy merchantmen at the outbreak of hostilities (Second Peace Conference).

(11) The Convention of 1907 concerning the conversion of merchantmen into men-of-war (Second Peace Conference).

(12) The Convention of 1907 concerning the laying of automatic submarine contact mines (Second Peace Conference).

(13) The Convention of 1907 concerning bombardment by naval forces in time of war (Second Peace Conference).

(14) The Convention of 1907 concerning certain restrictions on the exercise of the right of capture in maritime war (Second Peace Conference).

(15) The two Conventions of 1907 concerning the rights and duties of neutral Powers and persons in land warfare and in sea warfare (Second Peace Conference).

(16) The Declaration of London of February 26, 1909, concerning the Laws of Naval War, which was signed at the Conference of London by Great Britain, Germany, the United States of America, Austria-Hungary, Spain, France, Italy, Japan, Holland, and Russia, but is not yet ratified. This Declaration enacts rules concerning blockade, contraband, unneutral service, destruction of neutral prizes, transfer of vessels to a neutral flag, enemy character, convoy, and resistance to search.[83]

[83] The United States of America (see above, vol. I. § 32), published on June 27, 1900, a body of rules for the use of her navy under the title *The Laws and Usages of War on Sea*—the so-called "United States Naval War Code." This code, although withdrawn on February 4, 1904, will undoubtedly be the starting-point of a movement for a Naval War Code to be generally agreed upon by the Powers. See below, § 179.

Binding force of the Laws of War

[Pg 84] § 69. As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals[84] as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects. In accordance with the German proverb, *Kriegsraeson geht vor Kriegsmanier* (*necessity in war overrules the manner of warfare*), many German authors[85] and the Swiss-Belgian Rivier[86] maintain that the laws of war lose their binding force in case of extreme necessity. Such case of extreme necessity is said to have arisen when violation of the laws of war alone offers either a means of escape from extreme danger or the realisation of the purpose of war—namely, the overpowering of the opponent. This alleged exception to the

binding force of the Laws of War, is, however, not at all generally accepted by German writers, for instance, Bluntschli does not mention it. English, American, French, and Italian writers do not, so far as I am aware, acknowledge it. The protest of Westlake,[87] therefore, against such an exception is the more justified, as a great danger would be involved by its admission.

[84] See below, § 248.

[85] See, for instance, Lueder in Holtzendorff, IV. pp. 254-257; Ullmann, § 170; Meurer, II. pp. 7-15. Liszt, who in former editions agreed with these writers, deserts their ranks in the sixth edition (§ 24, IV. 3), and correctly takes the other side. See also Nys, III. p. 202, and Holland, *War*, § 2, where the older literature is quoted.

[86] See Rivier, II. p. 242.

[87] See Westlake, II. pp. 115-117, and Westlake, *Chapters*, p. 238.

The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war—that is universally binding customs and international treaties, but only by usages (*Manier, i.e. Brauch*), and it says that necessity in war overrules usages of warfare. In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws, firm rules recognised either by international treaties or by
[Pg 85] universal custom.[88] These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self-preservation. Thus, for instance, the rules that poisoned arms and poison are forbidden, and that it is not allowed treacherously to kill or wound individuals belonging to the hostile army, do not lose their binding force even if escape from extreme danger or the realisation of the purpose of war would result from an act of this kind. Article 22 of the Hague Rules stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity. What may be ignored in case of military necessity are not the laws of war, but only the usages of war. *Kriegsraeson geht vor Kriegsmanier*, but not *vor Kriegsrecht*!

[88] Concerning the distinction between usage and custom, see above, vol. I. § 17.

IV

THE REGION OF WAR

Taylor, §§ 471 and 498—Heffter, § 118—Lueder in Holtzendorff, IV. pp. 362-364—Klüber, § 242—Liszt, § 40, I.—Ullmann, § 174—Pradier-Fodéré, VI. No. 2733, and VIII. Nos. 3104-3106—Rivier, II. pp. 216-219—Boeck, Nos. 214-230—Longuet, §§ 18-25—Perels, § 33—Rettich, *Zur Theorie und Geschichte des Rechts zum Kriege* (1888), pp. 174-213.

Region of War in contradistinction to Theatre of War.

§ 70. Region of war is that part of the surface of the earth in which the belligerents may prepare and execute hostilities against each other. In this meaning region of war ought[89] to be distinguished from theatre of war. The latter is that part of a territory or the Open Sea on which hostilities actually take place. Legally no part of the earth which is not region of war may be
[Pg 86] made the theatre of war, but not every section of the whole region of war is necessarily theatre of war. Thus, in the war between Great Britain and the two South African Republics the whole of the territory of the British Empire and the Open Sea, as well as the territory of the Republics, was the region of war, but the theatre of war was in South Africa only. On the other hand, in a war between Great Britain and another great naval Power it might well happen that the region of war is in many of its sections made the theatre of war.

[89] This distinction, although of considerable importance, does not appear to have been made by any other publicist.

Particular Region of every War.

§ 71. The region of war depends upon the belligerents. For this reason every war has its particular region, so far at any rate as territorial region is concerned. For besides the Open Sea[90] and all such territories as are as yet not occupied by any State, which are always within the region of war, the particular region of every war is the whole of the territories and territorial waters of the belligerents. It must, however, be specially observed that any part of the globe which is permanently neutralised,[91] is always exempt from the region of war.

[90] See above, vol. I. § 256.

[91] See below, § 72.

Since colonies are a part of the territory of the mother country, they fall within the region of war in the case of a war between the mother country and another State, whatever their position may be within the colonial empire they belong to. Thus in a war between Great Britain and France the whole of Australia, of Canada, of India, and so on, would be included with the British Islands as region of war. And, further, as States under the suzerainty of another State are internationally in several respects considered to be a portion of the latter's territory,[92] they fall within the region of war in case of war between the suzerain and another Power. Again, such
[Pg 87] parts of the territory of a State as are under the *condominium* or under the administration of another State[93] fall within the region of war in case of war between one of the *condomini* and another Power and in case of war between the administrating State and another State. Thus, in a war between Great Britain and another Power, Cyprus would fall within the region of war; and the Soudan, which is in the *condominium* of England and Egypt, would likewise do so. On the other hand, Cyprus would not fall within the region of war in the case of war between Turkey and another Power, Great Britain excepted.

[92] See above, vol. I. §§ 91 and 169.

[93] See above, vol. I. § 171.

Although as a rule the territories of both belligerents, together with the Open Sea, fall within the region of war, and neutral territories do not, exceptions to the rule may occur:—

(1) A belligerent can deliberately treat certain territories which legally fall within the region of war, as well as parts of the Open Sea, as though they were not parts of the region of war, provided that such territories on their part fulfil the duties incumbent upon neutrals. Thus during the Turco-Italian War in 1911 and 1912, Italy treated Crete and Egypt as though they were not parts of the region of war.[94]

(2) Cases are possible in which a part or the whole of the territory of a neutral State falls within the region of war. These cases arise in wars in which such neutral territories are the very objects of the war, as Korea, which was at that time an independent State, and the Chinese province of Manchuria[95] were in the Russo-Japanese War of 1904 and 1905. Such a case may also occur if
[Pg 88] an army of one of the belligerents crosses the frontier of a neutral State, but is not at once disarmed and interned, and is, therefore, able at any moment to recross the frontier and attack the other belligerent.[96] Since necessity of self-preservation can compel the latter on his part also to cross the neutral frontier and pursue and attack the enemy on neutral territory, the part of such neutral territory concerned would for this reason become part of the region of war.

[94] There is no doubt that this attitude of Italy is explained by the fact that Egypt, although legally under Turkish suzerainty, is actually under British occupation, and that Crete is forcibly kept by the Powers under Turkish suzerainty.

[95] See below, § 320.

[96] See below, § 339.

Exclusion from region of war through neutralisation.

§ 72. Although the Open Sea in its whole extent and the whole of the territories of the belligerents are as a rule within the region of war, certain parts can be excluded through neutralisation. Such neutralisation can take place permanently through a general treaty of the Powers or temporarily through a special treaty of the belligerents. At present no part of the Open Sea is neutralised, as the neutralisation of the Black Sea was abolished[97] in 1871. But the following are some important instances[98] of permanent neutralisation of parts of territories:—

(1) The former Sardinian, but since 1860 French, provinces of Chablais and Faucigny[99] are permanently neutralised through article 92 of the Act of the Vienna Congress, 1815.

(2) The Ionian Islands through article 2 of the Treaty of London of November 14, 1863, are permanently neutralised since they merged in the kingdom of Greece. But this neutralisation was restricted[100] to the islands of Corfu and Paxo only by article 2 of the treaty of London of March 24, 1864.

[Pg 89] (3) The Suez Canal is permanently neutralised[101] since 1888.

(4) The Straits of Magellan[102] are permanently neutralised through article 5 of the boundary treaty of Buenos Ayres of July 23, 1881. But this treaty is not a general treaty of the Powers, since it is concluded between Argentina and Chili only.

(5) The Panama[103] Canal is permanently neutralised through article 3 of the Hay-Pauncefote treaty of November 18, 1901. But this treaty is not a general treaty of the Powers either, being concluded between only Great Britain and the United States.

(6) A piece of territory along the frontier between Sweden and Norway is neutralised by the Convention of Stockholm of October 26, 1905, which includes rules concerning a neutral zone.[104] But this is a neutralisation agreed upon between Sweden and Norway only, no third Power has anything to do with it, and even the contracting Powers stipulate—see article 1, last paragraph—that the neutralisation shall not be valid in the case of a war against a common enemy.

[97] See above, vol. I. §§ 181 and 256.

[98] The matter is thoroughly treated in Rettich, *Zur Theorie und Geschichte des Rechtes zum Kriege* (1888), pp. 174-213, where also the neutralisation of some so-called international rivers, especially the Danube, Congo, and Niger, is discussed.

[99] See above, vol. I. § 207.

[100] See Martens, *N.R.G.* XVIII. p. 63.

[101] See above, vol. I. § 183.

[102] See Martens, *N.R.G.* 2nd Ser. XII. p. 491, and above, vol. I. § 195, p. 267, note 2, and § 568, p. 592, note 2.

[103] See above, vol. I. § 184.

[104] See Martens, *N.R.G.* 2nd Ser. XXXIV. (1907), p. 703.

As regards temporary neutralisation, it is possible for parts of the territories of belligerents and certain parts of the Open Sea to become neutralised through a treaty of the belligerents for the time of a particular war only. Thus, when in 1870 war broke out between France and Germany, the commander of the French man-of-war[105] *Dupleix* arranged with the commander of the German man-of-war *Hertha*—both stationed in the Japanese and Chinese waters—that they should, through their embassies in Yokohama, propose to their respective Governments the neutralisation of the Japanese and Chinese waters for the time of the war. Germany consented,
[Pg 90] but France refused the neutralisation. Again, at the commencement of the Turco-Italian War in 1911, Turkey proposed the neutralisation of the Red Sea, but Italy refused to agree to it.

[105] See Perels, § 33, p. 160, note 2.

Asserted exclusion of the Baltic Sea from the Region of War.

§ 73. That there is at present no part of the Open Sea neutralised is universally recognised, and this applies to the Baltic Sea, which is admittedly part of the Open Sea. Some writers,[106] however, maintain that the littoral States of the Baltic have a right to forbid all hostilities within the Baltic in case of a war between other States than themselves, and could thereby neutralise the Baltic without the consent and even against the will of the belligerents. This opinion is based on the fact that during the eighteenth century the littoral States of the Baltic claimed that right in several conventions, but it appears untenable, because it is opposed to the universally recognised principle of the freedom of the Open Sea. As no State has territorial supremacy over parts of the Open Sea, I cannot see how such a right of the littoral States of the Baltic could be justified.[107]

[106] See Perels, pp. 160-163, who discusses the question at some length and answers it in the affirmative.

[107] See Rivier, II. p. 218; Bonfils, § 504; Nys, I. pp. 448-450.

V

THE BELLIGERENTS

Vattel, III. § 4—Phillimore, III. §§ 92-93—Taylor, §§ 458-460—Wheaton, § 294—Bluntschli, §§ 511-514—Heffter, §§ 114-117—Lueder in Holtzendorff, IV. pp. 237-248—Klüber, § 236—G. F. Martens, II. § 264—Gareis, § 83—Liszt, § 39, II.—Ullmann, §§ 168-169—Pradier-Fodéré, VI. Nos. 2656-2660—Rivier, II. pp. 207-216—Nys. III. pp. 114-118—Calvo, IV. §§ 2004-2038—Martens, II. § 108—Heilborn, *System*, pp. 333-335.

Qualification to become a Belligerent (*facultas bellandi*).

§ 74. As the Law of Nations recognises the status of war and its effects as regards rights and duties between the two or more belligerents on the one hand, and, on the other, between the [Pg 91] belligerents and neutral States, the question arises what kind of States are legally qualified to make war and to become thereby belligerents. Publicists who discuss this question at all speak mostly of a *right* of States to make war, a *jus belli*. But if this so-called right is examined, it turns out to be no right at all, as there is no corresponding duty in those against whom the right is said to exist.[108] A State which makes war against another exercises one of its natural functions, and the only question is whether such State is or is not legally qualified to exercise such function. Now, according to the Law of Nations full-Sovereign States alone possess the legal qualification to become belligerents; half-and part-Sovereign States are not legally qualified to become belligerents. Since neutralised States, as Switzerland, Belgium, and Luxemburg, are full-Sovereign States, they are legally qualified to become belligerents, although their neutralisation binds them not to make use of their qualification except for defence. If they become belligerents because they are attacked, they do not lose their character as neutralised States, but if they become belligerents for offensive purposes they *ipso facto* lose this character.

[108] See Heilborn, *System*, p. 333.

Possibility in contradistinction to qualification to become a Belligerent.

§ 75. Such States as do not possess the legal qualification to become belligerents are by law prohibited from offensive or defensive warfare. But the possession of armed forces makes it possible for them in fact to enter into war and to become belligerents. History records instances enough of such States having actually made war. Thus in 1876 Servia and Montenegro, although at that time vassal States under Turkish suzerainty, declared war against Turkey, and in March 1877, peace was concluded between Turkey and Servia.[109] And when in April 1877 war broke [Pg 92] out between Russia and Turkey, the then Turkish vassal State Roumania joined Russia, and Servia declared war anew against Turkey in December 1877. Further in November 1885 a war was waged between Servia, which had become a full-Sovereign State, and Bulgaria, which was at the time still a vassal State under Turkish suzerainty; the war lasted actually only a fortnight, but the formal treaty of peace was not signed until March 3, 1886, at Bukarest.[110] And although Turkey is a party to this treaty, Bulgaria appears as a party thereto independently and on its own behalf.

[109] See Martens, *N.R.G.* 2nd Ser. IV. pp. 12, 14, 172.

[110] See Martens, *N.R.G.* 2nd Ser. IV. p. 284.

Whenever a case arises in which a State lacking the legal qualification to make war nevertheless actually makes war, such State is a belligerent, the contention is real war and all the rules of International Law respecting warfare apply to it.[111] Therefore, an armed contention between the suzerain and the vassal, between a full-Sovereign State and a vassal State under the suzerainty of another State, and, lastly, between a Federal State and one or more of its members, is war[112] in the technical sense of the term according to the Law of Nations.

[111] This is quite apparent through the fact that Bulgaria by accession became a party to the Geneva Convention at a time when she was still a vassal State under Turkish suzerainty.

[112] See above, § 56, and Baty, *International Law in South Africa* (1900), pp. 66-68.

Insurgents as a Belligerent Power.

§ 76. The distinction between legal qualification and actual power to make war explains the fact

that insurgents may become a belligerent Power. It is a customary rule of the Law of Nations that any State may recognise insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government
[Pg 93] according to the laws and usages of war.[113] Such insurgents in fact, although not in law, form a State-like community, and practically they are making war, although their contention is by International Law not considered as war in the technical sense of the term as long as they have not received recognition as a belligerent Power.

[113] See above, § 59. See also Rougier, *Les guerres civiles*, &c. (1903), pp. 372-447, and Westlake, I. pp. 50-57. The Institute of International Law, at its meeting at Neuchatel in 1900, adopted a body of nine articles concerning the rights and duties of foreign States in case of an insurrection; articles 4-9 deal with the recognition of the belligerency of insurgents. See *Annuaire*, XVIII. p. 227.

Principal and accessory Belligerent Parties.

§ 77. War occurs usually between two States, one belligerent party being on each side. But there are cases in which there are on one or on both sides several parties, and in some of such cases principal and accessory belligerent parties are to be distinguished.

Principal belligerent parties are those parties to a war who wage it on the basis of a treaty of alliance, whether such treaty was concluded before or during the war. On the other hand, accessory belligerent parties are such States as provide help and succour only in a limited way to a principal belligerent party at war with another State; for instance, by paying subsidies, sending a certain number of troops or men-of-war to take part in the contention, granting a coaling station to the men-of-war of the principal party, allowing the latter's troops a passage through their territory, and the like. Such accessory party becomes a belligerent through rendering help.

The matter need hardly be mentioned at all were it not for the fact that the question was formerly discussed by publicists whether or not it involved a violation of neutrality on the part of a neutral State in case it fulfilled in time of war a treaty concluded in time of peace, by the terms of which it had to grant a coaling station, the passage of troops through its territory, and the like,
[Pg 94] to one of the belligerents. This question is identical with the question, to be treated below in § 305, whether a qualified neutrality, in contradistinction to a perfect neutrality, is admissible. Since the answer to this question is in the negative, such State as fulfils a treaty obligation of this kind in time of war may be considered by the other side an accessory belligerent party to the war, and all doubt in the matter ought now to be removed since article 2 of Convention V. of the Second Peace Conference[114] categorically enacts that "belligerents are forbidden to move across the territory of a neutral Power troops or convoys either of munitions of war or of supplies."

[114] See also article 3 of Convention V.

VI

THE ARMED FORCES OF THE BELLIGERENTS

Vattel, III. §§ 223-231—Hall, §§ 177-179, 181—Lawrence, §§ 148-150—Westlake, II. pp. 60-63—Manning, pp. 206-210—Phillimore, III. § 94—Twiss, II. § 45—Halleck, I. pp. 555-562—Taylor, §§ 471-476—Moore, VII. § 1109—Wheaton, §§ 356-358—Bluntschli, §§ 569-572—Heffter, §§ 124-124A—Lueder in Holtzendorff, IV. pp. 371-385—Klüber, 267—G. F. Martens, II. § 271—Gareis, § 83—Ullmann, § 175—Liszt, § 40, II.—Bonfils, Nos. 1088-1098—Despagnet, Nos. 520-523—Pradier-Fodéré, VI. Nos. 2721-2732, and VIII. Nos. 3091-3102—Nys, III. pp. 155-202—Rivier, II. pp. 242-259—Calvo, IV. §§ 2044-2065—Fiore, III. Nos. 1303-1316, and Code, Nos. 1455-1475—Martens, II. § 112—Longuet, §§ 26-36—Pillet, pp. 35-59—*Kriegsbrauch*, pp. 4-8—Perels, § 34—Boeck, Nos. 209-213—Dupuis, Nos. 74-91—Lawrence, *War*, pp. 195-218—Zorn, pp. 36-73—Bordwell, pp. 228-236—*Land Warfare*, § 17-38—Meurer, II. §§ 11-20—Spaight, pp. 34-72—Ariga, pp. 74-91—Takahashi, pp. 89-93.

Regular Armies and Navies.

§ 78. The chief part of the armed forces of the belligerents are their regular armies and navies. What kinds of forces constitute a regular army and a regular navy is not for International Law to determine, but a matter of Municipal Law exclusively. Whether or not so-called Militia and Volunteer corps belong to armies rests entirely with the Municipal Law of the belligerents. There
[Pg 95] are several States whose armies consist of Militia and Volunteer Corps exclusively, no standing army being provided for. The Hague Regulations expressly stipulate in article 1 that in countries where Militia or Volunteer Corps constitute the army or form part of it they are included under the denomination "Army." It is likewise irrelevant to consider the composition of a regular army, whether it is based on conscription or not, whether natives only or foreigners also are enrolled, and the like.

Non-combatant Members of Armed Forces.

§ 79. In the main, armed forces consist of combatants, but no army in the field consists of combatants exclusively, as there are always several kinds of other individuals, such as couriers, aeronauts, doctors, farriers, veterinary surgeons, chaplains, nurses, official and voluntary ambulance men, contractors, canteen-caterers, newspaper correspondents,[115] civil servants, diplomatists, and foreign military attachés[116] in the suite of the Commander-in-Chief.

[115] See Rey in *R.G.* XVII. (1910), pp. 73-102, and Higgins, *War and the Private Citizen* (1912), pp. 91-114.

[116] See Rey in *R.G.* XVII. (1910), pp. 63-73.

Writers on the Law of Nations do not agree as regards the position of such individuals; they are not mere private individuals, but, on the other hand, are certainly not combatants, although they may—as, for instance, couriers, doctors, farriers, and veterinary surgeons—have the character of soldiers. They may correctly be said to belong *indirectly* to the armed forces. Article 3 of the Hague Regulations expressly stipulates that the armed forces of the belligerents may consist of combatants and non-combatants, and that both in case of capture must be treated as prisoners of war, provided[117] they produce a certificate of identification from the military authorities of the army they are accompanying. However, when one speaks of armed forces generally, combatants only are in consideration.

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[117] See below, § 127.

Irregular Forces.

§ 80. Very often the armed forces of belligerents consist throughout the war of their regular armies only, but, on the other hand, it happens frequently that irregular forces take part in the war. Of such irregular forces there are two different kinds to be distinguished—first, such as are authorised by the belligerents; and, secondly, such as are acting on their own initiative and their own account without special authorisation. Formerly it was a recognised rule of International Law that only the members of authorised irregular forces enjoyed the privileges due to the members of the armed forces of belligerents, whereas members of unauthorised irregular forces were considered to be war criminals and could be shot when captured. During the Franco-German war in 1870 the Germans acted throughout according to this rule with regard to the so-called "Franctireurs," requesting the production of a special authorisation from the French Government from every irregular combatant they captured, failing which he was shot. But according to article 1 of the Hague Regulations this rule is now obsolete, and its place is taken by the rule that irregulars enjoy the privileges due to members of the armed forces of the belligerents, although they do not act under authorisation, provided (1) that they are commanded by a person responsible for his subordinates, (2) that they have a fixed distinctive emblem

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recognisable at a distance,[118] (3) that they carry arms openly,[119] and (4) that they conduct their operations in accordance with the laws and customs of war. It must, however, be emphasised that this rule applies only to irregulars fighting in bodies, however small. Such individuals as take up arms or commit hostile acts singly and severally are still liable to be treated as war criminals, and shot.[120]

[118] The distance at which the emblem should be visible is undetermined. See *Land Warfare*, § 23, where it is pointed out that it is reasonable to expect that the silhouette of an irregular combatant in the position of standing against the skyline should be at once distinguishable from the outline of a peaceable inhabitant, and this by the naked eye of ordinary individuals, at a distance at which the form of an individual can be determined.—See Ariga, p. 87, concerning 120 irregulars who were treated as criminals and shot by the Japanese after the occupation of Vladimirowka on the island of Sakhaline.

[119] See *Land Warfare*, § 26; individuals whose sole arm is a pistol, hand-grenade, a dagger concealed about the person, or a sword-stick, are not such as carry their arms openly.

[120] See below, § 254.

Levies *en masse*.

§ 81. It sometimes happens during war that on the approach of the enemy a belligerent calls the whole population of the country to arms and thus makes them a part, although a more or less irregular part, of his armed forces. Provided they receive some organisation and comply with the laws and usages of war, the combatants who take part in such a levy *en masse* organised by the State enjoy the privileges due to members of armed forces.

It sometimes happens, further, during wars, that a levy *en masse* takes place spontaneously without organisation by a belligerent, and the question arises whether or not those who take part in such levies *en masse* belong to the armed forces of the belligerents, and therefore enjoy the privileges due to members of such forces. Article 2 of the Hague Regulations stipulates that the population of a territory not yet occupied who, on the enemy's approach, spontaneously take up arms to resist the invading enemy, without having time to organise themselves under responsible commanders and to procure fixed distinctive emblems recognisable at a distance, shall nevertheless enjoy the privileges due to armed forces, provided that they carry arms openly and act otherwise in conformity with the laws and usages of war. But this case is totally different from a levy *en masse* of the population of a territory already invaded by the enemy, for the

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purpose of freeing the country from the invader. The stipulation of the Hague Regulations quoted above does not cover this case, in which, therefore, the old customary rule of International Law is valid, that those taking part in such a levy *en masse*, if captured, are liable to be shot.[121]

[121] See below, § 254. Article 85 of the American *Instructions for the Government of Armies in the Field* of 1863 has enacted this rule as follows: "War rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled Government or not...."

It is of particular importance not to confound invasion with occupation in this matter. Article 2 distinctly speaks of the *approach* of the enemy, and thereby sanctions only such a levy *en masse* as takes place in territory not yet *invaded* by the enemy. Once the territory is invaded, although the invasion has not yet ripened into occupation,[122] a levy *en masse* is no longer legitimate. But, of course, the term *territory*, as used by article 2, is not intended to mean[123] the whole extent of the State of a belligerent, but refers only to such parts of it as are not yet invaded. For this reason, if a town is already invaded, but not a neighbouring town, the inhabitants of the latter

may, on the approach of the enemy, legitimately rise *en masse*. And it matters not whether the individuals taking part in the levy *en masse* are acting in immediate combination with a regular army or separately from it.[124]

[122] Concerning the difference between invasion and occupation, see below, § 167.

[123] See *Land Warfare*, §§ 31-32.

[124] See *Land Warfare*, § 34.

Barbarous Forces.

§ 82. As International Law grew up amongst the States of Christendom, and as the circle of the members of the Family of Nations includes only civilised, although not necessarily Christian, States, all writers on International Law agree that in wars between themselves the members of
[Pg 99] the Family of Nations should not make use of barbarous forces—that is, troops consisting of individuals belonging to savage tribes and barbarous races. But it can hardly be maintained that a rule of this kind has customarily grown up in practice, nor has it been stipulated by treaties, and the Hague Regulations overlook this point. This being the fact, it is difficult to say whether the members of such barbarous forces, if employed in a war between members of the Family of Nations, would enjoy the privileges due to members of armed forces generally. I see no reason why they should not, provided such barbarous forces would or could comply with the laws and usages of war prevalent according to International Law. But the very fact that they are barbarians makes it probable that they could or would not do so, and then it would be unreasonable to grant them the privileges generally due to members of armed forces, and it would be necessary to treat them according to discretion.[125] But it must be specially observed that the employment of barbarous forces must not be confounded with the enrolling of coloured individuals into the regular army and the employment of regiments consisting of disciplined coloured soldiers. There is no reason whatever why, for instance, the members of a regiment eventually formed by the United States of America out of negroes bred and educated in America, or why members of Indian regiments under English commanders, if employed in wars between members of the Family of Nations, should not enjoy the privileges due to the members of armed forces according to International Law.

[125] As regards the limited use made of armed natives as scouts, and the like, on the part of the British commanders during the South-African War, see *The Times' History of the War in South Africa*, pp. 249-251. The Boers refused quarter to any such armed natives as fell into their hands.

Privateers.

§ 83. Formerly privateers were a generally recognised part of the armed forces of the
[Pg 100] belligerents, private vessels being commissioned by the belligerents through Letters of Marque to carry on hostilities at sea, and particularly to capture enemy merchantmen.[126] From the fifteenth century, when privateering began to grow up, down to the eighteenth century, belligerents used to grant such Letters of Marque to private ships owned by their subjects and by the subjects of neutral States. But during the eighteenth century the practice grew up that belligerents granted Letters of Marque to private ships of their own subjects only.[127] However, privateering was abolished by the Declaration of Paris in 1856 as between the signatory Powers and others who joined it later. And although privateering would still be legal as between other Powers, it will in future scarcely be made use of. In all the wars that occurred after 1856 between such Powers, no Letters of Marque were granted to private ships.[128]

[126] See Martens, *Essai concernant les armateurs, les prises, et surtout les reprises* (1795).

[127] Many publicists maintain that nowadays a privateer commissioned by another State than that of which he is a subject is liable to be treated as a pirate when captured. With this, however, I cannot agree; see above, vol. I. § 273, Hall, § 81, and below, § 330.

[128] See below, § 177. It is confidently to be hoped that the great progress made by the abolition of privateering through the Declaration of Paris will never be undone. But it is of importance to note the fact that up to the present day endeavours have been made on the part of freelances to win public opinion for a retrograde step. See, for instance, Munro-Butler Johnstone, *Handbook of Maritime Rights; and the Declaration of Paris Considered* (1876), and Gibson Bowles, *The Declaration of Paris of 1856* (1900); see also Perels, pp. 177-179. The Declaration of Paris being a law-making treaty which does not provide the right of the several signatory Powers to give notice of withdrawal, a signatory Power is not at liberty to give such notice, although Mr. Gibson Bowles (*op. cit.* pp. 169-179) asserts that this could be done. See above, vol. I. § 12.

Converted Merchantmen.

§ 84. A case which happened in 1870, soon after the outbreak of the Franco-German war, gave occasion for the question whether converted merchantmen could be considered a part of the armed naval forces of a belligerent. As the North-German Confederation owned only a few men-
[Pg 101] of-war, the creation of a volunteer fleet was intended. The King of Prussia, as President of the Confederation, invited the owners of private German vessels to make them a part of the German navy under the following conditions: Every ship should be assessed as to her value, and 10 per cent. of such value should at once be paid in cash to the owner as a price for the charter of the ship. The owner should engage the crew himself, but the latter should become for the time of the war members of the German navy, wear the German naval uniform, and the ship should sail under the German war flag and be armed and adapted for her purpose by the German naval authorities. Should the ship be captured or destroyed by the enemy, the assessed value should be paid to her owners in full; but should it be restored after the war undamaged, the owner should retain the 10 per cent. received as charter price. All such vessels should only try to capture or

destroy French men-of-war, and if successful the owner should receive a sum between £1500 and £7500 as premium. The French Government considered this scheme a disguised evasion of the Declaration of Paris which abolished privateering, and requested the intervention of Great Britain. The British Government brought the case before the Law Officers of the Crown, who declared the German scheme to be substantially different from the revival of privateering, and consequently the British Government refused to object to it. The scheme, however, was never put into practice.[129]

[129] See Perels, § 34; Hall, § 182; Boeck, No. 211; Dupuis, Nos. 81-84.

Now, in spite of the opinion of the British Law Officers, writers on International Law differ as to the legality of the above scheme; but, on the other hand, they are unanimous that not every scheme for a voluntary fleet is to be rejected. Russia,[130] in fact, since 1877, has possessed a voluntary fleet. France[131] has made arrangements with certain steamship companies according
[Pg 102] to which their mail-boats have to be constructed on plans approved by the Government, have to be commanded by officers of the French navy, and have to be incorporated in the French navy at the outbreak of war. Great Britain from 1887 onwards has entered into agreements with several powerful British steamship companies for the purpose of securing their vessels at the outbreak of hostilities; and the United States of America in 1892 made similar arrangements with the American Line.[132]

[130] See Dupuis, No. 85.

[131] See Dupuis, No. 86.

[132] See Lawrence, § 201, and Dupuis, Nos. 87-88. On the whole question see Pradier-Fodéré, VIII. Nos. 3102-3103.

Matters were brought to a climax in 1904, during the Russo-Japanese War, through the cases of the *Peterburg* and the *Smolensk*.[133] On July 4 and 6 of that year, these vessels, which belonged to the Russian volunteer fleet in the Black Sea, were allowed to pass the Bosphorus and the Dardanelles, which are closed[134] to men-of-war of all nations, because they were flying the Russian commercial flag. They likewise passed the Suez Canal under their commercial flag, but after leaving Suez they converted themselves into men-of-war by hoisting the Russian war flag, and began to exercise over neutral merchantmen all rights of supervision which belligerents can claim for their cruisers in time of war. On July 13 the *Peterburg* captured the British P. & O. steamer *Malacca* for alleged carriage of contraband, and put a prize-crew on board for the purpose of navigating her to Libau. But the British Government protested; the *Malacca* was released at Algiers on her way to Libau on July 27, and Russia agreed that the *Peterburg* and the *Smolensk* should no longer act as cruisers, and that all neutral vessels captured by them should be released.

[133] See the details of the career of these vessels in Lawrence, *War*, pp. 205 *seq.*

[134] See above, vol. I. § 197.

This case was the cause of the question of the conversion of merchantmen into men-of-war
[Pg 103] being taken up by the Second Peace Conference in 1907, which produced Convention VII. on the matter.[135] This Convention, which is signed by all the States represented at the Conference except the United States of America, China, San Domingo, Nicaragua, and Uruguay—but Nicaragua acceded later—comprises twelve articles; its more important stipulations are the following: No converted vessel can have the status of a warship unless she is placed under the direct authority, immediate control, and responsibility of the Power whose flag she flies (article 1). Such a vessel must, therefore, bear the external marks which distinguish the warships of her nationality (article 2); the commander must be in the service of the State concerned, must be duly commissioned, and his name must figure on the list of the officers of the military fleet (article 3); and the crew must be subject to the rules of military discipline (article 4). A converted vessel must observe the laws and usages of war (article 5) and her conversion must as soon as possible be announced by the belligerent concerned in the list of the ships of his military fleet (article 6).

[135] See Wilson in *A.J.* II. (1908), pp. 271-275; Lémonon, pp. 607-622; Higgins, pp. 312-321; Dupuis, Nos. 48-58; Nippold, II. pp. 73-84; Scott, *Conferences*, pp. 568-576; Higgins, *War and the Private Citizen* (1912), pp. 115-168.

The opinion, which largely prevails, that through this admittance of the conversion of merchantmen into men-of-war privateering has been revived, is absolutely unfounded, for the rules stipulated by Convention VII. in no way abrogate the rule of the Declaration of Paris that privateering is and remains abolished. But the Convention does not give satisfaction in so far as it does not settle the questions where the conversion of a vessel may be performed, and whether it
[Pg 104] is permitted to reconvert, before the termination of the war, into a merchantman a vessel which during the war had been converted into a warship. The fact is, the Powers could not come to an agreement on these two points, the one party claiming that conversion could only be performed within a harbour of the converting Power, or an enemy harbour occupied by it, the other party defending the claim to convert likewise on the High Seas. One must look to the future for a compromise that will settle this vexed controversy. It is, however, important to notice the fact that the preamble of Convention VII. states expressly that the question of the place where a conversion may be performed remains open. Those Powers which claim that conversions[136] must not take place on the High Seas are not, therefore, prevented from refusing to acknowledge the public character of any vessel which had been converted on the High Seas, and from upholding their view that a converted vessel may not alternately claim the character and the privileges of a belligerent man-of-war and a merchantman.

[136] Concerning the question whether an enemy merchantman, captured on the High Seas, may at once be converted into a warship, see below, p. 231, *note* 2.

The Crews of Merchantmen.

§ 85. In a sense the crews of merchantmen owned by subjects of the belligerents belong to the latter's armed forces. For those vessels are liable to be seized by enemy men-of-war, and if attacked for that purpose they may defend themselves, may return the attack, and eventually seize the attacking men-of-war. The crews of merchantmen become in such cases combatants, and enjoy all the privileges of the members of armed forces. But unless attacked they must not commit hostilities, and if they do so they are liable to be treated as criminals just as are private individuals who commit hostilities in land warfare. Some writers[137] assert that, although
[Pg 105] merchantmen of the belligerents are not competent to exercise the right of visit, search, and capture towards neutral vessels, they may attack enemy vessels—merchantmen as well as public vessels—not merely in self-defence but even without having been previously attacked, and that, consequently, the crews must in such case enjoy the privileges due to members of the armed forces. But this opinion is absolutely without foundation nowadays,[138] even in former times it was not generally recognised.[139]

[137] See Wheaton, § 357; Taylor, § 496; Walker, p. 135, and *Science*, p. 268.

[138] See below, § 181, and Hall, § 183.

[139] See Vattel, III. § 226, and G. F. Martens, II. § 289.

It should be mentioned in regard to the fate of the crews of captured merchantmen that a distinction is to be made according as to whether or no a vessel has defended herself against a legitimate attack. In the first case the members of the crew become prisoners of war, for by legitimately taking part in the fighting they have become members of the armed forces of the enemy.[140] In the second case, articles 5 to 7 of Convention XI. of the Second Peace Conference enact the following rules:[141]—

(1) Such members of the crew as are subjects of neutral States may not be made prisoners of war.

(2) The captain and the officers who are subjects of neutral States may only be made prisoners if they refuse to give a promise in writing not to serve on an enemy ship while the war lasts.

(3) The captain, officers, and such members of the crew who are enemy subjects may only be made prisoners if they refuse to give a written promise not to engage, while hostilities last, in any service connected with the operations of war.

(4) The names of all the individuals retaining their liberty under parole must be notified by the captor to the enemy, and the latter is forbidden knowingly to employ the individuals concerned in any service prohibited by the parole.

[140] This follows indirectly from article 8 of Convention XI.

[Pg 106] [141] See below, § 201.

Deserters and Traitors.

§ 86. The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. And the like is valid with regard to such treasonable subjects of a belligerent as, without having been members of his armed forces, are fighting in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished.[142]

[142] See below, § 222; Hall, § 190; *Land Warfare*, § 36.

VII

ENEMY CHARACTER

Grotius, III. c. 4, §§ 6 and 7—Bynkershoek, *Quaestiones juris publici*, I. c. 3 *in fine*—Hall, §§ 167-175—Lawrence, §§ 151-159—Westlake, II. pp. 140-154—Phillimore, III. §§ 82-86—Twiss, II. §§ 152-162—Taylor, §§ 468 and 517—Walker, §§ 39-43—Wharton, III. §§ 352-353—Wheaton, §§ 324-341—Moore, VII. §§ 1185-1194—Geffcken in Holtzendorff, IV. pp. 581-588—Ullmann, § 192—Nys, III. pp. 150-154—Pradier-Fodéré, VIII. Nos. 3166-3175—Bonfils, Nos. 1343-1349[1]—Despagnet, Nos. 650-653 *quinto*—Calvo, IV. §§ 1932-1952—Fiore, III. Nos. 1432-1436, and Code, Nos. 1701-1709—Boeck, Nos. 156-190—Dupuis, Nos. 92-129, and *Guerre*, Nos. 59-73—Lémonon, pp. 426-467—Higgins, p. 593—Nippold, II. pp. 40-54—Scott, *Conferences*, pp. 541-555—Frankenbach, *Die Rechtsstellung von neutralen Staatsangehörigen in kriegführenden Staaten* (1910)—Baty in *The Journal of the Society of Comparative Legislation*, New Series, IX. Part I. (1908), pp. 157-166, and Westlake, *ibidem*, Part II. (1909), pp. 265-268—Oppenheim in *The Law Quarterly Review*, XXV. (1909), pp. 372-383.

On Enemy Character in general.

§ 87. Since the belligerents, for the realisation of the purpose of war, are entitled to many kinds of measures against enemy persons and enemy property, the question must be settled as to what persons and what property are vested with enemy character. Now it is, generally speaking, correct to say that, whereas the subjects of the belligerents and the property of such subjects
[Pg 107] bear enemy character, the subjects of neutral States and the property of such subjects do not bear enemy character. This rule has, however, important exceptions. For under certain circumstances and conditions enemy persons and property of enemy subjects may not bear, and, on the other hand, subjects of neutral States and their property may bear, enemy character. And it is even possible that a subject of a belligerent may for some parts bear enemy character as

between himself and his home State.

The matter of enemy character is, however, to a great extent in an unsettled condition, since on many points connected with it there are no universally recognised rules of International Law in existence. British and American Courts have worked out a body of precise and clear rules on the subject, but the practice of other countries, and especially of France, follows different lines. The Second Peace Conference of 1907 produced three articles on the matter—16, 17, and 18—in Convention V., accepted by all the signatory Powers, except Great Britain which, upon signing the Convention, entered a reservation against these three articles, and although these articles are only of minor importance, they have to be taken into consideration. On the other hand, the as yet unratified Declaration of London comprises a number of rules which, apart from two points, offer a common basis for the practice of all maritime States. At the first glance it would seem that only the four articles—57 to 60—of Chapter VI. headed "Enemy Character," treat of the subject under survey, but a closer examination shows that article 46, dealing with a certain kind of unneutral service, articles 55 and 56, dealing with transfer to a neutral flag, and, lastly, article 63, dealing with forcible resistance to the right of visitation, are also concerned with enemy character. In spite of these stipulations, which are accepted by all the Powers concerned, there
[Pg 108]
remain two important points unsettled, since neither the Second Hague Peace Conference of 1907 nor the Naval Conference of London of 1908-9 succeeded in agreeing upon a compromise concerning the old controversy as to whether nationality exclusively, or domicile also, should determine the neutral or enemy character of individuals and their goods, and further, whether or not neutral vessels acquire enemy character by embarking in time of war, with permission of the enemy, upon such trade with the latter as was closed to them in time of peace (Rule of 1756). According to article 7 of Convention XII. of the Second Hague Peace Conference, concerning the establishment of an International Prize Court, likewise not yet ratified, this Court would in time have to evolve a uniform practice of all the maritime States on these two points.

For the consideration of enemy character in detail, it is convenient to distinguish between individuals, vessels, goods, the transfer of enemy vessels, and the transfer of enemy goods on enemy vessels.

Enemy Character of Individuals.

§ 88. The general rule with regard to individuals is that subjects of the belligerents bear enemy character, whereas subjects of neutral States do not. In this sense article 16 of Convention V. stipulates: "The nationals of a State which is not taking part in the war are considered to be neutral." These neutral individuals can, however, lose their neutral and acquire enemy character in several cases, just as subjects of the belligerents can in other cases lose their enemy character:—

(1) Since relations of peace obtain between either of the belligerents and neutral States, the subjects of the latter can, by way of trade and otherwise, render many kinds of service to either belligerent without thereby losing their neutral character. On the other hand, if they enter the
[Pg 109]
armed forces of a belligerent, or if they commit other acts in his favour, or commit hostile acts against a belligerent, they acquire enemy character (article 17 of Convention V.). All measures that are allowed during war against enemy subjects are likewise allowed against such subjects of neutral Powers as have thus acquired enemy character. For instance, during the late South African War hundreds of subjects of neutral States, who were fighting in the ranks of the Boers, were captured by Great Britain and retained as prisoners until the end of the struggle. Such individuals must not, however, be more severely treated than enemy subjects, and, in especial, no punitive measures are allowed against them (article 17 of Convention V.). And article 18(*a*) of Convention V. stipulates expressly that subjects of neutral States not inhabiting the territory of the enemy or any territory militarily occupied by him do not acquire enemy character by furnishing supplies or making loans to the enemy, provided the supplies do not come from the enemy territory or any territory occupied by him.[143]

[143] Since Great Britain has entered a reservation against articles 16, 17, and 18 of Convention V. she is not bound by them. It is, however, of importance to state that articles 16, 17, and 18(*a*)—not 18(*b*)!—enact only such rules as were always customarily recognised, *unless such an interpretation is to be put upon article 16 as prevents a belligerent from considering subjects of neutral States inhabiting the enemy country as bearing enemy character*. The matter is different with regard to article 18(*b*), which creates an entirely new rule, for nobody has hitherto doubted that the members of the police force and the administrative officials of the enemy bear enemy character whether or no they are subjects of the enemy State.

Article 18(*b*) of Convention V. stipulates that such subjects of neutral States as render services to the enemy in matters of police and administration, likewise do not acquire enemy character. This stipulation must, however, be read with caution. It can only mean that such individuals do not lose their neutral character to a greater degree than other subjects of neutral States resident
[Pg 110]
on enemy territory; it cannot mean that they are in every way to be considered and treated like subjects of neutral States not residing on enemy territory.

However that may be, it must be specially observed, that the acts by which subjects of neutral States lose their neutral and acquire enemy character need not necessarily be committed after the outbreak of war. Such individuals can, even before the outbreak of war, identify themselves to such a degree with a foreign State that, with the outbreak of war against that State, enemy character devolves upon them *ipso facto* unless they at once sever their connection with such State. This, for instance, is the case when a foreign subject in time of peace enlists in the armed forces of a State and continues to serve after the outbreak of war.

(2) From the time when International Law made its appearance down to our own no difference

has been made by a belligerent in the treatment accorded to subjects of the enemy and subjects of neutral States inhabiting the enemy country. Thus Grotius (III. c. 4, §§ 6 and 7) teaches that foreigners must share the fate of the population living on enemy territory, and Bynkershoek[144] distinctly teaches that foreigners residing in enemy country bear enemy character. English[145] and American practice assert, therefore, that foreigners, whether subjects of the belligerents or of neutral States, acquire enemy character by being domiciled (*i.e.* resident) in enemy country, because they have thereby identified themselves with the enemy population and contribute, by paying taxes and the like, to the support of the enemy Government. For this reason, all measures which may legitimately be taken against the civil population of the enemy territory, may likewise
[Pg 111]
be taken against them, unless they withdraw from the country or are expelled therefrom. It must, however, be remembered that they acquire enemy character *in a sense* and *to a certain degree* only, for their enemy character is not as intensive as that of enemy subjects resident on enemy territory. Such of them as are subjects of neutral States do not, therefore, lose the protection of their home State against arbitrary treatment inconsistent with the laws of war; and such of them as are subjects of the other belligerent are handed over to the protection of the Embassy of a neutral Power. However that may be, they are not exempt from requisitions and contributions; from the restrictions which an occupant imposes upon the population in the interest of the safety of his troops and his military operations; from punishments for hostile acts committed against the occupant; or from being taken into captivity, if exceptionally necessary.

[144] *Quaestiones juris publici*, I. c. 3 *in fine*.

[145] See the *Harmony* (1800), 2 C. Rob. 322; the *Johanna Emilie*, otherwise *Emilia* (1854), Spinks, 12; the *Baltica* (1857), 11 Moore, P.C. 141.

This treatment of foreigners resident on occupied enemy territory is generally recognised as legitimate by theory[146] and practice. The proposal of Germany, made at the Second Peace Conference, to agree upon rules which would have stipulated a more favourable treatment of subjects of neutral States resident on occupied enemy territory was, therefore, rejected. Not even France supported the German proposals, although according to the French conception foreigners residing in enemy country do not acquire enemy character, and therefore the German proposals were only a logical consequence of the French conception. This French conception of enemy character dates from the judgment of the *Conseil des Prises* in the case of *Le Hardy contre La Voltigeante*[147] (1802), which laid down the rule that neutral subjects residing in enemy country do not lose their neutral character, and enemy subjects residing in neutral countries do
[Pg 112]
not lose their enemy character. But it must be emphasised that this French conception of enemy character has been developed, not with regard to the treatment of foreigners whom an occupant finds resident on occupied enemy territory, but with regard to the exercise of the right of capture of enemy vessels and goods in warfare at sea. France did not make an attempt to draw the logical consequences from this conception and, therefore, to mete out to foreigners resident on occupied enemy territory a treatment different from that of enemy subjects resident there.

[146] See Albrecht, *Requisitionen von neutralem Privateigenthum*, &c. (1912), pp. 13-15.

[147] 1 Pistoye et Duverdy (1859), 321.

(3) Since enemy subjects who reside in neutral countries, or are allowed to remain resident on the territory of the other belligerent, have to a great extent identified themselves with the local population and are not under the territorial supremacy of the enemy, they lose their enemy character according to English and American practice,[148] but according to French practice they do not, a difference of practice which bears upon many points, especially upon the character of goods.[149]

[148] See the *Postilion* (1779), Hay & Marriot, 245; the *Danous* (1802), 4 C. Rob. 255, note; the *Venus* (1814), 8 Cranch, 253.

[149] See below, § 90.

Enemy Character of Vessels.

§ 89. The general rule with regard to vessels is that their character is determined by their flag. Whatever may be the nationality of the owner of a vessel—whether he be a subject of a neutral State, or of either belligerent—she bears enemy character, if she be sailing under the enemy flag. For this reason, the vessel of an enemy owner which sails under a neutral flag does as little bear enemy character as the vessel of the subject of a neutral State sailing under the flag of another neutral State. But the flag is the deciding factor only when the vessel is legitimately sailing under it. Should it be found that a vessel sailing under the flag of a certain neutral State has, according
[Pg 113]
to the Municipal Law of such State, no right to fly the flag she shows, the real character of the vessel must be determined in order to decide whether or no she bears enemy character. On the other hand, it makes no difference that the owner be the subject of a neutral non-littoral State without a maritime flag and that the vessel is, therefore, compelled to fly the flag of a maritime State: if the flag the vessel flies be the enemy flag, she bears enemy character.

The general rule that the flag is the deciding factor has exceptions, and it is convenient to expound the matter according to the rules of the Declaration of London, although it is not yet ratified. The general rule is laid down by article 57 of the Declaration which enacts that, subject to the provisions respecting transfer to another flag, the character of a vessel is determined by the flag she is entitled to fly. Nevertheless, there are two exceptions to this rule:—

(1) According to article 46 of the Declaration[150] a neutral merchantman acquires enemy character by taking a direct part in the hostilities, by being in the exclusive employment of the enemy government, and by being at the time exclusively intended either for the transport of troops or for the transmission of intelligence for the enemy. And it must be emphasised that the

act by which a neutral merchantman acquires enemy character need not necessarily be committed *after* the outbreak of war, for she can, even *before* the outbreak of war, to such a degree identify herself with a foreign State that, with the outbreak of war against such State, enemy character devolves upon her *ipso facto*, unless she severs her connexion with the State concerned. This is, for instance, the case of a foreign merchantman which in time of peace has [Pg 114] been hired by a State for the transport of troops or of war material, and is carrying out her contract in spite of the outbreak of war.[151]

(2) According to article 63 of the Declaration a neutral merchantman acquires enemy character *ipso facto* by forcibly resisting the legitimate exercise of the right of visitation and capture on the part of a belligerent cruiser (see details below, § 422).

(3) According to British practice—adopted by America and Japan[152]—neutral merchantmen likewise acquire enemy character by violating the so-called rule of 1756,[153] in case they engage in time of war in a trade which the enemy prior to the war reserved exclusively for merchantmen sailing under his own flag. The Declaration of London has neither rejected nor accepted this rule of 1756, for article 57 stipulates expressly that the case where a neutral vessel is engaged in a trade which is closed in time of peace, remains unsettled. It would, therefore, according to article 7 of Convention XII. of the Second Peace Conference, be the task of the proposed International Prize Court to settle this point.

Of whatever kind may be the case of the acquisition of enemy character on the part of a neutral [Pg 115] vessel, the following four rules apply to all cases of such neutral vessels as have acquired enemy character:—(*a*) all enemy goods on board may now be confiscated, although when they were first shipped the vessels concerned were neutral; (*b*) all goods on board will now be presumed to be enemy goods, and the owners of neutral goods will have to prove the neutral character of the latter; (*c*) the stipulations of articles 48 and 49 of the Declaration of London concerning the sinking of neutral prizes do not apply, because these vessels are now enemy vessels; (*d*) no appeal may be brought from the national prize courts to the International Prize Court, except with regard to the one question only, whether the vessel concerned has been justly considered to have acquired enemy character (see article 4 of Convention XII. of the Second Hague Peace Conference, concerning the establishment of an International Prize Court).

[150] See below, § 410.

[151] The case of the *Kow-shing* ought here to be mentioned, although it has now lost its former importance:—

On July 14, 1894, the *Kow-shing*, a British ship, was hired at Shanghai by the Chinese Government to serve as a transport for eleven hundred Chinese soldiers and also for arms and ammunition from Tien-tsin to Korea. She was met on July 25 near the island of Phung-do, in Korean waters, by the Japanese fleet; she was signalled to stop, was visited by some prize officers, and, as it was apparent that she was a transport for Chinese soldiers, she was ordered to follow the Japanese cruiser, *Naniwa*. But although the British captain of the vessel was ready to comply with these orders, the Chinese on board would not allow it. Thereupon the Japanese opened fire and sank the vessel. As formerly hostilities could be commenced without a previous declaration of war the action of the Japanese was in accordance with the rules of International Law existing at the time. But in consequence of Convention III. of the Second Peace Conference which requires a declaration of war before the opening of hostilities, such action nowadays would not be justifiable. See Hall, § 168*; Takahashi, pp. 27-51; Holland, *Studies*, pp. 126-128.

[152] See the case of the *Montara* in Takahashi, p. 633.

[153] See below, § 289, and Higgins, *War and the Private Citizen* (1912), pp. 169-192.

Enemy Character of Goods.

§ 90. It is an old customary rule that all goods found on board an enemy merchantman are presumed to be enemy goods unless the contrary is proved by the neutral owners concerned. It is, further, generally recognised that the enemy character of goods depends upon the enemy character of their owners. As, however, no universally recognised rules exist as to the enemy character of individuals, there are likewise no universally recognised rules in existence as to the enemy character of goods.

(1) Since, according to British and American practice, domicile in enemy country makes an individual bear enemy character, all goods belonging to individuals domiciled in enemy country are enemy goods, and all goods belonging to individuals not resident in enemy country are not, as a rule, enemy goods. For this reason, goods belonging to enemy subjects residing in neutral [Pg 116] countries[154] do not, but goods belonging to subjects of neutral States residing in enemy country[155] do bear enemy character, although they may be the goods of a foreign consul appointed and residing in enemy country.[156] Further, the goods of such subjects of the belligerents as are domiciled on each other's territory and are allowed to remain there after the outbreak of war, acquire enemy character in the eyes of the belligerent whose subjects they are, but lose their enemy character in the eyes of the belligerent on whose territory they are allowed to remain.[157] Again, the produce of an estate on enemy territory belonging to a subject of a neutral State who resides abroad, does bear enemy character, for "*Nothing*[158] *can be more decided and fixed than the principle ... that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned ... whatever the local residence of the owner may be*." Lastly, all such property of a subject of a neutral State residing abroad but having a house of trade within the enemy country as is concerned in the commercial transactions of such house of trade,[159] likewise bears enemy character, because the owner of these goods has a "commercial domicile" in enemy country.

(2) On the other hand, according to French practice, the nationality of the owner of the goods is exclusively the deciding factor, and it does not matter where he resides. Hence only such goods on enemy merchantmen bear enemy character as belong to subjects of the enemy, whether those [Pg 117]

subjects are residing on enemy or neutral territory; and all such goods on enemy merchantmen as belong to subjects of neutral States do not bear enemy character, whether those subjects reside on neutral or enemy country.[160]

(3) The Declaration of London does not purport to decide the controversy, since the Powers represented at the Naval Conference of London could not agree. Whereas Holland, Spain, and Japan approved of the British and American practice, Austria-Hungary, Italy, Germany, and Russia sided with France. For this reason, the Declaration, by articles 58 and 59, only enacts that the enemy character of goods on enemy vessels is determined by the enemy character of their owner, and that all goods on enemy vessels are presumed to be enemy goods unless the contrary is proved. But the chief question, namely, what is the factor that decides the enemy character of an owner, is deliberately left unanswered. It would, therefore, according to article 7 of Convention XII., be for the proposed International Prize Court to settle it.

[154] The *Postilion* (1779), Hay & Marriot, 245; the *Danous* (1802), 4 C. Rob. 255, note.

[155] The *Baltica* (1857), 11 Moore, P.C. 141.

[156] The *Indian Chief* (1801), 3 C. Rob. 12.

[157] The *Venus* (1814), 8 Cranch, 253.

[158] From the judgment of Sir William Scott in the case of the *Phœnix* (1803), 5 C. Rob. 41; see also *Thirty Hogsheads of Sugar* v. *Boyle* (*Bentzen* v. *Boyle*) (1815), 9 Cranch, 191.

[159] The *Portland* (1800), 3 C. Rob. 41; the *Jonge Klassina* (1803), 5 C. Rob. 297; the *Freundschaft* (1819), 4 Wheaton, 105.

[160] See the French cases of:—*Le Hardy contre La Voltigeante* (1802) and *La Paix* (1803), 1 Pistoye et Duverdy, pp. 321 and 486; *Le Joan* (1871), *Le Nicolaüs* (1871), *Le Thalia* (1871); *Le Laura-Louise* (1871), Barboux, pp. 101, 108, 116, 119.

Transfer of Enemy Vessels.

§ 91. The question of the transfer of enemy vessels to subjects of neutral States, either shortly before or during the war, must be regarded as forming part of the larger question of enemy character, for the point to be decided is whether such transfer[161] divests these vessels of their enemy character. It is obvious that, if this point is answered in the affirmative, the owners of enemy vessels can evade the danger of having their property seized and confiscated by selling their vessels to subjects of neutral States. Before the Declaration of London, which is, however,
[Pg 118]
not yet ratified, the maritime Powers had not agreed upon common rules concerning this subject. According to French[162] practice no transfer of enemy vessels to neutrals could be recognised, and a vessel thus transferred retained enemy character; but this concerned only transfer after the outbreak of war, any legitimate transfer anterior to the outbreak of war did give neutral character to a vessel. According to British and American practice, on the other hand, neutral vessels could well be transferred to a neutral flag before or after the outbreak of war and lose thereby their enemy character, provided that the transfer took place *bona fide*,[163] was not effected either in a blockaded port[164] or while the vessel was *in transitu*,[165] the vendor did not retain an interest in the vessel or did not stipulate a right to recover or repurchase the vessel after the conclusion of the war,[166] and the transfer was not made *in transitu* in contemplation of war.[167]

The Declaration of London offers clear and decisive rules concerning the transfer of enemy vessels, making a distinction between the transfer to a neutral flag *before* and *after* the outbreak of hostilities:

(1) According to article 55 of the Declaration, the transfer of an enemy vessel to a neutral flag, if effected *before* the outbreak of hostilities, is *valid*, unless the captor is able to prove that the transfer was made in order to avoid capture. However, if the bill of sale is not on board the transferred vessel, and if the transfer was effected less than sixty days before the outbreak of hostilities, the transfer is presumed to be void, unless the vessel can prove that such transfer was
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not effected in order to avoid capture. To provide commerce with a guarantee that a transfer should not easily be treated as void on the ground that it was effected for the purpose of evading capture, it is stipulated that, in case the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption of its validity, provided the transfer was unconditional, complete, and in conformity with the laws of the countries concerned, and further, provided that neither the control of, nor the profits arising from, the employment of the vessels remain in the same hands as before the transfer. But even in this case a vessel is suspect if the transfer took place less than sixty days before the outbreak of hostilities, and if her bill of sale is not on board. Hence she may be seized and brought into a port of a prize court for investigation, and she cannot claim damages for the capture, even if the Court releases her.

(2) According to article 56 of the Declaration, the transfer of an enemy vessel to a neutral flag, if effected *after* the outbreak of hostilities, is *void* unless the vessel can prove that the transfer was not made in order to avoid capture. And such proof is excluded, and an absolute presumption is established that the transfer is void, if the transfer has been made in a blockaded port or while the vessel was *in transitu*, further, if a right to repurchase or recover the vessel is reserved to the vendor, and lastly, if the requirements of the Municipal Law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.

[161] See Holland, *Prize Law*, § 19; Hall, § 171; Twiss, II. §§ 162-163; Phillimore, III. § 386; Boeck, Nos. 178-180; Bonfils, Nos. 1344-1349[1]; Dupuis, Nos. 117-129, and *Guerre*, Nos. 62-66.

[162] See Dupuis, No. 97.

[163] The *Vigilantia* (1798), 1 C. Rob. 1; the *Baltica* (1857), 11 Moore, P.C. 141; the *Benito Estenger* (1899), 176

United States, 568.

[164] The *General Hamilton* (1805), 6 C. Rob. 61.

[165] The moment a vessel transferred *in transitu* reaches a port where the new owner takes possession of her, the voyage of the vessel is considered to have terminated. The *Vrow Margaretha* (1799), 1 C. Rob. 336; the *Jan Frederick* (1804), 5 C. Rob. 128.

[166] The *Sechs Geschwistern* (1801), 4 C. Rob. 100; the *Jemmy* (1801), 4 C. Rob. 31.

[167] The *Jan Frederick* (1804), 5 C. Rob. 128.

Transfer of Goods on Enemy Vessels.

§ 92. The subject of the transfer of enemy goods on enemy vessels must likewise be considered as forming part of the larger subject of enemy character, for the question is here also whether
[Pg 120] such a transfer divests these goods of their enemy character. And concerning this question[168] there was likewise no unanimous practice in existence among the maritime States before the agreement on the Declaration of London. British and American practice refused to recognise a sale *in transitu* under any circumstances or conditions, if the vessel concerned was captured before the neutral buyer had actually taken possession of the transferred goods.[169] On the other hand, French practice recognised such a sale *in transitu*, provided it could be proved that the transaction was made *bona fide*.[170]

The Declaration of London now stipulates, by article 60, that enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are *in transitu*. Hence if such enemy vessel is captured before having reached her destination, goods consigned to enemy subjects may be confiscated, although they have been sold *in transitu* to subjects of neutral States. A special rule is provided for the case of the enemy consignee of goods on board an enemy vessel becoming bankrupt while the goods are *in transitu*. In a number of countries[171] an unpaid vendor has, in the event of the bankruptcy of the buyer, a recognised legal right to recover such goods as have already become the property of the buyer, but have not yet reached him (right of stoppage *in transitu*). For this reason, article 60 of the Declaration stipulates in the second paragraph, that if, prior to the capture, the neutral consignor exercises, on the bankruptcy of the enemy consignee, his right of stoppage *in transitu*, the goods regain their neutral character and may not therefore be confiscated.

[168] See Hall, § 172; Twiss, II. §§ 162 and 163; Phillimore, III. §§ 387 and 388; Dupuis, No. 1421, and *Guerre*, Nos. 68-73; Boeck, Nos. 182 and 183.

[169] The *Jan Frederick* (1804), 5 C. Rob. 128; the *Ann Green* (1812), I Gallison, 274.

[170] See Boeck, No. 162; Dupuis, No. 142.

[171] Great Britain is one of them, see Section 44 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

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CHAPTER II

THE OUTBREAK OF WAR

I

COMMENCEMENT OF WAR

Grotius, c. 3, 5-14—Bynkershoek, *Quaestiones juris publici*, I. c. 2—Vattel, III. §§ 51-65—Hall, § 123—Westlake, II. pp. 18-26, and 267—Lawrence, § 140—Manning, pp. 161-163—Phillimore, III. §§ 51-56—Twiss, II. §§ 31-40—Halleck, I. pp. 521-526—Taylor, §§ 455-456—Moore, VII. §§ 1106-1108—Walker, § 37—Wharton, III. §§ 333-335—Wheaton, § 297—Bluntschli, §§ 521-528—Heffter, § 120—Lueder in Holtzendorff, IV. pp. 332-347—Gareis, § 80—Liszt, § 39, V.—Ullmann, § 171—Bonfils, Nos. 1027-1031[2]—Despagnet, Nos. 513-516—Pradier-Fodéré, VI. Nos. 2671-2693—Nys, III. pp. 118-133—Rivier, II. pp. 220-228—Calvo, IV. §§ 1899-1911—Fiore, III. Nos. 1272-1276, and Code, 1422-1428—Martens, II. § 109—Longuet, §§ 1-7, 15-16—Mérignhac, pp. 29-41—Pillet, pp. 61-72—Lawrence, *War*, pp. 26-44—Barclay, pp. 53-58—Boidin, pp. 116-121—Bordwell, pp. 198-200—Higgins, pp. 202-205—Holland, *War*, § 16—Lémonon, pp. 309-406—Nippold, II. pp. 6-10—Scott, *Conferences*, pp. 516-522—Spaight, pp. 20-33—Ariga, §§ 11-12—Takahashi, pp. 1-25—*Land Warfare*, §§ 8-10—Holland, *Studies*, p. 115—Sainte-Croix, *La Déclaration de guerre et ses effets immédiats* (1892)—Bruyas, *De la déclaration de guerre*, etc. (1899)—Tambaro, *L'inizio della guerra et la 3ª convenzione dell' Aja del 1907* (1911)—Maurel, *De la déclaration de guerre* (1907)—Soughimoura, *De la Déclaration de Guerre* (1912)—Brocher in *R.I.* IV. (1872), p. 400; Férand-Giraud in *R.I.* XVII. (1885), p. 19; Nagaoka in *R.I.* 2nd Ser. VI. p. 475—Rolin in *Annuaire*, XX. (1904), pp. 64-70—Ebren and Martens in *R.G.* XI. (1904), pp. 133 and 148—Dupuis in *R.G.* XIII. (1906), pp. 725-735—Stowell in *A.J.* II. (1908), pp. 50-62.

Commencement of War in General.

§ 93. According to the former practice of the States a condition of war could *de facto* arise either through a declaration of war; or through a proclamation and manifesto of a State that it considered itself at war with another State; or through the committal by one State of certain hostile acts of force against another State. History presents many instances of wars commenced
[Pg 122] in one of these three ways. Although Grotius (III. c. 3, § 5) laid down the rule that a declaration of war is necessary for its commencement, the practice of the States shows that this rule was not accepted, and many wars have taken place between the time of Grotius and our own without a previous[172] declaration of war. Indeed many writers,[173] following the example of Grotius, have

always asserted the existence of a rule that a declaration is necessary for the commencement of war, but it cannot be denied that until the Second Peace Conference of 1907 such a rule was neither sanctioned by custom nor by a general treaty of the Powers. Moreover many writers[174] distinctly approved of the practice of the Powers. This does not mean that in former times a State would have been justified in opening hostilities without any preceding conflict. There was, and can be, no greater violation of the Law of Nations than for a State to begin hostilities in time of peace without previous controversy and without having endeavoured to settle the conflict by negotiation.[175] But if negotiation had been tried without success, a State did not act treacherously in case it resorted to hostilities without a declaration of war, especially after diplomatic intercourse had been broken off. The rule, adopted by the First Peace Conference of 1899—see article 2 of the Conventions for the peaceful settlement of international differences of 1899 and 1907—which stipulates that, *as far as circumstances allow*, before the appeal to arms recourse must be had to the good offices or mediation of friendly Powers, did not essentially alter
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matters, for the formula *as far as circumstances allow* leaves practically everything to the discretion of the Power bent on making war.

The outbreak of war between Russia and Japan in 1904 through Japanese torpedo boats attacking Russian men-of-war at Port Arthur before a formal declaration of war, caused a movement for the establishment of some written rules concerning the commencement of war. The Institute of International Law, at its meeting at Ghent in 1906, adopted three principles[176] according to which war should not be commenced without either a declaration of war or an ultimatum, and in either case a certain delay sufficient to ensure against treacherous surprise must be allowed before the belligerent can have recourse to actual hostilities. The Second Peace Conference at the Hague in 1907 took the matter up and produced the Convention (III.) relative to the commencement of hostilities which comprises four articles and has been signed by all the Powers represented at the Conference, except China and Nicaragua, both of which, however, acceded later.

[172] See Maurice, *Hostilities without Declaration of War* (1883).

[173] See, for instance, Vattel, III. § 51; Calvo, IV. § 1907; Bluntschli, § 571; Fiore, III. No. 1274; Heffter, § 120.

[174] See, for instance, Bynkershoek, *Quaestiones juris publici*, I. c. 2; Klüber, § 238; G. F. Martens, § 267; Twiss, II. § 35: Phillimore, III. §§ 51-55; Hall, § 123; Ullmann (first edition), § 145; Gareis, § 80.

[175] See above, § 3, where the rule is quoted that no State is allowed to make use of compulsive means of settling differences before negotiation has been tried.

[176] See *Annuaire*, XXI. (1906), p. 283.

Declaration of War.

§ 94. According to article 1 of Convention III. hostilities must not commence without a previous and unequivocal warning, and one of the forms which this warning may take is a declaration of war stating the reasons why the Power concerned has recourse to arms.

A declaration of war is a communication of one State to another that the condition of peace between them has come to an end and a condition of war has taken its place. In former times declarations of war used to take place under greater or lesser solemnities, but during the last few centuries all these formalities have vanished, and a declaration of war nowadays may take place through a simple communication. The only two conditions with which, according to article 1,
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declarations of war must comply are, that they must be unmistakable, and that they must state the reason for the resort to arms. No delay between the declaration and the actual commencement of hostilities is stipulated, and it is, therefore, possible for a Power to open hostilities immediately after the communication of the declaration of war to the enemy. All the more is it necessary to emphasise that there could be no greater violation of the Law of Nations than that which would be committed by a State which sent a declaration to another without previously having tried to settle the difference concerned by negotiation.

However this may be, the question as to the way in which the communication of the declaration of war is to be made requires attention. Since there is nowhere a rule expressly formulated according to which the declaration must be communicated in writing, it might be asserted that communication by any means, be it by a written document, by telegraph or by telephone message, or by direct word of mouth, is admissible. I believe that such an assertion cannot be supported. The essential importance of the declaration of war and the fact that according to article 1 of Convention III. it must be unmistakable and must state the reason for the resort to arms, would seem to require a written document which is to be handed over to the other party by an envoy. Further, the fact that article 2 of Convention III. expressly enacts that the notification of the outbreak of war to neutrals *may even be made by telegraph*, points the same way, for the conclusion is justified that the declaration of war stipulated as necessary by article I may *not* be made by telegraph. And if a telegraph message is inadmissible, much more are telephone messages and communications by word of mouth. Moreover, the practice of the States throughout the last centuries has been to hand in a written declaration of war, when any
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declaration has been made.

Particular attention must be paid to the fact that, in case of a declaration of war, the war, as between the belligerents, is considered to have commenced with the date of its declaration, although actual hostilities may not have been commenced until a much later date. On the other hand, as regards relations between the belligerents and neutrals, a war is not considered to have commenced until its outbreak has either been notified to the neutrals or has otherwise become unmistakably known to them. For this reason, article 2 of Convention III. enacts that the belligerents must at once after the outbreak of war notify[177] the neutrals, even if only by

telegraph, and that the state of war shall not take effect with regard to neutrals until after they have received notification, unless it be established beyond doubt that they were in fact aware of the condition of war.

[177] See below, § 307.

Ultimatum.

§ 95. The second form which the unequivocal warning, stipulated by article 1 of Convention III. as necessary before the commencement of hostilities, may take is an ultimatum with a conditional declaration of war.

Ultimatum[178] is the technical term for a written communication of one State to another which ends amicable negotiations respecting a difference, and formulates, for the last time and categorically, the demands to be fulfilled if other measures are to be averted. An ultimatum may be simple or qualified. It is *simple* in case it does not include an indication of the measures contemplated by the Power sending it; such measures may be acts of retorsion or reprisals, or hostilities. It is *qualified* if it includes an indication of the measures contemplated by the Power sending it, for instance a pacific blockade, occupation of a certain territory, or war. Now the
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ultimatum stipulated by article 1 of Convention III. must be a qualified one, for it must be so worded that the recipient can have no doubt about the commencement of war in case he does not comply with the demands of the ultimatum. For this reason, if a State has sent a simple ultimatum to another, or a qualified ultimatum threatening a measure other than war, it is not, in case of non-compliance, justified in at once commencing hostilities without a previous declaration of war. For this reason, Italy sent a declaration of war to Turkey in 1911, although an ultimatum threatening the occupation of Tripoli had preceded it.

Nothing is enacted by article 1 of Convention III. concerning the minimum length of time which an ultimatum must grant before the commencement of hostilities; this period may, therefore, be only very short, as, for instance, a number of hours. All the more is it necessary here likewise to emphasise that there could be no greater violation of the Law of Nations than that which would be committed by a State which sent an ultimatum without previously having tried to settle the difference concerned by negotiation.

It must be specially observed that the state of war following an ultimatum must likewise be notified to neutrals, for article 2 of Convention III. applies to this case also. And it must further be observed that, for the same reason as in the case of a declaration of war, an ultimatum containing a conditional declaration of war must be communicated to the other party by a written document.

[178] See above, § 28.

Initiative hostile Acts of War.

§ 96. There is no doubt that, in consequence of Convention III. of the Second Peace Conference, the recourse to hostilities without a previous declaration of war or qualified ultimatum is forbidden. But the fact must not be overlooked that a war can nevertheless break out without
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these preliminaries. Thus a State might deliberately order hostilities to be commenced without a previous declaration of war or qualified ultimatum. Further, the armed forces of two States having a grievance against one another might engage in hostilities without having been authorised thereto and without the respective Governments ordering them to desist from further hostilities. Again, acts of force by way of reprisals or during a pacific blockade or an intervention might be forcibly resisted by the other party, hostilities breaking out in this way.

It is certain that States which deliberately order the commencement of hostilities without a previous declaration of war or qualified ultimatum, commit an international delinquency, but they are nevertheless engaged in war. Further, it is certain that States which allow themselves to be dragged into a condition of war through unauthorised hostile acts of their armed forces, commit an international delinquency, but they are nevertheless engaged in war. Again, war is actually in existence if the other party forcibly resists acts of force undertaken by a State by way of reprisals, or during a pacific blockade or an intervention. Now in all these and similar cases, although war has broken out without a previous declaration or qualified ultimatum, all the laws of warfare must find application, for a war is still war in the eyes of International Law even though it has been illegally commenced, or has automatically arisen from acts of force which were not intended to be acts of war.

However that may be, article 2 of Convention III. also applies to wars which have broken out without a previous declaration or qualified ultimatum, and the belligerents must without delay send a notification to neutral Powers so that these may be compelled to fulfil the duties of
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neutrality. But, of course, neutral Powers must in this case likewise, even without notification, fulfil the duties of neutrality if they are unmistakably aware of the outbreak of war.

II

EFFECTS OF THE OUTBREAK OF WAR

Vattel, III. § 63—Hall, §§ 124-126—Westlake, II. pp. 29-32—Lawrence, §§ 143-146—Manning, pp. 163-165—Phillimore, III. §§ 67-91—Twiss, II. §§ 41-61—Halleck, I. pp. 526-552, and II. pp. 124-140—Taylor, §§ 461-468—Walker, §§ 44-50—Wharton, III. §§ 336-337A—Wheaton, §§ 298-319—Moore, V. § 779, and VII. §§ 1135-1142—Heffter, §§ 121-123—Lueder in Holtzendorff, IV. pp. 347-363—Gareis, § 81—Liszt, § 39, V.—Ullmann, § 173—Bonfils, Nos. 1044-1065—Despagnet, Nos. 517-519—Pradier-Fodéré, VI. Nos. 2694-2720—Nys, III. pp. 134-

150—Rivier, II. pp. 228-237—Calvo, IV. §§ 1911-1931—Fiore, III. Nos. 1290-1301, and Code, Nos. 1439-1445—Martens, II. § 109—Longuet, §§ 8-15—Mérignhac, pp. 72-84—Pillet, pp. 42-59—Bordwell, pp. 200-211—Spaight, pp. 25-33—Ariga, §§ 13-15—Takahashi, pp. 26-88—Lawrence, *War*, pp. 45-55—Sainte-Croix, *La Déclaration de guerre et ses effets immédiats* (1892), pp. 166-207—Meyer, *De l'interdiction du commerce entre les belligérants* (1902)—Jaconnet, *La guerre et les traités* (1909)—Politis in *Annuaire* XXIII. (1910), pp. 251-282, and XXIV. (1911), pp. 200-223.

General Effects of the Outbreak of War.

§ 97. When war breaks out, even if it be limited to only two members of the Family of Nations, nevertheless the whole Family of Nations is thereby affected, since the rights and duties of neutrality devolve upon such States as are not parties to the war. And the subjects of neutral States may feel the consequences of the outbreak of war in many ways. War is not only a calamity to the commerce and industry of the whole world, but also involves the alteration of the legal position of neutral merchantmen on the Open Sea, and of the subjects of neutral States within the boundaries of the belligerents. For the belligerents have the right of visit, search, and eventually capture of neutral merchantmen on the Open Sea, and foreigners who remain within
[Pg 129] the boundaries of the belligerents, although subjects of neutral Powers, acquire in a degree and to a certain extent enemy character.[179] However, the outbreak of war tells chiefly and directly upon the relations between the belligerents and their subjects. Yet it would not be correct to maintain that all legal relations between the parties thereto and between their subjects disappear with the outbreak of war. War is not a condition of anarchy, indifferent or hostile to law, but a condition recognised and ruled by International Law, although it involves a rupture of peaceful relations between the belligerents.

[179] See above, § 88.

Rupture of Diplomatic Intercourse and Consular Activity.

§ 98. The outbreak of war causes at once the rupture of diplomatic intercourse between the belligerents, if such rupture has not already taken place. The respective diplomatic envoys are recalled and ask for their passports, or receive them without any previous request, but they enjoy their privileges of inviolability and exterritoriality for the period of time requisite for leaving the country. Consular activity likewise comes to an end through the outbreak of war.[180]

[180] See above, vol. I. §§ 413 and 436.

Cancellation of Treaties.

§ 99. The doctrine was formerly held, and a few writers[181] maintain it even now, that the outbreak of war *ipso facto* cancels all treaties previously concluded between the belligerents, such treaties only excepted as have been concluded especially for the case of war. The vast majority of modern writers on International Law have abandoned this standpoint,[182] and the opinion is pretty general that war by no means annuls every treaty. But unanimity as to what treaties are or are not cancelled by war does not exist. Neither does a uniform practice of the
[Pg 130] States exist, cases having occurred in which States have expressly declared[183] that they considered all treaties annulled through war. Thus the whole question remains as yet unsettled. Nevertheless a majority of writers agree on the following points:—

(1) The outbreak of war cancels all political treaties between the belligerents which have not been concluded for the purpose of setting up a permanent condition of things, for instance, treaties of alliance.

(2) On the other hand, it is obvious that such treaties as have been especially concluded for the case of war are not annulled, such as treaties in regard to the neutralisation of certain parts of the territories of the belligerents.

(3) Such political and other treaties as have been concluded for the purpose of setting up a permanent[184] condition of things are not *ipso facto* annulled by the outbreak of war, but nothing prevents the victorious party from imposing upon the other party in the treaty of peace any alterations in, or even the dissolution of, such treaties.

(4) Such non-political treaties as do not intend to set up a permanent condition of things, as treaties of commerce for example, are not *ipso facto* annulled, but the parties may annul them or suspend them according to discretion.

(5) So-called law-making[185] treaties, as the Declaration of Paris for example, are not cancelled by the outbreak of war. The same is valid in regard to all treaties to which a multitude of States are parties, as the International Postal Union for example, but the belligerents may suspend
[Pg 131] them, as far as they themselves are concerned, in case the necessities of war compel them to do so.[186]

[181] See, for instance, Phillimore, III. § 530, and Twiss, I. § 252, in contradistinction to Hall, § 125.

[182] See Jaconnet, *op. cit.* pp. 113-128.

[183] As, for instance, Spain in 1898, at the outbreak of the war with the United States of America, see Moore, V. pp. 375-380.

[184] Thus American and English Courts—see the cases of the *Society for the Propagation of the Gospel* v. *Town of Newhaven* (1823), 8 Wheaton 464, and *Sutton* v. *Sutton* (1830), 1 Russel & Mylne, 663—have declared that article IX. of the treaty of Nov. 19, 1794, between Great Britain and the United States was not annulled by the outbreak of war in 1812. See Moore, V. § 779 and Westlake, II. p. 30; see also the foreign cases discussed by Jaconnet, *op. cit.* pp. 168-179.

[185] See above, vol. I. §§ 18, 492, 555-568*b*.

[186] The Institute of International Law is studying the whole question of the effect of war on treaties; see Politis, *l.c.*, and especially *Annuaire*, XXIV. (1911), pp. 201-213, and 220-221.

Precarious position of Belligerents' subjects on Enemy Territory.

§ 100. The outbreak of war affects likewise such subjects of the belligerents as are at the time within the enemy's territory. In former times they could at once be detained as prisoners of war, and many States, therefore, concluded in time of peace special treaties for the time of war expressly stipulating a specified period during which their subjects should be allowed to leave each other's territory unmolested.[187] Through the influence of such treaties, which became pretty general during the eighteenth century, it became an international practice that, as a rule, enemy subjects must be allowed to withdraw within a reasonable period, and no instance of the former rule has occurred during the nineteenth[188] century. Although some[189] writers even nowadays maintain that according to strict law the old rule is still in force, it may safely[190] be maintained that there is now a customary rule of International Law, according to which all such subjects of the enemy as have not according to the Municipal Law of their country to join the armed forces of the enemy must be allowed a reasonable period for withdrawal. On the other hand, such enemy subjects as are active or reserve officers, or reservists, and the like, may be
[Pg 132]
prevented from leaving the country and detained as prisoners of war, for the principle of self-preservation must justify belligerents in refusing to furnish each other with resources which increase their means of offence and defence.[191] However that may be, a belligerent need not allow[192] enemy subjects to remain on his territory, although this is frequently done. Thus, during the Crimean War Russian subjects in Great Britain and France were allowed to remain there, as were likewise Russians in Japan and Japanese in Russia during the Russo-Japanese War, and Turks in Italy during the Turco-Italian War. On the other hand, France expelled all Germans during the Franco-German war in 1870; the former South African Republics expelled most British subjects when war broke out in 1899; Russia, although during the Russo-Japanese War she allowed Japanese subjects to remain in other parts of her territory, expelled them from her provinces in the Far East; and in May 1912, eight months after the outbreak of the Turko-Italian War, Turkey decreed the expulsion of all Italians, certain classes excepted. In case a belligerent allows the residence of enemy subjects on his territory, he can, of course, give the permission under certain conditions only, such as an oath to abstain from all hostile acts or a promise not to leave a certain region, and the like. And it must be especially observed that an enemy subject who is allowed to stay in the country after the outbreak of war must not, in case the forces of his home State militarily occupy the part of the country inhabited by him, join these forces or assist them in any way. If, nevertheless, he does so, he is liable to be punished for treason[193] by the local Sovereign after the withdrawal of the enemy forces.

[187] See a list of such treaties in Hall, § 126, p. 107, note 1.

[188] With regard to the 10,000 Englishmen who were arrested in France by Napoleon at the outbreak of war with England in 1803 and kept as prisoners of war for many years, it must be borne in mind that Napoleon did not claim a right to make such civilians prisoners of war as were at the outbreak of war on French soil. He justified his act as one of reprisals, considering it a violation of the Law of Nations on the part of England to begin hostilities by capturing two French merchantmen in the Bay of Audierne without a formal declaration of war. See Alison, *History of Europe*, V. p. 277, and Bonfils, No. 1052.

[189] See Twiss, II. § 50; Rivier, II. p. 320; Liszt, § 39, V.; Holland, *Letters upon War and Neutrality* (1909), p. 39.

[190] See *Land Warfare*, § 12.

[191] See *Land Warfare*, § 13.

[192] See above, vol. I. § 324.

[193] See above, vol. I. § 317, p. 394, where the case of *De Jager* v. *Attorney General* is discussed.

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Persona standi in judicio on Enemy Territory.

§ 100*a*. Formerly the rule prevailed everywhere that an enemy subject has no *persona standi in judicio* and is, therefore, *ipso facto* by the outbreak of war, prevented from either taking or defending proceedings in the Courts. This rule dates from the time when war was considered such a condition between belligerents as justified the committing of hostilities on the part of all subjects of the one belligerent against all subjects of the other, and, further, the killing of all enemy subjects irrespective of sex and age, and, at any rate, the confiscation of all private enemy property. War in those times used to put enemy subjects entirely *ex lege*, and it was only a logical consequence from this principle that enemy subjects could not sustain *persona standi in judicio*. Since the rule that enemy subjects are entirely *ex lege* has everywhere vanished, the rule that they may not take or defend proceedings in the Courts has in many countries, such as Austria-Hungary, Germany, Holland, and Italy, likewise vanished. But in Great Britain and the United States of America[194] enemy subjects are still prevented from taking and defending legal proceedings,[195] although there are six exceptions to the general rule. Firstly, enemy subjects who do not bear enemy character because they are resident in neutral country or have a licence to trade or are allowed[196] to remain in the country of a belligerent, are therefore permitted to sue and be sued in British and American Courts. Secondly, if during time of peace a defendant obtains an opportunity to plead, and if subsequently war breaks out with the country of the plaintiff, the defendant may not plead that the plaintiff is prevented from suing.[197] Thirdly, if a
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contract was entered into and executed before the war, and if an absent enemy subject has property within the boundaries of a belligerent, he may be sued.[198] Fourthly, a prisoner of war[199] may sue during war on a contract for wages. Fifthly, if the parties, being desirous to obtain a decision on the merits of the case, waive the objection, enemy subjects may sue and be sued.[200] Lastly, a petition on the part of a creditor who is an enemy subject, to prove a debt

under a commission of bankruptcy must be admitted[201] although the dividend will not be paid till after the conclusion of peace.

[194] In strict law also in France.

[195] The leading case is the *Hoop* (1799), 1 C. Rob. 196.

[196] *Wells* v. *Williams* (1698), 1 Lord Raymond, 282.

[197] *Shepeler* v. *Durand* (1854), 14 P.C. 582.

[198] *Dorsey* v. *Kyle* (1869), 3 Maryland, 512. It would seem that the American Courts are inclined to drop the rule that an enemy subject cannot be sued; see *De Jarnett* v. *De Giversville* (1874), 56 Missouri, 440.

[199] *Maria* v. *Hall* (1800), 2 B. & P. 236.

[200] *Driefontein Consolidated Gold Mines Co.* v. *Janson* (1910), 2 Q.B. 419; App. Cas. (1902), 484.

[201] *Ex parte Boussmaker* (1806), 13 Vesey Jun. 71.

It is asserted that, in consequence of article 23 (*h*) of the Hague Regulations concerning land warfare enacting the injunction "to declare extinguished, suspended, or unenforceable in a Court of Law the rights and rights of action of the nationals of the adverse party," Great Britain and the United States are compelled to abolish their rule that enemy subjects may not sue. But the interpretation of article 23 (*h*) is controversial, Great Britain and the United States of America—in contradistinction to Germany and France—maintaining that the article has nothing to do with their Municipal Law but concerns the conduct of armies in occupied enemy territory.[202]

[202] It is impossible here to discuss the details of this controversy which the third Peace Conference must settle. See above, vol. I. § 554, No. 10; Politis in *R.G.* XVIII. (1911), pp. 249-259, and the literature there quoted; Kohler in *Z.V.* V. (1911), pp. 384-393; Holland in *The Law Quarterly Review*, XXVIII. (1912), pp. 94-98; Charteris in *The Juridical Review*, XXIII. (1911), pp. 307-323; Oppenheim, *Die Zukunft des Völkerrechts* (1911), pp. 30-32.

However this may be, it must be especially observed that, according to British and American law, claims arising out of contracts concluded before the war do not become extinguished
[Pg 135] through the outbreak of war, but are only suspended during war, and the Statute of Limitations does not, according to American[203] practice at any rate, run during war.

[203] *Hanger* v. *Abbot* (1867), 6 Wallace, 532. The point is not settled in English law, for the *obiter dictum* in *De Wahl* v. *Browne* (1856), 25 L.J. (N.S.) Ex. 343, "It may be that the effect would ultimately be to bar the action by reason of the Statute of Limitations is no answer...", is not decisive, although Anson, *Principles of the English Law of Contract* (11th ed. 1906), p. 122, and other writers accept it as decisive.

Intercourse, especially Trading, between Subjects of Belligerents.

§ 101. Following Bynkershoek,[204] all British and American writers and cases, and also some French[205] and German[206] writers assert the existence of a rule of International Law that all intercourse, and especially trading, is *ipso facto* by the outbreak of war prohibited between the subjects of the belligerents, unless it is permitted under the customs of war, as, for instance, ransom bills, or is allowed under special licences, and that all contracts concluded between the subjects of the belligerents before the outbreak of war become extinct or suspended. On the other hand, most German, French, and Italian writers deny the existence of such a rule, but assert the existence of another according to which belligerents are empowered to prohibit by special orders all trade between their own and enemy subjects.

[204] *Quaestiones juris publici*, I. c. 3: "*quamvis autem nulla specialis sit commerciorum prohibitio ipsa tamen jure belli commercia sunt vetita*."

[205] For instance, Pillet, p. 74, and Mérignhac, p. 57.

[206] For instance, Geffcken in his note 4 to Heffter, p. 265.

These assertions are remnants of the time when the distinction[207] between International and Municipal Law was not, or not clearly, drawn. International Law, being a law for the conduct of States only and exclusively, has nothing to do directly with the conduct of private individuals, and both assertions are, therefore, nowadays untenable. Their place must be taken by the statement that, States being sovereign and the outbreak of war bringing the peaceful relations between
[Pg 136] belligerents to an end, it is within the competence of every State to enact by its Municipal Law such rules as it pleases concerning intercourse, and especially trading, between its own and enemy subjects. And if we look at the Municipal Laws of the several countries, we find that they have to be divided into two groups. To the one group belong those States—such as Austria-Hungary, Germany, Holland, and Italy—whose Governments are empowered by their Municipal Laws to prohibit by special order all trading with enemy subjects at the outbreak of war. In these countries trade with enemy subjects is permitted to continue after the outbreak of war unless special prohibitive orders are issued. To the other group belong those States—such as Great Britain, the United States of America, and, unless *desuetudo*[208] has made an alteration, France—whose Municipal Laws declare trade and intercourse with enemy subjects *ipso facto* by the outbreak of war prohibited, but empowers the Governments to allow by special licences all or certain kinds of such trade.

[207] See above, vol. I. § 20.

[208] See Meyer, *op. cit.* p. 91.

As regards the law of Great Britain[209] and the United States of America, it has been, since the end of the eighteenth century, an absolutely settled[210] rule of the Common Law that, certain cases excepted, all trading with alien enemies is *ipso facto* by the outbreak of war illegal unless it
[Pg 137] is allowed by special licences of the Crown. From the general principle asserted in the leading cases,[211] the Courts have drawn the following more important consequences:—

(1) All contracts, entered into

during

a war,

[212]

with alien enemies without a special licence are illegal, invalid, and can never be enforced, unless the contract was one entered into in case of necessity,

[213]

or in order to supply

[214]

an invading English army or the English fleet, or by prisoners

[215]

of war concerning personal services and requirements. (2) Trading with the enemy does not become legal by the fact that goods coming from the enemy country to Great Britain, or going from Great Britain to the enemy country, are sent to their destination through a neutral country.

[216]

(3) As regards contracts entered into

before

[217]

the outbreak of war, a distinction must be drawn:—(

a

) Executory contracts are avoided, both parties being released from performance. (

b

) Contracts executed before the outbreak of war and not requiring to be acted upon during the war are suspended until after the conclusion of peace. (

c

) Executed contracts which require acting upon during the war are dissolved. (4) Partnerships

[218]

with alien enemies are dissolved. (5) No interest runs on debts

[219]

or mortgages.

[220]

[Pg 138]

(6) A contract of affreightment

[221]

must not be fulfilled; therefore English ships must not load or unload goods in an enemy port. (7) Contracts of insurance of enemy vessels and goods are so to be construed as to contain a proviso that the assurance shall not cover any loss occurring during a war between the country of the assurer and the country of the assured.

[222]

(8) A life insurance policy,

[223]

entered into before the outbreak of war conditioning the payment of yearly premiums on pain of forfeiture of the policy, is forfeited

ipso facto

by the outbreak of war because the payment of the premium is now prohibited. After the conclusion of peace, however, the insured may claim the equitable value of the policy arising, at the time of the outbreak of war, from the premiums actually paid.

[209] See besides the English and American text-books quoted above at the commencement of § 97, Pennant, Chadwick, and Gregory in *The Law Quarterly Review*, XVIII. (1902), pp. 289-296, XX. (1904), pp. 167-185, XXV. (1909), pp. 297-316; Bentwich, *The Law of Private Property in War* (1907), pp. 46-61; Phillipson, *The Effect of War on Contracts* (1909); Latifi, *Effects of War on Property* (1909), pp. 50-58.

[210] Whereas the Admiralty Court did at all times, the Common Law Courts did not during the eighteenth century hold trading with enemy subjects to be illegal, at any rate not in so far as insurance of enemy vessels and goods against capture on the part of English cruisers was concerned; see *Henkle* v. *London Exchange Assurance Co.* (1749), 1 Vesey Sen. 320; *Planche* v. *Fletcher* (1779), 1 Dougl. 251; *Lavabre* v. *Wilson* (1779), 1 Dougl. 284; *Gist* v. *Mason* (1786), 1 T.R. 84.

[211] Besides the Admiralty case of the *Hoop* (1799), 1 C. Rob. 196, the following are the leading cases:—*Potts* v. *Bell* (1800), 8 D. & E. 548; *Furtado* v. *Rodgers* (1802), 3 P. & B. 191; *Esposito* v. *Bowden* (1857), 7 E. & B. 763; the *Mashona* (1900), 10 *Cape Times* Law Reports, 170.

[212] *Willison* v. *Paterson* (1817), 7 Taunt, 439.

[213] *Antoine* v. *Morshead* (1815), 6 Taunt, 237.

[214] The *Madonna delle Gracie* (1802), 4 C. Rob. 195.

[215] *Maria* v. *Hall* (1800), 2 B. & P. 236.

[216] The *Jonge Pieter* (1801), 4 C. Rob. 79. But if the goods have been bought by the subject of a neutral State *bona fide* by himself and are afterwards shipped through neutral country to the enemy, it is not a case of trading with the

enemy; see the *Samuel* (1802), 4 C. Rob. 284, note.

[217] *Melville* v. *De Wold* (1855), 4 E. & B. 844; *Esposito* v. *Bowden* (1857), 7 E. & B. 763; *Ex parte Boussmaker* (1806), 13 Ves. Jun. 71; *Alcinous* v. *Nygreu* (1854), 4 E. & B. 217; the *Charlotta* (1814), 1 Dodson, 390.

[218] *Griswold* v. *Boddington* (1819), 16 Johnson, 438; *Esposito* v. *Bowden* (1857), 7 E. & B. 763.

[219] *Du Belloix* v. *Lord Waterpark* (1822), 1 Dowl. & R. 16; *Mayer* v. *Reed* (1867), 37 Gallison, 482.

[220] *Hoare* v. *Allan* (1789), 2 Dallas, 102.

[221] *Esposito* v. *Bowden* (1857), 7 E. & B. 763. See also the *Teutonia* (1870), L. R. 4 Privy Council, 171.

[222] *Brandon* v. *Curling* (1803), 4 East, 410; but see also *Potts* v. *Bell* (1800), 8 D. & E. 548; *Furtado* v. *Rodgers* (1802), 3 P. & B. 191; *Kellner* v. *Le Mesurier* (1803), 4 East, 396; *Gamba* v. *Le Mesurier* (1803), 4 East, 407.

[223] *New York Life Insurance Co.* v. *Stathem*, v. *Symes*, and v. *Buck* (1876), 93 United States, 24; *New York Life Insurance Co.* v. *Davis* (1877), 95 United States, 425.

It must be specially observed that, if the continental interpretation of article 23 (*h*) of the Hague Regulations—see above, § 100*a*—were not contradicted by Great Britain and the United States of America, both countries would be compelled to alter their Municipal Laws in so far as these declare such contracts as have been entered into with alien enemies before the outbreak of war dissolved, void, or suspended. Article 23 (*h*) distinctly enacts that it is forbidden to declare extinguished or suspended the rights of the nationals of the adverse party. Since, however, as stated above in § 100*a*, Great Britain and the United States of America uphold a different interpretation, this article does not concern their Municipal Laws respecting trading with alien enemies.

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Position of Belligerents' Property in the Enemy State.

§ 102. In former times all private and public enemy property, immoveable or moveable, on each other's territory could be confiscated by the belligerents at the outbreak of war, as could also enemy debts; and the treaties[224] concluded between many States with regard to the withdrawal of each other's subjects at the outbreak of war stipulated likewise the unrestrained withdrawal of the private property of their subjects. Through the influence of such treaties as well as of Municipal Laws and Decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate private enemy property nor annul enemy debts on their territory. The last case of confiscation of private property is that of 1793 at the outbreak of war between France and Great Britain. No case of confiscation occurred during the nineteenth century, and although several writers maintain that according to strict law the old rule, in contradistinction to the usage which they do not deny, is still valid, it may safely be maintained that it is obsolete, and that there is now a customary rule of International Law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent. This rule, however, does not prevent a belligerent from seizing public enemy property on his territory, such as funds, ammunition, provisions, rolling stock of enemy state-railways, and other valuables; from preventing the withdrawal of private enemy property which may be made use of by the enemy[225] for military operations, such as arms and munitions;
[Pg 140]
from seizing and making use of rolling stock belonging to private enemy railway companies, other means of transport of persons or goods which are private enemy property, and, further, all appliances for the transmission of news, although they are private enemy property, provided all these articles are restored and indemnities are paid for them after the conclusion of peace;[226] and from suspending, as a measure of self preservation, the payment of large enemy debts till after the conclusion of peace in order to prevent the increase of resources of the enemy.

[224] See above, § 100; Moore, VII. § 1196; Scott, *Conferences*, pp. 559-563.

[225] The indulgence granted to enemy merchantmen in Russian and Japanese ports at the outbreak of the war in 1904, to leave those ports unmolested within a certain period of time, was conditional upon there being no contraband in the cargoes. See Lawrence, *War*, p. 52.

[226] As the seizure of all these articles is, according to article 53 of the Hague Regulations, permissible in occupied enemy country, provided they are restored and indemnities paid after the conclusion of peace, seizure must likewise —under the same conditions—be permissible in case these articles are on the territory of a belligerent. As regards rolling stock belonging to private enemy railway companies, see Nowacki, *Die Eisenbahnen im Kriege* (1906), § 15.

Effect of the Outbreak of War on Merchantmen.

§ 102*a*. In former times International Law empowered States at the outbreak of war to lay an embargo upon all enemy merchantmen in their harbours in order to confiscate them. And enemy merchantmen on the sea could at the outbreak of war be captured and confiscated although they did not even know of the outbreak of war. As regards enemy merchantmen in the harbours of the belligerents, it became, from the outbreak of the Crimean War in 1854, a usage, if not a custom, that no embargo[227] could be laid on them for the purpose of confiscating them, and that a reasonable time must be granted them to depart unmolested; but no rule was in existence until the Second Peace Conference of 1907 which prescribed immunity from confiscation for such enemy merchantmen at sea as did not know of the outbreak of war. This Conference took the matter into consideration, and produced a Convention (VI.) relative to the status of enemy merchantmen at the outbreak of hostilities[228] which is signed by all the Powers represented at
[Pg 141]
the Conference, except the United States of America,[229] China, and Nicaragua; but Nicaragua acceded later. In coming to an agreement on the subject, two facts had to be taken into consideration. There is, firstly, the fact that in all maritime countries numerous merchantmen are now built from special designs in order that they may quickly, at the outbreak of or during war, be converted into cruisers; it would therefore be folly on the part of a belligerent to grant any lenient treatment to such vessels. There is, secondly, the fact, that a belligerent fleet cannot

nowadays remain effective for long without being accompanied by a train of colliers, transport vessels, and repairing vessels; it is, therefore, of the greatest importance for a belligerent to have as many merchantmen as possible at his disposal for the purpose of making use of them for such assistance to the fleet. For this reason, Convention VI. represents a compromise, and it distinguishes between vessels in the harbours of the belligerents and vessels on the sea. Its provisions are the following:—

[227] See above, § 40.

[228] See Lémonon, pp. 647-661; Higgins, pp. 300-307; Nippold, II. pp. 146-153; Scott, *Conferences*, pp. 556-568; Dupuis, *Guerre*, Nos. 74-81; Scott in *A.J.* II. (1908), pp. 260-269.

[229] The United States of America refused to sign the Convention because she considers its stipulations retrogressive as they are less liberal than the practice which has prevailed since 1854. But circumstances have changed since that time, and the two facts explained in the text would seem to have compelled the maritime Powers to adopt rules somewhat less liberal. This was the more necessary since no agreement could be arrived at concerning the question of the locality in which belligerents should be allowed to convert merchantmen into cruisers.

(1) Article 1 of the Convention enacts that, in case an enemy merchantman is at the beginning of the war in the port of a belligerent, it is *desirable* that she should be allowed freely to depart, either immediately or after a sufficient term of grace, and, after being furnished with a passport, to proceed either direct to her port of destination or to such other port as may be determined. It is obvious that, since only the desirability of free departure of such vessels is stipulated, a belligerent is not compelled to grant free departure; nevertheless there must be grave reasons
[Pg 142] for not acting in accordance with what is considered desirable by article 1. And it must be specially observed that a belligerent may make a distinction in the treatment of several enemy vessels in his harbours, and may grant free departure to one or more of them, and refuse it to others, according to his discretion.

(2) The former usage that enemy merchantmen in the harbours of the belligerents at the outbreak of war may not be confiscated, has been made a *binding rule* by article 2 which enacts that such vessels as were not allowed to leave, or were by *force majeure* prevented from leaving during the term of grace, may not be confiscated, but may only be detained under the obligation that they shall be restored, without indemnity, after the conclusion of peace, or they may be requisitioned on condition of indemnities to be paid to the owners.

(3) Enemy merchantmen which have left their last port of departure before the outbreak of war and which, while ignorant of the outbreak of war, are met at sea by cruisers of the belligerents, may, according to article 3, be captured, but they may not be confiscated, for they must be restored after the war is ended, although no indemnities need be paid. Indemnities are only to be paid in case the vessels have been requisitioned or destroyed, for a belligerent is empowered to requisition or destroy such vessels provided he takes care to preserve the ship papers and makes arrangements for the safety of the persons on board.

It is obvious that, in case such vessels are not ignorant of the outbreak of war—having, for instance, received the news by wireless telegraphy—they may not any longer claim the privileges stipulated by article 3. And this article stipulates expressly that after having touched a port of their own or of a neutral country, such vessels are no longer privileged.

[Pg 143] (4) Enemy goods on board such enemy merchantmen as are in the harbour of a belligerent at the outbreak of war or at sea and are in ignorance of the outbreak of war are, according to article 4, privileged to the same extent as the vessels concerned.

(5) Enemy merchantmen whose construction indicates that they are intended to be converted into cruisers may be seized and confiscated in the harbours of the belligerents, as well as at sea, although ignorant of the outbreak of war, for article 5 stipulates expressly that Convention VI. does not affect such vessels.

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CHAPTER III

WARFARE ON LAND

I

ON LAND WARFARE IN GENERAL

Vattel, III. §§ 136-138—Hall, §§ 184-185—Phillimore, III. § 94—Taylor, § 469—Wheaton, § 342—Bluntschli, §§ 534-535—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 388-389—Gareis, § 84—Bonfils, Nos. 1066-1067—Pradier-Fodéré, VI. Nos. 2734-2741—Longuet, § 41—Mérignhac, p. 146—Pillet, pp. 85-89—*Kriegsbrauch*, p. 9—*Land Warfare*, § 39—Holland, *War*, Nos. 1-15.

Aims and Means of Land Warfare.

§ 103. The purpose of war, namely, the overpowering of the enemy, is served in land warfare through two aims[230]—firstly, defeat of the enemy armed forces on land, and, secondly, occupation and administration of the enemy territory. The chief means by which belligerents try to realise those aims, and which are always conclusively decisive, are the different sorts of force applied against enemy persons. But besides such violence against enemy persons there are other means which are not at all unimportant, although they play a secondary part only. Such means

are: appropriation, utilisation, and destruction of enemy property; siege; bombardment; assault; espionage; utilisation of treason; ruses. All these means of warfare on land must be discussed in this chapter, as must also occupation of enemy territory.

[230] Aims of land warfare must not be confounded with ends of war; see above, § 66.

Lawful and Unlawful Practices of Land Warfare.

[Pg 145] § 104. But—to use the words of article 22 of the Hague Regulations—"the belligerents have not an unlimited right as to the means they adopt for injuring the enemy." For not all possible practices of injuring the enemy in offence and defence are lawful, certain practices being prohibited under all circumstances and conditions, and other practices being allowed only under certain circumstances and conditions, or only with certain restrictions. The principles of chivalry and of humanity have been at work[231] for many hundreds of years to create these restrictions, and their work is not yet at an end. However, apart from these restrictions, all kinds and degrees of force and many other practices may be made use of in war.

[231] See above, § 67.

Objects of the Means of Warfare.

§ 105. In a sense all means of warfare are directed against one object only—namely, the enemy State, which is to be overpowered by all legitimate means. Apart from this, the means of land warfare are directed against several objects.[232] Such objects are chiefly the members of the armed forces of the enemy, but likewise, although in a lesser degree, other enemy persons; further, private and public property, fortresses, and roads. Indeed, apart from certain restrictions, everything may eventually be the object of a means of warfare, provided the means are legitimate in themselves and are capable of fostering the realisation of the purpose of war.

[232] See Oppenheim, *Die Objekte des Verbrechens* (1894), pp. 64-146, where the relation of human actions with their objects is fully discussed.

Land Warfare in contradistinction to Sea Warfare.

§ 106. Land warfare must be distinguished from sea warfare chiefly for two reasons. Firstly, their circumstances and conditions differ widely from each other, and, therefore, their means and practices also differ. Secondly, the law-making Conventions which deal with warfare rarely deal with land and sea warfare at the same time, but mostly treat them separately, for whereas some Conventions deal exclusively with warfare on sea, the Hague Regulations (Convention IV.) deal [Pg 146] exclusively with warfare on land.

II

VIOLENCE AGAINST ENEMY PERSONS

Grotius, III. c. 4—Vattel, III. §§ 139-159—Hall, §§ 128, 129, 185—Westlake, II. pp. 72-76—Lawrence, §§ 161, 163, 166-169—Maine, pp. 123-148—Manning, pp. 196-205—Phillimore, III. §§ 94-95—Halleck, II. pp. 14-18—Moore, VII. §§ 1111, 1119, 1122, 1124—Taylor, §§ 477-480—Walker, § 50—Wheaton, §§ 343-345—Bluntschli, §§ 557-563—Heffter, § 126—Lueder in Holtzendorff, IV. pp. 390-394—Gareis, § 85—Klüber, § 244—Liszt, § 40, III.—G. F. Martens, II. § 272—Ullmann, § 176—Bonfils, Nos. 1068-1071, 1099, 1141—Despagnet, Nos. 525-527—Pradier-Fodéré, VI. Nos. 2742-2758—Rivier, II. pp. 260-265—Nys, III. pp. 206-209—Calvo, IV. 2098-2105—Fiore, III. Nos. 1317-1320, 1342-1348, and Code, Nos. 1476-1483—Martens, II. § 110—Longuet, §§ 42-49—Mérignhac, pp. 146-165—Pillet, pp. 85-95—Holland, *War*, pp. 70-76—Zorn, pp. 127-161—Bordwell, pp. 278-283—Meurer, II. §§ 30-31—Spaight, pp. 73-156—*Kriegsbrauch*, pp. 9-11—*Land Warfare*, §§ 39-53.

On Violence in general against Enemy Persons.

§ 107. As war is a contention between States for the purpose of overpowering each other, violence consisting of different sorts of force applied against enemy persons is the chief and decisive means of warfare. These different sorts of force are used against combatants as well as non-combatants, but with discrimination and differentiation. The purpose of the application of violence against combatants is their disablement so that they can no longer take part in the fighting. And this purpose may be realised through either killing or wounding them, or making them prisoners. As regards non-combatant members of armed forces, private enemy persons showing no hostile conduct, and officials in important positions, only minor means of force may as a rule be applied, since they do not take part in the armed contention of the belligerents.

Killing and Wounding of Combatants.

§ 108. Every combatant may be killed or wounded, whether a private soldier or an officer, or even the monarch or a member of his family. Some publicists[233] assert that it is a usage of [Pg 147] warfare not to aim at a sovereign or a member of his family. Be that as it may, there is in strict law[234] no rule preventing the killing and wounding of such illustrious persons. But combatants may only be killed or wounded if they are able and willing to fight or to resist capture. Therefore, such combatants as are disabled by sickness or wounds may not be killed. Further, such combatants as lay down arms and surrender or do not resist being made prisoners may neither be killed nor wounded, but must be given quarter. These rules are universally recognised, and are now expressly enacted by article 23 (*c*) of the Hague Regulations, although the fury of battle frequently makes individual fighters[235] forget and neglect them.

[233] See Klüber, § 245; G. F. Martens, II. § 278; Heffter, § 126.

[234] Says Vattel, III. § 159: "Mais ce n'est point une loi de la guerre d'épargner en toute rencontre la personne du roi ennemi; et on n'y est obligé que quand on a la facilité de le faire prisonnier." The example of Charles XII. of Sweden (quoted by Vattel), who was intentionally fired at by the defenders of the fortress of Thorn, besieged by him, and who said that the defenders were within their right, ought to settle the point.

[235] See Baty, *International Law in South Africa* (1900), pp. 84-85.

Refusal of Quarter.

§ 109. However, the rule that quarter must be given has its exceptions. Although it has of late been a customary rule of International Law, and although the Hague Regulations now expressly stipulate by article 23 (*d*) that belligerents are prohibited from declaring that no quarter will be given, quarter may nevertheless be refused[236] by way of reprisal for violations of the rules of warfare committed by the other side; and, further, in case of imperative necessity, when the granting of quarter would so encumber a force with prisoners that its own security would thereby be vitally imperilled.[237] But it must be emphasised that the mere fact that numerous prisoners
[Pg 148] cannot safely be guarded and fed by the captors[238] does not furnish an exceptional case to the rule, provided that no vital danger to the captors is therein involved. And it must likewise be emphasised that the former rule is now obsolete according to which quarter could be refused to the garrison of a fortress carried by assault, to the defenders of an unfortified place against an attack of artillery, and to the weak garrison who obstinately and uselessly persevered in defending a fortified place against overwhelming enemy forces.

[236] See Pradier-Fodéré, VII. Nos. 2800-2801, who opposes this principle but discusses the subject in a very detailed way.

[237] See Payrat, *Le Prisonnier de Guerre* (1910), pp. 191-220, and *Land Warfare*, § 80.

[238] Accordingly, the Boers frequently during the South African War set free British soldiers whom they had captured.

Lawful and Unlawful Means of killing and wounding Combatants.

§ 110. Apart from such means as are expressly prohibited by treaties or custom, all means of killing and wounding that exist or may be invented are lawful. And it matters not whether the means used are directed against single individuals, as swords and rifles, or against large bodies of individuals, as, for instance, shrapnel, Gatlings, and mines. On the other hand, all means are unlawful that render death inevitable or that needlessly aggravate the sufferings of wounded combatants. A customary rule of International Law, now expressly enacted by article 23 (*e*) of the Hague Regulations, prohibits, therefore, the employment of poison and of such arms, projectiles, and material as cause unnecessary injury. Accordingly: wells, pumps, rivers, and the like from which the enemy draws drinking water must not be poisoned; poisoned weapons must not be made use of; rifles must not be loaded with bits of glass, irregularly shaped iron, nails, and the like; cannons must not be loaded with chain shot, crossbar shot, red-hot balls, and the like. Another customary rule, now likewise enacted by article 23 (*b*) of the Hague Regulations, prohibits any treacherous way of killing and wounding combatants. Accordingly: no assassin must be hired and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for
[Pg 149] quarter must be made; no treacherous simulation of sickness or wounds is permitted.

Explosive Bullets.

§ 111. In 1868 a conference met at St. Petersburg for the examination of a proposition made by Russia with regard to the use of explosive projectiles in war. The representatives of seventeen Powers—namely, Great Britain, Russia, Austria-Hungary, Bavaria, Belgium, Denmark, France, Greece, Holland, Italy, Persia, Portugal, Prussia and the North German Confederation, Sweden-Norway, Switzerland, Turkey and Württemberg (Brazil acceded later) signed on December 11, 1868, the so-called Declaration of St. Petersburg,[239] which stipulates that the signatory Powers, and those who should accede later, renounce in case of war between themselves the employment, by their military and naval troops, of any projectile of a weight below 400 grammes (14 ounces) which is either explosive or charged with fulminating or inflammable substances. This engagement is obligatory only upon the contracting Powers, and it ceases to be obligatory in case a non-contracting Power takes part in a war between any of the contracting Powers.

[239] See above, vol. I. § 562, and Martens, *N.R.G.* XVIII. p. 474.

Expanding (Dum-Dum) Bullets.

§ 112. As Great Britain had introduced bullets manufactured at the Indian arsenal of Dum-Dum, near Calcutta, the hard jacket of which did not quite cover the core and which therefore easily expanded and flattened in the human body, the First Hague Peace Conference adopted a declaration signed on July 29, 1899, by fifteen Powers—namely, Belgium, Denmark, Spain, Mexico, France, Greece, Montenegro, Holland, Persia, Roumania, Russia, Siam, Sweden-Norway, Turkey, and Bulgaria—stipulating that the contracting Powers should abstain, in case of war between two or more of them, from the use of bullets which expand or flatten easily in the human
[Pg 150] body, such as bullets with hard envelopes which do not entirely cover the core or are pierced with incisions. Austria-Hungary, China, Germany, Italy, Nicaragua, Portugal, Japan, Luxemburg, Servia, Switzerland, and Great Britain acceded later.

Projectiles diffusing Asphyxiating or Deleterious Gases.

§ 113. The First Hague Peace Conference also adopted a Declaration, signed on July 29, 1899, by sixteen States—namely, Belgium, Denmark, Spain, Mexico, France, Greece, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Siam, Sweden-Norway, Turkey and Bulgaria—stipulating that the signatory Powers should in a war between two or more of them abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases. Austria-Hungary, China, Germany, Italy, Japan, Luxemburg, Nicaragua, Servia, Switzerland, and Great Britain acceded later.

Violence directed from Air-Vessels.

§ 114. The First Hague Peace Conference adopted likewise a Declaration, signed on July 29, 1899, prohibiting *for a term of five years* the launching of projectiles or explosives from balloons or other kinds of aerial vessels. The Second Peace Conference, on October 18, 1907, renewed this Declaration *up to the close of the Third Peace Conference*, but out of twenty-seven States which signed the Declaration only seven—namely, Great Britain, the United States of America, China, Holland, Bolivia, Salvador, Haiti (Nicaragua acceded later)—ratified it, and Germany, France, Italy, Japan, Russia—not to mention smaller Powers—did not even sign it. There is, therefore, no doubt that the Third Peace Conference will not renew the Declaration. Although it is very much to be regretted, the fact must be taken into consideration that in future violence directed from air-vessels will play a great part in war. For this reason, the question as to the
[Pg 151]
conditions under which such violence is admissible, is of importance,[240] but it is as yet impossible to give a satisfactory answer. The Institute of International Law, at its meeting at Madrid in 1911, adopted the principle[241] that *aerial warfare must not comprise greater danger to the person and the property of the peaceful population than land or sea warfare*. However this may be, there can be no doubt that the general principles laid down in the Declaration of St. Petersburg of 1868, in the two Declarations, adopted by the First Peace Conference, concerning expanding bullets and projectiles diffusing asphyxiating or deleterious gases, in the Hague rules concerning land warfare, and the like, must find application as regards violence directed from air vessels.

[240] See, besides the literature quoted above, vol. I. p. 237, note 1, Mérignhac, pp. 198-209; Bonfils, Nos. 1440[4]-1440[21]; Despagnet, No. 721 *bis*; Meyer, *Die Luftschiffahrt in kriegsrechtlicher Beleuchtung* (1909); Philet, *La guerre aérienne* (1910); Nys, Fauchille, and Bar in *Annuaire*, XIX. (1902), pp. 58-114, XXIV. (1911), pp. 23-126; Fauchille in *R.G.* VIII. (1901), pp. 414-485.

[241] See *Annuaire*, XXIV. (1911), p. 346.

Violence against non-combatant Members of Armed Forces.

§ 115. It will be remembered from above, § 79, that numerous individuals belong to armed forces without being combatants. Now, since and in so far as these non-combatant members of armed forces do not take part in the fighting, they may not directly be attacked and killed or wounded. However, they are exposed to all injuries indirectly resulting from the operations of warfare. And, with the exception of the personnel[242] engaged in the interest of the wounded, such as doctors, chaplains, persons employed in military hospitals, official ambulance men, who, according to articles 9 and 10 of the Geneva Convention, are specially privileged, such non-combatant members of armed forces may certainly be made prisoners, since the assistance they give to the fighting forces may be of great importance.

[242] See below, § 121.

Violence against Private Enemy Persons.

§ 116. Whereas in former[243] times private enemy persons of either sex could be killed or
[Pg 152]
otherwise badly treated according to discretion, and whereas in especial the inhabitants of fortified places taken by assault used to be abandoned to the mercy of the assailants, in the eighteenth century it became a universally recognised customary rule of the Law of Nations that private enemy individuals should not be killed or attacked. In so far as they do not take part in the fighting, they may not be directly attacked and killed or wounded. They are, however, like non-combatant members of the armed forces, exposed to all injuries indirectly resulting from the operations of warfare. Thus, for instance, when a town is bombarded and thousands of inhabitants are thereby killed, or when a train carrying private individuals as well as soldiers is wrecked by a mine, no violation of the rule prohibiting attack on private enemy persons has taken place.

[243] See Grotius, III. c. 4, §§ VI. and IX.

As regards captivity, the rule is that private enemy persons may not be made prisoners of war. But this rule has exceptions conditioned by the carrying out of certain military operations, the safety of the armed forces, and the order and tranquillity of occupied enemy territory. Thus, for instance, influential enemy citizens who try to incite their fellow-citizens to take up arms may be arrested and deported into captivity. And even the whole population of a province may be imprisoned in case a levy *en masse* is threatening.[244]

[244] Civilians who render assistance to the enemy as drivers, or as labourers to construct fortifications or siege works, or in a similar way, if captured while they are so engaged, may not be detained as prisoners of war, whether they render these services voluntarily or are requisitioned or hired. See *Land Warfare*, § 58 note (*a*).

Apart from captivity, restrictions of all sorts may be imposed upon, and means of force may be applied against, private enemy persons for many purposes. Such purposes are:—the keeping of

[Pg 153] order and tranquillity on occupied enemy territory; the prevention of any hostile conduct, especially conspiracies; the prevention of intercourse with and assistance to the enemy forces; the securing of the fulfilment of commands and requests of the military authorities, such as those for the provision of drivers, hostages, farriers; the securing of compliance with requisitions and contributions, of the execution of public works necessary for military operations, such as the building of fortifications, roads, bridges, soldiers' quarters, and the like. What kind of violent means may be applied for these purposes is in the discretion of the respective military authorities, who on their part will act according to expediency and the rules of martial law established by the belligerents. But there is no doubt that, if necessary, capital punishment and imprisonment[245] are lawful means for these purposes. The essence of the position of private individuals in modern warfare with regard to violence against them finds expression in article 46 of the Hague Regulations, which lays down the rule that "family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected."

[245] That in case of general devastation the peaceful population may be detained in so-called concentration camps, there is no doubt; see below, § 154. And there is likewise no doubt that hostages may be taken from the peaceful population; see below, § 170, p. 213, and § 259, p. 319, note 2.

Violence against the Head of the Enemy State and against Officials in Important Positions.

§ 117. The head of the enemy State and officials in important posts, in case they do not belong to the armed forces, occupy, so far as their liability to direct attack, death, or wounds is concerned, a position similar to that of private enemy persons. But they are so important to the enemy State, and they may be so useful to the enemy and so dangerous to the invading forces, that they may certainly be made prisoners of war. If a belligerent succeeds in obtaining
[Pg 154] possession of the head of the enemy State or its Cabinet Ministers, he will certainly remove them into captivity. And he may do the same with diplomatic agents and other officials of importance, because by weakening the enemy Government he may thereby influence the enemy to agree to terms of peace.

III

TREATMENT OF WOUNDED, AND DEAD BODIES

Hall, § 130—Lawrence, § 165—Maine, pp. 156-159—Manning, p. 205—Phillimore, III. § 95—Halleck, II. pp. 36-39—Moore, VII. § 1134—Taylor, §§ 527-528—Bluntschli, §§ 586-592—Lueder in Holtzendorff, IV. pp. 289-319, 398-421—Liszt, § 40, V.—Ullmann, § 178 and in *R.G.* IV. (1897), pp. 437-447—Bonfils, Nos. 1108-1118[7]—Despagnet, Nos. 551-553—Pradier-Fodéré, VI. No. 2794, VII. Nos. 2849-2881—Rivier, II. pp. 268-273—Nys, III. pp. 526-536—Calvo, IV. §§ 2161-2165—Fiore, III. Nos. 1363-1372, and Code, Nos. 1589-1604—Martens, II. § 114—Longuet, §§ 85-90—Mérignhac, pp. 114-142—Pillet, pp. 165-192—*Kriegsbrauch*, p. 26—*Land Warfare*, §§ 174-220—Zorn, p. 122—Bordwell, pp. 249-277—Spaight, pp. 419-460—Higgins, pp. 35-38—Holland, *Studies*, pp. 61-65—Holland, *War*, Nos. 41-69—Güret, *Zur Geschichte der internationalen und freiwilligen Krankenpflege* (1873)—Lueder, *Die Genfer Convention* (1876)—Moynier, *La croix rouge, son passé et son avenir* (1882); *La revision de la Convention de Genève* (1898); *La fondation de la croix rouge* (1903)—Buzzati, *De l'emploi abusif … de la croix rouge* (1890)—Triepel, *Die neuesten Fortschritte auf dem Gebiet des Kriegsrechts* (1894), pp. 1-41—Müller, *Entstehungsgeschichte des rothen Kreuzes und der Genfer Konvention* (1897)—Münzel, *Untersuchungen über die Genfer Konvention* (1901)—Roszkoroski in *R.I.* 2nd Ser. IV. (1902), pp. 199, 299, 442—Gillot, *La revision de la Convention de Genève, etc.* (1902)—Meurer, *Die Genfer Konvention und ihre Reform* (1906)—Delpech in *R.G.* XIII. (1906), pp. 629-724—Macpherson in *Z.V.* V. (1911), pp. 253-277.

Origin of Geneva Convention.

§ 118. Although[246] since the seventeenth century several hundreds of special treaties have been concluded between different States regarding the tending of each other's wounded and the exemption of army surgeons from captivity, no general rule of the Law of Nations on these points was in existence until the second half of the nineteenth century other than one prohibiting the
[Pg 155] killing, mutilation, or ill-treatment of the wounded. A change for the better was initiated by Jean Henry Dunant, a Swiss citizen from Geneva, who was an eye-witness of the battle of Solferino in 1859, where many thousands of wounded died who could, under more favourable circumstances, have been saved. When he published, in 1861 and 1863, his pamphlet, *Un Souvenir de Solférino*, the Geneva *Société d'utilité publique*, under the presidency of Gustave Moynier, created an agitation in favour of better arrangements for the tending of the wounded on the battlefield, and convoked an international congress at Geneva in 1863, where thirty-six representatives of nearly all the European States met and discussed the matter. In 1864 the Bundesrath, the Government of the Federal State of Switzerland, took the matter in hand officially, and invited all European and several American States to send official representatives to a Congress at Geneva for the purpose of discussing and concluding an international treaty regarding the wounded. This Congress met in 1864, and sixteen States were represented. Its result was the international "Convention[247] for the Amelioration of the Condition of Soldiers wounded in Armies in the Field," commonly called "Geneva Convention," signed on August 22, 1864. By-and-by States other than the original signatories joined the Convention, and finally the whole body of the civilised States of the world, with the exception of Costa Rica, Monaco, and Lichtenstein, became parties. That the rules of the Convention were in no wise perfect, and needed to be supplemented regarding many points, soon became apparent. A second International Congress met at the invitation of Switzerland in 1868 at Geneva, where additional articles[248] to the original Convention were
[Pg 156] discussed and signed. These additional articles have, however, never been ratified. The First Hague Peace Conference in 1899 unanimously formulated the wish that Switzerland should

shortly take steps for the assemblage of another international congress in order to revise the Geneva Convention. This Congress assembled in June 1906, thirty-five States having sent representatives, and on July 6, 1906, a new Geneva Convention[249] was signed by Great Britain, Germany, Argentina, Austria-Hungary, Belgium, Bulgaria, Chili, China, Congo Free State, Korea, Denmark, Spain, the United States of America, Brazil, Mexico, France, Greece, Guatemala, Honduras, Italy, Japan, Luxemburg, Montenegro, Norway, Holland, Peru, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden, Switzerland, and Uruguay. Most of these States have already ratified, and Colombia, Costa-Rica, Cuba, Nicaragua, Salvador, Turkey, and Venezuela, which were not represented at the Congress, acceded later. There is no doubt that in time all the civilised Powers will become parties.

[246] See Macpherson, *loc. cit.* p. 254.

[247] See Martens, *N.R.G.* XVIII. p. 607, and above, vol. I. § 560.

[248] See Martens, *N.R.G.* XVIII. p. 61.

[249] See Martens, *N.R.G.* 3rd. Ser. II. (1910), p. 620, and *Treaty Series*, 1907, No. 15.

The new Convention consists of thirty-three articles instead of the ten articles of the old Convention, and provides rules for the treatment of the wounded and the dead; further rules concerning military hospitals and mobile medical units; the personnel engaged in the interest of the wounded including army chaplains; the material belonging to mobile medical units, military hospitals, and voluntary aid societies; the convoys of evacuation; the distinctive emblem; the carrying out of the Convention; and the prevention of abuses and infractions.

[Pg 157] In the final protocol the Conference expresses the desire that, in order to arrive at a unanimous interpretation of the Convention, the parties should, so far as the cases and the circumstances permit, submit to Hague Court Arbitration any differences which *in time of peace* might arise between them concerning the interpretation of the Convention, but Great Britain and Japan refused to become parties to this.

The Wounded and the Sick.

§ 119. According to articles 1-5 of the Geneva Convention,[250] the sick and wounded persons belonging, or officially attached, to armies must be respected and taken care of, without distinction of nationality, by the belligerent in whose power they may be. Should, however, a belligerent necessarily be compelled to abandon such sick and wounded persons to the enemy, he must, so far as military exigencies permit, leave behind with them a portion of his medical personnel to take care of them, and the necessary material. The sick and wounded who have fallen into the hands of the enemy are prisoners of war, but belligerents may exchange or release them, or even hand them over to a neutral State which has to intern them until after the conclusion of peace. After each engagement the commander in possession of the field must have search made for the wounded and must take measures to protect them against pillage and maltreatment. A nominal roll of all wounded and sick who have been collected must be sent as early as possible to the authorities of the country or army to which they belong, and the belligerents must keep each other mutually informed of any internments and changes as well as of admissions into hospital. It is specially stipulated by article 5 that, if a military authority finds it necessary to appeal to the charitable zeal of the inhabitants to collect and take care of, under [Pg 158] his direction, the wounded and sick of armies, he can grant to those who have responded to his appeal special protection and certain immunities.

[250] The stipulations of the Geneva Convention are for the most part of a technical military character, and it is, therefore, impossible in a general treatise of International Law to enter into any details. Readers who take a deeper interest in the matter must be referred to the most valuable article by Macpherson in *Z.V.* V. (1911), pp. 253-277.

Medical Units and Establishments, and Material.

§ 120. In order that the wounded and sick may receive proper treatment, mobile medical units as well as the fixed establishments of the medical service must be respected and protected by the belligerents, but this protection ceases if these units and establishments are made use of to commit acts harmful to the enemy, for instance, to shelter combatants, to carry on espionage, to conceal arms and ammunition (articles 6 and 7). But article 8 expressly enacts that the units and establishments do not forego protection:—(*a*) in case the personnel is armed and use their arms for their own defence or for the defence of the wounded and sick under their charge; (*b*) in case, in default of armed orderlies, units or establishments are guarded by pickets or by sentinels furnished with authority in due form; (*c*) in case weapons and cartridges, taken from the wounded and not yet handed over to the proper department, are found in units or establishments.

As regards the *material*, a distinction is drawn between the treatment of the material of mobile medical units, of fixed medical establishments, and of material belonging to Voluntary Aid Societies.

(*a*) Mobile medical units which fall into the hands of the enemy must not be deprived of their material, including their teams, whatever may be the means of transport and whoever may be the drivers employed (article 14). The competent military authority is, however, permitted to make use of the material in captured medical units for the treatment of the wounded and the sick at hand, provided it is restored under the same conditions, and so far as possible at the same time, [Pg 159] as laid down for the release of the medical personnel by article 12.

(*b*) The buildings and material of fixed medical establishments which, because the locality where they are is militarily occupied, fall into the hands of the enemy, remain, according to article 15, "subject to the laws of war," that means they remain entirely in the power of the

captor, but they may not be diverted from their medical purpose so long as they are necessary for the proper treatment of the wounded and the sick. Should, however, urgent military necessity demand it, a commander may dispose of them, provided he makes previous arrangements for the welfare of the wounded and sick found in the fixed establishments.

(*c*) The material of Voluntary Aid Societies, which are duly recognised, is, according to article 16, considered private property and must, therefore, be respected as such under all circumstances, although it may be requisitioned.

Personnel.

§ 121. The personnel engaged exclusively in the collection, transport, and treatment of the wounded and sick, as well as in the administration of mobile medical units and establishments, the chaplains attached to armies, and, lastly, pickets and sentinels guarding medical units and establishments, must, according to article 9, under all circumstances be respected and protected. If they fall into the hands of the enemy they must not be treated as prisoners of war. According to article 12, however, they are not free to act or move without let or hindrance, for, if their assistance is indispensable, they may be called upon by the captor to carry on their duties to the wounded and the sick. But when their assistance is no longer indispensable, they must be sent back to their army or to their country at such time and by such route as may be compatible with military exigencies, and they must be allowed to take with them such effects, instruments, arms,
[Pg 160] and horses as are their private property. So long as they are detained by the enemy he must, according to article 13, grant them the same allowances and the same pay as are due to the personnel holding the same rank in his own army.

The personnel of Voluntary Aid Societies employed in the medical units and establishments is, according to article 10, privileged to the same extent as the official personnel, provided that the Voluntary Aid Society concerned is duly recognised and authorised by its Government and that the personnel of the Society is subject to military law and regulations. Each State must notify to the other, either in time of peace or at the commencement, or during the course, of hostilities, but in every case before actually employing them, the names of societies which it has authorised to render assistance to the regular medical service of its armies. A recognised Voluntary Aid Society of a *neutral* country cannot, according to article 11, afford the assistance of its personnel and units to a belligerent unless it has previously received the consent of its own Government and of the belligerent concerned. And a belligerent who accepts such assistance from a Voluntary Aid Society of a neutral country is bound, before making any use of it, to notify the fact to the enemy.

Convoys of Evacuation.

§ 122. Convoys used for evacuating the wounded and sick must, as regards their personnel and material, be treated in the same way as mobile medical units, but subject to the following special provisions enacted by article 17:—

A belligerent intercepting a convoy may, if military exigencies demand, break it up, provided he takes charge of the sick and wounded who are in it. In this case, the obligation to send back the medical personnel, provided for in article 12, must be extended to the whole of the military
[Pg 161] personnel detailed for the transport or the protection of the convoy and furnished with an authority in due form to that effect.

The obligation to restore the medical material, provided for in article 14, must apply to railway trains and boats used in internal navigation, which are specially arranged for evacuation, as well as to the material belonging to the medical service for fitting up ordinary vehicles, trains, and boats. Military vehicles, other than those of the medical service, however, may be captured with their teams; and the civilian personnel and the various means of transport obtained by requisition, including railway material and boats used for convoys, are subject to the general rules of International Law concerning war.

Distinctive Emblem.

§ 123. According to article 18 the Swiss heraldic device of the red cross on a white ground, formed by reversing the federal colours, is adopted as the emblem and distinctive sign of the medical service of armies, but there is no objection to the adoption of another emblem on the part of such non-Christian States as object to the cross on religious grounds. Thus Turkey has substituted a red crescent, and Persia a red sun for the cross.[251] The following are the rules concerning the use of this emblem:—

(1) The emblem must be shown on the flags and the armlets (*brassards*) as well as on all the material belonging to the medical service, but the emblem cannot be recognised unless it is used with the permission of the competent military authority (article 19).

(2) Medical units and establishments must hoist the red cross flag accompanied by the national flag of the belligerent concerned (article 21), but medical units which have fallen into the hands of the enemy must not, so long as they are in that situation, fly any other flag than that of the red
[Pg 162] cross. The medical units belonging to neutral countries which have, in accordance with article 11, been admitted to afford their services, must fly, along with the red cross flag, the national flag of the belligerent to whose army they are attached (article 22).

(3) All the personnel must, according to article 20, wear, fixed to the left arm, an armlet (*brassard*) with a red cross on a white ground, delivered and stamped by the competent military

authority and accompanied by a certificate of identity in the case of persons who are attached to the medical service and armies without wearing the military uniform.

(4) The employment of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" must not, according to article 23, be used, either in time of peace or in time of war, except to indicate the protected medical units, establishments, personnel, and material.

[251] See below, § 207.

Treatment of the Dead.

§ 124. According to a customary rule of the Law of Nations belligerents have the right to demand from one another that dead soldiers shall not be disgracefully treated, especially not mutilated, and shall be, so far as possible, collected and buried[252] or cremated on the battlefield by the victor. The Geneva Convention does not stipulate any rule concerning the collection and burial or cremation of the dead, but article 3 enacts that after each engagement the commander in possession of the field must take measures to ensure protection of the dead against pillage and maltreatment, and that a careful examination of the bodies, in order to see that life is really extinct, must be made before the dead are buried or cremated. Each belligerent must send as
[Pg 163] soon as possible to the authorities of the country or army to which they belong the military identification marks or tokens found on the dead (article 4). Pieces of equipment found upon the dead of the enemy are public enemy property and may, therefore, be appropriated as booty[253] by the victor. On the other hand, letters, money, jewellery, and such other articles of value found upon the dead on the battlefield, or on those who die in the medical units or fixed establishments, as are apparently private property, are not booty, but must, according to article 4 of the Geneva Convention and article 14 of the Hague rules concerning warfare on land, be collected and handed over to the Bureau of Information[254] concerning the prisoners of war, which has to transmit them to the persons interested through the channel of the authorities of their own country.

[252] See Grotius, II. c. 19, §§ 1 and 3. Regarding a valuable suggestion of Ullmann's concerning sanitary measures for the purpose of avoiding epidemics, see above, vol. I. p. 621, note 1.

[253] See below, § 139.

[254] See below, § 130.

Application of the Geneva Convention, and Prevention of Abuses.

§ 124*a*. The provisions of the Geneva Convention are only binding in the case of war between two or more of the contracting parties, they cease to be binding from the moment when one of the belligerent Powers is not a party (article 24). The commanders-in-chief of the belligerent armies must, in accordance with the instructions of their Governments and in conformity with the general principles of the Geneva Convention, arrange the details for carrying out the articles of the Geneva Convention, as well as for cases not provided for in these articles (article 25). The contracting parties must take the necessary measures to instruct their troops, especially the personnel protected by the Geneva Convention, in the provisions of the Convention, and to bring these provisions to the notice of the civil population (article 26). In countries whose legislation is not at the time of the signing of the Convention adequate for the purpose, the contracting parties
[Pg 164] must adopt such measures as may be necessary to prevent, at all times, the employment of the emblem or the name of "Red Cross" or "Geneva Cross" by private individuals or by Societies other than those which are entitled to do so according to the Geneva Convention, and in particular for commercial purposes as a trade mark or trading mark (article 27). The contracting Governments must likewise adopt measures necessary for the repression in time of war of individual acts of pillage and maltreatment of the wounded and sick, as well as for the punishment of the improper use of the Red Cross flag and armlet (*brassard*) by officers and soldiers or private individuals not protected by the Geneva Convention. They must, at the latest within five years from the ratification of the Geneva Convention, communicate to one another through the Swiss Federal Council, the provisions concerning these measures of repression (article 28).[255]

[255] By reason of the uncertainties of parliamentary proceedings, Great Britain, in signing and ratifying the Geneva Convention, entered a reservation against articles 23, 27, and 28, but by the Geneva Convention Act, 1911 (1 & 2 Geo. V. ch. 20), Great Britain is now able to carry out the stipulations of these three articles.

General provisions of the Geneva Convention.

§ 124*b*. The Geneva Convention comes into force for each contracting Power six months after the date of the deposit of its ratification (article 30). The new Geneva Convention replaces the old of 1864, but the old Geneva Convention remains in force between such of its contracting parties as do not become parties to the new Convention of 1906 (article 31). Such of the Powers as signed the old Convention of 1864, but did not sign the new Convention of December 31, 1906, are free to accede to it at any time later by means of a written notification to the Swiss Federal Council. Other Powers may likewise notify their accession at any time to the Swiss Federal Council, but their accession only takes effect in case, within a period of one year from such
[Pg 165] notification, no objection to the accession reaches the Swiss Federal Council from any of the previous contracting Powers (article 32). Each of the contracting Powers is at liberty at any time to denounce the Geneva Convention by a written notification to the Swiss Federal Council, which must immediately indicate it to all the other contracting Powers (article 33). The denunciation, however, does not take effect until one year after it has come to the notice of the Swiss Federal

Council, and a denunciation only affects such Power as has notified it.

IV

CAPTIVITY

Grotius, III. c. 14—Bynkershoek, *Quaest. jur. publ.* I. c. 3—Vattel, III. §§ 148-154—Hall, §§ 131-134—Westlake, II. pp. 63-68—Lawrence, § 164—Maine, pp. 160-167—Manning, pp. 210-222—Phillimore, III. § 95—Twiss, II. § 177—Halleck, II. pp. 19-30—Taylor, §§ 519-524—Moore, VII. §§ 1127-1133—Wharton, III. §§ 348-348D—Wheaton, § 344—Bluntschli, §§ 593-626—Heffter, §§ 127-129—Lueder in Holtzendorff, IV. pp. 423-445—Ullmann, § 177—Bonfils, Nos. 1119-1140—Despagnet, Nos. 544-550—Pradier-Fodéré, VII. Nos. 2796-2842, and VIII. No. 3208—Rivier, II. pp. 273-279—Nys, III. pp. 537-553—Calvo, IV. §§ 2133-2157—Fiore, III. Nos. 1355-1362, and Code, Nos. 1567-1588—Martens, II. § 113—Longuet, §§ 77-83—Mérignhac, pp. 87-113—Pillet, pp. 145-164—*Kriegsbrauch*, pp. 11-18—Zorn, pp. 73-123—Bordwell, pp. 237-248—*Land Warfare*, §§ 54-116—Spaight, pp. 260-320—Holland, *War*, Nos. 24-40—Eichelmann, *Über die Kriegsgefangenschaft* (1878)—Romberg, *Des belligérants et des prisonniers de guerre* (1894)—Triepel, *Die neuesten Fortschritte auf dem Gebiet des Kriegsrechts* (1894), pp. 41-55—Holls, *The Peace Conference at the Hague* (1900), pp. 145-151—Cros, *Condition et traitement des prisonniers de guerre* (1900)—Beinhauer, *Die Kriegsgefangenschaft* (1910)—Payrat, *Le prisonnier de guerre dans la guerre continentale* (1910).

Development of International Law regarding Captivity.

§ 125. During antiquity, prisoners of war could be killed, and they were very often at once actually butchered or offered as sacrifices to the gods. If they were spared, they were as a rule made slaves and only exceptionally liberated. But belligerents also exchanged their prisoners or
[Pg 166] liberated them for ransom. During the first part of the Middle Ages prisoners of war could likewise be killed or made slaves. Under the influence of Christianity, however, their fate in time became mitigated. Although they were often most cruelly treated during the second part of the Middle Ages, they were not as a rule killed and, with the disappearance of slavery in Europe, they were no longer enslaved. By the time modern International Law gradually came into existence, killing and enslaving prisoners of war had disappeared, but they were still often treated as criminals and as objects of personal revenge. They were not considered in the power of the State by whose forces they were captured, but in the power of those very forces or of the individual soldiers that had made the capture. And it was considered lawful on the part of captors to make as much profit as possible out of their prisoners by way of ransom, provided no exchange of prisoners took place. So general was this practice that a more or less definite scale of ransom became usual. Thus, Grotius (III. c. 14, § 9) mentions that in his time the ransom of a private was the amount of his one month's pay. And since the pecuniary value of a prisoner as regards ransom rose in proportion with his fortune and his position in life and in the enemy army, it became usual for prisoners of rank and note not to belong to the capturing forces but to the Sovereign, who had, however, to recompense the captors. During the seventeenth century, the custom that prisoners were considered in the power of their captors died away. They were now considered to be in the power of the Sovereign by whose forces they were captured. But rules of the Law of Nations regarding their proper treatment were hardly in existence. The practice of liberating prisoners in exchange, or for ransom only, continued. Special cartels were often
[Pg 167] concluded at the outbreak of or during a war for the purpose of stipulating a scale of ransom according to which either belligerent could redeem his soldiers and officers from captivity. The last[256] instance of such cartels is that between England and France in 1780, stipulating the ransom for members of the naval and military forces of both belligerents.

[256] See Hall, § 134, p. 428, note 1.

It was not until the eighteenth century, with its general tendencies to mitigate the cruel practices of warfare, that matters changed for the better. The conviction in time became general that captivity should only be the means of preventing prisoners from returning to their corps and taking up arms again, and should, as a matter of principle, be distinguished from imprisonment as a punishment for crimes. The Treaty of Friendship[257] concluded in 1785 between Prussia and the United States of America was probably the first to stipulate (article 24) the proper treatment of prisoners of war, prohibiting confinement in convict prisons and the use of irons, and insisting upon their confinement in a healthy place, where they may have exercise, and where they may be kept and fed as troops. During the nineteenth century the principle that prisoners of war should be treated by their captor in a manner analogous to that meted out to his own troops became generally recognised, and the Hague Regulations have now, by articles 4 to 20, enacted exhaustive rules regarding captivity.

[257] See Martens, *N.R.* IV. p. 37.

Treatment of Prisoners of War.

§ 126. According to articles 4-7 and 16-19 of the Hague Regulations prisoners of war are not in the power of the individuals or corps who capture them, but in the power of the Government of the captor. They must be humanely treated. All their personal belongings remain their property, with the exception of arms, horses, and military papers, which are booty;[258] and in practice[259]
[Pg 168] personal belongings are understood to include military uniform, clothing, and kit required for personal use, although technically they are Government property. They may only be imprisoned as an unavoidable matter of safety, and only while the circumstances which necessitate the measure continue to exist. They may, therefore, be detained in a town, fortress, camp, or any other locality, and they may be bound not to go beyond a certain fixed boundary. But they may not be kept in convict prisons. Except in the case of officers, their labour may be utilised by the

Government according to their rank and aptitude, but their tasks must not be excessive and must have nothing to do with military operations. Work done by them for the State must be paid for in accordance with tariffs in force for soldiers of the national army employed on similar tasks, or, in case there are no such tariffs in force, at rates proportional to the work executed. But prisoners of war may also be authorised to work for other branches of the public service or for private persons under conditions of employment to be settled by the military authorities, and they may likewise be authorised to work on their own account. All wages they receive go towards improving their position, and a balance must be paid to them at the time of their release, after deducting the cost of their maintenance. But whether they earn wages or not, the Government is bound under all circumstances to maintain them, and provide quarters, food, and clothing for them on the same footing as for its own troops. Officer prisoners must receive the same pay as officers of corresponding rank in the country where they are detained, the amount to be repaid by their Government after the conclusion of peace. All prisoners of war must enjoy every latitude in the exercise of their religion, including attendance at their own church service, provided only
[Pg 169]
they comply with the regulations for order issued by the military authorities. If a prisoner wants to make a will, it must be received by the authorities or drawn up on the same conditions as for soldiers of the national army. And the same rules are valid regarding death certificates and the burial of prisoners of war, and due regard must be paid to their grade and rank. Letters, money orders, valuables, and postal parcels destined for or despatched by prisoners of war must enjoy free postage, and gifts and relief in kind for prisoners of war must be admitted free from all custom and other duties as well as payments for carriage by Government railways (article 16).

[258] See below, § 144.

[259] See *Land Warfare*, § 69.

Who may claim to be Prisoners of War.

§ 127. Every individual who is deprived of his liberty not for a crime but for military reasons has a claim to be treated as a prisoner of war. Article 13 of the Hague Regulations expressly enacts that non-combatant[260] members of armed forces, such as newspaper correspondents, reporters, sutlers, contractors, who are captured and detained, may claim to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying. But although the Hague Regulations do not contain anything regarding the treatment of private enemy individuals and enemy officials whom a belligerent thinks it necessary[261] to make prisoners of war, it is evident that they may claim all privileges of such prisoners. Such individuals are not convicts; they are taken into captivity for military reasons, and they are therefore prisoners of war.

[260] See above, § 79.

[261] See above, §§ 116 and 117.

Discipline.

§ 128. Articles 8 and 9 of the Hague Regulations lay down the discipline to be observed in the case of prisoners of war in the following way:—Every prisoner who, if questioned, does not
[Pg 170]
declare his true name and rank is liable to a curtailment of the advantages accorded to prisoners of his class. All prisoners are subject to the laws, regulations, and orders in force in the army of the belligerent that keeps them in captivity. Any act of insubordination on the part of prisoners may be punished in accordance with these laws,[262] but apart from these laws, all kinds of severe measures are admissible to prevent a repetition of such acts. Escaped prisoners, who, after having rejoined their national army, are again taken prisoners, are not liable to any punishment for their flight. But if they are recaptured before they succeed in rejoining their army, or before they have quitted the territory occupied by the capturing forces, they are liable to disciplinary punishment.

[262] Concerning the question whether after conclusion of peace such prisoners as are undergoing a term of imprisonment for offences against discipline may be detained, see below, § 275.

Release on Parole.

§ 129. Articles 10 to 12 of the Hague Regulations deal with release on parole in the following manner:—No belligerent is obliged to assent to a prisoner's request to be released on parole, and no prisoner may be forced to accept such release. But if the laws of his country authorise him to do so, and if he acquiesces, any prisoner may be released on parole. In such case he is in honour bound scrupulously to fulfil the engagement he has contracted, both as regards his own Government and the Government that released him. And his own Government is formally bound neither to request, nor to accept, from him any service incompatible with the parole given. Any prisoner released on parole and recaptured bearing arms against the belligerent who released him, or against such belligerent's allies, forfeits the privilege to be treated as a prisoner of war, and may be tried by court-martial. The Hague Regulations do not lay down the punishment for such breach of parole, but according to a customary rule of International Law the punishment
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may be capital.

Bureau of Information.

§ 130. According to articles 14 and 16 of the Hague Regulations every belligerent[263] must institute on the commencement of war a Bureau of Information relative to his prisoners of war. This Bureau is intended to answer all inquiries about prisoners. It must be furnished by all the

services concerned with all the necessary information to enable it to make out and keep up to date a separate return for each prisoner, and it must, therefore, be kept informed of internments and changes as well as of admissions into hospital, of deaths, releases on parole, exchanges, and escapes. It must state in its return for each prisoner the regimental number, surname and name, age, place of origin, rank, unit, wounds, date and place of capture, of internment, of the wounds received, date of death, and any observations of a special character. This separate return must, after conclusion of peace, be sent to the Government of the other belligerent.

[263] And likewise such neutral States as receive and detain members of the armed forces of the belligerents; see article 14.

The Bureau must likewise receive and collect all objects of personal use, valuables, letters, and the like, found on battlefields[264] or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospital or ambulances, and must transmit these articles to those interested. The Bureau must enjoy the privilege of free postage.

[264] See above, § 124.

Relief Societies.

§ 131. A new and valuable rule, taken from the Brussels Declaration, is that of article 15 of the Hague Regulations making it a duty of every belligerent to grant facilities to Relief Societies to serve as intermediaries for charity to prisoners of war. The condition of the admission of such societies and their agents is that the former are regularly constituted in accordance with the law
[Pg 172] of their country. Delegates of such societies may be admitted to the places of internment for the distribution of relief, as also to the halting-places of repatriated prisoners, through a personal permit of the military authorities, provided they give an engagement in writing that they will comply with all regulations by the authorities for order and police.

End of Captivity.

§ 132. Captivity can come to an end through different modes. Apart from release on parole, which has already been mentioned, captivity comes to an end—(1) through simple release without parole; (2) through successful flight; (3) through liberation by the invading enemy to whose army the respective prisoners belong; (4) through exchange for prisoners taken by the enemy; (5) through prisoners[265] being brought into neutral territory by captors who take refuge there; and, lastly (6), through the war coming to an end. Release of prisoners for ransom is no longer practised, except in the case of the crew of a captured merchantman released on a ransom bill.[266] It ought, however, to be observed that the practice of ransoming prisoners might be revived if convenient, provided the ransom is to be paid not to the individual captor but to the belligerent whose forces made the capture.

[265] See below, § 337.

[266] See below, § 195.

As regards the end of captivity through the war coming to an end, a distinction must be made according to the different modes of ending war. If the war ends by peace being concluded, captivity comes to an end at once[267] with the conclusion of peace, and, as article 20 of the Hague Regulations expressly enacts, the repatriation of prisoners must be effected as speedily as possible. If, however, the war ends through conquest and annexation of the vanquished State,
[Pg 173] captivity comes to an end as soon as peace is established. It ought to end with annexation, and it will in most cases do so. But as guerilla war may well go on after conquest and annexation, and thus prevent a condition of peace from being established, although real warfare is over, it is necessary not to confound annexation with peace.[268] The point is of interest regarding such prisoners only as are subjects of neutral States. For other prisoners become through annexation subjects of the State that keeps them in captivity, and such State is, therefore, as far as International Law is concerned, unrestricted in taking any measure it likes with regard to them. It can repatriate them, and it will in most cases do so. But if it thinks that they might endanger its hold over the conquered territory, it might likewise prevent their repatriation for any definite or indefinite period.[269]

[267] That, nevertheless, the prisoners remain under the discipline of the captor until they have been handed over to the authorities of their home State, will be shown below, § 275.

[268] See above, § 60.

[269] Thus, after the South African War, Great Britain refused to repatriate those prisoners of war who were not
[Pg 174] prepared to take the oath of allegiance.

V

APPROPRIATION AND UTILISATION OF PUBLIC ENEMY PROPERTY

Grotius, III. c. 5—Vattel, III. §§ 73, 160-164—Hall, §§ 136-138—Westlake, II. pp. 102-107—Lawrence, § 171—Maine, pp. 192-206—Manning, pp. 179-183—Twiss, II. §§ 62-71—Halleck, II. pp. 58-68—Moore, VII. § 1148—Taylor, §§ 529-536—Wharton, III. § 340—Wheaton, §§ 346, 352-354—Bluntschli, §§ 644-651A—Heffter, §§ 130-136—Lueder in Holtzendorff, IV. pp. 488-500—G. F. Martens, II. §§ 279-280—Ullmann, § 183—Bonfils, Nos. 1176-1193—Despagnet, Nos. 592-596—Pradier-Fodéré, VII. Nos. 2989-3018—Rivier, II. pp. 306-314—Nys, III. pp. 296-308—Calvo, IV. §§ 2199-2214—Fiore, III. Nos. 1389, 1392, 1393, 1470, and Code, Nos. 1557-1560—Martens, II. § 120—Longuet, § 96—Mérignhac, pp. 299-316—Pillet, pp. 319-340—*Kriegsbrauch*, pp. 57-60—Holland, *War*, No. 113—*Land Warfare*, §§ 426-432—Meurer, II. §§ 65-69—Spaight, pp. 410-418—Zorn, pp. 243-270—Rouard de Card, *La guerre continentale et la propriété* (1877)—Bluntschli, *Das Beuterecht im Krieg, und das Seebeuterecht insbesondere* (1878)—Depambour, *Des effets de l'occupation en temps de*

guerre sur la propriété et la jouissance des biens publics et particuliers (1900)—Wehberg, *Das Beuterecht im Land und Seekrieg* (1909; an English translation appeared in 1911 under the title *Capture in War on Land and Sea*)—Latifi, *Effects of War on Property* (1909).

Appropriation of all the Enemy Property no longer admissible.

§ 133. Under a former rule of International Law belligerents could appropriate all public and private[270] enemy property they found on enemy territory. This rule is now obsolete. Its place is taken by several rules, since distinctions are to be made between moveable and immoveable property, public and private property, and, further, between different kinds of private and public property. These rules must be discussed *seriatim*.

[270] It is impossible for a treatise to go into historical details, and to show the gradual disappearance of the old rule. But it is of importance to state the fact, that even during the nineteenth century—see, for instance, G. F. Martens, II. § 280; Twiss, II. § 64; Hall, § 139—it was asserted that in strict law all private enemy moveable property was as much booty as public property, although the growth of a usage was recognised which under certain conditions exempted it from appropriation. In the face of articles 46 and 47 of the Hague Regulations these assertions have no longer any basis, and all the text-books of the nineteenth century are now antiquated with regard to this matter.

Immoveable Public Property.

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§ 134. Appropriation of public immoveables is not lawful so long as the territory on which they are has not become State property of the occupant through annexation. During mere military occupation of the enemy territory, a belligerent may not sell or otherwise alienate public enemy land and buildings, but only appropriate the produce of them. Article 55 of the Hague Regulations expressly enacts that a belligerent occupying enemy territory shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State and situated on the occupied territory; that he must protect the stock and plant, and that he must administer them according to the rules of usufruct. He may, therefore, sell the crop from public land, cut timber in the public forests and sell it, may let public land and buildings for the time of his occupation, and the like. He is, however, only usufructuary, and he is, therefore, prohibited from exercising his right in a wasteful or negligent way that would decrease the value of the stock and plant. Thus, for instance, he must not cut down a whole forest unless the necessities of war compel him.

Immoveable Property of Municipalities, and of Religious, Charitable, and the like Institutions.

§ 135. It must, however, be observed that the produce of such public immoveables only as belong to the State itself may be appropriated, but not the produce of those belonging to municipalities or of those which, although they belong to the hostile State, are permanently set aside for religious purposes, for the maintenance of charitable and educational institutions, and for the benefit of art and science. Article 56 of the Hague Regulations expressly enacts that such property is to be treated as private property.

Utilisation of Public Buildings.

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§ 136. So far as the necessities of war demand, a belligerent may make use of public enemy buildings for all kinds of purposes. Troops must be housed, horses stabled, the sick and wounded nursed. Public buildings may in the first instance, therefore, be made use of for such purposes, although they may thereby be considerably damaged. And it matters not whether the buildings belong to the enemy State or to municipalities, whether they are regularly destined for ordinary governmental and municipal purposes, or for religious, educational, scientific, and the like purposes. Thus, churches may be converted into hospitals, schools into barracks, buildings used for scientific research into stables. But it must be observed that such utilisation of public buildings as damages them is justified only if it is necessary. A belligerent who turned a picture gallery into stables without being compelled thereto would certainly commit a violation of the Law of Nations.

Moveable Public Property.

§ 137. Moveable public enemy property may certainly be appropriated by a belligerent provided that it can directly or indirectly be useful for military operations. Article 53 of the Hague Regulations unmistakably enacts that a belligerent occupying hostile territory may take possession of the cash, funds, realisable securities, depôts of arms, means of transport, stores, supplies, appliances on land or at sea or in the air adapted for the transmission of news or for the transport of persons or goods, and of all other moveable property of the hostile State which may be used for military operations. Thus, a belligerent is entitled to seize not only the money and funds of the hostile State on the one hand, and, on the other, munitions of war, depôts of arms, stores and supplies, but also the rolling-stock of public railways[271] and other means of transport

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and everything and anything he can directly or indirectly make use of for military operations. He may, for instance, seize a quantity of cloth for the purpose of clothing his soldiers.

[271] See Nowacki, *Die Eisenbahnen im Kriege* (1906), §§ 15 and 19. Some writers—see, for instance, Bonfils, No. 1185, and Wehberg, *op. cit.* p. 22—maintain that such rolling stock may not be appropriated, but may only be made use of during war and must be restored after the conclusion of peace. The assertion that article 53, second paragraph, is to be interpreted in that sense, is unfounded, for restoration is there stipulated for such means of transport and the like as are *private* property.

Moveable Property of Municipalities, and of Religious, Charitable, and the like Institutions.

§ 138. But exceptions similar to those regarding the usufruct of public immoveables are valid in the case of the appropriation of public moveables. Article 56 of the Hague Regulations enumerates the property of municipalities, of religious, charitable, educational institutions, and of those of science and art. Thus the moveable property of churches, hospitals, schools, universities, museums, picture galleries, even when belonging to the hostile State, is exempt from appropriation by a belligerent. As regards archives, they are no doubt institutions for science, but a belligerent may nevertheless seize such State papers deposited therein as are of importance to him in connection with the war. The last instances of the former practice are presented by Napoleon I., who seized works of art during his numerous wars and had them taken to the galleries of Paris. But they had to be restored to their former owners in 1815.

Booty on the Battlefield.

§ 139. The case of moveable enemy property found by an invading belligerent on enemy territory is different from the case of moveable enemy property on the battlefield. According to a former rule of the Law of Nations all enemy property, public or private, which a belligerent could get hold of on the battlefield was booty and could be appropriated. Although some modern publicists[272] who wrote before the Hague Peace Conference of 1899 teach the validity of this rule, it is obvious from articles 4 and 14 of the Hague Regulations that it is now obsolete as regards *private*[273] enemy property except military papers, arms, horses, and the like. But as
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regards *public* enemy property this customary rule is still valid. Thus weapons, munition, and valuable pieces of equipment which are found upon the dead, the wounded, and the prisoners, whether they are public or private property, may be seized, as may also the war-chest and State papers in possession of a captured commander, enemy horses, batteries, carts, and everything else that is of value. To whom the booty ultimately belongs is not for International but for Municipal Law[274] to determine, since International Law simply states that public enemy property on the battlefield can be appropriated by belligerents. And it must be specially observed that the restriction of article 53 of the Hague Regulations according to which only such moveable property may be appropriated as can be used for the operations of war, does not find application in the case of moveable property found on the battlefield, for article 53 speaks of "an army of occupation" only. Such property may be appropriated, whether it can be used for military operations or not; the mere fact that it was seized on the battlefield entitles a belligerent to appropriate it.

[272] See, for instance, Halleck, II. p. 73, and Heffter, § 135.

[273] See above, § 124, and below, § 144.

[274] According to British law all booty belongs to the Crown. See Twiss, II. §§ 64 and 71.

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VI

APPROPRIATION AND UTILISATION OF PRIVATE ENEMY PROPERTY

Grotius, III. c. 5—Vattel, III. §§ 73, 160-164—Hall, §§ 139, 141-144—Lawrence, §§ 172-175—Maine, pp. 192-206—Manning, pp. 179-183—Twiss, II. §§ 62-71—Halleck, II. pp. 73-75—Moore, VII. §§ 1121, 1151, 1152, 1155—Taylor, §§ 529, 532, 537—Wharton, III. § 338—Wheaton, § 355—Bluntschli, §§ 652, 656-659—Heffter, §§ 130-136—Lueder in Holtzendorff, IV. pp. 488-500—G.F. Martens, II. §§ 279-280—Ullmann, § 183—Bonfils, Nos. 1194-1206—Despagnet, Nos. 597-604—Pradier-Fodéré, VII. Nos. 3032-3047—Rivier, II. pp. 318-329—Nys, III. pp. 296-308—Calvo, IV. §§ 2220-2229—Fiore, III. Nos. 1391, 1392, 1472, and Code, Nos. 1530-1531—Martens, II. § 120—Longuet, §§ 97-98—Mérignhac, pp. 263-268—Pillet, pp. 319-340—*Kriegsbrauch*, pp. 53-56—Zorn, pp. 270-283—Meurer, II. § 64—Spaight, pp. 188-196—Holland, *War*, Nos. 106-107—*Land Warfare*, §§ 407-415—Bentwich, *The Law of Private Property in War* (1907)—See also the monographs of Rouard de Card, Bluntschli, Depambour, Wehberg, and Latifi, quoted above at the commencement of § 133.

Immoveable Private Property.

§ 140. Immoveable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right[275] whatever to the property. Article 46 of the Hague Regulations expressly enacts that "private property may not be confiscated." But confiscation differs from the temporary use of private land and buildings for all kinds of purposes demanded by the necessities of war. What has been said above in § 136 with regard to utilisation of public buildings finds equal application[276] to private buildings. If necessary they may be converted into hospitals, barracks, and stables without indemnification of the proprietors, and they may also be converted into fortifications. A humane belligerent will not drive the wretched inhabitants into
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the street if he can help it. But under the pressure of necessity he may be obliged to do this, and he is certainly not prohibited from doing it.

[275] See below, § 283.

[276] The Hague Regulations do not mention this; they simply enact in article 46 that private property must be "respected," and may not be confiscated.

Private War Material and Means of Transport.

§ 141. All kinds of private moveable property which can serve as war material, such as arms, ammunition, cloth for uniforms, leather for boots, saddles, and also all appliances, whether on land or at sea or in the air, which are adapted for the transmission of news or for the transportation of persons and goods, such as railway rolling-stock,[277] ships, telegraphs, telephones, carts, and horses, may be seized and made use of for military purposes by an

invading belligerent, but they must be restored at the conclusion of peace, and indemnities must be paid for them. This is expressly enacted by article 53 of the Hague Regulations. It is evident that the seizure of such material must be duly acknowledged by receipt, although article 53 does not say so; for otherwise how could indemnities be paid after the conclusion of peace? As regards the question who is to pay the indemnities, Holland (*War*, No. 113) correctly maintains that "the Treaty of Peace must settle upon whom the burden of making compensation is ultimately to fall."

[277] See Nowacki, *Die Eisenbahnen im Kriege* (1906), § 15.

Works of Art and Science, Historical Monuments.

§ 142. On the other hand, works of art and science, and historical monuments may not under any circumstances or conditions be appropriated or made use of for military operations. Article 56 of the Hague Regulations enacts categorically that "all seizure" of such works and monuments is prohibited. Therefore, although the metal of which a statue is cast may be of the greatest value for cannons, it must not be touched.

Other Private Personal Property.

§ 143. Private personal property which does not consist of war material or means of transport serviceable to military operations may not as a rule be seized.[278] Articles 46 and 47 of the Hague
[Pg 181] Regulations expressly stipulate that "private property may not be confiscated," and "pillage is formally prohibited." But it must be emphasised that these rules have in a sense exceptions, demanded and justified by the necessities of war. Men and horses must be fed, men must protect themselves against the weather. If there is no time for ordinary requisitions[279] to provide food, forage, clothing, and fuel, or if the inhabitants of a locality have fled so that ordinary requisitions cannot be made, a belligerent must take these articles wherever he can get them, and he is justified[280] in so doing. And it must further be emphasised that quartering[281] of soldiers who, together with their horses, must be well fed by the inhabitants of the houses concerned, is likewise lawful, although it may be ruinous to the private individuals upon whom they are quartered.

[278] See above, § 133, note.

[279] See below, § 147.

[280] The Hague Regulations do not mention this case.

[281] See below, § 147.

Booty on the Battlefield.

§ 144. Private enemy property on the battlefield is no longer in every case an object of booty.[282] Arms, horses, and military papers may indeed be appropriated,[283] even if they are private property, as may also private means of transport, such as carts and other vehicles which an enemy has made use of. But letters, cash, jewellery, and other articles of value found upon the dead, wounded, and prisoners must, according to article 14 of the Hague Regulations and article 4 of the Geneva Convention, be handed over to the Bureau of Information regarding prisoners of war, which must transmit them to those interested. Through article 14 of the Hague Regulations and article 4 of the Geneva Convention it becomes apparent that nowadays private enemy
[Pg 182] property, except military papers, arms, horses, and the like, is no longer booty, although, individual soldiers often take as much spoil as they can get. It is impossible for the commanders to bring the offender to justice in every case.[284]

[282] See above, § 139.

[283] See above, § 139, and article 4 of the Hague Regulations. This article only mentions arms, horses, and military papers, but saddles, stirrups, and the like go with horses, as ammunition goes with arms, and these may for this reason likewise be appropriated; see *Land Warfare*, § 69, note (*e*).

[284] It is of interest to state the fact that, during the Russo-Japanese War, Japan carried out to the letter the stipulation of article 14 of the Hague Regulations. Through the intermediary of the French Embassies in Tokio and St. Petersburg, all valuables found on the Russian dead and seized by the Japanese were handed over to the Russian Government.

Private Enemy Property brought into a Belligerent's Territory.

§ 145. The case of private property found by a belligerent on enemy territory differs from the case of such property brought during time of war into the territory of a belligerent. That private enemy property on a belligerent's territory at the time of the outbreak of war may not be confiscated has already been stated above in § 102. Taking this fact into consideration, as well as the other fact that private property found on enemy territory is nowadays likewise as a rule exempt from confiscation, there can be no doubt that private enemy property brought into a belligerent's territory during time of war may not, as a rule, be confiscated.[285] On the other hand, a belligerent may prohibit the withdrawal of those articles of property which can be made use of by the enemy for military purposes, such as arms, ammunition, provisions, and the like. And in analogy with article 53 of the Hague Regulations there can be no doubt that a belligerent may seize such articles and make use of them for military purposes, provided that he restores them at the conclusion of peace and pays indemnities for them.

[Pg 183] [285] The case of enemy merchantmen seized in a belligerent's territorial waters is, of course, an exception.

Vattel, III. § 165—Hall, § 140-140*—Lawrence, § 180—Westlake, II. pp. 96-102—Maine, p. 200—Twiss, II. § 64—Halleck, II. pp. 68-69—Taylor, §§ 538-539—Moore, VII. § 1146—Bluntschli, §§ 653-655—Heffter, § 131—Lueder in Holtzendorff, IV. pp. 500-510—Ullmann, § 183—Bonfils, Nos. 1207-1226—Despagnet, Nos. 587-590—Pradier-Fodéré, VII. Nos. 3048-3064—Rivier, II. pp. 323-327—Nys, III. pp. 368-432—Calvo, IV. §§ 2231-2284—Fiore, III. Nos. 1394, 1473-1476—Martens, II. § 120—Longuet, §§ 110-114—Mérignhac, pp. 272-298—Pillet, pp. 215-235—Zorn, pp. 283-315—*Kriegsbrauch*, pp. 61-63—Holland, *War*, Nos. 111-112—Bordwell, pp. 314-324—Meurer, II. §§ 56-60—Spaight, pp. 381-408—Ariga, §§ 116-122—*Land Warfare*, §§ 416-425—Thomas, *Des réquisitions militaires* (1884)—Keller, *Requisition und Kontribution* (1898)—Pont, *Les réquisitions militaires du temps de guerre* (1905)—Albrecht, *Requisitionen von neutralem Privateigentum, etc.* (1912), pp. 1-24:—Risley in the *Journal of the Society of Comparative Legislation*, new series, vol. II. (1900), pp. 214-223.

War must support War.

§ 146. Requisitions and contributions in war are the outcome of the eternal principle that war must support war.[286] This means that every belligerent may make his enemy pay as far as possible for the continuation of the war. But this principle, though it is as old as war and will only die with war itself, has not the same effect in modern times on the actions of belligerents as it formerly had. For thousands of years belligerents used to appropriate all private and public enemy property they could obtain, and, when modern International Law grew up, this practice found legal sanction. But after the end of the seventeenth century this practice grew milder under the influence of the experience that the provisioning of armies in enemy territory became more or less impossible when the inhabitants were treated according to the old principle. Although belligerents retained in strict law the right to appropriate all private besides all public
[Pg 184] property, it became usual to abstain from enforcing such right, and in lieu thereof to impose contributions of cash and requisitions in kind upon the inhabitants of the invaded country.[287] And when this usage developed, no belligerent ever thought of paying in cash for requisitions, or giving a receipt for them. But in the nineteenth century another practice became usual. Commanders then often gave a receipt for contributions and requisitions, in order to avoid abuse and to prevent further demands for fresh contributions and requisitions by succeeding commanders without knowledge of the former impositions. And there are instances of cases during the nineteenth century on record in which belligerents actually paid in cash for all requisitions they made. The usual practice at the end of the nineteenth century was that commanders always gave a receipt for contributions, and that they either paid in cash for requisitions or acknowledged them by receipt, so that the respective inhabitants could be indemnified by their own Government after conclusion of peace. However, no restriction whatever was imposed upon commanders with regard to the amount of contributions and requisitions, and with regard to the proportion between the resources of a country and the burden imposed. The Hague Regulations have now settled the matter of contributions and requisitions in a progressive way by enacting rules which put the whole matter on a new basis. That war must support war remains a principle under these regulations also. But they are widely influenced by the demand that the enemy State as such, and not the private enemy individuals, should be made to support the war, and that only so far as the necessities of war demand it
[Pg 185] should contributions and requisitions be imposed. Although certain public moveable property and the produce of public immoveables may be appropriated as heretofore, requisitions must be paid for in cash or, if this is impossible, acknowledged by receipt.

[286] Concerning the controversy as to the justification of Requisitions and Contributions, see Albrecht, *op. cit.* pp. 18-21.

[287] An excellent sketch of the historical development of the practice of requisitions and contributions is given by Keller, *Requisition und Kontribution* (1898), pp. 5-26.

Requisitions in Kind, and Quartering.

§ 147. Requisition is the name for the demand for the supply of all kinds of articles necessary for an army, such as provisions for men and horses, clothing, or means of transport. Requisition of certain services may also be made, but they will be treated below in § 170 together with occupation, requisitions in kind only being within the scope of this section. Now, what articles may be demanded by an army cannot once for all be laid down, as they depend upon the actual need of an army. According to article 52 of the Hague Regulations, requisitions may be made from municipalities as well as from inhabitants, but they may be made so far only as they are really necessary for the army. They may not be made by individual soldiers or officers, but only by the commander in the locality. All requisitions must be paid for in cash, and if this is impossible, they must be acknowledged by receipt, and the payment of the amount must be made as soon as possible. The principle that requisitions must be paid for by the enemy is thereby absolutely recognised, but, of course, commanders-in-chief may levy contributions—see below, § 148—in case they do not possess cash for the payment of requisitions. However this may be, by the rule that requisitions must always be paid for, it again becomes apparent and beyond all doubt that henceforth private enemy property is as a rule exempt from appropriation by an invading army.

A special kind of requisition is the quartering[288] of soldiers in the houses of private inhabitants of enemy territory, by which each inhabitant is required to supply lodging and food for a certain
[Pg 186] number of soldiers, and sometimes also stabling and forage for horses. Although the Hague Regulations do not specially mention quartering, article 52 is nevertheless to be applied to it, since quartering is nothing else than a special kind of requisition. If cash cannot be paid at once

for quartering, every inhabitant concerned must get a receipt for it, stating the number of soldiers quartered and the number of days they were catered for, and the payment of the amount must be made as soon as possible.

[288] See above, § 143.

But it must be specially observed, that neither in the case of ordinary requisitions nor in the case of quartering of troops is a commander compelled to pay the prices asked by the inhabitants concerned. On the contrary, he may fix the prices himself, although it is expected that the prices paid shall be fair.

Contributions.

§ 148. Contribution is a payment in ready money demanded either from municipalities or from inhabitants, whether enemy subjects or foreign residents. Whereas formerly no general rules concerning contributions existed, articles 49 and 51 of the Hague Regulations now enact that contributions may not be demanded extortionately, but exclusively[289] for the needs of the army, in order, for instance, to pay for requisitions or for the administration of the locality in question. They may be imposed by a written order of a commander-in-chief only, in contradistinction to requisitions which may be imposed by a mere commander in a locality. They may not be imposed indiscriminately on the inhabitants, but must so far as possible be assessed upon such inhabitants in compliance with the rules in force of the respective enemy Government regarding the assessment of taxes. And, finally, for every individual contribution a receipt must be given. It is
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apparent that these rules of the Hague Regulations try to exclude all arbitrariness and despotism on the part of an invading enemy with regard to contributions, and that they try to secure to the individual contributors as well as to contributing municipalities the possibility of being indemnified afterwards by their own Government, thus shifting, so far as possible, the burden of supporting the war from private individuals and municipalities to the State proper.[290]

[289] As regards contributions as a penalty, see article 50 of the Hague Regulations. See also Keller, *op. cit.* pp. 60-62.

[290] It is strange to observe that *Kriegsbrauch*, pp. 61-63, does not mention the Hague Regulations at all.

VIII

DESTRUCTION OF ENEMY PROPERTY

Grotius, III. c. 5, §§ 1-3; c. 12—Vattel, III. §§ 166-168—Hall, § 186—Lawrence, § 206—Manning, p. 186—Twiss, II. §§ 65-69—Halleck, II. pp. 63, 64, 71, 74—Taylor, §§ 481-482—Wharton, III. § 349—Moore, VII. § 1113—Wheaton, §§ 347-351—Bluntschli, §§ 649, 651, 662, 663—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 482-485—Klüber, § 262—G. F. Martens, II. § 280—Ullmann, § 176—Bonfils, Nos. 1078, 1178-1180—Pradier-Fodéré, VI. Nos. 2770-2774—Rivier, II. pp. 265-268—Nys, III. pp. 220-223—Calvo, IV. §§ 2215-2222—Fiore, III. Nos. 1383-1388, and Code, Nos. 1525-1529—Martens, II. § 110—Longuet, §§ 99, 100—Mérignhac, pp. 266-268—*Kriegsbrauch*, pp. 52-56—Holland, *War*, Nos. 3 and 76 (*g*)—Bordwell, p. 84—Spaight, pp. 129-140—*Land Warfare*, §§ 414, 422, 426, 427, 434.

Wanton destruction prohibited.

§ 149. In former times invading armies frequently used to fire and destroy all enemy property they could not make use of or carry away. Afterwards, when the practice of warfare grew milder, belligerents in strict law retained the right to destroy enemy property according to discretion, although they did not, as a rule, any longer make use of such right. Nowadays, however, this right is obsolete. For in the nineteenth century it became a universally recognised rule of International Law that all useless and wanton destruction of enemy property, be it public or
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private, is absolutely prohibited. And this rule has now been expressly enacted by article 23 (*g*) of the Hague Regulations, where it is categorically enacted that "to destroy ... enemy's property, unless such destruction ... be imperatively demanded by the necessities of war, is prohibited."

Destruction for the purpose of Offence and Defence.

§ 150. All destruction of and damage to enemy property for the purpose of offence and defence is *necessary* destruction and damage, and therefore lawful. It is not only permissible to destroy and damage all kinds of enemy property on the battlefield during battle, but also in preparation for battle or siege. To strengthen a defensive position a house may be destroyed or damaged. To cover the retreat of an army a village on the battlefield may be fired. The district around an enemy fortress held by a belligerent may be razed, and, therefore, all private and public buildings, all vegetation may be destroyed, and all bridges blown up within a certain area. If a farm, a village, or even a town is not to be abandoned but prepared for defence, it may be necessary to damage in many ways or entirely destroy private and public property. Further, if and where a bombardment is lawful, all destruction of property involved in it becomes likewise lawful. When a belligerent force obtains possession of an enemy factory for ammunition or provisions for the enemy troops, if it is not certain that they can hold it against an attack, they may at least destroy the plant, if not the buildings. Or if a force occupies an enemy fortress, they may raze the fortifications. Even a force intrenching themselves on a battlefield may be obliged to resort to the destruction of many kinds of property.

Destruction in marching, reconnoitring, and conducting Transport.

§ 151. Destruction of enemy property in marching troops, conducting military transport, and in

[Pg 189] reconnoitring, is likewise lawful if unavoidable. A reconnoitring party need not keep on the road if they can better serve their purpose by riding across the tilled fields. And troops may be marched and transport may be conducted over crops when necessary. A humane commander will not unnecessarily allow his troops and transport to march and ride over tilled fields and crops. But if the purpose of war necessitates it he is justified in so doing.

Destruction of Arms, Ammunition, and Provisions.

§ 152. Whatever enemy property a belligerent may appropriate he may likewise destroy. To prevent the enemy from making use of them a retreating force may destroy arms, ammunition, provisions, and the like, which they have taken from the enemy or requisitioned and cannot carry away. But it must be specially observed that they may not destroy provisions in the possession of private enemy inhabitants in order to prevent the enemy from making use of them in the future. [291]

[291] Nor is a commander allowed to requisition such provisions in order to have them destroyed, for article 52 of the Hague Regulations expressly enacts that requisitions are only admissible for the necessities of the army.

Destruction of Historical Monuments, Works of Art, and the like.

§ 153. All destruction of and damage to historical monuments, works of art and science, buildings for charitable, educational, and religious[292] purposes are specially prohibited by article 56 of the Hague Regulations which enacts that the perpetrators of such acts must be prosecuted (*poursuivie*), that is court-martialed. But it must be emphasised that these objects enjoy this protection only during military occupation of enemy territory. Should a battle be waged around an historical monument on open ground, should a church, a school, or a museum be defended and attacked during military operations, these otherwise protected objects may be damaged or destroyed under the same conditions as other enemy property.

[292] It is of importance to state the fact that, according to Grotius (III. c. 5, §§ 2 and 3), destruction of graves, tombstones, churches, and the like is not prohibited by the Law of Nations, although he strongly (III. c. 12, §§ 5-7)
[Pg 190] advises that they should be spared unless their preservation is dangerous to the interests of the invader.

General Devastation.

§ 154. The question must also be taken into consideration whether and under what conditions general devastation of a locality, be it a town or a larger part of enemy territory, is permitted. There cannot be the slightest doubt that such devastation is as a rule absolutely prohibited and only in exceptional cases permitted when, to use the words of article 23 (*g*) of the Hague Regulations, it is "imperatively demanded by the necessities of war." It is, however, impossible to define once for all the circumstances which make a general devastation necessary, since everything depends upon the merits of the special case. But the fact that a general devastation can be lawful must be admitted. And it is, for instance, lawful in case of a levy *en masse* on already occupied territory, when self-preservation obliges a belligerent to resort to the most severe measures. It is also lawful when, after the defeat of his main forces and occupation of his territory, an enemy disperses his remaining forces into small bands which carry on guerilla tactics and receive food and information, so that there is no hope of ending the war except by a general devastation which cuts off supplies of every kind from the guerilla bands. But it must be specially observed that general devastation is only justified by imperative necessity and by the fact that there is no better and less severe way open to a belligerent.[293]

[293] See Hall, § 186, who gives *in nuce* a good survey of the doctrine and practice of general devastation from Grotius down to the beginning of the nineteenth century. See also Spaight, pp. 125-139.

Be that as it may, whenever a belligerent resorts to general devastation he ought, if possible, to make some provision for the unfortunate peaceful population of the devastated tract of territory. It would be more humane to take them away into captivity rather than let them perish on the spot. The practice, resorted to during the South African war, to house the victims of devastation
[Pg 191] in concentration camps, must be approved. The purpose of war may even oblige a belligerent to confine a population forcibly[294] in concentration camps.

[294] See above, p. 153, note 1. As regards the devastation resorted to during the South African War, and as regards the concentration camps instituted in consequence of devastation during this war, see Beak, *The Aftermath of War* (1906), pp. 1-30, and *The Times' History of the War in South Africa*, vol. V. pp. 250-252.

IX

ASSAULT, SIEGE, AND BOMBARDMENT

Vattel, III. §§ 168-170—Hall, § 186—Lawrence, § 204—Westlake, II. pp. 76-79—Moore, VII. § 1112—Halleck, II. pp. 59, 67, 185—Taylor, §§ 483-485—Bluntschli, §§ 552-554B—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 448-457—G. F. Martens, II. § 286—Ullmann, § 181—Bonfils, Nos. 1079-1087—Despagnet, Nos. 528-535—Pradier-Fodéré, VI. Nos. 2779-2786—Rivier, II. pp. 284-288—Nys, III. pp. 210-219—Calvo, IV. §§ 2067-2095—Fiore, III. Nos. 1322-1330, and Code, Nos. 1519-1524—Longuet, §§ 58-59—Mérignhac, pp. 171-182—Pillet, pp. 101-112—Zorn, pp. 161-174—Holland, *War*, Nos. 80-83—Rolin-Jaequemyns in *R.I.* II. (1870), pp. 659 and 674, III. (1871), pp. 297-307—Bordwell, pp. 286-288—Meurer, §§ 32-34—Spaight, pp. 157-201—*Kriegsbrauch*, pp. 18-22—*Land Warfare*, §§ 117-138.

Assault, Siege, and Bombardment, when lawful.

§ 155. Assault is the rush of an armed force upon enemy forces in the battlefield, or upon

intrenchments, fortifications, habitations, villages, or towns, such rushing force committing every violence against opposing persons and destroying all impediments. Siege is the surrounding and investing of an enemy locality by an armed force, cutting off those inside from all communication for the purpose of starving them into surrender or for the purpose of attacking the invested locality and taking it by assault. Bombardment is the throwing by artillery of shot and shell upon persons and things. Siege can be accompanied by bombardment and assault, but this is not necessary, since a siege can be carried out by mere investment and starvation caused thereby.
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Assault, siege, and bombardment are severally and jointly perfectly legitimate means of warfare.[295] Neither bombardment nor assault, if they take place on the battlefield, needs special discussion, as they are allowed under the same circumstances and conditions as force in general is allowed. The only question here is under what circumstances assault and bombardment are allowed outside the battlefield. The answer is indirectly given by article 25 of the Hague Regulations, where it is categorically enacted that "the attack or bombardment, by any means[296] whatever, of towns, villages, habitations, or buildings, which are not defended, is prohibited." Siege is not specially mentioned, because no belligerent would dream of besieging an undefended locality, and because siege of an undefended town would involve unjustifiable violence against enemy persons and would, therefore, be unlawful. Be this as it may, the fact that defended localities only may now be bombarded, involves a decided advance in the view taken by International Law. For it was formerly asserted by many writers[297] and military experts that, for certain reasons and purposes, undefended localities also might in exceptional cases be bombarded. But it must be specially observed that it matters not whether the defended locality be fortified or not, since an unfortified place can be defended.[298] And it must be mentioned that nothing prevents a belligerent who has taken possession of an undefended fortified place from destroying the fortifications by bombardment as well as by other means.

[295] The assertion of some writers—see, for instance, Pillet, pp. 104-107, and Mérignhac, p. 173—that bombardment is lawful only after an unsuccessful attempt of the besiegers to starve the besieged into surrender is not based upon a recognised rule of the Law of Nations.

[296] The words *by any means whatever* were inserted by the Second Peace Conference in order to make it quite clear that the article is likewise to refer to bombardment from air-vessels.

[297] See, for instance, Lueder in Holtzendorff, IV. p. 451.

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[298] See Holls, *The Peace Conference at the Hague* (1900), p. 152.

Assault, how carried out.

§ 156. No special rules of International Law exist with regard to the mode of carrying out an assault. Therefore, only the general rules respecting offence and defence find application. It is in especial not[299] necessary to give notice of an impending assault to the authorities of the respective locality, or to request them to surrender before an assault is made. That an assault may or may not be preceded or accompanied by a bombardment, need hardly be mentioned, nor that by article 28 of the Hague Regulations pillage of towns taken by assault is now expressly prohibited.

[299] This becomes indirectly apparent from article 26 of the Hague Regulations.

Siege, how carried out.

§ 157. With regard to the mode of carrying out siege without bombardment no special rules of International Law exist, and here too only the general rules respecting offence and defence find application. Therefore, an armed force besieging a town may, for instance, cut off the river which supplies drinking water to the besieged, but must not poison[300] such river. And it must be specially observed that no rule of law exists which obliges a besieging force to allow all non-combatants, or only women, children, the aged, the sick and wounded, or subjects of neutral Powers, to leave the besieged locality unmolested. Although such permission[301] is sometimes granted, it is in most cases refused, because the fact that non-combatants are besieged together with the combatants, and that they have to endure the same hardships, may, and very often does, exercise pressure upon the authorities to surrender. Further, should the commander of a besieged place expel the non-combatants in order to lessen the number of those who consume his
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store of provisions, the besieging force need not allow them to pass through its lines, but may drive them back.[302]

[300] See above, § 110.

[301] Thus in 1870, during the Franco-German War, the German besiegers of Strassburg as well as of Belfort allowed the women, the children, and the sick to leave the besieged fortresses.

[302] See *Land Warfare*, § 129.

That diplomatic envoys of neutral Powers may not be prevented from leaving a besieged town is a consequence of their exterritoriality. However, if they voluntarily remain, may they claim uncontrolled[303] communication with their home State by correspondence and couriers? When Mr. Washburne, the American diplomatic envoy at Paris during the siege of that city in 1870 by the Germans, claimed the right of sending a messenger with despatches to London in a sealed bag through the German lines, Bismarck declared that he was ready to allow foreign diplomatists in Paris to send a courier to their home States once a week, but only under the condition that their despatches were open and did not contain any remarks concerning the war. Although the United States and other Powers protested, Bismarck did not alter his decision. The whole question must be treated as open.[304]

[303] The matter is discussed by Rolin-Jaequemyns in *R.I.* III. (1871), pp. 371-377.

[304] See above, vol. I. § 399, and Wharton, I. § 97.

Bombardment, how carried out.

§ 158. Regarding bombardment, article 26 of the Hague Regulations enacts that the commander of the attacking forces shall do all he can to notify his intention to resort to bombardment. But it must be emphasised that a strict duty of notification for all cases of bombardment is not thereby imposed, since it is only enacted that a commander *shall do all he can* to send notification. He cannot do it when the circumstances of the case prevent him, or when the necessities of war demand an immediate bombardment. Be that as it may, the purpose of notification is to enable private individuals within the locality to be bombarded to seek shelter for their persons and for their valuable personal property.

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Article 27 of the Hague Regulations enacts the hitherto customary rule that all necessary steps must be taken to spare as far as possible all buildings devoted to religion, art, science, and charity; further, historic monuments, hospitals, and all other places where the sick and wounded are collected, provided these buildings, places, and monuments are not used at the same time for military purposes. To enable the attacking forces to spare these buildings and places, the latter must be indicated by some particular signs, which must be previously notified to the attacking forces and must be visible from the far distance from which the besieging artillery carries out the bombardment.[305]

[305] No siege takes place without the besieged accusing the besiegers of neglecting the rule that buildings devoted to religion, art, charity, the tending of the sick, and the like, must be spared during bombardments. The fact is that in case of a bombardment the destruction of such buildings cannot always be avoided, although the artillery of the besiegers do not intentionally aim at them. That the forces of civilised States intentionally destroy such buildings, I cannot believe.

It must be specially observed that no legal duty exists for the attacking forces to restrict bombardment to fortifications only. On the contrary, destruction of private and public buildings through bombardment has always been and is still considered lawful, as it is one of the means to impress upon the authorities the advisability of surrender. Some writers[306] assert either that bombardment of the town, in contradistinction to the fortifications, is never lawful, or that it is only lawful when bombardment of the fortifications has not resulted in inducing surrender. But this opinion does not represent the actual practice of belligerents, and the Hague Regulations do not adopt it.

[306] See, for instance, Pillet, pp. 104-107; Bluntschli § 554A; Mérignhac, p. 180. Vattel (III. § 169) does not deny the right to bombard the town, although he does not recommend such bombardment.

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X

ESPIONAGE AND TREASON

Vattel, III. §§ 179-182—Hall, § 188—Westlake, II. pp. 79 and 90—Lawrence, § 199—Phillimore, III. § 96—Halleck, I. pp. 571-575, and in *A.J.* V.(1911), pp. 590-603—Taylor, §§ 490 and 492—Wharton, III. § 347—Moore, VII. § 1132—Bluntschli, §§ 563-564, 628-640—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 461-467—Ullmann, § 176—Bonfils, Nos. 1100-1104—Despagnet, Nos. 537-542—Pradier-Fodéré, VI. Nos. 2762-2768—Rivier, II. pp. 282-284—Nys, III. pp. 256-263—Calvo, IV. §§ 2111-2122—Fiore, III. Nos. 1341, 1374-1376, and Code, Nos. 1487-1490—Martens, II. § 116—Longuet, §§ 63-75—Mérignhac, pp. 183-209—Pillet, pp. 97-100—Zorn, pp. 174-195—Holland, *War*, Nos. 84-87—Bordwell, pp. 291-292—Meurer, §§ 35-38—Spaight, pp. 202-215, 333-335—Ariga, §§ 98-100—Takahashi, pp. 185-194—Friedemann, *Die Lage der Kriegskundschafter und Spione* (1892)—Violle, *L'espionage militaire en temps de guerre* (1904)—Adler, *Die Spionage* (1906)—*Kriegsbrauch*, pp. 30-31—*Land Warfare*, §§ 155-173—Bentwich in *The Journal of the Society of Comparative Legislation*, New Series, X. (1909), pp. 243-299.

Twofold Character of Espionage and Treason.

§ 159. War cannot be waged without all kinds of information about the forces and the intentions of the enemy and about the character of the country within the zone of military operations. To obtain the necessary information, it has always been considered lawful, on the one hand, to employ spies, and, on the other, to make use of the treason of enemy soldiers or private enemy subjects, whether they were bribed[307] or offered the information voluntarily and gratuitously. Article 24 of the Hague Regulations enacts the old customary rule that the employment of methods necessary to obtain information about the enemy and the country is considered allowable. The fact, however, that these methods are lawful on the part of the belligerent who employs them does not prevent the punishment of such individuals as are engaged in procuring information. Although a belligerent acts lawfully in employing spies and traitors, the other belligerent, who punishes spies and traitors, likewise acts lawfully. Indeed, espionage and treason bear a twofold character. For persons committing acts of espionage or treason are—as will be shown below in § 255—considered war criminals and may be punished, but the employment of spies and traitors is considered lawful on the part of the belligerents.

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[307] Some writers maintain, however, that it is not lawful to bribe enemy soldiers into espionage; see below, § 162.

Espionage in contradistinction to Scouting and Despatch-bearing.

§ 160. Espionage must not be confounded, firstly, with scouting, or secondly, with despatch-bearing. According to article 29 of the Hague Regulations, espionage is the act of a soldier or other individual who clandestinely, or under false pretences, seeks to obtain information concerning one belligerent in the zone of belligerent operations with the intention of

communicating it to the other belligerent.[308] Therefore, soldiers not in disguise, who penetrate into the zone of operations of the enemy, are not spies. They are scouts who enjoy all privileges of the members of armed forces, and they must, if captured, be treated as prisoners of war. Likewise, soldiers or civilians charged with the delivery of despatches for their own army or for that of the enemy and carrying out their mission openly are not spies. And it matters not whether despatch-bearers make use of balloons or of other means of communication. Thus, a soldier or civilian trying to carry despatches from a force besieged in a fortress to other forces of the same belligerent, whether making use of a balloon or riding or walking at night, may not be treated as a spy. On the other hand, spying can well be carried out by despatch-bearers or by persons in a balloon, whether they make use of the balloon of a despatch-bearer or rise in a balloon for the
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special purpose of spying.[309] The mere fact that a balloon is visible does not protect the persons using it from being treated as spies; since spying can be carried out under false pretences quite as well as clandestinely. But special care must be taken really to prove the fact of espionage in such cases, for an individual carrying despatches is *prima facie* not a spy and must not be treated as a spy until proved to be such.

[308] Assisting or favouring espionage or knowingly concealing a spy are, according to a customary rule of International Law, punishable as though they were themselves acts of espionage; see *Land Warfare*, § 172.

[309] See below, § 356 (4), concerning wireless telegraphy.

A remarkable case of espionage is that of Major André,[310] which occurred in 1780 during the American War of Independence. The American General Arnold, who was commandant of West Point, on the North River, intended to desert the Americans and join the British forces. He opened negotiations with Sir Henry Clinton for the purpose of surrendering West Point, and Major André was commissioned by Sir Henry Clinton to make the final arrangements with Arnold. On the night of September 21, Arnold and André met outside the American and British lines, but André, after having changed his uniform for plain clothes, undertook to pass the American lines on his return, furnished with a passport under the name of John Anderson by General Arnold. He was caught, convicted as a spy, and hanged. As he was not seeking information,[311] and therefore was not a spy according to article 29 of the Hague Regulations, a conviction for espionage would not, if such a case occurred to-day, be justified. But it would be possible to convict for war treason, for André was no doubt negotiating treason. Be that as it may, George III. considered André a martyr, and honoured his memory by granting a pension to his mother and a baronetcy to his brother.[312]

[310] See Halleck in *A.J.* V. (1911), p. 594.

[311] Halleck, *loc. cit.*, p. 598, asserts the contrary.

[312] See Phillimore, III. § 106; Halleck, I. p. 575; Rivier, II. p. 284.

Punishment of Espionage.

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§ 161. The usual punishment for spying is hanging or shooting, but less severe punishments are, of course, admissible and sometimes inflicted. However this may be, according to article 30 of the Hague Regulations a spy may not be punished without a trial before a court-martial. And according to article 31 of the Hague Regulations a spy who is not captured in the act but rejoins the army to which he belongs, and is subsequently captured by the enemy, may not be punished for his previous espionage and must be treated as a prisoner of war. But it must be specially observed that article 31 concerns only such spies as belong to the armed forces of the enemy; civilians who act as spies and are captured later may be punished. Be that as it may, no regard is paid to the status, rank, position, or motive of a spy. He may be a soldier or a civilian, an officer or a private. He may be following instructions of superiors or acting on his own initiative from patriotic motives. A case of espionage, remarkable on account of the position of the spy, is that of the American Captain Nathan Hale, which occurred in 1776. After the American forces had withdrawn from Long Island, Captain Hale recrossed under disguise and obtained valuable information about the English forces that had occupied the island. But he was caught before he could rejoin his army, and he was executed as a spy.[313]

[313] The case of Major Jakoga and Captain Oki, which, though reported as a case of espionage, is really a case of treason, will be discussed below in § 255.

Treason.

§ 162. Treason can be committed by a soldier or an ordinary subject of a belligerent, but it can also be committed by an inhabitant of an occupied enemy territory or even by the subject of a neutral State temporarily staying there, and it can take place after an arrangement with the favoured belligerent or without such an arrangement. In any case a belligerent making use of
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treason acts lawfully, although the Hague Regulations do not mention the matter at all. But many acts of different sorts can be treasonable; the possible cases of treason and the punishment of treason will be discussed below in § 255.

Although it is generally recognised that a belligerent acts lawfully who makes use of the offer of a traitor, the question is controversial[314] whether a belligerent acts lawfully who bribes a commander of an enemy fortress into surrender, incites enemy soldiers to desertion, bribes enemy officers for the purpose of getting important information, incites enemy subjects to rise against the legitimate Government, and the like. If the rules of the Law of Nations are formulated, not from doctrines of book-writers, but from what is done by the belligerents in practice,[315] it must be asserted that such acts, detestable and immoral as they are, are not considered illegal according to the Law of Nations.

[314] See Vattel, III. § 180; Heffter, § 125; Taylor, § 490; Martens, II. § 110 (8); Longuet, § 52; Mérignhac, p. 188, and others. See also below, § 164.

[315] See *Land Warfare*, § 158.

XI

RUSES

Grotius, III. c. 1, §§ 6-18—Bynkershoek, *Quaest. jur. publ.* I. c. 1—Vattel, III. §§ 177-178—Hall, § 187—Lawrence, § 207—Westlake, II. p. 73—Phillimore, III. § 94—Halleck, I. pp. 566-571—Taylor, § 488—Moore, VII. § 1115—Bluntschli, §§ 565-566—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 457-461—Ullmann, § 176—Bonfils, Nos. 1073-1075—Despagnet, Nos. 526-527—Pradier-Fodéré, VI. Nos. 2759-2761—Rivier, II. p. 261—Nys, III. pp. 252-255—Calvo, IV. §§ 2106-2110—Fiore, III. Nos. 1334-1339—Longuet, §§ 53-56—Mérignhac, pp. 165-168—Pillet, pp. 93-97—*Kriegsbrauch*, pp. 23-24—Holland, *War*, Nos. 78-79—Bordwell, pp. 283-286—Meurer, II pp. 151-152—Spaight, pp. 152-156—*Land Warfare*, §§ 139-154—Brocher in *R.I.* V. (1873), pp. 325-329.

Character of Ruses of War.

[Pg 201] § 163. Ruses of war or stratagems are deceit employed during military operations for the purpose of misleading the enemy. Such deceit is of great importance in war, and, just as belligerents are allowed to employ all methods of obtaining information, so they are, on the other hand, and article 24 of the Hague Regulations confirms this, allowed to employ all sorts of ruses for the purpose of deceiving the enemy. Very important objects can be attained through ruses of war, as, for instance, the surrender of a force or of a fortress, the evacuation of territory held by the enemy, the withdrawal from a siege, the abandonment of an intended attack, and the like. But ruses of war are also employed, and are very often the decisive factor, during battles.

Different kinds of Stratagems.

§ 164. Of ruses there are so many kinds that it is impossible to enumerate[316] and classify them. But in order to illustrate acts carried out as ruses some instances may be given. It is hardly necessary to mention the laying of ambushes and traps, the masking of military operations such as marches or the erection of batteries and the like, the feigning of attacks or flights or withdrawals, the carrying out of a surprise, and other stratagems employed every day in war. But it is important to know that, when useful, feigned signals and bugle-calls may be ordered, the watchword of the enemy may be used, deceitful intelligence may be disseminated,[317] the signals and the bugle-calls of the enemy may be mimicked[318] to mislead his forces. And even such detestable acts[319] as bribery of enemy commanders and officials in high position, and secret seduction of enemy soldiers to desertion, and of enemy subjects to insurrection, are frequently committed, although many writers protest. As regards the use of the national flag, the military [Pg 202] ensigns, and the uniforms of the enemy, theory and practice are unanimous in rejecting it during actual attack and defence, since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe. But many[320] publicists maintain that until the actual fighting begins belligerent forces may by way of stratagem make use of the national flag, military ensigns, and uniforms of the enemy. Article 23 (*f*) of the Hague Regulations does not prohibit any and every use of these symbols, but only their *improper* use, thus leaving the question open,[321] what uses are proper and what are not. Those who have hitherto taught the admissibility of the use of these symbols outside actual fighting can correctly maintain that the quoted article 23 (*f*) does not prohibit it.[322]

[316] See *Land Warfare*, § 144, where a great number of legitimate ruses are enumerated.

[317] See the examples quoted by Pradier-Fodéré, VI. No. 2761.

[318] See Pradier-Fodéré, VI. No. 2760.

[319] The point has been discussed above in § 162.

[320] See, for instance, Hall, § 187; Bluntschli, § 565; Taylor, § 488; Calvo, IV. No. 2106; Pillet, p. 95; Longuet, § 54. But, on the other hand, the number of publicists who consider it illegal to make use of the enemy flag, ensigns, and uniforms, even before an actual attack, is daily becoming larger; see, for instance, Lueder in Holtzendorff, IV. p. 458; Mérignhac, p. 166; Pradier-Fodéré, VI. No. 2760; Bonfils, No. 1074; *Kriegsbrauch*, p. 24. As regards the use of the enemy flag on the part of men-of-war, see below, in § 211.

[321] Some writers maintain that article 23 (*f*) of the Hague Regulations has settled the controversy, but they forget that this article speaks only of the *improper* use of the enemy ensigns and uniform. See *Land Warfare*, § 152.

[322] The use of the enemy uniform for the purpose of deceit is different from the case when members of armed forces who are deficient in clothes wear the uniforms of prisoners or of the enemy dead. If this is done—and it always will be done if necessary—such distinct alterations in the uniform ought to be made as will make it apparent to which side the soldiers concerned belong (see *Land Warfare*, § 154). Different again is the case where soldiers are, through lack of clothing, obliged to wear the apparel of civilians, such as greatcoats, hats, and the like. Care must then be taken that the soldiers concerned do nevertheless wear a fixed distinctive emblem which marks them as soldiers, since otherwise they lose the privileges of members of the armed forces of the belligerents (see article 1, No. 2, of the Hague Regulations). During the Russo-Japanese War both belligerents repeatedly accused each other of using Chinese clothing for members of their armed forces; the soldiers concerned apparently were obliged through lack of proper clothing temporarily to make use of Chinese garments. See, however, Takahashi, pp. 174-178.

Stratagems in contradistinction to Perfidy.

[Pg 203] § 165. Stratagems must be carefully distinguished from perfidy, since the former are allowed, whereas the latter is prohibited. Halleck (I. p. 566) correctly formulates the distinction by laying

down the principle that, whenever a belligerent has expressly or tacitly engaged and is therefore bound by a moral obligation to speak the truth to an enemy, it is perfidy to betray the latter's confidence, because it contains a breach of good faith.[323] Thus a flag of truce or the cross of the Geneva Convention must never be made use of for a stratagem, capitulations must be carried out to the letter, the feigning of surrender for the purpose of luring the enemy into a trap is a treacherous act, as is the assassination of enemy commanders or soldiers or heads of States. On the other hand, stratagem may be met by stratagem, and a belligerent cannot complain of the enemy who so deceives him. If, for instance, a spy of the enemy is bribed to give deceitful intelligence to his employer, or if an officer, who is approached by the enemy and offered a bribe, accepts it feignedly but deceives the briber and leads him to disaster, no perfidy is committed.

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[323] See *Land Warfare*, §§ 139-142, 146-150.

XII

OCCUPATION OF ENEMY TERRITORY

Grotius, III. c. 6, § 4—Vattel, III. §§ 197-200—Hall, §§ 153-161—Westlake, II. pp. 83-106—Lawrence, §§ 176-179—Maine, pp. 176-183—Halleck, II. pp. 432-466—Taylor, §§ 568-579—Wharton, III. §§ 354-355—Moore, VII. §§ 1143-1155—Bluntschli, §§ 539-551—Heffter, §§ 131-132—Lueder in Holtzendorff, IV. pp. 510-524—Klüber, §§ 255-256—G. F. Martens, II. § 280—Ullmann, § 183—Bonfils, Nos. 1156-1175—Despagnet, Nos. 567-578—Pradier-Fodéré, VII. Nos. 2939-2988, 3019-3028—Nys, III. pp. 309-351—Rivier, II. pp. 299-306—Calvo, IV. §§ 2166-2198—Fiore, III. Nos. 1454-1481, and Code, Nos. 1535-1563—Martens, II. §§ 117-119—Longuet, §§ 115-133—Mérignhac, pp. 241-262—Pillet, pp. 237-259—Zorn, pp. 213-243—*Kriegsbrauch*, pp. 45-50—Holland, *War*, Nos. 102-106—Bordwell, pp. 312-330—Meurer, II. §§ 45-55—Spaight, pp. 320-380—*Land Warfare*, §§ 340-405—Waxel, *L'armée d'invasion el la population* (1874)—Litta, *L'occupazione militare* (1874)—Löning, *Die Verwaltung des General-Gouvernements im Elsass* (1874), and in *R.I.* IV. (1872), p. 622, V. (1873), p. 69—Bernier, *De l'occupation militaire en temps de guerre* (1884)—Corsi, *L'occupazione militare in tempo di guerra e le relazione internazionale che ne derivano* (2nd edit. 1886)—Bray, *De l'occupation militaire en temps de guerre, etc.* (1891)—Magoon, *Law of Civil Government under Military Occupation* (2nd edit. 1900)—Lorriot, *De la nature de l'occupation de guerre* (1903)—Deherpe, *Essai sur le developpement de l'occupation en droit international* (1903)—Sichel, *Die kriegerische Besetzung feindlichen Staatsgebietes* (1905)—Nowacki, *Die Eisenbahnen im Kriege* (1906), pp. 78-90—*Rolin-Jaequemyns* in *R.I.* II. (1870), p. 666, and III. (1871), p. 311.

Occupation as an Aim of Warfare.

§ 166. If a belligerent succeeds in occupying a part or even the whole of the enemy territory, he has realised a very important aim of warfare. He can now not only make use of the resources of the enemy country for military purposes, but can also keep it for the time being as a pledge of his military success, and thereby impress upon the enemy the necessity of submitting to terms of peace. And in regard to occupation, International Law respecting warfare has progressed more than in any other department. In former times enemy territory that was occupied by a belligerent was in every point considered his State property, with which and with the inhabitants therein he could do what he liked. He could devastate the country with fire and sword, appropriate all

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public and private property therein, kill the inhabitants, or take them away into captivity, or make them take an oath of allegiance. He could, even before the war was decided and his occupation was definitive, dispose of the territory by ceding it to a third State, and an instance of this happened during the Northern War (1700-1718), when in 1715 Denmark sold the occupied Swedish territories of Bremen and Verden to Hanover. That an occupant could force the inhabitants of the occupied territory to serve in his own army and to fight against their legitimate sovereign, was indubitable. Thus, during the Seven Years' War, Frederick II. of Prussia repeatedly made forcible levies of thousands of recruits in Saxony, which he had occupied. But during the second half of the eighteenth century things gradually began to undergo a change. That the distinction between mere temporary military occupation of territory, on the one hand, and, on the other, real acquisition of territory through conquest and subjugation, became more and more apparent, is shown by the fact that Vattel (III. § 197) drew attention to it. However, it was not till long after the Napoleonic wars in the nineteenth century that the consequences of this distinction were carried to their full extent by the theory and practice of International Law. So late as 1808, after the Russian troops had militarily occupied Finland, which was at that time a part of Sweden, Alexander I. of Russia made the inhabitants take an oath of allegiance,[324] although it was only by article 4 of the Peace Treaty of Frederikshamm[325] of September 17, 1809, that Sweden ceded Finland to Russia. The first writer who drew all the consequences of the distinction between mere military occupation and real acquisition of territory was Heffter in his treatise *Das Europaeische Völkerrecht der Gegenwart* (§ 131), which made its appearance in

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1844. And it is certain that it took the whole of the nineteenth century to develop such rules regarding occupation as are now universally recognised and in many respects enacted by articles 42-56 of the Hague Regulations.

[324] See Martens, *N.R.* I. p. 9.

[325] See Martens, *N.R.* I. p. 19.

In so far as these rules touch upon the special treatment of persons and property of the inhabitants of, and public property situated within, occupied territory, they have already been taken into consideration above in §§ 107-154. What concerns us here are the rights and duties of the occupying belligerent in relation to his political administration of the territory and to his political authority over its inhabitants.[326] The principle underlying these modern rules is that, although the occupant does in no wise acquire sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being a military authority over it. As

he thereby prevents the legitimate Sovereign from exercising his authority and claims obedience for himself from the inhabitants, he has to administer the country not only in the interest of his own military advantage, but also, so far as possible at any rate, for the public benefit of the inhabitants. Thus the present International Law not only gives certain rights to an occupant, but also imposes certain duties upon him.

[326] The Hague Regulations (Section III. articles 42-56), and all the French writers, but also many others, treat under the heading "occupation" not only of the rights and duties of an occupant concerning the political administration of the country and the political authority over the inhabitants, but also of other matters, such as appropriation of public and private property, requisitions and contributions, and destruction of public and private property, violence against private enemy subjects and enemy officials. These matters have, however, nothing to do with occupation, but are better discussed in connection with the means of land warfare; see above, §§ 107-154.

Occupation, when effected.

§ 167. Since an occupant, although his power is merely military, has certain rights and duties, the first question to deal with is, when and under what circumstances a territory must be considered occupied.

[Pg 207] Now it is certain that mere invasion is not occupation. Invasion is the marching or riding of troops—or the flying of a military air vessel—into enemy country. Occupation is invasion *plus* taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent by the fact that an occupant sets up some kind of administration, whereas the mere invader does not. A small belligerent force can raid enemy territory without establishing any administration, but quickly rush on to some place in the interior for the purpose of reconnoitring, of destroying a bridge or depôt of munitions and provisions, and the like, and quickly withdraw after having realised its purpose.[327] Although it may correctly be asserted that, so long and in so far as such raiding force is in possession of a locality and sets up a temporary administration therein, it occupies this locality, yet it certainly does not occupy the whole territory, and even the occupation of such locality ceases the moment the force withdraws.

[327] See *Land Warfare*, § 343.

However this may be, as a rule occupation will be coincident with invasion. The troops march into a district, and the moment they get into a village or town—unless they are actually fighting their way—they take possession of the Municipal Offices, the Post Office, the Police Stations, and the like, and assert their authority there. From the military point of view such villages and towns are now "occupied." Article 42 of the Hague Regulations enacts that territory is considered occupied when it is actually placed under the authority of the hostile army, and that such occupation applies only to the territory where that authority is established and in a position to assert itself. This definition of occupation is not at all precise, but it is as precise as a legal
[Pg 208] definition of such kind of fact as occupation can be. If, as some publicists[328] maintain, only such territory were actually occupied, in which every part is held by a sufficient number of soldiers to enforce immediately and on the very spot the authority of an occupant, an effective occupation of a large territory would be impossible, since then not only in every town, village, and railway station, but also in every isolated habitation and hut the presence of a sufficient number of soldiers would be necessary. Reasonably no other conditions ought to be laid down as necessary to constitute effective occupation in war than those under which in time of peace a Sovereign is able to assert his authority over a territory. What these conditions are is a question of fact which is to be answered according to the merits of the special case. When the legitimate Sovereign is prevented from exercising his powers and the occupant, being able to assert his authority, actually establishes an administration over a territory, it matters not with what means and in what ways his authority is exercised. For instance, when in the centre of a territory a large force is established from which flying columns are constantly sent round the territory, such territory is indeed effectively occupied, provided there are no enemy forces present, and, further, provided these columns can really keep the territory concerned under control.[329] Again, when an army is marching on through enemy territory, taking possession of the lines of communication and the
[Pg 209] open towns, surrounding the fortresses with besieging forces, and disarming the inhabitants in open places of habitation, the whole territory left behind the army is effectively occupied, provided some kind of administration is established, and further provided that, as soon as it becomes necessary to assert the authority of the occupant, a sufficient force can within reasonable time be sent to the locality affected. The conditions vary with those of the country concerned. When a vast country is thinly populated, a smaller force is necessary to occupy it, and a smaller number of centres need be garrisoned than in the case of a thickly populated country. Thus, the occupation of the former Orange Free State and the former South African Republic became effective in 1901 some time after their annexation by Great Britain and the degeneration of ordinary war into guerilla war, although only about 250,000 British soldiers had to keep up the occupation of a territory of about 500,000 square miles. The fact that all the towns and all the lines of communication were in the hands and under the administration of the British army, that the inhabitants of smaller places were taken away into concentration camps, that the enemy forces were either in captivity or dispersed into comparatively small guerilla bands, and finally, that wherever such bands tried to make an attack, a sufficient British force could within
[Pg 210] reasonable time make its appearance, was quite sufficient to assert British authority[330] over that vast territory, although it was more than a year before peace was finally established.

[328] See, for instance, Hall, § 161. This was also the standpoint of the delegates of the smaller States at the Brussels Conference of 1874 when the Declaration of Brussels was drafted.

[329] This is not identical with so-called *constructive* occupation, but is really *effective* occupation. An occupation is

constructive only if an invader declares districts as occupied over which he actually does not exercise control—for instance, when he actually occupies only the capital of a large province, and proclaims that he has thereby occupied the whole of the province, although he does not take any steps to exercise control over it.

[330] The annexation of the Orange Free State dates from May 24, 1900, and that of the South African Republic from September 1, 1900. It may well be doubted whether at these dates the occupation of the territories concerned was already so complete as to be called effective. The British Government ought not, therefore, to have proclaimed the annexation at such early dates. But there ought to be no doubt that the occupation became effective some time afterwards, in 1901. See, however, Sir Thomas Barclay in *The Law Quarterly Review*, XXI. (1905), p. 307, who asserts the contrary; see also, below, § 264, p. 326, note 2, and § 265, p. 327, note 1. *The Times' History of the War in South Africa* (vol. V. p. 251) estimates the number of Boer fighters in May 1901 to be about 13,000. These armed men were dispersed into a very large number of guerilla bands, and they were in a great many cases men who seemingly had submitted to the British authorities, but afterwards had taken up arms.

It must be emphasised that the rules regarding effective occupation must be formulated on the basis of actual practice quite as much as rules regarding other matters of International Law. Those rules are not authoritative which are laid down by theorists, but only those which are abstracted from the actual practice of warfare and are unopposed by the Powers.[331]

[331] The question is so much controverted that it is impossible to enumerate the different opinions. Readers who want to study the question must be referred to the literature quoted above at the commencement of § 166.

Occupation, when ended.

§ 168. Occupation comes to an end when an occupant withdraws from a territory or is driven out of it. Thus, occupation remains only over a limited area of a territory if the forces in occupation are drawn into a fortress on that territory and are there besieged by the re-advancing enemy, or if the occupant concentrates his forces in a certain place of the territory, withdrawing before the re-advancing enemy. But occupation does not cease because the occupant, after having disarmed the inhabitants and having made arrangements for the administration of the country, is marching on to overtake the retreating enemy, leaving only comparatively few soldiers behind.

Rights and Duties in General of the Occupant.

§ 169. As the occupant actually exercises authority, and as the legitimate Government is prevented from exercising its authority, the occupant acquires a temporary right of administration over the respective territory and its inhabitants. And all steps he takes in the exercise of this right must be recognised by the legitimate Government after occupation has ceased. This administration is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration. In carrying it out the occupant is, on the one [Pg 211] hand, totally independent of the Constitution and the laws of the respective territory, since occupation is an aim of warfare, and since the maintenance and safety of his forces and the purpose of war stand in the foreground of his interest and must be promoted under all circumstances and conditions. But, although as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power, he is not the Sovereign of the territory, and therefore has no right to make changes in the laws or in the administration except those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realisation of the purpose of war. On the contrary, he has the duty of administrating the country according to the existing laws and the existing rules of administration; he must insure public order and safety, must respect family honour and rights, individual lives, private property, religious convictions and liberty. Article 43 of the Hague Regulations enacts the following rule which is of fundamental importance: "The authority of the legitimate Power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Rights of the Occupant regarding the Inhabitants.

§ 170. An occupant having authority over the territory, the inhabitants are under his sway and have to render obedience to his commands. However, the power of the occupant over the inhabitants is not unrestricted, for articles 23, 44, and 45 of the Hague Regulations expressly enact, that he is prohibited from compelling the inhabitants to take part in military operations against the legitimate Government, to give information concerning the army of the other [Pg 212] belligerent or concerning the latter's means of defence, or to take an oath of allegiance. On the other hand, he may compel them to take an oath—sometimes called an "oath of neutrality"—to abstain from taking up a hostile attitude against the occupant and willingly to submit to his legitimate commands; and he may punish them severely for breaking this oath. He may make requisitions and demand contributions[332] from them, may compel them to render services as drivers, farriers, and the like.[333] He may compel them to render services for the repair or the erection of such roads, buildings, or other works as are necessary for military operations.[334] He may also collect the ordinary taxes, dues, and tolls imposed for the benefit of the State by the legitimate Government. But in such case he is, according to article 48 of the Hague Regulations, obliged to make the collection, as far as possible, in accordance with the rules in existence and the assessment in force, and he is, on the other hand, bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

[332] See above, §§ 147 and 148.

[333] Formerly he could likewise compel them to render services as guides, but this is now prohibited by the wording

which article 44 received from the Second Peace Conference. It should, however, be mentioned that Germany, Austria-Hungary, Japan, Montenegro, and Russia have signed Convention IV. with a reservation against article 44, and that in a war with these Powers the old rule is valid that inhabitants may be compelled to serve as guides.

[334] See article 52 of the Hague regulations, and *Land Warfare*, §§ 388-392.

Whoever does not comply with his commands, or commits a prohibited act, may be punished by him; but article 50 of the Hague Regulations expressly enacts the rule that *no general penalty, pecuniary or otherwise, may be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible*. It must, however, be specially
[Pg 213] observed that this rule does not at all prevent[335] reprisals on the part of belligerents occupying enemy territory. In case acts of illegitimate warfare are committed by enemy individuals not belonging to the armed forces, reprisals may be resorted to, although practically innocent individuals are thereby punished for illegal acts for which they are neither legally nor morally responsible—for instance, when a village is burned by way of reprisal for a treacherous attack committed there on enemy soldiers by some unknown individuals.[336] Nor does this new rule prevent an occupant from taking hostages[337] in the interest of the safety of the line of communication threatened by guerillas not belonging to the armed forces, or for other purposes, [338] although the hostage must suffer for acts or omissions of others for which he is neither legally nor morally responsible.

[335] See Holland, *War*, No. 110, and *Land Warfare*, §§ 385-386. See also Zorn, pp. 239-243, where an important interpretation of article 50 is discussed.

[336] See below, § 248.

[337] But this is a moot point; see below, § 259.

[338] Belligerents sometimes take hostages for the purpose of securing compliance with demands for contributions, requisitions, and the like. As long as such hostages obtain the same treatment as prisoners of war, the practice does not seem to be illegal, although the Hague Regulations do not mention and many publicists condemn it; see above, § 116, p. 153, note 1, and below, § 259, p. 319, note 2.

It must be particularly noted that in the treatment of the inhabitants of enemy territory the occupant need not make any difference between such as are subjects of the enemy and such as are subjects of neutral States.[339]

[339] See above,§ 88, and Frankenbach, *Die Rechtsstellung von neutralen Staatsangehörigen in kriegführenden Staaten* (1910), pp. 46-50.

And it must be further observed that, according to British and American views—see above, § 100*a*—article 23 (*h*) of the Hague Regulations prohibits an occupant of enemy territory from declaring extinguished, suspended, or unenforceable in a Court of Law the rights and the rights of action of the inhabitants.

Position of Government Officials and Municipal Functionaries during Occupation.

[Pg 214] § 171. As through occupation authority over the territory actually passes into the hands of the occupant, he may for the time of his occupation depose all Government officials and municipal functionaries that have not withdrawn with the retreating enemy. On the other hand, he must not compel them by force to carry on their functions during occupation, if they refuse to do so, except where a military necessity for the carrying on of a certain function arises. If they are willing to serve under him, he may make them take an oath of obedience, but not of allegiance, and he may not compel them to carry on their functions in his name, but he may prevent them from doing so in the name of the legitimate Government.[340] Since, according to article 43 of the Hague Regulations, he has to secure public order and safety, he must temporarily appoint other functionaries in case those of the legitimate Government refuse to serve under him, or in case he deposes them for the time of the occupation.

[340] Many publicists assert that in case an occupant leaves officials of the legitimate Government in office, he "must" pay them their ordinary salaries. But I cannot see that there is a customary or conventional rule in existence concerning this point. But it is in an occupant's own interest to pay such salaries. and he will as a rule do this. Only in the case of article 48 of the Hague Regulations is he compelled to do it.

Position of Courts of Justice during Occupation.

§ 172. The particular position which Courts of Justice have nowadays in civilised countries, makes it necessary to discuss their position during occupation.[341] There is no doubt that an occupant may suspend the judges as well as other officials. However, if he does suspend them, he must temporarily appoint others in their place. If they are willing to serve under him, he must respect their independence according to the laws of the country. Where it is necessary, he may set up military Courts instead of the ordinary Courts. In case and in so far as he admits the administration of justice by the ordinary Courts, he may nevertheless, so far as it is necessary for
[Pg 215] military purposes or for the maintenance of public order and safety, temporarily alter the laws, especially the Criminal Law, on the basis of which justice is administered, as well as the laws regarding procedure. He has, however, no right to constrain the Courts to pronounce their verdicts in his name, although he need not allow them to pronounce verdicts in the name of the legitimate Government. A case that happened during the Franco-German War may serve as an illustration. In September 1870, after the fall of the Emperor Napoleon and the proclamation of the French Republic, the Court of Appeal at Nancy pronounced its verdicts under the formula "In the name of the French Government and People." Since Germany had not yet recognised the French Republic, the Germans ordered the Court to use the formula "In the name of the High German Powers occupying Alsace and Lorraine," but gave the Court to understand that, if the Court objected to this formula, they were disposed to admit another, and were even ready to

admit the formula "In the name of the Emperor of the French," as the Emperor had not abdicated. The Court, however, refused to pronounce its verdict otherwise than "In the name of the French Government and People," and, consequently, suspended its sittings. There can be no doubt that the Germans had no right to order the formula, "In the name of the High German Powers, &c.," to be used, but they were certainly not obliged to admit the formula preferred by the Court; and the fact that they were disposed to admit another formula than that at first ordered ought to have made the Court accept a compromise. Bluntschli (§ 547) correctly maintains that the most natural solution of the difficulty would have been to use the neutral formula "In the name of the Law."

[341] See Petit, *L'Administration de la justice en territoire occupé* (1900).

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CHAPTER IV

WARFARE ON SEA

I

ON SEA WARFARE IN GENERAL

Hall, § 147—Lawrence, §§ 193-194—Westlake, II. pp. 120-132—Maine, pp. 117-122—Manning, pp. 183-184—Phillimore, III. § 347—Twiss, II. § 73—Halleck, II. pp. 80-82—Taylor, § 547—Wharton, III. §§ 342-345—Wheaton, § 355—Bluntschli, §§ 665-667—Heffter, § 139—Geffcken in Holtzendorff, IV. pp. 547-548, 571-581—Ullmann, §§ 187-188—Bonfils, Nos. 1268, 1294-1338—Despagnet, Nos. 647-649—Pradier-Fodéré, VIII. Nos. 3066-3090, 3107-3108—Nys, III. pp. 433-466—Rivier, II. pp. 329-335—Calvo, IV. §§ 2123, 2379-2410—Fiore, III. Nos. 1399-1413—Pillet, pp. 118-120—Perels, § 36—Testa, pp. 147-157—Boeck, Nos. 3-153—Lawrence, *Essays*, pp. 278-306—Westlake, *Chapters*, pp. 245-253—Ortolan, I. pp. 35-50—Hautefeuille, I. pp. 161-167—Gessner, Westlake, Lorimer, Rolin-Jaequemyns, Laveleye, Albéric Rolin, and Pierantoni in *R.I.* VII. (1875), pp. 256-272 and 558-656—Twiss, in *R.I.* XVI. (1884), pp. 113-137—See also the authors quoted below, § 178, p. 223, note 1.

Aims and Means of Sea Warfare.

§ 173. The purpose of war is the same in the case of warfare on land or on sea—namely, the overpowering of the enemy. But sea warfare serves this purpose by attempting the accomplishment of aims different from those of land warfare. Whereas the aims of land warfare are defeat of the enemy army and occupation of the enemy territory, the aims[342] of sea warfare are: defeat of the enemy navy; annihilation of the enemy merchant fleet; destruction of enemy coast fortifications, and of maritime as well as military establishments on the enemy coast; [Pg 217] cutting off intercourse with the enemy coast; prevention of carriage of contraband and of rendering unneutral service to the enemy; all kinds of support to military operations on land, such as protection of a landing of troops on the enemy coast; and lastly, defence of the home coast and protection to the home merchant fleet.[343] The means by which belligerents in sea warfare endeavour to realise these aims are: attack on and seizure of enemy vessels, violence against enemy individuals, appropriation and destruction of enemy vessels and goods carried by them, requisitions and contributions, bombardment of the enemy coast, cutting of submarine cables, blockade, espionage, treason, ruses, capture of neutral vessels carrying contraband or rendering unneutral service.

[342] Aims of sea warfare must not be confounded with ends of war; see above, § 66.

[343] Article 1 of the U.S. Naval War Code enumerates the following as aims of sea warfare:—The capture or destruction of the military and naval forces of the enemy, of his fortifications, arsenals, dry docks, and dockyards, of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land; to protect and defend the national territory, property, and sea-borne commerce.

Lawful and Unlawful Practices of Sea Warfare.

§ 174. As regards means of sea warfare, just as regards means of land warfare, it must be emphasised that not every practice capable of injuring the enemy in offence and defence is lawful. Although no regulations regarding the laws of war on sea have as yet been enacted by a general law-making treaty as a pendant to the Hague Regulations, there are treaties concerning special points—such as submarine mines, bombardment by naval forces, and others—and customary rules of International Law in existence which regulate the matter. Be that as it may, the rules concerning sea warfare are in many points identical with, but in many respects differ from, the rules in force regarding warfare on land. Therefore, the means of sea warfare must be discussed separately in the following sections. But blockade and capture of vessels carrying [Pg 218] contraband and rendering unneutral service to the enemy, although they are means of warfare against an enemy, are of such importance as regards neutral trade that they will be discussed below in Part III. §§ 368-413.

Objects of the Means of Sea Warfare.

§ 175. Whereas the objects against which means of land warfare may be directed are innumerable, the number of the objects against which means of sea warfare are directed is very limited, comprising six objects only. The chief object is enemy vessels, whether public or private;

the next, enemy individuals, with distinction between those taking part in fighting and others; the third, enemy goods on enemy vessels; the fourth, the enemy coast; the fifth and sixth, neutral vessels attempting to break blockade, carrying contraband, or rendering unneutral service to the enemy.

Development of International Law regarding Private Property on Sea.

§ 176. It is evident that in times when a belligerent could destroy all public and private enemy property he was able to seize, no special rule existed regarding private enemy ships and private enemy property carried by them on the sea. But the practice of sea warfare frequently went beyond the limits of even so wide a right, treating neutral goods on enemy ships as enemy goods, and treating neutral ships carrying enemy goods as enemy ships. It was not until the time of the *Consolato del Mare* in the fourteenth century that a set of clear and definite rules with regard to private enemy vessels and private enemy property on sea in contradistinction to neutral ships and neutral goods was adopted. According to this famous collection of maritime usages observed by the communities of the Mediterranean, there is no doubt that a belligerent may seize and appropriate all private enemy ships and goods. But a distinction is made in case of either ship or goods being neutral. Although an enemy ship may always be appropriated, neutral goods thereon have to be restored to the neutral owners. On the other hand, enemy goods on neutral ships may
[Pg 219] be appropriated, but the neutral ships carrying such goods must be restored to their owners. However, these rules of the *Consolato del Mare* were not at all generally recognised, although they were adopted by several treaties between single States during the fourteenth and fifteenth centuries. Neither the communities belonging to the Hanseatic League, nor the Netherlands and Spain during the War of Independence, nor England and Spain during their wars in the sixteenth century, adopted these rules. And France expressly enacted by Ordinances of 1543 (article 42) and 1583 (article 69) that neutral goods on enemy ships as well as neutral ships carrying enemy goods should be appropriated.[344] Although France adopted in 1650 the rules of the *Consolato del Mare*, Louis XIV. dropped them again by the Ordinance of 1681 and re-enacted that neutral goods on enemy ships and neutral ships carrying enemy goods should be appropriated. Spain enacted the same rules in 1718. The Netherlands, in contradistinction to the *Consolato del Mare*, endeavoured by a number of treaties to foster the principle that the flag covers the goods, so that enemy goods on neutral vessels were exempt from, whereas neutral goods on enemy vessels were subject to, appropriation. On the other hand, throughout the eighteenth and during the nineteenth century down to the beginning of the Crimean War in 1854, England adhered to the rules of the *Consolato del Mare*. Thus, no generally accepted rules of International Law regarding private property on sea were in existence.[345] Matters were made worse by privateering, which was generally recognised as lawful, and by the fact that belligerents frequently declared a coast
[Pg 220] blockaded without having a sufficient number of men-of-war on the spot to make the blockade effective. It was not until the Declaration of Paris in 1856 that general rules of International Law regarding private property on sea came into existence.

[344] *Robe d'ennemy confisque celle d'amy. Confiscantur ex navibus res, ex rebus naves.*

[345] Boeck, Nos. 3-103, and Geffcken in Holtzendorff, IV. pp. 572-578, give excellent summaries of the facts.

Declaration of Paris.

§ 177. Things began to undergo a change with the outbreak of the Crimean War in 1854, when all the belligerents proclaimed that they would not issue Letters of Marque, and when, further, Great Britain declared that she would not seize enemy goods on neutral vessels, and when, thirdly, France declared that she would not appropriate neutral goods on enemy vessels. Although this alteration of attitude on the part of the belligerents was originally intended for the Crimean War only and exceptionally, it led after the conclusion of peace in 1856 to the famous and epoch-making Declaration of Paris,[346] which enacted the four rules—(1) that privateering is abolished, (2) that the neutral flag covers enemy goods[347] with the exception of contraband of war, (3) that neutral goods, contraband of war excepted, are not liable to capture under the enemy flag, (4) that blockades, in order to be binding, must be effective, which means maintained by a force sufficient really to prevent access to the coast of the enemy. Since, with the exception of a few States such as the United States of America, Colombia, Venezuela, Bolivia, and Uruguay, all members of the Family of Nations are now parties to the Declaration of Paris, it may well be maintained that the rules quoted are general International Law, the more so as the non-signatory
[Pg 221] Powers have hitherto in practice always acted in accordance with those rules.[348]

[346] See Martens, *N.R.G.* XV. p. 767, and above, vol. I. § 559.

[347] It has been asserted—see, for instance, Rivier, II. p. 429—that the neutral flag covers only private, not public, enemy property, and therefore that such goods on neutral vessels as belong to the State of the enemy may be seized and appropriated. This opinion would seem, however, to be untenable in face of the fact that the Declaration of Paris speaks of *marchandise neutre* without any qualification, only excepting contraband goods, thus protecting the whole of the cargo under the neutral flag, contraband excepted. See below, § 319, p. 385, note 3.

[348] That there is an agitation for the abolition of the Declaration of Paris has been mentioned above, § 83, p. 100, note 3.

The Principle of Appropriation of Private Enemy Vessels and Enemy Goods thereon.

§ 178. The Declaration of Paris did not touch upon the old rule that private enemy vessels and private enemy goods thereon may be seized and appropriated, and this rule is, therefore, as valid as ever, although there is much agitation for its abolition. In 1785 Prussia and the United States of America had already stipulated by article 23 of their Treaty of Friendship[349] that in case of

war between the parties each other's merchantmen shall not be seized and appropriated. Again, in 1871 the United States and Italy, by article 12 of their Treaty of Commerce,[350] stipulated that in case of war between the parties each other's merchantmen, with the exception of those carrying contraband of war or attempting to break a blockade, shall not be seized and appropriated. In 1823 the United States had already made the proposal to Great Britain, France, and Russia[351] for a treaty abrogating the rule that enemy merchantmen and enemy goods thereon may be appropriated; but Russia alone accepted the proposal under the condition that all other naval Powers should consent. Again, in 1856,[352] on the occasion of the Declaration of Paris, the United States endeavoured to obtain the victory of the principle that enemy merchantmen shall not be appropriated, making it a condition of their accession to the Declaration of Paris that this principle should be recognised. But again the attempt failed, owing to the opposition of Great Britain.

[349] See Martens, *R.* IV. p. 37. Perels (p. 198) maintains that this article has not been adopted by the Treaty of Commerce between Prussia and the United States of May 1, 1828; but this statement is incorrect, for article 12 of this treaty—see Martens, *N.R.* VII. p. 615—adopts it expressly.

[350] See Martens, *N.R.G.* 2nd Ser. I. p. 57.

[351] See Wharton, III. § 342, pp. 260-261, and Moore, VII. § 1198, p. 465.

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[352] See Wharton, III. § 342, pp. 270-287, and Moore, VII. § 1198, p. 466.

At the outbreak of war in 1866, Prussia and Austria expressly declared that they would not seize and appropriate each other's merchantmen. At the outbreak of the Franco-German War in 1870, Germany declared French merchantmen exempt from capture, but she changed her attitude when France did not act upon the same lines. It should also be mentioned that already in 1865 Italy, by article 211 of her Marine Code, enacted that, in case of war with any other State, enemy merchantmen not carrying contraband of war or breaking a blockade shall not be seized and appropriated, provided reciprocity be granted. And it should further be mentioned that the United States of America made attempts[353] in vain to secure immunity from capture to enemy merchantmen and goods on sea at the First as well as at the Second Hague Peace Conference.

[353] See Holls, *The Peace Conference at the Hague*, pp. 306-321, and Scott, *Conferences*, pp. 699-707.

It cannot be denied that the constant agitation, since the middle of the eighteenth century, in favour of the abolition of the rule that private enemy vessels and goods may be captured on the High Seas, might, during the second half of the nineteenth century, have met with success but for the decided opposition of Great Britain. Public opinion in Great Britain was not, and is not, prepared to consent to the abolition of this rule. And there is no doubt that the abolition of the rule would involve a certain amount of danger to a country like Great Britain whose position and power depend chiefly upon her navy. The possibility of annihilating an enemy's commerce by annihilating his merchant fleet is a powerful weapon in the hands of a great naval Power. Moreover, if enemy merchantmen are not captured, they can be fitted out as cruisers, or at least

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be made use of for the transport of troops, munitions, and provisions. Have not several maritime States made arrangements with their steamship companies to secure the building of their Transatlantic liners according to plans which make these merchantmen easily convertible into men-of-war?

The argument that it is unjust that private enemy citizens should suffer through having their property seized has no weight in face of the probability that fear of the annihilation of its merchant fleet in case of war may well deter a State intending to go to war from doing so. It is a matter for politicians, not for jurists, to decide whether Great Britain must in the interest of self-preservation oppose the abolition of the rule that sea-borne private enemy property may be confiscated.

However this may be, since the end of the nineteenth century it has not been the attitude of Great Britain alone which stands in the way of the abolition of the rule. Since the growth of navies among continental Powers, these Powers have learnt to appreciate the value of the rule in war, and the outcry against the capture of merchantmen has become less loud. To-day, it may perhaps be said that, even if Great Britain were to propose the abolition of the rule, it is probable that a greater number of the maritime States would refuse to accede. For it should be noted that at the Second Peace Conference, France, Russia, Japan, Spain, Portugal, Mexico, Colombia, and Panama, besides Great Britain, voted against the abolition of the rule. And there is noticeable a

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slow, but constant, increase in the number of continental publicists[354] who oppose the abolition of the once so much objected to practice of capturing enemy merchantmen.

[354] See, for instance, Perels, § 36, pp. 195-198; Röpcke, *Das Seebeuterecht* (1904), pp. 36-47; Dupuis, Nos. 29-31; Pillet, p. 119; Giordana, *La proprieta privata nelle guerre maritime, etc.* (1907); Niemeyer, *Prinzipien des Seekriegsrechts* (1909); Boidin, pp. 144-167. On the other hand, the Institute of International Law has several times voted in favour of the abolition of the rule; see *Tableau Général de l'Institut de droit International* (1893), pp. 190-193. The literature concerning the question of confiscation of private enemy property on sea is abundant. The following authors, besides those already quoted above at the commencement of § 173, may be mentioned:—Upton, *The Law of Nations affecting Commerce during War* (1863); Cauchy, *Du respect de la propriété privée dans la guerre maritime* (1866); Vidari, *Del rispetto della proprietà privata fra gli stati in guerra* (1867); Gessner, *Zur Reform des Kriegsseerechts* (1875); Klobukowski, *Die Seebeute oder das feindliche Privateigenthum zur See* (1877); Bluntschli, *Das Beuterecht im Kriege und das Seebeuterecht insbesondere* (1878); Boeck, *De la propriété privée ennemie sous pavillon ennemi* (1882); Dupuis, *La guerre maritime et les doctrines anglaises* (1899); Leroy, *La guerre maritime* (1900); Röpcke, *Das Seebeuterecht* (1904); Hirst, *Commerce and Property in Naval Warfare: A Letter of the Lord Chancellor* (1906); Hamman, *Der Streit um das Seebeuterecht* (1907); Wehberg, *Das Beuterecht im Land und Seekrieg* (1909); Cohen, *The Immunity of Enemy's Property from Capture at Sea* (1909); Macdonell, *Some plain Reasons for Immunity from Capture of Private Property at Sea* (1910). See also the literature quoted by Bonfils, No. 1281, Pradier-Fodéré, VIII. Nos. 3070-3090, and Boeck, Nos. 382-572, where the arguments of the authors against and in favour of the present practice are discussed.

Impending Codification of Law of Sea Warfare.

§ 179. Be that as it may, the time is not very far distant when the Powers will perforce come to an agreement on this as on other points of sea warfare, in a code of regulations regarding sea warfare as a pendant to the Hague Regulations regarding warfare on land. An initiative step was taken by the United States of America by her Naval War Code[355] published in 1900, although she withdrew[356] the Code in 1904. Meanwhile, the Second Peace Conference has produced a number of Conventions dealing with some parts of Sea Warfare, namely: (1) the Convention (VI.) concerning the status of enemy merchantmen at the outbreak of hostilities; (2) the Convention (VII.) concerning the conversion of merchantmen into warships; (3) the Convention (VIII.) concerning the laying of automatic submarine contact mines; (4) the Convention (IX.) concerning the bombardment by naval forces; (5) the Convention (XI.) concerning restrictions on the exercise of the right of capture in maritime war.

[355] See above, vol. I. § 32.

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[356] See above, § 68, p. 83, note 1.

II

ATTACK AND SEIZURE OF ENEMY VESSELS

Hall, §§ 138 and 148—Lawrence, § 182—Westlake, II. pp. 133-140, 307-331—Phillimore, III. § 347—Twiss, II. § 73—Halleck, II. pp. 105-108—Taylor, §§ 545-546—Moore, VII. §§ 1175-1183, &c.,—Walker, § 50, p. 147—Wharton, III. § 345—Bluntschli, §§ 664-670—Heffter, §§ 137-139—Ullmann, § 188—Bonfils, Nos. 1269-1271, 1350-1354, 1398-1400—Despagnet, Nos. 650-659—Rivier, § 66—Nys, III. pp. 467-478—Pradier-Fodéré, VIII. Nos. 3155-3165, 3176-3178—Calvo, IV. §§ 2368-2378—Fiore, III. Nos. 1414-1424, and Code, Nos. 1643-1649—Pillet, pp. 120-128—Perels, § 35—Testa, pp. 155-157—Lawrence, *War*, pp. 48-55, 93-111—Ortolan, II. pp. 31-34—Boeck, Nos. 190-208—Dupuis, Nos. 150-158, and *Guerre*, Nos. 74-112—U.S. Naval War Code, articles 13-16—Bernsten, §§ 7-8.

Importance of Attack and Seizure of Enemy Vessels.

§ 180. Whereas in land warfare all sorts of violence against enemy individuals are the chief means, in sea warfare attack and seizure of enemy vessels are the most important means. For together with enemy vessels, a belligerent takes possession of the enemy individuals and enemy goods thereon, so that he can appropriate vessels and goods, as well as detain those enemy individuals who belong to the enemy armed forces as prisoners of war. For this reason, and compared with attack and seizure of enemy vessels, violence against enemy persons and the other means of sea warfare play only a secondary part, although such means are certainly not unimportant. For a weak naval Power can even restrict the operations of her fleet to mere coast defence, and thus totally refrain from directly attacking and seizing enemy vessels.

Attack when legitimate.

§ 181. All enemy men-of-war and other public vessels, which are met by a belligerent's men-of-war on the High Seas or within the territorial waters of either belligerent,[357] may at once be attacked, and the attacked vessel may, of course, defend herself by a counter-attack. Enemy merchantmen may be attacked only if they refuse to submit to visit after having been duly signalled to do so. And no duty exists for an enemy merchantman to submit to visit; on the contrary, she may refuse it, and defend herself against an attack. But only a man-of-war is competent to attack men-of-war as well as merchantmen, provided the war takes place between parties to the Declaration of Paris, so that privateering is prohibited. Any merchantman of a belligerent attacking a public or private vessel of the enemy would be considered and treated as a pirate, and the members of the crew would be liable to be treated as war criminals[358] to the same extent as private individuals committing hostilities in land warfare. However, if attacked by an enemy vessel, a merchantman is competent to deliver a counter-attack and need not discontinue her attack because the vessel which opened hostilities takes to flight, but may pursue and seize her.

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[357] But not, of course, in territorial waters of neutral States; see the *De Fortuyn* (1760), Burrell 175.

[358] See above, § 85, and below, § 254. Should a merchantman, legitimately—after having been herself attacked—or illegitimately, attack an enemy vessel, and succeed in capturing her, the prize, on condemnation, becomes *droits* of Admiralty and, therefore, the property of the British Government; see article 39 of the Naval Prize Act, 1864, and article 44 of the Naval Prize Bill introduced in 1911.

It must be specially mentioned that an attack upon enemy vessels on the sea may be made by forces on the shore. For instance, this is done when coast batteries fire upon an enemy man-of-war within reach of their guns. Enemy merchantmen, however, may not be attacked in this way, for they may only be attacked by men-of-war after having been signalled in vain to submit to visit.

Attack how effected.

§ 182. One mode of attack which was in use at the time of sailing ships, namely, boarding and fighting the crew, which can be described as a parallel to assault in land warfare, is no longer used, but if an instance occurred, it would be perfectly lawful. Attack is nowadays effected by cannonade, torpedoes, and, if opportunity arises, by ramming; and nothing forbids an attack on enemy vessels by launching projectiles and explosives from air-vessels, provided the belligerents are not parties to the Declaration—see above, § 114—which prohibits such attacks. As a rule attacks on merchantmen will be made by cannonade only, as the attacking vessel aims at seizing

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her on account of her value. But, in case the attacked vessel not only takes to flight, but defends herself by a counter-attack, all modes of attack are lawful against her, just as she herself is justified in applying all modes of attack by way of defence.

As regards attack by torpedoes, article 1 No. 3 of Convention VIII. of the Second Peace Conference enacts that it is forbidden to use torpedoes which do not become harmless if they miss their mark.

Submarine Contact Mines.

§ 182*a*. A new mode of attack which requires special attention[359] is that by means of floating mechanical, in contradistinction to so-called electro-contact, mines. The latter need not specially be discussed, because they are connected with a battery on land, can naturally only be laid within territorial waters, and present no danger to neutral shipping except on the spot where they are laid. But floating mechanical mines can be dropped as well in the Open Sea as in territorial waters; they can, moreover, drift away to any distance from the spot where they were dropped and thus become a great danger to navigation in general. Mechanical mines were for the first time used, and by both parties, in the Russo-Japanese War during the blockade of Port Arthur in
[Pg 228] 1904, and the question of their admissibility was at once raised in the press of all neutral countries, the danger to neutral shipping being obvious. The Second Peace Conference took the matter up and, in spite of the opposing views of the Powers, was able to produce the Convention (VIII.) concerning the laying of automatic submarine contact mines. This Convention comprises thirteen articles and was signed, although by some only with reservations, by all the Powers represented at the Conference, except China, Montenegro, Nicaragua, Portugal, Russia, Spain, and Sweden. Most of the signatory States have already ratified, and Nicaragua has since acceded. The more important stipulations of this Convention are the following:—

(1) Belligerents[360] are forbidden to lay *unanchored* automatic contact mines, unless they be so constructed as to become harmless one hour at most after those who laid them have lost control over them, and it is forbidden to lay *anchored* automatic contact mines which do not become harmless as soon as they have broken loose from their moorings (article 1).

(2) It is forbidden to lay automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial navigation (article 2).[361]

(3) When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful navigation. The belligerents must provide, as far as possible, for these mines becoming harmless after a limited time has elapsed, and, where the mines cease to be under observation, to notify the danger zones as soon as military exigencies permit, by notice to mariners, which must also be communicated to the Governments through the diplomatic
[Pg 229] channel (article 3).

(4) At the close of the war, each Power must remove the mines laid by it. As regards anchored automatic contact mines laid by one of the belligerents off the coasts of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters (article 5).

(5) The Convention remains in force for seven years, but, unless denounced, it continues in force afterwards (article 11). According to article 12, however, the contracting Powers agree to reopen the question of the employment of automatic contact mines after six and a half years unless the Third Peace Conference has already taken up and settled the matter.

[359] See Lawrence, *War*, pp. 93-111; Wetzstein, *Die Seeminenfrage im Völkerrecht* (1909); Rocholl, *Die Frage der Minen im Seekrieg* (1910); Barclay, pp. 59 and 158; Lémonon, pp. 472-502; Higgins, pp. 328-345; Boidin, pp. 216-235; Dupuis, *Guerre*, Nos. 331-358; Scott, *Conferences*, pp. 576-587; Martitz in the *Report of the 23rd Conference (1906) of the International Law Association*, pp. 47-74; Stockton in *A.J.* II. (1908), pp. 276-284.

[360] As regards neutrals, see below, § 363*a*.

[361] France and Germany have signed with reservations against article 2.

There is no doubt that the stipulations of Convention VIII. are totally inadequate to secure the safety of neutral shipping, and it is for this reason that Great Britain added the following reservation in signing the Convention:—"In placing their signatures to this Convention the British plenipotentiaries declare that the mere fact that the said Convention does not prohibit a particular act or proceeding must not be held to debar His Britannic Majesty's Government from contesting its legitimacy." It is to be hoped that the Third Peace Conference will produce a more satisfactory settlement of the problem. The Institute of International Law studied the matter at its meetings at Paris in 1910 and at Madrid in 1911, and produced a *Règlementation*[362] *internationale de l'usage des mines sous-marines et torpilles*, comprising nine articles, of which the more important are the following:—

(1) It is forbidden to place anchored or unanchored automatic mines in the Open Sea (the question of the laying of electric contact mines in the Open Sea being reserved for future
[Pg 230] consideration).

(2) Belligerents may lay mines in their own and in the enemy's territorial waters, but it is forbidden (*a*) to lay unanchored automatic contact mines which do not become harmless one hour at most after those who laid them have lost control over them; (*b*) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

(3) A belligerent is only allowed to lay mines off the coasts and ports of the enemy for naval and military purposes, he is not allowed to lay them there in order to establish or maintain a

commercial blockade.

(4) If mines are laid, all precautions must be taken for the safety of peaceful navigation, and belligerents must, in especial, provide that mines become harmless after a limited time has elapsed. In case mines cease to be under observation the belligerents must, as soon as military exigencies permit, notify the danger zones to mariners and also to the Governments through the diplomatic channel.

(5) The question as to the laying of mines in straits is reserved for future consideration.

(6) At the end of the war each Power must remove the mines laid by it. As regards anchored automatic contact mines laid by one of the belligerents off the coasts of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters. The Power whose duty it is to remove the mines after the war must make known the date at which the removal of the mines is complete.

(7) A violation of these rules involves responsibility on the part of the guilty State. The State which has laid the mines is presumed to be guilty unless the contrary is proved, and an action
[Pg 231] may be brought against the guilty State, even by individuals who have suffered damage, before the competent International Tribunal.

[362] See *Annuaire*, XXIV. (1911), p. 301.

Duty of giving Quarter.

§ 183. As soon as an attacked or counter-attacked vessel hauls down her flag and, therefore, signals that she is ready to surrender, she must be given quarter and seized without further firing. To continue an attack although she is ready to surrender, and to sink her and her crew, would constitute a violation of customary International Law, and would only as an exception be admissible in case of imperative necessity or of reprisals.

Seizure.

§ 184. Seizure is effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board the captured vessel. But if for any reason this is impracticable, the captor orders the captured vessel to lower her flag and to steer according to his orders.

Effect of Seizure.

§ 185. The effect of seizure is different with regard to private enemy vessels, on the one hand, and, on the other, to public vessels.

Seizure of *private* enemy vessels may be described as a parallel to occupation of enemy territory in land warfare. Since the vessel and the individuals and goods thereon are actually placed under the captor's authority, her officers and crew, and any private individuals on board, are for the time being submitted to the discipline of the captor, just as private individuals on occupied enemy territory are submitted to the authority of the occupant.[363] Seizure of private enemy vessels does not, however, vest the property finally in the hands of the belligerent[364]
[Pg 232] whose forces effected the capture. The prize has to be brought before a Prize Court, and it is the latter's confirmation of the capture through adjudication of the prize which makes the appropriation by the capturing belligerent final.[365]

[363] Concerning the ultimate fate of the crew, see above, § 85.

[364] It is asserted that a captured enemy merchantman may at once be converted by the captor into a man-of-war, but the cases of the *Ceylon* (1811) and the *Georgina* (1814), 1 Dodson 105 and 397, which are quoted in favour of such a practice, are not decisive. See Higgins, *War and the Private Citizen* (1912), pp. 138-142.

[365] See below, § 192.

On the other hand, the effect of seizure of *public* enemy vessels is their immediate and final appropriation. They may be either taken into a port or at once destroyed. All individuals on board become prisoners of war, although, if perchance there should be on board a private enemy individual of no importance, he would probably not be kept for long in captivity, but liberated in due time.

As regards goods on captured public enemy vessels, there is no doubt that the effect of seizure is the immediate appropriation of such goods on the vessels concerned as are enemy property, and these goods may therefore be destroyed at once, if desirable. Should, however, neutral goods be on board a captured enemy public vessel, it is a moot point whether or no they share the fate of the captured ship. According to British practice they do, but according to American practice they do not.[366]

[366] See, on the one hand, the *Fanny* (1814), 1 Dodson, 443, and, on the other, the *Nereide* (1815), 9 Cranch, 388. See also below, § 424, p. 542 note 2.

Immunity of Vessels charged with Religious, Scientific, or Philanthropic Mission.

§ 186. Enemy vessels engaged in scientific discovery and exploration were, according to a general international usage in existence before the Second Peace Conference of 1907, granted immunity from attack and seizure in so far and so long as they themselves abstained from hostilities. The usage grew up in the eighteenth century. In 1766, the French explorer Bougainville, who started from St. Malo with the vessels *La Boudeuse* and *L'Étoile* on a voyage

round the world, was furnished by the British Government with safe-conducts. In 1776, Captain Cook's vessels *Resolution* and *Discovery*, sailing from Plymouth for the purpose of exploring the
[Pg 233] Pacific Ocean, were declared exempt from attack and seizure on the part of French cruisers by the French Government. Again, the French Count Lapérouse, who started on a voyage of exploration in 1785 with the vessels *Astrolabe* and *Boussole*, was secured immunity from attack and seizure. During the nineteenth century this usage became quite general, and had almost ripened into a custom; examples are the Austrian cruiser *Novara* (1859) and the Swedish cruiser *Vega* (1878). No immunity, however, was granted to vessels charged with religious or philanthropic missions. A remarkable case occurred during the Franco-German war. In June, 1871, the *Palme*, a vessel belonging to the Missionary Society of Basle, was captured by a French man-of-war, and condemned by the Prize Court of Bordeaux. The owners appealed and the French Conseil d'État set the vessel free, not because the capture was not justified but because equity demanded that the fact that Swiss subjects owning sea-going vessels were obliged to have them sailing under the flag of another State, should be taken into consideration.[367]

[367] See Rivier, II. pp. 343-344; Dupuis, No. 158; and Boeck, No. 199.

The Second Peace Conference embodied the previous usage concerning immunity of vessels of discovery and exploration in a written rule and extended the immunity to vessels with a religious or philanthropic mission, for article 4 of Convention XI. enacts that vessels charged with religious, scientific, or philanthropic missions are exempt from capture.

It must be specially observed that it matters not whether the vessel concerned is a private or a public vessel.[368]

[368] See U.S. Naval War Code, article 13. The matter is discussed at some length by Kleen, II. § 210, pp. 503-505. Concerning the case of the English explorer Flinders, who sailed with the vessel *Investigator* from England, but exchanged her for the *Cumberland*, which was seized in 1803 by the French at Port Louis, in Mauritius, as she was
[Pg 234] not the vessel to which a safe-conduct was given, see Lawrence, § 185.

Immunity of Fishing-boats and small boats employed in local Trade.

§ 187. Coast fishing-boats, in contradistinction to boats engaged in deep-sea fisheries, were, according to a general, but not universal, custom in existence during the nineteenth century, granted immunity from attack and seizure so long and in so far as they were unarmed and were innocently employed in catching and bringing in fish.[369] As early as the sixteenth century treaties were concluded between single States stipulating such immunity to each other's fishing-boats for the time of war. But throughout the seventeenth and eighteenth centuries there were instances of a contrary practice, and Lord Stowell refused[370] to recognise in strict law any such exemption, although he recognised a rule of comity to that extent. Great Britain has always taken the standpoint that any immunity granted by her to fishing-boats was a relaxation[371] of strict right in the interest of humanity, but revocable at any moment, and that her cruisers were justified in seizing enemy fishing-boats unless prevented therefrom by special instructions on the part of the Admiralty.[372] But at the Second Peace Conference she altered her attitude, and agreed to the immunity not only of fishing vessels, but also of small boats employed in local trade. Article 3 of Convention XI. enacts, therefore, that vessels employed exclusively in coast fisheries, and small boats employed in local trade, are, together with appliances, rigging, tackle, and cargo, exempt from capture.

[369] The *Paquette Habana* (1899), 175, United States, 677. See U.S. Naval War Code, article 14; Japanese Prize Law, article 3 (1).

[370] The *Young Jacob and Joanna* (1798), 1 C. Rob, 20.

[371] See Hall, § 148.

[372] See Holland, *Prize Law*, § 36.

It must be specially observed that boats engaged in deep-sea fisheries and large boats engaged in local trade do not enjoy the privilege of immunity from capture, and that the fishing vessels and small boats employed in local trade lose that privilege in case they take any part whatever in
[Pg 235] hostilities. And article 3 expressly stipulates that belligerents must not take advantage of the harmless character of the said boats in order to use them for military purposes while preserving their peaceful appearance.

Immunity of Merchantmen at the Outbreak of War on their Voyage to and from a Belligerent's Port.

§ 188. Several times at the outbreak of war during the nineteenth century belligerents decreed that such enemy merchantmen as were on their voyage to one of the former's ports at the outbreak of war, should not be attacked and seized during the period of their voyage to and from such port. Thus, at the outbreak of the Crimean War, Great Britain and France decreed such immunity for Russian vessels, Germany did the same with regard to French vessels in 1870,[373] Russia with regard to Turkish vessels in 1877, the United States with regard to Spanish vessels in 1898, Russia and Japan with regard to each other's vessels in 1904. But there is no rule of International Law which compels a belligerent to grant such days of grace, and it is probable that in future wars days of grace will not be granted. The reason is that the steamboats of many countries are now built, according to an arrangement with the Government of their home State, from special designs which make them easily convertible into cruisers, and that a belligerent fleet cannot nowadays remain effective for long without being accompanied by a train of transport-vessels, colliers, repairing-vessels, and the like.[374]

[373] See, however, above, § 178, p. 222.

[374] This point is ably argued by Lawrence, *War*, pp 54-55.

In case, however, merchantmen, other than those constructed on special lines in order to make them easily convertible into cruisers, are, at the outbreak of war, on their voyage to an enemy port and are ignorant of the outbreak of hostilities, article 3 of Convention VI.[375] of the Second
[Pg 236] Peace Conference must find application. They may not, therefore, be confiscated, but may only be captured on condition that they shall be restored after the conclusion of peace, or that indemnities shall be paid for them if they have been requisitioned or destroyed.

[375] See above, § 102*a*, Nos. 3 and 4.

Vessels in Distress.

§ 189. Instances have occurred when enemy vessels which were forced by stress of weather to seek refuge in a belligerent's harbour were granted exemption from seizure.[376] Thus, when in 1746, during war with Spain, the *Elisabeth*, a British man-of-war, was forced to take refuge in the port of Havanna, she was not seized, but was offered facility for repairing damages, and furnished with a safe-conduct as far as the Bermudas. Thus, further, when in 1799, during war with France, the *Diana*, a Prussian merchantman, was forced to take refuge in the port of Dunkirk and seized, she was restored by the French Prize Court. But these and other cases have not created any rule of International Law whereby immunity from attack and seizure is granted to vessels in distress, and no such rule is likely to grow up, especially not as regards men-of-war and such merchantmen as are easily convertible into cruisers.

[376] See Ortolan, II. pp. 286-291; Kleen, II. § 210, pp. 492-494.

Immunity of Hospital and Cartel Ships.

§ 190. According to the Hague Convention, which adapted the principles of the Geneva Convention to warfare on sea, hospital ships are inviolable, and therefore may be neither attacked nor seized; see below in §§ 204-209. Concerning the immunity of cartel ships, see below in § 225.

Immunity of Mail-boats and of Mail-bags.

§ 191. No general rule of International Law exists granting enemy mail-boats immunity from attack and seizure, but the several States have frequently stipulated such immunity in the case of war by special treaties.[377] Thus, for instance, Great Britain and France by article 9 of the Postal
[Pg 237] Convention of August 30, 1860, and Great Britain and Holland by article 7 of the Postal Convention of October 14, 1843, stipulated that all mail-boats navigating between the countries of the parties shall continue to navigate in time of war between these countries without impediment or molestation until special notice be given by either party that the service is to be discontinued.

[377] See Kleen, II. § 210, pp. 505-507.

Whereas there is no general rule granting immunity from capture to enemy mail-boats, enemy *mail-bags* do, according to article 1 of Convention XI., enjoy the privilege of such immunity, for it is there enacted that the postal correspondence of neutrals or belligerents, whether official or private in character, which may be found on board a neutral[378] or enemy ship at sea, is inviolable, and that, in case the ship is detained, the correspondence is to be forwarded by the captor with the least possible delay. There is only one exception to this rule of article 1, for correspondence destined to or proceeding from a blockaded port does not enjoy the privilege of immunity.

[378] See below, §§ 319 and 411.

It must be specially observed that postal correspondence, and not parcels sent by parcel post,
[Pg 238] are immune from capture.

III

APPROPRIATION AND DESTRUCTION OF ENEMY MERCHANTMEN

Hall, §§ 149-152, 171, 269—Lawrence, §§ 183-191—Westlake, II. pp. 156-160—Phillimore, III. §§ 345-381—Twiss, II. §§ 72-97—Halleck, II. pp. 362-431, 510-526—Taylor, §§ 552-567—Wharton, III. § 345—Wheaton, §§ 355-394—Moore, VII. §§ 1206-1214—Bluntschli, §§ 672-673—Heffter, §§ 137-138—Geffcken in Holtzendorff, IV. pp. 588-596—Ullmann, § 189—Bonfils, Nos. 1396-1440—Despagnet, Nos. 670-682—Pradier-Fodéré, VIII. Nos. 3179-3207—Rivier, II. § 66—Calvo, IV. §§ 2294-2366, V. §§ 3004-3034—Fiore, III. Nos. 1426-1443, and Code, Nos. 1693-1706—Martens, II. §§ 125-126—Pillet, pp. 342-352—Perels, §§ 36, 55-58—Testa, pp. 147-160—Valin, *Traité des prises*, 2 vols. (1758-60), and *Commentaire sur l'ordonnance de 1681*, 2 vols. (1766)—Pistoye et Duverdy, *Traité des prises maritimes*, 2 vols. (1854-1859)—Upton, *The Law of Nations affecting Commerce during War* (1863)—Boeck, Nos. 156-209, 329-380—Dupuis, Nos. 96-149, 282-301—Bernsten, § 8—Marsden, *Early Prize Jurisdiction and Prize Law in England* in *The English Historical Review*, XXIV. (1909), p. 675; XXV. (1910), p. 243; XXVI. (1911) p. 34—Roscoe, *The Growth of English Law* (1911), pp. 92-140. See also the literature quoted by Bonfils at the commencement of No. 1396.

Prize Courts.

§ 192. It has already been stated above, in § 185, that the capture of a private enemy vessel has to be confirmed by a Prize Court, and that it is only through the latter's adjudication that the vessel becomes finally appropriated. The origin[379] of Prize Courts is to be traced back to the end of the Middle Ages. During the Middle Ages, after the Roman Empire had broken up, a state of lawlessness established itself on the High Seas. Piratical vessels of the Danes covered the North

Sea and the Baltic, and navigation of the Mediterranean Sea was threatened by Greek and Saracen pirates. Merchantmen, therefore, associated themselves for mutual protection and sailed [Pg 239] as a merchant fleet under a specially elected chief, the so-called Admiral. They also occasionally sent out a fleet of armed vessels for the purpose of sweeping pirates from certain parts of the High Seas. Piratical vessels and goods which were captured were divided among the captors according to a decision of their Admiral. During the thirteenth century the maritime States of Europe themselves endeavoured to keep order on the Open Sea. By-and-by armed vessels were obliged to be furnished with Letters Patent or Letters of Marque from the Sovereign of a maritime State and their captures submitted to the official control of such State as had furnished them with their Letters. A board, called the Admiralty, was instituted by maritime States, and officers of that Board of Admiralty exercised control over the armed vessels and their captures, inquiring in each case[380] into the legitimation of the captor and the nationality of the captured vessel and her goods. And after modern International Law had grown up, it was a recognised customary rule that in time of war the Admiralty of maritime belligerents should be obliged to institute a Court[381] or Courts whenever a prize was captured by public vessels or privateers in order to decide whether the capture was lawful or not. These Courts were called Prize Courts. This institution has come down to our times, and nowadays all maritime States either constitute permanent Prize Courts, or appoint them specially in each case of an outbreak of war. The whole institution is essentially one in the interest of neutrals, since belligerents want to be guarded by a decision of a Court against claims of neutral States regarding alleged unjustified capture of [Pg 240] neutral vessels and goods. The capture of any private vessel, whether *prima facie* belonging to an enemy or a neutral, must, therefore, be submitted to a Prize Court. Article 1 of Convention XII. (as yet unratified) of the Second Peace Conference now expressly enacts the old customary rule that "the validity of the capture of a merchantman or its cargo, when neutral or enemy property is involved, is decided before a Prize Court." It must, however, be emphasised that the ordinary Prize-Courts are not International Courts, but National Courts instituted by Municipal Law, and that the law they administer is Municipal Law,[382] based on custom, statutes, or special regulations of their State. Every State is, however, bound by International Law to enact only such statutes and regulations[383] for its Prize Courts as are in conformity with International Law. A State may, therefore, instead of making special regulations, directly order its Prize Courts to apply the rules of International Law, and it is understood that, when no statutes are enacted or regulations are given, Prize Courts have to apply International Law. Prize Courts may be instituted by belligerents in any part of their territory or the territories of allies, but not on neutral territory. It would nowadays constitute a breach of neutrality on the part of a neutral State to allow the institution on its territory of a Prize Court.[384]

[379] I follow the excellent summary of the facts given by Twiss, II. §§ 74-75, but Marsden's articles in *The English Historical Review*, XXIV. (1909), p. 675, XXV. (1910), p. 243, XXVI. (1911), p. 34, must likewise be referred to.

[380] The first case that is mentioned as having led to judicial proceedings before the Admiral in England dates from 1357; see Marsden, *loc. cit.* XXIV. (1909), p. 680.

[381] In England an Order in Council, dated July 20, 1589, first provided that all captures should be submitted to the High Court of Admiralty; see Marsden, *loc. cit.* XXIV. (1909), p. 690.

[382] See below, § 434.

[383] The constitution and procedure of Prize Courts in Great Britain are governed by the Naval Prize Act, 1864 (27 and 28 Vict. ch. 25), and the Prize Courts Act, 1894 (57 and 58 Vict. ch. 39). The Naval Prize Bill introduced by the British Government in 1911, although accepted by the House of Commons, was thrown out by the House of Lords.—It should be mentioned that the Institute of International Law has in various meetings occupied itself with the whole matter of capture, and adopted a body of rules in the *Règlement international des Prises Maritimes*, which represent a code of Prize Law; see *Annuaire*, IX. pp. 218-243, but also XVI. pp. 44 and 311.

[384] See below, § 327, and article 4 of Convention XIII. of the Second Peace Conference.

Whereas the ordinary Prize Courts are national courts, Convention XII.—as yet unratified—of [Pg 241] the Second Peace Conference, provides for the establishment of an International[385] Prize Court at the Hague, which, in certain matters, is to serve as a Court of Appeal in prize cases. In these cases jurisdiction in matters of prize is exercised, in the first instance, by the Prize Courts of belligerents (article 2), but, according to article 6, the national Prize Courts may not deal with any case in which there is a second appeal; since such cases necessarily come before the International Prize Court at the second appeal. This means that belligerents, besides Prize Courts of the first instance, may set up a Prize Court of Appeal, but they may not set up a second Court of Appeal above the first, except in cases in which the International Prize Court has no jurisdiction.

[385] See above, vol. I. § 476*a*, and below, §§ 442-447.

It must be specially observed that the proposed International Prize Court—see articles 3 and 4—is, in the main, a Court to decide between belligerents and neutrals, and not between two belligerents.

Conduct of Prize to port of Prize Court.

§ 193. As soon as a vessel is seized she must be conducted to a port where a Prize Court is sitting. As a rule the officer and the crew sent on board the prize by the captor will navigate the prize to the port. This officer can ask the master and crew of the vessel to assist him, but, if they refuse, they may not be compelled thereto. The captor need not accompany the prize to the port. In the exceptional case, however, where an officer and crew cannot be sent on board and the captured vessel is ordered to lower her flag and to steer according to orders, the captor must conduct the prize to the port. To which port a prize is to be taken is not for International Law to determine; the latter says only that the prize must be taken straight to a port of a Prize Court,

[Pg 242] and only in case of distress or necessity is delay allowed. If the neutral State concerned gives permission,[386] the prize may, in case of distress or in case she is in such bad condition as prevents her from being taken to a port of a Prize Court, be taken to a near neutral port, and, if admitted, the capturing man-of-war as well as the prize enjoy there the privilege of exterritoriality. But as soon as circumstances allow, the prize must be conducted from the neutral port to that of the Prize Court, and only if the condition of the prize does not at all allow this, may the Prize Court give its verdict in the absence of the prize after the ship papers of the prize and witnesses have been produced before it.

[386] See below, § 328, and articles 21-23 of Convention XIII. of the Second Peace Conference.

The whole of the crew of the prize are, as a rule, to be kept on board and to be brought before the Prize Court. But if this is impracticable, several important members of the crew, such as the master, mate, or supercargo, must be kept on board, whereas the others may be removed and forwarded to the port of the Prize Court by other means of transport. The whole of the cargo is, as a rule, also to remain on board the prize. But if the whole or part of the cargo is in a condition which prevents it from being sent to the port of the Prize Court, it may, according to the needs of the case, either be destroyed or sold in the nearest port, and in the latter case an account of the sale has to be sent to the Prize Court. All neutral goods amongst the cargo are also to be taken to the port of adjudication, although they have now, according to the Declaration of Paris, to be restored to their neutral owners. But if such neutral goods are not in a condition to be taken to the port of adjudication, they may likewise be sold or destroyed, as the case may require.

Destruction of Prize.

§ 194. Since through adjudication by the Prize Courts the ownership of captured private enemy
[Pg 243] vessels becomes finally transferred to the belligerent whose forces made the capture, it is evident that after transfer the captured vessel as well as her cargo may be destroyed. On the other hand, it is likewise evident that, since a verdict of a Prize Court is necessary before the appropriation of the prize becomes final, a captured merchantman must not as a rule be destroyed instead of being conducted to the port of a Prize Court. There are, however, exceptions to the rule, but no unanimity exists in theory or practice as regards those exceptions. Whereas some[387] consider the destruction of a prize allowable only in case of imperative necessity, others[388] allow it in nearly every case of convenience. Thus, the Government of the United States of America, on the outbreak of war with England in 1812, instructed the commanders of her vessels to destroy at once all captures, the very valuable excepted, because a single cruiser, however successful, could man a few prizes only, but by destroying each capture would be able to continue capturing, and thereby constantly diminish the enemy merchant fleet.[389] During the Civil War in America the cruisers of the Southern Confederated States destroyed all enemy prizes because there was no port open for them to bring prizes to. And during the Russo-Japanese War, Russian cruisers destroyed twenty-one captured Japanese merchantmen.[390] According to British practice,[391] the captor is allowed to destroy the prize in only two cases—namely, first, when the prize is in such a condition as prevents her from being sent to any port of adjudication; and, secondly, when the
[Pg 244] capturing vessel is unable to spare a prize crew to navigate the prize into such a port. The *Règlement international des prises maritimes* of the Institute of International Law enumerates in § 50 five cases in which destruction of the capture is allowed—namely (1) when the condition of the vessel and the weather make it impossible to keep the prize afloat; (2) when the vessel navigates so slowly that she cannot follow the captor and is therefore exposed to an easy recapture by the enemy; (3) when the approach of a superior enemy force creates the fear that the prize might be recaptured by the enemy; (4) when the captor cannot spare a prize crew; (5) when the port of adjudication to which the prize might be taken is too far from the spot where the capture was made. Be that as it may,[392] in every case of destruction of the vessel the captor must remove crew, ship papers, and, if possible, the cargo, before the destruction of the prize, and must afterwards send crew, papers, and cargo to a port of a Prize Court for the purpose of satisfying the latter that both the capture and the destruction were lawful.

[387] See, for instance, Bluntschli, § 672.

[388] See, for instance, Martens, § 126, who moreover makes no difference between the prize being an enemy or a neutral ship.

[389] U.S. Naval War Code (article 14) allows the destruction "in case of military or other necessity."

[390] See Takahashi, pp. 284-310.

[391] The *Actaeon* (1815), 2 Dod. 48; the *Felicity* (1819), 2 Dod. 381; the *Leucade* (1855), Spinks, 217. See also Holland, *Prize Law*, §§ 303-304.

[392] The whole matter is thoroughly discussed by Boeck, Nos. 268-285; Dupuis, Nos. 262-268; and Calvo, V. §§ 3028-3034. As regards destruction of a neutral prize, see below, § 431.

But if destruction of a captured enemy merchantman can as an exception be lawful, the question as to indemnities to be paid to the neutral owners of goods carried by the destroyed vessel requires attention. It seems to be obvious that, if the destruction of the vessel herself was lawful, and if it was not possible to remove her cargo, no indemnities need be paid. An illustrative case happened during the Franco-German War. On October 21, 1870, the French cruiser *Dessaix* seized two German merchantmen, the *Ludwig* and the *Vorwärts*, but burned them because she could not spare a prize crew to navigate the prizes into a French port. The neutral owners of part
[Pg 245] of the cargo claimed indemnities, but the French Conseil d'État refused to grant indemnities on the ground that the action of the captor was lawful.[393]

[393] See Boeck, No. 146; Barboux, p. 153; Calvo, V. § 3033; Dupuis, No. 262; Hall, § 269. Should the International Prize Court at the Hague be established, article 3 of Convention XII. of the Second Peace Conference would enable

the owners of neutral goods destroyed with the destroyed enemy merchantmen that carried them to bring the question as to whether they may claim damages before this Court.

Ransom of Prize.

§ 195. Although prizes have as a rule to be brought before a Prize Court, International Law nevertheless does not forbid the ransoming of the captured vessel either directly after the capture or after she has been conducted to the port of a Prize Court, but before the Court has given its verdict. However, the practice of accepting and paying ransom, which grew up in the seventeenth century, is in many countries now prohibited by Municipal Law. Thus, for instance, Great Britain by section 45 of the Naval Prize Act, 1864, prohibits ransoming except in such cases as may be specially provided for by an Order of the King in Council.[394] Where ransom is accepted, a contract of ransom is entered into by the captor and the master of the captured vessel; the latter gives a so-called ransom bill to the former, in which he promises the amount of
[Pg 246]
the ransom. He is given a copy of the ransom bill for the purpose of a safe-conduct to protect his vessel from again being captured, under the condition that he keeps the course to such port as is agreed upon in the ransom bill. To secure the payment of ransom, an officer of the captured vessel can be detained as hostage, otherwise the whole of the crew is to be liberated with the vessel, ransom being an equivalent for both the restoration of the prize and the release of her crew from captivity. So long as the ransom bill is not paid, the hostage can be kept in captivity. But it is exclusively a matter for the Municipal Law of the State concerned to determine whether or no the captor can sue upon the ransom bill, if the ransom is not voluntarily paid.[395] Should the capturing vessel, with the hostage or the ransom bill on board, be captured herself and thus become a prize of the enemy, the hostage is liberated, the ransom bill loses its effect, and need not be paid.[396]

[394] Article 40 of the Naval Prize Bill of 1911 runs as follows:—

(1) His Majesty in Council may, in relation to any war, make such orders as may seem expedient according to circumstances for prohibiting or allowing, wholly or in certain cases or subject to any conditions or regulations or otherwise as may from time to time seem meet, the ransoming or the entering into any contract or agreement for the ransoming of any ship or goods belonging to any of His Majesty's subjects, and taken as prize by any of His Majesty's enemies.

(2) Any contract or agreement entered into, and any bill, bond, or other security given for ransom of any ship or goods, shall be under the exclusive jurisdiction of the High Court as a Prize Court (subject to appeal to the Supreme Prize Court) and if entered into or given in contravention to any such Order in Council shall be deemed to have been entered into or given for an illegal consideration.

(3) If any person ransoms or enters into any contract or agreement for ransoming any ship or goods, in contravention of any such Order in Council, he shall for every such offence be liable to be proceeded against in the High Court at the suit of His Majesty in his office of Admiralty, and on conviction to be fined, in the discretion of the Court, any sum not exceeding five hundred pounds.

[395] See Hall, § 151, p. 479:—"The English Courts refuse to accept such arrangements (for ransom) from the effect of the rule that the character of an alien enemy carries with it a disability to sue, and compel payment of the debt indirectly through an action brought by the imprisoned hostage for the recovery of his freedom." The American Courts, in contradistinction to the British, recognise ransom bills. See on the one hand, the case of *Cornu* v. *Blackburne* (1781), 2 Douglas, 640, *Anthon* v. *Fisher* (1782), 2 Douglas, 649 note, the *Hoop*, 1 C. Rob. 201; and, on the other, *Goodrich* and *De Forest* v. *Gordon* (1818), 15 Johnson, 6.

[396] The matter of ransom is treated with great lucidity by Twiss, II. §§ 180-183; Boeck, Nos. 257-267; Dupuis, Nos. 269-277.

Loss of Prize, especially Recapture.

§ 196. A prize is lost—(1) when the captor intentionally abandons her, (2) when she escapes through being rescued by her own crew, or (3) when she is recaptured. Just as through capture the prize becomes, according to International Law, the property of the belligerent whose forces made the capture, provided a Prize Court confirms the capture, so such property is lost when the prize vessel becomes abandoned, or escapes, or is recaptured. And it seems to be obvious, and everywhere recognised by Municipal Law, that as soon as a captured enemy merchantman
[Pg 247]
succeeds in escaping, the proprietorship of the former owners revives *ipso facto*. But the case is different when a captured vessel, whose crew has been taken on board the capturing vessel, is abandoned and afterwards met and taken possession of by a neutral vessel or by a vessel of her home State. It is certainly not for International Law to determine whether or not the original proprietorship revives through abandonment. This is a matter for Municipal Law. The case of recapture is different from escape. Here too Municipal Law has to determine whether or no the former proprietorship revives, since International Law lays down the rule only that recapture takes the vessel out of the property of the enemy and brings her into the property of the belligerent whose forces made the recapture. Municipal Law of the individual States has settled the matter in different ways. Thus, Great Britain, by section 40 of the Naval Prize Act, 1864, enacted that the recaptured vessel, except when she has been used by the captor as a ship of war, shall be restored to her former owner on his paying one-eighth to one-fourth, as the Prize Court may award, of her value as prize salvage, no matter if the recapture was made before or after the enemy Prize Court had confirmed the capture.[397] Other States restore a recaptured vessel only when the recapture was made within twenty-four hours[398] after the capture occurred, or before the captured vessel was conducted into an enemy port, or before she was condemned by an enemy Prize Court.

[397] Article 30 of the Naval Prize Bill introduced in 1911 simply enacts that British merchantmen or goods captured by the enemy and recaptured by a British man-of-war shall be restored to the owner by a decree of the Prize Court.

[398] So, for instance, France; see Dupuis, Nos. 278-279.

Fate of Prize.

§ 197. Through being captured and afterwards condemned by a Prize Court, a captured enemy vessel and captured enemy goods become the property of the belligerent whose forces made the
[Pg 248] capture. What becomes of the prize after the condemnation is not for International, but for Municipal Law to determine. A belligerent can hand the prize over to the officers and crew who made the capture, or can keep her altogether for himself, or can give a share to those who made the capture. As a rule, prizes are sold after they are condemned, and the whole or a part of the net proceeds is distributed among the officers and crew who made the capture. For Great Britain this distribution is regulated by the "Royal Proclamation as to Distribution of Prize Money" of August 3, 1886.[399] There is no doubt whatever that, if a neutral subject buys a captured ship after her condemnation, she may not be attacked and captured by the belligerent to whose subject she formerly belonged, although, if she is bought by an enemy subject and afterwards captured, she might be restored[400] to her former owner.

[399] See Holland, *Prize Law*, pp. 142-150.

[400] See above, § 196.

Vessels belonging to Subjects of Neutral States, but sailing under Enemy Flag.

§ 198. It has been already stated above in § 89 that merchantmen owned by subjects of neutral States but sailing under enemy flag are vested with enemy character. It is, therefore, evident that they may be captured and condemned. As at present no non-littoral State has a maritime flag, vessels belonging to subjects of such States are forced to navigate under the flag of another State,[401] and they are, therefore, in case of war exposed to capture.

[401] See above, vol. I. § 261.

Effect of Sale of Enemy Vessels during War.

§ 199. Since enemy vessels are liable to capture, the question must be taken into consideration whether the fact that an enemy vessel has been sold during the war to a subject of a neutral or to a subject of the belligerent State whose forces seized her, has the effect of excluding her appropriation. It is obvious that, if the question is answered in the affirmative, the owners of
[Pg 249] enemy vessels can evade the danger of having their property captured by selling their vessels. The question of transfer of enemy vessels must, therefore, be regarded as forming part of the larger questions of enemy character and has consequently been treated in detail above, § 91.

Goods sold by and to Enemy Subjects during War.

§ 200. If a captured enemy vessel carries goods consigned by enemy subjects to subjects of neutral States, or to subjects of the belligerent whose forces captured the vessel, they may not be appropriated, provided the consignee can prove that he is the owner. As regards such goods found on captured enemy merchantmen as are consigned to enemy subjects but have been sold *in transitu* to subjects of neutral States, no unanimous practice of the different States is in existence. The subject of goods sold *in transitu* must—in the same way as the question of transfer of enemy vessels—be considered as forming part of the larger question of enemy character. It has, for this reason, been treated above, § 92.

IV

VIOLENCE AGAINST ENEMY PERSONS

See the literature quoted above at the commencement of § 107. See also Bonfils, Nos. 1273-1273[3]

Violence against Combatants.

§ 201. As regards killing and wounding combatants in sea warfare and the means used for the purpose, customary rules of International Law are in existence according to which only those combatants may be killed or wounded who are able and willing to fight or who resist capture. Men disabled by sickness or wounds, or such men as lay down arms and surrender or do not resist capture, must be given quarter, except in a case of imperative necessity or of reprisals.
[Pg 250] Poison, and such arms, projectiles, and materials as cause unnecessary injury, are prohibited, as is also killing and wounding in a treacherous way.[402] The Declaration of St. Petersburg[403] and the Hague Declaration prohibiting the use of expanding (Dum-Dum)[404] bullets, apply to sea warfare as well as to land warfare, as also do the Hague Declarations concerning projectiles and explosives launched from balloons, and projectiles diffusing asphyxiating or deleterious gases.[405]

[402] See the corresponding rules for warfare on land, which are discussed above in §§ 108-110. See also U.S. Naval War Code, article 3.

[403] See above,§ 111.

[404] See above, § 112.

[405] See above, §§ 113 and 114.

All combatants, and also all officers and members of the crews of captured merchantmen, could formerly[406] be made prisoners of war. According to articles 5 to 7 of Convention XI. of the Second Peace Conference—see above in § 85—such members of the crews as are subjects of neutral States may never be made prisoners of war; but the captain, officers, and members of the crews who are enemy subjects, and, further, the captain and officers who are subjects of neutral

States may be made prisoners of war in case they refuse to be released on parole. As soon as such prisoners are landed, their treatment falls under articles 4-20 of the Hague Regulations; but as long as they are on board, the old customary rule of International Law, that prisoners must be treated humanely,[407] and not like convicts, must be complied with. The Hague Convention for the adaptation of the Geneva Convention to sea warfare enacts, however, some particular rules concerning the shipwrecked, the wounded, and the sick who, through falling into the hands of the enemy, become prisoners of war.[408]

[406] This was almost generally recognised, but was refused recognition by Count Bismarck during the Franco-German War (see below, § 249) and by some German publicists, as, for instance, Lueder in Holtzendorff, IV. p. 479, note 6.

[407] See Holland, *Prize Law*, § 249, and U.S. Naval War Code, articles 10, 11.

[408] See below, § 205.

Violence against Non-combatant Members of Naval Forces.

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§ 202. Just as military forces consist of combatants and non-combatants, so do the naval forces of belligerents. Non-combatants, as, for instance, stokers, surgeons, chaplains, members of the hospital staff, and the like, who do not take part in the fighting, may not be attacked directly and killed or wounded.[409] But they are exposed to all injuries indirectly resulting from attacks on or by their vessels. And they may certainly be made prisoners of war, with the exception of members of the religious, medical, and hospital staff, who are inviolable according to article 10 of the Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention.[410]

[409] See U.S. Naval War Code, article 3.

[410] See below, § 209.

Violence against Enemy Individuals not belonging to the Naval Forces.

§ 203. Since and so far as enemy individuals on board an attacked or seized enemy vessel who do not belong to the naval forces do not take part in the fighting, they may not directly be attacked and killed or wounded, although they are exposed to all injury indirectly resulting from an attack on or by their vessel. If they are mere private individuals, they may as an exception only and under the same circumstances as private individuals on occupied territory be made prisoners of war.[411] But they are nevertheless, for the time they are on board the captured vessel, under the discipline of the captor. All restrictive measures against them which are necessary are therefore lawful, as are also punishments, in case they do not comply with lawful orders of the commanding officer. If they are enemy officials in important positions,[412] they may be made prisoners of war.

[411] See U.S. Naval War Code, article 11, and above, § 116.

[412] See above, § 117.

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V

TREATMENT OF WOUNDED AND SHIPWRECKED

Perels, § 37—Pillet, pp. 188-191—Westlake, II. pp. 275-280—Moore, VII. § 1178—Bernsten, § 12—Bonfils, Nos. 1280-1280[9]—Pradier-Fodéré, VIII. No. 3209—U.S. Naval War Code, articles 21-29—Ferguson, *The Red Cross Alliance at Sea* (1871)—Houette, *De l'extension des principes de la Convention de Genève aux victimes des guerres maritimes* (1892)—Cauwès, *L'extension des principes de la Convention de Genève aux guerres maritimes* (1899)—Holls, *The Peace Conference at the Hague* (1900), pp. 120-132—Boidin, pp. 248-262—Dupuis, *Guerre*, Nos. 82-105—Meurer, II. §§ 74-87—Higgins, pp. 382-394—Lémonon, pp. 526-554—Nippold, II. § 33—Scott, *Conferences*, pp. 599-614—Takahashi, pp. 375-385—Fauchille in *R.G.* VI. (1899), pp. 291-302—Bayer, in *R.G.* VIII. (1901), pp. 225-230—Renault in *A.J.* II. pp. 295-306—Higgins, *War and the Private Citizen* (1912), pp. 73-90, and in *The Law Quarterly Review*, XXVI (1910), pp. 408-414. See also the literature quoted above at the commencement of § 118.

Adaptation of Geneva Convention to Sea Warfare.

§ 204. Soon after the ratification of the Geneva Convention the necessity of adapting its principles to naval warfare was generally recognised, and among the non-ratified Additional articles to the Geneva Convention of 1868 were nine which aimed at such an adaptation. But it was not until the Hague Peace Conference in 1899 that an adaptation came into legal existence. This adaptation was contained in the "Convention[413] for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864," which comprised fourteen articles. It has, however, been replaced by the "Convention (X.) for the Adaptation of the Principles of the Geneva Convention to Maritime War," of the Second Hague Peace Conference. This new convention comprises twenty-eight articles and was signed, although with some reservations, by all the Powers represented at the Conference, except Nicaragua which acceded later, and it has already been ratified by most of the signatory Powers. It provides rules concerning the wounded, sick, shipwrecked, and dead; hospital ships; sickbays on men-of-war; the distinctive colour and emblem of hospital ships; neutral vessels taking on board belligerent wounded, sick, or shipwrecked; the religious, medical, and hospital staff of captured ships; the carrying out of the convention, and the prevention of abuses and infractions.

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[413] Martens, *N.R.G.* 2nd Ser. XXVI. p. 979.

§ 205. Soldiers, sailors, and other persons officially attached to fleets or armies, whatever their nationality, who are taken on board when sick or wounded, must be respected and tended by the captors (article 11). All enemy shipwrecked, sick, or wounded who fall into the power of a belligerent are prisoners of war. It is left to the captor to determine whether they are to be kept on board, or to be sent to a port of his own country, or a neutral port, or even a hostile port; and in the last case such repatriated prisoners must be prevented by their Government from again serving in the war (article 14). The shipwrecked, wounded, or sick, who are landed at a neutral port with the consent of the local authorities, must, unless there is an arrangement to the contrary between the neutral State concerned and the belligerent States, be guarded by the neutral State so as to prevent them from again taking part in the war;[414] the expenses of tending and interning them must be borne by the State to whom they belong (article 15). After each engagement, both belligerents must, so far as military interests permit, take measures to search for the shipwrecked, wounded, and sick, and to ensure them protection against pillage and maltreatment (article 16). Each belligerent must, as early as possible, send to the authorities of their country, navy, or army, a list of the names of the sick and wounded picked up by him; and
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the belligerents must keep each other informed as to internments and transfers as well as to admissions into hospital and deaths which have occurred amongst the sick and wounded in their hands. And they must collect all objects of personal use, valuables, letters, &c., that are found in the captured ships in order to have them forwarded to the persons concerned by the authorities of their own country (article 17).

[414] See below, § 348*a*.

Treatment of the Dead.

§ 205*a*. After each engagement both belligerents must, so far as military interests permit, take measures to ensure the dead protection against pillage and maltreatment, and they must see that the burial, whether by land or sea, or cremation of the dead is preceded by a careful examination of the corpses in order to determine that life is really extinct (article 16). Each belligerent must, as early as possible, send to the authorities of their country, navy, or army, the military identification marks or tokens found on the dead; they must also collect all the objects of personal use, valuables, letters, &c., which have been left by the wounded and sick who die in hospital, in order that they may be forwarded to the persons concerned by the authorities of their own country (article 17).

Hospital Ships.

§ 206. Three different kinds of hospital ships must be distinguished—namely, military hospital ships, hospital ships equipped by private individuals or relief societies of the belligerents, and hospital ships equipped by private neutral individuals and neutral relief societies.

(1) Military hospital ships (article 1) are ships constructed or assigned by States specially and solely for the purpose of assisting the wounded, sick, and shipwrecked. Their names must be communicated to the belligerents at the commencement of or during hostilities, and in any case before they are employed. They must be respected by the belligerents, they may not be captured
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while hostilities last, and they are not on the same footing as men-of-war during their stay in a neutral port.

(2) Hospital ships equipped wholly or in part at the cost of private individuals or officially recognised relief societies of the belligerents must be respected by either belligerent (article 2), and are exempt from capture, provided their home State has given them an official commission and has notified their names to the other belligerent at the commencement of or during hostilities, and in any case before they are employed. They must, further, be furnished with a certificate from the competent authorities declaring that they had been under the latter's control while fitting out and on final departure.

(3) Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognised relief societies of neutral States (article 3), must likewise be respected, and are exempt from capture, provided that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorisation of the belligerent himself, and that the latter has notified their names to his adversary at the commencement of, or during, hostilities, and in any case before they are employed.

According to article 4 all military and other hospital ships must afford relief and assistance to the wounded, sick, and shipwrecked of either belligerent. The respective Governments are prohibited from using these ships for any military purpose. The commanders of these vessels must not in any way hamper the movements of the combatants, and during and after an engagement they act at their own risk and peril. Both belligerents have a right to control and visit all military and other hospital ships, to refuse their assistance, to order them off, to make
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them take a certain course, to put a commissioner on board, and, lastly, to detain them temporarily, if important circumstances require this. In case a hospital ship receives orders from a belligerent, these orders must, as far as possible, be inscribed in the ship papers.

The protection to which hospital ships are entitled ceases if they are made use of to commit acts harmful to the enemy[415] (article 8). But the fact of the staff being armed for the purpose of maintaining order and defending the wounded and sick, and the fact of the presence of wireless telegraphic apparatus on board, are not sufficient reasons for withdrawing protection.

[415] An interesting case of this kind occurred during the Russo-Japanese war. The *Aryol* (also called the *Orel*), a

hospital ship of the Russian Red Cross Society, was captured, and afterwards condemned by the Prize Court on the following grounds:—(*a*) For having communicated the orders of the commander-in-chief of the Russian squadron with which she was sailing to other Russian vessels; (*b*) for carrying, by order of the commander-in-chief of the squadron, in order to take them to Vladivostock, the master and some members of the crew of the British steamship *Oldhamia*, which had been captured by the Russians; (*c*) for having been instructed to purchase in Cape Town, or its neighbourhood, 11,000 ft. of conducting wire of good insulation; (*d*) for having navigated at the head of the squadron in the position usually occupied by reconnoitring vessels.—See Takahashi, pp. 620-625, and Higgins, *op. cit.* p. 74, and in *The Law Quarterly Review*, XXVI. (1910), p. 408.

It must be specially observed that any man-of-war of either belligerent may, according to article 12, demand the surrender of the wounded, sick, or shipwrecked who are on board hospital ships of any kind. According to a reservation by Great Britain, article 12 is understood "to apply only to the case of combatants rescued during or after a naval engagement in which they have taken part."

Hospital Ships in Neutral Ports.

§ 206*a*. For the purpose of defining the status of hospital ships when entering neutral ports an International Conference met at the Hague in 1904, where Germany, Austria-Hungary, Belgium, China, Korea, Denmark, Spain, the United States of America, France, Greece, Guatemala, Italy, Japan, Luxemburg, Mexico, Holland, Persia, Portugal, Roumania, Russia, Servia, and Siam, were represented. Great Britain, however, did not take part. The following is the text of the six articles of the Convention signed by all the representatives:—

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> Article 1.—Hospital ships fulfilling the conditions prescribed in articles 1, 2, and 3 of the Convention concluded at the Hague on July 27, 1899, for the adaptation of the principles of the Geneva Convention of August 22, 1864, to naval warfare shall in time of war be exempt in the ports of the contracting parties from all dues and taxes imposed on vessels for the benefit of the State.
>
> Article 2.—The provision contained in the preceding article shall not prevent the exercise of the right of search and other formalities demanded by the fiscal and other laws in force in the said ports.
>
> Article 3.—The regulation laid down in article 1 is binding only upon the contracting Powers in case of war between two or more of themselves. The said rule shall cease to be obligatory as soon as in a war between any of the contracting Powers a non-contracting Power shall join one of the belligerents.
>
> Article 4.—The present Convention, which bears date of this day and may be signed up to October 1, 1905, by any Power which shall have expressed a wish to do so, shall be ratified as speedily as possible. The ratifications shall be deposited at the Hague. On the deposit of the ratifications, a *procès-verbal* shall be drawn up, of which a certified copy shall be conveyed by diplomatic channels, after the deposit of each ratification, to all the contracting Powers.
>
> Article 5.—Non-signatory Powers will be allowed to adhere to the present convention after October 1, 1905. For that purpose they will have to make known the fact of their adhesion to the contracting Powers by means of a written notification addressed to the Government of the Netherlands, which will be communicated by that Government to all the other contracting Powers.
>
> Article 6.—In the event of any of the high contracting parties denouncing the present Convention, the denunciation shall only take effect after notification has been made in writing to the Government of the Netherlands and communicated by that Government at once to all the other contracting Powers. Such denunciation shall be effective only in respect of the Power which shall have given notice of it.

Sick-Bays.

§ 206*b*. According to article 7, in case of a fight on board a man-of-war, the sick-bays must, as far as possible, be respected and spared. These sick-bays, and the material belonging to them, remain subject to the laws of war; they may not, however, be used for any purpose other than that for which they were originally intended so long as they are required for the wounded and sick. But should the military situation require it, a commander into whose power they have fallen may nevertheless apply them to other purposes, under the condition that he previously makes arrangements for proper accommodation for the wounded and sick on board. The protection to which sick-bays are entitled ceases if they are made use of to commit acts harmful to the enemy (article 8). But the fact that the staff of sick-bays is armed in order to defend the wounded and sick is not sufficient reason for withdrawing protection.

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Distinctive Colour and Emblem of Hospital Ships.

§ 207. All military hospital ships must be painted white outside with a horizontal band of green about one metre and a half in breadth. Other hospital ships must also be painted white outside, but with a horizontal band of red. The boats and small craft of hospital ships used for hospital work must likewise be painted white. And besides being painted in this distinguishing colour, all military and other hospital ships (article 5) must hoist, together with their national flag, the white

flag with a red cross stipulated by the Geneva Convention. If they belong to a neutral State, they must also fly at the main mast the national flag of the belligerent under whose control they are placed. Hospital ships which, under the terms of article 4, are detained by the enemy, must haul down the national flag of the belligerent to whom they belong. All hospital ships which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the [Pg 259] assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain. According to article 6 the distinguishing signs mentioned in article 5 may only be used, whether in time of peace or war, for protecting or indicating the ships therein mentioned.

Although in this connection the red cross is especially stipulated as the distinctive emblem, there is no objection to the use by non-Christian States, who object to the cross on religious grounds, of another emblem. Thus Turkey reserved the right to use a red crescent, and Persia to use a red sun.

Neutral Vessels assisting the Wounded, Sick, or Shipwrecked.

§ 208. A distinction must be made between neutral men-of-war and private vessels assisting the sick, wounded, and shipwrecked.

(1) If men-of-war take on board wounded, sick, or shipwrecked persons, precaution must be taken, so far as possible, that they do not again take part in the operations of war (article 13). Such individuals must not, however, be handed over to the adversary but must be detained till the end of the war.[416]

(2) Neutral merchantmen,[417] yachts, or boats which have of their own accord rescued sick, wounded, or shipwrecked men, or who have taken such men on board at the appeal of the belligerent, must, according to article 9, enjoy special protection and certain immunities. In no case may they be captured for the sole reason of having such persons on board. But, subject to any undertaking that may have been given to them, they remain liable to capture for any violation of neutrality they may have committed.

[416] See below, § 348.

[417] See below, § 348*a*.

It must be specially observed that, according to article 12, any man-of-war of either belligerent may demand from merchant ships, yachts, and boats, whatever the nationality of such vessels, the surrender of the wounded, sick, or shipwrecked who are on board.

[Pg 260] According to the reservation of Great Britain, mentioned above in § 206, article 12 is understood "to apply only to the case of combatants rescued during or after a naval engagement in which they have taken part."

The Religious, Medical, and Hospital Staff.

§ 209. The religious, medical, and hospital staff of any captured vessel is inviolable, and the members may not be made prisoners of war, but they must continue to discharge their duties while necessary. If they do this, the belligerent into whose hands they have fallen has to give them the same allowances and the same pay as are granted to persons holding the same rank in his own navy. They may leave the ship, when the commander-in-chief considers it possible, and on leaving they are allowed to take with them all surgical articles and instruments which are their private property (article 10).

Application of Convention X., and Prevention of Abuses.

§ 209*a*. The provisions of Convention X. are only binding in the case of war between contracting Powers, they cease to be binding the moment a non-contracting Power becomes one of the belligerents (article 18). In the case of operations of war between land and sea forces of belligerents, the provisions of Convention X. only apply to forces on board ship (article 22). The commanders-in-chief of the belligerent fleets must, in accordance with the instructions of their Governments and in conformity with the general principles of the Convention, arrange the details for carrying out the articles of Convention X., as well as for cases not provided for in these articles (article 19). The contracting parties must take the necessary measures to instruct their naval forces, especially the personnel protected by Convention X., in the provisions of the Convention, and to bring these provisions to the notice of the public (article 20). The contracting Powers must, in case their criminal laws are inadequate, enact measures necessary for checking, [Pg 261] in time of war, individual acts of pillage or maltreatment of the wounded and sick in the fleet, as well as for punishing, as unjustifiable adoption of military or naval marks, the unauthorised use of the distinctive signs mentioned in article 5 on the part of vessels not protected by the present Convention; they must communicate to each other, through the Dutch Government, the enactments for preventing such acts at the latest within five years of the ratification of Convention X.[418] (article 21).

[418] Great Britain has entered a reservation against articles 6 and 21, but see above, § 124*b*, p. 164, note 1.

General Provisions of Convention X.

§ 209*b*. Convention X. comes into force sixty days after ratification or accession on the part of each Power concerned (article 26). It replaces the Convention of 1899 for the adaptation to naval warfare of the principles of the Geneva Convention, but this latter Convention remains in force between such of its contracting parties as do not become parties to Convention X. (article 25).

Such non-signatory Powers of Convention X. as are parties to the Geneva Convention of 1906 are free to accede at any time, and a Power desiring to accede must notify its intention in writing to the Dutch Government which must communicate the accession to all the contracting Powers (article 24). Each of the contracting Powers is at any time at liberty to denounce Convention X. by a written notification to the Dutch Government which must immediately communicate the notification to all the other contracting Powers; the denunciation, however, does not take effect until one year after the notification has reached the Dutch Government, and a denunciation only affects the Power making the notification (article 27). A register kept by the Dutch Minister of Foreign Affairs must record the dates of the deposit of ratifications, as well as the dates of
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accessions or of denunciations; each contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it (article 28).

VI

ESPIONAGE, TREASON, RUSES

See, besides the literature quoted above at the commencement of §§ 159 and 163, Pradier-Fodéré, VIII. No. 3157, and Bentwich in *The Journal of the Society of Comparative Legislation*, New Series, X. (1909), pp. 243-249.

Espionage and Treason.

§ 210. Espionage[419] and treason do not play as large a part in sea warfare as in land warfare; [420] still they may be made use of by belligerents. But it must be specially observed that, since the Hague Regulations deal only with land warfare, the legal necessity of trying a spy by court-martial according to article 30 of these Regulations does not exist for sea warfare, although such trial by court-martial is advisable.

[419] As regards the case of the *Haimun*, see below, § 356.

[420] See above, §§ 159-162.

Ruses.

§ 211. Ruses are customarily allowed in sea warfare within the same limits as in land warfare, perfidy being excluded. As regards the use of a false flag, it is by most publicists considered perfectly lawful for a man-of-war to use a neutral's or the enemy's flag (1) when chasing an enemy vessel, (2) when trying to escape, and (3) for the purpose of drawing an enemy vessel into
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action.[421] On the other hand, it is universally agreed that immediately before an attack a vessel must fly her national flag. Halleck (I. p. 568) relates the following instance: In 1783 the *Sybille*, a French frigate of thirty-eight guns, enticed the British man-of-war *Hussar* by displaying the British flag and intimating herself to be a distressed prize of a British captor. The *Hussar* approached to succour her, but the latter at once attacked the *Hussar* without showing the French flag. She was, however, overpowered and captured, and the commander of the *Hussar* publicly broke the sword of the commander of the *Sybille*, whom he justly accused of perfidy, although the French commander was acquitted when subsequently brought to trial by the French Government. Again, Halleck (I. p. 568) relates: In 1813 two merchants of New York carried out a plan for destroying the British man-of-war *Ramillies* in the following way. A schooner with some casks of flour on deck was expressly laden with several casks of gunpowder having trains leading from a species of gunlock, which, by the action of clockwork, went off at a given time after it had been set. To entice the *Ramillies* to seize her, the schooner came up, and the *Ramillies* then sent a boat with thirteen men and a lieutenant to cut her off. Subsequently the crew of the schooner abandoned her and she blew up with the lieutenant and his men on board.

[421] The use of a false flag on the part of a belligerent man-of-war is analogous to the use of the enemy flag and the like in land warfare; see above, § 164. British practice—see Holland, *Prize Law*, § 200—permits the use of false colours. U.S. Naval War Code, article 7, forbids it altogether, whereas as late as 1898, during the war with Spain in consequence of the Cuban insurrection, two American men-of-war made use of the Spanish flag (see Perels, p. 183). And during the war between Turkey and Russia, in 1877, Russian men-of-war in the Black Sea made use of the Italian flag (see Martens, II. § 103, p. 566). The question of the permissibility of the use of a neutral or enemy flag is answered in the affirmative, among others, by Ortolan, II. p. 29; Fiore, III. No. 1340; Perels, § 35, p. 183; Pillet, p. 116; Bonfils, No. 1274; Calvo, IV. 2106; Hall, § 187. See also Pillet in *R.G.* V. (1898), pp. 444-451. But see the arguments against the use of a false flag in Pradier-Fodéré, VI. No. 2760.

Vattel (III. § 178) relates the following case of perfidy: In 1755, during war between Great Britain and France, a British man-of-war appeared off Calais, made signals of distress for the purpose of soliciting French vessels to approach to her succour, and seized a sloop and some sailors who came to bring her help. Vattel is himself not certain whether this case is a fact or fiction. But be that as it may, there is no doubt that, if the case be true, it is an example of
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perfidy, which is not allowed.

VII

REQUISITIONS, CONTRIBUTIONS, BOMBARDMENT

Hall, § 140*—Lawrence, § 204—Westlake, II. pp. 315-318—Moore, VII. §§ 1166-1174—Taylor, § 499—Bonfils, Nos. 1277-1277[1]—Despagnet, Nos. 618-618 *bis*—Fiore, Code, Nos. 1633-1642—Pradier-Fodéré, VIII. Nos. 3153-3154—Nys, III. pp. 430-432—Pillet, p. 117—Perels, § 35, p. 181—Holland, *Studies*, pp. 96-111—Dupuis, Nos. 67-73, and *Guerre*, Nos. 42-47—Barclay, *Problems*, p. 51—Higgins, pp. 352-357—Lémonon, pp. 503-525—Bernsten, § 7, III.—Boidin, pp. 201-215—Nippold, II. § 28—Scott, *Conferences*, pp. 587-598, and in *A.J.* II.

(1908), pp. 285-294.

Requisitions and Contributions upon Coast Towns.

§ 212. No case has to my knowledge occurred in Europe[422] of requisitions or contributions imposed by naval forces upon enemy coast towns. The question whether or not such requisitions and contributions would be lawful became of interest through an article on naval warfare of the future, published in 1882 by the French Admiral Aube in the *Revue des Deux Mondes* (vol. 50, p. 331). Aube pointed out that one of the tasks of the fleet in sea warfare of the future would be to attack and destroy by bombardment fortified and unfortified military and commercial enemy coast towns, or at least to compel them mercilessly to requisitions and contributions. As during the British naval manœuvres of 1888 and 1889 imaginary contributions were imposed upon several coast towns, Hall (§ 140*) took into consideration the question under what conditions requisitions and contributions would be lawful in sea warfare. He concluded, after careful consideration and starting from the principles regarding requisitions and contributions in land warfare, that such requisitions and contributions may be levied, provided a force is landed which actually takes possession of the respective coast town and establishes itself there, although only
[Pg 265] temporarily, until the imposed requisitions and contributions have been complied with; that, however, no requisitions or contributions could be demanded by a single message sent on shore under threatened penalty of bombardment in case of refusal. There is no doubt that Hall's arguments are, logically, correct; but it was not at all certain that the naval Powers would adopt them, since neither the Institute of International Law nor the U.S. Naval War Code had done so.[423] The Second Hague Peace Conference has now settled the matter through the Convention (IX.) concerning bombardment by naval forces in time of war which amongst its thirteen articles includes two—3 and 4—dealing with requisitions and contributions. This Convention has been signed, although with some reservations, by all the Powers represented at the Conference except Spain, China, and Nicaragua, but China and Nicaragua acceded later. Many States have already ratified.

[422] Holland, *Studies*, p. 101, mentions a case which occurred in South America in 1871.

[423] The Institute of International Law has touched upon the question of requisitions and contributions in sea warfare in article 4, No. 1, of its rules regarding the bombardment of open towns by naval forces; see below, § 213, p. 267. U.S. Naval War Code, article 4, allows "reasonable" requisitions, but no contributions since "ransom" is not allowed.

According to article 3 undefended ports, towns, villages, dwellings, or other buildings may be bombarded by a naval force, if the local authorities, on a formal summons being made to them, decline to comply with requisitions for provisions or supplies *necessary* for the *immediate* use of the naval force concerned. These requisitions must be proportional to the resources of the place; they can only be demanded by the commander of the naval force concerned; they must be paid for in cash, and, if this is not possible for want of sufficient ready money, their receipt must be acknowledged.

As regards contributions, Convention IX. does not directly forbid the demand for them, but
[Pg 266] article 4 expressly forbids bombardment of undefended places by a naval force on account of non-payment of money contributions; in practice, therefore, the demand for contributions will not occur in naval warfare.

Bombardment of the Enemy Coast.

§ 213. There is no doubt whatever that enemy coast towns which are defended may be bombarded by naval forces, acting either independently or in co-operation with a besieging army. But before the Second Peace Conference of 1907 the question was not settled as to whether or not *open and undefended* coast places might be bombarded by naval forces. The Institute of International Law in 1895, at its meeting at Cambridge, appointed a committee to investigate the matter. The report[424] of this committee, drafted by Professor Holland with the approval of the Dutch General Den Beer Portugael, and presented in 1896 at the meeting at Venice,[425] is of such interest that it is advisable to reproduce here a translation of the following chief parts:—

> When the Prince de Joinville recommended in 1844, in case of war, the devastation of the great commercial towns of England, the Duke of Wellington wrote:—"What but the inordinate desire of popularity could have induced a man in his station to write and publish such a production, an invitation and provocation to war, to be carried on in a manner such as has been disclaimed by the civilised portions of mankind?" (Raikes, *Correspondence*, p. 367). The opinion of the Prince de Joinville has been taken up by Admiral Aube in an article which appeared in the *Revue des Deux Mondes* in 1882. After having remarked that the ultimate object of war is to inflict the greatest possible damage to the enemy and that "La richesse est le nerf de la guerre," he goes on as follows:—"Tout ce qui frappe l'ennemi dans sa richesse devient non seulement légitime, mais s'impose comme obligatoire. Il faut donc s'attendre à voir les flottes cuirassées, maîtresses de la mer, tourner leur puissance d'attaque et déstruction, à défaut d'adversaires se dérobant à leurs coups, contre toutes les villes du littoral, fortifiées ou
> [Pg 267] non, pacifiques ou guerrières, les incendier, les ruiner, et tout au moins les rançonner sans merci. Cela s'est fait autrefois; cela ne se fait plus; cela se fera encore: Strasbourg et Péronne en sont garants...."

[424] See *Annuaire*, XV. (1896), pp. 148-150.

[425] See *Annuaire*, XV. (1896), p. 313.

The discussion was opened again in 1888, on the occasion of manœuvres executed by the British Fleet, the enemy part of which feigned to hold to ransom, under the threat of bombardment, great commercial towns, such as Liverpool, and to cause unnecessary devastation to pleasure towns and bathing-places, such as Folkestone, through throwing bombs. One of your reporters observed in a series of letters addressed to the *Times* that such acts are contrary to the rules of International Law as well as to the practice of the present century. He maintained that bombardment of an open town ought to be allowed only for the purpose of obtaining requisitions in kind necessary for the enemy fleet and contributions instead of requisitions, further by the way of reprisal, and in case the town defends itself against occupation by enemy troops approaching on land.... Most of the admirals and naval officers of England who took part in the lively correspondence which arose in the *Times* and other journals during the months of August and September 1880 took up a contrary attitude....

On the basis of this report the Institute, at the same meeting, adopted a body of rules regarding the bombardment of open towns by naval forces, declaring that the rules of the law of war concerning bombardment are the same in the case of land warfare and sea warfare. Of special interest are articles 4 and 5 of these rules, which run as follows:—

> Article 4. In virtue of the general principles above, the bombardment by a naval force of an open town, that is to say one which is not defended by fortifications or by other means of attack or of resistance for immediate defence, or by detached forts situated in proximity, for example of the maximum distance of from four to ten kilometres, is inadmissible except in the following cases:—
>
> (1) For the purpose of obtaining by requisitions or contributions what is necessary for the fleet. These requisitions or contributions must in every case remain within the limits prescribed by articles 56 and 58 of the Manual of the Institute.
>
> [Pg 268] (2) For the purpose of destroying sheds, military erections, depôts of war munitions, or of war vessels in a port. Further, an open town which defends itself against the entrance of troops or of disembarked marines can be bombarded for the purpose of protecting the disembarkation of the soldiers and of the marines, if the open town attempts to prevent it, and as an auxiliary measure of war to facilitate the result made by the troops and the disembarked marines, if the town defends itself. Bombardments of which the object is only to exact a ransom are specially forbidden, and, with the stronger reason, those which are intended only to bring about the submission of the country by the destruction, for which there is no other motive, of the peaceful inhabitants or of their property.
>
> Article 5. An open town cannot be exposed to a bombardment for the only reasons:—
>
> (*a*) That it is the capital of the State or the seat of the Government (but naturally these circumstances do not guarantee it in any way against a bombardment).
>
> (*b*) That it is actually occupied by troops, or that it is ordinarily the garrison of troops of different arms intended to join the army in time of war.

The First Peace Conference did not settle the matter, but expressed the desire "that the proposal to settle the question of bombardment of ports, towns, and villages by a naval force may be referred to a subsequent Conference for consideration." The Second Peace Conference, however, by Convention IX.—see above, § 212, p. 265—has provided detailed rules concerning all the points in question, and the following is now the law concerning bombardment by naval forces:—

> (1) The bombardment of undefended ports, towns, villages, dwellings, or other buildings is under all circumstances and conditions prohibited (article 1). To define the term "undefended," article 1 expressly enacts that "a place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbour," but Great Britain, France, Germany, and Japan entered a reservation against this, since they
> [Pg 269] correctly consider such a place to be "defended."
>
> (2) Although undefended places themselves are exempt, nevertheless military works, military or naval establishments, depôts of arms or war material, workshops or plant which could be utilised for the needs of the hostile fleet or army, and men-of-war in the harbour of undefended places may be bombarded. And no responsibility is incurred for any unavoidable damage caused thereby to the undefended place or its inhabitants. As a rule, however, the commander must, before resorting to bombardment of these works, ships, and the like, give warning to the local authorities so that they can destroy the works and vessels themselves. Only if, for military reasons, immediate action is necessary and no delay can be allowed to the enemy, may bombardment be resorted to without previous warning, the commander being compelled to take all due measures in order that the undefended place itself may suffer as little harm as possible (article 2).

The first case in which naval forces acted according to these rules occurred during the Turco-Italian war. On February 25, 1912, Admiral Faravelli, the commander of an Italian squadron, surprised, at dawn, the Turkish gunboat *Awni-Illa* and a torpedo-boat in the port of Beirut. These vessels were called upon to surrender, they were given until nine o'clock a.m. to comply with the

demand, and the demand was communicated to the Governor and the Consular authorities. At nine o'clock the Turkish vessels were again, by signal, summoned to surrender, and as no reply was received, they were fired at and destroyed, but not without first having vigorously answered the fire of the Italians. Shells missing the vessels and bursting on the quay killed and wounded a number of individuals and damaged several buildings. The Turkish Government protested against [Pg 270] this procedure as a violation of Convention IX. of the Second Peace Conference, but, provided the official report of Admiral Faravelli corresponds with the facts, the Turkish protest is unfounded.

(3) In case undefended places do not comply with legitimate requisitions, they likewise may be bombarded; see details above, § 212.

(4) In case of bombardments, all necessary steps must be taken to spare buildings devoted to public worship, art, science, or charitable purposes; historical monuments; hospitals, and places where the sick or wounded are collected, provided they are not at the time used for military purposes. To enable the attacking force to carry out this injunction, the privileged buildings, monuments, and places must be indicated by visible signs, which shall consist of large stiff rectangular panels, divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white (article 5). Unless military exigencies render it impossible the commander of an attacking naval force must, before commencing the bombardment, do all in his power to warn the authorities (article 6).

(5) The giving over to pillage of a town or place, even when taken by assault, is forbidden [Pg 271] (article 7).

VIII

INTERFERENCE WITH SUBMARINE TELEGRAPH CABLES

Moore, VII. § 1176—Westlake, II. pp. 280-283—Liszt, § 41, III.—Bonfils, No. 1278—Pradier-Fodéré, VI. No. 2772—Fiore, III. No. 1387, and Code, Nos. 1650-1655—Perels, § 35, p. 185—Perdrix, *Les câbles sousmarines et leur protection internationale* (1902)—Kraemer, *Die unterseeischen Telegraphenkabel in Kriegszeiten* (1903)—Scholz, *Krieg und Seekabel* (1904)—Zuculin, *I cavi sottomarini e il telegrafo senza fili nel diritto di guerra* (1907)—Holland, in *Journal de Droit International Privé et de la Jurisprudence comparée* (Clunet), XXV. (1898), pp. 648-652, and *War*, No. 114—Goffin, in *The Law Quarterly Review*, XV. (1899), pp. 145-154—Bar, in the *Archiv für Oeffentliches Recht*, XV. (1900), pp. 414-421—Rey, in *R.G.* VIII. (1901), pp. 681-762—Dupuis, in *R.G.* X. (1903), pp. 532-547—Nordon in *The Law Magazine and Review*, XXXII. (1907), pp. 166-188. See also the literature quoted above, vol. I., at the commencement of § 286.

Uncertainty of Rules concerning Interference with Submarine Telegraph Cables.

§ 214. As the "International Convention[426] for the Protection of Submarine Telegraph Cables" of 1884 expressly stipulates by article 15 that freedom of action is reserved to belligerents, the question is not settled how far belligerents are entitled to interfere with submarine telegraph cables. The only conventional rule concerning this question is article 54 of the Hague Regulations, inserted by the Second Peace Conference, which enacts that submarine cables connecting occupied enemy territory with a neutral territory shall not be seized or destroyed, and that, if a case of absolute necessity has compelled the occupant to seize or destroy such cable, it must be restored after the conclusion of peace and indemnities paid. There is no rule in existence which deals with other possible cases of seizure and destruction.

[426] See above, vol. I. §§ 286 and 287.

The Institute of International Law has studied the matter and adopted,[427] at its meeting at [Pg 272] Brussels in 1902, the following five rules:—

(1) Le câble sousmarin reliant deux territoires neutres est inviolable.

(2) Le câble reliant les territoires de deux belligérants ou deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans la mer territoriale et dans les eaux neutralisées dépendant d'un territoire neutre.

(3) Le câble reliant un territoire neutre au territoire d'un des belligérants ne peut en aucun cas être coupé dans la mer territoriale ou dans les eaux neutralisées dépendant d'un territoire neutre. En haute mer, ce câble ne peut être coupé que s'il y a blocus effectif et dans les limites de la ligne du blocus, sauf rétablissement du câble dans le plus bref délai possible. Le câble peut toujours être coupé sur le territoire et dans la mer territoriale dépendant d'un territoire ennemi jusqu'à d'une distance de trois milles marins de la laisse de basse-marée.

(4) Il est entendu que la liberté de l'État neutre de transmettre des dépêches n'implique pas la faculté d'en user ou d'en permettre l'usage manifestement pour prêter assistance à l'un des belligérants.

(5) En ce qui concerne l'application des règles précédentes, il n'y a de différence à établir ni entre les câbles d'État et les câbles appartenant à des particuliers, ni entre les câbles de propriété ennemie et ceux qui sont de propriété neutre.

[427] See *Annuaire*, XIX. (1902), p. 331.

The U.S. Naval War Code, article 5, laid down the following rules:—

(1) Submarine telegraphic cables between points in the territory of an enemy, or

between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

(2) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

(3) Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption.[428]

[428] It is impossible for a treatise to discuss the details of the absolutely unsettled question as to how far belligerents may interfere with submarine telegraph cables. Readers who take a particular interest in it may be referred to the excellent monograph of Scholz, *Krieg und Seekabel* (1904), which discusses the matter thoroughly and ably.

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CHAPTER V

NON-HOSTILE RELATIONS OF BELLIGERENTS

I

ON NON-HOSTILE RELATIONS IN GENERAL BETWEEN BELLIGERENTS

Grotius, III. c. 19—Pufendorf, VIII. c. 7, §§ 1-2—Bynkershoek, *Quaest. jur. publ.* I. c. 1—Vattel, III. §§ 174-175—Hall, § 189—Lawrence, § 210—Phillimore, III. § 97—Halleck, I. pp. 310-311—Taylor, § 508—Wheaton, § 399—Bluntschli, § 679—Heffter, § 141—Lueder in Holtzendorff, IV. pp. 525-527—Ullmann, § 185—Bonfils, Nos. 1237-1238—Despagnet, No. 555—Pradier-Fodéré, VII. Nos. 2882-2887—Rivier, II. p. 367—Calvo, IV. §§ 2411-2412—Fiore, III. No. 1482, and Code, Nos. 1721-1723—Martens, II. § 127—Longuet, §§ 134-135—Mérignhac, pp. 218-220—Pillet, pp. 355-356—*Kriegsbrauch*, p. 38—*Land Warfare*, §§ 221-223—Emanuel, *Les conventions militaires dans la guerre continentale* (1904).

Fides etiam hosti servanda.

§ 215. Although the outbreak of war between States as a rule brings non-hostile intercourse to an end, necessity of circumstances, convenience, humanity, and other factors call, or may call, some kinds of non-hostile relations of belligerents into existence. And it is a universally recognised principle of International Law that, where such relations arise, belligerents must carry them out in good faith. *Fides etiam hosti servanda* is a rule which was adhered to in antiquity, when no International Law in the modern sense of the term existed. But it had then a religious and moral sanction only. Since in modern times war is not a condition of anarchy and lawlessness between belligerents, but a contention in many respects regulated, restricted, and
[Pg 274] modified by law, it is obvious that, where non-hostile relations between belligerents occur, they are protected by law. *Fides etiam hosti servanda* is, therefore, a principle which nowadays enjoys as well a legal as a religious and moral sanction.

Different kinds of Non-hostile Relations.

§ 216. As through the outbreak of war all diplomatic intercourse and other non-hostile relations come to an end, it is obvious that non-hostile relations between belligerents must originate either from special rules of International Law or from special agreements between the belligerents.

No special rules of International Law which demanded non-hostile relations between belligerents existed in former times, but of late a few rules of this kind have arisen. Thus, for instance, release on parole[429] of prisoners of war creates an obligation on the part of the enemy not to re-admit the individuals concerned into the forces while the war lasts. And, to give another example, by article 4 of the Geneva Convention of 1906, and article 14 of the Hague Regulations —see also article 17 of Convention X. of the Second Peace Conference—it is the duty of either belligerent to return to the enemy, by his prisoner-of-war bureau, all objects of personal use, letters, jewellery, and the like found on the battlefield or left by those who died in hospital.[430] Non-hostile relations of this kind, however, need not be considered in this chapter, since they have already been discussed on several previous pages.

[429] See above, § 129.

[430] See above, § 144.

Non-hostile relations originating from special agreements of belligerents, so-called *commercia belli*, may either be concluded in time of peace for the purpose of creating certain non-hostile relations between the parties in case war breaks out, or they may be concluded during the actual time of war. Such non-hostile relations are created through passports, safe-conducts, safeguards,
[Pg 275] flags of truce, cartels, capitulations, and armistices. Non-hostile relations can also be created by peace negotiations.[431] Each of these non-hostile relations must be discussed separately.

[431] See below, § 267.

Licences to Trade.

§ 217. Several writers[432] speak of non-hostile relations between belligerents created by licences to trade granted by a belligerent to enemy subjects either within certain limits or

generally. It has been explained above, in § 101, that it is for Municipal Law to determine whether or not through the outbreak of war all trade and the like is prohibited between the subjects of belligerents. If the Municipal Law of one or both belligerents does contain such a prohibition, it is of course within the discretion of one or both of them to grant exceptional licences to trade to their own or the other belligerent's subjects, and such licences naturally include certain privileges. Thus, for instance, if a belligerent allows enemy subjects to trade with his own subjects, enemy merchantmen engaged in such trade are exempt from capture and appropriation by the grantor. Yet it is not International Law which creates this exemption, but the very licence to trade granted by the belligerent and revocable at any moment; and no non-hostile international relations between the belligerents themselves originate from such licences. The matter would be different if, either in time of peace for the time of war, or, during war, the belligerents agreed to allow certain trade between their subjects; but non-hostile relations originating from such an agreement would not be relations arising from a licence to trade, but from a cartel.[433]

[432] See, for instance, Hall, § 196; Halleck, II. pp. 343-363; Lawrence, § 214; Manning, p. 168; Taylor, § 512; Wheaton, §§ 409-410; Fiore, III. No. 1500; Pradier-Fodéré, VII. No. 2938.

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[433] See below, § 224.

II

PASSPORTS, SAFE-CONDUCTS, SAFEGUARDS

Grotius, III. c. 21, §§ 14-22—Vattel, III. §§ 265-277—Hall, §§ 191 and 195—Lawrence, § 213—Phillimore, III. §§ 98-102—Halleck, II. pp. 323-328—Taylor, § 511—Wheaton, § 408—Moore, VII. §§ 1158-1159—Bluntschli, §§ 675-678—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 525-527—Ullmann, § 185—Bonfils, Nos. 1246-1247—Despagnet, Nos. 558-561—Pradier-Fodéré, VII. Nos. 2884, 2932-2938—Nys, III. pp. 504-505—Calvo, IV. §§ 2413-2418—Fiore, III. No. 1499, and Code, Nos. 1742-1749—Longuet, §§ 142-143—Mérignhac, pp. 239-240—Pillet, pp. 359-360—*Kriegsbrauch*, p. 41—Holland, *War*, No. 101—*Land Warfare*, §§ 326-337.

Passports and Safe-conducts.

§ 218. Belligerents on occasions arrange between themselves that passports and safe-conducts shall be given to certain of each other's subjects. Passports are written permissions given by a belligerent to enemy subjects, or others, allowing them to travel within that belligerent's territory or enemy territory occupied by him. Safe-conducts are written permissions given by a belligerent to enemy subjects, or others, allowing them to proceed to a particular place for a defined object, for instance, to a besieged town for conducting certain negotiations; but safe-conducts may also be given for goods, and they then comprise permission to carry such goods without molestation to a certain place. Passports as well as safe-conducts make the grantee inviolable so long and in so far as he complies with the conditions specially imposed upon him or made necessary by the circumstances of the special case. Passports and safe-conducts are not transferable, and they may be granted to enemy subjects for a limited or an unlimited period; in the former case their validity ceases with the expiration of the period. Both may be withdrawn, not only when the grantee abuses the protection, but also for military expediency. It must, however, be specially
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observed that passports and safe-conducts are only a matter of International Law when the granting of them has been arranged between the belligerents or their responsible commanders, or between belligerents and neutral Powers. If they are granted without such an arrangement, unilaterally on the part of one of the belligerents, they fall outside the scope of International Law.[434]

[434] The distinction between passports and the like arranged between the belligerents to be granted, on the one hand, and, on the other, such as are granted unilaterally, would seem to be necessary, although it is not generally made.

Safeguards.

§ 219. Belligerents on occasions arrange between themselves that they shall grant protection to certain of each other's subjects or property against their own forces in the form of safeguards, of which there are two kinds. One consists in a written order given to an enemy subject or left with enemy property and addressed to the commander of armed forces of the grantor, in which the former is charged with the protection of the respective individual or property, and by which both become inviolable. The other kind of safeguard is given by detailing one or more soldiers to accompany enemy subjects or to guard the spot where certain enemy property is, for the purpose of protection. Soldiers on this duty are inviolable on the part of the other belligerent; they must neither be attacked nor made prisoners, and they must, on falling into the hands of the enemy, be fed, well kept, and eventually safely sent back to their corps. As in the case of passports and safe-conducts, it must be specially observed that safeguards are only a matter of International Law when the granting of them has been arranged by the belligerents, and not otherwise; except in the case of the safeguards mentioned by article 8, No. 2, of the Geneva Convention of 1906, who,
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according to articles 9 and 12 of that Convention, are inviolable.

III

FLAGS OF TRUCE

Hall, § 190—Lawrence, § 211—Westlake, II. p. 81—Moore, VII. § 1157—Phillimore, III. § 115—Halleck, II. pp. 333, 334—Taylor, § 510—Bluntschli, §§ 681-684—Heffter, § 126—Lueder in Holtzendorff, IV. pp. 421-423—

Ullmann, § 180—Bonfils, Nos. 1239-1245—Despagnet, Nos. 556-557—Pradier-Fodéré, VII. Nos. 2927-2931—Rivier, II. pp. 279-280—Calvo, IV. §§ 2430-2432—Fiore, III. No. 1378, and Code, Nos. 1495-1500—Martens, II. § 127—Longuet, §§ 136-138—Mérignhac, pp. 220-225—Pillet, pp. 356-358—Zorn, pp. 195-199—Meurer, II. §§ 39-40—Bordwell, p. 293—Spaight, pp. 216-231—*Kriegsbrauch*, pp. 26-29—Holland, *War*, Nos. 88-91—*Land Warfare*, §§ 224-255.

Meaning of Flags of Truce.

§ 220. Although the outbreak of war brings all negotiations between belligerents to an end, and although no negotiations are as a rule conducted during war, certain circumstances and conditions make it necessary or convenient for the armed forces of belligerents to enter into negotiations with each other for various purposes. Since time immemorial a white flag has been used as a symbol by an armed force wishing to negotiate with the enemy, and always and everywhere it has been considered a duty of the enemy to respect this symbol. In land warfare the flag of truce is made use of in the following manner.[435] An individual—soldier or civilian—charged by his force with the task of negotiating with the enemy, approaches the latter either carrying the flag himself, or accompanied by a flag-bearer and, often, also by a drummer, a bugler, or a trumpeter, and an interpreter. In sea warfare the individual charged with the task of negotiating approaches the enemy in a boat flying the white flag. The Hague Regulations have now by articles 32 to 34 enacted most of the customary rules of International Law regarding flags [Pg 279] of truce without adding any new rule. These rules are the same for land warfare as for sea warfare, although their validity for land warfare is now grounded on the Hague Regulations, whereas their validity for sea warfare is still based on custom only.

[435] See Hague Regulations, article 32.

Treatment of Unadmitted Flag-bearers.

§ 221. As a commander of an armed force is not, according to article 33 of the Hague Regulations, compelled to receive a bearer of a flag of truce, a flag-bearer who makes his appearance may at once be signalled to withdraw. Yet even then he is inviolable from the time he displays the flag to the end of the time necessary for withdrawal. During this time he may neither be intentionally attacked nor made prisoner. However, an armed force in battle is not obliged to stop its military operations on account of the approach of an enemy flag-bearer who has been signalled to withdraw. Although the latter may not be fired upon intentionally, should he be wounded or killed accidentally, during the battle, no responsibility or moral blame would rest upon the belligerent concerned. In former times the commander of an armed force could inform the enemy that, within a certain defined or indefinite period, he would under no circumstances or conditions receive a flag-bearer; if, in spite of such notice, a flag-bearer approached, he did not enjoy any privilege, and he could be attacked and made prisoner like any other member of the enemy forces. But this rule is now obsolete, and its place is taken by the rule that a commander must never, except in a case of reprisals, declare beforehand, even only for a specified period, that he will not receive a bearer of a flag of truce.[436]

[436] This becomes quite apparent from the discussion of the subject at the First Peace Conference; see Martens, *N.R.G.* 2nd Ser. XXVI. p. 465; and *Land Warfare*, § 234.

Treatment of Admitted Flag-bearers.

§ 222. Bearers of flags of truce and their parties, when admitted by the other side, must be granted the privilege of inviolability. They may neither be attacked nor taken prisoners, and they [Pg 280] must be allowed to return safely in due time to their own lines. On the other hand, the forces admitting enemy flag-bearers need not allow them to acquire information about the receiving forces and to carry it back to their own corps. Flag-bearers and their parties may, therefore, be blindfolded by the receiving forces, or be conducted by roundabout ways, or be prevented from entering into communication with individuals other than those who confer officially with them, and they may even temporarily be prevented from returning till a certain military operation of which they have obtained information is carried out. Article 33 of the Hague Regulations specifically enacts that a commander to whom a flag of truce is sent "may take all steps necessary to prevent the envoy taking advantage of his mission to obtain information." Bearers of flags of truce are not, however, prevented from reporting to their corps any information they have gained by observation in passing through the enemy lines and in communicating with enemy individuals. But they are not allowed to sketch maps of defences and positions, to gather information secretly and surreptitiously, to provoke or to commit treacherous acts, and the like. If nevertheless they do any of these acts, they may be court-martialed. Articles 33 and 34 of the Hague Regulations specifically enact that a flag-bearer may temporarily be detained in case he abuses his mission for the purpose of obtaining information, and that he loses all privileges of inviolability "if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery." Bearers of white flags and their party, who approach the enemy and are received, must carry[437] some authorisation with them to show that they are [Pg 281] charged with the task of entering into negotiations (article 32), otherwise they may be detained as prisoners, since it is his mission and not the white flag itself which protects the flag-bearer. This mission protects every one who is charged with it, notwithstanding his position in his corps and his status as a civilian or a soldier, but it does not protect a deserter. The latter may be detained, court-martialed, and punished, notice being given to his principal of the reason of punishment.[438]

[437] Article 32 of the Hague Regulations confirms this customary rule by speaking of an individual who is "authorised" by one of the belligerents to enter into communication with the other.

[438] See Hall, § 190.

Abuse of Flag of Truce.

§ 223. Abuse of his mission by an authorised flag-bearer must be distinguished from an abuse of the flag of truce itself. Such abuse is possible in two different forms:—

(1) The force which sends an authorised flag-bearer to the enemy has to take up a corresponding attitude; the ranks which the flag-bearer leaves being obliged to halt and to cease fire. Now it constitutes an abuse of the flag of truce if such attitude corresponding with the sending of a flag of truce is intentionally not taken up by the sending force. The case is even worse when a flag-bearer is intentionally sent on a feigned mission in order that military operations may be carried out by the sender under the protection due from the enemy to the flag-bearer and his party.

(2) The second form of a possible abuse appears in the case in which a white flag is made use of for the purpose of making the enemy believe that a flag of truce is about to be sent, although it is not sent, and of carrying out operations under the protection granted by the enemy to this pretended flag of truce.

It need hardly be specially mentioned that both forms of abuse are gross perfidy and may be met with reprisals, or with punishment of the offenders in case they fall into the hands of the
[Pg 282] enemy. The following case of abuse is related by Sir Sherston Baker in Halleck (II. p. 315):—"On July 12, 1882, while the British fleet was lying off Alexandria, in support of the authority of the Khedive of Egypt, and the rebels under Arabi Pasha were being driven to great straits, a rebel boat, carrying a white flag of truce, was observed approaching H.M.S. *Invincible* from the harbour, whereupon H.M. ships *Temeraire* and *Inflexible*, which had just commenced firing, were ordered to suspend fire. So soon as the firing ceased, the boat, instead of going to the *Invincible*, returned to the harbour. A flag of truce was simultaneously hoisted by the rebels on the Ras-el-Tin fort. These deceits gave the rebels time to leave the works and to retire through the town, abandoning the forts, and withdrawing the whole of their garrison under the flag of truce."

IV

CARTELS

Grotius, III. c. 21, §§ 23-30—Vattel, III. §§ 278-286—Hall, § 193—Lawrence, § 212—Westlake, II. p. 139—Phillimore, III. §§ 111-112—Halleck, II. pp. 326-329—Taylor, § 599—Bluntschli, §§ 679-680—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 525-529—Ullmann, § 185—Bonfils, Nos. 827 and 1280—Despagnet, No. 658—Pradier-Fodéré, VII. Nos. 2832-2837, 2888—Rivier, II. p. 360—Nys, III. pp. 521-525—Calvo, IV. §§ 2419-2429—Longuet, §§ 140, 141—Pillet, p. 359—*Kriegsbrauch*, p. 38—Holland, *War*, No. 100, and *Prize Law*, §§ 32-35—*Land Warfare*, §§ 338-339.

Definition and Purpose of Cartels.

§ 224. Cartels are conventions between belligerents concluded for the purpose of permitting certain kinds of non-hostile intercourse between one another such as would otherwise be prevented by the condition of war. Cartels may be concluded during peace in anticipation of war, or during the time of war, and they may provide for numerous purposes. Thus, communication by
[Pg 283] post, telegraph, telephone, and railway, which would otherwise not take place, can be arranged by cartels, as can also the exchange of prisoners, or a certain treatment of wounded, and the like. Thus, further, intercourse between each other's subjects through trade[439] can, either with or without limits, be agreed upon by belligerents. All rights and duties originating from cartels must be complied with in the same manner and good faith as rights and duties arising from other treaties.

[439] See above, § 217. But arrangements for granting passports, safe-conducts, and safeguards—see above, §§ 218 and 219—are not a matter of cartels.

Cartel Ships.

§ 225. Cartel ships[440] are vessels of belligerents which are commissioned for the carriage by sea of exchanged prisoners from the enemy country to their own country, or for the carriage of official communications to and from the enemy. Custom has sanctioned the following rules regarding these cartel ships for the purpose of securing protection for them on the one hand, and, on the other, their exclusive employment as a means for the exchange of prisoners: Cartel ships must not do any trade or carry any cargo or despatches;[441] they are especially not allowed to carry ammunition or instruments of war, except one gun for firing signals. They have to be furnished with a document from an official belonging to the home State of the prisoners and stationed in the country of the enemy declaring that they are commissioned as cartel ships. They are under the protection of both belligerents and may neither be seized nor appropriated. They enjoy this protection not only when actually carrying exchanged prisoners or official communications, but also on their way home after such carriage and on their way to fetch prisoners or official communications.[442] They lose the protection at once, and may consequently
[Pg 284] be seized and eventually be appropriated, in case they do not comply, either with the general rules regarding cartel ships, or with the special conditions imposed upon them.

[440] See above, § 190.

[441] The *La Rosina* (1800), 2 C. Rob. 372; the *Venus* (1803), 4 C. Rob. 355.

[442] The *Daifje* (1800), 3 C. Rob. 139; the *La Gloire* (1804), 5 C. Rob. 192.

V

CAPITULATIONS

Grotius, III. c. 22, § 9—Vattel, III. §§ 261-264—Hall, § 194—Lawrence, § 215—Westlake, II. p. 81—Phillimore, III. §§ 122-127—Halleck, II. pp. 319-322—Taylor, §§ 514-516—Wheaton, § 405—Moore, VII. § 1160—Bluntschli, §§ 697-699—Heffter, § 142—Lueder in Holtzendorff, IV. p. 527—Ullmann, § 185—Bonfils, Nos. 1259-1267—Despagnet, No. 562—Pradier-Fodéré, VII. Nos. 2917-2926—Rivier, II. pp. 361-362—Nys, III. pp. 514-517—Calvo, IV. §§ 2450-2452—Fiore, III. Nos. 1495-1497, and Code, Nos. 1733-1740—Martens, II. § 127—Longuet, §§ 151-154—Mérignhac, pp. 225-230—Pillet, pp. 361-364—Bordwell, p. 294—Meurer, II. §§ 41-42—Spaight, pp. 249-259—*Kriegsbrauch*, pp. 38-41—Holland, *War*, No. 92—*Land Warfare*, §§ 301-325.

Character and Purpose of Capitulations.

§ 226. Capitulations are conventions between armed forces of belligerents stipulating the terms of surrender of fortresses and other defended places, or of men-of-war, or of troops. It is, therefore, necessary to distinguish between a *simple* and a *stipulated* surrender. If one or more soldiers lay down their arms and surrender, or if a fortress or a man-of-war surrenders without making any terms whatever, there is no capitulation, for capitulation is a convention stipulating the terms of surrender.

Capitulations are military conventions only and exclusively; they must not, therefore, contain arrangements other than those of a local and military character concerning the surrendering forces, places, or ships. If they do contain such arrangements, the latter are not valid, unless they
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are ratified by the political authorities of both belligerents.[443] The surrender of a certain place or force may, of course, be arranged by some convention containing other than military stipulations, but then such surrender would not originate from a capitulation. And just as is their character, so the purpose of capitulations is merely military—namely, the abandonment of a hopeless struggle and resistance which would only involve useless loss of life on the part of a hopelessly beset force. Therefore, whatever may be the indirect consequences of a certain capitulation, its direct consequences have nothing to do with the war at large, but are local only and concern the surrendering force exclusively.

[443] See Phillimore, III. § 123, who discusses the promise of Lord William Bentinck to Genoa, in 1814, regarding its independence, which was disowned by the British Government. Phillimore himself disapproves of the attitude of Great Britain, and so do some foreign publicists, as, for instance, Despagnet (No. 562); but the rule that capitulations are military conventions, and that, therefore, such stipulations are not valid as are not of a local military character, is indubitable.

Contents of Capitulations.

§ 227. If special conditions are not agreed upon in a capitulation, it is concluded under the obvious condition that the surrendering force become prisoners of war, and that all war material and other public property in their possession or within the surrendering place or ship are surrendered in the condition they were at the time when the signature was given to the capitulation. Nothing prevents a force fearing surrender from destroying their provisions, munitions, their arms and other instruments of war which, when falling into the hands of the enemy, would be useful to him. Again, nothing prevents a commander, even after negotiations regarding surrender have begun, from destroying such articles. But when once a capitulation has
[Pg 286]
been signed,[444] such destruction is no longer lawful, and, if carried out, constitutes perfidy which may be punished by the other party as a war crime.

[444] When, during the Russo-Japanese War, in January 1905, General Stoessel, the Commander of Port Arthur, had fortifications blown up and vessels sunk, during negotiations for surrender, but before the capitulation was signed, the Press undeservedly accused him of perfidy. U.S. Naval War Code, article 52, enacted the right principle, that "*after agreeing upon or signing* a capitulation, the capitulator must neither injure nor destroy the vessels, property, or stores in his possession that he is to deliver up, unless the right to do so is expressly reserved to him in the agreement or capitulation."

But special conditions may be agreed upon between the forces concerned, and they must then be faithfully adhered to by both parties. The only rule which article 35 of the Hague Regulations enacts regarding capitulations is that the latter must be in accordance with the demands of military honour, and that, when once settled, they must be scrupulously observed. It is instructive to give some instances of possible conditions:—A condition of a capitulation may be the provision that the convention shall be valid only if within a certain period relief troops are not approaching. Provision may, further, be made that the surrendering forces shall not in every detail be treated like ordinary prisoners of war. Thus it may be stipulated that the officers or even the soldiers shall be released on parole, that officers remaining prisoners shall retain their swords. Whether or not a belligerent will grant or even offer such specially favourable conditions depends upon the importance of the force, place, or ship to be surrendered, and upon the bravery of the surrendering force. There are even instances of capitulations which stipulated that the surrendering forces should leave the place with full honours, carrying their arms and baggage away and joining their own army unmolested by the enemy through whose lines they had to march.[445]

[445] During the Franco-German War the Germans granted these most favourable conditions to the French forces that surrendered Belfort on February 15, 1871.

Form of Capitulations.

§ 228. No rule of International Law exists regarding the form of capitulations, which may,

therefore, be concluded either orally or in writing. But they are usually concluded in writing. Negotiations for surrender, from whichever side they emanate, are usually sent under a flag of
[Pg 287] truce, but a force which is ready to surrender without special conditions can indicate their intention by hoisting a white flag as a signal that they abandon all and every resistance. The question whether the enemy must at once cease firing and accept the surrender, is to be answered in the affirmative, provided he is certain that the white flag was hoisted by order or with the authority of the commander of the respective force. As, however, such hoisting may well have taken place without the authority of the commander and may, therefore, be disowned by the latter, no duty exists for the enemy to cease his attack until he is convinced that the white flag really indicates the intention of the commander to surrender.

Competence to conclude Capitulations.

§ 229. The competence to conclude capitulations is vested in the commanders of the forces opposing each other. Capitulations entered into by unauthorised subordinate officers may, therefore, be disowned by the commander concerned without breach of faith. As regards special conditions of capitulations, it must be particularly noted that the competence of a commander to grant them is limited[446] to those the fulfilment of which depends entirely upon the forces under his command. If he grants conditions against his instructions, his superiors may disown such conditions. And the same is valid if he grants conditions the fulfilment of which depends upon forces other than his own and upon superior officers. The capitulation in El Arish[447] on January 24, 1800, arranged between the French General Kléber and the Turkish Grand Vizier, and approved by the British Admiral, Sir Sidney Smith, presents an illustrative example of this rule. As General Kléber, who was commanding the French army in Egypt, thought that he could not remain in Egypt, he proposed surrender under the condition that his army should be safely
[Pg 288] transported to France, carrying away their arms and baggage. The Grand Vizier accepted these conditions. The British Admiral, Sir Sidney Smith, who approved of these conditions, was the local commander on the coast of Egypt, but was an officer inferior to Lord Keith, the commander of the British Mediterranean fleet. The latter had, on January 8, 1800, received secret orders, dated December 15, 1799, from the British Government instructing him not to agree to any capitulation which stipulated the free return of Kléber's army to France. Sir Sidney Smith did not, however, receive instructions based on these orders until February 22, 1800, and, therefore, when he approved of the capitulation of El Arish in January, was not aware that he acted against orders of the British Government.[448] Lord Keith, after having received the above orders on January 8, 1800, wrote at once to General Kléber, pointing out that he was not allowed to grant the return of the French army to France.[449] On the other hand, the British Government, after having been informed that Sir Sidney Smith had approved of the return of the French army, sent, on March 28, 1800, fresh orders[450] to Lord Keith, received by him at the end of April, advising him, although Sir Sidney Smith had exceeded his competence, to allow the capitulation to be carried out and the French army to be safely transported to France. Meanwhile, however, circumstances had entirely changed. When General Kléber had on March 17, 1800, received Lord Keith's letter of January 8, he addressed a proclamation,[451] in which Lord Keith's letter was embodied, to his troops asking them to prepare themselves for battle and actually began hostilities again on March 20. He was assassinated on June 14, and General Menou took over the
[Pg 289] command, and it was the latter who received, on June 20, 1800, information of the changed attitude of the British Government regarding the capitulation of El Arish. Hostilities having been renewed as far back as March, General Menou refused,[452] on his part, to consent to the carrying out of the capitulation, and continued hostilities.

[446] See U.S. Naval War Code, article 51.

[447] Martens, *R.* VII. p. 1.

[448] Martens, *R.* VII. pp. 8 and 9.

[449] Martens, *R.* VII. p. 10.

[450] Martens, *R.* VII. p. 11.

[451] Martens, *R.* VII. p. 15.

[452] Martens, *R.* VII. p. 16.

It is obvious that Sir Sidney Smith, in approving the capitulation, granted a condition which did not depend entirely upon himself and the forces under him, but which depended upon Lord Keith and his fleet. Lord Keith as well as the British Government could have lawfully disowned this condition. That the British Government did not do so, but was ready to ratify Sir Sidney Smith's approval, was due to the fact that it did not want to disavow the promises of Sir Sidney Smith, who was not at the time aware of the orders of his Government to Lord Keith. On the other hand, the French Generals were not wrong in resuming hostilities after having received Lord Keith's first information, as thereby the capitulation fell to the ground.

Violation of Capitulations.

§ 230. That capitulations must be scrupulously adhered to is an old customary rule, now enacted by article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency if ordered by the belligerent Government concerned, and a war crime if committed without such order. Such violation may be met with reprisals or
[Pg 290] punishment of the offenders as war criminals.

Grotius, III. c. 21, §§ 1-13, c. 22, § 8—Pufendorf, VIII. c. 7, §§ 3-12—Vattel, III. §§ 233-260—Hall, § 192—Lawrence, § 216—Westlake, p. 82—Phillimore, III. §§ 116-121—Halleck, II. pp. 311-319—Moore, VII. § 1162—Taylor, §§ 513 and 516—Wheaton, §§ 400-404—Bluntschli, §§ 688-699—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 531-544—Ullmann, § 186—Bonfils, Nos. 1248-1258—Despagnet, Nos. 563-566—Pradier-Fodéré, VII. Nos. 2889-2918—Rivier, II. pp. 362-368—Nys, III. pp. 518-520—Calvo, IV. §§ 2433-2449—Fiore, III. Nos. 1484-1494, and Code, Nos. 1750-1763—Martens, II. § 127—Longuet, §§ 145-149—Mérignhac, pp. 230-239—Pillet, pp. 364-370—Zorn. pp. 201-206—Bordwell, p. 291—Meurer, II. §§ 43-44—Spaight, pp. 232-248—*Kriegsbrauch*, pp. 41-44—Holland, *War*, Nos. 93-99—*Land Warfare*, §§ 256-300.

Character and Kinds of Armistices.

§ 231. Armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared with peace, and ought not to be called temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals on all points beyond the mere cessation of hostilities. In spite of such cessation the right of visit and search over neutral merchantmen therefore remains intact, as does likewise the right to capture neutral vessels attempting to break a blockade, and the right to seize contraband of war. However, although all armistices are essentially alike in so far as they consist of cessation of hostilities, three different kinds must be distinguished—namely, (1) suspensions of arms, (2) general armistices, and (3) partial armistices.[453] It must be emphasised that the Hague Regulations deal
[Pg 291]
with armistices in articles 36 to 41 very incompletely, so that the gaps need filling up from old customary rules.

[453] Although, as will be seen from the following sections, this distinction is absolutely necessary, it is not made by several publicists. Holland, *War*, No. 93, even says: "There is no difference of meaning, according to British usage at least, between a 'truce,' an 'armistice,' and a 'suspension of arms.'" *Land Warfare*, § 256—see in especial note (*a*)—accepts the distinction as indispensable.

Suspensions of Arms.

§ 232. Suspensions of arms, in contradistinction to armistices in the narrower sense of the term, are such cessations of hostilities as are agreed upon between large or small military or naval forces for a very short time and regarding momentary and local military purposes only. Such purposes may be—collection of the wounded; burial of the dead; negotiation regarding surrender or evacuation of a defended place, or regarding an armistice in the narrower sense of the term; but may also be the creation of a possibility for a commander to ask for and receive instructions from a superior authority,[454] and the like. Suspensions of arms have nothing to do with political purposes, or with the war generally, since they are of momentary and local importance only. They concern exclusively those forces and that spot which are the object of the suspension of arms. The Hague Regulations do not specially mention suspensions of arms, since article 37 speaks of local armistices only, apparently comprising suspensions of arms among local armistices.

[454] An instructive example of a suspension of arms for such purposes is furnished by the Convention between the German forces besieging Belfort and the French forces holding this fortress during the Franco-German War, signed on February 13, 1871; see Martens, *N.R.G.* XIX. p. 646.

General Armistices.

§ 233. A general armistice is such a cessation of hostilities as, in contradistinction to suspensions of arms with their momentary and local military purposes, is agreed upon between belligerents for the whole of their forces and the whole region of war. General armistices are always conventions of vital political importance affecting the whole of the war. They are as a rule, although not necessarily, concluded for a political purpose. It may be that negotiations of peace
[Pg 292]
have ripened so far that the end of the war is in sight and that, therefore, military operations appear superfluous; or that the forces of either belligerent are exhausted and need rest; or that the belligerents have to face domestic difficulties, the settlement of which is more pressing than the continuation of the war; or any other political purpose. Thus article 2 of the general armistice agreed upon at the end of the Franco-German War on January 28, 1871,[455] expressly declared the purpose of the armistice to be the creation of the possibility for the French Government to convoke a Parliamentary Assembly which could determine whether or not the war was to be continued or what conditions of peace should be accepted.

[455] Martens, *N.R.G.* XIX. p. 626.

It is of importance to note that, for particular reasons, small parts of the belligerent forces and small parts of the theatre of war may be specially excluded without detracting from the general character of the armistice, provided the bulk of the forces and the greater part of the region of war are included. Thus, article 1 of the above-mentioned general armistice at the end of the Franco-German war specially excluded all military operations in the Départements du Doubs, du Jura, de la Côte d'Or, and likewise the siege of Belfort. It should also be mentioned that in the practice of belligerents the terms "suspension of arms" and "general armistice" are sometimes not sufficiently distinguished, but are interchangeable. Thus, for instance, the above-mentioned general armistice between France and Germany is entitled "Convention entre l'Allemagne et la France pour la suspension des hostilités, ..." whereas the different articles of the Convention always speak correctly of an armistice, and whereas, further, an annexe to the Convention signed on January 29 is entitled[456] "Annexe à la Convention d'armistice."

[Pg 293] [456] Martens, *N.R.G.* XIX. p. 636.

Partial Armistices.

§ 234. Partial armistices are agreements for cessations of hostilities which are not concluded by belligerents for their whole forces and the whole region of war, but do not merely serve, like suspensions of arms, momentary and local military purposes. They are armistices concluded by belligerents for a considerable part of their forces and front; they are always of political importance affecting the war in general; and they are very often, although they need not be, agreed upon for political purposes. Article 37 of the Hague Regulations apparently includes partial armistices together with suspensions of arms under the term "local" armistices. A partial armistice may be concluded for the military or the naval forces only; for cessation of hostilities in the colonies only; for cessation of hostilities between two of the belligerents in case more than two are parties to the war, and the like. But it is always a condition that a considerable part of the forces and region of war must be included, and that the purpose is not only a momentary one.

Competence to conclude Armistices.

§ 235. As regards the competence to conclude armistices, a distinction is necessary between suspensions of arms and general and partial armistices.

(1) Since the character and purpose of suspensions of arms are military, local, and momentary only, every commander is supposed to be competent to agree upon a suspension of arms, and no ratification on the part of superior officers or other authorities is required. Even commanders of the smallest opposing detachments may arrange a suspension of arms.

(2) On the other hand, since general armistices are of vital political importance, only the belligerent Governments themselves or their commanders-in-chief are competent to conclude them, and ratification, whether specially stipulated or not, is necessary. Should a commander-in-
[Pg 294] chief conclude a general armistice which would not find ratification, hostilities may at once be recommenced without breach of faith, it being a matter of common knowledge that a commander-in-chief is not authorised to agree upon exclusion of ratification, unless he received special powers thereto.

(3) Partial armistices may be concluded by the commanders-in-chief of the respective forces, and ratification is not necessary, unless specially stipulated; the commanders being responsible to their own Governments in case they agree upon a partial armistice without being specially authorised thereto.

Form of Armistices.

§ 236. No legal rule exists regarding the form of armistices, which may therefore be concluded either orally or in writing. However, the importance of general as well as partial armistices makes it advisable to conclude them by signing written documents containing all items which have been agreed upon. No instance is known of a general or partial armistice of modern times concluded otherwise than in writing. But suspensions of arms are often only orally concluded.

Contents of Armistices.

§ 237. That hostilities must cease is the obvious content of all kinds of armistices. Usually, although not at all necessarily, the parties embody special conditions in the agreement instituting an armistice. If and so far as this has not been done, the import of armistices is for some parts much controverted. Everybody agrees that belligerents during an armistice may, outside the line where the forces face each other, do everything and anything they like regarding defence and preparation of offence; for instance, they may manufacture and import munitions and guns, drill recruits, build fortresses, concentrate or withdraw troops. But no unanimity exists regarding such acts as must be left undone or may be done within the very line where the belligerent forces
[Pg 295] face each other. The majority of writers, led by Vattel (III. § 245), maintain that in the absence of special stipulations it is essentially implied in an armistice that within such line no alteration of the *status quo* shall take place which the other party, were it not for the armistice, could by application of force, for instance by a cannonade or by some other means, prevent from taking place. These writers consider it a breach of faith for a belligerent to make such alterations under the protection of the armistice. On the other hand, a small minority of writers, but led by Grotius (III. c. 21, § 7) and Pufendorf (VIII. 7, § 7), assert that cessation of hostilities and of further advance only are essentially implied in an armistice; all other acts, such as strengthening of positions by concentration of more troops on the spot, erection and strengthening of defences, repairing of breaches of besieged fortresses, withdrawing of troops, making of fresh batteries on the part of besiegers without advancing, and the like, being allowed. As the Hague Regulations do not mention the matter, the controversy still remains unsettled. I believe the opinion of the minority to be correct, since an armistice does not mean anything else than a cessation of actual hostilities, and it is for the parties who agree upon an armistice to stipulate such special conditions as they think necessary or convenient. This applies particularly to the other controversial questions as to revictualling of besieged places and as to intercourse, commercial and otherwise, of the inhabitants of the region where actual fighting was going on before the armistice. As regards revictualling, it has been correctly maintained that, if it were not allowed, the position of the besieged forces would thereby be weakened by the action of the armistice. But I cannot see why this should be an argument to hold revictualling permissible. The principle
[Pg 296] *vigilantibus jura sunt scripta* applies to armistices as well as to all other legal transactions. It is

for the parties to prepare such arrangements as really suit their needs and wants. Thus, during the Franco-German War an armistice for twenty-five days proposed in November 1870 fell to the ground on the Germans refusing to grant the revictualling of Paris.[457] It seems to be the intention of the Hague Regulations that the parties should always stipulate those special conditions which they need. Article 39 pronounces this intention regarding intercourse, commercial and otherwise, during armistices, by the following words:—"It is for the contracting parties to settle in the terms of the armistice what communications may be held within the theatre of war with the population and with each other."

[457] See Pradier-Fodéré, VII. No. 2908, where the question of revictualling during an armistice is discussed at some length, and the opinions of many publicists from Grotius to our own days are quoted.

It must be specially mentioned that for the purpose of preventing the outbreak of hostilities during an armistice it is usual to agree upon so-called lines of demarcation[458]—that is, a small neutral zone between the forces facing each other which must not be entered by members of either force. But such lines of demarcation do not exist, if they are not specially stipulated by the armistice concerned.

[458] See Pradier-Fodéré, VII. No. 2901.

Commencement of Armistices.

§ 238. In case the contrary is not stipulated, an armistice commences the very moment the agreement upon it is complete. But often the parties stipulate in the agreement the time from which the armistice shall begin. If this is done in so detailed a manner that the very hour of the commencement is mentioned, no cause for controversy is given. But sometimes the parties fix only the date by stipulating that the armistice shall last from one certain day to another, *e.g.* from June 15 to July 15. In such case the actual commencement is controversial. Most publicists
[Pg 297] maintain that in such case the armistice begins at 12 o'clock of the night between the 14th and the 15th of June, but Grotius (III. c. 21, § 4) maintains that it begins at 12 o'clock of the night between the 15th and the 16th of June.[459] Therefore, to avoid difficulties, agreements concerning armistices ought always to stipulate whether the first day is to be included in the armistice. Be that as it may, when the forces included in an armistice are dispersed over a very large area, the parties very often stipulate different dates of commencement for the different parts of the front, because it is not possible to announce the armistice at once to all the forces included. Thus, for instance, article 1 of the general armistice at the end of the Franco-German War[460] stipulated its immediate commencement for the forces in and around Paris, but that with regard to the other forces its commencement should be delayed three days. Article 38 of the Hague Regulations enacts that an armistice must be notified officially and in good time to the competent authorities and the troops, and that hostilities are suspended immediately after the ratification or at a fixed date, as the case may be.

[459] See Pradier-Fodéré, VII. No. 2897. The controversy occurs again with regard to the end of an armistice; see below, § 240.

[460] Martens, *N.R.G.* XIX. p. 626.

It sometimes happens that hostilities are carried on after the commencement of an armistice by forces which did not know of its commencement. In such cases the *status quo* at the date of the commencement of armistice has to be re-established so far as possible, prisoners made and enemy vessels seized being liberated, capitulations annulled, places occupied evacuated, and the like; but the parties may, of course, stipulate the contrary.

Violation of Armistices.

§ 239. Any violation of armistices is prohibited, and, if ordered by the Governments concerned,
[Pg 298] constitutes an international delinquency. In case an armistice is violated by members of the forces on their own account, the individuals concerned may be punished by the other party in case they fall into its hands. Be that as it may, the question must be answered, what general attitude is to be taken by one party, if the other violates the armistice? No unanimity regarding this point exists among the writers on International Law, many[461] asserting that in case of violation the other party may at once, without giving notice, re-open hostilities; others[462] maintaining that such party may not do this, but has only the right to denounce the armistice. The Hague Regulations endeavour to settle the controversy, article 40 enacting that any serious violation of an armistice by one of the parties gives the other the right to denounce it, and even, in case of urgency, to recommence hostilities at once. Three rules may be formulated from this—(1) violations which are not serious do not even give the right to denounce an armistice; (2) serious violations do as a rule empower the other party to denounce only the armistice, but not to recommence hostilities at once without notice; (3) only in case of urgency is a party justified in recommencing hostilities without notice, when the other party has broken an armistice. But since the terms "serious violation" and "urgency" lack precise definition, it is practically left to the discretion of the injured party.

It must be specially observed that violation of an armistice committed by private individuals acting on their own initiative is to be distinguished from violation by members of the armed
[Pg 299] forces. In the former case the injured party has, according to article 41 of the Hague Regulations, only the right of demanding punishment of the offenders, and, if necessary, indemnity for losses sustained.

[461] See, for instance, Grotius, III. c. 21, § 11; Pufendorf, VIII. c. 7, § 11; Vattel, III. § 242; Phillimore, II. § 121; Bluntschli, § 695; Fiore, III. No. 1494.

[462] See, for instance, Calvo, IV. § 2436; Despagnet, No. 566; Pradier-Fodéré, VII. No. 2913.

End of Armistices.

§ 240. In case an armistice has been concluded for an indefinite period, the parties having made no stipulations regarding notice to recommence hostilities, notice may be given at any time, and hostilities recommenced at once after notification. In most cases, however, armistices are agreed upon for a definite period, and then they expire with such period without special notice, unless notification has been expressly stipulated. If, in case of an armistice for a definite period, the exact hour of the termination has not been agreed upon, but only the date, the armistice terminates at twelve o'clock midnight of such date. In case an armistice has been arranged to last from one certain day to another, *e.g.* from June 15 to July 15, it is again[463] controversial whether July 15 is excluded or included. An armistice may, lastly, be concluded under a resolutive condition, in which case the occurrence of the condition brings the armistice to an end.

[463] See above, § 238.

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CHAPTER VI

MEANS OF SECURING LEGITIMATE WARFARE

I

ON MEANS IN GENERAL OF SECURING LEGITIMATE WARFARE

Bonfils, Nos. 1014-1017—Spaight, p. 460—*Land Warfare*, §§ 435-438.

Legitimate and Illegitimate Warfare.

§ 241. Since war is not a condition of anarchy and lawlessness, International Law requires that belligerents shall comply with its rules in carrying on their military and naval operations. So long and in so far as belligerents do this, their warfare is legitimate; if they do not comply with the rules, their warfare is illegitimate. Now, illegitimate acts and omissions can be committed by belligerent Governments themselves, by the commanders or members of their forces, and by their subjects not belonging to the forces. Experience teaches that, on the whole, omissions and the committal of illegitimate acts on the part of individual soldiers are unavoidable during war, since the passions which are aroused by and during war will always carry away some individuals. But belligerents bear a vicarious responsibility for internationally illegal acts of their soldiers, which turns into original responsibility if they refuse to repair the wrong done by punishing the offenders and, if necessary, indemnifying the sufferers.[464] Cases in which belligerent
[Pg 301] Governments themselves commit illegitimate acts, as well as cases in which they refuse to punish their soldiers for illegitimate acts constitute international delinquencies.[465] Now, if in time of peace an international delinquency is committed, the offended State can, if the worst comes to the worst, make war against the offender to compel adequate reparation.[466] But if an international delinquency is committed during warfare itself, no means whatever exist of compelling reparation.

[464] See above, vol. I. §§ 149-150.

[465] See above, vol. I. § 151.

[466] See above, vol. I. § 156.

How Legitimate Warfare is on the whole secured.

§ 242. Yet legitimate warfare is, on the whole at any rate, secured through several means recognised by International Law. These means of securing legitimate warfare may be divided into three classes. The first class comprises measures of self-help:—reprisals; punishment of war crimes committed by enemy soldiers and other enemy subjects; the taking of hostages. The second class comprises:—complaints lodged with the enemy; complaints lodged with neutral States; good offices, mediation, and intervention on the part of neutral States. And there is, thirdly, the fact that, according to article 3 of Convention IV. of the Second Peace Conference, belligerents are responsible for all acts committed by persons forming part of their forces, and are liable to make compensation, if the case demands it, for any violation of the Hague Regulations. These means, as I have said, do on the whole secure the legitimacy of warfare, because it is to the interest of either belligerent to prevent the enemy from getting a justifiable opportunity of making use of them. On the other hand, isolated illegitimate acts of individual enemy soldiers will always occur; but they will in many cases meet with punishment either by one
[Pg 302] party to the war or the other. As regards hostile acts of private enemy individuals not belonging to the armed forces, belligerents have a right[467] to consider and punish them severely as acts of illegitimate warfare.

[467] See below, § 254.

II

Land Warfare, §§ 439-440.

Complaints lodged with the Enemy.

§ 243. Commanders of forces engaged in hostilities frequently lodge complaints with each other regarding single acts of illegitimate warfare committed by members of their forces, such as abuses of the flag of truce, violations of such flag or of the Geneva Convention, and the like. The complaint is sent to the enemy under the protection of a flag of truce, and the interest which every commander takes in the legitimate behaviour of his troops will always make him attend to complaints and punish the offenders, provided the complaints concerned are found to be justified. Very often, however, it is impossible to verify the statements in the complaint, and then certain assertions by one party, and their denial by the other, face each other without there being any way of solving the difficulty. It also often happens during war that the belligerent Governments lodge with each other mutual complaints of illegitimate acts and omissions. Since diplomatic intercourse is broken off during war, such complaints are either sent to the enemy under the protection of a flag of truce or through a neutral[468] State which lends its good offices.
[Pg 303] But here too indignant assertion and emphatic denial frequently face each other without there being a way of solving the conflict.

[468] Thus, in October 1904, during the Russo-Japanese War, Japan sent a complaint concerning the alleged use of Chinese clothing on the part of Russian troops to the Russian Government, through the intermediary of the United States of America; see Takahashi, pp. 174-178.

Complaints lodged with Neutrals.

§ 244. If certain grave illegitimate acts or omissions of warfare occur, belligerents frequently lodge complaints with neutral States, either asking their good offices, mediation, or intervention to make the enemy comply with the laws of war, or simply drawing their attention to the facts. Thus, at the beginning of the Franco-German War, France lodged a complaint with Great Britain and asked her intervention on account of the intended creation of a volunteer fleet on the part of Germany, which France considered a violation of the Declaration of Paris.[469] Conversely, in January 1871, Germany, in a circular addressed to her diplomatic envoys abroad, and to be communicated to the respective neutral Governments, complained of twenty-one cases in which the French forces had, deliberately and intentionally it was alleged, fired on bearers of a flag of truce. Again, in November 1911, and in February 1912, during the Turco-Italian War, Turkey lodged a complaint with the Powers on account of the execution of Arabs in Tripoli as war criminals, and on account of the bombardment of Turkish war vessels in the harbour of Beirut.[470]

[469] See above, § 84.

[470] See above, § 213.

Good Offices and Mediation.

§ 245. Complaints lodged with neutral States may have the effect of one or more of the latter lending their offices or their mediation to the belligerents for the purpose of settling such conflict as arose out of the alleged illegitimate acts or omissions of warfare, thus preventing them from resorting to reprisals. Such good offices and mediation do not differ from those which settle a difference between States in time of peace and which have been discussed above in §§ 7-11; they are friendly acts in contradistinction to intervention, which is dictatorial interference for the
[Pg 304] purpose of making the respective belligerents comply with the laws of war.

Intervention on the part of Neutrals.

§ 246. There can be no doubt that neutral States, whether a complaint has been lodged with them or not, may either singly, or jointly and collectively, exercise intervention in cases of illegitimate acts or omissions of warfare being committed by belligerent Governments, or committed by members of belligerent forces if the Governments concerned do not punish the offenders. It will be remembered that it has been stated above in Vol. I. § 135, No. 4, that other States have a right to intervene in case a State violates in time of peace or war those principles of the Law of Nations which are universally recognised. There is not the slightest doubt that such principles of International Law are endangered in case a belligerent Government commits acts of illegitimate warfare or does not punish the offenders in case such acts are committed by members of its armed forces. But apart from this, the Hague Regulations make illegitimate acts of warfare on land now appear as by right the affair of all signatory States to the Convention, and therefore, in case of war between signatory States, the neutral signatory States certainly would have a right of intervention if acts of warfare were committed which are illegitimate according to the Hague Regulations. It must, however, be specially observed that any such intervention, if it ever occurred, would have nothing to do with the war in general and would not make the intervening State a party to the war, but would concern only the international delinquency
[Pg 305] committed by the one belligerent through acts of illegitimate warfare.

III

REPRISALS

Vattel, III. p. 142—Hall, § 135—Westlake, II. pp. 112-115, and *Chapters*, pp. 253-258—Taylor, §§ 487 and 507—

Wharton, III. § 348B—Moore, VII. § 1114—Bluntschli, §§ 567, 580, 654, 685—Lueder in Holtzendorff, IV. p. 392—Pradier-Fodéré, VIII. Nos. 3214-3221—Bonfils, Nos. 1018-1026—Despagnet, No. 543—Rivier, II. pp. 298-299—Calvo, IV. §§ 2041-2043—Martens, II. § 121—Mérignhac, pp. 210-218—Holland, *War*, Nos. 119-120—Bordwell, p. 305—Spaight, pp. 462-465—*Land Warfare*, §§ 452-460—Halleck in *A.J.* VI. (1912), pp. 107-118.

Reprisals between Belligerents in contradistinction to Reprisals in time of Peace.

§ 247. Whereas reprisals in time of peace are to be distinguished from retorsion and are injurious acts committed for the purpose of compelling a State to consent to a satisfactory settlement of a difference created through an international delinquency,[471] reprisals between belligerents are retaliation of an illegitimate act of warfare, whether constituting an international delinquency or not, for the purpose of making the enemy comply in future with the rules of legitimate warfare. Reprisals between belligerents are terrible means, because they are in most cases directed against innocent enemy individuals, who must suffer for real or alleged offences for which they are not responsible. But reprisals cannot be dispensed with, because without them illegitimate acts of warfare would be innumerable. As matters stand, every belligerent and every member of his forces knows for certain that reprisals are to be expected in case they violate the rules of legitimate warfare. And when nevertheless an illegal act occurs and is promptly met with reprisals as a retaliation, human nature would not be what it is if such retaliation did not act as a deterrent against a repetition of illegitimate acts.

[471] See above, §§ 33 and 42.

Reprisals admissible for every Illegitimate Act of Warfare.

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§ 248. Whereas reprisals in time of peace are admissible for international delinquencies only, reprisals between belligerents are at once admissible for every and any act of illegitimate warfare, whether the act constitutes an international delinquency or not. It is for the consideration of the injured belligerent as to whether he will at once resort to reprisals, or, before doing so, will lodge complaints with the enemy or with neutral States. Practically, however, a belligerent will rarely resort at once to reprisals, provided the violation of the rules of legitimate warfare is not very grave and the safety of his troops does not require prompt and drastic measures. Thus, the Germans during the Franco-German War frequently by way of reprisal, bombarded and fired undefended open villages where their soldiers were treacherously killed by enemy individuals in ambush who did not belong to the armed forces. And Lord Roberts, during the South African War, ordered[472] by way of reprisal the destruction of houses and farms in the vicinity of the place where damage was done to the lines of communication.[473]

[472] See section 4 of the Proclamation of June 19, 1900 (Martens, *N.R.G.* 2nd Ser., XXXII. p. 147), and Beak, *The Aftermath of War* (1906), p. 11.

[473] That prisoners of war may be made the objects of reprisals for acts of illegitimate warfare committed by the enemy, there is hardly any doubt; see Beinhauer, *Die Kriegsgefangenschaft* (1910), p. 74.

Danger of Arbitrariness in Reprisals.

§ 249. The right to exercise reprisals carries with it great danger of arbitrariness, for often the alleged facts which make belligerents resort to reprisals are not sufficiently verified, or the rules of war which they consider the enemy has violated are sometimes not generally recognised, or the act of reprisal performed is often excessive compared with the precedent act of illegitimate warfare. Three cases may illustrate this danger.

(1) In 1782 Joshua Huddy, a captain in the army of the American insurgents, was taken prisoner by loyalists and handed over to a Captain Lippencott for the ostensible purpose of being

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exchanged, but was arbitrarily hanged. The commander of the British troops had Lippencott arrested, and ordered him to be tried for murder. Lippencott was, however, acquitted by the court-martial, as there was evidence to show that his command to execute Huddy was in accordance with orders of a Board which he was bound to obey. Thereupon some British officers who were prisoners of war in the hands of the Americans were directed to cast lots to determine who should be executed by way of reprisal for the execution of Huddy. The lot fell on Captain Asgill, a young officer only nineteen years old, and he would have been executed but for the mediation of the Queen of France, who saved his life.[474]

(2) "The British Government, having sent to England, early in 1813, to be tried for treason, twenty-three Irishmen, naturalised in the United States, who had been captured on vessels of the United States, Congress authorised the President to retaliate. Under this act, General Dearborn placed in close confinement twenty-three prisoners taken at Fort George. General Prevost, under express directions of Lord Bathurst, ordered the close imprisonment of double the number of commissioned and non-commissioned United States' officers. This was followed by a threat of 'unmitigated severity against the American citizens and villages' in case the system of retaliation was pursued. Mr. Madison having retorted by putting in confinement a similar number of British officers taken by the United States, General Prevost immediately retorted by subjecting to the same discipline all his prisoners whatsoever.... A better temper, however, soon came over the British Government, by whom this system had been instituted. A party of United States' officers,

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who were prisoners of war in England, were released on parole, with instructions to state to the President that the twenty-three prisoners who had been charged with treason in England had not been tried, but remained on the usual basis of prisoners of war. This led to the dismissal on parole of all the officers of both sides."[475]

(3) During the Franco-German War the French had captured forty German merchantmen, and made their captains and crews prisoners of war. Count Bismarck, who considered it against

International Law to detain these men as prisoners, demanded their liberation, and when the French refused this, ordered by way of reprisal forty French private individuals of local importance to be arrested and to be sent as prisoners of war to Bremen, where they were kept until the end of the war. Count Bismarck was decidedly wrong,[476] since France had, as the law then stood, in no way committed an illegal act by detaining the German crews as prisoners of war.[477]

[474] See the case reported in Martens, *Causes Célèbres*, III, pp. 311-321. See also Phillimore, III. § 105.

[475] See Wharton, III. § 348B.

[476] That Bismarck's standpoint was wrong has been pointed out above in § 201. Some German writers, however, take his part; see, for instance, Lueder in Holtzendorff, IV. p. 479, note 6. As regards the present law on the subject, see above, §§ 85 and 201.

[477] The case is one of reprisals, and has nothing to do with the taking of hostages; see below, § 258.

Proposed Restriction of Reprisals.

§ 250. The Hague Regulations do not mention reprisals at all because the Brussels Conference of 1874, which accepted the unratified Brussels Declaration, had struck out several sections of the Russian draft code regarding reprisals. These original sections[478] (69-71) stipulated—(1) that reprisals should be admitted only in extreme cases of absolutely certain violations of the rules of legitimate warfare; (2) that the acts performed by way of reprisal must not be excessive, but in proportion to the respective violation; (3) that reprisals should be ordered by commanders-in-chief only. Articles 85 and 86 of the Manual of the Laws of War, adopted by the Institute of
[Pg 309] International Law,[479] propose the following rules:—(1) Reprisals are to be prohibited in case reparation is given for the damage done by an illegal act; (2) in grave cases, in which reprisals are an imperative necessity, they must never exceed the degree of the violation committed by the enemy; (3) they may only be resorted to with the authorisation of the commander-in-chief; (4) they must in every case respect the laws of humanity and of morality. In face of the arbitrariness with which, according to the present state of International Law, reprisals may be exercised, it cannot be denied that an agreement upon some precise rules regarding reprisals is an imperative necessity.

[478] See Martens, *N.R.G.* 2nd Ser. IV. pp. 14, 139, 207.

[479] See *Annuaire*, V. p. 174.

IV

PUNISHMENT OF WAR CRIMES

Hall, § 135—Bluntschli, §§ 627-643A—Spaight, p. 462—Holland, *War*, Nos. 117-118—Ariga, §§ 96-99—Takahashi, pp. 166-184—Landa in *R.I.* X. (1878), pp. 182-184—*Land Warfare*, §§ 441-451.

Conception of War Crimes.

§ 251. In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as members of armed forces who have done no wrong, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders. It must, however, be emphasised that the term war crime is used, not in the moral sense of the term crime, but only in a technical legal sense, on account of the fact that perpetrators of these acts may be punished by the enemy. For, although among the acts called war crimes are many which are crimes in the moral sense of the term, such, for instance, as the abuse of a flag of truce or assassination of enemy soldiers; there are others which may be highly
[Pg 310] praiseworthy and patriotic acts, such as taking part in a levy *en masse* on territory occupied by the enemy. But because every belligerent may, and actually must, in the interest of his own safety punish these acts, they are termed war crimes, whatever may be the motive, the purpose, and the moral character of the respective act.[480]

[480] See above, § 57.

Different kinds of War Crimes.

§ 252. In spite of the uniform designation of these acts as war crimes, four different kinds of war crimes must be distinguished on account of the essentially different character of the acts. Violations of recognised rules regarding warfare committed by members of the armed forces belong to the first kind; all hostilities in arms committed by individuals who are not members of the enemy armed forces constitute the second kind; espionage and war treason belong to the third; and all marauding acts belong to the fourth kind.

Violations of Rules regarding Warfare.

§ 253. Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations *by order* of their Government, they are not war criminals and may not be punished by the enemy; the latter may, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.

The following are the more important violations that may occur:

(1) Making use of poisoned or otherwise forbidden arms and ammunition.

(2) Killing or wounding soldiers disabled by sickness or wounds, or who have laid down arms and surrendered.

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(3) Assassination, and hiring of assassins.

(4) Treacherous request for quarter, or treacherous feigning of sickness and wounds.

(5) Ill-treatment of prisoners of war, of the wounded and sick. Appropriation of such of their money and valuables as are not public property.

(6) Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property, and especially pillaging. Compulsion of the population of occupied territory to furnish information about the army of the other belligerent or about his means of defence.

(7) Disgraceful treatment of dead bodies on battlefields. Appropriation of such money and other valuables found upon dead bodies as are not public property, nor arms, ammunition, and the like.

(8) Appropriation and destruction of property belonging to museums, hospitals, churches, schools, and the like.

(9) Assault, siege, and bombardment of undefended open towns and other habitations. Unjustified bombardment of undefended places on the part of naval forces.

(10) Unnecessary bombardment of historical monuments, and of such hospitals and buildings devoted to religion, art, science, and charity, as are indicated by particular signs notified to the besiegers bombarding a defended town.

(11) Violations of the Geneva Convention.

(12) Attack on or sinking of enemy vessels which have hauled down their flags as a sign of surrender. Attack on enemy merchantmen without previous request to submit to visit.

(13) Attack or seizure of hospital ships, and all other violations of the Hague Convention for the

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adaptation to naval warfare of the principles of the Geneva Convention.

(14) Unjustified destruction of enemy prizes.[481]

(15) Use of enemy uniforms and the like during battle, use of the enemy flag during attack by a belligerent vessel.

(16) Violation of enemy individuals furnished with passports or safe-conducts, violation of safeguards.

(17) Violation of bearers of flags of truce.

(18) Abuse of the protection granted to flags of truce.

(19) Violation of cartels, capitulations, and armistices.

(20) Breach of parole.

[481] Unjustified destruction of neutral prizes—see below, § 431—is not a war crime, but is nevertheless an international delinquency, if ordered by the belligerent government.

Hostilities in Arms by Private Individuals.

§ 254. Since International Law is a law between States only and exclusively, no rules of International Law can exist which prohibit private individuals from taking up arms and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileges of members of armed forces, and the enemy has according to a customary rule of International Law the right to consider and punish such individuals as war criminals. Hostilities in arms committed by private individuals are not war crimes because they really are violations of recognised rules regarding warfare, but because the enemy has the right to consider and punish them as acts of illegitimate warfare. The conflict between praiseworthy patriotism on the part of such individuals and the safety of the enemy troops does not allow of any solution. It would be unreasonable for International Law to impose upon belligerents the duty to forbid the taking up of arms by their private subjects, because such action may occasionally be of the greatest value to a belligerent, especially for the purpose of freeing a country from the enemy

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who has militarily occupied it. Nevertheless the safety of his troops compels the enemy to consider and punish such hostilities as acts of illegitimate warfare, and International Law gives him a right to do so.

It is usual to make a distinction between hostilities in arms on the part of private individuals against an invading or retiring enemy on the one hand, and, on the other, hostilities in arms committed on the part of the inhabitants against an enemy occupying a conquered territory. In the latter case one speaks of war rebellion, whether inhabitants take up arms singly or rise in a so-called levy *en masse*. Articles 1 and 2 of the Hague Regulations make the greatest possible concessions regarding hostilities committed by irregulars.[482] Beyond the limits of these concessions belligerents will never be able to go without the greatest danger to their troops.

[482] See above, §§ 80 and 81.

It must be particularly noted that merchantmen of belligerents, which attack enemy vessels without previously having been attacked by them, commit a war crime,[483] and that the captains, officers, and members of the crews may, therefore, be punished as war criminals to the same extent as private individuals who commit hostilities in land warfare.

[483] See above, §§ 85 and 181.

Espionage and War Treason.

§ 255. Article 24 of the Hague Regulations now enacts the old customary rule that a belligerent has a right to employ all methods necessary to obtain information, and these methods include espionage and treason. But this right stands face to face with the right to consider and punish as war criminals enemy individuals, whether soldiers or not, committing acts of espionage or treason. There is an irreconcilable conflict between the necessity of obtaining information on the one hand, and self-preservation on the other; and accordingly espionage and treason, as has been
[Pg 314] explained above in § 159, bear a twofold character. On the one hand, International Law gives a right to belligerents to make use of espionage and treason. On the other hand, the same law gives a right to belligerents to consider espionage and treason, committed by enemy soldiers or enemy private individuals within their lines, as acts of illegitimate warfare, and consequently punishable.

Espionage has already been treated above in §§ 159-161. War treason may be committed in different ways. The following are the chief cases of war treason that may occur:—

(1) Information of any kind given to the enemy.

(2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like, to the enemy.

(3) Any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door of a defended habitation, by repairing a destroyed bridge, or otherwise.

(4) Attempt to induce soldiers to desert, to surrender, to serve as spies, and the like, and negotiating desertion, surrender, and espionage offered by soldiers.

(5) Attempt to bribe soldiers or officials in the interest of the enemy, and negotiating such bribe.

(6) Liberation of enemy prisoners of war.

(7) Conspiracy against the armed forces or against individual officers and members of them.

(8) Wrecking of military trains, destruction of the lines of communication or of the telegraphs or telephones in the interest of the enemy, and the destruction of any war material for the same purpose.

(9) Circulation of enemy proclamations dangerous to the interests of the belligerent concerned.

(10) Intentional false guidance of troops by a hired guide or by one who offered his services voluntarily.

[Pg 315] (11) Rendering courier or similar services to the enemy.

It must be specially observed that enemy soldiers—in contradistinction to private enemy individuals—may only be punished for war treason when they have committed the act of treason during their stay within a belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent into the rear of the enemy for the purpose of destroying a bridge, they may not, when caught by the enemy, be punished for war treason, because their act was one of legitimate warfare. But if they exchange their uniforms for plain clothes and thereby appear as members of the peaceful private population, they may be punished for war treason. A remarkable case of this kind occurred in the summer of 1904, during the Russo-Japanese War. Two Japanese disguised in Chinese clothes were caught in the attempt to destroy, with the aid of dynamite, a railway bridge in Manchuria, in the rear of the Russian forces. Brought before a court-martial, they confessed themselves to be Shozo Jakoga, forty-three years of age, a Major on the Japanese General Staff, and Teisuki Oki, thirty-one years of age, a Captain on the Japanese General Staff. They were convicted, and condemned to be hanged, but the mode of punishment was changed and they were shot. All the newspapers which mentioned this case reported it as a case of espionage, but it is in fact one of war treason. Although the two officers were in disguise, their conviction for espionage was impossible according to article 29 of the Hague Regulations, provided, of course, they were court-martialed for no other act than the attempt to destroy a bridge.

It must be particularly noted that there are many acts of inhabitants which a belligerent may forbid and punish in the interests of order and the safety of his army, although these acts do not fall under the category of war treason, and are not therefore punished as war crimes. To this
[Pg 316] class belong all acts which violate the orders legitimately decreed by an occupant of enemy territory.[484]

[484] See *Land Warfare*, § 446.

Marauding.

§ 256. Marauders are individuals roving either singly or collectively in bands over battlefields, or following advancing or retreating forces in quest of booty. They have nothing to do with warfare in the strict sense of the term, but they are an unavoidable accessory to warfare and frequently consist of soldiers who have left their corps. Their acts are considered acts of illegitimate warfare, and their punishment takes place in the interest of the safety of either belligerent.

Mode of Punishment of War Crimes.

§ 257. All war crimes may be punished with death, but belligerents may, of course, inflict a more lenient punishment, or commute a sentence of death into a more lenient penalty. If this be

done and imprisonment take the place of capital punishment, the question arises whether such convicts must be released at the end of the war, although their term of imprisonment has not yet expired. Some publicists[485] answer this question in the affirmative, maintaining that it could never be lawful to inflict a penalty extending beyond the duration of the war. But I believe that the question has to be answered in the negative. If a belligerent has a right to pronounce a sentence of capital punishment, it is obvious that he may select a more lenient penalty and carry the latter out even beyond the duration of the war. And it would in no wise be in the interest of humanity to deny this right, for otherwise belligerents would have always to pronounce and carry out sentence of capital punishment in the interest of self-preservation.

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[485] See, for instance, Hall, § 135, p. 432.

V

TAKING OF HOSTAGES

Hall, §§ 135 and 156—Taylor, § 525—Bluntschli, § 600—Lueder in Holtzendorff, IV. pp. 475-477—Klüber, §§ 156 and 247—G. F. Martens, II. 277—Ullmann, § 183—Bonfils, Nos. 1145 and 1151—Pradier-Fodéré, VII. Nos. 2843-2848—Rivier, II. p. 302—Calvo, IV. §§ 2158-2160—Fiore, III. Nos. 1363-1364—Martens, II. § 119—Longuet, § 84—Bordwell, p. 305—Spaight, pp. 465-470—*Kriegsbrauch*, pp. 49, 50—*Land Warfare*, §§ 461-464.

Former Practice of taking Hostages.

§ 258. The practice of taking hostages as a means of securing legitimate warfare prevailed in former times much more than nowadays. It was frequently resorted to in cases in which belligerent forces depended more or less upon each other's good faith, such as capitulations and armistices for instance. To make sure that no perfidy was intended, officers or prominent private individuals were taken as hostages and could be held responsible with their lives for any perfidy committed by the enemy. This practice has totally disappeared, and is hardly likely to be revived. But this former practice must not be confounded with the still existing practice of seizing enemy individuals for the purpose of making them the object of reprisals. Thus, when in 1870, during the Franco-German War, Count Bismarck ordered forty French notables to be seized and to be taken away into captivity as a retaliation upon the French for refusing to liberate the crews of forty captured merchantmen, these forty French notables were not taken as hostages, but were made the object of reprisals.[486]

[486] The case has been discussed above in § 249. All the French writers who comment upon this case make the mistake of referring to it as an instance of the taking of hostages.

Modern Practice of taking Hostages.

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§ 259. A new practice of taking hostages was resorted to by the Germans in 1870 during the Franco-German War for the purpose of securing the safety of forces against possible hostile acts on the part of private inhabitants of occupied enemy territory. Well-known men were seized and detained in the expectation that the population would refrain from hostile acts out of regard for the fate of the hostages. Thus, when unknown people frequently wrecked the trains transporting troops, the Germans seized prominent enemy citizens and put them on the engines of trains to prevent the latter from being wrecked, a means which always proved effective and soon put a stop to further train-wrecking. The same practice was resorted to, although for a short time only, by Lord Roberts[487] in 1900 during the South African War. This practice has been condemned by the majority of publicists. But, with all due deference to the authority of so many prominent men who oppose the practice, I cannot agree with their opinion. Matters would be different if hostages were seized and exposed to dangers for the purpose of preventing legitimate hostilities on the part of members of the armed forces of the enemy.[488] But no one can deny that train-wrecking on occupied enemy territory by private enemy individuals is an act which a belligerent is justified in considering and punishing as war treason.[489] It is for the purpose of guarding against an act of illegitimate warfare that these hostages are put on the engines. The danger they are exposed to comes from their fellow-citizens, who are informed of the fact that hostages are on the engines and who ought therefore to refrain from wrecking the trains. It cannot, and will not, be denied that the measure is a harsh one, and that it makes individuals liable to suffer for

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acts for which they are not responsible. But the safety of his troops and lines of communication is at stake for the belligerent concerned, and I doubt, therefore, whether even the most humane commanders will be able to dispense with this measure, since it alone has proved effective. And it must further be taken into consideration that the amount of cruelty connected with it is no greater than in reprisals where also innocent individuals must suffer for illegitimate acts for which they are not responsible. And is it not more reasonable to prevent train-wrecking by putting hostages on the engines than to resort to reprisals for wreckage of trains? For there is no doubt that a belligerent is justified in resorting to reprisals[490] in each case of train-wrecking by private enemy individuals.[491]

[487] See section 3 of the Proclamation of Lord Roberts, dated Pretoria, June 19, 1900, but this section was repealed by the Proclamation of July 29, 1900. See Martens, *N.R.G.* 2nd Ser. XXXII. (1905), pp. 147 and 149.

[488] *Land Warfare*, § 463, does not consider the practice commendable, because innocent citizens are thereby exposed to legitimate acts of train-wrecking on the part of raiding parties of armed forces of the enemy.

[489] See above, § 255, No. 8.

[490] See above, § 248.

[491] Belligerents sometimes take hostages to secure compliance with requisitions, contributions, ransom bills, and the like, but such cases have nothing to do with illegitimate warfare: see above, § 116, p. 153, note 1, and § 170, p.

213, note 3. The Hague Regulations do not mention the taking of hostages for any purpose.

VI

COMPENSATION

Bonfils, No. 1026[1]—Despagnet, No. 510 *bis*—Lémonon, pp. 344-346—Higgins, pp. 260-261—Scott, *Conferences*, p. 528—Nippold, II. § 24—Boidin, pp. 83-84—Spaight, p. 462—Holland, *War*, No. 19—*Land Warfare*, § 436.

How the Principle of Compensation for Violations of the Laws of War arose.

§ 259*a*. There is no doubt that, if a belligerent can be made to pay compensation for all damage done by him in violating the laws of war, this will be an indirect means of securing legitimate warfare. In former times no rule existed which stipulated such compensation, although, of course, violation of the laws of war was always an international delinquency. On the contrary, it [Pg 320] was an established customary rule[492] that claims for reparation of damages caused by violations of the rules of legitimate warfare could not be raised after the conclusion of peace, unless the contrary was expressly stipulated. It was not until the Second Hague Peace Conference that matters underwent a change. In revising the Convention concerning the laws and customs of war on land, besides other alterations, a new article (3) was adopted which enacts that a belligerent who violates the provisions of the Hague Regulations, shall, if the case demand, be liable to make compensation, and that he shall be responsible for all acts committed by persons forming part of his armed forces.

[492] See below, § 274, p. 335.

Attention should be drawn to the fact that Germany, on whose initiative this principle was adopted, proposed two articles concerning the matter, the one dealing with the payment of compensation for violations of the Hague Regulations with regard to subjects of neutral States, [493] and the other for violations of these Regulations with regard to enemy subjects. The conference, however, preferred to make no distinction between the different cases of violation but to adopt the general principle.

[493] See below, § 357.

Compensation for Violations of the Hague Regulations.

§ 259*b*. It is apparent that article 3 of Convention IV. enacts two different rules: firstly, that a belligerent who violates the Hague Regulations shall, if the case demand, pay compensation; and secondly, that a belligerent is responsible for all acts committed by any person forming part of his armed forces.

To take this second rule first, the responsibility of a State for internationally illegal acts on the part of members of its armed forces is, provided the acts have not been committed by the State's command or authorisation, only a vicarious responsibility, but nevertheless the State concerned [Pg 321] must, as was pointed out above, Vol. I. § 163, pay damages for these acts when required. For this reason, article 3 does not create a new rule in so far as it enacts that belligerents must pay for damage caused by members of their forces.

On the other hand, the rule that compensation must be paid by belligerents for damage done through violations of the Hague Regulations, is a new rule, at any rate in so far as it is laid down in a general way. If interpreted according to the letter, article 3 of Convention IV. establishes the rule for payment of compensation for violations of the Hague Regulations only, and not for violations of other rules of International Law concerning land warfare or even concerning sea warfare. I have, however, no doubt that the Powers would recognise that the principle of article 3 must find application to any rule of the laws of war, if by the violation of such rule subjects of the enemy, or of neutral States, suffer damage. For instance, if the commander of a naval force, in contravention of Convention IX. of the Second Peace Conference, were to bombard an undefended place, compensation could be claimed for such subjects of the enemy and subjects of neutral States as suffered damage through the bombardment.

A point, however, to be kept in view is that article 3, although it establishes the obligation to pay compensation, does not stipulate anything concerning the time or the way in which claims for compensation are to be settled. This is clearly a case for arbitration, and it is to be hoped that the Third Peace Conference will make arbitration obligatory in cases of claims for compensation arising from violations, on the part of a belligerent, of the Hague Regulations as well as of other laws of war.

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CHAPTER VII

END OF WAR, AND POSTLIMINIUM

I

ON TERMINATION OF WAR IN GENERAL

Hall, § 197—Lawrence, § 217—Phillimore, III. § 510—Taylor, § 580—Moore, VII. § 1163—Heffter, § 176—

Kirchenheim in Holtzendorff, IV. pp. 791-792—Ullmann, § 198—Bonfils, No. 1692—Despagnet, No. 605—Calvo, V. § 3115—Fiore, III. No. 1693—Martens, II. § 128—Longuet, § 155.

War a Temporary Condition.

§ 260. The normal condition between two States being peace, war can never be more than a temporary condition; whatever may have been the cause or causes of a war, the latter cannot possibly last for ever. For either the purpose of war will be realised and one belligerent will be overpowered by the other, or both will sooner or later be so exhausted by their exertions that they will desist from the struggle. Nevertheless wars may last for many years, although of late European wars have gradually become shorter. The shortening of European wars in recent times has resulted from several causes, the more important of which are:—conscription, the foundation of the armies of all the great European Powers, Great Britain excepted; the net of railways which extends over all European countries, and which enables a much quicker transport of troops on enemy territory; and lastly, the vast numbers of the opposing forces which usually hasten a decisive battle.

Three Modes of Termination of War.

§ 261. Be that as it may, a war may be terminated in three different ways. Belligerents may, [Pg 323] first, abstain

from further acts of war and glide into peaceful relations without expressly making peace through a special treaty. Or, secondly, belligerents may formally establish the condition of peace through a special treaty of peace. Or, thirdly, a belligerent may end the war through subjugation of his adversary.[494]

[494] That a civil war may come to an end through simple cessation of hostilities or through a treaty of peace need hardly be mentioned. But it is of importance to state the fact that there is a difference between civil war and other war concerning the third mode of ending war, namely subjugation. For to terminate a civil war, conquest *and* annexation, which together make subjugation, is unnecessary (see below, § 264), but conquest alone is sufficient.

II

SIMPLE CESSATION OF HOSTILITIES

Hall, § 203—Phillimore, III. § 511—Halleck, II. p. 468—Taylor, § 584—Bluntschli, § 700—Heffter, § 177—Kirchenheim in Holtzendorff, IV. p. 793—Ullmann, § 198—Bonfils, No. 1693—Despagnet, No. 605—Rivier, II. pp. 435-436—Calvo, V. § 3116—Fiore, III. No. 1693—Martens, II. § 128—Longuet, § 155—Mérignhac, p. 323—Pillet, p. 370.

Exceptional Occurrence of simple Cessation of Hostilities.

§ 262. The regular modes of termination of war are treaties of peace or subjugation, but cases have occurred in which simple cessation of all acts of war on the part of both belligerents has actually and informally brought the war to an end. Thus ended in 1716 the war between Sweden and Poland, in 1720 the war between Spain and France, in 1801 the war between Russia and Persia, in 1867 the war between France and Mexico. And it may also be mentioned that, whereas the war between Prussia and several German States in 1866 came to an end through subjugation of some States and through treaties of peace with others, Prussia has never concluded a treaty of peace with the Principality of Lichtenstein, which was also a party to the war. Although such [Pg 324] termination of war through simple cessation of hostilities is for many reasons inconvenient, and is, therefore, as a rule avoided, it may nevertheless in the future as in the past occasionally occur.

Effect of Termination of War through simple Cessation of Hostilities.

§ 263. Since in the case of termination of war through simple cessation of hostilities no treaty of peace embodies the conditions of peace between the former belligerents, the question arises whether the *status* which existed between the parties before the outbreak of war, the *status quo ante bellum*, should be revived, or the *status* which exists between the parties at the time when they simply ceased hostilities, the *status quo post bellum* (the *uti possidetis*), can be upheld. The majority of publicists[495] correctly maintain that the *status* which exists at the time of cessation of hostilities becomes silently recognised through such cessation, and is, therefore, the basis of the future relations of the parties. This question is of the greatest importance regarding enemy territory militarily occupied by a belligerent at the time hostilities cease. According to the correct opinion such territory can be annexed by the occupier, the adversary through the cessation of hostilities having dropped all rights he possessed over such territory. On the other hand, this termination of war through cessation of hostilities contains no decision regarding such claims of the parties as have not been settled by the actual position of affairs at the termination of hostilities, and it remains for the parties to settle them by special agreement or to let them stand over.

[Pg 325] [495] See, however, Phillimore, III. § 511, who maintains that the *status quo ante bellum* has to be revived.

III

SUBJUGATION

Vattel, III. §§ 199-203—Hall, §§ 204-205—Lawrence, § 77—Phillimore, III. § 512—Halleck, I. pp. 467-498—

Taylor, §§ 220, 585-588—Moore, I. § 87—Walker, § 11—Wheaton, § 165—Bluntschli, §§ 287-289, 701-702—Heffter, § 178—Kirchenheim in Holtzendorff, IV. p. 792—Liszt, § 10—Ullmann, §§ 92, 97, and 197—Bonfils, Nos. 535 and 1694—Despagnet, Nos. 387-390, 605—Rivier, II. pp. 436-441—Calvo, V. §§ 3117-3118—Fiore, II. Nos. 863, III. No. 1693, and Code, Nos. 1078-1089—Martens. I. § 91, II. § 128—Longuet, § 155—Mérignhac, p. 324—Pillet, p. 371—Holtzendorff, *Eroberung und Eroberungsrecht* (1871)—Heimburger, *Der Erwerb der Gebietshoheit* (1888), pp. 121-132—Westlake, in *The Law Quarterly Review*, XVII. (1901), p. 392.

Subjugation in contradistinction to Conquest.

§ 264. Subjugation must not be confounded with conquest, although there can be no subjugation without conquest. Conquest is taking possession of enemy territory by military force. Conquest is completed as soon as the territory concerned is effectively[496] occupied. Now it is obvious that conquest of a part of enemy territory has nothing to do with subjugation, because the enemy may well reconquer it. But even the conquest of the whole of the enemy territory need not necessarily include subjugation. For, first, in a war between more than two belligerents the troops of one of them may evacuate their country and join the army of allies, so that the armed contention is continued, although the territory of one of the allies is completely conquered. Again, a belligerent, although he has annihilated the forces, conquered the whole of the territory of his adversary, and thereby actually brought the armed contention to an end,[497] may nevertheless not choose to exterminate the enemy State by annexing the conquered territory, but
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may conclude a treaty of peace with the expelled or imprisoned head of the defeated State, re-establish the latter's Government, and hand the whole or a part of the conquered territory over to it. Subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory. Subjugation may, therefore, correctly be defined as *extermination in war of one belligerent by another through annexation*[498] *of the former's territory after conquest, the enemy forces having been annihilated*.[499]

[496] The conditions of effective occupation have been discussed above in § 167. Regarding subjugation as a mode of acquisition of territory, see above, vol. I. §§ 236-241.

[497] The continuation of guerilla war after the termination of a real war is discussed above in § 60.

[498] That conquest alone is sufficient for the termination of civil wars has been pointed out above, § 261, p. 323, note 1.

[499] It should be mentioned that a premature annexation can become valid through the occupation in question becoming soon afterwards effective. Thus, although the annexation of the South African Republic, on September 1, 1900, was premature, it became valid through the occupation becoming effective in 1901. See above, § 167, p. 209, note 1.

Subjugation a formal End of War.

§ 265. Although complete conquest, together with annihilation of the enemy forces, brings the armed contention, and thereby the war, actually to an end, the formal end of the war is thereby not yet realised, as everything depends upon the resolution of the victor regarding the fate of the vanquished State. If he be willing to re-establish the captive or expelled head of the vanquished State, it is a treaty of peace concluded with the latter which terminates the war. But if he desires to acquire the whole of the conquered territory for himself, he annexes it, and thereby formally ends the war through subjugation. That the expelled head of the vanquished State protests and keeps up his claims, matters as little eventually as protests on the part of neutral States. These protests may be of political importance for the future, legally they are of no importance at all.

History presents numerous instances of subjugation. Although no longer so frequent as in
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former times, subjugation is not at all of rare occurrence. Thus, modern Italy came into existence through the subjugation by Sardinia in 1859 of the Two Sicilies, the Grand Dukedom of Tuscany, the Dukedoms of Parma and Modena, and in 1870 the Papal States. Thus, further, Prussia subjugated in 1866 the Kingdom of Hanover, the Dukedom of Nassau, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Main. And Great Britain annexed in 1900 the Orange Free State and the South African Republic.[500]

[500] Since Great Britain annexed these territories in 1900, the agreement of 1902, regarding "Terms of Surrender of the Boer Forces in the Field"—see *Parliamentary Papers*, South Africa, 1902, Cd. 1096—is not a treaty of peace, and the South African War came formally to an end through subjugation, although—see above, § 167, p. 209, note 1—the proclamation of the annexation was somewhat premature. The agreement embodying the terms of surrender of the routed remnants of the Boer forces has, therefore, no internationally le gal basis (see also below, § 274, p. 334, note 2). The case would be different if the British Government had really—as Sir Thomas Barclay asserts in *The Law Quarterly Review*, XXI. (1905), pp. 303 and 307—recognised the existence of the Government of the South African Republic down to May 31, 1902.

IV

TREATY OF PEACE

Grotius, III. c. 20—Vattel, IV. §§ 9-18—Phillimore, III. §§ 513-516—Halleck, I. pp. 306-324—Taylor, §§ 590-592—Moore, VII. § 1163—Wheaton, §§ 538-543—Bluntschli, §§ 703-707—Heffter, § 179—Kirchenheim in Holtzendorff, IV. pp. 794-804—Ullmann, § 198—Bonfils, Nos. 1696-1697, 1703-1705—Despagnet, Nos. 606-611—Rivier, II. pp. 443-453—Nys, III. pp. 719-734—Calvo, V. §§ 3119-3136—Fiore, III. Nos. 1694-1700, and Code, Nos. 1931-1941—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 324-329—Pillet, pp. 372-375.

Treaty of Peace the most frequent End of War.

§ 266. Although occasionally war ends through simple cessation of hostilities, and although subjugation is not at all rare or irregular, the most frequent end of war is a treaty of peace. Many publicists correctly call a treaty of peace the normal mode of terminating war. On the one hand, [Pg 328] simple cessation of hostilities is certainly an irregular mode. Subjugation, on the other hand, is in most cases either not within the scope of the intention of the victor or not realisable. And it is quite reasonable that a treaty of peace should be the normal end of war. States which are driven from disagreement to war will, sooner or later, when the fortune of war has given its decision, be convinced that the armed contention ought to be terminated. Thus a mutual understanding and agreement upon certain terms is the normal mode of ending the contention. And it is a treaty of peace which embodies such understanding.

Peace Negotiations.

§ 267. However, as the outbreak of war interrupts all regular non-hostile intercourse between belligerents, negotiations for peace are often difficult of initiation. Each party, although willing to negotiate, may have strong reasons for not opening negotiations. Good offices and mediation on the part of neutrals, therefore, always are of great importance, as thereby negotiations are called into existence which otherwise might have been long delayed. But it must be emphasised that neither formal nor informal peace negotiations do *ipso facto* bring hostilities to a standstill, although a partial or general armistice may be concluded for the purpose of such negotiations. The fact that peace negotiations are going on directly between belligerents does not create any non-hostile relations between them apart from those negotiations themselves. Such negotiations can take place by the exchange of letters between the belligerent Governments, or through special negotiators who may meet on neutral territory or on the territory of one of the belligerents. In case they meet on belligerent territory, the enemy negotiators are inviolable and must be treated on the same footing as bearers of flags of truce, if not as diplomatic envoys. For it can happen that a belligerent receives an enemy diplomatic envoy for the purpose of peace [Pg 329] negotiations. Be that as it may, negotiations, wherever taking place and by whomsoever conducted, may always be broken off before an agreement is arrived at.

Preliminaries of Peace.

§ 268. Although ready to terminate the war through a treaty of peace, belligerents are frequently not able to settle all the terms of peace at once. In such cases hostilities are usually brought to an end through so-called preliminaries of peace, the definite treaty, which has to take the place of the preliminaries, being concluded later on. Such preliminaries are a treaty in themselves, embodying an agreement of the parties regarding such terms of peace as are essential. Preliminaries are as binding as any other treaty, and therefore they need ratification. Very often, but not necessarily, the definitive treaty of peace is concluded at a place other than that at which the preliminaries were settled. Thus, the war between Austria, France, and Sardinia was ended by the Preliminaries of Villafranca of July 11, 1859, yet the definitive treaty of peace was concluded at Zurich on November 10, 1859. The war between Austria and Prussia was ended by the Preliminaries of Nickolsburg of July 26, 1866, yet the definitive treaty of peace was concluded at Prague on August 23. In the Franco-German War the Preliminaries of Versailles of February 26, 1871, were the precursor of the definitive treaty of peace concluded at Frankfort on May 10, 1871.[501]

[501] No preliminaries of peace were agreed upon at the end of the Russo-Japanese war. After negotiations at Portsmouth (New Hampshire) had led to a final understanding on August 29, 1905, the treaty of peace was signed on September 5, and ratified on October 16.

The purpose for which preliminaries of peace are agreed upon makes it obvious that such essential terms of peace as are stipulated by the Preliminaries are the basis of the definitive treaty of peace. It may happen, however, that neutral States protest for the purpose of [Pg 330] preventing this. Thus, when the war between Russia and Turkey had been ended through the Preliminaries of San Stefano of March 3, 1878, Great Britain protested, a Congress met at Berlin, and Russia had to be content with less favourable terms of peace than those stipulated at San Stefano.

Form and Parts of Peace Treaties.

§ 269. International Law does not contain any rules regarding the form of peace treaties; they may, therefore, be concluded verbally or in writing. But the importance of the matter makes the parties always conclude a treaty of peace in writing, and there is no instance of a verbally concluded treaty of peace.

According to the different points stipulated, it is usual to distinguish different parts within a peace treaty. Besides the preamble, there are general, special, and separate articles. General articles are those which stipulate such points as are to be agreed upon in every treaty of peace, as the date of termination of hostilities, the release of prisoners of war, and the like. Special articles are those which stipulate the special terms of the agreement of peace in question. Separate articles are those which stipulate points with regard to the execution of the general and special articles, or which contain reservations and other special remarks of the parties. Sometimes *additional* articles occur. Such are stipulations agreed upon in a special treaty following the treaty of peace and comprising stipulations regarding such points as have not been mentioned in the treaty of peace.

Competence to conclude Peace.

§ 270. As the treaty-making Power is according to the Law of Nations in the hands of the head[502] of the State, it is he who is competent to conclude peace. But just as constitutional restrictions imposed upon heads of States regarding their general power of concluding treaties[503] are of importance for International Law, so constitutional restrictions imposed upon
[Pg 331] heads of States regarding their competence to make peace are of similar importance. And, therefore, such treaties of peace concluded by heads of States as violate constitutional restrictions are not binding upon the States concerned, because the heads have exceeded their powers. The Constitutions of the several States settle the matter differently, and it is not at all necessary that the power of declaring war and that of making peace should be vested by a Constitution in the same hands. In Great Britain the power of the Crown to declare war and to make peace is indeed unrestricted. But in the German Empire, for instance, it is different; for whereas the Emperor, the case of an attack on German territory excepted, may declare war only with the consent of the Bundesrath, his power of making peace is unrestricted.[504]

[502] See above, vol. I. § 495.

[503] See above, vol. I. § 497.

[504] See more examples in Rivier, II. p. 445.

The controverted question as to whether the head of a State who is a prisoner of war is competent to make peace ought to be answered in the negative. The reason is that the head of a constitutional State, although he does not by becoming a prisoner of war lose his position, he nevertheless thereby loses the power of exercising the rights connected with his position.[505]

[505] See Vattel, IV. § 13.

Date of Peace.

§ 271. Unless the treaty provides otherwise, peace commences with the signing of the peace treaty. Should the latter not be ratified, hostilities may be recommenced, and the unratified peace treaty is considered as an armistice. Sometimes, however, the peace treaty fixes a future date for the commencement of peace, stipulating that hostilities must cease on a certain future day. This is the case when war is waged in several or widely separated parts of the world, and when, therefore, it is impossible at once to inform the opposing forces of the conclusion of peace.
[Pg 332] [506] It may even occur that different dates are stipulated for the termination of hostilities in different parts of the world.

[506] The ending of the Russo-Japanese war was quite peculiar. Although the treaty of peace was signed on September 5, 1905, the agreement concerning an armistice pending ratification of the peace treaty was not signed until September 14, and hostilities went on till September 16.

The question has arisen as to whether, in case a peace treaty provides a future date for the termination of hostilities in distant parts, and in case the forces in these parts hear of the conclusion of peace before such date, they must abstain at once from further hostilities. Most publicists correctly answer this question in the affirmative. But the French Prize Courts in 1801 condemned as a good prize the English vessel *Swineherd* which was captured by the French privateer *Bellona* in the Indian Seas within the period of five months fixed by the Peace of Amiens for the termination of hostilities in these seas.[507]

[507] The details of this case are given by Hall, § 199; see also Phillimore, III. § 521.

V

EFFECTS OF TREATY OF PEACE

Grotius, III. c. 20—Vattel, IV. §§ 19-23—Hall, §§ 198-202—Lawrence, § 218—Phillimore, III. §§ 518-528—Halleck, I. pp. 312-324—Taylor, §§ 581-583—Wheaton, §§ 544-547—Bluntschli, §§ 708-723—Heffter, §§ 180-183, 184A—Kirchenheim in Holtzendorff, IV. pp. 804-817—Ullmann, § 199—Bonfils, Nos. 1698-1702—Despagnet, No. 607—Rivier, II. pp. 454-461—Calvo, V. §§ 3137-3163—Fiore, III. Nos. 1701-1703, and Code, Nos. 1942-1962—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 330-336—Pillet, pp. 375-377.

Restoration of Condition of Peace.

§ 272. The chief and general effect of a peace treaty is restoration of the condition of peace between the former belligerents. As soon as the treaty is ratified, all rights and duties which exist in time of peace between the members of the family of nations are *ipso facto* and at once revived
[Pg 333] between the former belligerents.

On the one hand, all acts legitimate in warfare cease to be legitimate. Neither contributions and requisitions, nor attacks on members of the armed forces or on fortresses, nor capture of ships, nor occupation of territory are any longer lawful. If forces, ignorant of the conclusion of peace, commit such hostile acts, the condition of things at the time peace was concluded must as far as possible be restored.[508] Thus, ships captured must be set free, territory occupied must be evacuated, members of armed forces taken prisoners must be liberated, contributions imposed and paid must be repaid.

[508] The *Mentor* (1799), 1 C. Rob. 179. Matters are, of course, different in case a future date—see above, § 271—is stipulated for the termination of hostilities.

On the other hand, all peaceful intercourse between the former belligerents as well as between their subjects is resumed as before the war. Thus diplomatic intercourse is restored, and consular officers recommence their duties.[509]

[509] The assertion of many writers, that such contracts between subjects of belligerents as have been suspended by

the outbreak of war revive *ipso facto* by the conclusion of peace is not the outcome of a rule of International Law. But just as Municipal Law may suspend such contracts *ipso facto* by the outbreak of war, so it may revive them *ipso facto* by the conclusion of peace. See above, § 101.

Attention must be drawn to the fact that the condition of peace created by a peace treaty is legally final in so far as the order of things set up and stipulated by the treaty of peace is the settled basis of future relations between the parties, however contentious the matters concerned may have been before the outbreak of war. In concluding peace the parties expressly or implicitly declare that they have come to an understanding regarding such settled matters. They may indeed make war against each other in future on other grounds, but they are legally bound not to go to war over such matters as have been settled by a previous treaty of peace. That the practice
[Pg 334] of States does not always comply with this rule is a well-known fact which, although it discredits this rule, cannot shake its theoretical validity.

Principle of *Uti Possidetis*.

§ 273. Unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the conclusion of peace. Thus, all moveable State property, as munitions, provisions, arms, money, horses, means of transport, and the like, seized by an invading belligerent remain his property, as likewise do the fruits of immoveable property seized by him. Thus further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who may annex it. But it is nowadays usual, although not at all legally necessary, for the conqueror desirous of retaining conquered territory to stipulate cession of such territory in the treaty of peace.

Amnesty.

§ 274. Since a treaty of peace is considered a final settlement of the war, one of the effects of every peace treaty is the so-called amnesty—that is, an immunity for all wrongful acts done by the belligerents themselves, the members of their forces, and their subjects during the war, and due to political motives.[510] It is usual, but not at all necessary, to insert an amnesty clause in a
[Pg 335] treaty of peace. So-called war crimes[511] which were not punished before the conclusion of peace may no longer be punished after its conclusion. Individuals who have committed such war crimes and have been arrested for them must be liberated.[512] International delinquencies committed intentionally by belligerents through violation of the rules of legitimate warfare are considered condoned. Formerly even claims for reparation of damages caused by such acts could not be raised after the conclusion of peace, unless the contrary was expressly stipulated, but the matter is different now in accordance with article 3 of Convention IV. of the Second Peace Conference.[513] On the other hand, the amnesty has nothing to do with ordinary crimes or with debts incurred during war. A prisoner of war who commits murder during captivity may be tried and punished after the conclusion of peace, just as a prisoner who runs into debt during captivity may be sued after the conclusion of peace, or an action may be brought on ransom bills after peace has been restored.

[510] Stress must be laid on the fact that this immunity is only effective in regard to the other party to the war. For instance, the occupant of enemy territory may not, after the conclusion of peace, punish war criminals. Nothing, however, prevents a belligerent from punishing members of his own forces or any of his own subjects who during war committed violations of the laws of war, *e.g.* killed wounded enemy soldiers and the like.

[511] See above, §§ 251-257. Clause 4 of the "Terms of Surrender of the Boer Forces in the Field"—see *Parliamentary Papers*, South Africa, 1902, Cd. 1096—seems to contradict this assertion, as it expressly excludes from the amnesty "certain acts, contrary to usages of war, which have been notified by the Commander-in-Chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities." But it will be remembered—see above, § 265, p. 327, note 1—that the agreement embodying these terms of surrender does not bear the character of a treaty of peace, the Boer War having been terminated through subjugation.

[512] This applies to such individuals only as have not yet been convicted. Those who are undergoing a term of imprisonment need not be liberated at the conclusion of peace; see above, § 257.

[513] See above, § 259*a*.

But it is important to remember here again that the amnesty grants immunity only for wrongful acts done by the subjects of one belligerent against the other. Such wrongful acts as have been committed by the subjects of a belligerent against their own Government are not covered by the amnesty. Therefore treason, desertion, and the like committed during the war by his own subjects may be punished by a belligerent after the conclusion of peace, unless the contrary has been expressly stipulated in the treaty of peace.[514]

[514] Thus Russia stipulated by article 17 of the Preliminaries of San Stefano, in 1878—see Martens, *N.R.G.* 2nd Ser. III. p. 252—that Turkey must accord an amnesty to such of her own subjects as had compromised themselves during the war.

Release of Prisoners of War.

§ 275. A very important effect of a treaty of peace is termination of the captivity of prisoners of
[Pg 336] war.[515] This, however, does not mean that with the conclusion of peace all prisoners of war must at once be released. It only means—to use the words of article 20 of the Hague Regulations—that "After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible." The instant release of prisoners at the very place where they were detained, would be inconvenient not only for the State which kept them in captivity, but also for themselves, as in most cases they would not possess means to pay for their journey home. Therefore, although with the conclusion of peace they cease to be captives in the technical sense of the term, prisoners of

war remain as a body under military discipline until they are brought to the frontier and handed over to their Government. That prisoners of war may be detained after the conclusion of peace until they have paid debts incurred during captivity seems to be an almost generally[516] recognised rule. But it is controversial whether such prisoners of war may be detained as are undergoing a term of imprisonment imposed upon them for offences against discipline. After the Franco-German War in 1871 Germany detained such prisoners,[517] whereas Japan after the Russo-Japanese War in 1905 released them.

[515] See above, § 132.

[516] See, however, Pradier-Fodéré, VII. No. 2839, who objects to it.

[517] See Pradier-Fodéré, VII. No. 2840; Beinhauer, *Die Kriegsgefangenschaft* (1910), p. 79; Payrat, *Le prisonnier de Guerre* (1910), pp. 364-370.

Revival of Treaties.

§ 276. The question how far a peace treaty has the effect of reviving treaties concluded between the parties before the outbreak of war is much controverted. The answer depends upon the other question, how far the outbreak of war cancels existing treaties between belligerents.[518] There can be no doubt that all such treaties as have been cancelled by the outbreak of war do not
[Pg 337] revive. On the other hand, there can likewise be no doubt that such treaties as have only become suspended by the outbreak of war do revive. But no certainty or unanimity exists regarding such treaties as do not belong to the above two classes, and it must, therefore, be emphasised that no rule of International Law exists concerning these treaties. It is for the parties to make such special stipulations in the peace treaty as will settle the matter.

[518] See the very detailed discussion of the question in Phillimore, III. §§ 529-538; see also above, § 99.

VI

PERFORMANCE OF TREATY OF PEACE

Grotius, III. c. 20—Vattel, IV. §§ 24-34—Phillimore, III. § 597—Halleck, I. pp. 322-324—Taylor, §§ 593-594—Wheaton, §§ 548-550—Bluntschli, §§ 724-726—Heffter, § 184—Kirchenheim in Holtzendorff, IV. pp. 817-822—Ullmann, § 199—Bonfils, Nos. 1706-1709—Despagnet, Nos. 612 and 613—Rivier, II. pp. 459-461—Calvo, V. §§ 3164-3168—Fiore, III. Nos. 1704-1705—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 336-337.

Treaty of Peace, how to be carried out.

§ 277. The general rule, that treaties must be performed in good faith, applies to peace treaties as well as to others. The great importance, however, of a treaty of peace and its special circumstances and conditions make it necessary to draw attention to some points connected with the performance of treaties of peace. Occupied territory may have to be evacuated, a war indemnity to be paid in cash, boundary lines of ceded territory may have to be drawn, and many other tasks performed. These tasks often necessitate the conclusion of numerous treaties for the purpose of performing details of the peace treaty concerned, and the appointment of commissioners who meet in conference to inquire into details and prepare a compromise. Difficulties may arise in regard to the interpretation[519] of certain stipulations of the peace treaty which arbitration will settle if the parties cannot agree.

[Pg 338] [519] See above, vol. I. §§ 553-554.

Arrangements may have to be made for the case in which a part or the whole of the territory occupied during the war remains, according to the peace treaty, for some period under military occupation, such occupation to serve as a means of securing the performance of the peace treaty.[520] One can form an idea of the numerous points of importance to be dealt with during the performance of a treaty of peace if one takes into consideration the fact that, after the Franco-German War was terminated in 1871 by the Peace of Frankfort, more than a hundred Conventions were successively concluded between the parties for the purpose of carrying out this treaty of peace.

[520] See above, vol. I. § 527.

Breach of Treaty of Peace.

§ 278. Just as is the performance, so is the breach of peace treaties of great importance. A peace treaty can be violated in its entirety or in one of its stipulations only. Violation by one of the parties does not *ipso facto* cancel the treaty, but the other party may cancel it on the ground of violation. Just as in connection with violation of treaties in general, so in violations of treaties of peace, some publicists maintain that a distinction must be drawn between essential and non-essential stipulations, and that violation of essential stipulations only creates a right of cancelling the treaty of peace. It has been shown above, Vol. I. § 547, that the majority of publicists rightly oppose the distinction.

But a distinction must be made between violation during the period in which the conditions of the peace treaty have to be fulfilled, and violation after such period. In the first case, the other party may at once recommence hostilities, the war being considered not to have terminated through the violated peace treaty. The second case, which might happen soon or several years
[Pg 339] after the period for the fulfilment of the peace conditions, is in no way different from violation of any treaty in general. And if a party cancels the peace treaty and wages war against the offender who violated it, this war is a new war, and in no way a continuation of the previous war which

was terminated by the violated treaty of peace. It must, however, be specially observed that, just as in case of violation of a treaty in general, so in case of violation of a peace treaty, the offended party who wants to cancel the treaty on the ground of its violation must do this in reasonable time after the violation has taken place, otherwise the treaty remains valid, or at least the non-violated parts of it. A mere protest neither constitutes a cancellation nor reserves the right of cancellation.[521]

[521] See above, vol. I. § 547.

VII

POSTLIMINIUM

Grotius, III. c. 9—Bynkershoek, *Quaest. jur. publ.* I. c. 15 and 16—Vattel, III. §§ 204-222—Hall, §§ 162-166—Manning, pp. 190-195—Phillimore, III. §§ 568-590—Halleck, II. pp. 500-526—Taylor, § 595—Wheaton, § 398—Bluntschli, §§ 727-741—Heffter, §§ 188-192—Kirchenheim in Holtzendorff, IV. pp. 822-836—Bonfils, No. 1710—Despagnet, No. 611—Nys, III. pp. 738-739—Rivier, II. pp. 314-316—Calvo, V. §§ 3169-3226—Fiore, III. Nos. 1706-1712—Martens, II. § 128—Pillet, p. 377.

Conception of Postliminium.

§ 279. The term "postliminium" is originally one of Roman Law derived from *post* and *limen* (*i.e.* boundary). According to Roman Law the relations of Rome with a foreign State depended upon the fact whether or not a treaty of friendship[522] existed. If such a treaty was not in existence, Romans entering the foreign State concerned could be enslaved, and Roman goods taken there
[Pg 340] could be appropriated. Now, *jus postliminii* denoted the rule, firstly, that such an enslaved Roman, should he ever return into the territory of the Roman Empire, became *ipso facto* a Roman citizen again with all the rights he possessed previous to his capture, and, secondly, that Roman property, appropriated after entry into the territory of a foreign State, should at once upon being taken back into the territory of the Roman Empire *ipso facto* revert to its former Roman owner. Modern International and Municipal Law have adopted the term for the purpose of indicating the fact that territory, individuals, and property, after having come in time of war under the sway of the enemy, return either during the war or with the end of the war under the sway of their original Sovereign. This can occur in different ways. An occupied territory can voluntarily be evacuated by the enemy and then at once be reoccupied by the owner. Or it can be reconquered by the legitimate Sovereign. Or it can be reconquered by a third party and restored to its legitimate owner. Conquered territory can also be freed through a successful levy *en masse*. Property seized by the enemy can be retaken, but it can also be abandoned by the enemy and subsequently revert to the belligerent from whom it was taken. And, further, conquered territory can in consequence of a treaty of peace be restored to its legitimate Sovereign. In all cases concerned, the question has to be answered what legal effects the postliminium has in regard to the territory, the individuals thereon, or the property concerned.

[522] See above, vol. I. § 40.

Postliminium according to International Law, in contradistinction to Postliminium according to Municipal Law.

§ 280. Most writers confound the effects of postliminium according to Municipal Law with those according to International Law. For instance: whether a private ship which is recaptured reverts *ipso facto* to its former owner;[523] whether the former laws of a reconquered State revive
[Pg 341] *ipso facto* by the reconquest; whether sentences passed on criminals during the time of an occupation by the enemy should be annulled—these and many similar questions treated in books on International Law have nothing at all to do with International Law, but have to be answered exclusively by the Municipal Law of the respective States. International Law can deal only with such effects of postliminium as are international. These international effects of postliminium may be grouped under the following heads: revival of the former condition of things, validity of legitimate acts, invalidity of illegitimate acts.

[523] See above, § 196.

Revival of the Former Condition of Things.

§ 281. Although a territory and the individuals thereon come through military occupation in war under the actual sway of the enemy, neither such territory nor such individuals, according to the rules of International Law of our times, fall under the sovereignty of the invader. They rather remain, if not acquired by the conqueror through subjugation, under the sovereignty of the other belligerent, although the latter is in fact prevented from exercising his supremacy over them. Now, the moment the invader voluntarily evacuates such territory, or is driven away by a levy *en masse*, or by troops of the other belligerent or of his ally, the former condition of things *ipso facto* revives; the territory and individuals concerned being at once, so far as International Law is concerned, considered to be again under the sway of their legitimate Sovereign. For all events of international importance taking place on such territory the legitimate Sovereign is again responsible towards third States, whereas during the time of occupation the occupant was responsible for such events.

But it must be specially observed that the case in which the occupant of a territory is driven out
[Pg 342] of it by the forces of a third State not allied with the legitimate Sovereign of such territory is not a case of postliminium, and that consequently the former state of things does not revive, unless the new occupant hands the territory over to the legitimate Sovereign. If this is not done, the

military occupation of the new occupant takes the place of that of the previous occupant.

Validity of Legitimate Acts.

§ 282. Postliminium has no effect upon such acts of the former military occupant connected with the occupied territory and the individuals and property thereon as were legitimate acts of warfare. On the contrary, the State into whose possession such territory has reverted must recognise all such legitimate acts of the former occupant, and the latter has by International Law a right to demand such recognition. Therefore, if the occupant has collected the ordinary taxes, has sold the ordinary fruits of immoveable property, has disposed of such moveable state property as he was competent to appropriate, or has performed other acts in conformity with the laws of war, this may not be ignored by the legitimate Sovereign after he has again taken possession of the territory.

However, only those consequences of such acts must be recognised which have occurred during the occupation. A case which illustrates this happened after the Franco-German War. In October 1870, during occupation by German troops of the *Départements de la Meuse* and *de la Meurthe*, a Berlin firm entered into a contract with the German Government to fell 15,000 oak trees in the State forests of these *départements*, paying in advance £2250. The Berlin firm sold the contract rights to others, who felled 9000 trees and sold, in March 1871, their right to fell the remaining 6000 trees to a third party. The last-named felled a part of these trees during the German occupation, but, when the French Government again took possession of the territory
[Pg 343] concerned, the contractors were without indemnity prevented from further felling of trees.[524] The question whether the Germans had a right at all to enter into the contract is doubtful. But even if they had such right, it covered the felling of trees during their occupation only, and not afterwards.

[524] The Protocol of Signature added to the Additional Convention to the Peace Treaty of Frankfort, signed on December 11, 1871—see Martens, *N.R.G.* XX. p. 868—comprises a declaration stating the fact that the French Government does not recognise any liability to pay indemnities to the contractors concerned.

Invalidity of Illegitimate Acts.

§ 283. If the occupant has performed acts which are not legitimate acts of warfare, postliminium makes their invalidity apparent. Therefore, if the occupant has sold immoveable State property, such property may afterwards be claimed from the acquirer, whoever he is, without any indemnity. If he has given office to individuals, they may afterwards be dismissed. If he has appropriated and sold such private or public property as may not legitimately be appropriated by a military occupant, it may afterwards be claimed from the acquirer without payment of damages.

No Postliminium after Interregnum.

§ 284. Cases of postliminium occur only when a conquered territory comes either during or at the end of the war again into the possession of the legitimate Sovereign. No case of postliminium arises when a territory, ceded to the enemy by the treaty of peace or conquered and annexed without cession at the end of a war which was terminated through simple cessation of hostilities, [525] later on reverts to its former owner State, or when the whole of the territory of a State which was conquered and subjugated regains its liberty and becomes again the territory of an independent State. Such territory has actually been under the sovereignty of the conqueror; the period between the conquest and the revival of the previous condition of things was not one of mere military occupation during war, but one of interregnum during time of peace, and therefore
[Pg 344] the revival of the former condition of things is not a case of postliminium. An illustrative instance of this is furnished by the case of the domains of the Electorate of Hesse-Cassel.[526] This hitherto independent State was subjugated in 1806 by Napoleon and became in 1807 part of the Kingdom of Westphalia constituted by Napoleon for his brother Jerome, who governed it up to the end of 1813, when, with the downfall of Napoleon, the Kingdom of Westphalia fell to pieces and the former Elector of Hesse-Cassel was reinstated. Jerome had during his reign sold many of the domains of Hesse-Cassel. The Elector, however, on his return, did not recognise these contracts, but deprived the owners of their property without indemnification, maintaining that a case of postliminium had arisen, and that Jerome had no right to sell the domains. The Courts of the Electorate pronounced against the Elector, denying that a case of postliminium had arisen, since Jerome, although a usurper, had been King of Westphalia during an interregnum, and since the sale of the domains was therefore no wrongful act. But the Elector, who was absolute in the Electorate, did not comply with the verdict of his own courts, and the Vienna Congress, which was approached in the matter by the unfortunate proprietors of the domains, refused its intervention, although Prussia strongly took their part. It is generally recognised by all writers on International Law that this case was not one of postliminium, and the attitude of the Elector cannot therefore be defended by appeal to International Law.

[525] See above, § 263.

[526] See Phillimore, III. §§ 568-574, and the literature there quoted.

[Pg 347]

PART III

NEUTRALITY

CHAPTER I

ON NEUTRALITY IN GENERAL

I

DEVELOPMENT OF THE INSTITUTION OF NEUTRALITY

Hall, §§ 208-214—Lawrence, § 223—Westlake, II. pp. 169-177—Phillimore, III. §§ 161-226—Twiss, II. §§ 208-212—Taylor, §§ 596-613—Walker, *History*, pp. 195-203, and *Science*, pp. 374-385—Geffcken in Holtzendorff, IV. pp. 614-634—Ullmann, § 190—Bonfils, Nos. 1494-1521—Despagnet, No. 687—Rivier, II. pp. 370-375—Nys, III. pp. 558-567—Calvo, IV. §§ 2494-2591—Fiore, III. Nos. 1503-1535—Martens, II. § 130—Dupuis, Nos. 302-307—Mérignhac, pp. 339-342—Boeck, Nos. 8-153—Kleen, I. pp. 1-70—Cauchy, *Le droit maritime international* (1862), vol. II. pp. 325-430—Gessner, pp. 1-69—Bergbohm, *Die bewaffnete Neutralität 1780-1783* (1884)—Fauchille, *La diplomatie française et la ligue des neutres 1780* (1893)—Schweizer, *Geschichte der schweizerischen Neutralitaet* (1895), I. pp. 10-72.

Neutrality not practised in Ancient Times.

§ 285. Since in antiquity there was no notion of an International Law,[527] it is not to be expected that neutrality as a legal institution should have existed among the nations of old. Neutrality did not exist even in practice, for belligerents never recognised an attitude of impartiality on the part of other States. If war broke out between two nations, third parties had to choose between the belligerents and become allies or enemies of one or other. This does not mean that third parties had actually to take part in the fighting. Nothing of the kind was the case. But they had, if necessary, to render assistance; for example, to allow the passage of belligerent forces through
[Pg 348] their country, to supply provisions and the like to the party they favoured, and to deny all such assistance to the enemy. Several instances are known of efforts[528] on the part of third parties to take up an attitude of impartiality, but belligerents never recognised such impartiality.

[527] See above, vol. I. § 37.

[528] See Geffcken in Holtzendorff, IV. pp. 614-615.

Neutrality during the Middle Ages.

§ 286. During the Middle Ages matters changed in so far only as, in the latter part of this period, belligerents did not exactly force third parties to a choice; but legal duties and rights connected with neutrality did not exist. A State could maintain that it was no party to a war, although it furnished one of the belligerents with money, troops, and other kinds of assistance. To prevent such assistance, which was in no way considered illegal, treaties were frequently concluded, during the latter part of the Middle Ages, for the purpose of specially stipulating that the parties were not to assist each other's enemies in any way during time of war, and were to prevent their subjects from rendering such assistance. Through the influence of such treaties the difference between a really and feigned impartial attitude of third States during war became recognised, and neutrality, as an institution of International Law, gradually developed during the sixteenth century.

Of great importance was the fact that the Swiss Confederation, in contradistinction to her policy during former times, made it a matter of policy from the end of the sixteenth century always to remain neutral during wars between other States. Although this former neutrality of the Swiss can in no way be compared with modern neutrality, since Swiss mercenaries for centuries afterwards fought in all European wars, the Swiss Government itself succeeded in each instance in taking up and preserving such an attitude of impartiality as complied with the current
[Pg 349] rules of neutrality.

It should be mentioned that the collection of rules and customs regarding Maritime Law which goes under the name of *Consolato del Mare* made its appearance about the middle of the fourteenth century. One of the rules there laid down, that in time of war enemy goods on neutral vessels may be confiscated, but that, on the other hand, neutral goods on enemy vessels must be restored, became of great importance, since Great Britain acted accordingly from the beginning of the eighteenth century until the outbreak of the Crimean War in 1854.[529]

[529] See above, § 176.

Neutrality during the Seventeenth Century.

§ 287. At the time of Grotius, neutrality was recognised as an institution of International Law, although such institution was in its infancy only and needed a long time to reach its present range. Grotius did not know, or at any rate did not make use of, the term neutrality.[530] He treats neutrality in the very short seventeenth chapter of the Third Book on the Law of War and Peace, under the head *De his, qui in bello medii sunt*, and establishes in § 3 two doubtful rules only. The first is that neutrals shall do nothing which may strengthen a belligerent whose cause is unjust, or which may hinder the movements of a belligerent whose cause is just. The second rule is that in a war in which it is doubtful whose cause is just, neutrals shall treat both belligerents alike, in permitting the passage of troops, in supplying provisions for the troops, and in not rendering assistance to persons besieged.

[530] That the term was known at the time of Grotius may be inferred from the fact that Neumayr de Ramsla in 1620 published his work *Von der Neutralität und Assistenz ... in Kriegszeiten*; see Nys in *R.I.* XVII. (1885), p. 78.

The treatment of neutrality by Grotius shows, on the one hand, that apart from the recognition of the fact that third parties could remain neutral, not many rules regarding the duties of
[Pg 350] neutrals existed, and, on the other hand, that the granting of passage to troops of belligerents and the supply of provisions to them was not considered illegal. And the practice of the seventeenth century furnishes numerous instances of the fact that neutrality was not really an attitude of impartiality, and that belligerents did not respect the territories of neutral States. Thus, although Charles I. remained neutral, the Marquis of Hamilton and six thousand British soldiers were fighting in 1631 under Gustavus Adolphus. "In 1626 the English captured a French ship in Dutch waters. In 1631 the Spaniards attacked the Dutch in a Danish port; in 1639 the Dutch were in turn the aggressors, and attacked the Spanish Fleet in English waters; again, in 1666 they captured English vessels in the Elbe...; in 1665 an English fleet endeavoured to seize the Dutch East India Squadron in the harbour of Bergen, but were beaten off with the help of the forts; finally, in 1693, the French attempted to cut some Dutch ships out of Lisbon, and on being prevented by the guns of the place from carrying them off, burnt them in the river."[531]

[531] See Hall, § 209, p. 604.

Progress of Neutrality during the Eighteenth Century.

§ 288. It was not until the eighteenth century that theory and practice agreed upon the duty of neutrals to remain impartial, and the duty of belligerents to respect the territories of neutrals. Bynkershoek and Vattel formulated adequate conceptions of neutrality. Bynkershoek[532] does not use the term "neutrality," but calls neutrals *non hostes*, and he describes them as those who are of neither party—*qui neutrarum partium sunt*—in a war, and who do not, in accordance with a treaty, give assistance to either party. Vattel (III. § 103), on the other hand, makes use of the term "neutrality," and gives the following definition:—"Neutral nations, during a war, are those
[Pg 351] who take no one's part, remaining friends common to both parties, and not favouring the armies of one of them to the prejudice of the other." But although Vattel's book appeared in 1758, twenty-one years after that of Bynkershoek, his doctrines are in some ways less advanced than those of Bynkershoek. The latter, in contradistinction to Grotius, maintained that neutrals had nothing to do with the question as to which party to a war had a just cause; that neutrals, being friends to both parties, have not to sit as judges between these parties, and, consequently, must not give or deny to one or other party more or less in accordance with their conviction as to the justice or injustice of the cause of each. Vattel, however, teaches (III. § 135) that a neutral, although he may generally allow the passage of troops of the belligerents through his territory, may refuse this passage to such belligerent as is making war for an unjust cause.

[532] *Quaest. jur. publ.* I. c. 9.

Although the theory and practice of the eighteenth century agreed upon the duty of neutrals to remain impartial, the impartiality demanded was not at all a strict one. For, firstly, throughout the greater part of the century a State was considered not to violate neutrality in case it furnished one of the belligerents with such limited assistance as it had previously promised by treaty.[533] In this way troops could be supplied by a neutral to a belligerent, and passage through neutral territory could be granted to his forces. And, secondly, the possibility existed for either belligerent to make use of the resources of neutrals. It was not considered a breach of neutrality on the part of a State to allow one or both belligerents to levy troops on its territory, or to grant Letters of Marque to vessels belonging to its commercial fleet. During the second half of the
[Pg 352] eighteenth century, theory and practice became aware of the fact that neutrality was not consistent with these and other indulgences. But this only led to the distinction between neutrality in the strict sense of the term and an imperfect neutrality.

[533] See examples in Hall, § 211.

As regards the duty of belligerents to respect neutral territory, progress was also made in the eighteenth century. Whenever neutral territory was violated, reparation was asked and made. But it was considered lawful for the victor to pursue the vanquished army into neutral territory, and, likewise, for a fleet to pursue[534] the defeated enemy fleet into neutral territorial waters.

[534] See below, §§ 320 and 347 (4).

First Armed Neutrality.

§ 289. Whereas, on the whole, the duty of neutrals to remain impartial and the duty of belligerents to respect neutral territory became generally recognised during the eighteenth century, the members of the Family of Nations did not come to an agreement during this period regarding the treatment of neutral vessels trading with belligerents. It is true that the right of visit and search for contraband of war and the right to seize the latter was generally recognised, but in other respects no general theory and practice was agreed upon. France and Spain upheld the rule that neutral goods on enemy ships as well as neutral ships carrying enemy goods could be seized by belligerents. Although England granted from time to time, by special treaties with special States, the rule "Free ship, free goods," her general practice throughout the eighteenth century followed the rule of the *Consolato del Mare*, according to which enemy goods on neutral vessels may be confiscated, whereas neutral goods on enemy vessels must be restored. England, further, upheld the principle that the commerce of neutrals should in time of war be restricted to the same limits as in time of peace, since most States in time of peace reserved cabotage and trade with their colonies to vessels of their own merchant marine. It was in 1756 that this
[Pg 353] principle first came into question. In this year, during war with England, France found that on

account of the naval superiority of England she was unable to carry on her colonial trade by her own merchant marine, and she, therefore, threw open this trade to vessels of the Netherlands, which had remained neutral. England, however, ordered her fleet to seize all such vessels with their cargoes on the ground that they had become incorporated with the French merchant marine, and had thereby acquired enemy character. From this time the above principle is commonly called the "rule[535] of 1756." England, thirdly, followed other Powers in the practice of declaring enemy coasts to be blockaded and condemning captured neutral vessels for breach of blockade, although the blockades were by no means always effective.

[535] See Phillimore, III. §§ 212-222; Hall, § 234; Manning, pp. 260-267; Westlake, II. p. 254; Moore, VII. § 1180; Boeck, No. 52: Dupuis, Nos. 131-133. Stress must be laid on the fact that the original meaning of the rule of 1756 is different from the meaning it received by its extension in 1793. From that year onwards England not only considered those neutral vessels which embarked upon the French coasting and colonial trade thrown open to them during the war with England, as having acquired enemy character, but likewise those neutral vessels which carried neutral goods from neutral ports to ports of a French colony. This extension of the rule of 1756 was clearly unjustified, and it is not possible to believe that it will ever be revived.

As privateering was legitimate and in general use, neutral commerce was considerably disturbed during every war between naval States. Now in 1780, during war between Great Britain, her American colonies, France, and Spain, Russia sent a circular[536] to England, France, and Spain, in which she proclaimed the following five principles: (1) That neutral vessels should be allowed to navigate from port to port of belligerents and along their coasts; (2) that enemy goods on neutral vessels, contraband excepted, should not be seized by belligerents; (3) that, [Pg 354] with regard to contraband, articles 10 and 11 of the treaty of 1766 between Russia and Great Britain should be applied in all cases; (4) that a port should only be considered blockaded if the blockading belligerent had stationed vessels there, so as to create an obvious danger for neutral vessels entering the port; (5) that these principles should be applied in the proceedings and judgments on the legality of prizes. In July and August 1780, Russia[537] entered into a treaty, first with Denmark and then with Sweden, for the purpose of enforcing those principles by equipping a number of men-of-war. Thus the "Armed Neutrality" made its appearance. In 1781, the Netherlands, Prussia, and Austria, in 1782 Portugal, and in 1783 the Two Sicilies joined the league. France, Spain, and the United States of America accepted the principles of the league without formally joining. The war between England, the United States, France, and Spain was terminated in 1783, and the war between England and the Netherlands in 1784, but in the treaties of peace the principles of the "Armed Neutrality" were not mentioned. This league had no direct practical consequences, since England retained her former standpoint. Moreover, some of the States that had joined the league acted contrary to some of its principles when they themselves went to war—as did Sweden during her war with Russia 1788-1790, and France and Russia in 1793—and some of them concluded treaties in which were stipulations at variance with those principles. Nevertheless, the First Armed Neutrality has proved of great importance, because its principles have furnished the basis of the Declaration of Paris of 1856.

[536] Martens, *R.* III. p. 158.

[537] Martens, *R.* III. pp. 189 and 198.

The French Revolution and the Second Armed Neutrality.

§ 290. The wars of the French Revolution showed that the time was not yet ripe for the progress aimed at by the First Armed Neutrality. Russia, the very same Power which had [Pg 355] initiated the Armed Neutrality in 1780 under the Empress Catharine II. (1762-1796), joined Great Britain in 1793 in order to interdict all neutral navigation into ports of France, with the intention of subduing France by famine. Russia and England justified their attitude by the exceptional character of their war against France, which country had proved to be the enemy of the security of all other nations. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to enemy ports or carrying enemy goods.

But although Russia herself had acted in defiance of the principles of the First Armed Neutrality, she called a second into existence in 1800, during the reign of the Emperor Paul. The Second Armed Neutrality was caused by the refusal of England to concede immunity from visit and search to neutral merchantmen under convoy.[538] Sweden was the first to claim in 1653, during war between Holland and Great Britain, that the belligerents should not visit and search Swedish merchantmen under convoy of Swedish men-of-war, provided a declaration was made by the men-of-war that the merchantmen had no contraband on board. Other States later raised the same claim, and many treaties were concluded which stipulated the immunity from visit and search of neutral merchantmen under convoy. But Great Britain refused to recognise the principle, and when, in July 1800, a British squadron captured a Danish man-of-war and her convoy of several merchantmen for having resisted visit and search, Russia invited Sweden, Denmark, and Prussia to renew the "Armed Neutrality," and to add to its principles the further one, that belligerents should not have a right of visit and search in case the commanding officer [Pg 356] of the man-of-war, under whose convoy neutral merchantmen were sailing, should declare that the convoyed vessels did not carry contraband of war. In December 1800 Russia concluded treaties with Sweden, Denmark, and Prussia consecutively, by which the "Second Armed Neutrality" became a fact.[539] But it lasted only a year on account of the assassination of the Emperor Paul of Russia on March 23, and the defeat of the Danish fleet by Nelson on April 2, 1801, in the battle of Copenhagen. Nevertheless, the Second Armed Neutrality likewise proved of importance, for it led to a compromise in the "Maritime Convention" concluded by England and Russia under the Emperor Alexander I. on June 17, 1801, at St. Petersburg.[540] By article 3 of this treaty, England recognised, as far as Russia was concerned, the rules that neutral vessels might

navigate from port to port and on the coasts of belligerents, and that blockades must be effective. But in the same article England enforced recognition by Russia of the rule that enemy goods on neutral vessels may be seized, and she did not recognise the immunity of neutral vessels under convoy from visit and search, although, by article 4, she conceded that the right of visit and search should be exercised only by men-of-war, and not by privateers, in case the neutral vessels concerned sailed under convoy.

[538] See below, § 417.

[539] Martens, *R.* VII. pp. 127-171. See also Martens, *Causes Célèbres*, IV. pp. 218-302.

[540] Martens, *R.* VII. p. 260.

But this compromise did not last long. When in November 1807 war broke out between Russia and England, the former in her declaration of war[541] annulled the Maritime Convention of 1801, proclaimed again the principles of the First Armed Neutrality, and asserted that she would never again drop these principles. Great Britain proclaimed in her counter-declaration[542] her return to
[Pg 357] those principles against which the First and the Second Armed Neutrality were directed, and she was able to point out that no Power had applied these principles more severely than Russia under the Empress Catharine II. after the latter had initiated the First Armed Neutrality.

[541] Martens, *R.* VIII. p. 706.

[542] Martens, *R.* VIII. p. 710.

Thus all progress made by the Maritime Convention of 1801 fell to the ground. Times were not favourable to any progress. After Napoleon's Berlin decrees in 1806 ordering the boycott of all English goods, England declared all French ports and all the ports of the allies of France blockaded, and ordered her fleet to capture all ships destined to these ports. And Russia, which had in her declaration of war against England in 1807 solemnly asserted that she would never again drop the principles of the First Armed Neutrality, by article 2 of the Ukase[543] published on August 1, 1809, violated one of the most important of these principles by ordering that neutral vessels carrying enemy (English) goods were to be stopped, the enemy goods seized, and the vessels themselves seized if more than the half of their cargoes consisted of enemy goods.

[543] Martens, *N.R.* I. p. 484.

Neutrality during the Nineteenth Century.

§ 291. The development of the rules of neutrality during the nineteenth century was due to four factors.

(1) The most prominent and influential factor is the attitude of the United States of America towards neutrality from 1793 to 1818. When in 1793 England joined the war which had broken out in 1792 between the so-called First Coalition and France, Genêt, the French diplomatic envoy accredited to the United States, granted Letters of Marque to American merchantmen manned by American citizens in American ports. These privateers were destined to cruise against English vessels, and French Prize Courts were set up by the French Minister in connection with French consulates in American ports. On the complaint of Great Britain, the Government of the United
[Pg 358] States ordered these privateers to be disarmed and the French Prize Courts to be disorganised.[544] As the trial of Gideon Henfield,[545] who was acquitted, proved that the Municipal Law of the United States did not prohibit the enlistment of American citizens in the service of a foreign belligerent, Congress in 1794 passed an Act temporarily forbidding American citizens to accept Letters of Marque from a foreign belligerent and to enlist in the army or navy of a foreign State, and forbidding the fitting out and arming of vessels intended as privateers for foreign belligerents. Other Acts were passed from time to time. Finally, on April 20, 1818, Congress passed the Foreign Enlistment Act, which deals definitely with the matter, and is still in force,[546] and which afforded the basis of the British Foreign Enlistment Act of 1819. The example of the United States initiated the present practice, according to which it is the duty of neutrals to prevent the fitting out and arming on their territory of cruisers for belligerents, to prevent enlistment on their territory for belligerents, and the like.

[544] See Wharton, III. §§ 395-396.

[545] Concerning this trial, see Taylor, § 609.

[546] See Wheaton, §§ 434-437; Taylor, § 610; Lawrence, § 223.

(2) Of great importance for the development of neutrality during the nineteenth century became the permanent neutralisation of Switzerland and Belgium. These States naturally adopted and retained throughout every war an exemplary attitude of impartiality towards the belligerents. And each time war broke out in their vicinity they took effectual military measures for the purpose of preventing belligerents from making use of their neutral territory and resources.

(3) The third factor is the Declaration of Paris of 1856, which incorporated into International
[Pg 359] Law the rule "Free ship, free goods," the rule that neutral goods on enemy ships cannot be appropriated, and the rule that blockade must be effective.

(4) The fourth and last factor is the general development of the military and naval resources of all members of the Family of Nations. As all the larger States were, during the second half of the nineteenth century, obliged to keep their armies and navies at every moment ready for war, it followed as a consequence that, whenever war broke out, each belligerent was anxious not to injure neutral States in order to avoid their taking the part of the enemy. On the other hand, neutral States were always anxious to fulfil the duties of neutrality for fear of being drawn into the war. Thus the general rule, that the development of International Law has been fostered by

the interests of the members of the Family of Nations, applies also to the special case of neutrality. But for the fact that it is to the interest of belligerents to remain during war on good terms with neutrals, and that it is to the interest of neutrals not to be drawn into war, the institution of neutrality would never have developed so favourably as it actually did during the nineteenth century.

Neutrality in the Twentieth Century.

§ 292. And this development has continued during the first decade of the twentieth century. The South African and Russo-Japanese wars produced several incidents which gave occasion for the Second Peace Conference of 1907 to take the matter of neutrality within the range of its deliberations and to agree upon the Convention (V.) concerning the rights and duties of neutral Powers and persons in war on land, as well as upon the Convention (XIII.) concerning the rights and duties of neutral Powers in maritime war. And some of the other Conventions agreed upon at this Conference, although they do not directly concern neutral Powers, are indirectly of great
[Pg 360] importance to them. Thus the Convention (VII.) respecting the conversion of merchantmen into men-of-war indirectly concerns neutral trade as well as the Convention (VIII.) respecting the laying of submarine mines, and the Convention (XI.) concerning restrictions on the exercise of the right of capture. Of the greatest importance, however, is the fact that by the as yet unratified Convention XII. the Conference agreed upon the establishment of an International Prize Court to serve as a Court of Appeal in such prize cases decided by the Prize Courts of either belligerent as concern the interests of neutral Powers or their subjects. To enable this proposed Court to find its verdicts on the basis of a generally accepted prize law the Naval Conference of London met in 1908 and produced, in 1909, the Declaration of London concerning the laws of naval war, which represents a code comprising the rules respecting blockade, contraband, unneutral service, destruction of neutral prizes, transfer to neutral flag, enemy character, convoy, resistance to search, and compensation. Although the Declaration of London has been signed by only ten Powers, none of which has as yet ratified,[547] there is no doubt that sooner or later, perhaps with some slight modifications, it will either be *expressly* ratified, or become customary law by the fact that maritime Powers which go to war will carry out its rules.[548] Be that as it may, the Declaration of London is a document of epoch-making character and the future historian of International Law will reckon its development from the Declaration of Paris (1856) to the Declaration of London[549] (1909).

[547] See Smith, *International Law*, 4th ed. by Wylie (1911), pp. 353-371, where the chief points against ratification, and the answers made thereto, are impartially set forth.

[548] Thus both Italy and Turkey, although the latter is not even a signatory Power, during the Turco-Italian War, complied with the rules of the Declaration of London.

[549] As regards the literature in favour and against the ratification, on the part of Great Britain, of the Declaration of London, see above, vol. I. § 568*b*, p. 595, note 1, and as regards the value of the Report of the Drafting Committee of
[Pg 361] the Naval Conference of London, see above, vol. I. § 554, No. 7.

II

CHARACTERISTICS OF NEUTRALITY

Grotius, III. c. 17, § 3—Bynkershoek, *Quaest. jur. publ.* I. c. 9—Vattel, III. §§ 103-104—Hall, §§ 19-20—Lawrence, § 222—Westlake, II. pp. 161-169—Phillimore, III. §§ 136-137—Halleck, II. p. 141—Taylor, § 614—Moore, VII. §§ 1287-1291—Walker, § 54—Wheaton, § 412—Bluntschli, §§ 742-744—Heffter, § 144—Geffcken in Holtzendorff, IV. pp. 605-606—Gareis, § 87—Liszt, § 42—Ullmann, § 190—Bonfils, Nos. 1441 and 1443—Despagnet, No. 686—Rivier, II. pp. 368-370—Pradier-Fodéré, VIII. Nos. 3222-3224, 3232-3233—Nys, III. pp. 570-581—Calvo, IV. §§ 2491-2493—Fiore, III. Nos. 1536-1541, and Code, Nos. 1768-1775—Martens, II. § 129—Dupuis, No. 316—Mérignhac, pp. 349-351—Pillet, pp. 272-274—Heilborn, *System*, pp. 336-351—Perels, § 38—Testa, pp. 167-172—Kleen, I. §§ 1-4—Hautefeuille, I. pp. 195-200—Gessner, pp. 22-23—Schopfer, *Le principe juridique de la neutralité et son évolution dans l'histoire de la guerre* (1894).

Conception of Neutrality.

§ 293. Such States as do not take part in a war between other States are neutrals.[550] The term "neutrality" is derived from the Latin *neuter*. Neutrality may be defined as *the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents, such attitude creating rights and duties between the impartial States and the belligerents*. Whether or not a third State will adopt and preserve an attitude of impartiality during war is not a matter for International Law but for International Politics. Therefore, unless a previous treaty stipulates it expressly, no duty exists for a State, according to International Law, to remain neutral in war. On the other hand, it ought not to be maintained, although this is done by some writers,[551] that every State has by the Law of Nations a right not to remain neutral. The fact is that every Sovereign State, as an independent member of the Family of Nations, is master of its own
[Pg 362] resolutions, and that the question of remaining neutral or not is, in absence of a treaty stipulating otherwise, one of policy and not of law. However, all States which do not expressly declare the contrary by word or action, are supposed to be neutral, and the rights and duties arising from neutrality come into and remain in existence through the mere fact that a State takes up and preserves an attitude of impartiality and is not drawn into the war by the belligerents themselves. A special assertion of intention to remain neutral is not therefore legally necessary on the part of neutral States, although they often expressly and formally proclaim[552] their neutrality.

[550] Grotius (III. c. 17) calls them *medii in bello*; Bynkershoek (I. c. 9) *non hostes qui neutrarum partium sunt*.

[551] See, for instance, Vattel, III. § 106, and Bonfils, No. 1443.

[552] See below, § 309.

Neutrality an Attitude of Impartiality.

§ 294. Since neutrality is an attitude of impartiality, it excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to the one as benefit the other. But it requires, on the other hand, active measures from neutral States. For neutrals must prevent belligerents from making use of their neutral territories and of their resources for military and naval purposes during the war. This concerns not only actual fighting on neutral territories, but also transport of troops, war materials, and provisions for the troops, the fitting out of men-of-war and privateers, the activity of Prize Courts, and the like.

But it is important to remember that the necessary attitude of impartiality is not incompatible with sympathy with one and antipathy against the other belligerent, so long as such sympathy and antipathy are not realised in actions violating impartiality. Thus, not only public opinion and
[Pg 363] the Press of a neutral State, but also the Government,[553] may show their sympathy to one party or another without thereby violating neutrality. And it must likewise be specially observed that acts of humanity on the part of neutrals and their subjects, such as the sending of doctors, medicine, provisions, dressing material, and the like, to military hospitals, and the sending of clothes and money to prisoners of war, can never be construed as acts of partiality, although these comforts are provided for the wounded and the prisoners of one of the belligerents only.

[553] See, however, Geffcken in Holtzendorff, IV. p. 656, and Frankenbach, *Die Rechtsstellung von neutralen Staatsangehörigen in kriegführenden Staaten* (1910), p. 53, who assert the contrary.

Neutrality an Attitude creating Rights and Duties.

§ 295. Since neutrality is an attitude during the condition of war only, this attitude calls into existence special rights and duties which do not generally obtain. They come into existence by the fact that the outbreak of war has been notified or has otherwise[554] unmistakably become known to third States who take up an attitude of impartiality, and they expire *ipso facto* by the termination of the war.

[554] See article 2 of Convention III. of the Second Peace Conference.

Rights and duties deriving from neutrality do not exist before the outbreak of war, although such outbreak may be expected every moment. Even so-called neutralised States, as Switzerland and Belgium, have during time of peace no duties connected with neutrality, although as neutralised States they have even in time of peace certain duties. These duties are not duties connected with neutrality, but duties imposed upon the neutralised States as a condition of their neutralisation. They include restrictions for the purpose of safeguarding the neutralised States from being drawn into war.[555]

[555] See above, vol. I. § 96.

Neutrality an Attitude of States.

§ 296. As International Law is a law between States only and exclusively, neutrality is an attitude of impartiality on the part of States, and not on the part of individuals.[556] Individuals
[Pg 364] derive neither rights nor duties, according to International Law, from the neutrality of those States whose subjects they are. Neutral States are indeed obliged by International Law to prevent their subjects from committing certain acts, but the duty of these subjects to comply with such injunctions of their Sovereigns is a duty imposed upon them by Municipal, not by International Law. Belligerents, on the other hand, are indeed permitted by International Law to punish subjects of neutrals for breach of blockade, for carriage of contraband and for rendering unneutral service to the enemy; but the duty of subjects of neutrals to comply with these injunctions of belligerents is a duty imposed upon them by these very injunctions of the belligerents, and not by International Law. Although as a rule a State has no jurisdiction over foreign subjects on the Open Sea,[557] either belligerent has, exceptionally, by International Law, the right to punish foreign subjects by confiscation of cargo, and eventually of the vessel itself, in case their vessels break blockade, carry contraband, or render unneutral service to the enemy; but punishment is threatened and executed by the belligerents, not by International Law. Therefore, if neutral merchantmen commit such acts, they neither violate neutrality nor do they act against International Law, but they simply violate injunctions of the belligerents concerned. If they choose to run the risk of punishment in the form of losing their property, this is their own concern, and their neutral home State need not prevent them from doing so. But to the right of belligerents to punish subjects of neutrals for the acts specified corresponds the duty of neutral
[Pg 365] States to acquiesce on their part in the exercise of this right by either belligerent.

[556] It should be specially observed that it is an inaccuracy of language to speak (as is commonly done in certain cases) of individuals as being neutral. Thus, article 16 of Convention V. of the Second Peace Conference designates the nationals of a State which is not taking part in a war as "neutrals." Thus, further, belligerents occupying enemy territory frequently make enemy individuals who are not members of the armed forces of the enemy take a so-called oath of neutrality.

[557] See above, vol. I. § 146.

Moreover, apart from carriage of contraband, breach of blockade, and unneutral service to the enemy, which a belligerent may punish by capturing and confiscating the vessels or goods concerned, subjects of neutrals are perfectly unhindered in their movements, and neutral States have in especial no duty to prevent their subjects from selling arms, munitions, and provisions to a belligerent, from enlisting in his forces, and the like.

No Cessation of Intercourse during Neutrality between Neutrals and Belligerents.

§ 297. Neutrality as an attitude of impartiality involves the duty of abstaining from assisting either belligerent either actively or passively, but it does not include the duty of breaking off all intercourse with the belligerents. Apart from certain restrictions necessitated by impartiality, all intercourse between belligerents and neutrals takes place as before, a condition of peace prevailing between them in spite of the war between the belligerents. This applies particularly to the working of treaties, to diplomatic intercourse, and to trade. But indirectly, of course, the condition of war between belligerents may have a disturbing influence upon intercourse between belligerents and neutrals. Thus the treaty-rights of a neutral State may be interfered with through occupation of enemy territory by a belligerent; its subjects living on such territory bear in a sense enemy character; its subjects trading with the belligerents are hampered by the right of visit and search, and the right of the belligerents to capture blockade-runners and contraband of war.

Neutrality an Attitude during War (Neutrality in Civil War).

§ 298. Since neutrality is an attitude during war, the question arises as to the necessary attitude of foreign States during civil war. As civil war becomes real war through recognition[558]
[Pg 366] of the insurgents as a belligerent Power, a distinction must be made as to whether recognition has taken place or not. There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of its being at peace with the legitimate Government. But matters are different after recognition. The insurgents are now a belligerent Power, and the civil war is now real war. Foreign States can either become a party to the war or remain neutral, and in the latter case all duties and rights of neutrality devolve upon them. Since, however, recognition may be granted by foreign States independently of the attitude of the legitimate Government, and since recognition granted by the latter is not at all binding upon foreign Governments, it may happen that insurgents are granted recognition on the part of the legitimate Government, whereas foreign States refuse it, and *vice versa*.[559] In the first case, the rights and duties of neutrality devolve upon foreign States as far as the legitimate Government is concerned. Men-of-war of the latter may visit and search merchantmen of foreign States for contraband; a blockade declared by the legitimate Government is binding upon foreign States, and the like. But no rights and duties of neutrality devolve upon foreign States as regards the insurgents. A blockade declared by them is not binding, their men-of-war may not visit and search merchantmen for contraband. On the other hand, if insurgents are recognised by a foreign State but not by the legitimate Government, such foreign State has all rights and duties of neutrality so far as the insurgents are concerned, but not so far as the legitimate Government is
[Pg 367] concerned.[560] In practice, however, recognition of insurgents on the part of foreign States will, if really justified, always have the effect of causing the legitimate Government to grant its recognition also.

[558] See above, §§ 59 and 76, and Rougier, *Les guerres civiles et le droit des gens* (1903), pp. 414-447.

[559] See above, § 59.

[560] See the body of nine rules regarding the position of foreign States in case of an insurrection, adopted by the Institute of International Law at its meeting at Neuchâtel in 1900 (*Annuaire*, XVIII. p. 227). The question as to whether, in case foreign States refuse recognition to insurgents, although the legitimate Government has granted it, the legitimate Government has a right of visit and search for contraband is controversial; see *Annuaire*, XVIII. pp. 213-216.

Neutrality to be recognised by the Belligerents.

§ 299. Just as third States have no duty to remain neutral in a war, so they have no right[561] to demand that they be allowed to remain neutral. History reports many cases in which States, although they intended to remain neutral, were obliged by one or both belligerents to make up their minds and choose the belligerent with whom they would throw in their lot. For neutrality to come into existence it is, therefore, not sufficient for a third State at the outbreak of war to take up an attitude of impartiality, but it is also necessary that the belligerents recognise this attitude by acquiescing in it and by not treating such third State as a party to the war. This does not mean, as has been maintained,[562] that neutrality is based on a contract concluded either *expressis verbis* or by unmistakable actions between the belligerents and third States, and that, consequently, a third State might at the outbreak of war take up the position of one which is neither neutral nor a party to the war, reserving thereby for itself freedom in its future resolutions and actions. Since the normal relation between members of the Family of Nations is peace, the outbreak of war between some of the members causes the others to become neutrals *ipso facto* by their taking up an attitude of impartiality and by their not being treated by the belligerents as parties to the war. Thus, it is not a contract that calls neutrality into existence, but
[Pg 368] this condition is rather a legal consequence of a certain attitude on the part of third States at the outbreak of war, on the one hand, and, on the other, on the part of the belligerents themselves.

[561] But many writers assert the existence of such a right; see, for instance, Vattel, III. § 106; Wheaton, § 414; Kleen, I. § 2; Bonfils, No. 1443.

[562] See Heilborn, *System*, pp. 347 and 350.

III

DIFFERENT KINDS OF NEUTRALITY

Vattel, III. §§ 101, 105, 107, 110—Phillimore, III. §§ 138-139—Halleck, II. p. 142—Taylor, § 618—Wheaton, §§

413-425—Bluntschli, §§ 745-748—Geffcken in Holtzendorff, IV. pp. 634-636—Ullmann, § 190—Despagnet, No. 685—Pradier-Fodéré, VIII. Nos. 3225-3231—Rivier, II. pp. 370-379—Calvo, IV. §§ 2592-2642—Fiore, III. Nos. 1542-1545—Mérignhac, pp. 347-349—Pillet, pp. 277-284—Kleen, I. §§ 6-22.

Perpetual Neutrality.

§ 300. The very first distinction to be made between different kinds of neutrality is that between perpetual or other neutrality. Perpetual or permanent is the neutrality of States which are neutralised by special treaties of the members of the Family of Nations, as at the present time that of Switzerland, Belgium, and Luxemburg. Apart from duties arising from the fact of their neutralisation which are to be performed in time of peace as well as in time of war, the duties and rights of neutrality are the same for neutralised as for other States. It must be specially observed that this concerns not only the obligation not to assist either belligerent, but likewise the obligation to prevent them from making use of the neutral territory for their military purposes. Thus, Switzerland in 1870 and 1871, during the Franco-German War, properly prevented the transport of troops, recruits, and war material of either belligerent over her territory, disarmed the French army which had saved itself by crossing the Swiss frontier, and detained the members of this army until the conclusion of peace.[563]

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[563] See below, § 339.

General and Partial Neutrality.

§ 301. The distinction between general and partial neutrality derives from the fact that a part of the territory of a State may be neutralised,[564] as are, for instance, the Ionian Islands of Corfu and Paxo, which are now a part of the territory of the Kingdom of Greece. Such State has the duty to remain always partially neutral—namely, as far as its neutralised part is concerned. In contradistinction to such partial neutrality, general neutrality is the neutrality of States no part of whose territory is neutralised by treaty.

[564] See above, § 72.

Voluntary and Conventional Neutrality.

§ 302. A third distinction is that between voluntary and conventional neutrality. Voluntary (or simple or natural) is the neutrality of such State as is not bound by a general or special treaty to remain neutral in a certain war. Neutrality is in most cases voluntary, and States whose neutrality is voluntary may at any time during the war give up their attitude of impartiality and take the part of either belligerent. On the other hand, the neutrality of such State as is by treaty bound to remain neutral in a war is conventional. Of course, the neutrality of neutralised States is in every case conventional. Yet not-neutralised States can likewise by treaty be obliged to remain neutral in a certain war, just as in other cases they can by treaty of alliance be compelled not to remain neutral, but to take the part of one of the belligerents.

Armed Neutrality.

§ 303. One speaks of an armed neutrality when a neutral State takes military measures for the purpose of defending its neutrality against possible or probable attempts of either belligerent to make use of the neutral territory. Thus, the neutrality of Switzerland during the Franco-German War was an armed neutrality. In another sense of the term, one speaks of an armed neutrality

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when neutral States take military measures for the purpose of defending the real or pretended rights of neutrals against threatening infringements on the part of either belligerent. The First and Second Armed Neutrality[565] of 1780 and 1800 were armed neutralities in the latter sense of the term.

[565] Se above, §§ 289 and 290.

Benevolent Neutrality.

§ 304. Treaties stipulating neutrality often stipulate a "benevolent" neutrality of the parties regarding a certain war. The term is likewise frequently used during diplomatic negotiations. However, at present there is no distinction between benevolent neutrality and neutrality pure and simple. The idea dates from earlier times, when the obligations imposed by neutrality were not so stringent, and neutral States could favour one of the belligerents in many ways without thereby violating their neutral attitude. If a State remained neutral in the then lax sense of the term, but otherwise favoured a belligerent, its neutrality was called benevolent.

Perfect and Qualified Neutrality.

§ 305. A distinction of great practical importance was in former times that between perfect, or absolute, and qualified, or imperfect, neutrality. The neutrality of a State was qualified if it remained neutral on the whole, but actively or passively, directly or indirectly, gave some kind of assistance to one of the belligerents in consequence of an obligation entered into by a treaty previous to the war, and not for the special war exclusively. On the other hand, a neutrality was termed perfect if a neutral State neither actively nor passively, and neither directly nor indirectly, favoured either belligerent. There is no doubt that in the eighteenth century, when it was recognised that a State could be considered neutral, although it was by a previous treaty bound to render more or less limited assistance to one of the belligerents, this distinction between neutrality perfect and qualified was justified. But during the second half of the

[Pg 371] nineteenth century it became controversial whether a so-called qualified neutrality was neutrality at all, and whether a State, which, in fulfilment of a treaty obligation, rendered some assistance to one of the belligerents, violated its neutrality. The majority of modern writers[566] maintained, correctly I think, that a State was either neutral or not, and that a State violated its neutrality in case it rendered any assistance whatever to one of the belligerents from any motive whatever. For this reason, a State which had entered into such obligations as those just mentioned would in time of war frequently be in a conflict of duties. For, in fulfilling its treaty obligations, it would frequently be obliged to violate its duty of neutrality, and *vice versa*. Several writers,[567] however, maintained that such fulfilment of treaty obligations would not contain a violation of neutrality. All doubt in the matter ought now to be removed, since article 2 of Convention V. of the Second Peace Conference categorically enacts that "belligerents are forbidden to move across the territory of a neutral Power troops or convoys either of munitions of war or of supplies." The principle at the back of this enactment no doubt is that a qualified neutrality has no longer any *raison d'être*, and that neutrality must in every case be perfect.[568]

[566] See, for instance, Ullmann, § 190; Despagnet, No. 685; Rivier, II. p. 378; Calvo, IV. § 2594; Taylor, § 618; Fiore, III. No. 1541; Kleen, I. § 21; Hall, § 215 (see also Hall, § 219, concerning passage of troops). Phillimore, III. § 138, goes with the majority of publicists, but in § 139 he thinks that it would be too rigid to consider acts of "minor" partiality which are the result of conventions previous to the war as violations of neutrality.

[567] See, for instance, Heffter, § 144; Manning, p. 225; Wheaton, §§ 425-426; Bluntschli, § 746; Halleck, II. p. 142.

[568] See above, § 77, where it has been pointed out that a neutral who takes up an attitude of qualified neutrality may nowadays be considered as an accessory belligerent party to the war.

Some Historical Examples of Qualified Neutrality.

§ 306. For the purpose of illustration the following instances of qualified neutrality may be mentioned:—

[Pg 372] (1) By a treaty of amity and commerce concluded in 1778 between the United States of America and France, the former granted for the time of war to French privateers and their prizes the right of admission to American ports, and entered into the obligation not to admit the privateers of the enemies of France. When subsequently, in 1793, war was waged between England and France, and England complained of the admission of French privateers to American ports, the United States met the complaint by advancing their treaty obligations.[569]

(2) Denmark had by several treaties, especially by one of 1781, undertaken the obligation to furnish Russia with a certain number of men-of-war and troops. When, in 1788, during war between Russia and Sweden, Denmark fulfilled her obligations towards Russia, she nevertheless declared herself neutral. And although Sweden protested against the possibility of such qualified neutrality, she acquiesced in the fact and did not consider herself to be at war with Denmark.[570]

(3) In 1848, during war between Germany and Denmark, Great Britain, fulfilling a treaty obligation towards Denmark, prohibited the exportation of arms to Germany, whereas such exportation to Denmark remained undisturbed.[571]

(4) In 1900, during the South African War, Portugal, for the purpose of complying with a treaty obligation[572] towards Great Britain regarding the passage of British troops through Portuguese territory in South Africa, allowed such passage to an English force which had landed at Beira[573] and was destined for Rhodesia.

[569] See Wheaton, § 425, and Phillimore, III. § 139.

[570] See Phillimore, III. § 140.

[571] See Geffcken in Holtzendorff, VI. p. 610, and Rivier, II. p. 379.

[572] Article 11 of the treaty between Great Britain and Portugal concerning the delimitation of spheres of influence in Africa. (Martens, *N.R.G.* 2nd Ser. XVIII. p. 185.)

[573] See below, § 323; Baty, *International Law in South Africa* (1900), p. 75; and *The Times' History of the War in*
[Pg 373] *South Africa*, vol. IV. p. 366.

IV

COMMENCEMENT AND END OF NEUTRALITY

Hall, § 207—Phillimore, I. §§ 392-392A, III. §§ 146-149—Taylor, §§ 610-611—Wheaton, §§ 437-439, and Dana's note 215—Heffter, § 145—Bonfils, Nos. 1445-1446—Despagnet, No. 689—Pradier-Fodéré, VIII. Nos. 3234-3237—Rivier, II. pp. 379-381—Martens, II. § 138—Kleen, I. §§ 5, 36-42.

Neutrality commences with Knowledge of the War.

§ 307. Since neutrality is an attitude of impartiality deliberately taken up by a State not implicated in a war, neutrality cannot begin before the outbreak of war becomes known. It is only then that third States can make up their minds whether or not they intend to remain neutral. They are supposed to remain neutral, and the duties deriving from neutrality are incumbent upon them so long as they do not *expressis verbis* or by unmistakable acts declare that they will be parties to the war. It had long been the usual practice on the part of belligerents to notify the outbreak of war to third States for the purpose of enabling them to take up the necessary attitude of impartiality, but such notification was not formerly in strict law necessary. The mere fact of the knowledge of the outbreak of war which had been obtained in any way gave a third State an opportunity of making up its mind regarding the attitude which it intended to take up, and, if it remained neutral, its neutrality was to be dated from the time of its knowledge of the outbreak of

war. But it is apparent that an immediate notification of the war on the part of belligerents is of great importance, as thereby all doubt and controversy regarding the knowledge of the outbreak of war are excluded. For the fact must always be remembered that a neutral State may in no way be made responsible for acts of its own or of its subjects which have been performed before it [Pg 374] knew of the war, although the outbreak of war might be expected. For this reason article 2 of Convention III. of the Second Peace Conference enacts that belligerents must without delay send a notification of the outbreak of war, which may even be made by telegraph, to neutral Powers, and that the condition of war shall not take effect in regard to neutral Powers until after receipt of a notification, unless it be established beyond doubt that they were in fact aware of the outbreak of war.[574]

[574] See above, §§ 94 and 95.

Commencement of Neutrality in Civil War.

§ 308. As civil war becomes real war through recognition of the insurgents as a belligerent Power, neutrality during a civil war begins for every foreign State from the moment recognition is granted. That recognition might be granted or refused by foreign States independently of the attitude of the legitimate Government has been stated above in § 298, where also an explanation is given of the consequences of recognition granted either by foreign States alone or by the legitimate Government alone.

Establishment of Neutrality by Declarations.

§ 309. Neutrality being an attitude of States creating rights and duties, active measures on the part of a neutral state are required for the purpose of preventing its officials and subjects from committing acts incompatible with its duty of impartiality. Now, the manifesto by which a neutral State orders its organs and subjects to comply with the attitude of impartiality adopted by itself is called a declaration of neutrality in the special sense of the term. Such declaration of neutrality must not, however, be confounded, on the one hand, with manifestoes of the belligerents proclaiming to neutrals the rights and duties devolving upon them through neutrality, or, on the other hand, with the assertions made by neutrals to belligerents or *urbi et orbi* that they will remain neutral, although these manifestoes and assertions are often also called declarations of neutrality.[575]

[Pg 375] [575] See above, § 293.

Municipal Neutrality Laws.

§ 310. International Law leaves the provision of necessary measures for the establishment of neutrality to the discretion of each State. Since in constitutional States the powers of Governments are frequently so limited by Municipal Law that they may not take adequate measures without the consent of their Parliaments, and since it is, so far as International Law is concerned, no excuse for a Government if it is by its Municipal Law prevented from taking adequate measures, several States have once for all enacted so-called Neutrality Laws, which prescribe the attitude to be taken up by their officials and subjects in case the States concerned remain neutral in a war. These Neutrality Laws are latent in time of peace, but their provisions become operative *ipso facto* by the respective States making a declaration of neutrality to their officials and subjects.

British Foreign Enlistment Act.

§ 311. After the United States of America had on April 20, 1818, enacted[576] a Neutrality Law, Great Britain followed the example in 1819 with her Foreign Enlistment Act,[577] which was in force till 1870. As this Act did not give adequate powers to the Government, Parliament passed on August 9, 1870, a new Foreign Enlistment Act,[578] which is still in force. This Act, in the event of British neutrality, prohibits—(1) The enlistment by a British subject in the military or naval [Pg 376] service of either belligerent, and similar acts (sections 4-7); (2) the building, equipping,[579] and despatching[580] of vessels for employment in the military or naval service of either belligerent (sections 8-9); (3) the increase, on the part of any individual living on British territory, of the armament of a man-of-war of either belligerent being at the time in a British port (section 10); (4) the preparing or fitting out of a naval or military expedition against a friendly State (section 11).

[576] Printed in Phillimore, I. pp. 667-672.

[577] 59 Geo. III. c. 69.

[578] 33 and 34 Vict. c. 90. See Sibley in the *Law Magazine and Review*, XXIX. (1904), pp. 453-464, and XXX. (1905), pp. 37-53.

[579] According to section 30, the Interpretation Clause of the Act, "equipping" includes "the furnishing of a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service." It is, therefore, not lawful for British ships, in case Great Britain is neutral, to supply a belligerent fleet direct with coal, a point which became of interest during the Russo-Japanese War. German steamers laden with coal followed the Russian fleet on her journey to the Far East, and British shipowners were prevented from doing the same by the Foreign Enlistment Act. And it was in application of this Act that the British Government ordered, in 1904, the detention of the German steamer *Captain W. Menzel*, which took in Welsh coal at Cardiff for the purpose of carrying it to the Russian fleet *en route* to the Far East. See below, § 350.

[580] An interesting case which ought here to be mentioned occurred in October 1904, during the Russo-Japanese War. Messrs. Yarrow & Co., the shipbuilders, possessed a partly completed vessel, the *Caroline*, which could be finally fitted up either as a yacht or as a torpedo-boat. In September 1904, a Mr. Sinnet and the Hon. James Burke

Roche called at the shipbuilding yard of Messrs. Yarrow, bought the *Caroline*, and ordered her to be fitted up as a high-speed yacht. The required additions were finished on October 3. On October 6 the vessel left Messrs. Yarrow's yard and was navigated by a Captain Ryder, *via* Hamburg, to the Russian port of Libau, there to be altered into a torpedo-boat. That section 8 of the Foreign Enlistment Act applies to this case there is no doubt. But there is no doubt either that it is this Act, and not the rules of International Law, which required the prosecution of Messrs. Sinnet and Roche on the part of the British Government. For, if viewed from the basis of International Law, the case is merely one of contraband. See below, §§ 321, 334, and 397.

It must be specially observed that the British Foreign Enlistment Act goes beyond the requirements of International Law in so far as it tries to prohibit and penalises a number of acts which, according to the present rules of International Law, a neutral State is not required to prohibit and penalise. Thus, for instance, a neutral State need not prohibit its private subjects from enlisting in the service of a belligerent; from supplying coal, provisions, arms, and ammunition direct to a belligerent fleet, provided such fleet is not within or just outside the territorial waters of the neutral concerned; from selling ships to a belligerent although it is known that they will be converted into cruisers or used as transport ships. For article 7 of
[Pg 377]
Convention VII. as well as of Convention XIII. of the Second Peace Conference categorically enacts that "a neutral Power is not bound to prevent the export or transit, on behalf of either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet."

End of Neutrality.

§ 312. Neutrality ends with the war, or through the commencement of war by a hitherto neutral State against one of the belligerents, or through one of the belligerents commencing war against a hitherto neutral State. Since, apart from a treaty obligation, no State has by International Law the duty to remain neutral in a war between other States,[581] or, if it is a belligerent, to allow a hitherto neutral State to remain neutral,[582] it does not constitute a violation of neutrality on the part of a hitherto neutral to declare war against one of the belligerents, and on the part of a belligerent to declare war against a neutral. Duties of neutrality exist so long only as a State remains neutral. They come to an end *ipso facto* by a hitherto neutral State throwing up its neutrality, or by a belligerent beginning war against a hitherto neutral State. But the ending of neutrality must not be confounded with violation of neutrality. Such violation does not *ipso facto* bring neutrality to an end, as will be shown below in § 358.

[581] See above, § 293.

[582] See above, § 299.

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CHAPTER II

RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS

I

RIGHTS AND DUTIES DERIVING FROM NEUTRALITY

Vattel, III. § 104—Hall, § 214—Phillimore, III. §§ 136-138—Twiss, II. § 216—Heffter, § 146—Geffcken in Holtzendorff, IV. pp. 656-657—Gareis, § 88—Liszt, § 42—Ullmann, § 191—Bonfils, Nos. 1441-1444—Despagnet, Nos. 684 and 690—Rivier, II. pp. 381-385—Nys, III. pp. 582-639—Calvo, IV. §§ 2491-2493—Fiore, III. Nos. 1501, 1536-1540, and Code, Nos. 1776-1778, 1784—Martens, II. § 131—Kleen, I. §§ 45-46—Mérignhac, pp. 339-342—Pillet, pp. 273-275.

Conduct in General of Neutrals and Belligerents.

§ 313. Neutrality can be carried out only if neutrals as well as belligerents follow a certain line of conduct in their relations with one another. It is for this reason that from neutrality derive rights and duties, as well for belligerents as for neutrals, and that, consequently, neutrality can be violated as well by belligerents as by neutrals. These rights and duties are correspondent: the duties of neutrals correspond to the rights of either belligerent, and the duties of either belligerent correspond to the rights of the neutrals.

What Rights and Duties of Neutrals and of Belligerents there are.

§ 314. There are two rights and two duties deriving from neutrality for neutrals, and likewise two for belligerents.

Duties of neutrals are, firstly, to act toward belligerents in accordance with their attitude of impartiality; and, secondly, to acquiesce in the exercise of either belligerent's right to punish neutral merchantmen for breach of blockade, carriage of contraband, and rendering unneutral
[Pg 379]
service to the enemy, and, accordingly, to visit, search, and eventually capture them.

The duties of either belligerent are, firstly, to act towards neutrals in accordance with their attitude of impartiality; and, secondly, not to suppress their intercourse, and in especial their commerce, with the enemy.[583]

[583] All writers on International Law resolve the duty of impartiality incumbent upon neutrals into many several duties, and they do the same as regards the duty of belligerents—namely, to act toward neutrals in accordance with the latter's impartiality. In this way quite a large catalogue of duties and corresponding rights are produced, and the

whole matter is unnecessarily complicated.

Either belligerent has a right to demand impartiality from neutrals, whereas, on the other hand, neutrals have a right to demand such behaviour from either belligerent as is in accordance with their attitude of impartiality. Neutrals have a right to demand that their intercourse, and in especial their commerce, with the enemy shall not be suppressed; whereas, on the other hand, either belligerent has the right to punish subjects of neutrals for breach of blockade, carriage of contraband, and unneutral service, and, accordingly, to visit, search, and capture neutral merchantmen.

Rights and Duties of Neutrals contested.

§ 315. Some writers[584] maintain that no rights derive from neutrality for neutrals, and, consequently, no duties for belligerents, because everything which must be left undone by a belligerent regarding his relations with a neutral must likewise be left undone in time of peace. But this opinion has no foundation. Indeed, it is true that the majority of the acts which belligerents must leave undone in consequence of their duty to respect neutrality must likewise be left undone in time of peace in consequence of the territorial supremacy of every State. However, there are several acts which do not belong to this class—for instance, the non-
[Pg 380] appropriation of enemy goods on neutral vessels. And those acts which do belong to this class fall nevertheless at the same time under another category. Thus, a violation of neutral territory on the part of a belligerent for military and naval purposes of the war is indeed an act prohibited in time of peace, because every State has to respect the territorial supremacy of other States; but it is at the same time a violation of neutrality, and therefore totally different from other violations of foreign territorial supremacy. This becomes quite apparent when the true inwardness of such acts is regarded. For every State has a right to demand reparation for an ordinary violation of its territorial supremacy, but it need not take any notice of it, and it has no duty to demand reparation. Yet in case a violation of its territorial supremacy constitutes at the same time a violation of its neutrality, the neutral State has not only a right to demand reparation, but has a duty[585] to do so. For, if it did not, this would contain a violation of its duty of impartiality, because it would be favouring one belligerent to the detriment of the other.[586]

[584] Heffter, § 149; Gareis, § 88; Heilborn, *System*, p. 341.

[585] See, for instance, article 3 of Convention XIII. of the Second Peace Conference, which enacts:—"When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew. If the prize is not within the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew."

[586] See below, § 360.

On the other hand, it has been asserted[587] that, apart from conventional neutrality, from which treaty obligations arise, it is incorrect to speak of duties deriving from neutrality, since at any moment during the war neutrals could throw up neutrality and become parties to the war. I cannot agree with this opinion either. That a hitherto neutral can at any moment throw up
[Pg 381] neutrality and take part in the war, is just as true as that a belligerent can at any moment during the war declare war against a hitherto neutral State. Yet this only proves that there is no duty to remain neutral, and no duty for a belligerent to abstain from declaring war against a hitherto neutral State. This is a truism which ought not to be doubted, and is totally different from the question as to what duties derive from neutrality so long as a certain State remains neutral at all. The assertion that such duties derive from neutrality is in no way inconsistent with the fact that neutrality itself can at any moment during the war come to an end through the beginning of war by either a neutral or a belligerent. This assertion only states the fact that, so long as neutrals intend neutrality and so long as belligerents intend to recognise such neutrality of third States, duties derive from neutrality for both belligerents and neutrals.

[587] See Gareis, § 88.

Contents of Duty of Impartiality.

§ 316. It has already been stated above, in § 294, that impartiality *excludes* such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to one of the belligerents as benefit the other, and that it *includes* active measures on the part of neutrals for the purpose of preventing belligerents from making use of neutral territories and neutral resources for their military and naval purposes. But all this does not exhaust the contents of the duty of impartiality.

It must, on the one hand, be added that according to the present strict conception of neutrality the duty of impartiality of a neutral *excludes* all facilities whatever for military and naval operations of the belligerents, even if granted to both belligerents alike. In former times assistance was not considered a violation of neutrality, provided it was given to both belligerents in the same way, and States were considered neutral although they allowed an equal number of
[Pg 382] their troops to fight on the side of each belligerent. To-day this could no longer happen. From Conventions V. and XIII. of the Second Peace Conference, which deal with neutrality in land and sea warfare respectively, it becomes quite apparent that any facility whatever directly concerning military or naval operations, even if it consists only in granting passage over neutral territory to belligerent forces, is illegal, although granted to both belligerents alike. *The duty of impartiality to-day comprises abstention from any active or passive co-operation with belligerents.*

On the other hand, it must be added that the duty of impartiality *includes* the equal treatment of both belligerents regarding such facilities as do not directly concern military or naval

operations, and which may, therefore, be granted or not to belligerents, according to the discretion of a neutral. If a neutral grants such facilities to one belligerent, he must grant them to the other in the same degree. If he refuses them to the one, he must likewise refuse them to the other.[588] Thus, since it does not, according to the International Law of the present day, constitute a violation of neutrality if a neutral allows his subjects to supply either belligerent with arms and ammunition in the ordinary way of trade, it would constitute a violation of neutrality to prohibit the export of arms destined for one of the belligerents only. Thus, further, if a neutral allows men-of-war of one of the belligerents to bring their prizes into neutral ports, he must grant the same facility to the other belligerent.

[588] See articles 7, 8, 9, 11, 13, 14, of Convention V., and articles 7, 9, 11, 17, 19, 21, 23 of Convention XIII. of the Second Peace Conference.

Duty of Impartiality continuously growing more intense.

§ 317. Although neutrality has already for centuries been recognised as an attitude of impartiality, it has taken two hundred years for the duty of impartiality to attain its present range
[Pg 383] and intensity. Now this continuous development has by no means ceased. It is slowly and gradually going on, and there is no doubt that during the twentieth century the duty of impartiality will become much more intense than it is at present. The fact that the intensity of this duty is the result of gradual development bears upon many practical questions regarding the conduct of neutrals. It is therefore necessary to discuss separately the relations between neutrals and belligerents in order to ascertain what line of conduct must be followed by neutrals.

Neutrality Conventions of the Second Peace Conference.

§ 317*a*. The Second Peace Conference has produced two Conventions concerning neutrality:—

(1) The Convention (V.) respecting the rights and duties of neutral Powers and persons in war on land,[589] which comprises twenty-five articles and has been signed by all the Powers represented at the Conference, except China and Nicaragua; both, however, acceded later. Many Powers have already ratified. Great Britain entered a reservation[590] against articles 16-18, and Argentina against article 18.

[589] See Lémonon, pp. 407-425; Higgins, pp. 290-294; Boidin, pp. 121-134; Nippold, § 25; Scott, *Conferences*, pp. 541-555; Bustamente in *A.J.* II. (1908), pp. 95-120.

[590] See above, § 88.

(2) The Convention (XIII.) respecting the rights and duties of neutral Powers in maritime war, [591] which comprises thirty-three articles and has been signed by all the Powers represented at the Conference, except the United States of America, China, Cuba, Nicaragua, and Spain; but America, China, and Nicaragua acceded later. Many Powers have already ratified, but there are a number of reservations; they will be dealt with in due course when the points concerned are being discussed.

[591] See Lémonon, pp. 555-606; Higgins, pp. 459-483; Bernsten, § 13; Boidin, pp. 236-247; Dupuis, *Guerre*, Nos. 277-330; Nippold, § 34; Scott, *Conferences*, pp. 620-648; Hyde in *A.J.* II. (1908), pp. 507-527.

Both Conventions deal comprehensively with the rights and duties of neutrals, but it is not
[Pg 384] convenient in a treatise on International Law either to treat separately of the duties of neutrals in war on land and on sea, or to dispense with any distinction in the treatment of the several points concerned. The arrangement of topics in the sections of this chapter will, therefore, be independent of the arrangement of topics in the two Conventions, and will be as follows:— Neutrals and Military Operations (§§ 320-328); Neutrals and Military Preparations (§§ 329-335); Neutral Asylum to Soldiers and War Materials (§§ 336-341); Neutral Asylum to Naval Forces (§§ 342-348); Supplies and Loans to Belligerents (§§ 349-352); Services to Belligerents (§§ 353-356).

Contents of Duty of Belligerents to treat Neutrals in accordance with their Impartiality.

§ 318. Whereas the relations between neutrals and belligerents require detailed discussion with regard to the duty of impartiality incumbent upon neutrals, the contents of the duty of belligerents to treat neutrals in accordance with their impartiality are so manifest that elaborate treatment is unnecessary. Such duty *excludes*, firstly, any violation of neutral territory for military or naval purposes of the war;[592] and, secondly, the appropriation of neutral goods, contraband excepted, on enemy vessels.[593] On the other hand, such duty *includes*, firstly, due treatment of neutral diplomatic envoys accredited to the enemy and found on occupied enemy territory; and, secondly, due treatment of neutral subjects and neutral property on enemy territory. A belligerent who conquers enemy territory must at least grant to neutral envoys accredited to the enemy the right to quit the occupied territory unmolested.[594] And such
[Pg 385] belligerent must likewise abstain from treating neutral subjects and property established on enemy territory more harshly than the laws of war allow; for, although neutral subjects and property have, by being established on enemy territory, acquired enemy character, they have nevertheless not lost the protection of their neutral home State.[595] And such belligerent must, lastly, pay full damages in case he makes use of his right of angary[596] against neutral property in course of transit through enemy territory.

[592] See articles 1-4 of Convention V., and articles 1-5 of Convention XIII. of the Second Peace Conference.

[593] This is stipulated by the Declaration of Paris of 1856.

[594] The position of foreign envoys found by a belligerent on occupied enemy territory is not settled as regards details. But there is no doubt that a certain consideration is due to them, and that they must at least be granted the right to depart. See above, vol. I. § 399.

[595] See above, § 88.

[596] See below, §§ 364-367.

Contents of Duty not to suppress Intercourse between Neutrals and the Enemy.

§ 319. The duty of either belligerent not to suppress intercourse of neutrals with the enemy requires no detailed discussion either. It is a duty which is in accordance with the development of the institution of neutrality. It is of special importance with regard to commerce of subjects of neutrals with belligerents, since formerly attempts were frequently made to intercept all neutral trade with the enemy. A consequence of the now recognised freedom of neutral commerce with either belligerent is, firstly, the rule, enacted by the Declaration of Paris of 1856, that enemy goods, with the exception of contraband, on neutral vessels on the Open Sea or in enemy territorial waters may not be appropriated by a belligerent,[597] and, secondly, the rule, enacted by article 1 of Convention XI. of the Second Peace Conference, that the postal correspondence of neutrals or belligerents, except correspondence destined for or proceeding from a blockaded port, which may be found on a neutral or enemy vessel, is inviolable.[598] But the recognised freedom of neutral commerce necessitates, on the other hand, certain measures on the part of
[Pg 386] belligerents. It would be unreasonable to impose on a belligerent a duty not to prevent the subjects of neutrals from breaking a blockade, from carrying contraband, and, lastly, from rendering unneutral service to the enemy. International Law gives, therefore, a right to either belligerent to forbid all such acts to neutral merchantmen, and, accordingly, to visit, search, capture, and punish them.[599]

[597] That not only goods owned by enemy individuals but also goods owned by the enemy State are exempt from appropriation when on neutral vessels, has been pointed out above, § 177, p. 220, note 2.

[598] See above, § 191, and below, § 411.

[599] That a subject of a neutral State who tries to break a blockade, or carries contraband to the enemy, or renders the enemy unneutral service, violates injunctions of the belligerents, but not International Law, has been shown above in § 296; see also below, §§ 383 and 398.

II

NEUTRALS AND MILITARY OPERATIONS

Vattel, III. §§ 105, 118-135—Hall, §§ 215, 219, 220, 226—Westlake, II. pp. 179-183—Lawrence, §§ 229, 234-240—Manning, pp. 225-227, 245-250—Twiss, II. §§ 217, 218, 228—Halleck, II. pp. 146, 165, 172—Taylor, §§ 618, 620, 632, 635—Walker, §§ 55, 57, 59-61—Wharton, III. §§ 397-400—Moore, VII. §§ 1293-1303—Wheaton, §§ 426-429—Bluntschli, §§ 758, 759, 763, 765, 769-773—Heffter, §§ 146-150—Geffcken in Holtzendorff, IV. pp. 657-676—Ullmann, § 191—Bonfils, Nos. 1449-1457, 1460, 1469, 1470—Despagnet, Nos. 690-692—Rivier, II. pp. 395-408—Calvo, IV. §§ 2644-2664, 2683—Fiore, III. Nos. 1546-1550, 1574-1575, 1582-1584—Martens, II. §§ 131-134—Kleen, I. §§ 70-75, 116-122—Mérignhac, pp. 352-380—Pillet, pp. 284-289—Perels, § 39—Testa, pp. 173-180—Heilborn, *Rechte*, pp. 4-12—Dupuis, Nos. 308-310, 315-317, and *Guerre*, Nos. 277-294—*Land Warfare*, §§ 465-471.

Hostilities by and against Neutrals.

§ 320. The duty of impartiality incumbent upon a neutral must obviously prevent him from committing hostilities against either belligerent. This would need no mention were it not for the purpose of distinction between hostilities on the one hand, and, on the other, military or naval acts of force by a neutral for the purpose of repulsing violations of his neutrality committed by either belligerent. Hostilities of a neutral are acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and
[Pg 387] the belligerent concerned. If, however, a neutral does not attack a belligerent, but only repulses him by force when he violates or attempts to violate the neutrality of the neutral, such repulse does not comprise hostilities. Thus, if men-of-war of a belligerent attack an enemy vessel in a neutral port and are repulsed by neutral men-of-war, or if belligerent forces try to make their way through neutral territory and are forcibly prevented by neutral troops, no hostilities have been committed by the neutral, who has done nothing else than fulfil his duty of impartiality. Article 10 of Convention V. enacts categorically that "the fact of a neutral Power repelling, even by force, attacks on its neutrality, cannot be considered as a hostile act." And stress must be laid on the fact that it is no longer legitimate for a belligerent to pursue[600] military or naval forces who take refuge on neutral territory; should, nevertheless, a belligerent do this, he must, if possible, be repulsed by the neutral.

[600] See above, § 288, p. 352, and below, § 347 (4), p. 422.

It is, on the other hand, likewise obvious that hostilities against a neutral on the part of either belligerent are acts of war, and not mere violations of neutrality. If, however, belligerent forces attack enemy forces which have taken refuge on neutral territory or which are there for other purposes, such acts are not hostilities against the neutral, but mere violations of neutrality which must be repulsed or for which reparation must be made, as the case may be.

Quite a peculiar condition arose at the outbreak of and during the Russo-Japanese War. The ends for which Japan went to war were the expulsion of the Russian forces from the Chinese Province of Manchuria and the liberation of Korea, which was at the time an independent State,
[Pg 388] from the influence of Russia. Manchuria and Korea became therefore the theatre of war, although both were neutral territories and although neither China nor Korea became parties to the war. The hostilities which occurred on these neutral territories were in no wise directed against the neutrals concerned. This anomalous condition of matters arose out of the inability of

both China and Korea to free themselves from Russian occupation and influence. And Japan considered her action, which must be classified as an intervention, justified on account of her vital interests. The Powers recognised this anomalous condition by influencing China not to take part in the war, and by influencing the belligerents not to extend military operations beyond the borders of Manchuria. Manchuria and Korea having become the theatre of war,[601] the hostilities committed there by the belligerents against one another cannot be classified as a violation of neutrality. The case of the *Variag* and the *Korietz* on the one hand, and, on the other, the case of the *Reshitelni*, may illustrate the peculiar condition of affairs:—

(1) On February 8, 1904, a Japanese squadron under Admiral Uriu entered the Korean harbour of Chemulpo and disembarked Japanese troops. The next morning Admiral Uriu requested the commanders of two Russian ships in the harbour of Chemulpo, the *Variag* and the *Korietz*, to leave the harbour and engage him in battle outside, threatening attack inside the harbour in case they would not comply with his request. But the Russian ships did comply, and the battle took place outside the harbour, but within Korean territorial waters.[602] The complaint made by Russia, that in this case the Japanese violated Korean neutrality, would seem to be unjustified,
[Pg 389] since Korea fell within the region and the theatre of war.

(2) The Russian destroyer *Reshitelni*, one of the vessels that escaped from Port Arthur on August 10, 1904, took refuge in the Chinese harbour of Chifu. On August 12, two Japanese destroyers entered the harbour, captured the *Reshitelni*, and towed her away.[603] There ought to be no doubt that this act of the Japanese comprises a violation of neutrality,[604] since Chifu does not belong to the part of China which fell within the region of war.

[601] See above, § 71, p. 87; Lawrence, *War*, pp. 268-294; Ariga, §§ 16-22.

[602] See Lawrence, *War*, pp. 279-289, and Takahashi, pp. 462-466.

[603] See Lawrence, *War*, pp. 291-294, and Takahashi, pp. 437-444.

[604] See below, § 361, where the case of the *General Armstrong* is discussed.

Furnishing Troops and Men-of-War to Belligerents.

§ 321. If a State remains neutral, it violates its impartiality by furnishing a belligerent with troops or men-of-war. And it matters not whether a neutral renders such assistance to one of the belligerents or to both alike. Whereas Convention V. does not mention the furnishing of troops to belligerents on the part of neutrals, article 6 of Convention XIII. enacts that "the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever, is forbidden."

However, the question is controversial as to whether a neutral State, which in time of peace concluded a treaty with one of the belligerents to furnish him in case of war with a limited number of troops, would violate its neutrality by fulfilling its treaty obligation. Several writers[605] have answered the question in the negative, and there is no doubt that during the eighteenth century such cases happened. But no case happened during the nineteenth century, and there ought to be no doubt that nowadays the answer must be in the affirmative, since a qualified neutrality[606] is no longer admissible.

[605] See, for instance, Bluntschli, § 759, and Heffter, § 144. See above, § 306 (2), where the case is quoted of Denmark furnishing troops to Russia in 1788 during a Russo-Swedish war.

[606] See above, § 305.

[Pg 390] As regards furnishing men-of-war to belligerents, the question arose during the Russo-Japanese War as to whether a neutral violates his duty of impartiality by not preventing his national steamship companies from selling to a belligerent such of their liners as are destined in case of war to be incorporated as cruisers in the national navy. The question was discussed on account of the sale to Russia of the *Augusta Victoria* and the *Kaiserin Maria Theresia* by the North German Lloyd, and the *Fürst Bismarck* and the *Columbia* by the Hamburg-American Line, vessels which were at once enrolled in the Russian Navy as second-class cruisers, re-named as the *Kuban*, *Ural*, *Don*, and *Terek*. Had these vessels, according to an arrangement with the German Government, really been auxiliary cruisers to the German Navy, and had the German Government given its consent to the transaction, a violation of neutrality would have been committed by Germany. But the German Press maintained that these vessels had not been auxiliary cruisers to the Navy, and Japan did not lodge a protest with Germany on account of the sale. If these liners were not auxiliary cruisers to the German Navy, their sale to Russia was a legitimate sale of articles of contraband.[607]

[607] See below, § 397.

Subjects of Neutrals fighting among Belligerent Forces.

§ 322. Although several States, as Great Britain[608] and the United States of America, by their Municipal Law prohibit their subjects from enlisting in the military or naval service of belligerents, the duty of impartiality incumbent upon neutrals does not at present include any necessity for such prohibition, provided the individuals concerned cross the frontier singly[609] and not in a body. But a neutral must recall his military and naval officers who may have been serving in the army or navy of either belligerent before the outbreak of war. A neutral must,
[Pg 391] further, retain military and naval officers who want to resign their commissions for the obvious purpose of enlisting in the service of either belligerent. Therefore, when in 1877, during war between Turkey and Servia, Russian officers left the Russian and entered the Servian Army as volunteers with permission of the Russian Government, there was a violation of the duty of impartiality on the part of neutral Russia.

[608] See Section 4 of the Foreign Enlistment Act, 1870.

[609] See article 6 of Convention V.

On the other hand, there is no violation of neutrality in a neutral allowing surgeons and such other non-combatant members of his army as are vested with a character of inviolability according to the Geneva Convention to enlist or to remain in the service of either belligerent.

Passage of Troops and War Material through Neutral Territory.

§ 323. In contradistinction to the practice of the eighteenth century,[610] it is now generally recognised that a violation of the duty of impartiality is involved when a neutral allows a belligerent the passage of troops or the transport of war material over his territory.[611] And it matters not whether a neutral gives such permission to one of the belligerents only, or to both alike. The practice of the eighteenth century was a necessity, since many German States consisted of parts distant one from another, so that their troops had to pass through other Sovereigns' territories for the purpose of reaching outlying parts. At the beginning of the nineteenth century the passing of belligerent troops through neutral territory still occurred. Prussia, although she at first repeatedly refused it, at last entered in 1805 into a secret convention with Russia granting Russian troops passage through Silesia during war with France. On the other hand, even before Russia had made use of this permission, Napoleon ordered
[Pg 392]
Bernadotte to march French troops through the then Prussian territory of Anspach without even asking the consent of Prussia. In spite of the protest of the Swiss Government, Austrian troops passed through Swiss territory in 1813, and when in 1815 war broke out again through the escape of Napoleon from the Island of Elba and his return to France, Switzerland granted to the allied troops passage through her territory.[612] But since that time it has become universally recognised that all passage of belligerent troops through neutral territory must be prohibited, and the Powers declared *expressis verbis* in the Act of November 20, 1815, which neutralised Switzerland, and was signed at Paris,[613] that "no inference unfavourable to the neutrality and inviolability of Switzerland can and must be drawn from the facts which have caused the passage of the allied troops through a part of the territory of the Swiss Confederation." The few instances[614] in which during the nineteenth century States pretended to remain neutral, but nevertheless allowed the troops of one of the belligerents passage through their territory, led to war between the neutral and the other belligerent.

[610] See Vattel, III. §§ 119-132.

[611] See Dumas in *R.G.* XVI. (1909), pp. 289-316.

[612] See Wheaton, §§ 418-420.

[613] See Martens, *N.R.* II. p. 741.

[614] See Heilborn, *Rechte*, pp. 8-9.

Passage of Wounded through Neutral Territory.

However, just as in the case of furnishing troops so in the case of passage, it is a moot point whether passage of troops can be granted without thereby violating the duty of impartiality incumbent upon a neutral, in case a neutral is required to grant it in consequence of an existing State-servitude or of a treaty previous to the war. There ought to be no doubt that, since nowadays a qualified neutrality is no longer admissible, the question must be answered in the negative.[615]

[615] See above, §§ 305 and 306, and also above, vol. I. § 207. Clauss, *Die Lehre von den Staatsdienstbarkeiten* (1894), pp. 212-217, must likewise be referred to. See also Dumas in *R.G.* XVI. (1909), pp. 286-316.

§ 324. The passage of wounded soldiers is different from that of troops. If a neutral allows the
[Pg 393]
passage of wounded soldiers, he certainly does not render direct assistance to the belligerent concerned. But it may well be that indirectly it is of assistance on account of the fact that a belligerent, thereby relieved from transport of his wounded, can now use the lines of communication for the transport of troops, war material, and provisions. Thus, when in 1870 after the battles of Sedan and Metz, Germany applied to Belgium and Luxemburg to allow her wounded to be sent through their territories, France protested on the ground that the relief thereby created to the lines of communication in the hands of the Germans would be an assistance to the military operations of the German Army. Belgium, on the advice of Great Britain, did not grant the request made by Germany, but Luxemburg granted it.[616]

[616] See Hall, § 219, and Geffcken in Holtzendorff, IV. p. 664.

According to article 14 of Convention V. a neutral Power *may* grant the passage of wounded or sick to a belligerent. If he does grant it, the trains bringing them must carry neither combatants nor war material, and those of the wounded and sick who belong to the army of the other belligerent must remain on the neutral territory concerned, must there be guarded by the neutral Government, and must, after having recovered, be prevented from returning to their home State and rejoining their corps. By the stipulation of article 14 it is left to the consideration of a neutral whether or no he will allow the passage of wounded and sick to a belligerent; he will, therefore, have to investigate every case and come to a conclusion according to its merits. It should be stated that, according to article 15 of Convention V., the "Geneva Convention applies to the sick and wounded interned in neutral territory."

Passage of Men-of-War.

§ 325. In contradistinction to passage of troops through his territory, the duty of impartiality

[Pg 394] incumbent upon a neutral does not require him to forbid the passage of belligerent men-of-war through the maritime belt forming part of his territorial waters. Article 10 of Convention XIII. categorically enacts that "the neutrality of a Power is not violated (*n'est pas compromise*) by the mere passage of belligerent men-of-war and their prizes." Since, as stated above in Vol. I. § 188, every littoral State may even in time of peace prohibit the passage of foreign men-of-war through its maritime belt provided such belt does not form a part of the highways for international traffic, it may certainly prohibit the passage of belligerent men-of-war in time of war. However, no duty exists for a neutral to prohibit such passage in time of war, and he need not exclude belligerent men-of-war from his ports either, although he may do this likewise. The reason is that such passage and such admittance into ports contain very little assistance indeed, and are justified by the character of the sea as an international high road. But it is, on the other hand, obvious that belligerent men-of-war must not commit any hostilities against enemy vessels during their passage, and must not use the neutral maritime belt and neutral ports as a basis for their operations against the enemy.[617]

[617] See below, § 333.

Occupation of Neutral Territory by Belligerents.

§ 326. In contradistinction to the practice of the eighteenth century,[618] the duty of impartiality must nowadays prevent a neutral from permitting belligerents to occupy a neutral fortress or any other part of neutral territory. If a treaty previously entered into stipulates such occupation, it cannot be granted without violation of neutrality.[619] On the contrary, the neutral must even use force to prevent belligerents from occupying any part of his neutral territory. The question as to
[Pg 395] whether such occupation on the part of a belligerent would be excusable in case of extreme necessity on account of the neutral's inability to prevent the other belligerent from making use of the neutral territory as a base for his military operations must, I think, be answered in the affirmative, since an extreme case of necessity in the interest of self-preservation must be considered as an excuse.[620]

[618] See Kleen, I. § 116.

[619] See Klüber, § 281, who asserts the contrary.

[620] See Vattel, III. § 122; Bluntschli, § 782; Calvo, IV. § 2642. Kleen, I. § 116, seems not to recognise an extreme necessity of the kind mentioned above as an excuse.—There is a difference between this case and the case which arose at the outbreak of the Russo-Japanese War, when both belligerents invaded Korea, for, as was explained above in § 320, Korea and Manchuria fell within the region and the theatre of war.

Prize Courts on Neutral Territory.

§ 327. It has long been universally recognised that the duty of impartiality must prevent a neutral from permitting a belligerent to set up Prize Courts on neutral territory. The intention of a belligerent in setting up a court on neutral territory can only be to facilitate the plundering by his men-of-war of the commerce of the enemy. A neutral tolerating such Prize Courts would, therefore, indirectly assist the belligerent in his naval operations. During the eighteenth century it was not considered illegitimate on the part of neutrals to allow the setting up of Prize Courts on their territory. The *Règlement du Roi de France concernant les prises qui seront conduites dans les ports étrangers, et des formalités que doivent remplir les Consuls de S.M. qui y sont établis* of 1779, furnishes a striking proof of it. But since in 1793 the United States of America disorganised the French Prize Courts set up by the French envoy Genêt on her territory,[621] it became recognised that such Prize Courts are inconsistent with the duty of impartiality incumbent upon a neutral, and article 4 of Convention XIII. enacts this formerly customary rule.

[621] See above, § 291 (1.)

Belligerent's Prizes in Neutral Ports.

§ 328. It would, no doubt, be an indirect assistance to the naval operations of a belligerent if a
[Pg 396] neutral allowed him to organise on neutral territory the safekeeping of prizes or their sale.

But the case of a temporary stay of a belligerent man-of-war with her prize in a neutral port is different. Neutral Powers may—although most maritime States no longer do it—allow prizes to be brought temporarily into their ports. Articles 21 and 22 of Convention XIII. lay down the following rules in the matter: A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions; it must leave as soon as the circumstances which justified its entry are at an end, and if it does not, the neutral Power must order it to leave at once and must, in case of disobedience, employ the means at disposal to release the prize with its officers and crew, and to intern the prize-crew; a prize brought into a neutral port for reasons other than unseaworthiness, stress of weather, or want of fuel or provisions, must forthwith be released by the respective neutral Power.

The question requires attention as to whether a prize whose unseaworthiness is so great that it cannot be repaired, may be allowed to remain in the neutral port and be there sold[622] after the competent Prize Court has condemned it. Since article 21 enacts that an admitted prize must leave the neutral port as soon as the circumstances which justified its entry are at an end, there is no doubt that it may remain if it cannot by repair be made seaworthy. And there ought, consequently, to be no objection to its sale in the neutral port, provided it has previously been condemned by the proper Prize Court.

[622] See Kleen, vol. I. § 115.

While the stipulation of article 21 cannot meet with any objection, the stipulation of article 23

of Convention XIII. is of a very doubtful character. This article enacts that a neutral Power may [Pg 397] allow prizes to enter its ports, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a Prize Court. And it is of importance to state the fact that the restriction of article 21 does not apply to prizes brought into a neutral port under the rule of article 23. This rule actually enables a belligerent to safeguard all his prizes against recapture, and a neutral Power which allows belligerent prizes access to its ports under the rule of article 23 would indirectly render assistance to the naval operations of the belligerent concerned. For this reason, Great Britain as well as Japan and Siam entered a reservation against article 23. Be that as it may, those Powers which have accepted article 23 will not, I believe, object to the sale in the neutral port concerned of such sequestrated prizes, provided they have previously been condemned by the proper Prize Court.

III

NEUTRALS AND MILITARY PREPARATIONS

Hall, §§ 217-218, 221-225—Lawrence, §§ 234-240—Westlake, II. pp. 181-198—Manning, pp. 227-244—Phillimore, III. §§ 142-151B—Twiss, II. §§ 223-225—Halleck, II. pp. 152-163—Taylor, §§ 616, 619, 626-628—Walker, §§ 62-66—Wharton, III. §§ 392, 395-396—Wheaton, §§ 436-439—Moore, VII. §§ 1293-1305—Heffter, §§ 148-150—Geffcken in Holtzendorff, IV. pp. 658-660, 676-684—Ullmann, § 191—Bonfils, Nos. 1458-1459, 1464-1466—Despagnet, Nos. 692-693—Rivier, II. pp. 395-408—Calvo, IV. §§ 2619-2627—Fiore, III. Nos. 1551-1570—Kleen, I. §§ 76-89, 114—Mérignhac, pp. 358-360—Pillet, pp. 288-290—Dupuis, Nos. 322-331, and *Guerre*, Nos. 290-294—*Land Warfare*, §§ 472-476.

Depôts and Factories on Neutral Territory.

§ 329. Although according to the present intense conception of the duty of impartiality neutrals need not[623] prohibit their subjects from supplying belligerents with arms and the like in the [Pg 398] ordinary way of trade, a neutral must[624] prohibit belligerents from erecting and maintaining on his territory depôts and factories of arms, ammunition, and military provisions. However, belligerents can easily evade this by not keeping depôts and factories, but contracting with subjects of the neutral concerned in the ordinary way of trade for any amount of arms, ammunition, and provisions.[625]

[623] See below, § 350.

[624] See Bluntschli, § 777, and Kleen, I. § 114.

[625] The distinction made by some writers between an occasional supply on the one hand, and, on the other, an organised supply in large proportions by subjects of neutrals, and the assertion that the latter must be prohibited by the neutral concerned, is not justified. See below, § 350.

Levy of Troops, and the like.

§ 330. In former centuries neutrals were not required to prevent belligerents from levying troops on their neutral territories, and a neutral often used to levy troops himself on his territory for belligerents without thereby violating his duty of impartiality as understood in those times. In this way the Swiss Confederation frequently used to furnish belligerents, and often both parties, with thousands of recruits, although she herself always remained neutral. But at the end of the eighteenth century a movement was started which tended to change this practice. In 1793 the United States of America interdicted the levy of troops on her territory for belligerents, and by-and-by many other States followed the example. During the nineteenth century the majority of writers maintained that the duty of impartiality must prevent a neutral from allowing the levy of troops. The few[626] writers who differed made it a condition that a neutral, if he allowed such levy at all, must allow it to both belligerents alike. The controversy is now finally settled, for articles 4 and 5 of Convention V. lay down the rules that corps of combatants may not be formed, nor recruiting offices opened, on the territory of a neutral Power, and that neutral Powers must not allow these acts.

[626] See, for instance, Twiss, II. § 225, and Bluntschli, § 762.

[Pg 399] The duty of impartiality must likewise prevent a neutral from allowing a belligerent man-of-war reduced in her crew to enrol sailors in his ports, with the exception of such few men as are absolutely necessary to navigate the vessel to the nearest home port.[627]

[627] See article 18 of Convention XIII. and below, § 333 (3), and § 346.

A pendant to the levy of troops on neutral territory was the granting of Letters of Marque to vessels belonging to the merchant marine of neutrals. Since privateering has practically disappeared, the question as to whether neutrals must prohibit their subjects from accepting Letters of Marque from a belligerent,[628] need not be discussed.

[628] See above, § 83. With the assertion of many writers that a subject of a neutral who accepts Letters of Marque from a belligerent may be treated as a pirate, I cannot agree. See above, vol. I. § 273.

Passage of Bodies of Men intending to Enlist.

§ 331. A neutral is not obliged by his duty of impartiality to interdict passage through his territory to men either singly or in numbers who intend to enlist. Thus in 1870 Switzerland did not object to Frenchmen travelling through Geneva for the purpose of reaching French corps or to Germans travelling through Basle for the purpose of reaching German corps, under the condition, however, that these men travelled without arms and uniform. On the other hand, when France during the Franco-German War organised an office[629] in Basle for the purpose of sending

bodies of Alsatian volunteers through Switzerland to the South of France, Switzerland correctly prohibited this on account of the fact that this *official* organisation of the passage of whole bodies of volunteers through her neutral territory was more or less equal to a passage of troops.

[629] See Bluntschli, § 770.

The Second Peace Conference has sanctioned this distinction, for article 6 of Convention V. enacts that "the responsibility of a neutral Power is not involved by the mere fact that persons
[Pg 400] cross the frontier individually (*isolément*) in order to offer their services to one of the belligerents." An *argumentum e contrario* justifies the conclusion that the responsibility of a neutral *is* involved in case it does allow men to cross the frontier in a body in order to enlist in the forces of a belligerent.

Organisation of Hostile Expeditions.

§ 332. If the levy and passage of troops, and the forming of corps of combatants, must be prevented by a neutral, he is all the more required to prevent the organisation of a hostile expedition from his territory against either belligerent. Such organisation takes place when a band of men combine under a commander for the purpose of starting from the neutral territory and joining the belligerent forces. The case, however, is different, if a number of individuals, not organised into a body under a commander, start in company from a neutral State for the purpose of enlisting with one of the belligerents. Thus in 1870, during the Franco-German War, 1200 Frenchmen started from New York in two French steamers for the purpose of joining the French Army. Although the vessels carried also 96,000 rifles and 11,000,000 cartridges, the United States did not interfere, since the men were not organised in a body, and since, on the other hand, the arms and ammunition were carried in the way of ordinary commerce.[630]

[630] See Hall, § 222.

Use of Neutral Territory as Base of Naval Operations.

§ 333. Although a neutral is not required by his duty of impartiality to prohibit[631] the passage of belligerent men of-war through his maritime belt, or the temporary stay of such vessels in his ports, it is universally recognised that he must not allow admitted vessels to make the neutral maritime belt and neutral ports the base of their naval operations against the enemy. And article
[Pg 401] 5 of Convention XIII. enacts that "belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries." The following rules may be formulated as emanating from the principle:—

(1) A neutral must, so far as is in his power, prevent belligerent men-of-war from cruising within his portion of the maritime belt for the purpose of capturing enemy vessels as soon as they leave this belt. It must, however, be specially observed that a neutral is not required to prevent this beyond his power. It is absolutely impossible to prevent such cruising under all circumstances and conditions, especially in the case of neutrals who own possessions in distant parts of the globe. How many thousands of vessels would be necessary, if Great Britain, for instance, were unconditionally obliged to prevent such cruising in every portion of the maritime belt of all her numerous possessions scattered over all parts of the globe?

(2) A neutral must prevent a belligerent man-of-war from leaving a neutral port at the same time as an enemy man-of-war or an enemy merchantman, or must make other arrangements which prevent an attack so soon as both reach the Open Sea.[632] Article 16 of Convention XIII. enacts that there must be an interval of at least twenty-four hours between the departure of a belligerent warship and a ship of the other belligerent.

(3) A neutral must prevent a belligerent man-of-war, whose crew is reduced from any cause whatever, from enrolling sailors in his neutral ports, with the exception of such few hands as are necessary for the purpose of safely navigating the vessel to the nearest port of her home State.[633]

(4) A neutral must prevent belligerent men-of-war admitted to his ports or maritime belt from
[Pg 402] taking in such a quantity of provisions and coal as would enable them to continue their naval operations, for otherwise he would make it possible for them to cruise on the Open Sea near his maritime belt for the purpose of attacking enemy vessels.

There is, however, no unanimity of the Powers concerning the quantity of provisions and coal which belligerent men-of-war may be allowed to take in. Articles 19 and 20 of Convention XIII. of the Second Peace Conference enact the following:—

Article 19: "Belligerent war-ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard. Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied. If in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the duration of their permitted stay is extended by twenty-four hours."

Article 20: "Belligerent war-ships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power."

Great Britain, Japan, and Siam, while they have accepted article 20,[634] have entered a reservation against article 19. Great Britain upholds her rule that belligerent warships shall not be allowed to take in more provisions and fuel in neutral ports than is necessary to bring them

safely to the nearest port of their own country.

While, therefore, the matter is not settled, it is agreed that it makes no difference whether the
[Pg 403] man-of-war concerned intends to buy provisions and coal on land or to take them in from transport vessels which accompany or meet her in neutral waters.

(5) A neutral must prevent belligerent men-of-war admitted into his ports or maritime belt from replenishing with ammunition and armaments, and from adding to their armaments, as otherwise he would indirectly assist them in preparing for hostilities (article 18 of Convention XIII.). And it makes no difference whether the ammunition and armaments are to come from the shore or are to be taken in from transport vessels.

Similarly a neutral must prevent belligerent men-of-war in his ports and roadsteads from carrying out such repairs as would add in any manner whatever to their fighting force. The local authorities of the neutral Power must decide what repairs are absolutely necessary to make these vessels seaworthy, and such repairs are allowed, but they must be carried out with the least possible delay (article 17 of Convention XIII.).

(6) A neutral must prevent belligerent men-of-war admitted into his ports from remaining there longer than is necessary for ordinary and legitimate purposes.[635] It cannot be said that the rule adopted in 1862 by Great Britain, and followed by some other maritime States, not to allow a longer stay than twenty-four hours, is a rule of International Law. It is left to the consideration of neutrals to adopt by their Municipal Law any rule they think fit so long as the admitted men-of-war do not prolong their stay for any other than ordinary and legitimate purposes. Article 12 of Convention XIII. prescribes the twenty-four hours rule only for those neutral countries which have not special provisions to the contrary in their Municipal Laws.[636] But it is agreed—and
[Pg 404] article 14 of Convention XIII. enacts it—that belligerent men-of-war, except those exclusively for the time devoted to religious, scientific, or philanthropic purposes, must not prolong their stay in neutral ports and waters beyond the time permitted, except on account of damage or stress of weather. A neutral would certainly violate his duty of impartiality if he were to allow belligerent men-of-war to winter in his ports or to stay there for the purpose of waiting for other vessels of the fleet or transports.

The rule that a neutral must prevent belligerent men-of-war from staying too long in his ports or waters, became of considerable importance during the Russo-Japanese War, when the Russian Baltic Fleet was on its way to the Far East. Admiral Rojdestvensky is said to have stayed in the French territorial waters of Madagascar from December 1904 till March 1905, for the purpose of awaiting there a part of the Baltic Fleet that had set out at a later date. The Press likewise reported a prolonged stay by parts of the Baltic Fleet during April 1905 at Kamranh Bay and Hon-kohe Bay in French Indo-China. Provided the reported facts be true, France would seem to have violated her duty of impartiality by not preventing such an abuse of her neutral ports.

(7) A neutral must prevent more than three men-of-war belonging to the same belligerent from being simultaneously in one of his ports or roadsteads unless his Municipal Law provides the contrary (article 15 of Convention XIII.).

(8) At the outbreak of war a neutral must warn all belligerent men-of-war which were in his ports or roadsteads or in his territorial waters before the outbreak of war, to depart within twenty-four hours or within such time as the local law prescribes (article 13[637] of Convention XIII.).

[631] See Curtius, *Des navires de guerre dans les eaux neutres* (1907).

[632] See below, § 347 (1).

[633] See article 18 of Convention XIII. and above, § 330.

[634] But Germany has entered a reservation against article 20.

[635] See below, § 347.

[636] Germany, Domingo, Siam, and Persia have entered a reservation against article 12.

[Pg 405] [637] Germany has entered a reservation against article 13.

Building and Fitting-out of Vessels intended for Naval Operations.

§ 334. Whereas a neutral is in no[638] wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men-of-war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent, has been adapted to warlike use.[639] The difference between selling armed vessels to belligerents, on the one hand, and building them to order, on the other hand, is usually defined in the following way:—

An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided she is not manned in a neutral port so that she can commit hostilities at once after having reached the Open Sea. A subject of a neutral who builds an armed ship or arms a merchantman, not to order of a belligerent but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a port of the belligerent. In the case of the *La Santissima Trinidad*[640] (1822), as in that of the *Meteor*[641] (1866), American courts have recognised this.[642]

[638] See below, §§ 350 and 397.

[639] See article 8 of Convention XIII.

[640] 7 Wheaton, § 340.

[641] See Wharton, III. § 396, p. 561.

[642] See Phillimore, III. § 151B, and Hall, § 224.

On the other hand, if a subject of a neutral builds armed ships to order of a belligerent, he prepares the means of naval operations, since the ships on sailing outside the territorial waters of the neutral and taking in a crew and ammunition can at once commit hostilities. Thus, through
[Pg 406] carrying out the order of the belligerent, the neutral territory concerned has been made the base of naval operations. And as the duty of impartiality includes the obligation of the neutral to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war.

This distinction, although of course logically correct, is hair-splitting. It only shows that neutral States ought[643] to be required to prevent their subjects from supplying arms, ammunition, and the like, to belligerents. But so long as this progress is not made, the above distinction will probably continue to be drawn, in spite of its hair-splitting character.

[643] See below, § 350.

The *Alabama* Case and the Three Rules of Washington.

§ 335. The movement for recognition of the fact that the duty of impartiality requires a neutral to prevent his subjects from building and fitting out to order of belligerents vessels intended for naval operations, began with the famous case of the *Alabama*. It is not necessary to go into all the details[644] of this case. It suffices to say that in 1862, during the American Civil War, the attention of the British Government was drawn by the Government of the United States to the fact that a vessel for warlike purposes was built in England to order of the insurgents. This vessel, afterwards called the *Alabama*, left Liverpool in July 1862 unarmed, but was met at the Azores by three other vessels, also coming from England, which supplied her with guns and ammunition, so that she could at once begin to prey upon the merchantmen of the United States. On the conclusion of the Civil War, the United States claimed damages from Great Britain for the
[Pg 407] losses sustained by her merchant marine through the operations of the *Alabama* and other vessels likewise built in England. Negotiations went on for several years, and finally the parties entered, on May 8, 1871, into the Treaty of Washington[645] for the purpose of having their difference settled by arbitration, five arbitrators to be nominated—Great Britain, the United States, Brazil, Italy, and Switzerland, each choosing one. The treaty contained three rules, since then known as "The Three Rules of Washington," to be binding upon the arbitrators, namely:[646] —

"A neutral Government is bound—

"*Firstly.* To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a Power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction, to warlike use.

"*Secondly.* Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"*Thirdly.* To exercise due diligence in its waters, and as to all persons within its jurisdiction, to prevent any violations of the foregoing obligations and duties."

[644] See Mountague Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 338-496; Geffcken, *Die Alabama Frage* (1872); Pradier-Fodéré, *La Question de l'Alabama* (1872); Caleb Cushing, *Le Traité de Washington* (1874); Bluntschli in *R.I.* II. (1870), pp. 452-485; Balch, *L'Évolution de l'arbitrage international* (1908), pp. 43-70.

[645] Martens, *N.R.G.* XX. p. 698.

[646] See Moore, VII. § 1330.

In consenting that these rules should be binding upon the arbitrators, Great Britain expressly declared that, in spite of her consent, she maintained that these rules were not recognised rules
[Pg 408] of International Law at the time when the case of the *Alabama* occurred, and the treaty contains also the stipulation that the parties—

"Agree to observe these rules as between themselves in future, and to bring them to the knowledge of other Maritime Powers, and to invite them to accede to them."

The appointed arbitrators[647] met at Geneva in 1871, held thirty-two conferences there, and gave decision[648] on September 14, 1872, according to which England had to pay 15,500,000 dollars damages to the United States.

[647] See Moore, *Arbitrations*, I. pp. 495-682.

[648] The award is printed in full in Moore, *Arbitrations*, I. pp. 653-659, and in Phillimore, III. § 151.

The arbitrators put a construction upon the term *due diligence*[649] and asserted other opinions in their decision which are very much contested and to which Great Britain never consented. Thus, Great Britain and the United States, although they agreed upon the three rules, did not at all agree upon the interpretation thereof, and they could, therefore, likewise not agree upon the contents of the communication to other maritime States stipulated by the Treaty of Washington.

It ought not, therefore, to be said that the Three Rules of Washington[650] have literally become universal rules of International Law. Nevertheless, they were the starting-point of the movement for the universal recognition of the fact that the duty of impartiality obliges neutrals to prevent their subjects from building and fitting out, to order of belligerents, vessels intended for warlike purposes, and to prevent the departure from their jurisdiction of any vessel, which, by order of a belligerent, has been adapted to warlike use. Particular attention must be paid to the fact that, [Pg 409] although article 8 of Convention XIII. in other respects copies almost verbally the first of the Three Rules of Washington, it differs from it in so far as it replaces the words "to use due diligence" by "to employ the means at its disposal." For this reason the construction put by the Geneva arbitrators upon the term *due diligence* cannot find application to the rule of article 8, the employment of the means at the disposal of a neutral to prevent the acts concerned being a mere question of fact.

[649] See below, § 363.

[650] As regards the seven rules adopted by the Institute of International Law, at its meeting at the Hague in 1875, as emanating from the Three Rules of Washington, see *Annuaire*, I. (1877), p. 139.

IV

NEUTRAL ASYLUM TO LAND FORCES AND WAR MATERIAL

Vattel, III. §§ 132-133—Hall, §§ 226 and 230—Halleck, II. p. 150—Taylor, § 621—Wharton, III. § 394—Moore, VII. §§ 1314-1318—Bluntschli, §§ 774, 776-776A, 785—Heffter, § 149—Geffcken in Holtzendorff, IV. pp. 662-665—Ullmann, § 191—Bonfils, Nos. 1461-1462—Rivier, II. pp. 395-398—Calvo, IV. §§ 2668-2669—Fiore, III. Nos. 1576, 1582, 1583—Martens, II. § 133—Mérignhac, pp. 370-376—Pillet, pp. 286-287—Kleen, II. §§ 151-157—Holland, War, Nos. 131-133—Zorn, pp. 316-352—Heilborn, *Rechte und Pflichten der neutralen Staaten in Bezug auf die während des Krieges auf ihr Gebiet übertretenden Angehörigen einer Armee und das dorthingebrachte Kriegsmaterial der kriegführenden Parteien* (1888), pp. 12-83—Rolin-Jaequemyns in *R.I.* III. (1871), pp. 352-366—*Land Warfare*, §§ 485-501.

On Neutral Asylum in general.

§ 336. Neutral territory, being outside the region of war,[651] offers an asylum to members of belligerent forces, to the subjects of the belligerents and their property, and to war material of the belligerents. Since, according to the present rules of International Law, the duty of either belligerent to treat neutrals according to their impartiality must—the case of extreme necessity for self-preservation excepted—prevent them from violating the territorial supremacy of neutrals, [Pg 410] enemy persons as well as enemy goods are perfectly safe on neutral territory. It is true that neither belligerent has a right to demand from a neutral[652] such asylum for his subjects, their property, and his State property. But neither has he, on the other hand, any right to demand that a neutral refuse such asylum to the enemy. The territorial supremacy of the neutral enables him to use his discretion, and either to grant or to refuse asylum. However, the duty of impartiality incumbent upon him must induce a neutral granting asylum to take all such measures as are necessary to prevent his territory from being used as a base of hostile operations.

[651] See above, §§ 70 and 71.

[652] The generally recognised usage for a neutral to grant temporary hospitality in his ports to vessels in distress of either belligerent is an exception to be discussed below in § 344.

Now, neutral territory may be an asylum, first, for private enemy property; secondly, for public enemy property, especially war material, cash, and provisions; thirdly, for private subjects of the enemy; fourthly, for enemy land forces; and, fifthly, for enemy naval forces. Details, however, need only be given with regard to asylum to land forces, war material, and naval forces. For with regard to private property and private subjects it need only be mentioned that private war material brought into neutral territory stands on the same footing as public war material of a belligerent brought there, and, further, that private enemy subjects are safe on neutral territory even if they are claimed by a belligerent for the committal of war crimes.

Only asylum to land forces and war material will be discussed here in §§ 337-341, asylum to naval forces being reserved for separate discussion in §§ 342-348. As regards asylum to land forces, a distinction must be made between (1) prisoners of war, (2) single fugitive soldiers, and (3) troops or whole armies pursued by the enemy and thereby induced to take refuge on neutral territory.

Neutral Territory and Prisoners of War.

[Pg 411] § 337. Neutral territory is an asylum to prisoners of war of either belligerent in so far as they become free *ipso facto* by their coming into neutral territory. And it matters not in which way they come there, whether they escape from a place of detention and take refuge on neutral territory, or whether they are brought as prisoners into such territory by enemy troops who themselves take refuge there.[653]

[653] The case of prisoners on board a belligerent man-of-war which enters a neutral port is different; see below, § 345.

The principle that prisoners of war regain their liberty by coming into neutral territory has been generally recognised for centuries. An illustration occurred in 1558, when several Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada which was wrecked near Calais, and, although the Spanish Ambassador claimed them, France considered them to be freed by the fact of their coming on her territory, and sent them to Constantinople.[654] But has

the neutral on whose territory a prisoner has taken refuge the duty to retain such fugitives and thereby prevent them from rejoining the enemy army? Formerly this question was not settled. In 1870, during the Franco-German War, Belgium answered the question in the affirmative, and detained a French non-commissioned officer who had been a prisoner in Germany and had escaped into Belgian territory with the intention of rejoining at once the French forces. Whereas this case was controversial,[655] all writers agreed that the case was different if escaped prisoners wanted to remain on the neutral territory. As such refugees might at any subsequent time wish to rejoin their forces, the neutral was by his duty of impartiality considered to be obliged to take adequate measures to prevent their so doing. There was likewise no unanimity regarding
[Pg 412] prisoners brought into neutral territory by enemy forces taking refuge there. It was agreed that such prisoners became free by being brought into neutral territory; but whereas some writers[656] maintained that they could not be detained in case they intended at once to leave the neutral territory, others asserted that they must always be detained and that they must comply with such measures as the neutral considers necessary to prevent them from rejoining their forces.

[654] See Hall, § 226, p. 641, note 1.

[655] See Rolin-Jaequemyns in *R.I.* III. (1871), p. 556; Bluntschli, § 776; Heilborn, *Rechte*, pp. 32-34.

[656] For instance, Heilborn, *Rechte*, pp. 51-52.

Article 13 of Convention V. settles the controversy by enacting that a neutral who receives prisoners of war who have escaped or who are brought there by troops of the enemy taking refuge on neutral territory, shall leave them at liberty, but that, if he allows them to remain on his territory, he *may*—he need not!—assign them a place of residence so as to prevent them from rejoining their forces. Since, therefore, everything is left to the discretion of the neutral, he will have to take into account the merits and needs of every case and to take such steps as he thinks adequate. But so much is certain that a belligerent may not in every case categorically demand from a neutral who receives escaped prisoners, or such as have been brought there by troops who take refuge, that he should detain them.

The case of prisoners who, with the consent of the neutral, are transported through neutral territory is different. Such prisoners do not become free on entering the neutral territory, but there is no doubt that a neutral, by consenting to the transport, violates his duty of impartiality, because such transport is equal to passage of troops through neutral territory (article 2 of Convention V.).

Attention must, lastly, be drawn to the case where enemy soldiers are amongst the wounded whom a belligerent is allowed by a neutral to transport through neutral territory. Such wounded
[Pg 413] prisoners become free, but they must, according to article 14 of Convention V., be guarded by the neutral so as to insure their not again taking part in military operations.[657]

[657] See also article 15 of Convention X. and below, § 348*a*.

Fugitive Soldiers on Neutral Territory.

§ 338. A neutral may grant asylum to single soldiers of belligerents who take refuge on his territory, although he need not do so, and may at once send them back to the place they came from. If he grants such asylum, his duty of impartiality obliges him to disarm the fugitives and to take such measures as are necessary to prevent them from rejoining their forces. But it must be emphasised that it is practically impossible for a neutral to be so watchful as to detect every single fugitive who enters his territory. It will always happen that such fugitives steal into neutral territory and leave it again later on to rejoin their forces without the neutral being responsible. And, before he can incur responsibility for not doing so, a neutral must actually be in a position to detain such fugitives. Thus Luxemburg, during the Franco-German War, could not prevent hundreds of French soldiers, who, after the capitulation of Metz, fled into her territory, from rejoining the French forces; because, according to the condition[658] of her neutralisation, she is not allowed to keep an army, and therefore, in contradistinction to Switzerland and Belgium, was unable to mobilise troops for the purpose of fulfilling her duty of impartiality.

[658] See above, vol. I. § 100.

Neutral Territory and Fugitive Troops.

§ 339. On occasions during war large bodies of troops, or even a whole army, are obliged to cross the neutral frontier for the purpose of escaping captivity. A neutral need not permit this, and may repulse them on the spot, but he may also grant asylum. It is, however, obvious that the presence of such troops on neutral territory is a danger for the other party. The duty of
[Pg 414] impartiality incumbent upon a neutral obliges him, therefore, to disarm such troops at once, and to guard them so as to insure their not again performing military acts against the enemy during the war. Convention V. enacts the following rules:—

Article 11: "A neutral Power which receives in its territory troops belonging to the belligerent armies shall detain them, if possible, at some distance from the theatre of war. It may keep them in camps, and even confine them in fortresses or localities assigned for the purpose. It shall decide whether officers are to be left at liberty on giving their parole that they will not leave the neutral territory without authorisation."

Article 12: "In the absence of a special Convention, the neutral Power shall supply the interned with the food, clothing, and relief which the dictates of humanity prescribe. At the conclusion of peace, the expenses caused by internment shall be made good."

It is usual for troops who are not actually pursued by the enemy—for if pursued they have no

time for it—to enter through their commander into a convention with the representative of the neutral concerned, stipulating the conditions upon which they cross the frontier and give themselves into the custody of the neutral. Such conventions are valid without needing ratification, provided they contain only such stipulations as do not disagree with International Law and as concern only the requirements of the case.

Stress must be laid on the fact that, although the detained troops are not prisoners of war captured by the neutral, they are nevertheless in his custody, and therefore under his disciplinary power, just as prisoners of war are under the disciplinary power of the State which keeps them in captivity. They do not enjoy the exterritoriality—see above, Vol. I. § 445—due to armed forces
[Pg 415] abroad because they are disarmed. As the neutral is required to prevent them from escaping, he must apply stern measures, and he may punish severely every member of the detained force who attempts to frustrate such measures or does not comply with the disciplinary rules regarding order, sanitation, and the like.

The most remarkable instance known in history is the asylum granted by Switzerland during the Franco-German War to a French army of 85,000 men with 10,000 horses which crossed the frontier on February 1, 1871.[659] France had, after the conclusion of the war, to pay about eleven million francs for the maintenance of this army in Switzerland during the rest of the war.

[659] See the Convention regarding this asylum between the Swiss General Herzog and the French General Clinchant in Martens, *N.R.G.* XIX. p. 639.

Neutral Territory and Non-combatant Members of Belligerent Forces.

§ 340. The duty of impartiality incumbent upon a neutral obliges him to detain in the same way as soldiers such non-combatant[660] members of belligerent forces as cross his frontier. He may not, however, detain army surgeons and other non-combatants who are privileged according to article 2 of the Geneva Convention.

[660] See Heilborn, *Rechte*, pp. 43-46. Convention V. does not mention any rule concerning this matter.

Neutral Territory and War Material of Belligerents.

§ 341. It can happen during war that war material belonging to one of the belligerents is brought into neutral territory for the purpose of saving it from capture by the enemy. Such war material can be brought by troops crossing the neutral frontier for the purpose of evading captivity, or it can be purposely sent there by order of a commander. Now, a neutral is by no means obliged to admit such material, just as he is not obliged to admit soldiers of belligerents. But if he admits it, his duty of impartiality obliges him to seize and retain it till after the conclusion of peace. War material includes, besides arms, ammunition, provisions, horses, means
[Pg 416] of military transport such as carts and the like, and everything else that belongs to the equipment of troops. But means of military transport belong to war material only so far as they are the property of a belligerent. If they are hired or requisitioned from private individuals, they may not be detained by the neutral.

It can likewise happen during war that war material, originally the property of one of the belligerents but seized and appropriated by the enemy, is brought by the latter into neutral territory. Does such material, through coming into neutral territory, become free, and must it be restored to its original owner, or must it be retained by the neutral and after the war be restored to the belligerent who brought it into the neutral territory? In analogy with prisoners of war who become free through being brought into neutral territory, it is maintained[661] that such war material becomes free and must be restored to its original owner. To this however, I cannot agree.[662] Since war material becomes through seizure by the enemy his property and remains his property unless the other party re-seizes and thereby re-appropriates it, there is no reason for its reverting to its original owner upon transportation into neutral territory.[663]

[661] See Hall, § 226.

[662] See Heilborn, *Rechte*, p. 60, and *Land Warfare*, § 492. The Dutch Government at the Second Peace Conference proposed a rule according to which captured war material brought by the captor into neutral territory should be restored, after the war, to its original owner, but—see *Deuxième Conférence, Actes*, vol. i. p. 145—this proposal was not accepted.

[663] See Heilborn, *Rechte*, pp. 61-65, where the question is discussed as to whether a neutral may claim a lien on war material brought into his territory for expenses incurred for the maintenance of detained troops belonging to
[Pg 417] the owner of the war material.

V

NEUTRAL ASYLUM TO NAVAL FORCES

Vattel, III. § 132—Hall, § 231—Twiss, II. § 222—Halleck, II. p. 151—Taylor, §§ 635, 636, 640—Wharton, III. § 394—Wheaton, § 434—Moore, VII. §§ 1314-1318—Bluntschli, §§ 775-776B—Heffter, § 149—Geffcken in Holtzendorff, IV. pp. 665-667, 674—Ullmann, § 191—Bonfils, No. 1463—Despagnet, No. 692 *ter*—Rivier, II. p. 405—Calvo, IV. §§ 2669-2684—Fiore, III. Nos. 1576-1581, 1584, and Code, Nos. 1788-1792—Martens, II. § 133—Kleen, II. § 155—Pillet, pp. 305-307—Perels, § 39, p. 231—Testa, pp. 173-187—Dupuis, Nos. 308-314, and *Guerre*, Nos. 304-328—Ortolan, II. pp. 247-291—Hautefeuille, I. pp. 344-405—Takahashi, pp. 418-484—Bajer in *R.I.* 2nd Ser. II. (1900), pp. 242-244—Lapradelle in *R.G.* XI. (1904), p. 531.

Asylum to Naval Forces in contradistinction to Asylum to Land Forces.

§ 342. Whereas asylum granted by a neutral to land forces and single members of them is

conditioned by the obligation of the neutral to disarm such forces and to detain them for the purpose of preventing them from joining in further military operations, a neutral may grant temporary asylum to men-of-war of belligerents without being obliged to disarm and detain them.[664] The reason is that the sea is considered an international highway, that the ports of all nations serve more or less the interests of international traffic on the sea, and that the conditions of navigation make a certain hospitality of ports to vessels of all nations a necessity. Thus the rules of International Law regarding asylum of neutral ports to men-of-war of belligerents have developed on somewhat different lines from the rules regarding asylum to land forces. But the rule, that the duty of impartiality incumbent upon a neutral must prevent him from allowing belligerents to use his territory as a base of operations of war, is nevertheless valid regarding asylum granted to their men-of-war.

[664] See, however, below, § 347, concerning the abuse of asylum, which must be prohibited.

Neutral Asylum to Naval Forces optional.

§ 343. Although a neutral may grant asylum to belligerent men-of-war in his ports, he has no
[Pg 418] duty to do so. He may prohibit all belligerent men-of-war from entering any of his ports, whether these vessels are pursued by the enemy or desire to enter for other reasons. However, his duty of impartiality must prevent him from denying to the one party what he grants to the other, and he may not, therefore, allow entry to men-of-war of one belligerent without giving the same permission to men-of-war of the other belligerent (article 9 of Convention XIII.). Neutrals as a rule admit men-of-war of both parties, but they frequently exclude all men-of-war of both parties from entering certain ports. Thus Austria prohibited during the Crimean War all belligerent men-of-war from entering the port of Cattaro. Thus, further, Great Britain prohibited during the American Civil War the access of all belligerent men-of-war to the ports of the Bahama Islands, the case of stress of weather excepted.

Be that as it may, since a neutral must prevent belligerents from making his territory the base of military operations, he must not allow an unlimited number of men-of-war belonging to one of the belligerents to stay simultaneously in one of his ports. Article 15 of Convention XIII. limits the number of such men-of-war to three, unless there are special provisions to the contrary in the Municipal Law of the neutral concerned.

Asylum to Naval Forces in Distress.

§ 344. To the rule that a neutral need not admit men-of-war of the belligerents to neutral ports there is no exception in strict law. However, there is an international usage that belligerent men-of-war in distress should never be prevented from making for the nearest port. In accordance with this usage vessels in distress have always been allowed entry even to such neutral ports as were totally closed to belligerent men-of-war. There are even instances known of belligerent
[Pg 419] men-of-war in distress having asked for and been granted asylum by the enemy in an enemy port.[665]

[665] See above, § 189.

Exterritoriality of Men-of-War during Asylum.

§ 345. The exterritoriality, which according to a universally recognised rule of International Law men-of-war must enjoy[666] in foreign ports, obtains even in time of war during their stay in neutral ports. Therefore, prisoners of war on board do not become free by coming into the neutral port[667] so long as they are not brought on shore, nor do prizes[668] brought into neutral ports by belligerents. On the other hand, belligerent men-of-war are expected to comply with all orders which the neutral makes for the purpose of preventing them from making his ports the base of their operations of war, as, for instance, with the order not to leave the ports at the same time as vessels of the other belligerent. And, if they do not comply voluntarily, they may be made to do so through application of force, for a neutral has the duty to prevent by all means at hand the abuse of the asylum granted.

[666] See above, vol. I. § 450.

[667] See above, § 337.

[668] See articles 21-23 of Convention XIII.

Special provision is made by article 24 of Convention XIII. for the case of a belligerent man-of-war which refuses to leave a neutral port. This article enacts:—"If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of putting to sea so long as the war lasts, and the commanding officer of the ship must facilitate the execution of such measures. When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained. The officers and crew so detained may be left in the ship or kept either on another vessel or on land, and may be
[Pg 420] subjected to such measures of restriction as it may appear necessary to impose upon them. A sufficient number of men must, however, be always left on board for looking after the vessel. The officers may be left at liberty on giving their word not to quit neutral territory without permission."

If a vessel is granted asylum for the whole time of the war—see below, § 347 (3 and 4)—and is, therefore, dismantled, she loses the character of a man-of-war, no longer enjoys the privilege of exterritoriality due to men-of-war in foreign waters, and prisoners on board become free, although they must be detained by the neutral concerned.

Facilities to Men-of-War during Asylum.

§ 346. A belligerent man-of-war, to which asylum is granted in a neutral port, is not only not disarmed and detained, but facilities may even be rendered to her as regards slight repairs, and the supply of provisions and coal. However, a neutral may only allow small repairs of the vessel herself and not of her armaments;[669] for he would render assistance to one of the belligerents, to the detriment of the other, if he were to allow the damaged armaments of a belligerent man-of-war to be repaired in a neutral port. And, further, a neutral may only allow a limited amount of provisions and coal to be taken in by a belligerent man-of-war in neutral ports;[670] for, if he did otherwise, he would allow the belligerent to use the neutral ports as a base for operations of war. And, lastly, a neutral may allow a belligerent man-of-war in his ports to enrol only such a small number of sailors as is necessary to navigate her safely to the nearest port of her home State.[671]

[669] See above, § 333 (5), and below, § 347 (3).

[670] See above, § 333 (4).

[671] See above, §§ 330 and 333 (3).

Abuse of Asylum to be prohibited.

§ 347. It would be easy for belligerent men-of-war to which asylum is granted in neutral ports
[Pg 421] to abuse such asylum if neutrals were not required to prohibit such abuse.

(1) A belligerent man-of-war can abuse asylum, firstly, by ascertaining whether and what kind of enemy vessels are in the same neutral port, accompanying them when they leave, and attacking them immediately they reach the Open Sea. To prevent such abuse, in the eighteenth century several neutral States arranged that, if belligerent men-of-war or privateers met enemy vessels in a neutral port, they were not to be allowed to leave together, but an interval of at least twenty-four hours was to elapse between the sailing of the vessels. During the nineteenth century this so-called twenty-four hours rule was enforced by the majority of States, and the Second Peace Conference, by article 16 of Convention XIII., has made it a general rule[672] by enacting:—"When war-ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other. The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible. A belligerent war-ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary."

(2) Asylum can, secondly, be abused by wintering in a port in order to wait for other vessels of the same fleet, or by similar intentional delay. There is no doubt that neutrals must prohibit this abuse by ordering such belligerent men-of-war to leave the neutral ports. Following the example set by Great Britain in 1862,[673] several maritime States have adopted the rule of not allowing a
[Pg 422] belligerent man-of-war to stay in their neutral ports for more than twenty-four hours, except on account of damage or stress of weather. Other States, such as France, do not, however, object to a more prolonged stay in their ports. Article 12 of Convention XIII. prescribes the twenty-four hours rule only for those neutral countries which have not special provisions to the contrary in their Municipal Laws.[674]

(3) Asylum can, thirdly, be abused by repairing a belligerent man-of-war which has become unseaworthy. Although small repairs are allowed,[675] a neutral would violate his duty of impartiality by allowing such repairs as would make good the unseaworthiness of a belligerent man-of-war. During the Russo-Japanese War this was generally recognised, and the Russian men-of-war *Askold* and *Grossovoi* in Shanghai, the *Diana* in Saigon, and the *Lena* in San Francisco had therefore to be disarmed and detained. The crews of these vessels had likewise to be detained for the time of the war.

(4) Asylum can, lastly, be abused by remaining in a neutral port an undue length of time in order to escape attack and capture by the other belligerent. Neutral territorial waters are in fact an asylum for men-of-war which are pursued by the enemy, but, since nowadays a right of pursuit into neutral waters, as asserted by Bynkershoek,[676] is no longer recognised, it would be an abuse of asylum if the escaped vessel were allowed to make a prolonged stay in the neutral waters. A neutral who allowed such abuse of asylum would violate his duty of impartiality, for he would
[Pg 423] assist one of the belligerents to the disadvantage of the other.[677] Therefore, when after the battle off Port Arthur in August 1904 the Russian battleship *Cesarewitch*, the cruiser *Novik*, and three destroyers escaped, and took refuge in the German port of Tsing-Tau in Kiao-Chau, the *Novik*, which was uninjured, had to leave the port after a few hours,[678] whereas the other vessels, which were too damaged to leave the port, were disarmed and, together with their crews, detained till the conclusion of peace. And when, at the end of May 1905, after the battle of Tsu Shima, three injured Russian men-of-war, the *Aurora*, *Oleg*, and *Jemchug*, escaped into the harbour of Manila, the United States of America ordered them to be disarmed and, together with their crews, to be detained during the war.

[672] See above, § 333 (2), and Hall, § 231, p. 651.

[673] See Hall, § 231, p. 653.

[674] See above, § 333 (6)—Germany, Domingo, Siam, and Persia have entered a reservation against article 12.

[675] See above, § 333 (5) and § 346.

[676] *Quaest. jur. publ.* I. c. 8. See also above, § 288, p. 352, and § 320, p. 387.

[677] It was only during the Russo-Japanese War in 1904 that this became generally recognised, and article 24 of Convention XIII. places it beyond all doubt. Until the Russo-Japanese War it was still a controverted question

whether a neutral is obliged either to dismiss or to disarm and detain such men-of war as had fled into his ports for the purpose of escaping attack and capture. See Hall, § 231, p. 651, and Perels, § 39, p. 213, in contradistinction to Fiore, III. No. 1578. The "Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers," adopted by the Institute of International Law in 1898 at its meeting at the Hague—see *Annuaire*, XVII. (1898), p. 273—answers (article 42) the question in the affirmative.

[678] This case marks the difference between the duties of neutrals as regards asylum to land and naval forces. Whereas land forces crossing neutral frontiers must either be at once repulsed or detained, men-of-war may be granted the right to stay for some limited time within neutral harbours and to leave afterwards unhindered; see above, § 342. The supply of a small quantity of coal to the *Novik* in Tsing-Tau was criticised by writers in the Press, but unjustly. For—see above, § 346—a neutral may allow a belligerent man-of-war in his port to take in so much coal as is necessary to navigate her to her nearest home port.

Neutral Men-of-War as an Asylum.

§ 348. It can happen during war that neutral men-of-war pick up and save from drowning soldiers and sailors of belligerent men-of-war sunk by the enemy, or that they take belligerent marines on board for other reasons. Such neutral men-of-war being an asylum for the rescued marines, the question has arisen whether such rescued marines must be given up to the enemy, or must be detained during the war, or may be brought to their home country. Two cases are on record which illustrate this matter.

[Pg 424] (1) At the beginning of the Chino-Japanese War, on July 25, 1894, after the Japanese cruiser *Naniwa* had sunk the British ship *Kow-shing*, which served as transport carrying Chinese troops, [679] forty-five Chinese soldiers who clung to the mast of the sinking ship were rescued by the French gunboat *Lion* and brought to the Korean harbour of Chemulpo. Hundreds of others saved themselves on some islands near the spot where the incident occurred, and 120 of these were taken on board the German man-of-war *Iltis* and brought back to the Chinese port of Tientsin.[680]

(2) At the beginning of the Russo-Japanese War, on February 9, 1904, after the Russian cruisers *Variag* and *Korietz* had accepted the challenge[681] of a Japanese fleet, fought a battle outside the harbour of Chemulpo, and returned, crowded with wounded, to Chemulpo, the British cruiser *Talbot*, the French *Pascal*, and the Italian *Elba* received large numbers of the crews of the disabled Russian cruisers. The Japanese demanded that the neutral ships should give up the rescued men as prisoners of war, but the neutral commanders demurred, and an arrangement was made according to which the rescued men were handed over to the Russians under the condition that they should not take part in hostilities during the war.[682]

[679] See above, § 89, p. 114, note 1.

[680] See Takahashi, *Cases on International Law during the Chino-Japanese War* (1899), pp. 36 and 51.

[681] See above, § 320 (1).

[682] See Lawrence, *War*, pp. 63-75, and Takahashi, pp. 462-466.

The Second Peace Conference has settled the question, for article 13 of Convention X. enacts:—"If wounded, sick, or shipwrecked are taken on board a neutral man-of-war, precaution must be taken, so far as possible, that they do not again take part in the operations of the war."

Neutral Territory and Shipwrecked Soldiers.

§ 348*a*. Just as in war on land members of the belligerent forces may find themselves on neutral territory, so in war on sea shipwrecked or wounded or sick belligerent soldiers can be brought [Pg 425] into neutral territory. Two cases of this kind must be distinguished:—

(1) According to article 14 of Convention X. it is left to the belligerent man-of-war who captures shipwrecked, wounded, or sick enemy soldiers to send them to a neutral port. The neutral Power concerned need not receive them, but, on the other hand, may grant them asylum. If asylum is granted, the neutral Power is, according to article 15 of Convention X., obliged—unless there is an arrangement to the contrary between the neutral Power and both belligerents—to guard them so as to prevent them from again taking part in the war,[683] the expenses for tending and interning them to be paid by the belligerent to whom they belong.

(2) Neutral merchantmen[684] can either of their own accord have rescued wounded, sick, or shipwrecked men, or they can have taken them on board on appeal by belligerent men-of-war. The surrender of these men may, according to article 12 of Convention X., be demanded at any time by any belligerent man-of-war. But if such demand be not made and the men be brought into a neutral port, they need not be detained by the neutral concerned.

[683] See above, § 205.

[Pg 426] [684] See above, § 208 (2).

VI

SUPPLIES AND LOANS TO BELLIGERENTS

Vattel, III. § 110—Hall, §§ 216-217—Lawrence, § 235—Westlake, II. pp. 217-219—Phillimore, III. § 151—Twiss, II. § 227—Halleck, II. p. 163—Taylor, §§ 622-625—Walker, § 67—Wharton, III. §§ 390-391—Moore, VII. §§ 1307-1312—Bluntschli, §§ 765-768—Heffter, § 148—Geffcken in Holtzendorff, IV. pp. 687-700—Ullmann, §§ 191-192—Bonfils, Nos. 1471-1474—Despagnet, Nos. 693-694—Rivier, II. pp. 385-411—Calvo, IV. §§ 2624-2630—Fiore, III. Nos. 1559-1563—Martens, II. § 134—Kleen, I. §§ 66-69, 96-97—Mérignhac, pp. 360-364—Pillet, pp. 289-293—Dupuis, Nos. 317-319—*Land Warfare*, §§ 477-480.

Supply on the part of Neutrals.

§ 349. The duty of impartiality must prevent a neutral from supplying belligerents with arms, ammunition, vessels, and military provisions.[685] And it matters not whether such supply takes place for money or gratuitously. A neutral who sold arms and ammunition to a belligerent at a profit would violate his duty of impartiality as also would one who transferred such arms and ammunition to a belligerent as a present. This is a settled rule so far as direct transactions regarding such supply between belligerents and neutrals are concerned. The case is different where a neutral does not directly and knowingly deal with a belligerent, although he may, or ought to, be aware that he is indirectly supplying a belligerent. Different States have during neutrality taken up different attitudes regarding such cases. Thus in 1825, during the War of Independence which the Spanish South American Colonies waged against their mother country, the Swedish Government sold three old men-of-war, the *Försigtigheten*, *Euridice*, and *Camille* to two merchants, who on their part sold them to English merchants, representatives of the
[Pg 427]
Government of the Mexican insurgents. When Spain complained, Sweden rescinded the contract.[686] Further, the British Government in 1863, during the American Civil War, after selling an old gunboat, the *Victor*, to a private purchaser and subsequently finding that the agents of the Confederate States had obtained possession of her, gave the order that during the war no more Government ships should be sold.[687] On the other hand, the Government of the United States of America, in pursuance of an Act passed by Congress in 1868 for the sale of arms which the end of the Civil War had rendered superfluous, sold in 1870, notwithstanding the Franco-German War, thousands of arms and other war material which were shipped to France.[688] This attitude of the United States is now generally condemned, and article 6 of Convention XIII. may be quoted against a repetition of such a practice on the part of a neutral State. This article prohibits the supply in any manner, directly or *indirectly*, by a neutral to a belligerent, of warships, ammunition, or war material of any kind whatever.

[685] See article 6 of Convention XIII.

[686] See Martens, *Causes Célèbres*, V. pp. 229-254.

[687] See Lawrence, § 235.

[688] See Wharton, III. § 391, and Moore, VII. § 1309.

Supply on the part of Subjects of Neutrals.

§ 350. In contradistinction to supply to belligerents by neutrals, such supply by subjects of neutrals is lawful, and neutrals are not, therefore, obliged according to their duty of impartiality to prevent such supply. Article 7 of Convention V. and article 7 of Convention XIII. concur in enacting the old customary rule that "A neutral Power is not bound to prevent the export or transit, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or fleet." And article 18[689] of Convention V. recognises the fact that the furnishing of supplies to a belligerent by such subjects of neutrals as do not live
[Pg 428]
on the territory of the other party, or on the territory occupied by that party, does not invest these individuals with enemy character. When in August 1870, during the Franco-German War, Germany lodged complaints with the British Government for not prohibiting its subjects from supplying arms and ammunition to the French Government, Great Britain correctly replied that she was not by International Law under the obligation to prevent her subjects from committing such acts. Of course, such neutral as is anxious to avoid all controversy and friction can by his Municipal Law order his subjects to abstain from such acts, as for instance Switzerland and Belgium did during the Franco-German War. But such injunctions arise from political prudence, and not from any obligation imposed by International Law.

[689] That Great Britain has entered a reservation against article 18, and the portent of this reservation, has been pointed out above, in § 88, p. 109, note 1.

The endeavour to make a distinction between supply in single cases and on a small scale on the one hand, and, on the other, supply on a large scale, and to consider only the former lawful,[690] has neither in theory nor in practice found recognition. As International Law stands, belligerents may make use of visit, search, and seizure to protect themselves against conveyance of contraband by sea to the enemy by subjects of neutrals. But so far as their neutral home State is concerned, such subjects may, at the risk of having their property seized during such conveyance, supply either belligerent with any amount of arms, ammunition, coal, provisions, and even with armed ships,[691] provided always that they deal with the belligerents in the ordinary way of commerce.

[690] See Bluntschli, § 766.

[691] See above, § 334, and below, § 397.

The case is different when there is no ordinary commerce with a belligerent Government and when subjects of neutrals directly supply a belligerent army or navy, or parts of them. If, for
[Pg 429]
instance, a belligerent fleet is cruising outside the maritime belt of a neutral, the latter must prevent vessels of his subjects from bringing coal, arms, ammunition, and provisions to that fleet, for otherwise he would allow the belligerent to make use of neutral resources for naval operations.[692] But he need not prevent vessels of his subjects from bringing coal, arms, ammunition, and provisions to belligerent ports, although the supply is destined for the navy and the army of the belligerent. He need not prevent belligerent merchantmen from coming into his ports and carrying arms and the like, bought from his subjects, over to the ports of their home State. And he need not prevent vessels of his subjects from following a belligerent fleet and supplying it *en route*[693] with coal, ammunition, provisions, and the like, provided such supply does not take place in the neutral maritime belt.

[692] See above, § 333 (4).

[693] See above, § 311, p. 375, note 4.

There is no doubt that, as the law stands at present, neutrals need not prevent their subjects from supplying belligerents with arms and ammunition. Yet, on the other hand, there is no doubt either that such supply is apt to prolong a war which otherwise would come to an end at an earlier date. But it will be a long time, if ever it happens, before it is made a duty of neutrals to prevent such supply as far as is in their power, and to punish such of their subjects as engage in it. The profit derived from such supply being enormous, the members of the Family of Nations are not inclined to cripple the trade of their subjects by preventing it. And belligerents want to have the opportunity of replenishing with arms and ammunition if they run short of them during war. The question is merely one of the standard of public morality.[694] If this standard rises, and
[Pg 430] it becomes the conviction of the world at large that supply of arms and ammunition by subjects of neutrals is apt to lengthen wars, the rule will appear that neutrals must prevent such supply.

[694] See above, vol. I. § 51 (6) p. 83.

Loans and Subsidies on the part of Neutrals.

§ 351. His duty of impartiality must prevent a neutral from granting a loan to either belligerent. Vattel's (III. § 110) distinction between such loans as are granted on interest and such as are not so granted, and his assertion that loans on the part of neutrals are lawful if they are granted on interest with the pure intention of making money, have not found favour with other writers. Nor do I know any instance of such loan on interest having occurred during the nineteenth century.

What is valid regarding a loan is all the more valid regarding subsidies in money granted to a belligerent on the part of a neutral. Through the granting of subsidies a neutral becomes as much the ally of the belligerent as he would by furnishing him with a number of troops.[695]

[695] See above, §§ 305, 306, 321.

Loans and Subsidies on the part of Subjects of Neutrals.

§ 352. It was formerly a moot point in the theory of International Law whether a neutral is obliged by his duty of impartiality to prevent his subjects from granting subsidies and loans to belligerents for the purpose of enabling them to continue the war. Several writers[696] maintained either that a neutral was obliged to prevent such loans and subsidies altogether, or at least that he must prohibit a public subscription on neutral territory for such loans and subsidies. On the other hand, a number of writers asserted that, since money is just as much an article of
[Pg 431] commerce as goods, a neutral was in no wise obliged to prevent on his territory public subscription by his subjects to loans for the belligerents. In contradistinction to the theory of International Law, the practice of the States has beyond doubt established the fact that neutrals need not prevent on their territory subscription to loans for belligerents. Thus in 1854, during the Crimean War, France protested in vain against a Russian loan being raised in Amsterdam, Berlin, and Hamburg. In 1870, during the Franco-German War, a French loan was raised in London. In 1877, during the Russo-Turkish War, no neutral prevented his subjects from subscribing to the Russian loan. Again, in 1904, during the Russo-Japanese War, Japanese loans were raised in London and Berlin, and Russian loans in Paris and Berlin. The Second Peace Conference, by enacting in article 7 of Convention V. that a neutral is not bound to prevent the export ... of anything which can be of use to an army or fleet, has indirectly recognised that a neutral need not prevent the subscription on his territory to loans for belligerents.

[696] See Phillimore, III. § 151; Bluntschli, § 768; Heffter, § 148; Kleen, I. § 68. The case of *De Wütz* v. *Hendricks* (9 Moore, 586) quoted by Phillimore in support of his assertion that neutrals must prevent their subjects from subscribing to a loan for belligerents, is not decisive, for Lord Chief Justice Best declared only "that it was contrary to the Law of Nations for persons residing in this country to enter into any agreements to raise money by way of a loan for the purpose of *supporting subjects of a foreign State in arms against a Government in alliance with our own*."

But matters differ somewhat in regard to subsidies to belligerents by subjects of neutrals. A neutral is not indeed obliged to prevent individual subjects from granting subsidies to belligerents, just as he is not obliged to prevent them from enlisting with either belligerent. But if he were to allow on his territory a public appeal for subscriptions to such subsidy, he would certainly violate his duty of impartiality; for loans are a matter of commerce, subsidies are not. It must, however, be emphasised that public appeals for subscriptions of money for charitable purposes in favour of the wounded, the prisoners, and the like, need not be prevented, even if they are only made in favour of one of the belligerents.

[Pg 432] The distinction between loans and subsidies is certainly correct as the law stands at present. But there is no doubt that the fact of belligerents having the opportunity of getting loans from subjects of neutrals is apt to lengthen wars. The Russo-Japanese War, for instance, would have come to an end much sooner if either belligerent could have been prevented from borrowing money from subjects of neutrals. Therefore, what has been said above in § 350 with regard to the supply of arms and ammunition on the part of subjects of neutrals applies likewise to loans: they will no longer be considered lawful when the standard of public morality rises.

VII

SERVICES TO BELLIGERENTS

Westlake, II. pp. 219-220—Despagnet, No. 696 *bis*—Bonfils, No. 1475[1]—Ullmann, § 192—Rivier, II. pp. 388-391—Calvo, IV. §§ 2640-2641—Martens, II. § 134—Perels, § 43—Kleen, I. §§ 103-108—Lawrence, *War*, pp. 83-

92, 218-220—Scholz, *Drahtlose Telegraphie und Neutralität* (1905), *passim*, and *Krieg und Seekabel* (1904), pp. 122-133—*Land Warfare*, §§ 481-484—Kebedgy, in *R.I.* 2nd Ser. IV. (1904), pp. 445-451.

Pilotage.

§ 353. Since pilots are in the service of littoral States the question as to whether neutrals may permit their pilots to render services to belligerent men-of-war and transport vessels, is of importance. Article 11[697] of Convention XIII. enacts that "a neutral Power may allow belligerent war-ships to employ its licensed pilots." Since, therefore, everything is left to the discretion of neutrals, they will have to take the merits and needs of every case into account. There would certainly be no objection to a neutral allowing belligerent vessels to which asylum is legitimately
[Pg 433] granted, to be piloted into his ports, and likewise such vessels to be piloted through his maritime belt if their passage is not prohibited. But a belligerent might justly object to the men-of-war of his adversary being piloted on the Open Sea by pilots of a neutral Power, except in a case of distress.

[697] Germany has entered a reservation against article 11.

It is worth mentioning that Great Britain during the Franco-German War in 1870, prohibited her pilots from conducting German and French men-of-war which were outside the maritime belt, except when in distress.

Transport on the part of Neutrals.

§ 354. It is generally recognised that the duty of impartiality incumbent upon a neutral obliges him to prevent his men-of-war and other public vessels from rendering transport services to either belligerent. Therefore, such vessels must neither carry soldiers nor sailors belonging to belligerent forces, nor their prisoners of war, nor ammunition, military or naval provisions, nor despatches. The question as to how far such vessels are prevented from carrying enemy subjects other than members of the forces depends upon the question whether by carrying those individuals they render such service to one of the belligerents as is detrimental to the other. Thus, when the Dutch Government in 1901, during the South African War, intended to send a man-of-war, the *Gelderland*, to President Kruger for the purpose of conveying him to Europe, they made sure in advance that Great Britain did not object.

The question has been raised[698] as to whether a neutral whose rolling stock runs on the railway lines of a belligerent, may continue to leave such rolling stock there although it is being used for the transport of troops, war material, and the like. The answer, I believe, ought to be in the negative, for there is no doubt that, if the rolling stock remains on the railway lines of a belligerent, the neutral concerned is indirectly rendering transport services to the belligerent. It
[Pg 434] is for this reason that article 19 of Convention V. enacts that railway material coming from the territory of neutrals shall not be requisitioned or used by a belligerent except in the case and to the extent required by absolute necessity.[699]

[698] See Nowacki, *Die Eisenbahnen im Kriege* (1906), p. 126.

[699] See below, § 365.

Transport on the part of Neutral Merchantmen and by neutral rolling stock.

§ 355. Just as a neutral is not obliged to prevent his merchantmen from carrying contraband, so he is not obliged to prevent them from rendering services to belligerents by carrying in the way of trade enemy troops, and the like, and enemy despatches. Neutral merchantmen rendering such services to belligerents do so at their own risk, for these are unneutral services for which the merchantmen may be punished[700] by the belligerents, but for which the neutral State under whose flag such merchantmen sail bears no responsibility whatever.

[700] See below, §§ 407-413.

And the same is valid with regard to rolling stock belonging to private railway companies of a neutral State. That such rolling stock may not, without the consent of the companies owning it, be made use of by a belligerent for the transport of troops, war material, and the like, except in the case of and to the extent required by absolute necessity, follows from article 19 of Convention V. But, if a private railway company gives its consent, and if its rolling stock is made use of for warlike purposes, it acquires enemy character, article 19 of Convention V. does not apply, and the other belligerent may seize and appropriate it as though it were the property of the enemy State.[701]

[701] See Nowacki, *Die Eisenbahnen im Kriege* (1906), p. 128.

Information regarding Military and Naval Operations.

§ 356. Information regarding military and naval operations may be given and obtained in so many various ways that several cases must be distinguished:—

(1) It is obvious that the duty of impartiality incumbent upon a neutral obliges him to prevent
[Pg 435] his men-of-war from giving any information to a belligerent concerning naval operations of the other party. But a neutral bears no responsibility whatever for private vessels sailing under his flag which give such information. Such vessels run, however, the risk of being punished for rendering unneutral service.[702]

[702] See below, §§ 409 and 410, and articles 45, Nos. 1 and 2, and 46, No. 4, of the Declaration of London.

(2) It is likewise obvious that his duty of impartiality must prevent a neutral from giving

information concerning the war to a belligerent through his diplomatic envoys, couriers, and the like. But the question has been raised as to whether a neutral is obliged to prevent couriers[703] from carrying despatches for a belligerent over his neutral territory. I believe the answer must be in the negative, at least so far as those couriers in the service of diplomatic envoys and such agents as carry despatches from a State to its head or to diplomatic envoys abroad are concerned. Since they enjoy—as stated above, Vol. I. §§ 405 and 457—inviolability for their persons and official papers, a neutral cannot interfere and find out whether these individuals carry information to the disadvantage of the enemy.

[703] See Calvo, § 2640.

(3) According to article 8 of Convention V. "a neutral Power is not bound to forbid or restrict the employment, on behalf of belligerents, of telegraph or telephone cables, or of wireless telegraphy apparatus whether belonging to it, or to companies, or to private individuals." Since, therefore, everything is left to the discretion of the neutral concerned, he will have to take the merits and needs of every case into consideration, and act accordingly. But so much is certain that a belligerent may not categorically request neutrals to forbid or restrict such employment of
[Pg 436] their telegraph wires and the like on the part of his adversary.

The case is different when a belligerent intends to arrange the transmitting of messages through a submarine cable purposely laid over neutral territory or through telegraph and telephone wires purposely erected on neutral territory. This would seem to be an abuse of neutral territory, and the neutral must prevent it. Accordingly, when in 1870, during the Franco-German War, France intended to lay a telegraph cable from Dunkirk to the North of France, the cable to go across the Channel to England and from there back to France, Great Britain refused her consent on account of her neutrality. And again in 1898, during war between Spain and the United States of America, when the latter intended to land at Hong Kong a cable proposed to be laid from Manila, Great Britain refused her consent.[704]

[704] See Lawrence, *War*, p. 219.

The case is likewise different when a belligerent intends to erect in a neutral country, or in a neutral port or neutral waters, a wireless telegraphy station or any apparatus intended as a means of communication with belligerent forces on land or sea, or to make use of any installation of this kind established by him before the outbreak of war for purely military purposes, and not previously opened for the service of the public generally. According to articles 3 and 5 of Convention V. and article 5 of Convention XIII., a neutral is bound to prohibit this. The case which occurred in 1904, during the Russo-Japanese War and the siege of Port Arthur, when the Russians installed an apparatus for wireless telegraphy in Chifu and communicated thereby with the besieged, constituted a violation of neutrality.

(4) It is obvious that his duty of impartiality must prevent a neutral from allowing belligerents to establish intelligence bureaux on his territory. On the other hand, a neutral is not obliged to
[Pg 437] prevent his subjects from giving information to belligerents, be it by letter, telegram, telephone, or wireless telegraphy. In especial a neutral is not obliged to prevent his subjects from giving information to belligerents by wireless telegraphy apparatus installed on a neutral merchantman. Such individuals run, however, the risk of being punished as spies, provided they act clandestinely or under false pretences, and the vessel concerned is subject to the risk of being captured and confiscated for rendering unneutral service.

Stress must be laid on the fact that newspaper correspondents making use of wireless telegraphy from on board neutral merchantmen for the purpose of sending news to their papers, [705] may not be treated as spies, and the merchantmen concerned may not be confiscated, although belligerents need by no means allow the presence of such vessels at the seat of war. Thus, during the Russo-Japanese War, the *Haimun*, a vessel fitted with a wireless telegraphy apparatus for the service of the *Times*, was ordered away by the Japanese. But, of course, an individual can at the same time be a correspondent for a neutral newspaper and a spy, and he may then be punished for espionage.

[705] See Lawrence, *War*, pp. 84-88. On newspaper correspondents generally in naval warfare, see Higgins, *War and the Private Citizen* (1912), pp. 91-114, and in *Z.V.* VI. (1912), pp. 19-28, and the literature and cases there cited.

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VIII

VIOLATION OF NEUTRALITY

Hall, §§ 227-229—Lawrence, §§ 233, 238, 239—Phillimore, III. §§ 151A-151B—Taylor, §§ 630 and 642—Wharton, III. §§ 402, 402A—Wheaton, §§ 429-433—Moore, VII. §§ 1319-1328, 1334-1335—Bluntschli, §§ 778-782—Heffter, § 146—Geffcken in Holtzendorff, IV. pp. 667-676, 700-709—Ullmann, § 191—Bonfils, No. 1476—Despagnet, No. 697—Pradier-Fodéré, No. 3235—Rivier, II. pp. 394-395—Calvo, IV. §§ 2654-2666—Fiore, III. Nos. 1567-1570—Martens, II. § 138—Kleen, I. § 25—Dupuis, Nos. 332-337.

Violation of Neutrality in the narrower and in the wider sense of the Term.

§ 357. Many writers who speak of violation of neutrality treat under this head only of violations of the duty of impartiality incumbent upon neutrals. And indeed such violations only are meant, if one speaks of violation of neutrality in the narrower sense of the term. However, it is necessary for obvious reasons to discuss not only violations of the duty of impartiality of neutrals, but violations of all duties deriving from neutrality, whether they are incumbent upon neutrals or upon belligerents. In the wider sense of the term violation of neutrality comprises, therefore, every performance or omission of an act contrary to the duty of a neutral towards either

belligerent as well as contrary to the duty of either belligerent towards a neutral. Everywhere in this treatise the term is used in its wider sense.

It is important to remember that violations of neutrality on the part of belligerents must not be confounded with violations of the laws of war by which subjects of neutral States suffer damage. If, for instance, an occupant levies excessive contributions from subjects of neutral States domiciled in enemy country in contravention of article 49 of the Hague Regulations, this is a violation of the Laws of War, for which, according to article 3 of Convention IV., the belligerent
[Pg 439] concerned must pay compensation, but it is not a violation of neutrality.

Violation in contradistinction to End of Neutrality.

§ 358. Violation of neutrality must not be confounded with the ending of neutrality,[706] for neither a violation on the part of a neutral[707] nor a violation on the part of a belligerent brings *ipso facto* neutrality to an end. If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality. It must be emphasised that a violation of neutrality contains nothing more than a breach of a duty deriving from the condition of neutrality. This applies not only to violations of neutrality by negligence, but also to those by intention. Even in an extreme case in which the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party. For there is no violation of neutrality so great as to oblige the offended party to make war in answer to it, such party having always the choice whether it will keep up the condition of neutrality or not.

[706] See above, § 312.

[707] But this is almost everywhere asserted, as the distinction between the violation of the duty of impartiality incumbent upon neutrals on the one hand, and on the other, the ending of neutrality, is usually not made.

But this applies only to mere violations of neutrality, and not to hostilities. The latter are acts of war and bring neutrality to an end; they have been characterised in contradistinction to mere violations above in § 320.

Consequences of Violations of Neutrality.

§ 359. Violations of neutrality, whether committed by a neutral against a belligerent or by a belligerent against a neutral, are international delinquencies.[708] They may at once be repulsed, the offended party may require the offender to make reparation, and, if this is refused, it may
[Pg 440] take such measures as it thinks adequate to exact the necessary reparation.[709] If the violation is only slight and unimportant, the offended State will often merely complain. If, on the other hand, the violation is very substantial and grave, the offended State will perhaps at once declare that it considers itself at war with the offender. In such case it is not the violation of neutrality which brings neutrality to an end, but the declaration of the offended State that it considers the violation of so grave a character as to oblige it to regard itself at war with the offender.

[708] See above, vol. I. § 151.

[709] See above, vol. I. § 156.

That a violation of neutrality can only, like any other international delinquency, be committed by malice or culpable negligence,[710] and that it can be committed through a State's refusing to comply with the consequences of its "vicarious" responsibility for acts of its agents or subjects,[711] is a matter of course. Thus, if a belligerent fleet attacks enemy vessels in neutral territorial waters without an order from its Government, the latter bears "vicarious" responsibility for this violation of neutral territory on the part of its fleet. If the Government concerned refuses to disown the act of its fleet and to make the necessary reparation, this "vicarious" responsibility turns into "original" responsibility, for a case of violation of neutrality and an international delinquency has then arisen. And the same is valid if an agent of a neutral State without an order of his Government commits such an act as would constitute a violation of neutrality in case it were ordered by the Government; for instance, if the head of a province of a neutral, without thereto being authorised by his Government, allows forces of a belligerent to march through this neutral territory.

[710] See above, vol. I. § 154.

[711] See above, vol. I. § 150.

Neutrals not to acquiesce in Violations of Neutrality committed by a Belligerent.

§ 360. It is entirely within the discretion of a belligerent whether he will acquiesce in a violation
[Pg 441] of neutrality committed by a neutral in favour of the other belligerent. On the other hand, a neutral may not exercise the same discretion regarding a violation of neutrality committed by one belligerent and detrimental to the other. His duty of impartiality rather obliges him in the first instance to prevent, with the means at his disposal, the belligerent concerned from committing such violation; for instance, to repulse an attack of men-of-war of a belligerent on enemy vessels in neutral ports. Thus article 3 of Convention XIII. enacts:—"When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew." And in case he could not prevent and repulse a violation of his neutrality, the same duty obliges him to exact due reparation from the offender,[712] for otherwise he would favour the one party to the detriment of the other. If a neutral neglects this obligation, he is thereby committing a violation of neutrality on his part for which he may be made

responsible by such belligerent as has suffered through the violation of neutrality committed by the other belligerent and acquiesced in by the neutral. For instance, if belligerent men-of-war seize enemy vessels in ports of a neutral, and if the neutral, who could not or did not prevent this, [Pg 442] exacts no reparation from the belligerent concerned, the other party may make the neutral responsible for the losses sustained.

[712] See articles 25 and 26 of Convention XIII. This duty is nowadays universally recognised, but before the nineteenth century it did not exist, although the rule that belligerents must not commit hostilities on neutral territory, and in especial in neutral ports and waters, was well recognised. That in spite of its recognition this rule was in the eighteenth century frequently infringed by commanders of belligerent fleets, may be illustrated by many cases. Thus, for instance, in 1793, the French frigate *Modeste* was captured in the harbour of Genoa by two British men-of-war (see Hall, § 220). And in 1801, during war against Sweden, a British frigate captured the *Freden* and three other Swedish vessels in the Norwegian harbour of Oster-Risoer (see Ortolan, II. pp. 413-418).

Case of the *General Armstrong*.

§ 361. Some writers[713] maintain that a neutral is freed from responsibility for a violation of neutrality through a belligerent attacking enemy forces in neutral territory, in case the attacked forces, instead of trusting for protection or redress to the neutral, defend themselves against the attack. This rule is adopted from the arbitral award in the case of the *General Armstrong*. In 1814, during war between Great Britain and the United States of America, the American privateer *General Armstrong*, lying in the harbour of Fayal, an island belonging to the Portuguese Azores, defended herself against an attack of an English squadron, but was nevertheless captured. The United States claimed damages from Portugal because the privateer was captured in a neutral Portuguese port. Negotiations went on for many years, and the parties finally agreed in 1851 upon arbitration to be given by Louis Napoleon, then President of the French Republic. In 1852 Napoleon gave his award in favour of Portugal, maintaining that, although the attack on the privateer in neutral waters comprised a violation of neutrality, Portugal could not be made responsible, on account of the fact that the attacked privateer chose to defend herself instead of demanding protection from the Portuguese authorities.[714] It is, however, not at all certain that the rule laid down in this award will find general recognition in theory and practice.[715]

[713] See, for instance, Hall, § 228, and Geffcken in Holtzendorff, IV. p. 701.

[714] See Moore, *Arbitrations*, II. pp. 1071-1132; Calvo, IV. § 2662; and Dana's note 208 in Wheaton, § 429.

[715] The case of the *Reshitelni*, which occurred in 1904, during the Russo-Japanese War, and is somewhat similar to that of the *General Armstrong*, is discussed above in § 320 (2). That no violation of neutrality took place in the case of the *Variag* and *Korietz*, is shown above in § 320 (1).

Mode of exacting Reparation from Belligerents for Violations of Neutrality.

§ 362. It is obvious that the duty of a neutral not to acquiesce in violations of neutrality [Pg 443] committed by one belligerent to the detriment of the other obliges him to repair, so far as he can, the result of such wrongful acts. Thus, he must liberate[716] a prize taken in his neutral waters, or prisoners made on his territory, and the like. In so far, however, as he cannot, or not sufficiently, undo the wrong done, he must exact reparation from the offender. Now, no general rule can be laid down regarding the mode of exacting such reparation, since everything depends upon the merits of the individual case. Only as regards capture of enemy vessels in neutral waters has a practice grown up, which must be considered binding, and according to which the neutral must claim the prize, and eventually damages, from the belligerent concerned, and must restore her to the other party. Thus in 1800, during war between Great Britain and the Netherlands, Prussia claimed before the British Prize Court the *Twee Gebroeders*,[717] a Dutch vessel captured by the British cruiser *L'Espiègle* in the neutral maritime belt of Prussia. Sir William Scott ordered restoration of the vessel, yet he refused costs and damages, because the captor had not violated Prussian neutrality intentionally but only by mistake and misapprehension. Thus again, in 1805, during war between Great Britain and Spain, the United States claimed before the British Prize Court the *Anna*,[718] a Spanish vessel captured by the English privateer *Minerva* within their neutral maritime belt. Thus, further, in 1864, during the American Civil War, when the Confederate cruiser *Florida* was captured by the Federal cruiser *Wachuset* in the neutral Brazilian port of Bahia, Brazil claimed the prize. As the latter had sunk while at anchor in Hampton Roads, she could not be restored, but the United States expiated the violation of [Pg 444] neutrality committed by her cruiser by court-martialing the commander; further, by dismissing her Consul at Bahia for having advised the capture; and, finally, by sending a man-of-war to the spot where the violation of neutrality had taken place for the special purpose of delivering a solemn salute to the Brazilian flag.[719]

[716] See article 3 of Convention XIII.

[717] 3 C. Rob. 162.

[718] 5 C. Rob. 373. See above, vol. I. § 234.

[719] See Moore, VII. § 1334, p. 1090.

Negligence on the part of Neutrals.

§ 363. Apart from intentional violations of neutrality, a neutral can be made responsible only for such acts favouring or damaging a belligerent as he could by due diligence have prevented, and which by culpable negligence he failed to prevent. It is by no means obligatory for a neutral to prevent such acts under all circumstances and conditions. This is in fact impossible, and it becomes more obviously so the larger a neutral State, and the longer its boundary lines. So long as a neutral exercises due diligence for the purpose of preventing such acts, he is not responsible

in case they are nevertheless performed. However, the term *due diligence* has become controversial through the definition proffered by the United States of America in interpreting the Three Rules of Washington, and through the Geneva Court of Arbitration adopting such interpretation.[720] According to this interpretation the *due diligence* of a neutral *must be in proportion to the risks to which either belligerent may be exposed from failure to fulfil the obligations of neutrality on his part*. Had this interpretation been generally accepted, the most oppressive obligations would have become incumbent upon neutrals. But no such general acceptance has taken place. The fact is that *due diligence* in International Law can have no other meaning than it has in Municipal Law. It means *such diligence as can reasonably be expected when all the circumstances and conditions of the case are taken into consideration*.

[720] See above, § 335.

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Be that as it may, the Second Peace Conference has taken a step which certainly excludes for the future the continuation of the controversy regarding the interpretation of *due diligence*, for articles 8 and 25 of Convention XIII., instead of stipulating due diligence on the part of neutrals, stipulate *the employment of the means at their disposal*.

Laying of Submarine Contact Mines by Neutrals.

§ 363*a*. In order to defend themselves against possible violations of their neutral territory, neutrals may lay automatic contact mines off their coasts. If they do this, they must, according to article 4 of Convention VIII., observe the same rules and take the same precautions as are imposed upon belligerents, and as have been expounded above, § 182*a*. Moreover they must, according to paragraph 2 of article 4 of Convention VIII., give notice in advance to mariners of the place where automatic contact mines have been laid, and this notice must be communicated at once to the Governments through the diplomatic channels.

Convention VIII. is quite as unsatisfactory in its rules concerning mines laid by neutrals as in its rules concerning mines laid by belligerents, and the danger to neutral shipping created by mines laid by neutrals is very great, all the more as the laying of mines by neutrals is not restricted to their maritime belt. For article 4 of Convention VIII. speaks of the laying of contact mines on the part of neutral Powers *off their coasts*, without limiting the laying within the three-mile wide maritime belt as was proposed at the Second Peace Conference, and as article 6[721] of the *Règlementation internationale de l'Usage des Mines sous-marines et torpilles* of the Institute of International Law likewise proposes.

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[721] See *Annuaire*, XXIV. (1911), p. 302.

IX

RIGHT OF ANGARY

Hall, § 278—Lawrence, § 233—Westlake, II. p. 119—Phillimore, III. § 29—Halleck, I. p. 485—Taylor, § 641—Walker, § 69—Bluntschli, § 795A—Heffter, § 150—Bulmerincq in Holtzendorff, IV. pp. 98-103—Geffcken in Holtzendorff, IV. pp. 771-773—Ullmann, § 192—Bonfils, No. 1440—Despagnet, No. 494—Rivier, II. pp. 327-329—Kleen, II. §§ 165 and 230—Perels, § 40—Hautefeuille, III. pp. 416-426—Holland, *War*, Nos. 139-140—*Land Warfare*, §§ 507-510—Albrecht, *Requisitionen von neutralem Privateigenthum, insbesondere von Schiffen* (1912), pp. 24-66.

The Obsolete Right of Angary.

§ 364. Under the term *jus angariae*[722] many writers on International Law place the right, often claimed and practised in former times, of a belligerent deficient in vessels to lay an *embargo* on and seize neutral merchantmen in his harbours, and to compel them and their crews to transport troops, ammunition, and provisions to certain places on payment of freight in advance.[723] This practice arose in the Middle Ages,[724] and was made much use of by Louis XIV. of France. To save the vessels of their subjects from seizure under the right of angary, States began in the seventeenth century to conclude treaties by which they renounced such right with regard to each other's vessels. Thereby the right came into disuse during the eighteenth century. Many writers[725] assert, nevertheless, that it is not obsolete, and might be exercised even to-day. But I doubt whether the Powers would concede to one another the exercise of such a right. The facts that no case happened in the nineteenth century and that International Law with regard to rights

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and duties of neutrals has become much more developed during the eighteenth and nineteenth centuries, would seem to justify the opinion that such angary is now probably obsolete,[726] although some writers[727] deny this.

[722] The term *angaria*, which in medieval Latin means *post station*, is a derivation from the Greek term ἄγγαρος for messenger. *Jus angariae* would therefore literally mean a right of transport.

[723] See above, § 40.

[724] On the origin and development of the *jus angariae*, see Albrecht, *op. cit.* pp. 24-37.

[725] See, for instance, Phillimore, III. § 29; Calvo, III. § 1277; Heffter, § 150; Perels, § 40.

[726] See Article 39 of the "Règlement sur le régime légal des navires ... dans les ports étrangers" adopted by the Institute of International Law (*Annuaire*, XVII. 1898, p. 272): "Le droit d'angarie est supprimé, soit en temps de paix, soit en temps de guerre, quant aux navires neutres."

[727] See Albrecht, *op. cit.* pp. 34-37.

The Modern Right of Angary.

§ 365. In contradistinction to this probably obsolete right to compel neutral ships and their crews to render certain services, the modern right of angary consists in the right of belligerents to make use of, or destroy in case of necessity, *for the purpose of offence and defence*, neutral property on their own or on enemy territory or on the Open Sea. In case property of subjects of neutral States is vested with enemy character,[728] it is not neutral property in the strict sense of the term neutral, and all rules respecting appropriation, utilisation, and destruction of enemy property obviously apply to it. The object of the right of angary is *such property of subjects of neutral States as retains its neutral character from its temporary position on belligerent territory and which therefore is not vested with enemy character*. All sorts of neutral property, whether it consists of vessels or other[729] means of transport, or arms, ammunition, provisions, or other personal property, may be the object of the right of angary, provided the articles concerned are serviceable to military ends and wants. The conditions under which the right may be exercised are the same as those under which private enemy property may be utilised or destroyed, but in every case the neutral owner must be fully indemnified.[730]

[728] See above, § 90.

[729] Thus in 1870, during the Franco-German War, the Germans seized hundreds of Swiss and Austrian railway carriages in France and made use of them for military purposes.

[730] See article 6 of U.S. Naval War Code:—"If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed, or otherwise used for military purposes, but in such cases the owners of the neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed upon in advance with the owner or master of the vessel; due regard must be had for treaty
[Pg 448] stipulations upon these matters." See also Holland, *War*, No. 140.

A remarkable case[731] happened in 1871 during the Franco-German War. The Germans seized some British coal-vessels lying in the river Seine at Duclair, and sank them for the purpose of preventing French gunboats from running up the river. On the intervention of the British Government, Count Bismarck refused to recognise the duty of Germany to indemnify the owners of the vessels sunk, although he agreed to pay indemnities.

[731] See Albrecht, *op. cit.* pp. 45-48.

However, it may safely be maintained that a duty to pay indemnities for any damage done by exercising the right of angary must nowadays be recognised. Article 53 of the Hague Regulations stipulates the payment of indemnities for the seizure and utilisation of all appliances adapted to the transport of persons or goods which are the private property of inhabitants of occupied enemy territory, and article 52 of the Hague Regulations stipulates payment for requisitions; if, thus, the immunity from confiscation of private property of inhabitants is recognised, all the more must that of private neutral property temporarily on occupied enemy territory be recognised also.

Right of Angary concerning Neutral Rolling Stock.

§ 366. A special case of the right of angary has found recognition by article 19 of Convention V. of the Second Peace Conference enacting that railway material coming from the territory of a neutral Power, whether belonging to the neutral State or to companies or private persons, shall not be requisitioned or utilised by a belligerent, *except in the case of and to the extent required by absolute necessity*, that it shall as soon as possible be sent back to the country of origin, and that compensation shall be paid for its use.[732] But it must be mentioned that article 19 gives a
[Pg 449] right to a neutral Power, whose railway material has been requisitioned by a belligerent, to retain and make use of, to a corresponding extent, railway material coming from the territory of the belligerent concerned.

[732] See Nowacki, *Die Eisenbahnen im Kriege* (1906), pp. 115-126, and Albrecht, *op. cit.* pp. 22-24.

Right of Angary not deriving from Neutrality.

§ 367. Whatever the extent of the right of angary may be, it does not derive from the law of neutrality. The correlative duty of a belligerent to indemnify the neutral owner of property appropriated or destroyed by the exercise of the right of angary does indeed derive from the law of neutrality. But the right of angary itself is rather a right deriving from the law of war. As a rule this law gives, under certain circumstances and conditions, the right to a belligerent to seize, make use of, or destroy private property of inhabitants only of occupied enemy territory, but under other circumstances and conditions, and very exceptionally, it likewise gives a belligerent the right to seize, use, or destroy such neutral property as is temporarily on occupied enemy territory.

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CHAPTER III

BLOCKADE

I

CONCEPTION OF BLOCKADE

Grotius, III. c. 1, § 5—Bynkershoek, *Quaest. jur. publ.* I. c. 2-15—Vattel, III. § 117—Hall, §§ 233, 237-266—Lawrence, §§ 246-252—Westlake, II. pp. 228-239—Maine, pp. 107-109—Manning, pp. 400-412—Phillimore, III. §§ 285-321—Twiss, II. §§ 98-120—Halleck, II. pp. 182-213—Taylor, §§ 674-684—Walker, §§ 76-82—

Wharton, III. §§ 359-365—Moore, VII. §§ 1266-1286—Wheaton, §§ 509-523—Bluntschli, §§ 827-840—Heffter, §§ 154-157—Geffcken in Holtzendorff, IV. pp. 738-771—Ullmann, § 182—Bonfils, Nos. 1608-1659—Despagnet, Nos. 620-640—Pradier-Fodéré, VI. Nos. 2676-2679, and VIII. Nos. 3109-3152—Nys, III. pp. 224-244, 693-694—Rivier, II. pp. 288-298—Calvo, V. §§ 2827-2908—Fiore, III. Nos. 1606-1629—Martens, II. § 124—Pillet, pp. 129-144—Kleen, I. §§ 124-139—Ortolan, II. pp. 292-336—Hautefeuille, II. pp. 189-288—Gessner, pp. 145-227—Perels, §§ 48-51—Testa, pp. 221-229—Dupuis, Nos. 159-198, and *Guerre*, Nos. 113-136—Boeck, Nos. 670-726—Holland, *Prize Law*, §§ 106-140—U.S. Naval War Code, articles 37-43—Bernsten, § 10—Nippold, II. § 32—Bargrave Deane, *The Law of Blockade* (1870)—Fauchille, *Du blocus maritime* (1882)—Carnazza-Amari, *Del blocco maritimo* (1897)—Frémont, *De la saisie des navires en cas de blocus* (1899)—Guynot-Boissière, *Du blocus maritime* (1899)—§§ 35-44 of the "Règlement international des prises maritimes" (*Annuaire*, IX. 1887, p. 218), adopted by the Institute of International Law—Atherley-Jones, *Commerce in War* (1906) pp. 92-252—Söderquist, *Le Blocus Maritime* (1908)—Hansemann, *Die Lehre von der einheitlichen Reise im Rechte der Blockade und Kriegskonterbande* (1910)—Güldenagel, *Verfolgung und Rechtsfolgen des Blockadebruches* (1911)—Hirschmann, *Das internationale Prisenrecht* (1912) §§ 17-23—Kennedy in *The Journal of the Society of Comparative Legislation*, New Series, IX. (1908), pp. 239-251—Myers in *A.J.* IV. pp. 571-595—General Report presented to the Naval Conference of London by its Drafting Committee, articles 1-21.

Definition of Blockade.

[Pg 451] § 368. Blockade is the blocking by men-of-war[733] of the approach to the enemy coast or a part of it for the purpose of preventing ingress and egress of vessels of all nations. Blockade must not be confounded with siege, although it may take place concurrently with siege. Whereas siege aims at the capture of the besieged place, blockade endeavours merely to intercept all intercourse, and especially commercial intercourse, by sea between the coast and the world at large. Although blockade is, as shown above in §§ 173 and 174, a means of warfare against the enemy, it concerns neutrals as well, because the ingress and egress of neutral vessels are thereby interdicted and may be punished.

[733] When in 1861, during the American Civil War, the Federal Government blocked the harbour of Charleston by sinking ships laden with stone, the question arose whether a so-called stone-blockade is lawful. There ought to be no doubt—see below, § 380—that such a stone-blockade is not a blockade in the ordinary sense of the term, and that neutral ships may not be seized and confiscated for having attempted egress or ingress. But, on the other hand, there ought to be no doubt either that this mode of obstructing an enemy port is as lawful as any other means of sea warfare, provided the blocking of the harbour is made known so that neutral vessels can avoid the danger of being wrecked. See Wharton, III. § 361A; Fauchille, *Blocus*, pp. 143-145; Perels, § 35, p. 187.

Blockade in the modern sense of the term is an institution which could not develop until neutrality was in some form a recognised institution of the Law of Nations, and until the freedom of neutral commerce was in some form guaranteed. The institution of blockade dates from the sixteenth century,[734] but it has taken several hundred years for the institution to reach its present condition, since, until the beginning of the nineteenth century, belligerents frequently made use of so-called paper blockades, which are no longer valid, a blockade now being binding only if effective.

[734] See Fauchille, *Blocus*, pp. 2-6.

It is on account of the practical importance of blockade for the interests of neutrals that the matter is more conveniently treated with neutrality than with war. And it must be noted that blockade as a means of warfare must not be confounded with so-called pacific blockade, which is a means of compulsive settlement of State differences.

[Pg 452] Apart from the stipulation of the Declaration of Paris that a blockade to be binding must be effective, no conventional rules concerning blockade were in existence until the Declaration of London, nor was the practice of the States governed by common rules covering all the points concerned. But articles 1-21 of the Declaration of London now offer a code of the law of blockade and will, should this Declaration be ratified, in time produce a common practice of all maritime States.

Blockade, Strategic and Commercial.

§ 369. A blockade is termed strategic if it forms part of other military operations directed against the coast which is blockaded, or if it be declared in order to cut off supply to enemy forces on shore. In contradistinction to blockade strategic, one speaks of a commercial blockade, when a blockade is declared simply in order to cut off the coast from intercourse with the outside world, although no military operations take place on shore. That blockades commercial are, according to the present rules of International Law, as legitimate as blockades strategic, is not generally denied. But several writers[735] maintain that blockades purely commercial ought to be abolished as not in accordance with the guaranteed freedom of neutral commerce during war.

[735] See Hall, § 233.

Blockade to be Universal.

§ 370. A blockade is really in being when vessels of all nations are interdicted and prevented from ingress or egress. Blockade as a means of warfare is admissible only in the form of a *universal* blockade, that is—as article 5 of the Declaration of London stipulates—it "must be applied impartially to the vessels of all nations." If the blockading belligerent were to allow the ingress or egress of vessels of one nation, no blockade would exist.[736]

[736] The *Rolla* (1807), 6 C. Rob. 364; the *Franciska* (1855), Spinks, 287. See also below, § 382.

[Pg 453] On the other hand, provided a blockade is universal, a special licence of ingress or egress may be given to a special vessel and for a particular purpose,[737] and men-of-war of all neutral nations

may be allowed to pass to and fro unhindered.[738] Thus, when during the American Civil War the Federal Government blockaded the coast of the Confederate States, neutral men-of-war were not prevented from ingress and egress. But it must be specially observed that a belligerent has a right to prevent neutral men-of-war from passing through the line of blockade, and it is entirely within his discretion whether or not he will admit or exclude them; nor is he compelled to admit them all, even though he has admitted one or more of them.

[737] This exception to the general rule is not mentioned by the Declaration of London, but I have no doubt that the International Prize Court would recognise it.

[738] Recognised by article 6 of the Declaration of London.

Blockade, Outwards and Inwards.

§ 371. As a rule a blockade is declared for the purpose of preventing ingress as well as egress. But sometimes only ingress or only egress is prevented. In such cases one speaks of "Blockade inwards" and of "Blockade outwards" respectively. Thus the blockade of the mouth of the Danube declared by the Allies in 1854 during the Crimean War was a "blockade inwards," since the only purpose was to prevent supply reaching the Russian Army from the sea.[739]

[739] The *Gerasimo* (1857), 11 Moore, P.C. 88.

What Places can be Blockaded.

§ 372. In former times it was sometimes asserted that only ports, or even only fortified[740] ports, could be blockaded, but the practice of the States has always shown that single ports and portions of an enemy coast as well as the whole of the enemy coast may be blockaded. Thus during the American Civil War the whole of the coast of the Confederate States to the extent of about 2500 nautical miles was blockaded. And attention must be drawn to the fact, that such
[Pg 454]
ports of a belligerent as are in the hands of the enemy may be the object of a blockade. Thus during the Franco-German War the French blockaded[741] their own ports of Rouen, Dieppe, and Fécamp, which were occupied by the Germans. Article 1 of the Declaration of London indirectly sanctions the practice of the States by enacting that "a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy."

[740] Napoleon I. maintained in his Berlin Decrees: "Le droit de blocus, d'après la raison et l'usage de tous les peuples policés, n'est applicable qu'aux places fortes."

[741] See Fauchille, *Blocus*, p. 161.

Blockade of International Rivers.

§ 373. It is a moot question whether the mouth of a so-called international river may be the object of a blockade, in case the riparian States are not all belligerents. Thus, when in 1854, during the Crimean War, the allied fleets of Great Britain and France blockaded the mouth of the Danube, Bavaria and Württemberg, which remained neutral, protested. When in 1870 the French blockaded the whole of the German coast of the North Sea, they exempted the mouth of the river Ems, because it runs partly through Holland. And when in 1863, during the blockade of the coast of the Confederate States, the Federal cruiser *Vanderbilt* captured the British vessel *Peterhoff*[742] destined for Matamaros, on the Mexican shore of the Rio Grande, the American Courts released the vessel on the ground that trade with Mexico, which was neutral, could not be prohibited.

[742] 5 Wallace, 49. See Fauchille, *Blocus*, pp. 171-183; Phillimore, III. § 293A; Hall, § 266; Rivier, II. p. 291.

The Declaration of London would seem to settle the controversy only as regards one point. By enacting that "the blockading forces must not bar access to neutral ports or coasts," article 18 certainly prohibits the blockade of the whole mouth of a boundary river between a neutral and a belligerent State, as, for instance, the River Rio Grande in case of war with the United States of
[Pg 455]
America, provided Mexico remained neutral. But no provision is made for the case of the blockade of the mouths of rivers, such as the Danube or the Rhine, for example, which pass through several States between their sources and their mouths at the sea coast, if one or more upper riparian States remain neutral.

Justification of Blockade.

§ 374. The question has been raised in what way blockade, which vests a belligerent with a certain jurisdiction over neutral vessels and which has detrimental consequences for neutral trade, could be justified.[743] Several writers, following Hautefeuille,[744] maintain that the establishment of a blockade by a belligerent stationing a number of men-of-war so as to block the approach to the coast includes conquest of that part of the sea, and that such conquest justifies a belligerent in prohibiting ingress and egress of vessels of all nations. In contradistinction to this artificial construction of a conquest of a part of the sea, some writers[745] try to justify blockade by the necessity of war. I think, however, no special justification of blockade is necessary at all. The fact is that the detrimental consequences of blockade to neutrals stand in the same category as the many other detrimental consequences of war to neutrals. Neither the one nor the other need be specially justified. A blockade interferes indeed with the recognised principle of the freedom of the sea, and, further, with the recognised freedom of neutral commerce. But all three have developed together, and when the freedom of the sea in time of peace and war, and, further, when the freedom of neutral commerce became generally recognised, the exceptional restrictions of blockade became at the same time recognised as legitimate.

[743] The matter is thoroughly treated by Fauchille, *Blocus*, pp. 13-36, and Güldenagel, *op. cit.* pp. 39-86.

[744] See Hautefeuille, II. pp. 190-191.

[Pg 456] [745] See Gessner, p. 151; Bluntschli, § 827; Martens, II. § 124.

II

ESTABLISHMENT OF BLOCKADE

See the literature quoted above at the commencement of § 368.

Competence to establish Blockade.

§ 375. A declaration of blockade being "a high[746] act of sovereignty" and having far-reaching consequences upon neutral trade, it is generally recognised not to be in the discretion of a commander of a naval force to establish blockade without the authority of his Government. Article 9 of the Declaration of London precisely enacts that "a Declaration of blockade is made by the blockading Power or by the naval authorities acting in its name." The authority of his Government to establish a blockade can be granted to a commander of a naval force purposely for a particular blockade, the Government ordering the commander of a squadron to blockade a certain port or coast. Or a Government can expressly delegate its power to blockade to a commander for use at his discretion. And if operations of war take place at great distance[747] from the seat of Government and a commander finds it necessary to establish a blockade, the latter can become valid through his Government giving its immediate consent after being informed of the act of the commander. And, further, the powers vested in the hands of the supreme commander of a fleet are supposed to include the authority to establish a blockade in case he finds it necessary, provided that his Government acquiesces as soon as it is informed of the establishment of the blockade.[748]

[746] The *Henrik* and *Maria* (1799), 1 C. Rob. 146.

[747] The *Rolla* (1807), 6 C. Rob. 364.

[748] As regards the whole matter, see Fauchille, *Blocus*, pp. 68-73.

Declaration and Notification of Blockade.

[Pg 457] § 376. A blockade is not in being *ipso facto* by the outbreak of war. And even the actual blocking of the approach to an enemy coast by belligerent men-of-war need not by itself mean that the ingress and egress of *neutral* vessels are to be prohibited, since it can take place for the purpose of preventing the egress and ingress of *enemy* vessels only. Continental writers, therefore, have always considered notification to be essential for the establishment of a blockade. English, American, and Japanese writers, however, have not hitherto held notification to be essential, although they considered knowledge on the part of a neutral vessel of an existing blockade to be necessary for her condemnation for breach of blockade.[749]

[749] See below, § 384.

But although Continental writers have always held notification to be essential for the establishment of blockade, they differed with regard to the kind of notification that is necessary. Some writers[750] maintained that three different notifications must take place—namely, first, a local notification to the authorities of the blockaded ports or coast; secondly, a diplomatic or general notification to all maritime neutral States by the blockading belligerent; and, thirdly, a special notification to every approaching neutral vessel. Other writers[751] considered only diplomatic and special notification essential. Others again[752] maintained that special notification to every approaching neutral vessel is alone required, although they recommended diplomatic notification as a matter of courtesy.

[750] See, for instance, Kleen, I. § 131.

[751] See, for instance, Bluntschli, 831-832; Martens, II. § 124, Gessner, p. 181.

[752] See, for instance, Hautefeuille, II. pp. 224 and 226; Calvo, V. § 2846; Fauchille, pp. 219-221.

As regards the practice of States, it has always been usual for the commander who established a blockade to send a notification of the blockade to the authorities of the blockaded ports or coast and the foreign consuls there. It has, further, always been usual for the blockading Government [Pg 458] to notify the fact diplomatically to all neutral maritime States. And some States, as France and Italy, have always ordered their blockading men-of-war to board every approaching neutral vessel and notify her of the establishment of the blockade. But Great Britain, the United States of America, and Japan did not formerly consider notification to be essential for the institution of a blockade. They held the simple fact that the approach was blocked, and egress and ingress of neutral vessels actually prevented, to be sufficient to make the existence of a blockade known, and when no diplomatic notification had taken place, they did not seize a vessel for breach of blockade whose master had no actual notice of the existence of the blockade. English,[753] American,[754] and Japanese[755] practice, accordingly, made a distinction between a so-called *de facto* blockade on the one hand, and, on the other, a notified blockade.

[753] The *Vrouw Judith* (1799), 1 C. Rob. 150.

[754] See U.S. Naval War Code, articles 39-40.

[755] See Japanese Prize Law, article 30.

The Declaration of London, when ratified, will create a common practice, for articles 8 to 12 represent an agreement of the Powers on the following points:—

(1) There must be a *declaration* as well as a *notification* in order to make a blockade binding

(article 8). If there is either no proper declaration or no proper notification, the blockade is not binding.

(2) A *declaration* of blockade is made either by the blockading Power or by the naval authorities acting in its name. The declaration of blockade must specify (*a*) the date when the blockade begins; (*b*) the geographical limits of the coastline under blockade; and (*c*) the period within which neutral vessels may come out (article 9). If the commencement of the blockade or
[Pg 459] its geographical limits are given inaccurately in the declaration, or if no mention is made of the period within which neutral vessels may come out, or if this period is given inaccurately, the declaration is void, and a new declaration is necessary in order to make the blockade binding (article 10).

(3) *Notification* of the declaration of blockade must at once be made. Two notifications are necessary (article 11):—

The first notification must be made by the Government of the blockading fleet to all neutral Governments either through the diplomatic channel, or otherwise, for instance by telegraph. The purpose of this notification is to enable neutral Governments to inform merchantmen sailing under their flag of the establishment of a blockade.

The second notification must be made to the local authorities by the officer commanding the blockading force; these authorities have on their part to notify, as soon as possible, the foreign consuls at the blockaded port or coastline. The purpose of this notification is to enable neutral merchantmen in the blockaded port or ports to receive knowledge of the establishment of the blockade and to prepare themselves to leave the port within the period specified in the declaration of blockade.

(4) The rules as to declaration and notification of blockade apply to cases where the limits of a blockade have been extended, or where a blockade is re-established after having been raised (article 12).

Length of Time for Egress of Neutral Vessels.

§ 377. As regards *ingress*, a blockade becomes valid the moment it is established; even vessels in ballast have no right of ingress. As regards *egress*, it has always been usual for the blockading commander to grant a certain length of time within which neutral vessels might leave the
[Pg 460] blockaded ports unhindered, but no rule existed respecting the length of such time, although fifteen days were frequently granted.[756] This usage of granting to neutral vessels a period within which they may leave the blockaded port, has been made a binding rule by the Declaration of London. For, since article 9 enacts that a declaration of blockade must specify the period within which neutral vessels may come out, it implicitly enacts that the granting of such a period is compulsory, although it may only be long enough to enable neutral vessels to make their way out as quickly as possible.

[756] According to U.S. Naval War Code, article 43, thirty days are allowed "unless otherwise specially ordered."

End of Blockade.

§ 378. Apart from the conclusion of peace, a blockade can come to an end in three different ways.

It may, firstly, be raised, or restricted in its limits, by the blockading Power for any reason it likes. In such a case it has always been usual to notify the end of blockade to all neutral maritime States, and article 13 of the Declaration of London turns this usage into a binding rule by enacting that the voluntary raising of a blockade, as also any restrictions in its limits, must, in the same way as the declaration of a blockade, be notified to all neutral Governments by the blockading Power, as well as to the local authorities by the officer commanding the blockading fleet.

A blockade can, secondly, come to an end through an enemy force driving off the blockading squadron or fleet. In such case the blockade ends *ipso facto* by the blockading squadron being driven away, whatever their intention as to returning may be. Should the squadron return and resume the blockade, it must be considered as new, and not simply the continuation of the former blockade, and another declaration and notification are necessary (article 12 of the Declaration of London).

[Pg 461] The third ground for the ending of a blockade is its failure to be effective, a point which will be treated below in § 382.

III

EFFECTIVENESS OF BLOCKADE

See the literature quoted above at the commencement of § 368.

Effective in contradistinction to Fictitious Blockade.

§ 379. The necessity for effectiveness in a blockade by means of the presence of a blockading squadron of sufficient strength to prevent egress and ingress of vessels became gradually recognised during the first half of the nineteenth century; it became formally enacted as a principle of the Law of Nations through the Declaration of Paris in 1856, and the Declaration of London enacts it by article 2. Effective blockade is the contrast to so-called fictitious or paper

blockade, which was frequently practised during the seventeenth, eighteenth, and at the beginning of the nineteenth century.[757] Fictitious blockade consists in the declaration and notification that a port or a coast is blockaded without, however, posting a sufficient number of men-of-war on the spot to be really able to prevent egress and ingress of every vessel. It was one of the principles of the First and of the Second Armed Neutrality that a blockade should always be effective, but it was not till after the Napoleonic wars that this principle gradually found universal recognition. During the second half of the nineteenth century even those States which had not acceded to the Declaration of Paris did not dissent regarding the necessity for effectiveness of blockade.

[757] See Fauchille, *Blocus*, pp. 74-109.

Condition of Effectiveness of Blockade.

[Pg 462] § 380. The condition of effectiveness of blockade, as defined by the Declaration of Paris, is its maintenance *by such a force as is sufficient really to prevent access to the coast*. But no unanimity exists respecting what is required to constitute an effective blockade according to this definition. Apart from differences of opinion regarding points of minor interest, it may be stated that in the main there are two conflicting opinions.

According to one opinion, the definition of an effective blockade pronounced by the First Armed Neutrality of 1780 is valid, and a blockade is effective only when the approach to the coast is barred by a chain of men-of-war anchored on the spot and so near to one another that the line cannot be passed without obvious danger to the passing vessel.[758] This corresponds to the practice hitherto followed by France.

[758] See Hautefeuille, II. p. 194; Gessner, p. 179; Kleen, I. § 129; Boeck, Nos. 676-681; Dupuis, Nos. 173-174; Fauchille, *Blocus*, pp. 110-142. Phillimore, III. § 293, takes up the same standpoint in so far as a blockade *de facto* is concerned:—"A blockade *de facto* should be effected by stationing a number of ships, and forming as it were an arch of circumvallation round the mouth of the prohibited port, where, if the arch fails in any one part, the blockade itself fails altogether."

According to another opinion, a blockade is effective when the approach is watched—to use the words of Dr. Lushington[759]—"by a force sufficient to render the egress and ingress dangerous, or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable." According to this opinion there need be no chain of anchored men-of-war to expose any vessels attempting to break the blockade to a cross fire, but a real danger of capture suffices, whether the danger is caused by cruising or anchored men-of-war. This is the standpoint of theory and practice of Great Britain and the United States, and it seems likewise to be that of [Pg 463] Germany and several German writers.[760] The blockade during the American War of the whole coast of the Confederate States to the extent of 2500 nautical miles by four hundred Federal cruisers could, of course, only be maintained by cruising vessels; and the fact that all neutral maritime States recognised it as effective shows that the opinion of dissenting writers has more theoretical than practical importance.

[759] In his judgment in the case of the *Franciska* (1855), Spinks, 287.

[760] See Perels, § 49; Bluntschli, § 829; Liszt, § 41, III.

The Declaration of London has settled the controversy in so far as article 3 enacts that "the question whether a blockade is effective, is a question of fact." Each case must, therefore, be judged according to its merits, and the before mentioned decision of Dr. Lushington would seem to have found implied recognition by article 3.

The question of effectiveness being one of fact, and the real danger to passing vessels being the characteristic of effectiveness of blockade, it must be recognised that in certain cases and in the absence of a sufficient number of men-of-war a blockade may be made effective through planting land batteries within range of any vessel attempting to pass,[761] provided there be at least one man-of-war on the spot. But a stone blockade,[762] so called because vessels laden with stones are sunk in the channel to block the approach, is not an effective blockade.

[761] The *Nancy* (1809), 1 Acton, 63; the *Circassian* (1864), 2 Wallace, 135; the *Olinde Rodrigues* (1898), 174, United States, 510. See also Bluntschli, § 829; Perels, § 49; Geffcken in Holtzendorff, IV. p. 750; Walker, *Manual*, § 78.

[762] See above, § 368, p. 450, note 1. It ought to be mentioned here also that according to article 2 of Convention VIII. "it is forbidden to lay automatic contact mines off the ports and coasts of the enemy, with the sole object of intercepting commercial navigation."

And it must, lastly, be mentioned that the distance of the blockading men-of war from the blockaded port or coast is immaterial so long as the circumstances and conditions of the special [Pg 464] case justify such distance. Thus during the Crimean War the port of Riga was blockaded by a man-of-war stationed at a distance of 120 miles from the town, in the Lyser Ort, a channel three miles wide forming the only approach to the gulf.[763]

[763] The *Franciska* (1855), Spinks, 287. See Hall, § 260, and Holland, *Studies*, pp. 166-167.

Amount of Danger which creates Effectiveness.

§ 381. It is impossible to state exactly what degree of danger to a vessel attempting to pass is necessary to prove an effective blockade. It is recognised that a blockade does not cease to be effective in case now and then a vessel succeeds in passing the line unhindered, provided there was so much danger as to make her capture probable. Dr. Lushington strikingly dealt with the matter in the following words:[764]—"The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a port. Nothing is further

from my intention, nor indeed more opposed to my notions, than any relaxation of the rule that a blockade must be sufficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence, I believe that in every case the inquiry has been, whether the force was competent and present, and, if so, the performance of the duty was presumed; and I think I may safely assert that in no case was a blockade held to be void when the blockading force was on the spot or near thereto on the ground of vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron."

[764] In his judgment in the case of the *Franciska* (1855), Spinks, 287.

Cessation of Effectiveness.

[Pg 465] § 382. A blockade is effective so long as the danger lasts which makes probable the capture of such vessels as attempt to pass the approach. A blockade, therefore, ceases *ipso facto* by the absence of such danger, whether the blockading men-of-war are driven away, or are sent away for the fulfilment of some task which has nothing to do with the blockade, or voluntarily withdraw, or allow the passage of vessels in other cases than those which are exceptionally admissible. Thus, when in 1861, during the American Civil War, the Federal cruiser *Niagara*, which blockaded Charleston, was sent away and her place was taken after five days by the *Minnesota*, the blockade ceased to be effective, although the Federal Government refused to recognise this.[765] Thus, further, when during the Crimean War Great Britain allowed Russian vessels to export goods from blockaded ports, and accordingly the egress of such vessels from the blockaded port of Riga was permitted, the blockade of Riga ceased to be effective, because it tried to interfere with neutral commerce only; therefore, the capture of the Danish vessel *Franciska*[766] for attempting to break the blockade was not upheld.

[765] See Mountague Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 237-239.

[766] Spinks, 287. See above, § 370.

On the other hand, practice[767] and the majority of writers have always recognised the fact that a blockade does not cease to be effective in case the blockading force is driven away for a short time through stress of weather, and article 4 of the Declaration of London precisely enacts that "a blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather." English[768] writers, further, have hitherto denied that a blockade loses effectiveness through a blockading man-of-war being absent for a short time for the purpose of [Pg 466] chasing a vessel which succeeded in passing the approach unhindered,[769] but the Declaration of London does not recognise this.[770]

[767] The *Columbia* (1799), 1 C. Rob. 154.

[768] See Twiss, II. § 103, p. 201, and Phillimore, III. § 294.

[769] See article 37 of U.S. Naval War Code.

[770] See the Report of the Drafting Committee on article 4 of the Declaration of London.

IV

BREACH OF BLOCKADE

See the literature quoted above at the commencement of § 368.

Definition of Breach of Blockade.

§ 383. Breach or violation of blockade is the unallowed ingress or egress of a vessel in spite of the blockade. The attempted breach is, so far as punishment is concerned, treated in the same way as the consummated breach, but the practice of States has hitherto differed with regard to the question at what time and by what act an attempt to break a blockade commences.

It must be specially observed that the blockade-runner violates International Law as little as the contraband carrier. Both (see below, § 398) violate injunctions of the belligerent concerned.

No Breach without Notice of Blockade.

§ 384. Since breach of blockade is, from the standpoint of the blockading belligerent, a criminal act, knowledge on the part of a vessel of the existence of a blockade is essential for making her egress or ingress a breach of blockade.

It is for this reason that Continental theory and practice have never considered a blockade established without local and diplomatic notification, so that every vessel might have, or might be supposed to have, notice of the existence of a blockade. And for the same reason some States, as France and Italy, have never considered a vessel to have committed a breach of blockade unless [Pg 467] a special warning was given her before her attempted ingress by one of the blockading cruisers stopping her and recording the warning upon her log-book.[771]

[771] See above, § 376.

British, American, and Japanese practice regarding the necessary knowledge of the existence of a blockade on the part of a vessel has always made a distinction between actual and constructive notice, no breach of blockade having been held to exist without either the one or the other.[772] Actual notice has been considered knowledge acquired by a direct warning from one of the blockading men-of-war or knowledge acquired from any other public or private source of

information. Constructive knowledge has been presumed knowledge of the blockade on the part of a vessel on the ground either of notoriety or of diplomatic notification. The existence of a blockade has always been presumed to be notorious to vessels within the blockaded ports, but it has been a question of fact whether it was notorious to other vessels. And knowledge of the existence of a blockade has always been presumed on the part of a vessel in case sufficient time had elapsed after the home State of the vessel had received diplomatic notification of the blockade, so that it could inform thereof all vessels sailing under its flag, whether or no they had actually received, or taken notice of, the information.[773]

[772] See Holland, *Prize Law*, §§ 107, 114-127; U.S. Naval War Code, article 39; Japanese Prize Law, article 30.

[773] The *Vrouw Judith* (1799), 1 C. Rob. 150; the *Neptunus* (1799), 2 C. Rob. 110; the *Calypso* (1799), 2 C. Rob. 298; the *Neptunus* (1800), 3 C. Rob. 173; the *Hoffnung* (1805), 6 C. Rob. 112.

The Declaration of London follows, to a certain extent, British, American, and Japanese practice, but differs chiefly in the presumption that knowledge of a blockade is never absolute, but may in every case be rebutted. Article 14 enacts that "the liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the
[Pg 468] blockade." Knowledge of the blockade is presumed, *failing proof to the contrary*, in case the vessel has left a neutral port subsequent to the notification of the blockade to the Power to which such port belongs, and provided that the notification was made in sufficient time (article 15). But in case a neutral vessel *approaching* a blockaded port has neither actual nor presumptive knowledge of the blockade, she is not considered *in delicto*, and notification must be made to her by recording a warning on her log-book, stating the day and hour and the geographical position of the vessel at the time (article 16, first paragraph). Further, if a neutral vessel is *coming out* of a blockaded port, she must be allowed to pass free, in case, through the negligence of the officer commanding the blockading fleet, no declaration of blockade was notified to the local authorities, or in case, in the declaration as notified, no period was mentioned within which neutral vessels might come out (article 16, second paragraph).

The former practice as to what constitutes an Attempt to break Blockade.

§ 385. The practice of States as well as the opinions of writers have hitherto differed much regarding such acts of a vessel as constitute an attempt to break blockade.

(1) The Second Armed Neutrality of 1800 intended to restrict an attempt to break blockade to the employment of force or ruse by a vessel on the line of blockade for the purpose of passing through. This was, on the whole, the practice of France, which moreover, as stated before, required that the vessel should previous to the attempt have received special warning from one of the blockading men-of-war. Many writers[774] took the same standpoint.

(2) The practice of other States, as Japan, approved by many writers,[775] went beyond this and
[Pg 469] considered it an attempt to break blockade when a vessel, with or without force or ruse, endeavoured to pass the line of blockade. This practice frequently saw an attempt complete in the fact that a vessel destined for a blockaded place was found anchoring or cruising near the line of blockade.

(3) The practice of Great Britain and the United States of America went furthest, since it considered it an attempted breach of blockade when a vessel, not destined according to her ship papers for a blockaded port, was found near it and steering for it; and, further, when a vessel destined for a port, the blockade of which was diplomatically notified, started on her journey knowing that the blockade had not been raised, except when the port from which the vessel sailed was so distant from the scene of war as to justify her master in starting for a destination known to be blockaded, on the chance of finding that the blockade had been removed, and with an intention of changing her destination should that not prove to be the case.[776] This practice, further, applied the doctrine of continuous voyages[777] to blockade, for it considered an attempt of breach of blockade to have been committed by such vessel as, although ostensibly destined for a neutral or an unblockaded port, is in reality intended, after touching there, to go on to a blockaded port.[778]

(4) During the Civil War the American Prize Courts carried the practice further by condemning such vessels for breach of blockade as knowingly carried to a neutral port cargo ultimately destined for a blockaded port, and by condemning for breach of blockade such cargo, but not the
[Pg 470] vessel, as was ultimately destined for a blockaded port, when the carrying vessel was ignorant of this ulterior destination of the cargo. Thus the *Bermuda*,[779] a British vessel with a cargo, part of which was, in the opinion of the American Courts, ultimately destined for the blockaded ports of the Confederate States, was seized on her voyage to the neutral British port of Nassau, in the Bahama Islands, and condemned for breach of blockade by the American Courts. The same happened to the British vessel *Stephen Hart*,[780] which was seized on her voyage to the neutral port of Cardenas, in Cuba. And in the famous case of the *Springbok*,[781] a British vessel also destined for Nassau, in the Bahama Islands, which was seized on her voyage to this neutral British port, the cargo alone was finally condemned for breach of blockade, since, in the opinion of the Court, the vessel was not cognisant that the cargo was intended to reach a blockaded port. The same happened to the cargo of the British vessel *Peterhoff*[782] destined for the neutral port of Matamaros, in Mexico. The British Government declined to intervene in favour of the British owners of the respective vessels and cargoes.[783]

[774] See Hautefeuille, II. p. 134; Kleen, I. § 137; Gessner, p. 202; Dupuis, No. 185; Fauchille, *Blocus*, p. 322.

[775] See Bluntschli, § 835; Perels, § 51; Geffcken in Holtzendorff, IV. p. 763; Rivier, II. p. 431. See also § 25 of the Prussian Regulations (1864) concerning Naval Prizes, and article 31 of the Japanese Naval Prize Law.

[776] See Holland, *Prize Law*, § 133, and U.S. Naval War Code, article 42; the *Betsey* (1799), 1 C. Rob. 332.

[777] On this doctrine, see below, § 400, p. 499, note 1.

[778] See Holland, *Prize Law*, § 134, and the case of the *James Cook* (1810), Edwards, 261.

[779] 3 Wallace, § 14.

[780] 3 Wallace, 559.

[781] 5 Wallace, 1.

[782] 5 Wallace, 28.

[783] See *Parliamentary Papers*, Miscellaneous, N. 1 (1900), "Correspondence regarding the Seizure of the British Vessels *Springbok* and *Peterhoff* by the United States Cruisers in 1863."

It is true that the majority of authorities[784] assert the illegality of these judgments of the American Prize Courts, but it is a fact that Great Britain at the time recognised as correct the principles which are the basis of these judgments.

[784] See, for instance, Holland, *Prize Law*, p. 38, note 2; Phillimore, III. § 298; Twiss, *Belligerent Right on the High Seas* (1884), p. 19; Hall, § 263; Gessner, *Kriegführende und neutrale Mächte* (1877), pp. 95-100; Bluntschli, § 835; Perels, § 51; Fauchille, pp. 333-344; Martens, II. § 124. See also Wharton, III. § 362, p. 401, and Moore, VII. § 1276.

What constitutes an Attempt to break Blockade according to the Declaration of London.

§ 385*a*. The Declaration of London proposes a settlement of this controversial matter by enacting in article 17 that "neutral vessels may not be captured for breach of blockade except
[Pg 471] within the area of operations of the men-of-war detailed to render the blockade effective," and in article 19 that "whatever may be the ulterior destination of a vessel or of her cargo, she may not be captured for breach of blockade, if, at the moment, she is on the way to a non-blockaded port."

Accordingly, a neutral vessel, to be guilty of an attempt to break blockade, must actually have entered the *area of operations* (*rayon d'action*) of the blockading fleet. This *area of operations* is a question of fact in each case of a blockade. "When a Government decides to undertake blockading operations against some part of the enemy coast it details a certain number of men-of-war to take part in the blockade, and entrusts the command to an officer whose duty it is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the vessels at his disposal according to the line of the coast and the geographical position of the blockaded places, and instructs each vessel as to the part which she has to play, and especially as to the zone which she is to watch. All the zones watched taken together and so organised as to make the blockade effective, form the area of operations of the blockading force."[785]

[785] Report of the Drafting Committee on article 17.

But the fact alone that a neutral vessel has entered the area of operations is not sufficient to justify her capture, she must also be destined and be on her way to the blockaded port. If she passes through the area of operations without being destined and on her way to the blockaded port, she is not attempting to break the blockade. Even should the ulterior destination of a vessel or her cargo be the blockaded port, she is not considered to attempt to break the blockade, if, at the moment of the visitation, she is really on her way to a non-blockaded port (article 19).
[Pg 472] However, she must really, and not only apparently, be on her way to a non-blockaded port; if it can be proved that in reality her immediate destination is the blockaded port and that she only feigns to be destined for a non-blockaded port, she may be captured, for she is actually attempting to break the blockade.[786]

[786] See the Report of the Drafting Committee on article 19.

From these stipulations of the Declaration of London it becomes quite apparent that the application to blockade of the doctrine of continuous voyage in any form is not admissible.

When Ingress is not considered Breach of Blockade.

§ 386. Although blockade inwards interdicts ingress to all vessels, if not especially licensed,[787] necessity makes exceptions to the rule.

[787] See above, § 370.

According to the practice which has hitherto been quite general, whenever a vessel either by need of repairs,[788] stress of weather,[789] want of water[790] or provisions, or upon any other ground was absolutely obliged to enter a blockaded port, such ingress did not constitute a breach of blockade. On the other hand, according to the British practice at any rate, ingress did not cease to be breach of blockade if caused by intoxication of the master,[791] ignorance[792] of the coast, loss of compass,[793] endeavour to get a pilot,[794] and the like, or an attempt to ascertain[795] whether the blockade was raised.[796]

[788] The *Charlotta* (1810), Edwards, 252.

[789] The *Fortuna* (1803), 5 C. Rob. 27.

[790] The *Hurtige Hanne* (1799), 2 C. Rob. 124.

[791] The *Shepherdess* (1804), 5 C. Rob. 262.

[792] The *Adonis* (1804), 5 C. Rob. 256.

[793] The *Elizabeth* (1810), Edwards, 198.

[794] The *Neutralitet* (1805), 6 C. Rob. 30.

[795] The *Spes* and *Irene* (1804), 5 C. Rob. 76.

[796] See Holland, *Prize Law*, §§ 135-136.

The Declaration of London recognises that necessity makes exceptions to the rule that vessels may not enter a blockaded port. Article 7 enacts that "in circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade, and
[Pg 473] subsequently leave it, provided that she has neither discharged nor shipped any cargo there." It has, however, to be kept in view that article 7, firstly, does not define the term *circumstances of distress*, and, secondly, makes it a condition that the circumstances concerned must be acknowledged by an officer of the blockading force. Everything is, therefore, *prima facie* at any rate, left to the consideration of the respective officer. A vessel in distress will have to signal to the man-of-war of the blockading force which she meets within the area of operations that she intends to enter the blockaded port, and the commander of the man-of-war will have to convince himself that circumstances of distress really exist, and that no fraud is intended. The commander may deny the condition of distress, and then the vessel may not proceed, although the State whose flag she flies may ask for indemnities in case there really was distress and the vessel was lost or damaged by not being allowed to enter the blockaded port. On the other hand, when once the commander of the man-of-war has acknowledged that the respective vessel is in a condition of distress, it is not in his discretion, but he is in duty bound,[797] to allow her to enter the blockaded port.

[797] See Report of the Drafting Committee on article 7.

When Egress is not considered Breach of Blockade.

§ 387. There are a few cases of egress which, according to the hitherto prevailing practice of Great Britain and most other States, were not considered breaches of blockade outwards.[798] Thus, a vessel that was in a blockaded port before the commencement of the blockade[799] was allowed to sail from this port in ballast, as was also a vessel that had entered during a blockade either in ignorance of it or with the permission of the blockading squadron.[800] Thus, further, a
[Pg 474] vessel the cargo of which was put on board before the commencement of the blockade was allowed to leave the port afterwards unhindered.[801] Thus, again, a vessel obliged by absolute necessity to enter a blockaded port was afterwards allowed to leave it unhindered. And a vessel employed by the diplomatic envoy of a neutral State for the exclusive purpose of sending home from a blockaded port distressed seamen of his nationality was also allowed to pass unhindered.[802]

[798] See Holland, *Prize Law*, § 130; Twiss, II. § 113; Phillimore, III. § 313.

[799] The *Frederick Moltke* (1798), 1 C. Rob. 86.

[800] The *Juno* (1799), 2 C. Rob. 116.

[801] The *Vrouw Judith* (1799), 1 C. Rob. 150.

[802] The *Rose in Bloom* (1811), 1 Dodson, 55.

The Declaration of London recognises by article 7—see above, § 386—that a vessel which, on account of distress, entered a blockaded port, must be allowed to leave it afterwards, provided she has neither discharged nor shipped cargo there. And article 16, second paragraph—see above, § 384—enacts that a vessel coming out of a blockaded port must be allowed to pass free, if, through the negligence of the commander of the blockading fleet, no declaration of blockade has been notified to the local authorities, or if, in the declaration as notified, no period has been mentioned within which neutral vessels might come out. But beyond these the Declaration of London does not specify any cases in which egress is not considered breach of blockade. The International Prize Court will, if established, have to develop a more detailed practice concerning the matter.

Passage through Unblockaded Canal no Breach of Blockade.

§ 388. A breach of blockade can only be committed by passing through the blockaded approach. Therefore, if the maritime approach to a port is blockaded whilst an inland canal leads to another unblockaded port of the enemy or to a neutral port, no breach of blockade is committed by the egress or the ingress of a vessel passing such canal for the purpose of reaching the blockaded port.[803]

[Pg 475] [803] The *Stert* (1801), 4 C. Rob. 65. See Phillimore, III. § 314.

Although the Declaration of London does not mention this point, the International Prize Court would surely decide it as stated, since this decision is based on common sense.

V

CONSEQUENCES OF BREACH OF BLOCKADE

See the literature quoted above at the commencement of § 368.

Capture of Blockade-running Vessels.

§ 389. It is universally recognised that a vessel may be captured for a breach of blockade *in delicto* only, that means, during the time of an attempt to break it, or of the breach itself. But here again practice as well as theory hitherto have differed much, since there has been no unanimity with regard to the extent of time during which an attempt of breach and the breach itself could be said to be actually continuing.

It has already been stated above in § 385 that it has been a moot point from what moment a

breach of blockade could be said to have been attempted, and that according to the practice of Great Britain and the United States an attempt was to be found in the fact that a vessel destined for a blockaded port was starting on her voyage. It is obvious that the controversy bore upon the question from what point of time a blockade-running vessel must be considered *in delicto*.

But it has been likewise a moot point as to when the period of time during which a blockade-running vessel might be said to be *in delicto* came to an end. According to Continental theory and practice, such vessel was considered to be *in delicto* only so long as she was actually on the line of blockade, or, having fled from there, so long as she was pursued by one of the blockading
[Pg 476] cruisers. On the other hand, according to the practice of Great Britain[804] and the United States,[805] a blockade-running vessel was held to be *in delicto* so long as she *had not completed her voyage from the blockaded port to the port of her destination and back to the port from which she started originally*, the voyage out and home being considered one voyage. But a vessel was held to be *in delicto* so long only as the blockade continued, capture being no longer admissible in case the blockade had been raised or had otherwise come to an end.

[804] The *Welvaart van Pillaw* (1799), 2 C. Rob. 128; *General Hamilton* (1805), 6 C. Rob. 61.

[805] See U.S. Naval War Code, article 44.

The Declaration of London, when ratified, will settle the controversy, for, according to article 20, a vessel is *in delicto* so long only as she is pursued by a man-of-war of the blockading force, and she may no longer be captured if the pursuit is abandoned or if the blockade is raised. Stress must be laid on two points. Firstly, the pursuit must be carried out by a man-of-war belonging to the blockading force, and not by any other cruiser. Secondly, a blockade-breaking vessel is liable to capture so long as the pursuit lasts, whether or no she is still within the area of operations; even if for a while she has taken refuge in a neutral port, she may, on coming out, be captured, provided the captor is one of the men-of-war of the blockading force which pursued her and waited for her outside the port of refuge.[806]

[806] See the Report of the Drafting Committee on article 20.

Penalty for Breach of Blockade.

§ 390. Capture being effected, the blockade-runner must be sent to a port to be brought before a Prize Court. For this purpose the crew may be temporarily detained, as they will have to serve as witnesses. In former times the crew could be imprisoned, and it is said that even capital[807]
[Pg 477] punishment could have been pronounced against them. But since the eighteenth century this practice of imprisoning the crew has been abandoned, and nowadays the crew may not even be made prisoners of war, but must be released as soon as the Prize Court has pronounced its verdict.[808] The only penalty which may be pronounced is confiscation of the vessel and the cargo. But the practice[809] of the several States has hitherto differed much concerning the penalty for breach of blockade. According to British and American practice, confiscation of both vessel and cargo used to take place in case the owners of the vessel were identical with those of the cargo. In case vessel and cargo had not the same owners, confiscation of both took place only when the cargo consisted of contraband of war or the owners knew of the blockade at the time the cargo was shipped for the blockaded port.[810] And it mattered not whether the captured vessel which carried the cargo had herself actually passed through the blockaded line, or the breach of blockade was effected through a combined action of lighters and the vessel, the lighters passing the line and discharging the cargo into the vessel near the line, or *vice versa*.[811] The cargo alone was confiscated according to the judgments of the American Prize Courts during the Civil War in the case of the *Springbok* and in similar cases[812] when goods ultimately destined for a blockaded port were sent to a neutral port on a vessel whose owners were ignorant of this ulterior destination of the goods.

[807] See Bynkershoek, *Quaest. jur. publ.* I. c. 11.

[808] See Calvo, V. §§ 2897-2898. U.S. Naval War Code, article 45.

[809] See Fauchille, *Blocus*, pp. 357-394: Gessner, pp. 210-214; Perels, § 51, pp. 276-278.

[810] The *Mercurius* (1798), 1 C. Rob. 80; the *Columbia* (1799), 1 C. Rob. 154; the *Alexander* (1801), 4 C. Rob. 93; the *Adonis* (1804), 5 C. Rob. 256; the *Exchange* (1808), Edwards, 39; the *Panaghia Rhomba* (1858), 12 Moore, P.C. 168—See Phillimore, III. §§ 318-319.

[811] The *Maria* (1805), 6 C Rob. 201.

[812] See above, § 385 (4).

The Declaration of London settles the matter by a very simple rule, for according to article 21
[Pg 478] the penalty for blockade-breaking is condemnation of the vessel in all cases, and condemnation of the cargo also, unless the owner proves that at the time of the shipment of the goods the shipper *neither knew nor could have known* of the intention of the vessel to break the blockade. The case in which the whole or part of the cargo consists of contraband, is not mentioned by article 21, but its condemnation is a matter of course.

[Pg 479]

CHAPTER IV

CONTRABAND

I

Grotius, III. c. 1, § 5—Bynkershoek, *Quaest. jur. publ.* I. cc, IX-XII—Vattel, III. §§ 111-113—Hall, §§ 236-247—Lawrence, §§ 253-259—Westlake, II. pp. 240-265—Maine, pp. 96-122—Manning, pp. 352-399—Phillimore, III. §§ 226-284—Twiss, II. §§ 121-151—Halleck, II. pp. 214-238—Taylor, §§ 653-666—Walker, §§ 73-75—Wharton, III. §§ 368-375—Moore, VII. §§ 1249—1263—Wheaton, §§ 476-508—Bluntschli, §§ 801-814—Heffter, §§ 158-161—Geffcken in Holtzendorff, IV. pp. 713-731—Gareis, § 89—Liszt, § 42—Ullmann, §§ 193-194—Bonfils, No. 1537-1588[15]—Despagnet, Nos. 705-715 *ter*—Rivier, II pp. 416-423—Calvo, V. §§ 2708-2795—Fiore, III. Nos. 1591-1601, and Code, Nos. 1827-1835—Martens, II. § 136—Kleen, I. §§ 70-102—Boeck, Nos. 606-659—Pillet, pp. 315-330—Gessner, pp. 70-144—Perels, §§ 44-46—Testa, pp. 201-220—Lawrence, *War*, pp. 140-174—Ortolan, II. pp. 165-213—Hautefeuille, II. pp. 69-172—Dupuis, Nos. 199-230, and *Guerre*, Nos. 137-171—Bernsten, § 9—Nippold, II. § 35—Takahashi, pp. 490-526—Holland, *Prize Law*, §§ 57-87—U.S. Naval War Code, articles 34-36—Heineccius, *De navibus ob vecturam vetitarum mercium commissis dissertatio* (1740)—Huebner, *De la saisie des bâtiments neutres*, 2 vols. (1759)—Valin, *Traité des prises*, 2 vols. (1763)—Martens, *Essai sur les armateurs, les prises, et surtout les reprises* (1795)—Lampredi, *Del commercio dei populi neutrali in tempo di guerra* (1801)—Tetens, *Considérations sur les droits réciproques des puissances belligérantes et des puissances neutres sur mer* (1805)—Pistoye et Duverdy, *Traité des prises maritimes*, 2 vols. (1855)—Pratt, *The Law of Contraband of War* (1856)—Moseley, *What is Contraband and what is not?* (1861)—Upton, *The Law of Nations affecting Commerce during War* (1863)—Lehmann, *Die Zufuhr von Kriegskonterbandewaren, etc.* (1877)—Kleen, *De contrebande de guerre et des transports interdits aux neutres* (1893)—Vossen, *Die Konterbande des Krieges* (1896)—Manceaux, *De la contrebande de guerre* (1899)—Brochet, *De la contrebande de guerre* (1900)—Hirsch, *Kriegskonterbande und verbotene Transporte in Kriegszeiten* (1901)—Pincitore, *Il contrabbando di guerra* (1902)—Remy, *Théorie de la continuauté du voyage en matière de blocus et de contrebande de guerre* (1902)—Knight, *Des états neutres au point de vue de la contrebande de guerre* (1903)—Wiegner, *Die Kriegskonterbande* (1904)—Atherley-Jones, *Commerce in War* (1906), pp. 1-91 and 253-283—Hold, *Die Kriegskonterbande* (1907)—Hansemann, *Die Lehre von der einheitlichen Reise im Rechte der Blockade und Kriegskonterbande* (1910)—Hirschmann, *Das internationale*
[Pg 480] *Prisenrecht* (1912), §§ 24-30—Westlake in *R.I.* II. (1870), pp. 614-655—Kleen in *R.I.* XXV. (1893), pp. 7, 124, 209, 389, and XXVI. pp. 214-217 (1894)—Bar in *R.I.* XXVI. (1894), pp. 401-414—Brocher de la Fléchère, in *R.I.* 2nd Ser. I. (1899), pp. 337-353—Fauchille in *R.G.* IV. (1897), pp. 297-323—Kleen in *R.G.* XI. (1904), pp. 353-362—Gover in *The Journal of the Society of Comparative Legislation*, new series, II. (1900), pp. 118-130—Kennedy and Randall in *The Law Quarterly Review*, XXIV (1908), pp. 59-75, 316-327, and 449-464—General Report presented to the Naval Conference of London by its Drafting Committee, articles 22-44.

Definition of Contraband of War.

§ 391. The term contraband is derived from the Italian "contrabbando," which, itself deriving from the Latin "contra" and "bannum" or "bandum," means "in defiance of an injunction." Contraband of war[813] is the designation of such goods as by either belligerent are forbidden to be carried to the enemy on the ground that they enable the latter to carry on the war with greater vigour. But this definition is only a formal one, as it does not state what kinds of goods belong to the class of contraband. This point was much controverted before the Declaration of London. Throughout the seventeenth, eighteenth, and nineteenth centuries the matter stood as Grotius had explained it. Although he does not employ the term contraband, he treats of the matter. He[814] distinguishes three different kinds of articles. Firstly, those which, as arms for instance, can only be made use of in war, and which are, therefore, always contraband. Secondly, those, as for example articles of luxury, which can never be made use of in war and which, therefore, are never contraband. Thirdly, those which, as money, provisions, ships, and articles of naval equipment, can be made use of in war as well as in peace, and which are on account of
[Pg 481] their ancipitous use contraband or not according to the circumstances of the case. In spite of Bynkershoek's decided opposition[815] to this distinction by Grotius, the practice of most belligerents until the beginning of the twentieth century has been in conformity with it. A great many treaties have from the beginning of the sixteenth century been concluded between many States for the purpose of fixing what articles belonging to the class of ancipitous use should, and what should not, be regarded between the parties as contraband, but these treaties disagree with one another. And, so far as they were not bound by a treaty, belligerents formerly exercised their discretion in every war according to the special circumstances and conditions in regarding or not regarding certain articles of ancipitous use as contraband. The endeavour of the First and the Second Armed Neutrality of 1780 and 1800 to restrict the number and kinds of articles that could be regarded as contraband failed, and the Declaration of Paris of 1856 uses the term contraband without any attempt to define it.

[813] Although—see above, §§ 173-174—prevention of carriage of contraband is a means of sea warfare against the enemy, it chiefly concerns neutral commerce and is, therefore, more conveniently treated with neutrality.

[814] See Grotius, III. c. I, § 5:—"Sunt res quae in bello tantum usum habent, ut arma: sunt quae in bello nullum habent usum, ut quae voluptati inserviunt: sunt quae et in bello et extra bellum usum habent, ut pecuniae, commeatus, naves, et quae navibus adsunt.... In tertio illo genere usus ancipitis, distinguendus erit belli status...."

[815] See Bynkershoek, *Quaest. jur. publici.* I. c. X.

It is by the Declaration of London that the Powers have, for the first time in history, come to an agreement concerning what articles are contraband. The distinction which Grotius made between three classes of goods, while still recognised, has been merged by the Declaration of London into the distinction between articles of absolute contraband, articles of conditional contraband, and such articles as may under no circumstances or conditions be considered contraband. This Declaration, moreover, has put the whole matter of contraband upon a new basis, since the Powers have by articles 22 to 44 agreed upon a common code of rules concerning contraband.

Absolute and conditional Contraband, and free Articles.

§ 392. Apart from the distinction between articles which can be made use of only in war and

[Pg 482] those of ancipitous use, two different classes of contraband must be distinguished.

There are, firstly, articles which by their very character are destined to be made use of in war. In this class are to be reckoned not only arms and ammunition, but also such articles of ancipitous use as military stores, naval stores, and the like. They are termed absolute contraband.

There are, secondly, articles which by their very character are not destined to be made use of in war, but which under certain circumstances and conditions can be of the greatest use to a belligerent for the continuation of the war. To this class belong, for instance, provisions, coal, gold, and silver. These articles are termed conditional or relative contraband.

Although hitherto not all the States have made this distinction, nevertheless they did make a distinction in so far as they varied the list of articles which they declared contraband in their different wars; certain articles, as arms and ammunition, have always been on the list, whilst other articles were only considered contraband when the circumstances of a particular war made it necessary. The majority of writers have always approved of the distinction between absolute and conditional contraband, although several insisted that arms and ammunition only and exclusively could be recognised as contraband, and that conditional contraband did not exist.[816] The distinction would seem to have been important not only regarding the question whether or no an article was contraband, but also regarding the consequences of carrying contraband.[817]

[816] See, for instance, Hautefeuille, II. p. 157, and Kleen, I. § 90.

[817] See below, § 405, p. 510.

[Pg 483] The Declaration of London has adopted (articles 22 and 24) the distinction between absolute and conditional contraband, but it distinguishes, besides these two classes of articles, a third class (article 27). To this class belong all articles which are either not susceptible of use in war, or the possibility of the use of which in war is so remote as practically to make them not susceptible of use in war. These articles are termed *free articles*.[818]

[818] But there are a number of other free articles, although they do not belong to the articles characterised above; see below, § 396*a*.

Articles absolutely Contraband.

§ 393. That absolute contraband cannot and need not be restricted to arms and ammunition only and exclusively becomes obvious, if the fact is taken into consideration that other articles, although of ancipitous use, can be as valuable and essential to a belligerent for the continuance of the war as arms and ammunition. The necessary machinery and material for the manufacture of arms and ammunition are almost as valuable as the latter themselves, and warfare on sea can as little be waged without vessels and articles of naval equipment as without arms and ammunition. But formerly no unanimity existed with regard to such articles of ancipitous use as had to be considered as absolute contraband, and States, when they went to war, increased or restricted, according to the circumstances of the particular war, the list of articles they considered absolute contraband.

According to the British practice[819] which has hitherto prevailed—subject, however, to the prerogative of the Crown to order alterations of the list during a war—the following articles were considered absolute contraband:—

> Arms of all kinds, and machinery for manufacturing arms; ammunition, and materials for ammunition, including lead, sulphate of potash, muriate of potash (chloride of potassium), chlorate of potash, and nitrate of soda; gunpowder and its materials,
> [Pg 484] saltpetre and brimstone, also guncotton; military equipments and clothing; military stores; naval stores, such as masts, spars, rudders, ship timbers, hemp and cordage, sail-cloth, pitch and tar, copper for sheathing vessels, marine engines and the component parts thereof (including screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates and fire bars), maritime cement and the materials used for its manufacture (as blue lias and Portland cement), iron in any of the following forms: anchors, rivet-iron, angle-iron, round bars of from 3/4 to 5/8 of an inch diameter, rivets, strips of iron, sheet plate-iron exceeding 1/4 of an inch, and Low Moor and Bowling plates.

[819] See Holland, *Prize Law*, § 62.

By articles 22 and 23 of the Declaration of London an agreement has been reached according to which two classes of absolute contraband must be distinguished. Article 22 enumerates eleven groups of articles which may *always*, without special declaration and notice, be treated as absolute contraband. These constitute the first class. The second—see article 23—consists of such articles exclusively used for war as are not enumerated[820] amongst the eleven groups of the first class; these may be treated as absolute contraband also, but only *after special declaration and notification*. Such declaration may be published during time of peace, and notification thereof must then be addressed to all other Powers; but if the declaration is published after the outbreak of hostilities, a notification need only be addressed to the neutral Powers. Should a Power—see article 26—waive, so far as itself is concerned, the right to treat as absolute contraband an article comprised in the first class, notification thereof must be made to the other
[Pg 485] Powers. The following are the groups of articles comprised in the first class:—

> (1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

(3) Powder and explosives specially prepared for use in war.

(4) Gun-mountings, limber boxes, limbers, military waggons, field forges, and their distinctive component parts.

(5) Clothing and equipment of a distinctively military character.

(6) All kinds of harness of a distinctively military character.

(7) Saddle, draught, and pack animals suitable for use in war.

(8) Articles of camp equipment, and their distinctive component parts.

(9) Armour plates.

(10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

[820] The Report of the Drafting Committee on article 23 recognises that at present it would be difficult to mention any articles which could under article 23 be declared absolute contraband, but since future contingencies cannot be foreseen, it was considered necessary to stipulate the possibility of increasing the list of absolute contraband. That only such additional articles could be declared absolute contraband as by their very character are destined to be made use of in war, is a matter of course.

It is apparent that this list embodies a compromise, for it includes several articles—such as saddle, draught, and pack animals suitable for use in war—which Great Britain and other Powers formerly only considered as conditional contraband.

Articles conditionally Contraband.

§ 394. There are many articles which are not by their character destined to be made use of in war, but which are nevertheless of great value to belligerents for the continuance of war. Such articles are conditionally contraband, which means that they are contraband when it is clearly apparent—see below, § 395—that they are intended to be made use of for military or naval purposes. This intention becomes apparent on considering either the destination of the vessel carrying the articles concerned, or the consignee of the articles.

[Pg 486] Before the Declaration of London neither the practice of States nor the opinion of writers agreed upon the matter, and it was in especial controversial[821] whether or no foodstuffs, horses and other beasts of burden, coal and other fuel, money and the like, and cotton could conditionally be declared contraband.

(1) That *foodstuffs* should not under ordinary circumstances be declared contraband there ought to be no doubt. There are even several[822] writers who emphatically deny that foodstuffs could ever be conditional contraband. But the majority of writers has always admitted that foodstuffs destined for the use of the enemy army or navy might be declared contraband. This has been the practice of Great Britain,[823] the United States of America, and Japan. But in 1885, during her hostilities against China, France declared rice in general as contraband, on the ground of the importance of this article to the Chinese population. And Russia in 1904, during the Russo-Japanese war, declared rice and provisions in general as contraband; on the protest of Great Britain and the United States of America, however, she altered her decision and declared these articles conditional contraband only.

(2) The importance of *horses and other beasts of burden* for cavalry, artillery, and military transport explains their frequently being declared as contraband by belligerents. No argument against their character as conditional contraband can have any basis. But they were frequently declared absolute contraband, as, for instance, by article 36 of the United States Naval War Code of 1900. Russia, which during the Russo-Japanese War altered the standpoint taken up at first by her, and recognised the distinction between absolute and conditional contraband, nevertheless [Pg 487] maintained her declaration of horses and beasts of burden as absolute contraband. The Declaration of London, by article 22, No. 7, declares them as absolute contraband.

(3) Since men-of-war are nowadays propelled by steam power, the importance of *coal*, and eventually other fuel for waging war at sea is obvious. For this reason, Great Britain has ever since 1854 maintained that coal, if destined for belligerent men-of-war or belligerent naval ports, is contraband. But in 1859 France and Italy did not take up the same standpoint. Russia, although in 1885 she declared that she would never consent to coal being regarded as contraband, in 1904 declared coal, naphtha, alcohol, and every other kind of fuel, absolute contraband. And she adhered to this standpoint, although she was made to recognise the distinction between absolute and conditional contraband.

(4) As regards *money*, unwrought precious metals which may be coined into money, bonds and the like, the mere fact that a neutral is prohibited by his duty of impartiality from granting a loan to a belligerent ought to bring conviction that these articles are contraband if destined for the enemy State or its forces. However, the case seldom happens that these articles are brought by

neutral vessels to belligerent ports, since under the modern conditions of trade belligerents can be supplied in other ways with the necessary funds.

(5) As regards *raw cotton*, it is asserted[824] that in 1861, during the Civil War, the United States declared it absolute contraband under quite peculiar circumstances, since it took the place of money sent abroad for the purpose of paying for vessels, arms, and ammunition. But this
[Pg 488] assertion is erroneous.[825] Be that as it may, raw cotton should not, under ordinary circumstances, be able to be considered absolute contraband. For this reason Great Britain protested when Russia, in 1904 during the Russo-Japanese War, declared cotton in general as contraband; Russia altered her standpoint and declared cotton conditional contraband only.[826]

[821] See Perels, § 45, and Hall, §§ 242-246, who give bird's-eye views of the controversy.

[822] See, for instance, Bluntschli, § 807.

[823] The *Jonge Margaretha* (1799), 1 C. Rob. 189.

[824] See Hall, § 246, p. 690, note 2; Taylor, § 662; Wharton, III. § 373.

[825] See Moore, VII. § 1254, and Holland, *Letters to the "Times" upon War and Neutrality* (1909) pp. 108-112.

[826] According to the British practice which has hitherto prevailed—see Holland, *Prize Law*, § 64—the list of conditional contraband comprises:—Provisions and liquors for the consumption of army and navy; money, telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc; materials for the construction of a railway, as iron bars, sleepers, and the like; coal, hay, horses, rosin, tallow, timber. But it always was in the prerogative of the Crown to extend or reduce this list during a war according to the requirements of the circumstances.

By articles 24 to 28 of the Declaration of London an agreement has been reached by the Powers according to which two classes of conditional contraband must be distinguished. Article 24 enumerates fourteen groups of articles which may *always*, without special declaration and notice, be treated as conditional contraband; these constitute the first class. The second—see article 25—consists of articles which are not enumerated either amongst the eleven groups of absolute contraband contained in article 22 or amongst the fourteen groups of conditional contraband contained in article 24, but which are nevertheless susceptible of use in war as well as for purposes of peace; these may be treated as conditional contraband also, but *only after special declaration and notification*. Such declaration may be published during time of peace, and notification thereof must then be addressed to all other Powers; but if the declaration is published after the outbreak of hostilities a notification need be addressed to the neutral Powers only. Should a Power—see article 26—waive, so far as itself is concerned, the right to treat as conditional contraband an article comprised in the first class, notification thereof must be made
[Pg 489] to the other Powers. But it is of course obvious, although not specially stated in article 26, that a Power may treat as conditional contraband any article belonging either to the first or second class of absolute contraband; in such a case, however, special declaration and notification would seem to be necessary. The following are the groups of articles comprised in the first class of conditional contraband:—

(1) Foodstuffs.

(2) Forage and grain, suitable for feeding animals.

(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.

(4) Gold and silver in coin or bullion; paper money.

(5) Vehicles of all kinds available for use in war, and their component parts.

(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.

(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.

(8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognisable as intended for use in connection with balloons and flying machines.

(9) Fuel; lubricants.

(10) Powder and explosives not specially prepared for use in war.

(11) Barbed wire and implements for fixing and cutting the same.

(12) Horseshoes and shoeing materials.

(13) Harness and saddlery.

(14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

This list represents a compromise, just as does the list of absolute contraband of article 22. Those opponents of the Declaration of London who object to foodstuffs being on the list of conditional contraband forget that several times in the past—see above, p. 486 (1)—belligerents
[Pg 490] have declared foodstuffs absolute contraband.

Hostile Destination essential to Contraband.

§ 395. Whatever may be the nature of articles, they are never contraband unless they are destined for the use of a belligerent in war. Arms and ammunition destined for a neutral are as little contraband as other goods with the same destination. As this hostile destination is essential even for articles which are obviously used in war, such hostile destination is all the more important for such articles of ancipitous use as are only conditionally contraband. Thus, for instance, provisions and coal are perfectly innocent and not at all contraband if they are not purposely destined for enemy troops and naval forces, but are destined for use by a neutral. However, the destination of the articles must not be confounded with the destination of the vessel which carries them. For, on the one hand, certain articles with a hostile destination are considered contraband although the carrying vessel is destined for a neutral port, and, on the other hand, certain articles, although they are without a hostile destination, are considered contraband because the carrying vessel is to touch at an intermediate enemy port and is, therefore, destined for such port, although her ultimate destination is a neutral port.

The Declaration of London, by articles 30 to 36, enacts very detailed rules with regard to hostile destination, distinguishing clearly between the characteristics of hostile destination of absolute contraband and those of hostile destination of conditional contraband.

(1) The destination of articles of *absolute* contraband is, according to article 30, to be considered hostile if it be shown that they are being sent either to enemy territory, or to territory occupied by the enemy, or, further, to the armed forces of the enemy. And, according to article 31, hostile destination of absolute contraband is considered to be completely proved, firstly,
[Pg 491] when the goods are consigned to an enemy port or to the armed forces of the enemy, and, secondly, when the vessel is to call either at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port to which the cargo concerned is consigned.

(2) The destination of articles of *conditional* contraband, on the other hand, is, according to article 33, considered to be hostile if they are intended for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the articles concerned cannot in fact be used for warlike purposes. Gold and silver in coin or bullion and paper money, however, are in every case considered to have a hostile destination if intended for a government department of the enemy State. And, according to article 34, hostile destination of articles of conditional contraband is, if the contrary be not proved, presumed when the articles are consigned, firstly, to enemy authorities or to an enemy contractor[827] established in the enemy country, who as a matter of common knowledge supplies articles of this kind to the enemy, or, secondly, to a fortified place of the enemy or to another place serving as a base[828]—whether of operations or supply—for the armed forces of the enemy. On the other hand, if the articles are not so consigned and if the contrary be not proved, their destination is presumed to
[Pg 492] be non-hostile. And in the case of a merchantman which can herself be conditional contraband if bound to a fortified place of the enemy or to another place serving as a base for the armed forces of the enemy, there is no presumption of a hostile destination, but a direct proof is necessary that she is destined for the use of the armed forces or of a government department of the enemy State.

[827] The French text of article 34 contains the words *à un commerçant établi en pays ennemi et lorsqu'il est notoire que ce commerçant fournit à l'ennemi des objets et materiaux de cette nature*. The translation *to an enemy contractor* has been objected to by opponents of the Declaration of London, but it is absolutely correct because it meets the meaning of the French text.

[828] The Report of the Drafting Committee on article 34 states that the base concerned may be one of operations or supply. Opponents of the Declaration of London object to article 34 on account of the alleged ambiguity of the words *place serving as a base for the armed forces of the enemy*, and assert that all seaports of Great Britain might be treated as bases of supply for the armed forces because railways connect them with other places which actually serve as bases of supply or operations. This is surely erroneous, because the doctrine of continuous voyages is not—see article 35 in contradistinction to article 30, and below, § 403*a*—to be applied to conditional contraband.

Free Articles.

§ 396. It is obvious that such articles as are not susceptible of use in war may never be declared contraband, whether their destination be hostile or not.

The Declaration of London, by article 27, expressly recognises this and, in article 28—the so-called *free list*—enumerates seventeen groups of articles which may never be declared contraband in spite of their hostile destination, namely:—

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.

(2) Oil seeds and nuts; copra.

(3) Rubber, resins, gums, and lacs; hops.

(4) Raw hides and horns, bones, and ivory.

(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.

(8) Chinaware and glass.

(9) Paper and paper-making materials.

(10) Soap, paint and colours, including articles exclusively used in their manufacture, and varnish.

(11) Bleaching powder, soda, ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

(12) Agricultural, mining, textile, and printing machinery.

(13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs, and bristles.

(17) Articles of household furniture and decoration, office furniture and requisites.

[Pg 493] This free list is of great importance to neutral trade, more particularly as it not only comprises such articles as are not susceptible of use in war, but likewise a number of articles, the possibility of the use of which in war is so remote as practically to make them not susceptible of use in war. The list guarantees to a number of industries and trades of neutral States freedom from interference on the part of belligerents, and it is to be expected that in time the list will be increased.

Articles destined for the use of the carrying Vessel, or to aid the Wounded.

§ 396*a*. Besides the seventeen groups of articles contained in the free list, there are two other groups of free articles.

Firstly, those articles which serve exclusively to aid the sick and wounded. They, according to article 29, No. 1, of the Declaration of London, may never be treated as contraband even if their destination is hostile. They may, however, in case of urgent military necessity and, subject to the payment of compensation, be requisitioned if they are destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy.

Secondly, articles intended for the use of the vessel in which they are found or for the use of her crew and passengers during the voyage. Hostile destination being essential before any kinds of articles may be considered contraband, those articles which are carried by a vessel evidently for her own use or for the use of her crew and passengers can never be contraband, as is now specially stipulated by article 29, No. 2, of the Declaration of London. Merchantmen frequently carry a gun and a certain amount of ammunition for the purpose of signalling, and, if they navigate in parts of the sea where there is danger of piracy, they frequently carry a certain
[Pg 494] amount of arms and ammunition for defence against an attack by pirates. It will not be difficult either for the searching belligerent man-of-war or for the Prize Court to ascertain whether or no such arms and ammunition are carried *bona fide*.

Contraband Vessels.

§ 397. A neutral vessel, whether carrying contraband or not, can herself be contraband. Such is the case when she has been built or fitted out for use in war and is on her way to the enemy. Although it is the duty of neutrals—see article 8 of Convention XIII., and above §§ 334 and 350—to employ the means at their disposal to prevent the fitting out, arming, or the departure of any vessel within their jurisdiction, which they have reason to believe is intended to cruise or to engage in hostile operations against a belligerent, their duty of impartiality does not compel them to prevent their subjects from supplying a belligerent with vessels fit for use in war except where the vessel concerned has been built or fitted out by order of a belligerent. Subjects of neutrals may therefore—unless prevented from so doing by Municipal Law, as, for instance, subjects of the British Crown by §§ 8 and 9 of the Foreign Enlistment Act, 1870—by way of trade supply belligerents with vessels of any kind, provided these vessels have not been built or fitted out by order of the belligerent concerned. According to the practice which has hitherto prevailed, such vessels, being equivalent to arms, used to be considered as absolute contraband.[829] And it made no difference whether or no they were fit for use as men-of-war, it sufficed that they were fit to be used for the transport of troops and the like.

[829] The *Richmond* (1804), 5 C. Rob. 325. See also Twiss, II. § 148, and Holland, *Prize Law*, § 86.

[Pg 495] According to article 22, No. 10, article 24, No. 6, and article 34 of the Declaration of London the law concerning contraband vessels will be the following:—A distinction is made between warships on the one hand, and, on the other, vessels and the like generally. According to article 22, No. 10, warships, including their boats and their distinctive component parts of such a nature that they can only be used on a vessel of war, may be treated as absolute contraband without notice. On the other hand, according to article 24, No. 6, vessels, craft, and boats of all kinds, and, further, floating docks, parts of docks and their component parts may only be treated as

conditional contraband, but may be so treated without notice. And it must be specially observed that whereas with regard to articles of conditional contraband generally, there is a legal presumption established as to their hostile destination in case they are consigned to enemy authorities or to a contractor established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy, article 34 expressly exempts merchant vessels from this presumption in case it is sought to prove that they themselves are contraband.

II

CARRIAGE OF CONTRABAND

See the literature quoted above at the commencement of § 391.

Carriage of Contraband Penal by the Municipal Law of Belligerents.

§ 398. The guaranteed freedom of commerce making the sale of articles of all kinds to belligerents by subjects of neutrals legitimate, articles of conditional as well as absolute contraband may be supplied by sale to either belligerent by these individuals. And the carriage of such articles by neutral merchantmen on the Open Sea is, as far as International Law is concerned, quite as legitimate as their sale. The carrier of contraband by no means violates an
[Pg 496] injunction of the Law of Nations. But belligerents have by the Law of Nations the right to prohibit and punish the carriage of contraband by neutral merchantmen, and the carrier of contraband violates, for this reason, an injunction of the belligerent concerned. It is not International Law, but the Municipal Law of the belligerents, which makes carriage of contraband illegitimate and penal.[830] The question why the carriage of contraband articles may nevertheless be prohibited and punished by the belligerents, although it is quite legitimate so far as International Law is concerned, can only be answered by a reference to the historical development of the Law of Nations. In contradistinction to former practice, which interdicted all trade between neutrals and the enemy, the principle of freedom of commerce between subjects of neutrals and either belligerent has gradually become universally recognised; but this recognition included from the beginning the right of either belligerent to punish carriage of contraband on the sea. And the reason obviously is the necessity for belligerents in the interest of self-preservation to prevent the import of such articles as may strengthen the enemy, and to confiscate the contraband cargo, and eventually the vessel also, as a deterrent to other vessels.

[830] See above, § 296.

The present condition of the matter of carriage of contraband[831] is therefore a compromise. In the interest of the generally recognised principle of freedom of commerce between belligerents and subjects of neutrals, International Law does not require neutrals to prevent their subjects from carrying contraband; on the other hand, International Law empowers either belligerent to prohibit and punish carriage of contraband just as it—see above, § 383—empowers either belligerent to prohibit and punish breach of blockade.

[831] The same applies to blockade-running and rendering unneutral service.

[Pg 497] The Declaration of London has in no way altered the existing condition of the matter. The fact that articles 22 and 24 give a list of articles which, without special declaration and notice, may always be treated as absolute and conditional contraband respectively, does not involve the forbidding by International Law of the carriage of the articles. Articles 22 and 24 are certainly part of International Law, yet they merely embody an agreement as to what goods may—but they need not—be treated as contraband.

Direct Carriage of Contraband.

§ 399. Carriage of contraband commonly occurs where a vessel is engaged in carrying to an enemy port such goods as are contraband when they have a hostile destination. In such cases it makes no difference whether the fact that the vessel is destined for an enemy port becomes apparent from her papers, she being bound to such port, or whether she is found at sea sailing on a course for an enemy port, although her papers show her to be bound to a neutral port. And, further, it makes no difference, according to the hitherto prevailing practice of Great Britain and the United States of America at any rate, that she is bound to a neutral port and that the articles concerned are, according to her papers, destined for a neutral port, if only she is to call at an intermediate enemy port or is to meet enemy naval forces at sea in the course of her voyage to the neutral port of destination;[832] for otherwise the door would be open to deceit, and it would always be pretended that goods which a vessel is engaged in carrying to such intermediate enemy places were intended for the neutral port of ultimate destination. For the same reason a vessel carrying such articles as are contraband when they have a hostile destination is considered to be carrying contraband if her papers show that her destination is dependent upon
[Pg 498] contingencies under which she may have to call at an enemy port, unless she proves that she has abandoned the intention of eventually calling there.[833]

[832] See Holland, *Prize Law*, § 69.

[833] The *Imina* (1800), 3 C. Rob. 167; and the *Trende Sostre* (1800), cited in the *Lisette* (1806), 6 C. Rob. 391, note. See also Holland, *Prize Law*, § 70.

The Declaration of London distinguishes between carriage of absolute and conditional contraband:—

As regards *absolute* contraband, a vessel is, according to article 32, considered to be carrying

contraband whether the fact that she is destined for an enemy port becomes evident from her papers, she being bound for such port, or whether she is found at sea sailing for an enemy port, although her papers show her to be bound for a neutral port. And, according to article 31, No. 2, it makes no difference that the vessel is bound for a neutral port and that the articles concerned are, according to her papers, destined for a neutral port, if only she is to touch at an intermediate enemy port or is to meet armed forces of the enemy before reaching the neutral port for which the goods in question are consigned.

As regards *conditional* contraband, a vessel is, according to article 35, considered to be carrying contraband whether her papers show her to be destined to an enemy port, or, being clearly found out of the course to a neutral port indicated by her papers, she is unable to give adequate reasons to justify such deviation.

Article 32 as well as article 35 stipulates that ship papers are conclusive proof as to the destination of the vessel and of the cargo, unless the vessel is clearly found out of the course indicated by her papers, but the Report of the Drafting Committee of the Naval Conference of London emphasises the fact that the rule of the conclusiveness of ship papers must not be interpreted too literally, since otherwise fraud would be made easy. Ship papers are conclusive proof—says the Report—*unless facts show their evidence to be false*.

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Circuitous Carriage of Contraband.

§ 400. On occasions a neutral vessel carrying such articles as are contraband if they have a hostile destination is, according to her papers, ostensibly bound for a neutral port, but is intended, after having called and eventually having delivered her cargo there, to carry the same cargo from there to an enemy port. There is, of course, no doubt that such vessels are carrying contraband whilst engaged in carrying the articles concerned from the neutral to the enemy port. But during the American Civil War the question arose whether they may already be considered to be carrying contraband when on their way from the port of starting to the neutral port from which they are afterwards to carry the cargo to an enemy port, since they are really intended to carry the cargo from the port of starting to an enemy port, although not directly, but circuitously, by a roundabout way. The American Prize Courts answered the question in the affirmative by applying to the carriage of contraband the principle of *dolus non purgatur circuitu* and the so-
[Pg 500] called doctrine of continuous voyages.[834] This attitude of the American Prize Courts has called forth protests from many authorities,[835] British as well as foreign, but Great Britain has not protested, and from the attitude of the British Government in the case of the *Bundesrath* and other vessels in 1900 during the South African War it could safely, although indirectly only, be concluded that Great Britain considered the practice of the American Prize Courts correct and just, and that, when a belligerent, she intended to apply the same principles. This could also be inferred from § 71 of Holland's *Manual of Naval Prize Law*, which established the rule: "The ostensible destination of a vessel is sometimes a neutral port, while she is in reality intended, after touching, and even landing and colourably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be 'continuous,' and the destination is held to be hostile throughout." And provided that the intention of the vessel is really to carry the cargo circuitously, by a roundabout way, to an enemy port, and further provided, that a mere suspicion is not held for a proof of such intention, I cannot see why this application of the doctrine of continuous voyages should not be considered reasonable, just, and adequate.

[834] The so-called doctrine of continuous voyages dates from the time of the Anglo-French wars at the end of the eighteenth century, and is connected with the application of the so-called rule of 1756. (See above, § 289.) Neutral vessels engaged in French and Spanish colonial trade, thrown open to them during the war, sought to evade seizure by British cruisers and condemnation by British Prize Courts, according to the rule of 1756, by taking their cargo to a neutral port, landing it and paying import duties there, and then re-lading it and carrying it to the mother country of the respective colony. Thus in the case of the *William* (1806), 5 C. Rob. 385, it was proved that this neutral vessel took a cargo from the Spanish port La Guira to the port of Marblehead in Massachusetts—the United States being neutral—landed the cargo, paid import duties there, then took in the chief part of this cargo besides other goods, and sailed after a week for the Spanish port of Bilbao. In all such cases the British Prize Courts considered the voyages from the colonial port to the neutral port and from there to the enemy port as one continuous voyage and confirmed the seizure of the ships concerned. See Remy, *Théorie de la continuauté du voyage en matière de blocus et de contrebande* (1902); Hansemann, *Die Lehre von der einheitlichen Reise im Rechte der Blockade und Kriegskonterbande* (1910), and Fauchille in *R.G.* IV. (1897), pp. 297-323. The American Courts have applied the doctrine of continuous voyages not only to carriage of contraband but also to blockade; see above, § 385 (4), where the cases of the *Bermuda* and the *Stephen Hart* are quoted.

[835] See, for instance, Hall, § 247. But Phillimore, III. § 227, p. 391, says of the judgments of the Supreme Court of the United States in the cases of the *Bermuda* and the *Peterhoff*, that they "contain very valuable and sound expositions of the law, professedly, and for the most part really, in harmony with the earlier decisions of English Prize Courts." On the other hand, Phillimore, III. § 298, p. 490, disagrees with the American Courts regarding the application of the doctrine of continuous voyages to breach of blockade, and reprobates the decision in the case of the *Springbok*.

Indirect Carriage of Contraband (Doctrine of Continuous Transports).

§ 401. It also happens in war that neutral vessels carry to neutral ports such articles as are contraband if bound for a hostile destination, the vessel being cognisant or not of the fact that arrangements have been made for the articles to be afterwards brought by land or sea into the
[Pg 501] hands of the enemy. And the question has arisen whether such vessels on their voyage to the neutral port may be considered to be carrying contraband of war.[836] As early as 1855, during the Crimean War, the French Conseil-Général des Prises, in condemning the cargo of saltpetre of the

Hanoverian neutral vessel *Vrow Houwina*, answered the question in the affirmative;[837] but it was not until the American Civil War that the question was decided on principle. Since from the British port of Nassau, in the Bahamas, and from other neutral ports near the coast of the Confederate States, goods, first brought to these nearer neutral ports by vessels coming from more distant neutral ports were carried to the blockaded coast of the Southern States, Federal cruisers seized several vessels destined and actually on their voyage to Nassau and other neutral ports because all or parts of their cargoes were ultimately destined for the enemy. And the American Courts considered those vessels to be carrying contraband, although they were sailing from one neutral port to another, on clear proof that the goods concerned were destined to be transported by land or sea from the neutral port of landing into the enemy territory. The leading cases are those of the *Springbok* and *Peterhoff*, which have been mentioned above in § 385 (4),
[Pg 502] for the Courts found the seizure of these and other vessels justified on the ground of carriage of contraband as well as on the ground of breach of blockade. Thus, another application of the doctrine of continuous voyages came into existence, since vessels whilst sailing between two neutral ports could only be considered to be carrying contraband when the transport first from one neutral port to another and afterwards from the latter to the enemy territory had been regarded as one continuous voyage. This application of the doctrine of continuous voyages is fitly termed "doctrine of continuous transports."

[836] The question is treated with special regard to the case of the *Bundesrath*, in two able articles in *The Law Quarterly Review*, XVII. (1901), under the titles "The Seizure of the *Bundesrath*" (Mr. I. Dundas White) and "Contraband Goods and Neutral Ports" (Mr. E. L. de Hart). See also Baty, *International Law in South Africa* (1900), pp. 1-44.

[837] See Calvo, V. § 2767, p. 52. The case of the Swedish neutral vessel *Commercen*, which occurred in 1814, and which is frequently quoted with that of the *Vrow Houwina* (1 Wheaton, 382), is not a case of indirect carriage of contraband. The *Commercen* was on her way to Bilbao, in Spain, carrying a cargo of provisions for the English army in Spain, and she was captured by a privateer commissioned by the United States of America, which was then at war with England. When the case, in 1816, came before Mr. Justice Story, he reprobated the argument that the seizure was not justified because a vessel could not be considered to be carrying contraband when on her way to a neutral port, and he asserted that the hostile destination of goods was sufficient to justify the seizure of the vessel.

The Case of the *Bundesrath*.

§ 402. This application of the doctrine of continuous voyages under the new form of continuous transports has likewise been condemned by many British and foreign authorities; but Great Britain did not protest in this case either—on the contrary, as was mentioned above in § 385 (4), she declined to interfere in favour of the British owners of the vessels and cargoes concerned. And that she really considered the practice of the American Courts just and sound became clearly apparent by her attitude during the South African War. When, in 1900, the *Bundesrath*, *Herzog*, and *General*, German vessels sailing from German neutral ports to the Portuguese neutral port of Lorenzo Marques in Delagoa Bay, were seized by British cruisers under the suspicion of carrying contraband, Germany demanded their release, maintaining that no carriage of contraband could be said to take place by vessels sailing from one neutral port to another. But Great Britain refused to admit this principle, maintaining that articles ultimately destined for the enemy were contraband, although the vessels carrying them were bound for a neutral port.[838]

[838] See *Parliamentary Papers*, Africa, No. 1 (1900); Correspondence respecting the action of H.M.'s naval authorities with regard to certain foreign vessels.

[Pg 503] There is no doubt that this attitude of the British Government was contrary to the opinion of the prominent English[839] writers on International Law. Even the *Manual of Naval Prize Law*, edited by Professor Holland[840] in 1888, and "issued by authority of the Lords Commissioners of the Admiralty," reprobated the American practice, for in § 72 it lays down the following rule: "... If the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior destination by transhipment, overland conveyance, or otherwise." And the practice of British Prize Courts in the past would seem to have been in accordance with this rule. In 1798, during war between England and the Netherlands, the neutral ship *Imina*,[841] which had left the neutral port of Dantzig for Amsterdam carrying ship's timber, but on hearing of the blockade of Amsterdam by the British had changed her course for the neutral port of Emden, was seized on her voyage to Emden by a British cruiser; she was, however, released by Sir William Scott because she had no intention of breaking blockade, and because a vessel could only be considered as carrying contraband whilst on a voyage to an enemy port. "The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy port," said Sir William Scott.[842]

[839] See, for instance, Hall, § 247, and Twiss in *The Law Magazine and Review*, XII. (1877), pp. 130-158.

[840] In a letter to the *Times* of January 3, 1900, Professor Holland points out that circumstances had so altered since 1888 that the attitude of the British Government in the case of the *Bundesrath* was quite justified; see Holland, *Letters to the "Times" upon War and Neutrality* (1909), pp. 114-119.

[841] 3 C. Rob. 167.

[842] It is frequently maintained—see Phillimore, III. § 227, pp. 397-403—that in 1864, in the case of *Hobbs* v. *Henning*, Lord Chief Justice Erle repudiated the doctrine of continuous transports, but Westlake shows that this is not the case. See Westlake's Introduction in Takahashi, *International Law during the Chino-Japanese War* (1899), pp. xx-xxiii, and in *The Law Quarterly Review*, XV. (1899), pp. 23-30. See also Hart, *ibidem*, XXIII. (1907), p. 199, who discusses the case of *Seymour* v. *London and Provincial Marine Insurance Co.* (41 L.J.C.P. 193) in which the
[Pg 504] Court recognised the doctrine of continuous transports.

Continental support to the Doctrine of Continuous Transports.

§ 403. Although the majority of Continental writers condemn the doctrine of continuous transports, several eminent Continental authorities support it. Thus, Gessner (p. 119) emphatically asserts that the destination of the carrying vessel is of no importance compared with the destination of the carried goods themselves. Bluntschli, although he condemns in § 835 the American practice regarding breach of blockade committed by a vessel sailing from one neutral port to another, expressly approves in § 813 of the American practice regarding carriage of contraband by a vessel sailing between two neutral ports, yet carrying goods with a hostile destination. Kleen (I. § 95, p. 388) condemns the rule that the neutral destination of the vessel makes the goods appear likewise neutral, and defends seizure in the case of a hostile destination of the goods on a vessel sailing between two neutral ports; he expressly states that such goods are contraband from the moment the carrying vessel leaves the port of loading. Fiore (III. No. 1649) reprobates the theory of continuous voyages as applied by British and American Courts, but he asserts nevertheless that the hostile destination of certain goods carried by a vessel sailing to a neutral port justifies the vessel being regarded as carrying contraband, and the seizure thereof. Bonfils (No. 1569) takes up the same standpoint as Bluntschli, admitting the application of the theory of continuous voyages to carriage of contraband, but reprobating its application to breach of blockade. And the Institute of International Law adopted the rule:[843] "*La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un*
[Pg 505]
port neutre qui, d'après des preuves évidentes et de fait incontestable, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale." Thus this representative body of authorities of all nations has fully adopted the American application of the doctrine of continuous voyages to contraband, and thereby recognised the possibility of circuitous as well as indirect carriage of contraband.

[843] See § 1 of the *Règlementation internationale de la contrebande de guerre*, *Annuaire*, XV. (1896), p. 230.

And it must be mentioned that the attitude of several Continental States has hitherto been in favour of the American practice. Thus, according to §§ 4 and 6 of the Prussian Regulations of 1864 regarding Naval Prizes, it was the hostile destination of the goods or the destination of the vessel to an enemy port which made a vessel appear as carrying contraband and which justified her seizure. In Sweden the same was valid.[844] Thus, further, an Italian Prize Court during the war with Abyssinia in 1896 justified the seizure in the Red Sea of the Dutch vessel *Doelwijk*,[845] which sailed for the neutral French port of Djibouti, carrying a cargo of arms and ammunition destined for the Abyssinian army and to be transported to Abyssinia after having been landed at Djibouti.

[844] See Kleen, I. p. 389, note 2.

[845] See Martens, *N.R.G.* 2nd Ser. XXVIII. p. 66. See also below, § 436.

Partial Recognition by the Declaration of London of the Doctrine of Continuous Voyages.

§ 403*a*. The Declaration of London offers a compromise in order to settle the controversy respecting the application of the doctrine of continuous voyages to the carriage of contraband, whether circuitous or indirect carriage be concerned.

(1) On the one hand, article 30 recognises with regard to *absolute* contraband the application of the doctrine of continuous voyages—both to circuitous and indirect carriage of contraband—by enacting that: "absolute contraband is liable to capture if it is shown to be destined to territory
[Pg 506]
belonging to or occupied by the enemy or to the armed forces of the enemy. *It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land.*"

(2) On the other hand, article 35 categorically rejects the doctrine of continuous voyages with regard to *conditional* contraband by enacting that "conditional contraband is not liable to capture except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy,[846] and when it is not to be discharged in an intervening neutral port."

(3) However, in cases where the enemy country has no seaboard, article 36—in contradistinction to the provisions of article 35—expressly recognises the doctrine of continuous voyages for *conditional* contraband also by enacting that "notwithstanding the provisions of article 35, conditional contraband, if shown to have the destination referred to in article 33, is liable to capture in cases where the enemy country has no seaboard."

[846] The rule of article 35 came into question for the first time during the Turco-Italian war. In January 1912, the *Carthage*, a French mail-steamer plying between Marseilles and Tunis, was captured for carriage of contraband by an Italian torpedo-boat and taken to Cagliari, because she had an aeroplane destined for Tunis on board. As the destination of the vessel was neutral, and as, according to article 24, No. 8, of the Declaration of London aeroplanes are conditional contraband, France protested against the capture of the vessel, Italy agreed to release her, and the parties arranged to have the question as to whether the capture of the vessel was justified settled by the Permanent Court of Arbitration at the Hague.

III

CONSEQUENCES OF CARRIAGE OF CONTRABAND

See the literature quoted above at the commencement of § 391.

Capture for Carriage of Contraband.

§ 404. It has always been universally recognised by theory and practice that a vessel carrying

contraband may be seized by the cruisers of the belligerent concerned. But seizure is allowed
[Pg 507] only so long as a vessel is *in delicto*, which commences when she leaves the port of starting and ends when she has deposited the contraband goods, whether with the enemy or otherwise. The rule is generally recognised, therefore, that a vessel which has deposited her contraband may not be seized on her return voyage. British and American practice, however, has hitherto admitted one exception to this rule—namely, in the case in which a vessel has carried contraband on her outward voyage with simulated and false papers.[847] But no exception has been admitted by the practice of other countries. Thus, when in 1879, during war between Peru and Chili, the German vessel *Luxor*, after having carried a cargo of arms and ammunition from Monte Video to Valparaiso, was seized in the harbour of Callao, in Peru, and condemned by the Peruvian Prize Courts for carrying contraband, Germany interfered and succeeded in getting the vessel released.

[847] The *Nancy* (1800), 3 C. Rob. 122; the *Margaret* (1810), 1 Acton, 333. See Holland, *Prize Law*, § 80. Wheaton, I. § 506, note 2, condemns this practice; Hall, § 247, p. 696, calls it "undoubtedly severe"; Halleck, II. p. 220, defends it. See also Calvo, V. §§ 2756-2758.

It must be specially observed that seizure for carriage of contraband is only admissible on the Open Sea and in the maritime territorial belts of the belligerents. Seizure within the maritime belt of neutrals would be a violation of neutrality.

The Declaration of London entirely confirms these old customary rules, but does not recognise the above-mentioned British exception. Article 37 enacts that a vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage even if she is to touch at a port of call before reaching the hostile destination. Article 38 enacts that a vessel may not be
[Pg 508] captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

Penalty for Carriage of Contraband according to the Practice hitherto prevailing.

§ 405. In former times neither in theory nor in practice have similar rules been recognised with regard to the penalty of carriage of contraband. The penalty was frequently confiscation not only of the contraband cargo itself, but also of all other parts of the cargo, together with the vessel. Only France made an exception, since according to an *ordonnance* of 1584 she did not even confiscate the contraband goods themselves, but only seized them against payment of their value, and it was not until 1681 that an *ordonnance* proclaimed confiscation of contraband, but with exclusion of the vessel and the innocent part of the cargo.[848] During the seventeenth century this distinction between contraband on the one hand, and, on the other, the innocent goods and the vessel was clearly recognised by Zouche and Bynkershoek, and confiscation of the contraband only became more and more the rule, certain cases excepted. During the eighteenth century the right to confiscate contraband was frequently contested, and it is remarkable as regards the change of attitude of some States that by article 13 of the Treaty of Friendship and Commerce[849] concluded in 1785 between Prussia and the United States of America all confiscation was abolished. This article provided that the belligerent should have the right to stop vessels carrying contraband and to detain them for such length of time as might be necessary to prevent possible damage by them, but such detained vessels should be paid compensation for the arrest imposed
[Pg 509] upon them. It further provided that the belligerent could seize all contraband against payment of its full value, and that, if the captain of a vessel stopped for carrying contraband should deliver up all contraband, the vessel should at once be set free. I doubt whether any other treaty of the same kind was entered into by either Prussia or the United States.[850] And it is certain that, if any rule regarding penalty for carriage of contraband was generally recognised at all, it was the rule that contraband goods could be confiscated. But there always remained the difficulty that it was controversial what articles were contraband, and that the practice of States varied much regarding the question as to whether the vessel herself and innocent cargo carried by her could be confiscated. For beyond the rule that absolute contraband could be confiscated, there was no unanimity regarding the fate of the vessel and the innocent part of the cargo. Great Britain and the United States of America hitherto confiscated the vessel when the owner of the contraband was also the owner of the vessel; they also confiscated such part of the innocent cargo as belonged to the owner of the contraband goods; they, lastly, confiscated the vessel, although her owner was not the owner of the contraband, provided he knew of the fact that his vessel was carrying contraband, or provided the vessel sailed with false or simulated papers for the purpose of carrying contraband.[851] Some States allowed such vessel carrying contraband as was not
[Pg 510] herself liable to confiscation to proceed with her voyage on delivery of her contraband goods to the seizing cruiser,[852] but Great Britain[853] and other States insisted upon the vessel being brought before a Prize Court in every case.

[848] See Wheaton, *Histoire des Progrès du Droit des gens en Europe* (1841), p. 82.

[849] Martens, *R.* IV. p. 42. The stipulation was renewed by article 12 of the Treaty of Commerce and Navigation concluded between the two States in 1828; Martens, *N.R.* VII. p. 619.

[850] Article 12 of the Treaty of Commerce, between the United States of America and Italy, signed at Florence on February 26, 1871—see Martens, *N.R.G.* 2nd Ser. I. p. 57—stipulates immunity from seizure of such private property only as does not consist of contraband: "The high contracting parties agree that in the unfortunate event of war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture, or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party." See above, § 178.

[851] See Holland, *Prize Law*, §§ 82-87.

[852] See Calvo, V. § 2779.

[853] See Holland, *Prize Law*, § 81.

As regards conditional contraband, those States which made any distinction at all between absolute and conditional contraband, as a rule confiscated neither the conditional contraband nor the carrying vessel, but seized the former and paid for it. According to British practice[854] hitherto prevailing, freight was paid to the vessel, and the usual compensation for the conditional contraband was the cost price plus 10 per cent. profit. States acting in this way asserted a right to confiscate conditional contraband, but exercised pre-emption in mitigation of such a right. Those Continental writers who refused to recognise the existence of conditional contraband, denied, consequently, that there was a right to confiscate articles not absolutely contraband, but they maintained that every belligerent had, according to the so-called right of angary,[855] a right to stop all such neutral vessels as carried provisions and other goods with a hostile destination of which he might have made use and to seize such goods against payment of their full value.

[854] See Holland, *Prize Law*, § 84. Great Britain likewise exercised pre-emption instead of confiscation with regard to such absolute contraband as was in an unmanufactured condition and was at the same time the produce of the country exporting it.

[855] See above, § 365.

The Institute of International Law, whose rules regarding contraband, adopted at its meeting at Venice in 1896, restrict contraband to arms, ammunition, articles of military equipment, vessels fitted for naval operations, and instruments for the immediate fabrication of ammunition, proposed a compromise regarding articles of ancipitous use. Although the rules state that those
[Pg 511]
articles may not be considered contraband, they nevertheless give the choice to a belligerent of either exercising pre-emption or seizing and temporarily retaining such articles against payment of indemnities.[856]

[856] It is of value to print here the *Règlementation internationale de la contrebande de guerre* adopted by the Institute of International Law (*Annuaire*, XV. [1896] p. 230):—

§ 1. Sont articles de contrebande de guerre: (1) les armes de toute nature; (2) les munitions de guerre et les explosifs; (3) le matériel militaire (objets d'équipement, affûts, uniformes, etc.); (4) les vaisseaux équipés pour la guerre; (5) les instruments spécialement faits pour la fabrication immédiate des munitions de guerre; lorsque ces divers objets sont transportés par mer pour le compte ou à la destination d'un belligérant.

La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestable, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale.

§ 2. Sous la dénomination de *munitions de guerre* doivent être compris les objets qui, pour servir immédiatement à la guerre, n'exigent qu'une simple réunion ou juxtaposition.

§ 3. Un objet ne saurait être qualifié de contrebande à raison de la seule intention de l'employer à aider ou favoriser un ennemi, ni par cela seul qu'il pourrait être, dans un but militaire, utile à un ennemi ou utilisé par lui, ou qu'il est destiné à son usage.

§ 4. Sont et demeurent abolies les prétendues contrebandes désignées sous les noms soit de contrebande *relative*, concernant des articles (*usus ancipitis*) susceptibles d'être utilisés par un belligérant dans un but militaire, mais dont l'usage est essentiellement pacifique, soit de contrebande *accidentelle*, quand lesdits articles ne servent spécialement aux buts militaires que dans une circonstance particulière.

§ 5. Néanmoins le belligérant a, à son choix et à charge d'une équitable indemnité, le droit de séquestre ou de préemption quant aux objets qui, en chemin vers un port de son adversaire, peuvent également servir à l'usage de la guerre et à des usages pacifiques.

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§ 9. En cas de saisies ou répressions non justifiées pour cause de contrebande ou de transport, l'État du capteur sera tenu aux dommages-intérêts et à la restitution des objets.

§ 10. Un transport parti avant la déclaration de la guerre et sans connaissance obligée de son imminence n'est pas punissable.

Penalty according to the Declaration of London for Carriage of Contraband.

§ 406. The Declaration of London offers by articles 39 to 44 a settlement of the controversy respecting the penalty for carriage of contraband which represents a fair compromise.

The chief rule is (article 39) that contraband goods, whether absolute or conditional contraband, may be confiscated. The carrying vessel may (article 40) likewise be confiscated if the contraband reckoned either by value, weight, volume, or freight, forms more than half the cargo. If the latter be not the case, and if the carrying vessel be therefore released, she may
[Pg 512]
(article 41) be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national Prize Court and the custody of the ship and cargo during the proceedings. But whatever be the proportion between contraband and innocent goods on a vessel, innocent goods (article 42) which belong to the owner of the contraband and are on board the same carrying vessel, may be confiscated.

If a vessel carrying contraband sails before the outbreak of war (article 43), or is unaware of a declaration of contraband which applies to her cargo, or has no opportunity of discharging her cargo after receiving such knowledge, the contraband may only be confiscated on payment of compensation, and the vessel herself and her innocent cargo may not be confiscated nor may the vessel be condemned to pay any costs and expenses incurred by the captor.[857] But there is a presumption which is not rebuttable with regard to the *mens rea* of the vessel. For according to the second paragraph of article 43 a vessel is considered to have knowledge of the outbreak of war or of a declaration of contraband if she leaves an enemy port after the outbreak of hostilities, or if she leaves a neutral port subsequent to the notification of the outbreak of hostilities or of the declaration of contraband to the Power to which such port belongs, provided such notification

was made in sufficient time.

[857] It is obvious that the vessel must be brought into a port and before a Prize Court if the captor desires to seize the contraband against compensation. The question as to whether article 44 applies to such a case, and whether, therefore, the neutral vessel may be allowed to continue her voyage if the master is willing to hand over the contraband to the captor, must be answered in the affirmative, provided that the contraband, reckoned either by value, weight, volume, or freight, forms less than half the cargo. For article 44 precisely treats of a case in which the vessel herself is not liable to condemnation *on account of the proportion of the contraband on board* (see article 40).

[Pg 513] The question of pre-emption of conditional contraband is not mentioned by the Declaration of London. There is, however, nothing to prevent the several maritime Powers from exercising pre-emption in mitigation of their right of confiscation; the future must show whether or no they will be inclined to do this.

Seizure of Contraband without Seizure of the Vessel.

§ 406*a*. Hitherto the practice of the several States has differed—see above, § 405—with regard to the question as to whether a vessel which was not herself liable to condemnation might be allowed to proceed on her voyage on condition that she handed over the contraband carried by her to the captor. Great Britain and some other States answered it in the negative, but several States in the affirmative. The Declaration of London, although it upholds the general rule that, whatever may be the ultimate fate of the vessel, she must be taken into a port of a Prize Court, admits two exceptions to the rule:—

(1) According to article 44, a vessel which has been stopped for carrying contraband and which is not herself liable to be confiscated on account of the proportion of contraband on board, may—not must—when the circumstances permit it, be allowed to continue her voyage in case she hands over the contraband cargo to the captor. In such a case the captor is at liberty to destroy the contraband handed over to him. But the matter must in any case be brought before a Prize Court. The captor must therefore enter the delivery of the contraband on the log-book of the vessel so stopped, and the master of the latter must give duly certified copies of all relevant papers to the captor.

(2) According to article 54, the captor may—see below, § 431—exceptionally, in case of necessity, demand the handing over, or may proceed himself to the destruction, of any absolute or conditional contraband goods found on a vessel which is not herself liable to condemnation, if the taking of the vessel into the port of a Prize Court would involve danger to the safety of the
[Pg 514] capturing cruiser or to the success of the operations in which she is engaged at the time. But the captor must, nevertheless, bring the case before a Prize Court. He must, therefore, enter the captured goods on the log-book of the stopped vessel, and must obtain duly certified copies of all relevant papers. If the captor cannot establish the fact before the Prize Court that he was really compelled to abandon the intention of bringing in the carrying vessel, he must be condemned (see article 51) to pay the value of the goods to their owners if the goods were contraband or if they were not. And the same is valid in case (article 52) the seizure or destruction of the goods is held by the Prize Court to have been justifiable, but not the capture itself of the carrying vessel.

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CHAPTER V

UNNEUTRAL SERVICE

I

THE DIFFERENT KINDS OF UNNEUTRAL SERVICE

Hall, §§ 248-253—Lawrence, §§ 260-262—Westlake, II. pp. 261-265—Phillimore, III. §§ 271-274—Halleck, II. pp. 289-301—Taylor, §§ 667-673—Walker, § 72—Wharton, III. § 374—Wheaton, §§ 502-504 and Dana's note No. 228—Moore, VII. §§ 1264-1265—Bluntschli, §§ 815-818—Heffter, § 161A—Geffcken in Holtzendorff, IV. pp. 731-738—Ullmann, § 192—Bonfils, Nos. 1584-1588—Despagnet, Nos. 716-716 *bis*—Rivier, II. pp. 388-391—Nys, III. pp. 675-681—Calvo, V. §§ 2796-2820—Fiore, III. Nos. 1602-1605, and Code, Nos. 1836-1840—Martens, II. § 136—Kleen, I. §§ 103-106—Boeck, Nos. 660-669—Pillet, p. 330—Gessner, pp. 99-111—Perels, § 47—Testa, p. 212—Dupuis, Nos. 231-238, and *Guerre*, Nos. 172-188—Bernsten, § 9—Nippold, II. § 35—Holland, *Prize Law*, §§ 88-105—U.S. Naval War Code, articles 16 and 20—Hautefeuille, II. pp. 173-188—Ortolan, II. pp. 209-213—Mountague Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 187-205—Marquardsen, *Der Trent-Fall* (1862), pp. 58-71—Hirsch, *Kriegskonterbande und verbotene Transporte in Kriegszeiten* (1897), pp. 42-55—Takahashi, *International Law during the Chino-Japanese War* (1899), pp. 52-72—Vetzel, *De la contrebande par analogie en droit maritime internationale* (1901)—Atherley-Jones, *Commerce in War* (1906), pp. 304-315—Hirschmann, *Das internationale Prisenrecht* (1912), §§ 31-32—See also the monographs quoted above at the commencement of § 391, and the General Report presented to the Naval Conference of London on behalf of the Drafting Committee, articles 45-47.

Unneutral service in general.

§ 407. Before the Declaration of London the term *unneutral service* was used by several writers with reference to the carriage of certain persons and despatches for the enemy on the part of neutral vessels. The term has been introduced in order to distinguish the carriage of persons and despatches for the enemy from the carriage of contraband, as these were often confounded with
[Pg 516] each other. Since contraband consists of certain goods only and never of persons or despatches, a vessel carrying persons and despatches for the enemy is not thereby actually carrying

contraband.[858] And there is another important difference between the two. Carriage of contraband need not necessarily, and in most cases actually does not, take place in the direct service of the enemy. On the other hand, carriage of persons and despatches for the enemy always takes place in the direct service of the enemy, and, consequently, represents a much more intensive assistance of, and a much more intimate connection with, the enemy than carriage of contraband. For these reasons a distinct treatment of carriage of contraband, on the one hand, and carriage of persons and despatches, on the other, was certainly considered desirable by many publicists. Those writers who did not adopt the term *unneutral service*, on account of its somewhat misleading character, preferred[859] the expression *analogous of contraband*, because in practice maritime transport for the enemy was always treated in analogy with, although not as, carriage of contraband.

[858] This was recognised in the case of the *Yangtsze Insurance Association* v. *Indemnity Mutual Marine Assurance Company*, L.R. (1908), 1 K.B. 910 and 2 K.B. 504.

[859] It was also preferred in the first edition of this work. But it was necessary to abandon further resistance on account of the fact that after the official adoption, in the translation of the Declaration of London, of the term *unneutral service* it was useless to oppose it.

The Declaration of London puts the whole matter upon a new and very much enlarged basis, for Chapter III. treats in articles 45 to 47, under the heading *De l'assistance hostile*—the official English translation of which is *unneutral service*—not only of the carriage of persons for the enemy on the part of a neutral vessel, but also of the transmission of intelligence in the interest of the enemy, the taking of a direct part in the hostilities, and a number of other acts on the part
[Pg 517] of a neutral vessel. Accordingly the Declaration of London makes a distinction between two kinds of unneutral service, meting out for the one a treatment analogous in a general way to contraband, and for the other a treatment analogous to that of enemy merchant vessels. Carriage of individual members of the armed forces of the enemy and a certain case of transmission of intelligence in the interest of the enemy constitute the first kind, and four groups of acts creating enemy character for the vessel concerned constitute the second kind.[860]

[860] Although—see above, §§ 173 and 174—prevention of unneutral service to the enemy is a means of sea warfare, it chiefly concerns neutral commerce, and is, therefore, more conveniently treated with neutrality.

Carriage of Persons for the Enemy.

§ 408. Either belligerent may punish neutral vessels for carrying, in the service of the enemy, certain persons.

Such persons included, according to the customary rules of International Law hitherto prevailing, not only members of the armed forces of the enemy, but also individuals who were not yet members of the armed forces but who would have become so as soon as they reached their place of destination, and, thirdly, non-military individuals in the service of the enemy either in such a prominent position that they could be made prisoners of war, or who were going abroad as agents for the purpose of fostering the cause of the enemy. Thus, for instance, if the head of the enemy State or one of his cabinet ministers fled the country to avoid captivity, the neutral vessel that carried him could have been punished, as could also the vessel carrying an agent of the enemy sent abroad to negotiate a loan and the like. However, the mere fact that enemy persons were on board a neutral vessel did not in itself prove that these persons were carried by the vessel for the enemy and in his service. This was the case only when either the vessel knew of the character of the persons and nevertheless carried them, thereby acting in the service of the
[Pg 518] enemy, or when the vessel was directly hired by the enemy for the purpose of transport of the individuals concerned. Thus, for instance, if able-bodied men booked their passages on a neutral vessel to an enemy port with the secret intention of enlisting in the forces of the enemy, the vessel could not be considered as carrying persons for the enemy; but she could be so considered if an agent of the enemy openly booked their passages. Thus, further, if the fugitive head of the enemy State booked his passage under a false name, and concealed his identity from the vessel, she could not be considered as carrying a person for the enemy; but she could be so considered if she knew whom she was carrying, because she was then aware that she was acting in the service of the enemy. As regards a vessel directly hired by the enemy, there could be no doubt that she was acting in the service of the enemy. Thus the American vessel *Orozembo*[861] was in 1807, during war between England and the Netherlands, captured and condemned, because, although chartered by a merchant in Lisbon ostensibly to sail in ballast to Macao and to take from there a cargo to America, she received by order of the charterer three Dutch officers and two Dutch civil servants, and sailed, not to Macao, but to Batavia. And the American vessel *Friendship*[862] was likewise in 1807, during war between England and France, captured and condemned, because she was hired by the French Government to carry ninety shipwrecked officers and sailors home to a French port.

[861] 6 C. Rob. 430.

[862] 6 C. Rob. 420.

According to British practice hitherto prevailing, a neutral vessel was considered as carrying persons in the service of the enemy even if she were, through the application of force, constrained by the enemy to carry the persons, or if she were in *bona-fide* ignorance of the status
[Pg 519] of her passengers. Thus, in 1802, during war between Great Britain and France, the Swedish vessel *Carolina*[863] was condemned by Sir William Scott for having carried French troops from Egypt to Italy, although the master endeavoured to prove that the vessel was obliged by force to render the transport service. And the above-mentioned vessel *Orozembo* was condemned[864] by Sir William Scott, although her master was ignorant of the service for the enemy on which he was

engaged: "... In cases of *bona-fide* ignorance there may be no actual delinquency; but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done or at least repeated," said Sir William Scott.[865]

[863] 4 C. Rob. 256.

[864] See Phillimore, III. § 274, and Holland, *Prize Law*, §§ 90-91. Hall, § 249, p. 700, note 2, reprobates the British practice. During the Russo-Japanese War only one case of condemnation of a neutral vessel for carrying persons for the enemy is recorded, that of the *Nigretia*, a vessel which endeavoured to carry into Vladivostock the escaped captain and lieutenant of the Russian destroyer *Ratzoporni*; see Takahashi, pp. 639-641.

[865] It should be mentioned that, according to the customary law hitherto prevailing, the case of diplomatic agents sent by the enemy to neutral States was an exception to the rule that neutral vessels may be punished for carrying agents sent by the enemy. The importance of this exception became apparent in the case of the *Trent* which occurred during the American War. On November 8, 1861, the Federal cruiser *San Jacinto* stopped the British mail steamer *Trent* on her voyage from Havana to the British port of Nassau, in the Bahamas, forcibly took off Messrs. Mason and Slidell, together with their secretaries, political agents sent by the Confederate States to Great Britain and France, and then let the vessel continue her voyage. Great Britain demanded their immediate release, and the United States at once granted this, although the ground on which release was granted was not identical with the ground on which release was demanded. The Government of the United States maintained that the removal of these men from the vessel without bringing her before a Prize Court for trial was irregular, and, therefore, not justified, whereas release was demanded on the ground that a neutral vessel could not be prevented from carrying diplomatic agents sent by the enemy to neutrals. Now diplomatic agents in the proper sense of the term these gentlemen were not, because although they were sent by the Confederate States, the latter were not recognised as such, but only as a belligerent Power. Yet these gentlemen were political agents of a quasi-diplomatic character, and the standpoint of Great Britain was for this reason perhaps correct. The fact that the Governments of France, Austria, and Prussia protested through their diplomatic envoys in Washington shows at least that neutral vessels may carry unhindered diplomatic agents sent by the enemy to neutrals, however doubtful it may be whether the same is valid regarding agents with a quasi-diplomatic character. See *Parliamentary Papers*, 1862, North America, N. 5; Marquardsen, *Der Trent Fall* (1862); Wharton, § 374; Moore, VII. § 1265; Phillimore, II. §§ 130-130A; Mountague Bernard, *Neutrality of*
[Pg 520] *Great Britain during the American Civil War* (1870), pp. 187-205; Harris, *The Trent Affair* (1896).

According to the Declaration of London neutral merchantmen may, apart from the case of the carriage of persons who in the course of the voyage directly assist the operations of the enemy, only be considered to render unneutral service by carrying such enemy persons as are actually already members of the armed forces of the enemy. Article 45 makes it quite apparent, through using the words "*embodied* in the armed forces," that reservists and the like who are on their way to the enemy country for the purpose of there joining the armed forces, do not belong to such enemy persons as a neutral vessel may not carry without exposing herself to punishment for rendering unneutral service to the enemy. And four different cases of carrying enemy persons must be distinguished according to the Declaration of London, namely: that of a neutral vessel exclusively engaged in the transport of enemy troops; that of a vessel transporting a military detachment of the enemy; that of a vessel transporting one or more persons who in the course of the voyage directly assist the operations of the enemy; that of a vessel transporting, on a voyage specially undertaken, individual members of the armed forces of the enemy.

(1) According to article 46, No. 4, a neutral vessel exclusively intended at the time for the transport of enemy troops acquires thereby enemy character. This case will be considered with others of the same kind below in § 410.

(2) In case a vessel, although she is not exclusively therefor destined, and although she is not on a voyage specially undertaken for that purpose, transports, to the knowledge of either the owner or the charterer or the master, a military detachment of the enemy, she is, according to article 45, No. 2, considered to render unneutral service for which she may be punished.
[Pg 521] Accordingly, if to the knowledge of either the owner or the charterer or the master, a neutral vessel *in the ordinary course of her voyage* carries a military detachment of the enemy, she is liable to be seized for unneutral service.

(3) In case a neutral vessel, to the knowledge of either the owner or the charterer or the master, carries one or more persons—subjects of one of the belligerents or of a neutral Power—who in the course of the voyage directly assist the operations of the enemy in any way, for instance by signalling or sending message by wireless telegraphy, she is, according to article 45, No. 2, likewise liable to seizure for rendering unneutral service.

(4) In case a neutral vessel carries individual members of the armed forces of the enemy, she is, according to article 45, No. 1, then only liable to seizure if she is on a voyage specially undertaken for such transport, that means, if she has been turned from her ordinary course and has touched at a port outside her ordinary course for the purpose of embarking, or is going to touch at a port outside her ordinary course for the purpose of disembarking, the enemy persons concerned. A liner, therefore, carrying individual members of the armed forces of the enemy in the ordinary course of her voyage may not be considered to be rendering unneutral service and may not be seized. However, according to article 47, a neutral vessel carrying members of the armed forces of the enemy while pursuing her ordinary course, may be stopped for the purpose of taking off such enemy persons and making them prisoners of war (see below, § 413).

Transmission of Intelligence to the Enemy.

§ 409. Either belligerent may punish neutral merchantmen for transmission of intelligence to the enemy.

According to customary rules hitherto in force, either belligerent might punish neutral vessels for the carriage of political despatches from or to the enemy, and especially for such despatches
[Pg 522] as were in relation to the war. But to this rule there were two exceptions. Firstly, on the ground that neutrals have a right to demand that their intercourse with either belligerent be not

suppressed: a neutral vessel might not, therefore, be punished for carrying despatches from the enemy to neutral Governments, and *vice versa*,[866] and, further, despatches from the enemy Government to its diplomatic agents and consuls abroad in neutral States, and *vice versa*.[867] Secondly, on account of article 1 of Convention XI., by which postal correspondence is inviolable, except in the case of violation of blockade, the correspondence destined for, or proceeding from, the blockaded port. However, the mere fact that a neutral vessel had political despatches to or from the enemy on board did not by itself prove that she was carrying them *for and in the service of the enemy*. Just as in the case of certain enemy persons on board, so in the case of despatches, the vessel was only considered to be carrying them in the service of the enemy if either she knew of their character and had nevertheless taken them on board, or if she was directly hired for the purpose of carrying them. Thus, the American vessel *Rapid*,[868] which was captured in 1810 during the war between Great Britain and the Netherlands, on her voyage from New York to Tonningen, for having on board a despatch for a Cabinet Minister of the Netherlands hidden under a cover addressed to a merchant at Tonningen, was released by the Prize Court. On the other hand, the *Atalanta*,[869] which carried despatches in a tea chest hidden in the trunk of a supercargo, was condemned.[870]

[866] The *Caroline* (1808), 6 C. Rob. 461.

[867] The *Madison* (1810), Edwards, 224.

[868] Edwards, 228.

[869] 6 C. Rob. 440.

[870] British practice seems unsettled on the question as to whether the vessel must know of the character of the despatch which she is carrying. In spite of the case of the *Rapid*, quoted above, Holland, *Prize Law*, § 100, maintains that ignorance of the master of the vessel is no excuse, and Phillimore, III. § 272, seems to be of the same opinion.

[Pg 523] According to the Declaration of London the carriage of despatches for the enemy may only be punished in case it falls under the category of transmitting intelligence to the enemy on the part of a neutral vessel. Two kinds of such transmission of intelligence must be distinguished:—

Firstly, according to article 46, No. 4, a neutral vessel exclusively intended for the transmission of intelligence to the enemy acquires thereby enemy character; this will be considered with other cases of the same kind below in § 410.

Secondly, according to article 45, No. 1, a neutral vessel may be seized for transmitting intelligence to the enemy if she is on a voyage specially undertaken for such transmission, that is to say, if she has been turned from her ordinary course and has touched or is going to touch at a port outside her ordinary course for the purpose of transmitting intelligence to the enemy. A liner, therefore, transmitting intelligence to the enemy in the ordinary course of her voyage may not be considered to be rendering unneutral service and may not be punished. However, self-preservation would in a case of necessity justify a belligerent in temporarily detaining such a liner for the purpose of preventing the intelligence from reaching the enemy.[871]

[871] See below, § 413.

The conception "transmission of intelligence" is not defined by the Declaration of London. It certainly means not only oral transmission of intelligence, but also the transmission of despatches containing intelligence. The transmission of any political intelligence of value to the enemy, whether or no the intelligence is in relation to the war, must be considered unneutral service, the case excepted in which intelligence is transmitted from the enemy to neutral Governments, and vice versa, and, further, from the enemy Government to its diplomatic agents [Pg 524] and consuls abroad in neutral States. And it must be emphasised that, although a vessel may be seized and punished for unneutral service, according to article 1 of Convention XI. of the Second Hague Peace Conference the postal correspondence of neutrals or belligerents, whatever its character, found on board is inviolable.

Unneutral Service creating Enemy Character.

§ 410. In contradistinction to cases of unneutral service which are similar to carriage of contraband, the Declaration of London enumerates in article 46 four cases of such kinds of unneutral service as vest neutral vessels with enemy character.[872]

(1) There is, firstly, the case of a neutral merchantman taking a direct part in the hostilities. This may occur in several ways, but such vessel in every case loses her neutral and acquires enemy character, just as a subject of a neutral Power who enlists in the ranks of the enemy armed forces. But a distinction must be made between taking a direct part in the hostilities, for instance rendering assistance to the enemy fleet during battle, on the one hand, and, on the other, acts of a piratical character. If a neutral merchantman—see above, §§ 85, 181, and 254—without Letters of Marque during war and from hatred of one of the belligerents, were to attack and sink merchantmen of such belligerent, she would have to be considered, and could therefore be treated as, a pirate.

(2) There is, secondly, the case of a neutral vessel which sails under the orders or the control of an agent placed on board by the enemy Government. The presence of such agent, and the fact that the vessel sails under his orders or control shows clearly that she is really for all practical purposes part and parcel of the enemy forces.

(3) There is, thirdly, the case of a neutral vessel in the exclusive employment of the enemy. This [Pg 525] may occur in two different ways: either the vessel may be rendering a specific service in the exclusive employment of the enemy, as, for instance, did those German merchantmen during the Russo-Japanese War which acted as colliers for the Russian fleet *en route* for the Far East; or the vessel may be chartered by the enemy so that she is entirely at his disposal for any purpose he

may choose, whether such purpose is or is not connected with the war.[873]

(4) There is, fourthly and lastly, the case of a neutral merchantman exclusively intended at the time either for the transport of enemy troops or for the transmission of intelligence for the enemy. This case is different from the case—provided for by article 45, No. 1—of a vessel on a voyage specially undertaken with a view to the carriage of individual members of the armed forces of the enemy. Whereas the latter is a case of unneutral service rendered by a vessel which turns from her course for the purpose of rendering specific service, the former is a case in which the vessel is exclusively and for the time being permanently intended and devoted to the rendering of unneutral service. For the time being she is, therefore, actually part and parcel of the enemy marine. For this reason she is considered to be rendering unneutral service, and to have lost her neutral character, even if, at the moment an enemy cruiser searches her, she is engaged neither in the transport of troops nor in the transmission of intelligence. The fact is decisive that she is for the time being exclusively intended for such unneutral service, whether or
[Pg 526] no she is at every moment really engaged in rendering such service. And it makes no difference, whether the vessel is engaged by the enemy and paid for the transport of troops or the transmission of intelligence, or whether she renders the service[874] gratuitously.

[872] See above, § 89 (1), p. 113.

[873] Two cases of interest occurred in 1905, during the Russo-Japanese War. The *Industrie*, a German vessel, and the *Quang-nam*, a French vessel, were captured and condemned by the Japanese for being in the employ of Russia as reconnoitring vessels, although the former pretended to collect news in the service of the Chefoo *Daily News*, and the latter pretended to be a cargo vessel plying between neutral ports. See Takahashi, pp. 732 and 735.

[874] As regards the meaning of the term transmission of intelligence, see above, § 409.

II

CONSEQUENCES OF UNNEUTRAL SERVICE

See the literature quoted above at the commencement of § 407.

Capture for Unneutral Service.

§ 411. According to customary rules hitherto prevailing, as well as according to the Declaration of London, a neutral vessel may be captured if visit or search establish the fact, or grave suspicion of the fact, that she is rendering unneutral service to the enemy. And such capture may take place anywhere throughout the range of the Open Sea and the territorial maritime belt of either belligerent.

Stress must be laid on the fact that mail steamers are on principle not exempt from capture for unneutral service. Although, according to article 1 of Convention XI., the postal correspondence of belligerents as well as of neutrals, whatever its official or private character, found on board a vessel on the sea is inviolable,[875] and a vessel may never, therefore, be considered to be rendering unneutral service by carrying amongst her postal correspondence despatches containing intelligence for the enemy, a mail steamer is nevertheless—see article 2 of Convention XI.—not exempt from the laws and customs of naval war respecting neutral merchantmen. A mail
[Pg 527] boat is, therefore, quite as much as any other merchantman, exposed to capture for rendering unneutral service.

[875] See above, §§ 191 and 319.

However this may be, capture is allowed only so long as the vessel is *in delicto*, that is during the time in which she is rendering the unneutral service concerned or immediately afterwards while she is being chased for having rendered unneutral service. A neutral vessel may not, therefore, be captured after the completion of a voyage specially undertaken for the purpose of transporting members of the armed forces of the enemy, or of transmitting intelligence for the enemy, or after having disembarked the military detachment of the enemy and the persons directly assisting the operations of the enemy in the course of the voyage whom she was transporting. And it must be specially emphasised that even such neutral vessel as had acquired —see article 46 of the Declaration of London—enemy character by rendering unneutral service, ceases to be *in delicto* after her unneutral service has come to an end. Thus, for instance, a neutral vessel which took a direct part in hostilities[876] may not afterwards be captured, nor may a vessel which has disembarked the agent of the enemy Government under whose orders or control she was navigating.

[876] Provided she did not—see above, § 410 (1)—commit acts of a piratical character; for such acts she may always be punished.

Penalty for Unneutral Service.

§ 412. According to the practice hitherto prevailing, a neutral vessel captured for carriage of persons or despatches in the service of the enemy could be confiscated. Moreover, according to British[877] practice, such part of the cargo as belonged to the owner of the vessel was likewise confiscated.[878] And if the vessel was not found guilty of carrying persons or despatches in the
[Pg 528] service of the enemy, and was not therefore condemned, the Government of the captor could nevertheless detain the persons as prisoners of war and confiscate the despatches, provided the persons and despatches concerned were in any way of such a character as to make a vessel, which was cognisant of this character, liable to punishment for transporting them for the enemy.

[877] The *Friendship* (1807), 6 C. Rob. 420; the *Atalanta* (1808), 6 C. Rob. 440. See Holland, *Prize Law*, §§ 95 and 105.

[878] See, however, the *Hope* (1808), 6 C. Rob. 463, note.

The Declaration of London recognises these three rules. Articles 45 and 46 declare any vessel rendering any kind of unneutral service to the enemy liable to confiscation, and likewise declare such part of the cargo as belongs to the owner of the confiscated vessel liable to confiscation. And article 47 enacts that, although a neutral vessel may not be condemned because there are no grounds for her capture, the capturing State may nevertheless detain as prisoners of war any members of the armed forces of the enemy who were found on board the vessel. The case of despatches found on board is not mentioned by article 47, but there ought to be no doubt—see below, § 413—that the old customary rule that, although the vessel may not be condemned because there is no ground for capture, any despatches for the enemy found on board may, in analogy with article 47, be confiscated, provided such despatches are not part of the postal correspondence carried on board.

It must be emphasised that the mere fact that a neutral vessel is rendering unneutral service, is not sufficient for her condemnation; for in addition *mens rea* is required. Now as regards the four kinds of unneutral service which create enemy character, *mens rea* is obviously always in existence, and therefore always presumed to be present. For this reason article 46, in contradistinction to article 45, does not mention anything concerning the knowledge by the vessel of the outbreak of hostilities. But as regards the other cases of unneutral service, article
[Pg 529] 45 provides that the vessel may not be confiscated if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers concerned. On the other hand, a vessel is deemed, according to article 45, to be aware of the existence of a state of war if she left an enemy port subsequent to the outbreak of hostilities, or a neutral port subsequent to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time.

Although the Declaration of London metes out the same punishment for the several kinds of unneutral service which it enumerates, it nevertheless makes a distinction, apart from the penalty, with regard to the treatment of the vessels captured for rendering unneutral service.

Article 45 provides for a neutral vessel captured for having rendered either of the two kinds of unneutral service mentioned in this article a treatment which is, in a general way, the same as that for a neutral vessel captured for the carriage of contraband. This means that the vessel does not lose her neutral character, and must under all circumstances and conditions be taken before a Prize Court, unless—see article 49 of the Declaration of London—the taking of her into a port of the capturing State would involve danger to the safety of the capturing vessel or to the success of the military operations in which she is engaged at the time. And an appeal from the national Prize Courts may be brought to the International Prize Court.

Article 46, on the other hand, provides, apart from the penalty, a treatment for a vessel captured for having rendered any of the four kinds of unneutral service enumerated in this article
[Pg 530] which, in a general way, is the same as that for a captured enemy merchantman. This means that such vessel acquires enemy character. Accordingly (see above, § 89) all enemy goods on the vessel may be seized, all goods on board will be presumed to be enemy goods, and the owners of neutral goods on board will have to prove the neutral character of their goods. Further, the rules of articles 48 and 49 of the Declaration of London concerning the destruction of neutral vessels do not apply. Again, no appeal may be brought from the national Prize Courts to the International Prize Court by the owner of the ship except concerning the one question only, namely, whether the act of which she is accused has the character of unneutral service.[879]

[879] The question as to whether, if the vessel has been destroyed by the captor, the innocent owners of the neutral goods on board may claim compensation, has to be decided in the same way as the question as to whether the owners of neutral goods on a destroyed enemy merchantman have a claim to compensation; see above, § 194.

Seizure of Enemy Persons and Despatches without Seizure of Vessel.

§ 413. According to the British[880] and American practice, as well as that of some other States, which has hitherto prevailed, whenever a neutral vessel was stopped for carrying persons or despatches for the enemy, these could not be seized unless the vessel were seized at the same time. The release, in 1861, during the American Civil War, of Messrs. Mason[881] and Slidell, who had been forcibly taken off the *Trent*, while the ship herself was allowed to continue her voyage, was based, by the United States, on the fact that the seizure of these men without the seizure of the vessel was illegal. Since, according to the Declaration of London, a neutral vessel rendering unneutral service of any kind is liable to be confiscated, it is evident that in such a case the enemy persons and despatches concerned may not be taken off the vessel unless the vessel herself is seized and brought into a port of a Prize Court. However, article 47 provides that any
[Pg 531] member of the armed forces of the enemy found on board a neutral merchant vessel may be taken off and made a prisoner of war, although there may be no ground for the capture of the vessel. Therefore, if a vessel carries individual members of the armed forces of the enemy in the ordinary course of her voyage,[882] or if she transports a military detachment of the enemy and the like without being aware of the outbreak of hostilities, the members of the armed forces of the enemy on board may be seized, although the vessel herself may not be seized, as she is not rendering unneutral service.

[880] See Holland, *Prize Law*, § 104.

[881] See above, § 408, p. 519, note 3.

[882] Accordingly, in January 1912, during the Turco-Italian War, the Italian gunboat *Volturno*, after having overhauled, in the Red Sea, the British steamer *Africa* going from Hodeida to Aden, took off and made prisoners of

war Colonel Riza Bey and eleven other Turkish officers. Although the Declaration of London is not yet ratified by Great Britain, she did not protest. The case of the *Manouba* ought likewise to be mentioned here. This French steamer, which plies between Marseilles and Tunis, was stopped on January 16, 1912, by an Italian cruiser in the Mediterranean, and twenty-nine Turkish passengers, who were supposed to be Turkish officers on their way to the theatre of war, were forcibly taken off and made prisoners. On the protest of France, the captives were handed over to her in order to ascertain whether they were members of the Turkish forces, and it was agreed between the parties that the case should be settled by an arbitral award of the Permanent Court of Arbitration at the Hague, Italy asserting that she had only acted in accordance with article 47 of the Declaration of London.

The Declaration of London does not mention the case of enemy despatches embodying intelligence found on board such a neutral vessel as may not herself be captured for such carriage. For instance, in the case of a mail steamer pursuing her ordinary course and carrying a despatch of the enemy not in her mail bags but separately, the vessel may not, according to article 45, be seized. In this, and similar cases, may despatches be seized without the seizure of the vessel? It has been pointed out above, § 409, that, in a case of necessity, self-preservation would justify a belligerent in temporarily detaining such a liner for the purpose of preventing the intelligence from reaching the enemy. This certainly fits the case of a vessel transmitting oral intelligence. But if a vessel carried despatches, the necessity of detaining her ceases through
[Pg 532]
seizure of the despatches themselves. The question—see above, § 412—as to whether in such cases the despatches may be seized without seizure of the vessel ought, therefore, in analogy with article 47 of the Declaration of London, to be answered in the affirmative.

Quite different from the case of seizure of such enemy persons and despatches as a vessel cannot carry without exposing herself to punishment, is the case[883] where a vessel has such enemy persons and despatches on board as she is allowed to carry, but whom a belligerent believes it to be necessary in the interest of self-preservation to seize. Since necessity in the interest of self-preservation is, according to International Law, an excuse[884] for an illegal act, a belligerent may seize such persons and despatches, provided that such seizure is not merely desirable, but absolutely necessary[885] in the interest of self-preservation, as, for instance, in the case where an Ambassador of the enemy on board a neutral vessel is on the way to submit to a neutral a draft treaty of alliance injurious to the other belligerent.

[883] See Hall, § 253; Rivier, II. p. 390.

[884] See above, vol. I. § 129.

[885] See above, vol. I. § 130.

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CHAPTER VI

VISITATION, CAPTURE, AND TRIAL OF NEUTRAL VESSELS

I

VISITATION

Bynkershoek, *Quaest. jur. pub.* I. c. 14—Vattel, III. § 114—Hall, §§ 270-276—Manning, pp. 433-460—Phillimore, III. §§ 322-344—Twiss, II. §§ 91-97—Halleck, II. pp. 255-271—Taylor, §§ 685-689—Wharton, III. §§ 325 and 346—Wheaton, §§ 524-537—Moore, VII. §§ 1199-1205—Bluntschli, §§ 819-826—Heffter, §§ 167-171—Geffcken in Holtzendorff, IV. pp. 773-781—Klüber, §§ 293-294—G. F. Martens, II. §§ 317 and 321—Ullmann, § 196—Bonfils, Nos. 1674-1691—Despagnet, Nos. 717-721—Rivier, II. pp. 423-426—Nys, III. pp. 682-692—Calvo, V. §§ 2939-2991—Fiore, III. Nos. 1630-1641, and Code, Nos. 1853-1877—Martens, II. § 137—Kleen, II. §§ 185-199, 209—Gessner, pp. 278-332—Boeck, Nos. 767-769—Dupuis, Nos. 239-252, and *Guerre*, Nos. 189-204—Bernsten, § 11—Nippold, II. § 35—Perels, §§ 52-55—Testa, pp. 230-242—Ortolan, II. pp. 214-245—Hautefeuille, III. pp. 1-299—Holland, *Prize Law*, §§ 1-17, 155-230—U.S. Naval War Code, articles 30-33—Schlegel, *Sur la visite des vaisseaux neutres sous convoi* (1800)—Mirbach, *Die völkerrechtlichen Grundsätze des Durchsuchungsrechts zur See* (1903)—Loewenthal, *Das Untersuchungsrecht des internationalen Seerechts im Krieg und Frieden* (1905)—Atherley-Jones, *Commerce in War* (1906), pp. 299-360—Hirschmann, *Das internationale Prisenrecht* (1912), §§ 33-34—Duboc in *R.G.* IV. (1897), pp 382-403—See also the monographs quoted above at the commencement of § 391, Bulmerincq's articles on *Le droit des prises maritimes* in *R.I.* X-XIII. (1878-1881), and the General Report presented to the Naval Conference of London on behalf of the Drafting Committee, article 63.

Conception of Right of Visitation.

§ 414. Right of visitation[886] is the right of belligerents to visit and eventually search neutral merchantmen for the purpose of ascertaining whether these vessels really belong to the
[Pg 534]
merchant marine of neutrals, and, if this is found to be the case, whether they are attempting to break a blockade, or carry contraband, or render unneutral service to the enemy. The right of visit and search was already mentioned in the *Consolato del Mare*, and although it has often[887] been contested, its *raison d'être* is so obvious that it has long been universally recognised in practice. It is indeed the only means by which belligerents are able to ascertain whether neutral merchantmen intend to bring assistance to the enemy and to render him unneutral services.[888]

[886] It must be borne in mind that this right of visitation is not an independent right but is involved in the right of either belligerent—see above, § 314—to punish neutral vessels breaking blockade, carrying contraband, and rendering unneutral service.

[887] See, for instance, Hübner, *De la saisie des bâtiments neutres* (1759), I. p. 227.

[888] Attention should be drawn to the *Règlement international des prises maritimes*, adopted at Heidelberg in 1887

by the Institute of International Law; §§ 1-29 regulate visit and search. See *Annuaire*, IX. (1888), p. 202.

Right of Visitation, by whom, when, and where exercised.

§ 415. The right of visit and search may be exercised by all warships[889] of belligerents. But since it is a belligerent right, it may, of course, only be exercised after the outbreak and before the end of war. The right of visitation on the part of men-of-war of all nations in time of peace in a case of suspicion of piracy—see above, vol. I. § 266 (2)—has nothing to do with the right of visit and search on the part of belligerents. And since an armistice does not bring war to an end, and since, on the other hand, the exercise of the right of visitation is not an act of warfare, this right may be exercised during the time of a partial as well as of a general armistice.[890] The region where the right may be exercised is the maritime territorial belt of either belligerent, and, [Pg 535] further, the Open Sea, but not the maritime territorial belt of neutrals. Whether the part of the Open Sea in which a belligerent man-of-war meets with a neutral merchantman is near or far away from that part of the world where hostilities are actually taking place makes no difference so long as there is suspicion against the vessel. The question as to whether the men-of-war of a belligerent may exercise the right of visitation in the maritime territorial belt of an ally is one between the latter and the belligerent exclusively, provided such an ally is already a belligerent.

[889] It should be mentioned that privateers could also exercise the right of visit and search. But since even such States as have not acceded to the Declaration of Paris in practice no longer issue Letters of Marque, such a case will no longer occur.

[890] But this is not universally recognised. Thus, Hautefeuille, III. p. 91, maintains that during a general armistice the right of visitation may not be exercised, and § 5 of the *Règlement international des prises maritimes* of the Institute of International Law takes up the same attitude. It ought, likewise, to be mentioned that in strict law the right of visit and search may be exercised even after the conclusion of peace before the treaty of peace is ratified. But the above-mentioned § 5 of the *Règlement international des prises maritimes* declares this right to cease "avec les préliminaires de la paix." See below, § 436.

Only Private Vessels may be Visited.

§ 416. During the nineteenth century it became universally recognised that neutral men-of-war are not objects of the right of visit and search of belligerents.[891] And the same is valid regarding public neutral vessels which sail in the service of armed forces, such as transport vessels, for instance. Doubt exists as to the position of public neutral vessels which do not sail in the service of armed forces, but sail for other purposes, as, for instance, mail-boats belonging to a neutral State. It is asserted[892] that, if commanded by an officer of the Navy, they must be treated in the same way as men-of-war, but that it is desirable to ask the commanders to give their word of honour assuring the absence of contraband and unneutral service.

[891] In former times Great Britain tried to extend visitation to neutral men-of-war. See Manning, p. 455.

[892] See, for instance, Gessner, p. 297, and Perels, § 52, IV.

Vessels under Convoy.

§ 417. Sweden in 1653, during war between Great Britain and the Netherlands, claimed that the belligerents ought to waive their right of visitation over Swedish merchantmen if the latter sailed under the convoy of a Swedish man-of-war whose commander asserted the absence of contraband on board the convoyed vessels. The Peace of Westminster in 1654 brought this war to [Pg 536] an end, and in 1756 the Netherlands, then neutral, claimed the right of convoy. But it was not until the last quarter of the eighteenth century that the right of convoy was more and more insisted upon by Continental neutrals. During the American War of Independence in 1780, the Netherlands again claimed that right, and when they themselves in 1781 waged war against Great Britain, they ordered their men-of-war and privateers to respect the right of convoy. Between 1780 and 1800 treaties were concluded, in which Russia, Austria, Prussia, Denmark, Sweden, France, the United States of America, and other States recognised that right. But Great Britain always refused to recognise it, and in July 1800 the action of a British squadron in capturing a Danish man-of-war and her convoy of six merchantmen for resistance to visitation called the Second Armed Neutrality into existence. Yet Great Britain still resisted, and by article 4 of the "Maritime Convention" of St. Petersburg of June 17, 1801, she conceded to Russia only that vessels under convoy should not be visited by privateers. During the nineteenth century more and more treaties stipulating the right of convoy were concluded, but this right was not mentioned in the Declaration of Paris of 1856, and Great Britain refused to recognise it throughout the century. However, Great Britain abandoned her opposition at the Naval Conference of London of 1908-9, and the Declaration of London proposes to settle the matter by articles 61 and 62 in the following way:—

Neutral vessels under the convoy of a man-of-war flying the same flag are exempt from search and may not be visited if the commander of the convoy, at the request of the commander of the belligerent cruiser which desires to visit, gives, in writing, all information as to the character of the convoyed vessels and their cargoes which could be obtained by search. Should the [Pg 537] commander of the belligerent man-of-war have reason to suspect that the confidence of the commander of the convoy has been abused, he may not himself resort to visit and search, but must communicate with the commander of the convoy. The latter must investigate the matter, and must record the result of his investigation in a report, a copy of which must be given to the commander of the belligerent cruiser. Should, in the opinion of the commander of the convoy, the facts stated in the report justify the capture of one or more of the convoyed vessels, he must withdraw protection from the offending vessels, and the belligerent cruiser may then capture

them.

In case a difference of opinion arises between the commander of the convoy and the commander of the belligerent cruiser—for instance, with regard to the question as to whether certain goods are absolute or conditional contraband or as to whether the port of destination of a convoyed vessel is an ordinary commercial port or a port which serves as a base of supply for the armed forces of the enemy and the like—the commander of the belligerent cruiser has no power of overruling the decision of the commander of the convoy. He can only protest and report the case to his Government, which will settle the matter by means of diplomacy.

No Universal Rules regarding Mode of Visitation.

§ 418. There are no rules of International Law which lay down all the details of the formalities of the mode of visitation. A great many treaties regulate them as between the parties, and all maritime nations have given instructions to their men-of-war regarding these formalities. Thereby uniform formalities are practised with regard to many points, but regarding others the practice of the several States differs. Article 17 of the Peace Treaty of the Pyrenees of 1659 has served as a model of many of the above-mentioned treaties regulating the formalities of
[Pg 538] visitation: "Les navires d'Espagne, pour éviter tout désordre, n'approcheront pas de plus près les Français que la portée du canon, et pourront envoyer leur petite barque ou chaloupe à bord des navires français et faire entrer dedans deux ou trois hommes seulement, à qui seront montrés les passeports par le maître du navire français, par lesquels il puisse apparoir, non seulement de la charge, mais aussi du lieu de sa demeure et résidence, et du nom tant du maître ou patron que du navire même, afin que, par ces deux moyens, on puisse connaître, s'il porte des marchandises de contrebande; et qu'il apparaisse suffisamment tant de la qualité du dit navire que de son maître ou patron; auxquelles passeports on devra donner entière foi et créance."

Stopping of Vessels for the Purpose of Visitation.

§ 419. A man-of-war which wishes to visit a neutral vessel must stop her or make her bring to. Although the chasing of vessels may take place under false colours, the right colours must be shown when vessels are stopped.[893] The order for stopping can be given[894] by hailing or by firing one or two blank cartridges from the so-called affirming gun, and, if necessary, by firing a shot across the bows of the vessel. If nevertheless the vessel does not bring to, the man-of-war is justified in using force to compel her to bring to. Once the vessel has been brought to, the man-of-war also brings to, keeping a reasonable distance. With regard to this distance, treaties very often stipulate either the range of a cannon shot or half such width or even a range beyond a cannon shot; but all this is totally impracticable.[895] The distance must vary according to the requirements of the case, and according to wind and weather.

[893] See above, § 211.

[894] See above, vol. I. § 268.

[895] See Ortolan, II. p. 220, and Perels, § 53, pp. 284, 285.

Visit.

§ 420. The vessel, having been stopped or brought to, is visited[896] by one or two officers sent in
[Pg 539] a boat from the man-of-war. These officers examine the papers of the vessel to ascertain her nationality, the character of her cargo and passengers, and, lastly, the ports from and to which she is sailing. Instead of visiting the merchantman and inspecting her papers on board, the practice is followed, by the men-of-war of some States, of summoning the master of the merchantman with his papers on board the former and examining the papers there.

[896] See above, vol. I. § 268, and Holland, *Prize Law*, §§ 195-216.

If everything is found in order and there is no suspicion of fraud, the vessel is allowed to continue her course, a memorandum of the visit having been entered in her log-book. On the other hand, if the inspection of the papers shows that the vessel is carrying contraband or rendering unneutral service, or that she is for another reason liable to capture, she is at once seized. But it may be that, although ostensibly everything is in order, there is nevertheless grave suspicion of fraud against the vessel. In such case she may be searched.

Search.

§ 421. Search is effected[897] by one or two officers, and eventually a few men, in presence of the master of the vessel. Care must be taken not to damage the vessel or the cargo, and no force whatever must be applied. No lock must be forcibly broken open by the search party, but the master is to be required to unlock it. If he fails to comply with the demand he is not to be forced thereto, since the master's refusal to assist the search in general, or that of a locked part of the vessel or of a locked box in particular, is at once sufficient cause for seizing the vessel. Search being completed, everything removed has to be replaced with care. If the search has satisfied the searching officers and dispelled all suspicion, a memorandum is entered in the log-book of the
[Pg 540] vessel, and she is allowed to continue her voyage. On the other hand, if search brought contraband or another cause for capture to light, the vessel is seized. But since search can never take place so thoroughly on the sea as in a harbour, it may be that, although search has disclosed no proof to bear out the suspicion, grave suspicion still remains. In such case she may be seized and brought into a port for the purpose of being searched there as thoroughly as possible. But the commander of a man-of-war seizing a vessel in such case must bear in mind that full

indemnities must be paid to the vessel for loss of time and other losses sustained if finally she is found innocent. Therefore, after a search at sea has brought nothing to light against the vessel, seizure should take place only in case of grave suspicion.

[897] See above, vol. I. § 269, and Holland, *Prize Law*, §§ 217-230.

Consequences of Resistance to Visitation.

§ 422. If a neutral merchantman resists visit or search, she is at once captured, and may be confiscated. The question as to whether the vessel only, or also her cargo, could be confiscated for resistance has hitherto been controversial. According to British[898] and American theory and practice, the cargo as well as the vessel was liable to confiscation. But Continental[899] writers emphatically argued against this and maintained that the vessel only was liable to confiscation.

[898] The *Maria* (1799), 1 C. Rob. 340.

[899] See Gessner, pp. 318-321.

According to article 63 of the Declaration of London, resistance to the legitimate exercise of the right of visit, search, and capture involves in all cases the confiscation of the vessel, which by her forcible resistance has acquired enemy character (see above, § 89). For this reason such goods on board as belong to the master or owner of the vessel are treated as enemy goods and may be confiscated. Enemy goods on board may now likewise be confiscated, although when they were first shipped the vessel bore neutral character. Further, all goods on board are now presumed to
[Pg 541] be enemy goods, and the owners of neutral goods on board will have to prove the neutral character of their goods. Lastly, no appeal may be brought from the National Prize Courts to the International Prize Court by the owner of the ship except concerning the one question only, namely, as to whether there was justification for capturing her on the grounds of forcible resistance.

It must be emphasised that visit and search do not take place after a vessel has been captured for resistance, for the mere fact of resisting has imposed enemy character upon her, and the question is now irrelevant whether visit and search would show her to be guilty or innocent.

What constitutes Resistance.

§ 423. According to the practice hitherto prevailing,[900] and also according to the Declaration of London, a mere attempt on the part of a neutral merchantman to escape visitation does not in itself constitute resistance. Such vessel may be chased and compelled by force to bring to, and she cannot complain if, in the endeavour forcibly to compel her to bring to, she is damaged or accidentally sunk. If, after the vessel has been compelled to bring to, visit and search show her to be innocent, she must be allowed to proceed on her course.

[900] The *Maria* (1799), 1 C. Rob. 340.

Resistance to be penal must be *forcible* resistance. It constitutes resistance, therefore, if a vessel applies force in resisting any legitimate action by the belligerent cruiser which requires her to stop and to be visited and searched. The term *forcible resistance* is not defined in detail by article 63 of the Declaration of London. It is, consequently, not certain whether the actual application of force only, or also the refusal, on the part of the master, to show the ship papers or to open locked parts of the vessel or locked boxes, and similar acts, constitutes forcible
[Pg 542] resistance. The International Prize Court, if established, would have to develop a practice which would decide these points.

Sailing under Enemy Convoy equivalent to Resistance.

§ 424. Wheaton excepted, all writers would seem to agree that the fact of neutral merchantmen sailing under a convoy of enemy men-of-war is equivalent to forcible resistance on their part, whether they themselves intend to resist by force or not. But the Government of the United States of America in 1810 contested this principle. In that year, during war between Great Britain and Denmark, many American vessels sailing from Russia used to seek protection under the convoy of British men-of-war, whereupon Denmark declared all such American vessels to be good and lawful prizes. Several were captured without making any resistance whatever, and were condemned by Danish Prize Courts. The United States protested, and claimed indemnities from Denmark, and in 1830 a treaty between the parties was signed at Copenhagen,[901] according to which Denmark had to pay 650,000 dollars as indemnity. But in article 5 of this treaty the parties "expressly declare that the present convention is only applicable to the cases therein mentioned, and, having no other object, may never hereafter be invoked by one party or the other as a precedent or a rule for the future."[902]

[901] Martens, *N.R.* VIII. p. 350.

[902] See Wheaton, §§ 530-537, and Taylor, § 693, p. 790. Wheaton was the negotiator of this treaty on the part of the United States.—With the case of neutral merchantmen sailing under enemy convoy, the other case—see above, § 185—in which neutral goods are placed on board an armed enemy vessel is frequently confused. In the case of the *Fanny* (1814), 1 Dodson, 443, Sir William Scott condemned neutral Portuguese property on the ground that placing neutral property on board an armed vessel was equal to resistance against visitation. But the Supreme Court of the United States of America, in the of the *Nereide* (1815), 9 Cranch, 388, held the contrary view. The Court was composed of four judges, of whom Story was one, and the latter dissented from the majority and considered the British practice correct. See Phillimore, III. § 341, and Wheaton, § 529.

Article 63 of the Declaration of London does not—as was pointed out above in § 423—define the
[Pg 543] term forcible resistance, but it is to be expected that the practice of the International Prize Court would consider the sailing under enemy convoy equivalent to forcible resistance.

Resistance by Neutral Convoy.

§ 425. Since Great Britain did not, before agreeing to the Declaration of London, recognise the right of convoy and had always insisted upon the right of visitation to be exercised over neutral merchantmen sailing under the convoy of neutral men-of-war, the question has arisen as to whether such merchantmen are considered resisting visitation in case the convoying men-of-war only, and not the convoyed vessels themselves, offer resistance. British practice has answered the question in the affirmative. The rule was laid down in 1799[903] and in 1804[904] by Sir William Scott in the cases of Swedish vessels captured while sailing under the convoy of a Swedish man-of-war.

[903] The *Maria*, 1 C. Rob. 340.

[904] The *Elsebe*, 5 C Rob. 173.

Since Great Britain—see above, § 417—has abandoned her opposition to the right of convoy and has agreed to articles 61 and 62 of the Declaration of London which lay down rules concerning the matter, the resistance by a neutral convoy to visitation may not, under ordinary circumstances, be considered to be resistance on the part of the convoyed neutral merchantman. If, however, the commander of a convoy, after having refused to give the written information mentioned in article 61 or to allow the investigation mentioned in article 62, forcibly resists visitation of the convoyed merchantmen by a belligerent cruiser, the question as to whether resistance by a convoy is equivalent to resistance by a convoyed vessel, may even under the Declaration of London arise.

Deficiency of Papers.

§ 426. Since the purpose of visit is to ascertain the nationality of a vessel, the character of her cargo and passengers, and the ports from and to which she is sailing, it is obvious that this
[Pg 544] purpose cannot be realised in case the visited vessel is deficient in her papers. As stated above in Vol. I. § 262, every merchantman ought to carry the following papers: (1) A certificate of registry or a sea-letter (passport); (2) the muster-roll; (3) the log-book; (4) the manifest of cargo; (5) bills of lading, and (6) if chartered, the charter-party. Now, if a vessel is visited and cannot produce one or more of the papers mentioned, she is suspect. Search is, of course, admissible for the purpose of verifying the suspicion, but it may be that, although search has not produced any proof of guilt, the suspicion is not dispelled. In such case she may be seized and brought to a port for thorough examination. But, with the exception of the case that she cannot produce either certificate of registry or a sea-letter (passport), she ought not to be confiscated for deficiency in papers only. Yet, if the cargo is also suspect, or if there are other circumstances which increase the suspicion, confiscation would be, I believe, in the discretion of the Prize Court.

The Declaration of London does not mention the point, and the International Prize Court would, therefore, have to evolve a system of rules to be applied in cases concerned.

Spoliation, Defacement, and Concealment of Papers.

§ 427. Mere deficiency of papers does not arouse the same suspicion which a vessel incurs if she destroys[905] or throws overboard any of her papers, defaces them or conceals them, and in especial in case the spoliation of papers takes place at the time when the visiting vessel comes in sight. Whatever her cargo may be, a vessel may at once be seized without further search so soon as it becomes apparent that spoliation, defacement, or concealment of papers has taken place. The practice of the several States has hitherto differed with regard to other consequences of
[Pg 545] spoliation, and the like, of papers, but confiscation is certainly admissible in case other circumstances increase the suspicion.[906]

[905] The *Hunter* (1815), 1 Dodson, 480.

[906] See the case of the *Apollo* in Calvo, V. § 2989.

The Declaration of London does not mention the case of spoliation of papers, and it would therefore be the task of the International Prize Court to evolve a uniform practice concerning the subject.

Double and False Papers.

§ 428. The highest suspicion is aroused through the fact that a visited vessel carries double papers, or false[907] papers, and such vessel may certainly be seized. But the practice of the several States has hitherto differed with regard to the question whether confiscation is admissible for the mere fact of carrying double or false papers. Whereas the practice of some States, as Russia and Spain, answered the question in the affirmative, British[908] and American[909] practice took a more lenient view, and condemned such vessels only on a clear inference that the false or double papers were carried for the purpose of deceiving the belligerent by whom the capture was made, but not in other cases.[910]

[907] The *Sarah* (1801), 3 C. Rob. 330.

[908] The *Eliza and Katy* (1805), 6 C. Rob. 192.

[909] The *St. Nicholas* (1816), 1 Wheaton, 417.

[910] See Halleck, II. p. 271; Hall, § 276; Taylor, § 690.

Since the Declaration of London does not mention the case of double or false papers, it would
[Pg 546] likewise be the task of the International Prize Court to evolve a uniform practice.

II

CAPTURE

Hall, § 277—Lawrence, § 191—Phillimore, III. §§ 361-364—Twiss, II. §§ 166-184—Halleck, II. pp. 362-391—Taylor, § 691—Moore, VII. §§ 1206-1214—Bluntschli, § 860—Heffter, §§ 171, 191, 192—Geffcken in Holtzendorff, IV. pp. 777-780—Ullmann, § 196—Rivier, II. pp. 426-428—Nys, III. pp. 697-709—Calvo, V. §§ 3004-3034—Fiore, III. Nos. 1644-1657, and Code, Nos. 1878-1889—Martens, II. §§ 126-137—Kleen, II. §§ 203-218—Gessner, pp. 333-356—Boeck, Nos. 770-777—Dupuis, Nos. 253-281, and *Guerre*, Nos. 205-217—Bernsten, § 11—Nippold, II. § 35—Perels, § 55—Testa, pp. 243-244—Hautefeuille, III. pp. 214-299—Holland, *Prize Law*, §§ 231-314—U.S. Naval War Code, articles 46-50—Atherley-Jones, *Commerce in War* (1906), pp. 361-646—Hirschmann, *Das internationale Prisenrecht* (1912), §§ 35-37—See also the monographs quoted above at the commencement of § 391, Bulmerincq's articles on *Le droit des prises maritimes* in *R.I.* X-XIII. (1878-1881), and the General Report presented to the Naval Conference of London on behalf of its Drafting Committee, articles 48-54.

Grounds and Mode of Capture.

§ 429. From the statements given above in §§ 368-428 regarding blockade, contraband, unneutral service, and visitation, it is obvious that capture may take place either because the vessel, or the cargo, or both, are liable to confiscation, or because grave suspicion demands a further inquiry which can be carried out in a port only. Both cases are alike so far as all details of capture are concerned, and in the latter case Prize Courts may pronounce capture to be justified, although no ground for confiscation of either vessel or cargo, or both, has been detected.

The mode of capture is the same as described above in § 184 regarding capture of enemy vessels.[911]

[911] The *Règlement international des prises maritimes*, adopted by the Institute of International Law at its meeting at Heidelberg in 1887, regulates capture in §§ 45-62; see *Annuaire*, IX. (1888), p. 204.

Effect of Capture of Neutral Vessels, and their Conduct to Port.

§ 430. The effect of capture of neutral vessels is in every way different from the effect of capture of enemy vessels,[912] since the purpose of capture differs in these two cases. Capture of
[Pg 547] enemy vessels is made for the purpose of appropriating them in the exercise of the right of belligerents to appropriate all enemy property found on the Open Sea or in the maritime territorial belt of either belligerent. On the other hand, neutral merchantmen are captured for the purpose of confiscation of vessel or cargo, or both, as punishment for certain special acts, the punishment to be pronounced by a Prize Court after a thorough investigation into all the circumstances of the special case. Therefore, although the effect of capture of neutral vessels is that the vessels, the individuals, and the goods thereon are placed under the captor's authority, her officers and crew never become prisoners of war. They are indeed to be detained as witnesses for the trial of the vessel and cargo, but nothing stands in the way of releasing such of them as are not wanted for that purpose. As regards passengers, if any, they have to be released as soon as possible, with the exception of those enemy persons who may be made prisoners of war.

[912] See above, § 185.

Regarding the conduct of captured neutral vessels to a port of a Prize Court, the same is valid as regards conduct of captured enemy vessels[913] to such port.

[913] See above, § 193.

Destruction of Neutral Prizes.

§ 431. That as a rule captured neutral vessels may not be sunk, burned, or otherwise destroyed has always been universally recognised just as that captured enemy merchantmen may not as a rule be destroyed. But up to the time of the agreement on the Declaration of London it was a moot question whether the destruction of captured neutral vessels was likewise exceptionally allowed instead of bringing them before a Prize Court. British[914] practice did not, as regards the neutral owner of the vessel, hold the captor justified in destroying a vessel, however exceptional
[Pg 548] the case may have been, and however meritorious the destruction of the vessel may have been from the point of view of the Government of the captor. For this reason, should a captor, for any motive whatever, have destroyed a neutral prize, full indemnities had to be paid to the owner, although, if brought into a port of a Prize Court, condemnation of vessel and cargo would have been pronounced beyond doubt. The rule was, that a neutral prize must be abandoned in case it could not, for any reason whatever, be brought to a port of a Prize Court. But the practice of other States did not recognise this British rule. The question became of great importance in 1905, during the Russo-Japanese War, when Russian cruisers sank the British vessels *Knight Commander*, *Oldhamia*, *Icona*, *St. Kilda*, and *Hipsang*, the German vessels *Thea*, and *Tetardos*, and the Danish vessel *Princesse Marie*. Russia paid damages to the owners of the vessels *Icona*, *St. Kilda*, *Thea*, *Tetardos*, and *Princesse Marie*, because her Prize Courts declared that the capture of these vessels was not justified, but she refused to pay damages to the owners of the other vessels destroyed, because her Prize Courts considered them to have been justly captured.

[914] The *Actaeon* (1815), 2 Dodson, 48; the *Felicity* (1819), 2 Dodson, 381; the *Leucade* (1855), Spinks, 217. See Phillimore, III. § 333; Twiss, II. § 166; Hall, § 77; Holland, *Letters to the "Times" upon War and Neutrality* (1909), pp. 140-150.

The Declaration of London proposes to settle the matter by a compromise. Recognising that

neutral prizes may not as a rule be destroyed, and admitting only one exception to the rule, it empowers the captor under certain circumstances and conditions to demand the handing over, or to proceed himself to the destruction, of contraband carried by a neutral prize which he is compelled to abandon.

The very first rule of Chapter IV. of the Declaration of London, headed "Destruction of Neutral Prizes," is that of article 48, according to which, as a matter of principle, captured neutral vessels
[Pg 549] may not be destroyed, but must be taken into a port of a Prize Court. However, article 49 permits, as an exception to the rule, the destruction of such a captured neutral vessel as would herself be liable to condemnation, if the taking of the vessel into a port of a Prize Court would involve danger to the safety of the capturing cruiser, or to the success of the operations in which she is at the time of capture engaged.

There is, therefore, no doubt that a neutral prize may no longer be destroyed because the captor cannot spare a prize crew or because a port of a Prize Court is too far distant, or the like. The only justification for destruction of a neutral prize is danger to the captor or his operations at the time of capture. As regards the degree of danger required, it cannot be denied that the wording of article 49 does not provide any clue for a restrictive interpretation. But considering that article 51 speaks of an "exceptional necessity," it is hoped and to be expected that the International Prize Court would give such an interpretation to article 49 as would permit a resort to the sinking of neutral prizes in cases of absolute necessity only. Be that as it may, according to article 49 only such neutral prizes may be sunk as would be liable to confiscation if brought before a Prize Court. Sinking of captured neutral vessels—apart from neutral vessels which have acquired enemy character and may for this reason be sunk under the same conditions as enemy vessels—is, therefore, chiefly admitted in three[915] cases, namely: (1) When—see article 40 of the
[Pg 550] Declaration of London—the vessel carries contraband the value of which forms more than half the value of the cargo; (2) when a vessel has been captured for rendering those kinds of unneutral service which are enumerated by article 45 of the Declaration of London; (3) when—see article 21 of the Declaration of London—a vessel has been captured for breach of blockade. In no case, however, in which she is not liable to confiscation, may a neutral vessel under any circumstances and conditions be destroyed; she must always be abandoned if the capturing cruiser cannot take her into a port of a Prize Court.

[915] Only such cases of possible confiscation of a neutral vessel are mentioned in the text as are in accordance with the Declaration of London. The practice of some States has hitherto admitted confiscation in other cases also, for instance, in case of deficiency, spoliation, or defacement of ship papers, and in case of double and false papers; see above, §§ 426-428. It will be the task of the International Prize Court to evolve a uniform practice with regard to such cases. Likewise the text does not enumerate the cases in which the sinking of a neutral vessel is permissible because she previously acquired enemy character; concerning this, see above, § 89.

However this may be, when the captor feels compelled to resort to the destruction of a neutral prize, he must place in safety all persons found on the captured vessel, and he must take on board all the captured ship's papers which are relevant for the purpose of deciding the validity of the capture (article 50). And (article 51) if the captor fails to establish the fact before the Prize Court that he destroyed the prize in the face of an exceptional necessity, the owners of the vessel and cargo must receive full compensation without any examination of, and any regard to, the question as to whether or no the capture itself was justifiable. Compensation must likewise be paid in case the capture is held by the Prize Court to be invalid, although the act of destruction has been held to be justifiable (article 52). And in any case, the owners of neutral goods not liable to condemnation which have been destroyed with the vessel, may always and under all circumstances and conditions claim damages (article 53).

Thus many safeguards have been established against arbitrariness in resorting to the destruction of neutral prizes. On the other hand, it would seem to be going too far to insist on the captor letting the prize go with her contraband on board, if he be compelled to abandon the
[Pg 551] prize. For this reason article 54 empowers the captor of a neutral vessel herself not liable to confiscation, to demand the handing over, or to proceed himself to the destruction, of any goods liable to confiscation found on board, if the taking of the vessel into a port of a Prize Court would involve danger to the captor or to the success of the operations in which he is at the time of capture engaged. Details concerning such destruction have been given above in § 406*a* (2).

Ransom and Recapture of Neutral Prizes.

§ 432. Regarding ransom of captured neutral vessels, the same is valid as regards ransom of captured enemy vessels.[916]

[916] See above, § 195.

As regards recapture of neutral prizes,[917] the rule ought to be that *ipso facto* by recapture the vessel becomes free without payment of any salvage. Although captured, she was still the property of her neutral owners, and if condemnation had taken place at all, it would have been a punishment, and the recapturing belligerent has no interest whatever in the punishment of a neutral vessel by the enemy.

[917] See Hautefeuille, III. pp. 366-406; Gessner, pp. 344-356; Kleen, II. § 217; Geffcken in Holtzendorff, IV. pp. 778-780; Calvo, V. §§ 3210-3216.

But the matter of recapture of neutral prizes is not settled, no rule of International Law and no uniform practice of the several States being formulated regarding it. Very few treaties touch upon it, and the municipal regulations of the different States regarding prizes seldom mention it. According to British practice,[918] the recaptor of a neutral prize is entitled to salvage, in case the recaptured vessel would have been liable to condemnation if brought into an enemy port.

[918] The *War Onskan* (1799), 2 C. Rob. 299. See Holland, *Prize Law*, § 270.

Release after Capture.

[Pg 552] § 433. Besides the case in which captured vessels must be abandoned, because they cannot for some reason or another be brought into a port, there are cases in which they are released without a trial. The rule is that a captured neutral vessel is to be tried by a Prize Court in case the captor asserts her to be suspicious or guilty. But it may happen that all suspicion is dispelled even before the trial, and then the vessel is to be released at once. For this reason article 246 of Holland's *Prize Law* lays down the rule: "If, after the detention of the vessel, there should come to the knowledge of the commander any further acts tending to show that the vessel has been improperly detained, he should immediately release her...." Even after she has been brought into the port of a Prize Court, release can take place without a trial. Thus the German vessels *Bundesrath* and *Herzog*, which were captured in 1900 during the South African War and taken to Durban, were, after search had dispelled all suspicion, released without trial.

That the released vessel may claim damages is a matter of course, and article 64 of the Declaration of London precisely enacts it. But it should be mentioned that, since Convention XII. stipulates only appeals against judgments of National Prize Courts, the International Prize Court would not have jurisdiction in a case of the release of a vessel without trial, and that the question
[Pg 553] of compensation could, therefore, be settled through the diplomatic channel only.

III

TRIAL OF CAPTURED NEUTRAL VESSELS

Lawrence, §§ 188-190—Maine, p. 96—Manning, pp. 472-483—Phillimore, III. §§ 433-508—Twiss, II. §§ 169-170—Halleck, II. pp. 393-429—Taylor, §§ 563-567—Wharton, III. §§ 328-330—Moore, VII. §§ 1222-1248—Wheaton, §§ 389-397—Bluntschli, §§ 841-862—Heffter, §§ 172-173—Geffcken in Holtzendorff, IV. pp. 781-788—Ullmann, § 196—Bonfils, Nos. 1676-1691—Despagnet, Nos. 677-682 *bis*—Rivier, II. pp. 353-356—Nys, III. pp. 710-718—Calvo, V. §§ 3035-3087—Fiore, III. Nos. 1681-1691, and Code, Nos. 1890-1929—Martens, II. §§ 125-126—Kleen, II. §§ 219-234—Gessner, pp. 357-427—Boeck, Nos. 740-800—Dupuis, Nos. 282-301, and *Guerre*, Nos. 218-223—Nippold, II. § 35—Perels, §§ 56-57—Testa, pp. 244-247—Hautefeuille, III. pp. 299-365—Atherley-Jones, *Commerce in War* (1906), pp. 361-594—Hirschmann, *Das internationale Prisenrecht* (1912), § 38—See also the monographs quoted above at the commencement of § 391, and Bulmerincq's articles on *Le droit des prises maritimes* in *R.I.* X.-XIII. (1878-1881).

Trial of Captured Vessels a Municipal Matter.

§ 434. Although belligerents have, under certain circumstances, according to International Law, the right to capture neutral vessels, and although they have the duty to bring these vessels for trial before a Prize Court, such trials are in no way an international matter. Just as Prize Courts—apart from the proposed International Prize Court—are municipal[919] institutions, so trials of captured neutral vessels by these Prize Courts are municipal matters. The neutral home States of the vessels are not represented and, directly at any rate, not concerned in the trial. Nor is, as commonly maintained, the law administered by Prize Courts International Law. These Courts apply the law of their country. The best proof of this is the fact that the practice of the
[Pg 554] Prize Courts of the several countries has hitherto differed in many points. Thus, for instance, the question what is and what is not contraband, and, further, the question when an attempt to break blockade begins and when it ends, have hitherto been differently answered by the practice of different States.

[919] See above, § 192. The matter is regulated so far as Great Britain is concerned by the Naval Prize Act, 1864 (27 and 28 Vict. ch. 25) and the Prize Courts Act, 1894 (57 and 58 Vict. ch. 39). The *Règlement international des prises maritimes*, adopted in 1887 at Heidelberg by the Institute of International Law, provides in §§ 63-118 detailed rules concerning the organisation of Prize Courts and the procedure before them; see *Annuaire*, IX. (1888), p. 208.

Many writers, however, maintain that Prize Courts are International Courts, and that the law administered by these courts is International Law. Lord Stowell again and again[920] emphatically asserted it, and the vast majority of English and American writers[921] follow him. But it is to be expected that the recognition of the difference between Municipal and International Law, as expounded above, Vol. I., §§ 20-25, and of the fact that States only, and neither their Courts nor officials nor citizens, are subjects of International Law, will lead to the general recognition of the fact that the law applied by National Prize Courts is not and cannot be International Law.

[920] The *Maria* (1799), 1 C. Rob. 340; the *Recovery* (1807), 6 C. Rob. 341; the *Fox and others* (1811), Edwards, 311.

[921] See, for instance, Halleck, II. p. 411; Maine, p. 96; Manning, p. 472; Phillimore, III. §§ 433-436; Hall, § 277. On the other hand, Holland, *Studies*, p. 199; Westlake, II. p. 289; and Scott, *Conferences*, p. 467, distinctly agree with me.

And matters will remain as they are even after the establishment of the International Prize Court and ratification of the Declaration of London. The law of this Declaration is certainly International Law, but it will be binding only upon the States, and they, on their part, must embody it in their Municipal Law so that their Prize Courts are obliged to administer such a law in prize cases as is in conformity with the Declaration of London. It will be the task of the International Prize Court[922] to control the National Prize Courts in that direction. A State which is a party to the Declaration and would nevertheless order its Prize Courts to apply a law which is
[Pg 555] in opposition to the Declaration of London, would commit an international delinquency, but its Prize Courts would be obliged to apply such law.

[922] Trial before this Court is, of course, an international matter.

Result of Trial.

§ 435. The trial of a captured neutral ship can have one or more of five results:—vessel and cargo can be condemned,[923] or the vessel alone, or the cargo alone; and the vessel and cargo can be released either with or without costs and damages. Costs and damages must be allowed when capture was not justified, and, after the ratification of the Declaration of London and the establishment of the International Prize Court, an appeal may, according to article 64 of the Declaration of London and article 4 of Convention XII., be brought before the International Prize Court if costs and damages are refused or inadequately allowed by a Prize Court. But it must be emphasised that capture might be justified, as, for instance, in the case of spoliation of papers, although the Prize Court did not condemn the vessel, and, further, that costs and damages are never allowed in case a part only of the cargo is condemned, although the vessel herself and the greater part of the cargo are released. That, in case the captor is unable to pay the costs and damages allowed to a released neutral vessel, his Government has to indemnify the vessel, there ought to be no doubt, for a State bears "vicarious" responsibility[924] for internationally injurious acts of its naval forces.

[923] It would seem to be obvious that condemnation of the vessel involves the loss of the vessel at the date of capture; see *Andersen* v. *Marten*, L.R. (1907) 2 K.B. 248.

[924] See above, vol. I. § 163.

Trial after Conclusion of Peace.

[Pg 556] § 436. It is a moot question whether neutral vessels captured before conclusion of peace may be tried after the conclusion of peace.[925] I think that the answer must be in the affirmative, even if a special clause is contained in the Treaty of Peace, which stipulates that captured but not yet condemned vessels of the belligerents shall be released. A trial of neutral prizes is in any case necessary for the purpose of deciding the question whether capture was justified or not, and whether, should condemnation not be justified, the neutral vessels may claim costs and indemnities. Thus, after the conclusion of the Abyssinian War, in December 1896, the Italian Prize Commission, in the case of the *Doelwijk*,[926] claimed the right to try the vessel in spite of the fact that peace had been concluded between the time of capture and trial, declared the capture of the vessel and cargo to have been justified, but pronounced that, peace having been concluded, confiscation of vessel and cargo would no longer be lawful.

[925] See Perels, § 57, p. 309, in contradistinction to Bluntschli, § 862. But there is, of course, no doubt that a belligerent can exercise an act of grace and release such prizes. Thus, in November 1905, at the end of the Russo-Japanese War, the Mikado proclaimed the unconditional release of all neutral prizes captured after the signing but before the ratification of the Peace of Portsmouth. Thereby, three German vessels, two English, and one Norwegian escaped confiscation, which in strict law—see above, p. 534, note 4—would have been justified.

[926] See Martens, *N.R.G.* 2nd Ser. XXVIII. pp. 66-90.

Different from the question whether neutral prizes may be tried after the conclusion of peace is the other question whether they may be condemned to be confiscated. In the above-mentioned case of the *Doelwijk* the question was answered in the negative, but I believe it ought to have been answered in the affirmative. Confiscation of vessel and cargo having the character of a punishment, it would seem that the punishment may be inflicted after the conclusion of peace provided the criminal act concerned was consummated before peace was concluded. But nothing, of course, stands in the way of a belligerent taking a more lenient view and ordering his Prize Courts not to pronounce confiscation of neutral vessels after the conclusion of peace.

[Pg 557] The Declaration of London does not settle either the former or the latter question, and it would therefore be the task of the International Prize Court to evolve a uniform practice in the cases concerned.

Protests and Claims of Neutrals after Trial.

§ 437. Hitherto, if a trial led to condemnation, and if the latter was confirmed by the Court of Appeal, the matter as between the captor and the owner of the captured vessel and cargo was finally settled. But the right of protection,[927] which a State exercises over its subjects and their property abroad, may nevertheless have been the cause of diplomatic protests and claims on the part of the neutral home State of a condemned vessel or cargo, in case the verdict of the Prize Courts was considered to be not in accordance with International Law or formally or materially unjust. It is through such protests and claims that the matter, which was hitherto a mere municipal one, became of *international* importance. And history records many instances of cases of interposition of neutral States after trials of vessels which had sailed under their flags. Thus, for instance, in the famous case of the Silesian Loan,[928] it was the fact that Frederick II. of Prussia considered the procedure of British Prize Courts regarding a number of Prussian merchantmen captured during war between Great Britain and France in 1747 and 1748 as unjust, which made him in 1752 resort to reprisal and cease the payment of the interest of the Silesian Loan. The matter was settled[929] in 1756, through the payment of £20,000 as indemnity by Great Britain. Thus, further, after the American Civil War, articles 12-17 of the Treaty of Washington[930] provided the appointment of three Commissioners for the purpose, amongst others, of deciding all claims against verdicts of the American Prize Courts. And when in 1879,

[Pg 558] during war between Peru and Chili, the German vessel *Luxor* was condemned by the Peruvian Courts, Germany interposed and the vessel was released.[931]

[927] See above, vol. I. § 319.

[928] See above, § 37.

[929] See Martens, *Causes Célèbres*, II. p. 167.

[930] See Martens, *N.R.G.* XX. p. 698.

[931] See above, § 404.

The ratification of the Declaration of London and the establishment of the International Prize Court would finally do away with such grave international disputes.

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CHAPTER VII

THE INTERNATIONAL PRIZE COURT

I

PROPOSALS FOR INTERNATIONAL PRIZE COURTS

Geffcken in Holtzendorff, IV. pp. 785-788—Boeck, Nos. 743-764—Dupuis, No. 289, and *Guerre*, Nos. 224-231—Higgins, pp. 432-435—Lémonon, pp. 280-293—Nippold, I. § 15—Trendelenburg, *Lücken im Völkerrecht* (1870), pp. 49-53—Gessner, *Kriegführende und neutrale Mächte* (1877), pp. 52-58—Bulmerincq and Gessner in *R.I.* XI. (1879), pp. 173-191, and XIII. (1881), pp. 260-267.

Early Projects.

§ 438. Numerous inconveniences must naturally result from a condition of International Law which has hitherto prevailed and according to which the Courts of the belligerent whose forces had captured neutral vessels exercised jurisdiction without any control by neutrals. Although, as shown above in § 437, neutrals frequently interfered after a trial and succeeded in obtaining recognition for their claims in face of the verdicts of Prize Courts, great dissatisfaction has long been felt at the condition of matters hitherto obtaining, and proposals have been made for so-called mixed Prize Courts.

The first proposal of this kind was made in 1759 by Hübner,[932] who suggested a Prize Court composed of judges nominated by the belligerent and of consuls or councillors nominated by the home State of the captured neutral merchantmen.

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[932] *De la saisie des bâtiments neutres* (1759), vol. II. p. 21.

A somewhat similar proposal was made by Tetens[933] in 1805.

[933] *Considérations sur les droits réciproques des puissances belligérantes et des puissances neutres sur mer, avec les principes du droit de guerre en général* (1805), p. 163.

Other proposals followed until the Institute of International Law took up the matter in 1875, appointing, on the suggestion of Westlake, at its meeting at the Hague, a Commission for the purpose of drafting a *Projet d'organisation d'un tribunal international des prises maritimes*. In the course of time there were mainly two proposals before the Institute, Westlake's and Bulmerincq's.

Westlake proposed[934] that Courts of Appeal should be instituted in each case of war, and each Court should consist of three judges—one to be nominated by the belligerent concerned, another by the home State of the neutral prizes concerned, and the third by a neutral Power not interested in the case. According to Westlake's proposal there would therefore have to be instituted in every war as many Courts of Appeal as neutrals concerned.

[934] See *Annuaire*, II. (1878), p. 114.

Bulmerincq proposed[935] that two Courts should be instituted in each war for all prize cases, the one to act as Prize Court of the First Instance, the other to act as Prize Court of Appeal; each Court to consist of three judges, one judge to be appointed by each belligerent, the third judge to be appointed in common by all neutral maritime Powers.

[935] See *R.I.* XI. (1879), pp. 191-194.

Finally, the Institute agreed, at its meeting at Heidelberg in 1887, upon the following proposal, which is embodied in §§ 100-109 of the *Règlement international des prises maritimes*:[936]—At the beginning of a war each belligerent institutes a Court of Appeal consisting of five judges, the president and one of the other judges to be appointed by the belligerent, the three remaining to be nominated by three neutral Powers, and this Court to be competent for all prize cases.

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[936] *Annuaire*, IX. (1887), p. 239.

No further step was taken in the matter during the nineteenth century. But, during the South African War, the conviction became general that the exclusive jurisdiction of belligerents over captured neutral vessels is incompatible with the modern condition of the oversea commerce of neutrals. At the Second Peace Conference of 1907, therefore, Germany, as well as Great Britain, brought forward a project for real International Prize Courts.

German Project of 1907.

§ 439. The German project[937] was embodied in a draft of thirty-one articles dealing in three chapters with "Competence in Prize Cases," "Organisation of the International Prize Court," and "Procedure before the International Prize Court," and made the following proposals:—National Prize Courts should only be competent in the first instance, every appeal to go to the International Prize Court, and the latter to be competent not only in case of capture of neutral

vessels, but in every case of capture of merchantmen. At the beginning of every war an International Prize Court should be established, but, in case there were more than two parties to a war, as many International Prize Courts should be established as there were couples of States fighting against each other. Each Court every time it sat should consist of five judges, three of whom should be members of the Permanent Court of Arbitration at the Hague, and two should be admirals. The admirals should belong to the navies of the belligerents, but the three members of the Permanent Court of Arbitration should be chosen by neutral Powers, each belligerent [Pg 562] authorising one neutral Power to select one member, and these two neutrals to appoint a third neutral Power which would select the third member. The Court should sit at the Hague, have its first meeting when the first appeal case arose, and be dissolved after the conclusion of peace. The International Bureau of the Permanent Court of Arbitration should serve as the Registry of every International Prize Court. Each belligerent and the owners of the captured vessels or cargoes should have the right to bring an appeal before the International Prize Court.

[937] *Deuxième Conférence, Actes*, II. p. 1071.

British Project of 1907.

§ 440. The British project[938] was embodied in a draft of sixteen articles, and made the following proposals:—The International Prize Court should be competent in such cases only as directly concerned a neutral Power or its subjects, an appeal to be brought before the International Court only after the case had been decided by the highest National Prize Court of the belligerent concerned. Neutral Powers only, and not their subjects, should have the right to enter an appeal, and each neutral Power should represent its subjects concerned in a prize case. In contradistinction to the German project, the British draft proposed the establishment once for all of a Permanent International Prize Court, each Power whose mercantile marine at the date of the signature of the proposed convention exceeded a total of 800,000 tons, should, within three months from the date of ratification, nominate a prominent jurist as a member of the Court, and another as his deputy. The President of the Court should be nominated by the signatory Powers in their alphabetical order, should remain in office one year only, and should have a casting vote. If a legal question were to be decided which had already been provided for in a convention between the parties in dispute, the Court should base its decision on such convention. In the [Pg 563] absence of such a convention, and if all civilised nations were agreed on a point of legal interest, the Court should base its decision thereon, otherwise the Court should decide according to the principles of International Law.

[938] *Deuxième Conférence de la Paix, Actes*, II. p. 1076.

Convention XII. of the Second Peace Conference.

§ 441. The Second Peace Conference, after having studied and discussed the German and the British projects, produced the "Convention (XII.) respecting the establishment of an International Prize Court" which, on the whole, follows more closely the lines of the British project, but includes several features of the German, and others which originate neither with the British nor the German project. It comprises fifty-seven articles and is divided into four parts headed respectively "General Provisions" (articles 1-9), "Constitution of the International Prize Court" (articles 10-27), "Procedure in the International Prize Court" (articles 28-50), and "Final Provisions" (articles 51-57). The Convention was signed by all the Powers represented at the Conference, except Brazil, China, Domingo, Greece, Luxemburg, Montenegro, Nicaragua, Roumania, Russia, Servia, and Venezuela. Ten States—namely, Chili, Cuba, Ecuador, Guatemala, Haiti, Persia, Salvador, Siam, Turkey, and Uruguay—entered a reservation against article 15 of the Convention because they did not agree with the principle of the composition of the Court embodied in this article.

As eleven States did not sign the Convention and ten of the signatory States refused to accept the composition of the Court as regulated by article 15, it cannot be said that the Convention is based on universal agreement. Yet the fact that, with the exception of Russia, all the Great Powers and a great number of the minor Powers have signed it without a reservation, offers sufficient guarantee for the success of the Court when once established. Nothing prevents a future Peace Conference from making such alterations in the Convention as would meet the [Pg 564] wishes of the Powers which at present refuse to sign the Convention or to accept article 15.

It should be mentioned that, according to article 55, the Convention remains in force for twelve years from the date it comes into force, and is to be tacitly renewed for six years, unless denounced one year at least before the expiry of the period for which it is in force. And article 57 stipulates that two years before the expiration of the period for which it is in force, any contracting Power may demand a modification of the provisions concerning its own participation in the composition of the Court. The demand must be addressed to the Administrative Council which, on its part, must examine it and submit proposals as to the measures to be adopted to all the contracting Powers. These Powers must, with the least possible delay, inform the Administrative Council of their decision. The result is at once, or at any rate one year and thirty days before the expiry of the period of two years, to be communicated to the Power which made the demand for a modification of the provisions concerning its participation in the composition of [Pg 565] the Court.

II

CONSTITUTION AND COMPETENCE OF THE INTERNATIONAL PRIZE COURT

Westlake, II. pp. 288-297—Lawrence, § 192—Ullmann, § 196—Bonfils, Nos. 1440[1]-1440[3]—Despagnet, Nos. 683-683 *bis*—Fiore, Code, Nos. 1897-1901—Dupuis, *Guerre*, Nos. 232-276—Bernsten, § 14—Lémonon, pp. 293-335—Higgins, pp. 435-444—Barclay, *Problems*, pp. 105-108—Scott, *Conferences*, pp. 466-511—Nippold, I. §§ 16-19—Fried, *Die zweite Haager Konferenz* (1908), pp. 121-130—Lawrence, *International Problems* (1908), pp. 132-159—Hirschmann, *Das internationale Prisenrecht* (1912), §§ 39-41—Gregory, White, and Scott in *A.J.* II. (1908), pp. 458-475, and 490-506, and V. (1911), pp. 302-324—Donker Curtius in *R.I.* 2nd Ser. XI. (1909), pp. 5-36.

Personnel.

§ 442. The International Prize Court consists of judges and deputy judges, a judge who is absent or prevented from sitting being replaced by a deputy (article 14). The judges and the deputies are appointed by the contracting Powers from among jurists of known proficiency in maritime International Law, and of the highest moral reputation, each Power appointing one judge and one deputy for a period of six years (articles 10 and 11). The judges are all of equal rank and have precedence according to the date of the notification of their appointment to the Administrative Council of the Permanent Court of Arbitration at the Hague, but, if they sit by rota in conformity with article 15, paragraph 2, they have precedence according to the date on which they entered upon their duties, and, when the date is the same, the senior takes precedence; deputies rank after the judges (article 12). The judges—and the deputies when taking the places of judges—must, when outside their own country, be granted diplomatic privileges and immunities in the performance of their duties; they must, before taking their seats, take an oath, [Pg 566] or make a solemn affirmation, before the Administrative Council, that they will discharge their duties impartially and conscientiously (article 13). No judge or deputy judge may, during the tenure of his office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever (article 17).

Attention should be drawn to the fact that the Court, if once established, will be permanent, and the judges, if once appointed, will always be at hand, although in time of peace they will not sit.

Deciding Tribunal.

§ 443. The judges appointed by the contracting Powers do not, as a body, decide the appeal cases brought before the Court. From among the great number of judges appointed, a deciding tribunal is formed which is composed of fifteen judges, nine of whom constitute a quorum; and a judge who is absent or prevented from sitting is replaced by a deputy (article 14). The judges appointed by Great Britain, Germany, the United States of America, Austria-Hungary, France, Italy, Japan, and Russia are always summoned to sit, but the judges appointed by the remaining contracting Powers are only in rotation summoned to sit, and their duties may successively be performed by the same person, since the same individual may be appointed as judge by several of these Powers (article 15). If a belligerent Power has, according to the rota, no judge sitting in the deciding tribunal, it has a right to demand that the judge appointed by it shall take part in the settlement of all cases arising from the war, and lots shall then be drawn to decide which of the judges entitled to sit by rota shall withdraw, but the judge of the other belligerent party does not take part in the drawing of lots (article 16). No judge may sit who has been a party, in any way whatever, to the sentence pronounced by the National Prize Court against which the appeal has [Pg 567] been made, or who has taken part in the case as counsel or advocate for one of the parties (article 17). The summoning by rota of the judges appointed by the minor Powers takes place according to the following list:—

Judges	Deputy Judges
First Year	
1. Argentina	Paraguay
2. Colombia	Bolivia
3. Spain	Spain
4. Greece	Roumania
5. Norway	Sweden
6. Holland	Belgium
7. Turkey	Persia
Second Year	
1. Argentina	Panama
2. Spain	Spain
3. Greece	Roumania
4. Norway	Sweden
5. Holland	Belgium
6. Turkey	Luxemburg
7. Uruguay	Costa Rica
Third Year	
1. Brazil	Domingo
2. China	Turkey
3. Spain	Portugal
4. Holland	Greece
5. Roumania	Belgium

6. Sweden	Denmark
7. Venezuela	Haiti
Fourth Year	
1. Brazil	Guatemala
2. China	Turkey
3. Spain	Portugal
4. Peru	Honduras
5. Roumania	Greece
6. Sweden	Denmark
7. Switzerland	Holland
Fifth Year	
1. Belgium	Holland
2. Bulgaria	Montenegro
3. Chili	Nicaragua
4. Denmark	Norway
5. Mexico	Cuba
6. Persia	China
7. Portugal	Spain
Sixth Year	
1. Belgium	Holland
2. Chili	Salvador
3. Denmark	Norway
4. Mexico	Ecuador
5. Portugal	Spain
6. Servia	Bulgaria
7. Siam	China

The deciding tribunal elects its President and Vice-President by an absolute majority of the votes cast, but after two ballots the election is made by a bare majority, and, in case the votes are equal, by lot (article 19).

The judges—as well as the deputies when they sit—receive, while carrying out their duties, a salary of one hundred Netherland florins (about £8, 4s.) *per diem*, besides travelling expenses. [Pg 568] The salaries and travelling expenses are to be paid by the International Bureau of the Permanent Court of Arbitration, and the judges must not receive any other remuneration either from their own Government or from any other Power (article 20).

The belligerent captor, as well as a neutral Power which is herself, or whose national is, a party, may appoint a naval officer of high rank to sit as *Assessor*, but he has no voice in the decision. If more than one neutral Power is concerned in a case, they must agree among themselves, if necessary by lot, on the naval officer to be appointed as Assessor (article 18).

The seat[939] of the deciding tribunal is at the Hague, and it may not, except in the case of *force majeure*, be transferred elsewhere without the consent of both belligerents (article 21). When the Court is not sitting, the duties conferred on it by certain articles of Convention XII. are discharged by a delegation of three judges appointed by the Court; this delegation comes to a decision by a majority of votes, and its members must, of course, reside at the Hague while they fulfil their duties (article 48).

[939] The working-order (*ordre intérieur*) of the International Prize Court is to be drawn up by the Court itself; see details in article 49.

The deciding tribunal determines what language it will itself use and what languages may be used before it, but in all cases the official language of the National Courts which have had cognisance of the case may be used before it (article 24).

For all notices to be served, in particular on the parties, witnesses, or experts, the deciding tribunal may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps to be taken to procure evidence. The Court [Pg 569] is equally entitled to act through the Power on whose territory it holds its sitting. Notices to be given to parties in the place where the Court sits may be served through the International Bureau (article 27).

Administrative Council and International Bureau.

§ 444. The Administrative Council of the Permanent Court of Arbitration at the Hague serves at the same time as the Administrative Council of the International Prize Court, but only representatives of the Powers who are parties to Convention XII. shall be members of it (article 22).

The International Bureau of the Permanent Court of Arbitration acts as Registry of the International Prize Court and must place its offices and staff at the disposal of the Court. This Bureau has the custody of the archives and carries out the administrative work, and its General Secretary acts as Registrar of the International Prize Court. The secretaries necessary to assist the Registrar, translators, and shorthand writers are appointed by the International Prize Court (article 23).

Agents, Counsel, Advocates, and Attorneys.

§ 445. Belligerent as well as neutral Powers concerned in a case may appoint special Agents to act as intermediaries between themselves and the International Prize Court, and they may also engage Counsel or Advocates to defend their rights and interests (article 25).

Private individuals concerned in a case are compelled to be represented before the Court by an Attorney, who must either be an Advocate qualified to plead before a Court of Appeal or a High Court of one of the contracting States, or a lawyer practising before a similar Court, or, lastly, a Professor of Law at one of the higher teaching centres of those countries (article 26).

Competence.

§ 446. The general principle underlying the rules of Convention XII. concerning the competence of the International Prize Court is that on the whole, *although not exclusively*, the Court is
[Pg 570] competent in cases where neutrals are directly or indirectly concerned. The International Prize Court is, as a rule, a Court of Appeal, all prize cases must, in the first instance, be decided by a National Prize Court of the captor, although the Municipal Law of the country concerned may provide that a first appeal must likewise be decided by a National Prize Court. The second appeal may never by decided by a National, but must always be decided by the International Prize Court. However, should the National Court of the First Instance or the National Court of Appeal fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Prize Court (articles 2 and 6).

An appeal against the judgments of National Prize Courts may be brought before the International Court: (1) when the judgment concerns the property of a neutral Power or a neutral individual;[940] (2) when the judgment concerns enemy property and relates to (*a*) cargo on board a neutral vessel, (*b*) an enemy vessel captured in the territorial waters of a neutral Power, provided such Power has not made the capture the subject of diplomatic claim, and (*c*) a claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor. In any case, the appeal may be based on the ground that the judgment was wrong either in fact or in law (article 3).

[940] Since the question of enemy or neutral character of individuals—see above, § 88—is for some parts controversial, the International Prize Court would have to decide the controversy.

The following Powers and individuals are entitled[941] to bring an appeal before the International Prize Court:—

(1) Neutral Powers, if the judgment injuriously affects their property or the property of their
[Pg 571] subjects, or if the capture is alleged to have taken place in the territorial waters of such Powers (article 4, No. 1).

(2) Neutral individuals,[942] if the judgment injuriously affects their property. But the home State of such an individual may intervene and either forbid him to bring the appeal before the International Prize Court, or itself undertake the proceedings in his place (article 4, No. 2).

(3) Subjects of the enemy, if the judgment injuriously affects their cargoes on neutral vessels, or if it injuriously affects their property in case the seizure is alleged to have been effected in violation, either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor (article 4, No. 3).

(4) Subjects of neutral Powers or of the enemy deriving rights from the rights of such individuals as are themselves qualified to bring an appeal before the International Prize Court, provided they have intervened in the proceedings of the National Court or Courts concerned. Individuals so entitled may appeal separately to the extent of their interests (article 5, first paragraph).

(5) Subjects of neutral Powers or of the enemy deriving rights from the rights of a neutral Power whose property was the subject of the judgment. Individuals so entitled may likewise appeal separately to the extent of their interest, provided they have intervened in the proceedings of the National Court or Courts concerned (article 5, second paragraph).

[941] But note article 51 of Convention XII.

[942] See above, vol. I. § 289, p. 365.

What Law to be applied.

§ 447. As regards the law to be applied by the International Prize Court, article 7 of Convention XII. contains the following provisions and distinctions:—

(1) If a question of law to be decided be covered by a treaty in force between the belligerent
[Pg 572] captor and a Power which is itself, or whose subject is, a party to the proceedings, the Court must apply the provisions of such treaty.

(2) In absence of such provisions, the Court must apply the rules of International Law.

(3) If there be no generally recognised rules of International Law which could be applied, the Court must base its decision on the general principles of justice and equity.

(4) If—see article 3, No. 2 (*c*) of Convention XII.—the ground of appeal be the violation of an enactment issued by the belligerent captor, the Court must apply such enactment.

(5) The Court is empowered to disregard failure, on the part of an appellant, to comply with the procedure laid down by the Municipal Law of the belligerent captor, if it is of opinion that the

consequences of such Municipal Law are unjust or inequitable.

The very wide powers of the International Prize Court with regard to the law to be applied by it, have been considerably narrowed down by the fact that the Declaration of London provides a code of Prize Law, which in time will be universally accepted, but those powers are still very wide.

III

PROCEDURE IN THE INTERNATIONAL PRIZE COURT

See the literature quoted above at the commencement of § 442.

Entering of Appeal.

§ 448. As a rule there are two ways of entering an appeal against the judgment of a National Prize Court, namely, either by a written declaration made in the National Court against whose
[Pg 573] judgment the appeal is directed, or by a written or telegraphic declaration addressed to the International Bureau. In either case the appeal must be entered within one hundred and twenty days from the day the judgment was delivered or notified (article 28). But the appeal must be addressed to the International Bureau only, if a party intends to carry a case direct to the International Prize Court on account of the National Courts having failed to give final judgment within two years from the date of capture, and in such case the appeal must be entered within thirty days from the expiry of the period of two years (article 30).

If the appeal has been entered in the National Court, this Court must, without considering the question as to whether the appeal was entered in time, transmit within seven days the record of the case to the International Bureau. On the other hand, if the declaration of appeal has been sent to the International Bureau, this Bureau must immediately, if possible by telegraph, send information to the National Court concerned which must within seven days transmit the record of the case to the Bureau. And should the appeal be entered by a neutral individual, the International Bureau must immediately by telegraph inform the Government of the respective individual in order to enable such Government to come to a decision as to whether it will—see article 4, No. 2—prevent the individual from going on with the appeal, or will undertake proceedings in his stead (article 29).

If the appeal has not been entered in time, the Court must reject it without discussion of the merits of the case. But the Court may grant relief from the effect of this rule and admit the appeal, if the appellant is able to show that he was prevented by *force majeure* from entering the
[Pg 574] appeal in time, and that he has entered the appeal within sixty days after the circumstances which prevented him from entering it earlier ceased to operate (article 31).

If the appeal has been entered in time, a certified copy of the notice of appeal must officially be transmitted to the respondent by the Court; if the Court is not sitting, its delegation of three judges must act for it (articles 32 and 48). If in addition to the parties who are before the Court through an appeal having been entered, there are other parties concerned who are entitled to appeal, or if in the case referred to in article 29, third paragraph, the Government which has received notice of an appeal has not announced its decision, the Court may not deal with the case until either the period of one hundred and twenty days from the day the judgment of the National Prize Court has been delivered or notified, or the period of thirty days from the expiry of two years from the date of capture has expired (article 31).

Pleadings and Discussion.

§ 449. The procedure, which follows the entry of an appeal and the preliminary steps in consequence thereof, comprises two distinct phases, namely, written pleadings and oral discussion.

(1) The written *pleadings* consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, the order of which, as also the periods within which they must be delivered, must be fixed by the Court or its delegation of three judges (article 48), and to which all papers and documents the parties intend to make use of must be annexed. The Court must communicate a certified copy of every document produced by one party to the other party (article 34).

(2) After the close of the pleadings the Court must fix a day for a public sitting on which the *discussion* is to take place (article 35). The discussion is under the direction of the President or
[Pg 575] Vice-President, or, in case both of these are absent or cannot act, of the senior judge present; but the judge appointed by a belligerent party may never preside (article 38). The discussion takes place with open doors, but a Government which is a party may demand that the discussion take place with closed doors. In any case minutes must be taken and must be signed by the President and Registrar, and these minutes alone have an authentic character (article 39). During the discussion the parties state their views of the case both as to the law and as to the facts, but the Court may at any stage suspend the speeches of counsel in order that supplementary evidence may be obtained (article 35). The Court may order the supplementary evidence to be taken, either in the manner provided for by article 27, or before itself, or before one or more members of the Court provided it can be done without compulsion or intimidation; if steps are taken by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained (article 36). The parties must be summoned to take part in all stages of the taking of supplementary evidence, and they must receive certified copies of the

minutes (article 37). If a party does not appear in spite of having been duly summoned, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party and the Court makes its decision on the basis of the material at its disposal, but the Court must officially notify to the parties all decisions or orders made in their absence (article 40).

Judgment.

§ 450. After the discussion follows the judgment of the Court.

The deliberation of the Court in order to agree upon the judgment takes place in private and must remain secret. The Court must take into consideration all the documents, evidence, and oral
[Pg 576] statements. All questions are decided by a majority of the judges present; if the number of the judges is even and is equally divided, the vote of the junior judge in the order of precedence is not counted (articles 42 and 43). The judgment must be taken down in writing, state the reasons upon which it is based, give the names of the judges taking part in it and of the assessors, if any, and must be signed by the President and Registrar.

The pronouncement of the judgment of the Court takes place in public, the parties being present or having been duly summoned to attend. The judgment must be officially communicated to the parties. After this communication has been made, the Court must transmit to the National Prize Court concerned the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings (article 45).

If the Court pronounces the capture of a vessel or cargo to be valid, they may be disposed of in accordance with the Municipal Law of the belligerent captor. If the Court pronounces the capture to be invalid, restitution of the vessel or cargo must be ordered, and the amount of damages, if any, must be fixed, especially in case the vessel or cargo has been sold or destroyed. If the National Prize Court has already declared the capture to be invalid, the International Prize Court must decide on an appeal concerning the damages due to the owner of the captured vessel or cargo (article 8).

Expenses and Costs.

§ 451. The *general expenses* of the International Prize Court are borne by the contracting Powers in proportion to their share in the composition of the Court as laid down in article 15 of Convention XII.; the appointment of deputy judges does not involve any contribution (article 47).

As regards *costs*, each party pays its own, but the party against whom the Court has given its
[Pg 577] decision, must bear the costs of the trial and, in addition, must pay one per cent. of the value of the subject matter of the case as a contribution to the general expenses of the International Prize Court. The amount of the payments must be fixed in the judgment of the Court (article 46, first and second paragraphs). If the appeal is brought by an individual, he must, after having entered the appeal, furnish the International Bureau with security to an amount fixed by the Court or—see article 48—by its delegation (article 46, third paragraph).

IV

ACTION IN DAMAGES INSTEAD OF APPEAL

Scott in *A.J.* V. (1911), pp. 302-324.

Reason for Action in Damages instead of Appeal.

§ 452. According to the Constitution of the United States of America, and probably that of some other States, no appeal may be brought against a judgment of their Highest Courts. These States could not, therefore, ratify Convention XII. and take part in the establishment of the International Prize Court without previously having altered their Constitution. As such alteration would be a very complicated and precarious matter, the Naval Conference of London of 1908-9 included in the Final Protocol of the Conference the following *vœu*:—"The Delegates of the Powers represented at the Naval Conference and which have signed or have expressed their intention to sign the Hague Convention of October 18, 1907, concerning the establishment of an International Prize Court, considering the constitutional difficulties which, in certain States, stand in the way of the ratification of that Convention in its actual form, agree to call the attention of their
[Pg 578] Governments to the advantage of concluding an arrangement according to which the said States would, in depositing their ratifications, have the power to add thereto a reservation to the effect that the right of recourse to the International Prize Court in connection with decisions of their National Courts, shall take the form of a direct action for damages, provided, however, that the effect of this reservation shall not be such as to impair the rights guaranteed by the said Convention to private individuals as well as to Governments, and that the terms of the reservation shall form the subject of a subsequent understanding between the signatory Powers of the same Convention."

To carry out this recommendation, Great Britain, Germany, the United States of America, Argentina, Austria-Hungary, Chili, Denmark, Spain, France, Japan, Norway, Holland, and Sweden signed on September 19, 1910, at the Hague the "Additional Protocol to the Convention relative to the establishment of an International Prize Court" which comprises nine articles, is (article 8) considered to be an integral part of that Convention, and which will be ratified at the same time as the Convention, accession to the Convention being subordinated (article 9) to accession to the

Protocol.[943]

[943] There is no doubt that, should the International Prize Court be established, all the contracting Powers of Convention XII. would accede to this additional protocol.

Procedure if Action for Damages is brought.

§ 453. According to article 1 of the Protocol, those signatory or acceding Powers of Convention XII. which are prevented by difficulties of a constitutional nature from accepting the Convention in its unaltered form, have, in ratifying the Convention or acceding to it, the right to declare that in prize cases over which their National Courts have jurisdiction, recourse to the International Prize Court may only be had in the form of an action in damages for the injury caused by the
[Pg 579] capture. In consequence thereof the procedure in the International Prize Court, as described above, §§ 448-451, takes place with the following modifications:—

(1) The action for damages may only be brought before the International Prize Court by means of a written or telegraphic declaration addressed to the International Bureau (article 5). This Bureau must directly notify, if possible by telegraph, the Government of the belligerent captor, which, without considering whether the prescribed periods of time have been observed, must within seven days of the receipt of the notification, transmit to the International Bureau the case and a certified copy of the decision, if any, rendered by the National Prize Court (article 6).

(2) The International Prize Court does not, as in Appeal Cases, pronounce upon the validity or nullity of the capture concerned, nor confirm or reverse the judgment of the National Prize Court, but simply fixes the amount of damages to be allowed, if any, to the plaintiff, if the capture is considered to be illegal (article 3).

(3) After having delivered judgment, the International Prize Court does not transmit the record of the case, the various decisions arrived at, and the minutes, to the National Prize Court, but directly to the Government of the belligerent captor (article 7).

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APPENDICES

APPENDIX I

DECLARATION OF PARIS OF 1856

Les Plénipotentiaires qui ont signé le Traité de Paris du trente mars, mil huit cent cinquante-six, réunis en Conférence,—

Considérant:

Que le droit maritime, en temps de guerre, a été pendant longtemps l'objet de contestations regrettables;

Que l'incertitude du droit et des devoirs en pareille matière, donne lieu, entre les neutres et les belligérants, à des divergences d'opinion qui peuvent faire naître des difficultés sérieuses et même des conflits;

Qu'il y a avantage, par conséquent, à établir une doctrine uniforme sur un point aussi important;

Que les Plénipotentiaires assemblés au Congrès de Paris ne sauraient mieux répondre aux intentions, dont leurs Gouvernements sont animés, qu'en cherchant à introduire dans les rapports internationaux des principes fixes à cet égard;

Dûment autorisés, les susdits Plénipotentiaires sont convenus de se concerter sur les moyens d'atteindre ce but; et étant tombés d'accord ont arrêté la Déclaration solennelle ci-après:—

1. La course est et demeure abolie;

2. Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre;

3. La marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi;

4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.

Les Gouvernements des Plénipotentiaires soussignés s'engagent à porter cette Déclaration à la connaissance des États, qui n'ont pas été appelés à participer au Congrès de Paris, et à les inviter à y accéder.

Convaincus qui les maximes qu'ils viennent de proclamer ne sauraient être accueillies qu'avec gratitude par le monde entier, les Plénipotentiaires soussignés ne doutent pas, que les efforts de leurs Gouvernements pour en généraliser l'adoption ne soient couronnés d'un plein succès.

La présente Déclaration n'est et ne sera obligatoire qu'entre les Puissances, qui y ont, ou qui y auront accédé.

[Pg 584] Fait à Paris, le seize avril, mil huit cent cinquante-six.

APPENDIX II

DECLARATION OF ST. PETERSBURG OF 1868

Sur la proposition du Cabinet Impérial de Russie, une Commission Militaire Internationale ayant été réunie à Saint-Pétersbourg, afin d'examiner la convenance d'interdire l'usage de certains projectiles en temps de guerre entre les nations civilisées, et cette Commission ayant fixé d'un commun accord les limites techniques où les nécessités de la guerre doivent s'arrêter devant les exigences de l'humanité, les Soussignés sont autorisés par les ordres de leurs Gouvernements à déclarer ce qui suit:

Considérant que les progrès de la civilisation doivent avoir pour effet d'atténuer autant que possible les calamités de la guerre;

Que le seul but légitime que les États doivent se proposer durant la guerre est l'affaiblissement des forces militaires de l'ennemi;

Qu'à cet effet, il suffit de mettre hors de combat le plus grand nombre d'hommes possible;

Que ce but serait dépassé par l'emploi d'armes qui aggraveraient inutilement les souffrances des hommes mis hors de combat, ou rendraient leur mort inévitable;

Que l'emploi de pareilles armes serait dès lors contraire aux lois de l'humanité;

Les Parties Contractantes s'engagent à renoncer mutuellement, en cas de guerre entre elles, à l'emploi par leurs troupes de terre ou de mer, de tout projectile d'un poids inférieur à 400 grammes, qui serait ou explosible ou chargé de matières fulminantes ou inflammables.

Elles inviteront tous les États, qui n'ont pas participé par l'envoi de Délégués aux délibérations de la Commission Militaire Internationale réunie à Saint-Pétersbourg, à accéder au présent engagement.

Cet engagement n'est obligatoire que pour les Parties Contractantes ou Accédantes en cas de guerre entre deux ou plusieurs d'entre elles: il n'est pas applicable vis-à-vis de Parties non-Contractantes ou qui n'auraient pas accédé.

Il cesserait également d'être obligatoire du moment où, dans une guerre entre Parties Contractantes ou Accédantes, une partie non-Contractante, ou qui n'aurait pas accédé, se joindrait à l'un des belligérants.

Les Parties Contractantes ou Accédantes se réservent de s'entendre ultérieurement toutes les fois qu'une proposition précise serait formulée en vue des perfectionnements à venir que la science pourrait apporter dans l'armement des troupes, afin de maintenir les principes, qu'elles ont posés et de concilier les nécessités de la guerre avec les lois de l'humanité.

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Fait à Saint-Pétersbourg, le vingt-neuf novembre onze décembre, mil huit cent soixante-huit.

APPENDIX III

DECLARATION CONCERNING EXPANDING (DUM-DUM) BULLETS

Signed at the Hague, July 29, 1899

Les Soussignés, Plénipotentiaires des Puissances représentées à la Conférence Internationale de la Paix à La Haye, dûment autorisés à cet effet par leurs Gouvernements, s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de Saint-Pétersbourg du 29 novembre (11 décembre) 1868,

Déclarent:

Les Puissances Contractantes s'interdisent l'emploi de balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain, telles que les balles à enveloppe dure dont l'enveloppe ne couvrirait pas entièrement le noyau ou serait pourvue d'incisions.

La présente Déclaration n'est obligatoire que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où dans une guerre entre des Puissances Contractantes, une Puissance non-Contractante se joindrait à l'un des belligérants.

La présente Déclaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Les Puissances non-Signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Déclaration et l'ont revêtue de leurs cachets.

Fait à La Haye, le 29 juillet 1899, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la [Pg 586] voie diplomatique aux Puissances Contractantes.

APPENDIX IV

DECLARATION CONCERNING THE DIFFUSION OF ASPHYXIATING GASES

Signed at the Hague, July 29, 1899

Les Soussignés, Plénipotentiaires des Puissances représentées à la Conférence Internationale de la Paix à La Haye, dûment autorisés à cet effet par leurs Gouvernements, s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de Saint-Pétersbourg du 29 novembre (11 décembre) 1868,

Déclarent:

Les Puissances Contractantes s'interdisent l'emploi de projectiles qui ont pour but unique de répandre des gaz asphyxiants ou délétères.

La présente Déclaration n'est obligatoire que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où dans une guerre entre des Puissances Contractantes une Puissance non-Contractante se joindrait à l'un des belligérants.

La présente Déclaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Les Puissances non-Signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Déclaration et l'ont revêtue de leurs cachets.

Fait à La Haye, le 29 juillet 1899, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la [Pg 587] voie diplomatique aux Puissances Contractantes.

APPENDIX V

GENEVA CONVENTION OF 1906

CHAPITRE PREMIER.—*Des Blessés et Malades.*

Article premier.

Les militaires et les autres personnes officiellement attachées aux armées, qui seront blessés ou malades, devront être respectés et soignés, sans distinction de nationalité, par le belligérant qui les aura en son pouvoir.

Toutefois, le belligérant, obligé d'abandonner des malades ou des blessés à son adversaire, laissera avec eux, autant que les circonstances militaires le permettront, une partie de son personnel et de son matériel sanitaires pour contribuer à les soigner.

Article 2.

Sous réserve des soins à leur fournir en vertu de l'article précédent, les blessés ou malades d'une armée tombés au pouvoir de l'autre belligérant sont prisonniers de guerre et les règles générales du droit des gens concernant les prisonniers leur sont applicables.

Cependant, les belligérants restent libres de stipuler entre eux, à l'égard des prisonniers blessés ou malades, telles clauses d'exception ou de faveur qu'ils jugeront utiles; ils auront, notamment, la faculté de convenir:

De se remettre réciproquement, après un combat, les blessés laissés sur le champ de bataille;

De renvoyer dans leur pays, après les avoir mis en état d'être transportés ou après guérison, les blessés ou malades qu'ils ne voudront pas garder prisonniers;

De remettre à un État neutre, du consentement de celui-ci, des blessés ou malades de la partie adverse, à la charge par l'État neutre de les interner jusqu'à la fin des hostilités.

Article 3.

Après chaque combat, l'occupant du champ de bataille prendra des mesures pour rechercher

les blessés et pour les faire protéger, ainsi que les morts, contre le pillage et les mauvais traitements.

Il veillera à ce que l'inhumation ou l'incinération des morts soit précédée d'un examen attentif de leurs cadavres.

Article 4.

Chaque belligérant enverra, dès qu'il sera possible, aux autorités de leur pays ou de leur armée les marques ou pièces militaires d'identité trouvées sur les morts et l'état nominatif des blessés ou malades recueillis par lui.

Les belligérants se tiendront réciproquement au courant des internements et des mutations, ainsi que des entrées dans les hôpitaux et des décès survenus parmi les blessés et malades en leur pouvoir. Ils recueilleront tous les objets d'un usage personnel, valeurs, lettres, etc., qui seront trouvés sur les champs de bataille ou délaissés par les blessés ou malades décédés dans les établissements et formations sanitaires, pour les faire transmettre aux intéressés par les autorités de leur pays.

Article 5.

L'autorité militaire pourra faire appel au zèle charitable des habitants pour recueillir et soigner, sous son contrôle, des blessés ou malades des armées, en accordant aux personnes ayant répondu à cet appel une protection spéciale et certaines immunités.

CHAPITRE II.—*Des Formations et Établissements Sanitaires.*

Article 6.

Les formations sanitaires mobiles (c'est-à-dire celles qui sont destinées à accompagner les armées en campagne) et les établissements fixes du service de santé seront respectés et protégés par les belligérants.

Article 7.

La protection due aux formations et établissements sanitaires cesse si l'on en use pour commettre des actes nuisibles à l'ennemi.

[Pg 588]

Article 8.

Ne sont pas considérés comme étant de nature à priver une formation ou un établissement sanitaire de la protection assurée par l'article 6:

1°. Le fait que le personnel de la formation ou de l'établissement est armé et qu'il use de ses armes pour sa propre défense ou celle de ses malades et blessés;

2°. Le fait qu'à défaut d'infirmiers armés, la formation ou l'établissement est gardé par un piquet ou des sentinelles munis d'un mandat régulier;

3°. Le fait qu'il est trouvé dans la formation ou l'établissement des armes et cartouches retirées aux blessés et n'ayant pas encore été versées au service compétent.

CHAPITRE III.—*Du Personnel.*

Article 9.

Le personnel exclusivement affecté à l'enlèvement, au transport et au traitement des blessés et des malades, ainsi qu'à l'administration des formations et établissements sanitaires, les aumôniers attachés aux armées, seront respectés et protégés en toute circonstance; s'ils tombent entre les mains de l'ennemi, ils ne seront pas traités comme prisonniers de guerre.

Ces dispositions s'appliquent au personnel de garde des formations et établissements sanitaires dans le cas prévu à l'article 8, n° 2.

Article 10.

Est assimilé au personnel visé à l'article précédent le personnel des Sociétés de secours volontaires dûment reconnues et autorisées par leur Gouvernement, qui sera employé dans les formations et établissements sanitaires des armées, sous la réserve que ledit personnel sera soumis aux lois et règlements militaires.

Chaque État doit notifier à l'autre soit dès le temps de paix, soit à l'ouverture ou au cours des hostilités, en tout cas avant tout emploi effectif, les noms des Sociétés qu'il a autorisées à prêter leur concours, sous sa responsabilité, au service sanitaire officiel de ses armées.

Article 11.

Une Société reconnue d'un pays neutre ne peut prêter le concours de ses personnels et formations sanitaires à un belligérant qu'avec l'assentiment préalable de son propre Gouvernement et l'autorisation du belligérant lui-même.

Le belligérant qui a accepté le secours est tenu, avant tout emploi, d'en faire la notification à son ennemi.

Article 12.

Les personnes désignées dans les articles 9, 10 et 11 continueront, après qu'elles seront tombées au pouvoir de l'ennemi, à remplir leurs fonctions sous sa direction.

Lorsque leur concours ne sera plus indispensable, elles seront renvoyées à leur armée ou à leur pays dans les délais et suivant l'itinéraire compatibles avec les nécessités militaires.

Elles emporteront, alors, les effets, les instruments, les armes et les chevaux qui sont leur propriété particulière.

Article 13.

L'ennemi assurera au personnel visé par l'article 9, pendant qu'il sera en son pouvoir, les mêmes allocations et la même solde qu'au personnel des mêmes grades de son armée.

Chapitre IV.—*Du Matériel.*

Article 14.

Les formations sanitaires mobiles conserveront, si elles tombent au pouvoir de l'ennemi, leur matériel, y compris les attelages, quels que soient les moyens de transport et le personnel conducteur.

Toutefois, l'autorité militaire compétente aura la faculté de s'en servir pour les soins des blessés et malades; la restitution du matériel aura lieu dans les conditions prévues pour le personnel sanitaire, et, autant que possible, en même temps.

Article 15.

Les bâtiments et le matériel des établissements fixes demeurent soumis aux lois de la guerre, mais ne pourront être détournés de leur emploi, tant qu'ils seront nécessaires aux blessés et aux malades.

Toutefois, les commandants des troupes d'opérations pourront en disposer, en cas de nécessités militaires importantes, en assurant au préalable le sort des blessés et malades qui s'y trouvent.

Article 16.

Le matériel des Sociétés de secours, admises au bénéfice de la Convention conformément aux conditions déterminées par celle-ci, est considéré comme propriété privée et, comme tel, respecté en toute circonstance, sauf le droit de réquisition reconnu aux belligérants selon les lois
[Pg 589] et usages de la guerre.

Chapitre V.—*Des Convois d'Évacuation.*

Article 17.

Les convois d'évacuation seront traités comme les formations sanitaires mobiles, sauf les dispositions spéciales suivantes:

1°. Le belligérant interceptant un convoi pourra, si les nécessités militaires l'exigent, le disloquer en se chargeant des malades et blessés qu'il contient.

2°. Dans ce cas, l'obligation de renvoyer le personnel sanitaire, prévue à l'article 12, sera étendue à tout le personnel militaire préposé au transport ou à la garde du convoi et muni à cet effet d'un mandat régulier.

L'obligation de rendre le matériel sanitaire, prévue à l'article 14, s'appliquera aux trains de chemins de fer et bateaux de la navigation intérieure spécialement organisés pour les évacuations, ainsi qu'au matériel d'aménagement des voitures, trains et bateaux ordinaires appartenant au service de santé.

Les voitures militaires, autres que celles du service de santé, pourront être capturées avec leurs attelages.

Le personnel civil et les divers moyens de transport provenant de la réquisition, y compris matériel de chemin de fer et les bateaux utilisés pour les convois, seront soumis aux règles générales du droit des gens.

Chapitre VI.—*Du Signe Distinctif.*

Article 18.

Par hommage pour la Suisse, le signe héraldique de la croix rouge sur fond blanc, formé par interversion des couleurs fédérales, est maintenu comme emblème et signe distinctif du service sanitaire des armées.

Article 19.

Cet emblème figure sur les drapeaux, les brassards, ainsi que sur tout le matériel se rattachant au service sanitaire, avec la permission de l'autorité militaire compétente.

Article 20.

Le personnel protégé en vertu des articles 9, alinéa 1er, 10 et 11 porte, fixé au bras gauche, un brassard avec croix rouge sur fond blanc, délivré et timbré, par l'autorité militaire compétente, accompagné d'un certificat d'identité pour les personnes rattachées au service de santé des armées et qui n'auraient pas d'uniforme militaire.

Article 21.

Le drapeau distinctif de la Convention ne peut être arboré que sur les formations et établissements sanitaires qu'elle ordonne de respecter et avec le consentement de l'autorité militaire. Il devra être accompagné du drapeau national du belligérant dont relève la formation ou l'établissement.

Toutefois, les formations sanitaires tombées au pouvoir de l'ennemi n'arboreront pas d'autre drapeau que celui de la Croix-Rouge, aussi longtemps qu'elles se trouveront dans cette situation.

Article 22.

Les formations sanitaires des pays neutres qui, dans les conditions prévues par l'article 11, auraient été autorisées à fournir leurs services, doivent arborer, avec le drapeau de la Convention, le drapeau national du belligérant dont elles relèvent.

Les dispositions du deuxième alinéa de l'article précédent leur sont applicables.

Article 23.

L'emblème de la Croix-Rouge sur fond blanc et les mots *Croix-Rouge* ou *Croix de Genève* ne pourront être employés, soit en temps de paix, soit en temps de guerre, que pour protéger ou désigner les formations et établissements sanitaires, le personnel et le matériel protégés par la Convention.

CHAPITRE VII.—*De l'Application et de l'Exécution de la Convention.*

Article 24.

Les dispositions de la présente Convention ne sont obligatoires que pour les Puissances contractantes, en cas de guerre entre deux ou plusieurs d'entre elles. Ces dispositions cesseront d'être obligatoires du moment où l'une des Puissances belligérantes ne serait pas signataire de la Convention.

Article 25.

Les commandants en chef des armées belligérantes auront à pourvoir aux détails d'exécution des articles précédents, ainsi qu'aux cas non prévus, d'après les instructions de leurs Gouvernements respectifs et conformément aux principes généraux de la présente Convention.

Article 26.

Les Gouvernements signataires prendront les mesures nécessaires pour instruire leurs troupes, [Pg 590] et spécialement le personnel protégé, des dispositions de la présente Convention et pour les porter à la connaissance des populations.

CHAPITRE VII.—*De la Répression des Abus et des Infractions.*

Article 27.

Les Gouvernements signataires, dont la législation ne serait pas dès à présent suffisante, s'engagent à prendre ou à proposer à leurs législatures les mesures nécessaires pour empêcher en tout temps l'emploi, par des particuliers ou par des sociétés autres que celles y ayant droit en vertu de la présente Convention, de l'emblème ou de la dénomination de *Croix-Rouge* ou *Croix de Genève*, notamment, dans un but commercial, par le moyen de marques de fabrique ou de commerce.

L'interdiction de l'emploi de l'emblème ou de la dénomination dont il s'agit produira son effet à partir de l'époque déterminée par chaque législation et, au plus tard, cinq ans après la mise en vigueur de la présente Convention. Dès cette mise en vigueur, il ne sera plus licite de prendre une marque de fabrique ou de commerce contraire à l'interdiction.

Article 28.

Les Gouvernements signataires s'engagent également à prendre ou à proposer à leurs législatures, en cas d'insuffisance de leurs lois pénales militaires, les mesures nécessaires pour réprimer, en temps de guerre, les actes individuels de pillage et de mauvais traitements envers des blessés et malades des armées, ainsi que pour punir, comme usurpation d'insignes militaires, l'usage abusif du drapeau et du brassard de la Croix-Rouge par des militaires ou des particuliers non protégés par la présente Convention.

Ils se communiqueront, par l'intermédiaire du Conseil fédéral suisse, les dispositions relatives à cette répression, au plus tard dans les cinq ans de la ratification de la présente Convention.

Dispositions Générales.

Article 29.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à Berne.

Il sera dressé du dépôt de chaque ratification un procès-verbal dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances contractantes.

Article 30.

La présente Convention entrera en vigueur pour chaque Puissance six mois après la date du dépôt de sa ratification.

Article 31.

La présente Convention, dûment ratifiée, remplacera la Convention du 22 août 1864 dans les rapports entre les États contractants.

La Convention de 1864 reste en vigueur dans les rapports entre les Parties qui l'ont signée et qui ne ratifieraient pas également la présente Convention.

Article 32.

La présente Convention pourra, jusqu'au 31 décembre prochain, être signée par les Puissances représentées à la Conférence qui s'est ouverte à Genève le 11 juin 1906, ainsi que par les Puissances non représentées à cette Conférence qui ont signé la Convention de 1864.

Celles de ces Puissances qui, au 31 décembre 1906, n'auront pas signé la présente Convention, resteront libres d'y adhérer par la suite. Elles auront à faire connaître leur adhésion au moyen d'une notification écrite adressée au Conseil fédéral suisse et communiquée par celui-ci à toutes les Puissances contractantes.

Les autres Puissances pourront demander à adhérer dans la même forme, mais leur demande ne produira effet que si, dans le délai d'un an à partir de la notification au Conseil fédéral, celui-ci n'a reçu d'opposition de la part d'aucune des Puissances contractantes.

Article 33.

Chacune des Parties contractantes aura la faculté de dénoncer la présente Convention. Cette dénonciation ne produira ses effets qu'un an après la notification faite par écrit au Conseil fédéral suisse; celui-ci communiquera immédiatement la notification à toutes les autres Parties contractantes.

Cette dénonciation ne vaudra qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Convention et l'ont revêtue de leurs cachets.

Fait à Genève, le six juillet mil neuf cent six, en un seul exemplaire, qui restera déposé dans les archives de la Confédération suisse, et dont des copies, certifiées conformes, seront remises par
[Pg 591] la voie diplomatique aux Puissances contractantes.

APPENDIX VI

FINAL ACT OF THE SECOND PEACE CONFERENCE

Signed at the Hague, October 18, 1907

La Deuxième Conférence Internationale de la Paix, proposée d'abord par Monsieur le Président des États-Unis d'Amérique, ayant été, sur l'invitation de Sa Majesté l'Empereur de Toutes les Russies, convoquée par Sa Majesté la Reine des Pays-Bas, s'est réunie le 15 juin 1907 à La Haye, dans la Salle des Chevaliers, avec la mission de donner un développement nouveau au principes humanitaires qui ont servi de base à l'œuvre de la Première Conférence de 1899.

Les Puissances, dont l'énumeration suit, ont pris part à la Conférence, pour laquelle Elles avaient désigné les Délégués nommés ci-après:

[Here follow names.]

Dans une série de réunions, tenues du 15 juin au 18 octobre 1907, où les Délégués précités ont été constamment animés du désir de réaliser, dans la plus large mesure possible, les vues généreuses de l'Auguste Initiateur de la Conférence et les intentions de leurs Gouvernements, la Conférence a arrêté, pour être soumis à la signature des Plénipotentiaires, le texte des Conventions et de la Déclaration énumérées ci-après et annexées au présent Acte:

I. Convention pour le règlement pacifique des conflits internationaux.

II. Convention concernant la limitation de l'emploi de la force pour le recouvrement de dettes contractuelles.

III. Convention relative à l'ouverture des hostilités.

IV. Convention concernant les lois et coutumes de la guerre sur terre.

V. Convention concernant les droits et les devoirs des Puissances et des personnes neutres en cas de guerre sur terre.

VI. Convention relative au régime des navires de commerce ennemis au début des hostilités.

VII. Convention relative à la transformation des navires de commerce en bâtiments de guerre.

VIII. Convention relative à la pose de mines sous-marines automatiques de contact.

IX. Convention concernant le bombardement par des forces navales en temps de guerre.

X. Convention pour l'adaptation à la guerre maritime des principes de la Convention de Genève.

XI. Convention relative à certaines restrictions à l'exercice du droit de capture dans la guerre maritime.

XII. Convention relative à l'établissement d'une Cour internationale des prises.

XIII. Convention concernant les droits et les devoirs des Puissances neutres en cas de guerre maritime.

XIV. Déclaration relative à l'interdiction de lancer des projectiles et des explosifs du haut de ballons.

Ces Conventions et cette Déclaration formeront autant d'actes séparés. Ces actes porteront la date de ce jour et pourront être signés jusqu'au 30 juin 1908 à La Haye par les Plénipotentiaires des Puissances représentées à la Deuxième Conférence de la Paix.

La Conférence, se conformant à l'esprit d'entente et de concessions réciproques qui est l'esprit même de ses délibérations, a arrêté la déclaration suivante qui, tout en réservant à chacune des Puissances représentées le bénéfice de ses votes, leur permet à toutes d'affirmer les principes qu'Elles considèrent comme unanimement reconnus:

Elle est unanime,

1º. A reconnaître le principe de l'arbitrage obligatoire;

2º. A déclarer que certains différends, et notamment ceux relatifs à l'interprétation et à l'application des stipulations conventionnelles internationales, sont susceptibles d'être soumis à l'arbitrage obligatoire sans aucune restriction.

Elle est unanime enfin à proclamer que, s'il n'a pas été donné de conclure dès maintenant une Convention en ce sens, les divergences d'opinion qui se sont manifestées n'ont pas dépassé les

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limites d'une controverse juridique, et qu'en travaillant ici ensemble pendant quatre mois, toutes les Puissances du monde, non seulement ont appris à se comprendre et à se rapprocher davantage, mais ont su dégager, au cours de cette longue collaboration, un sentiment très élevé du bien commun de l'humanité.

En outre, la Conférence a adopté à l'unanimité la Résolution suivante:

La Deuxième Conférence de la Paix confirme la Résolution adoptée par la Conférence de 1899 à l'égard de la limitation des charges militaires; et, vu que les charges militaires se sont considérablement accrues dans presque tous les pays depuis ladite année, la Conférence déclare qu'il est hautement désirable de voir les Gouvernements reprendre l'étude sérieuse de cette question.

Elle a, de plus, émis les Vœux suivants:

1º. La Conférence recommande aux Puissances signataires l'adoption du projet ci-annexé de Convention pour l'établissement d'une Cour de Justice arbitrale, et sa mise en vigueur dès qu'un accord sera intervenu sur le choix des juges et la constitution de la Cour.

2º. La Conférence émet le vœu qu'en cas de guerre, les autorités compétentes, civiles et militaires, se fassent un devoir tout spécial d'assurer et de protéger le maintien des rapports pacifiques et notamment des relations commerciales et industrielles entre les populations des États belligérants et les pays neutres.

3º. La Conférence émet le vœu que les Puissances règlent, par des Conventions particulières, la situation, au point de vue des charges militaires, des étrangers établis sur leurs territoires.

4º. La Conférence émet le vœu que l'élaboration d'un règlement relatif aux lois et coutumes de la guerre maritime figure au programme de la prochaine Conférence et que, dans tous les cas, les Puissances appliquent, autant que possible, à la guerre sur mer, les principes de la Convention relative aux lois et coutumes de la guerre sur terre.

Enfin, la Conférence recommande aux Puissances la réunion d'une troisième Conférence de la Paix qui pourrait avoir lieu, dans une période analogue à celle qui s'est écoulée depuis la précédente Conférence, à une date à fixer d'un commun accord entre les Puissances, et elle appelle leur attention sur la nécessité de préparer les travaux de cette troisième Conférence assez longtemps à l'avance pour que ses délibérations se poursuivent avec l'autorité et la rapidité indispensables.

Pour atteindre à ce but, la Conférence estime qu'il serait très désirable que environ deux ans avant l'époque probable de la réunion, un Comité préparatoire fût chargé par les Gouvernements de recueillir les diverses propositions à soumettre à la Conférence, de rechercher les matières susceptibles d'un prochain règlement international et de préparer un programme que les Gouvernements arrêteraient assez tôt pour qu'il pût être sérieusement étudié dans chaque pays. Ce Comité serait, en outre, chargé, de proposer un mode d'organisation et de procédure pour la Conférence elle-même.

En foi de quoi, les Plénipotentiaires ont signé le présent acte et y ont apposé leurs cachets.

Fait à La Haye, le dix-huit octobre mil neuf cent sept, en un seul exemplaire qui sera déposé dans les archives du Gouvernement des Pays-Bas et dont les copies, certifiées conformes, seront délivrées à toutes les Puissances représentées à la Conférence.

CONVENTION I.

Convention for the Pacific Settlement of International Disputes.

[944]

[944] Only the texts of this and the other Conventions of the Second Peace Conference are here printed; the preambles, reservations, and special declarations made in signing the Conventions are omitted.

Titre I.—Du maintien de la paix générale.

Article premier.

En vue de prévenir autant que possible le recours à la force dans les rapports entre les États, les Puissances contractantes conviennent d'employer tous leurs efforts pour assurer le règlement pacifique des différends internationaux.

Titre II.—Des bons offices et de la médiation.

Article 2.

En cas de dissentiment grave ou de conflit, avant d'en appeler aux armes, les Puissances contractantes conviennent d'avoir recours, en tant que les circonstances le permettront, aux bons offices ou à la médiation d'une ou de plusieurs Puissances amies.

Article 3.

Indépendamment de ce recours, les Puissances contractantes jugent utile et désirable qu'une ou plusieurs Puissances étrangères au conflit offrent de leur propre initiative, en tant

que les circonstances s'y prêtent, leurs bons offices ou leur médiation aux Etats en conflit.

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Le droit d'offrir les bons offices ou la médiation appartient aux Puissances étrangères au conflit, même pendant le cours des hostilités.

L'exercice de ce droit ne peut jamais être considéré par l'une ou l'autre des Parties en litige comme un acte peu amical.

Article 4.

Le rôle du médiateur consiste à concilier les prétentions opposées et à apaiser les ressentiments qui peuvent s'être produits entre les États en conflit.

Article 5.

Les fonctions du médiateur cessent du moment où il est constaté, soit par l'une des Parties en litige, soit par le médiateur lui-même, que les moyens de conciliation proposés par lui ne sont pas acceptés.

Article 6.

Les bons offices et la médiation, soit sur le recours des Parties en conflit, soit sur l'initiative des Puissances étrangères au conflit, ont exclusivement le caractère de conseil et n'ont jamais force obligatoire.

Article 7.

L'acceptation de la médiation ne peut avoir pour effet, sauf convention contraire, d'interrompre, de retarder ou d'entraver la mobilisation et autres mesures préparatoires à la guerre.

Si elle intervient après l'ouverture des hostilités, elle n'interrompt pas, sauf convention contraire, les opérations militaires en cours.

Article 8.

Les Puissances contractantes sont d'accord pour recommander l'application, dans les circonstances qui le permettent, d'une médiation spéciale sous la forme suivante.

En cas de différend grave compromettant la paix, les États en conflit choisissent respectivement une Puissance à laquelle ils confient la mission d'entrer en rapport direct avec la Puissance choisie d'autre part, à l'effet de prévenir la rupture des relations pacifiques.

Pendant la durée de ce mandat dont le terme, sauf stipulation contraire, ne peut excéder trente jours, les États en litige cessent tout rapport direct au sujet du conflit, lequel est considéré comme déféré exclusivement aux Puissances médiatrices. Celles-ci doivent appliquer tous leurs efforts à régler le différend.

En cas de rupture effective des relations pacifiques, ces Puissances demeurent chargées de la mission commune de profiter de toute occasion pour rétablir la paix.

Titre III.—Des Commissions internationales d'enquête.

Article 9.

Dans les litiges d'ordre international n'engageant ni l'honneur ni des intérêts essentiels et provenant d'une divergence d'appréciation sur des points de fait, les Puissances contractantes jugent utile et désirable que les Parties qui n'auraient pu se mettre d'accord par les voies diplomatiques instituent, en tant que les circonstances le permettront, une Commission internationale d'enquête chargée de faciliter la solution de ces litiges en éclaircissant, par un examen impartial et consciencieux, les questions de fait.

Article 10.

Les Commissions internationales d'enquête sont constituées par convention spéciale entre les Parties en litige.

La convention d'enquête précise les faits à examiner; elle détermine le mode et le délai de formation de la Commission et l'étendue des pouvoirs des commissaires.

Elle détermine également, s'il y a lieu, le siège de la Commission et la faculté de se déplacer, la langue dont la Commission fera usage et celles dont l'emploi sera autorisé devant elle, ainsi que la date à laquelle chaque Partie devra déposer son exposé des faits, et généralement toutes les conditions dont les Parties sont convenues.

Si les Parties jugent nécessaire de nommer des assesseurs, la convention d'enquête détermine le mode de leur désignation et l'étendue de leurs pouvoirs.

Article 11.

Si la convention d'enquête n'a pas désigné le siège de la Commission, celle-ci siégera à La Haye.

Le siège une fois fixé ne peut être changé par la Commission qu'avec l'assentiment des Parties.

Si la convention d'enquête n'a pas déterminé les langues à employer, il en est décidé par la Commission.

Article 12.

Sauf stipulation contraire, les Commissions d'enquête sont formées de la manière déterminée par les articles 45 et 57 de la présente Convention.

Article 13.

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En cas de décès, de démission ou d'empêchement, pour quelque cause que ce soit, de l'un des commissaires, ou éventuellement de l'un des assesseurs, il est pourvu à son remplacement selon le mode fixé pour sa nomination.

Article 14.

Les Parties ont le droit de nommer auprès de la Commission d'enquête des agents spéciaux avec la mission de Les représenter et de servir d'intermédiaires entre Elles et la Commission.

Elles sont, en outre, autorisées à charger des conseils ou avocats nommés par elles, d'exposer et de soutenir leurs intérêts devant la Commission.

Article 15.

Le Bureau International de la Cour permanente d'arbitrage sert de greffe aux Commissions qui siègent à La Haye, et mettra ses locaux et son organisation à la disposition des Puissances contractantes pour le fonctionnement de la Commission d'enquête.

Article 16.

Si la Commission siège ailleurs qu'à La Haye, elle nomme un Secrétaire Général dont le bureau lui sert de greffe.

Le greffe est chargé, sous l'autorité du Président, de l'organisation matérielle des séances de la Commission, de la rédaction des procès-verbaux et, pendant le temps de l'enquête, de la garde des archives qui seront ensuite versées au Bureau International de La Haye.

Article 17.

En vue de faciliter l'institution et le fonctionnement des Commissions d'enquête, les Puissances contractantes recommandent les règles suivantes qui seront applicables à la procédure d'enquête en tant que les Parties n'adopteront pas d'autres règles.

Article 18.

La Commission réglera les détails de la procédure non prévus dans la convention spéciale d'enquête ou dans la présente Convention, et procédera à toutes les formalités que comporte l'administration des preuves.

Article 19.

L'enquête a lieu contradictoirement.

Aux dates prévues, chaque Partie communique à la Commission et à l'autre Partie les exposés des faits, s'il y a lieu, et, dans tous les cas, les actes, pièces et documents qu'Elle juge utiles à la découverte de la vérité, ainsi que la liste des témoins et des experts qu'elle désire faire entendre.

Article 20.

La Commission a la faculté, avec l'assentiment des Parties, de se transporter momentanément sur les lieux où elle juge utile de recourir à ce moyen d'information ou d'y déléguer un ou plusieurs de ses membres. L'autorisation de l'État sur le territoire duquel il doit être procédé à cette information devra être obtenue.

Article 21.

Toutes constatations matérielles, et toutes visites des lieux doivent être faites en présence des agents et conseils des Parties ou eux dûment appelés.

Article 22.

La Commission a le droit de solliciter de l'une ou l'autre Partie telles explications ou informations qu'elle juge utiles.

Article 23.

Les Parties s'engagent à fournir à la Commission d'enquête, dans la plus large mesure qu'Elles jugeront possible, tous les moyens et toutes les facilités nécessaires pour la connaissance complète et l'appréciation exacte des faits en question.

Elles s'engagent à user des moyens dont Elles disposent d'après leur législation intérieure, pour assurer la comparution des témoins ou des experts se trouvant sur leur territoire et cités devant la Commission.

Si ceux-ci ne peuvent comparaître devant la Commission, Elles feront procéder à leur audition devant leurs autorités compétentes.

Article 24.

Pour toutes les notifications que la Commission aurait à faire sur le territoire d'une tierce Puissance contractante, la Commission s'adressera directement au Gouvernement de cette Puissance. Il en sera de même s'il s'agit de faire procéder sur place à l'établissement de tous moyens de preuve.

Les requêtes adressées à cet effet seront exécutées suivant les moyens dont la Puissance requise dispose d'après Sa législation intérieure. Elles ne peuvent être refusées que si cette Puissance les juge de nature à porter atteinte à Sa souveraineté ou à Sa sécurité.

La Commission aura aussi toujours la faculté de recourir à l'intermédiaire de la Puissance sur le territoire de laquelle elle a son siège.

Article 25.

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Les témoins et les experts sont appelés à la requête des Parties ou d'office par la Commission, et, dans tous les cas, par l'intermédiaire du Gouvernement de l'État sur le

territoire duquel ils se trouvent.

Les témoins sont entendus, successivement et séparément, en présence des agents et des conseils et dans un ordre à fixer par la Commission.

Article 26.

L'interrogatoire des témoins est conduit par le Président.

Les membres de la Commission peuvent néanmoins poser à chaque témoin les questions qu'ils croient convenables pour éclaircir ou compléter sa déposition, ou pour se renseigner sur tout ce qui concerne le témoin dans les limites nécessaires à la manifestation de la vérité.

Les agents et les conseils des Parties ne peuvent interrompre le témoin dans sa déposition, ni lui faire aucune interpellation directe, mais peuvent demander au Président de poser au témoin telles questions complémentaires qu'ils jugent utiles.

Article 27.

Le témoin doit déposer sans qu'il lui soit permis de lire aucun projet écrit. Toutefois, il peut être autorisé par le Président à s'aider de notes ou documents si la nature des faits rapportés en nécessite l'emploi.

Article 28.

Procès-verbal de la déposition du témoin est dressé séance tenante et lecture en est donnée au témoin. Le témoin peut y faire tels changements et additions que bon lui semble et qui seront consignés à la suite de sa déposition.

Lecture faite au témoin de l'ensemble de sa déposition, le témoin est requis de signer.

Article 29.

Les agents sont autorisés, au cours ou à la fin de l'enquête, à présenter par écrit à la Commission et à l'autre Partie tels dires, réquisitions ou résumés de fait, qu'ils jugent utiles à la découverte de la vérité.

Article 30.

Les délibérations de la Commission ont lieu à huis clos et restent secrètes.

Toute décision est prise à la majorité des membres de la Commission.

Le refus d'un membre de prendre part au vote doit être constaté dans le procès-verbal.

Article 31.

Les séances de la Commission ne sont publiques et les procès-verbaux et documents de l'enquête ne sont rendus publics qu'en vertu d'une décision de la Commission, prise avec l'assentiment des Parties.

Article 32.

Les Parties ayant présenté tous les éclaircissements et preuves, tous les témoins ayant été entendus, le Président prononce la clôture de l'enquête et la Commission s'ajourne pour délibérer et rédiger son rapport.

Article 33.

Le rapport est signé par tous les membres de la Commission.

Si un des membres refuse de signer, mention en est faite; le rapport reste néanmoins valable.

Article 34.

Le rapport de la Commission est lu en séance publique, les agents et les conseils des Parties présents ou dûment appelés.

Un exemplaire du rapport est remis à chaque Partie.

Article 35.

Le rapport de la Commission, limité à la constatation des faits, n'a nullement le caractère d'une sentence arbitrale. Il laisse aux Parties une entière liberté pour la suite à donner à cette constatation.

Article 36.

Chaque Partie supporte ses propres frais et une part égale des frais de la Commission.

Titre IV.—De l'arbitrage international.

Chapitre I.—*De la Justice arbitrale.*

Article 37.

L'arbitrage international a pour objet le règlement de litiges entre les États par des juges de leur choix et sur la base du respect du droit.

Le recours à l'arbitrage implique l'engagement de se soumettre de bonne foi à la sentence.

Article 38.

Dans les questions d'ordre juridique, et en premier lieu, dans les questions d'interprétation ou d'application des Conventions internationales, l'arbitrage est reconnu par les Puissances contractantes comme le moyen le plus efficace et en même temps le plus équitable de régler les litiges qui n'ont pas été résolus par les voies diplomatiques. [Pg 596]

En conséquence, il serait désirable que, dans les litiges sur les questions susmentionnées,

les Puissances contractantes eussent, le cas échéant, recours à l'arbitrage, en tant que les circonstances le permettraient.

Article 39.

La Convention d'arbitrage est conclue pour des contestations déjà nées ou pour des contestations éventuelles.

Elle peut concerner tout litige ou seulement les litiges d'une catégorie déterminée.

Article 40.

Indépendamment des Traités généraux ou particuliers qui stipulent actuellement l'obligation du recours à l'arbitrage pour les Puissances contractantes, ces Puissances se réservent de conclure des accords nouveaux, généraux ou particuliers, en vue d'étendre l'arbitrage obligatoire à tous les cas qu'Elles jugeront possible de lui soumettre.

CHAPITRE II.—*De la Cour permanente d'arbitrage.*

Article 41.

Dans le but de faciliter le recours immédiat à l'arbitrage pour les différends internationaux qui n'ont pu être réglés par la voie diplomatique, les Puissances contractantes s'engagent à maintenir, telle qu'elle a été établie par la Première Conférence de la Paix, la Cour permanente d'arbitrage, accessible en tout temps et fonctionnant, sauf stipulation contraire des Parties, conformément aux règles de procédure insérées dans la présente Convention.

Article 42.

La Cour permanente est compétente pour tous les cas d'arbitrage, à moins qu'il n'y ait entente entre les Parties pour l'établissement d'une juridiction spéciale.

Article 43.

La cour permanente a son siège à La Haye.

Un Bureau International sert de greffe à la Cour; il est l'intermédiaire des communications relatives aux réunions de celle-ci; il a la garde des archives et la gestion de toutes les affaires administratives.

Les Puissances contractantes s'engagent à communiquer au Bureau, aussitôt que possible, une copie certifiée conforme de toute stipulation d'arbitrage intervenue entre Elles et de toute sentence arbitrale Les concernant et rendue par des juridictions spéciales.

Elles s'engagent à communiquer de même au Bureau les lois, règlements et documents constatant éventuellement l'exécution des sentences rendues par la Cour.

Article 44.

Chaque Puissance contractante désigne quatre personnes au plus, d'une compétence reconnue dans les questions de droit international, jouissant de la plus haute considération morale et disposées à accepter les fonctions d'arbitre.

Les personnes ainsi désignées sont inscrites, au titre de Membres de la Cour, sur une liste qui sera notifiée à toutes les Puissances contractantes par les soins du Bureau.

Toute modification à la liste des arbitres est portée, par les soins du Bureau, à la connaissance des Puissances contractantes.

Deux ou plusieurs Puissances peuvent s'entendre pour la désignation en commun d'un ou de plusieurs Membres.

La même personne peut être désignée par des Puissances différentes.

Les Membres de la Cour sont nommés pour un terme de six ans. Leur mandat peut être renouvelé.

En cas de décès ou de retraite d'un Membre de la Cour, il est pourvu à son remplacement selon le mode fixé pour sa nomination, et pour une nouvelle période de six ans.

Article 45.

Lorsque les Puissances contractantes veulent s'adresser à la Cour permanente pour le règlement d'un différend survenu entre Elles, le choix des arbitres appelés à former le Tribunal compétent pour statuer sur ce différend, doit être fait dans la liste générale des Membres de la Cour.

A défaut de constitution du Tribunal arbitral par l'accord des Parties, il est procédé de la manière suivante:

Chaque Partie nomme deux arbitres, dont un seulement peut être son national ou choisi parmi ceux qui ont été désignés par Elle comme Membres de la Cour permanente. Ces arbitres choisissent ensemble un surarbitre.

En cas de partage des voix, le choix du surarbitre est confié à une Puissance tierce, désignée de commun accord par les Parties.

Si l'accord ne s'établit pas à ce sujet, chaque Partie désigne une Puissance différente et le choix du surarbitre est fait de concert par les Puissances ainsi désignées.

Si, dans un délai de deux mois, ces deux Puissances n'ont pu tomber d'accord, chacune d'Elles présente deux candidats pris sur la liste des Membres de la Cour permanente, en dehors des Membres désignés par les Parties et n'étant les nationaux d'aucune d'Elles. Le sort détermine lequel des candidats ainsi présentés sera le surarbitre.

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Article 46.

Dès que le Tribunal est composé, les Parties notifient au Bureau leur décision de s'adresser à la Cour, le texte de leur compromis, et les noms des arbitres.

Le Bureau communique sans délai à chaque arbitre le compromis et les noms des autres Membres du Tribunal.

Le Tribunal se réunit à la date fixée par les Parties. Le Bureau pourvoit à son installation.

Les Membres du Tribunal, dans l'exercice de leurs fonctions et en dehors de leur pays, jouissent des privilèges et immunités diplomatiques.

Article 47.

Le Bureau est autorisé à mettre ses locaux et son organisation à la disposition des Puissances contractantes pour le fonctionnement de toute juridiction spéciale d'arbitrage.

La juridiction de la Cour permanente peut être étendue, dans les conditions prescrites par les règlements, aux litiges existant entre des Puissances non contractantes ou entre des Puissances contractantes et des Puissances non contractantes, si les Parties sont convenues de recourir à cette juridiction.

Article 48.

Les Puissances contractantes considèrent comme un devoir, dans le cas où un conflit aigu menacerait d'éclater entre deux ou plusieurs d'entre Elles, de rappeler à celles-ci que la Cour permanente leur est ouverte.

En conséquence, Elles déclarent que le fait de rappeler aux Parties en conflit les dispositions de la présente Convention, et le conseil donné, dans l'intérêt supérieur de la paix, de s'adresser à la Cour permanente, ne peuvent être considérés que comme actes de bons offices.

En cas de conflit entre deux Puissances, l'une d'Elles pourra toujours adresser au Bureau International une note contenant sa déclaration qu'Elle serait disposée à soumettre le différend à un arbitrage.

Le Bureau devra porter aussitôt la déclaration à la connaissance de l'autre Puissance.

Article 49.

Le Conseil administratif permanent, composé des Représentants diplomatiques des Puissances contractantes accrédités à La Haye et du Ministre des Affaires Étrangères des Pays-Bas, qui remplit les fonctions de Président, a la direction et le contrôle du Bureau International.

Le Conseil arrête son règlement d'ordre ainsi que tous autres règlements nécessaires.

Il décide toutes les questions administratives qui pourraient surgir touchant le fonctionnement de la Cour.

Il a tout pouvoir quant à la nomination, la suspension ou la révocation des fonctionnaires et employés du Bureau.

Il fixe les traitements et salaires, et contrôle la dépense générale.

La présence de neuf membres dans les réunions dûment convoquées suffit pour permettre au Conseil de délibérer valablement. Les décisions sont prises à la majorité des voix.

Le Conseil communique sans délai aux Puissances contractantes les règlements adoptés par lui. Il Leur présente chaque année un rapport sur les travaux de la Cour, sur le fonctionnement des services administratifs et sur les dépenses. Le rapport contient également un résumé du contenu essentiel des documents communiqués au Bureau par les Puissances en vertu de l'article 43 alinéas 3 et 4.

Article 50.

Les frais du Bureau seront supportés par les Puissances contractantes dans la proportion établie pour le Bureau international de l'Union postale universelle.

Les frais à la charge des Puissances adhérentes seront comptés à partir du jour où leur adhésion produit ses effets.

CHAPITRE III.—*De la procédure arbitrale.*

Article 51.

En vue de favoriser le développement de l'arbitrage, les Puissances contractantes ont arrêté les règles suivantes qui sont applicables à la procédure arbitrale, en tant que les Parties ne sont pas convenues d'autres règles.

Article 52.

Les Puissances qui recourent à l'arbitrage signent un compromis dans lequel sont déterminés l'objet du litige, le délai de nomination des arbitres, la forme, l'ordre et les délais dans lesquels la communication visée par l'article 63 devra être faite, et le montant de la somme que chaque Partie aura à déposer à titre d'avance pour les frais.

Le compromis détermine également, s'il y a lieu, le mode de nomination des arbitres, tous pouvoirs spéciaux éventuels du Tribunal, son siège, la langue dont il fera usage et celles dont l'emploi sera autorisé devant lui, et généralement toutes les conditions dont les Parties sont convenues.

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Article 53.

La Cour permanente est compétente pour l'établissement du compromis, si les Parties sont d'accord pour s'en remettre à elle.

Elle est également compétente, même si la demande est faite seulement par l'une des Parties, après qu'un accord par la voie diplomatique a été vainement essayé, quand il s'agit:

1°. d'un différend rentrant dans un Traité d'arbitrage général conclu ou renouvelé après la mise en vigueur de cette Convention et qui prévoit pour chaque différend un compromis et n'exclut pour l'établissement de ce dernier ni explicitement ni implicitement la compétence de la Cour. Toutefois, le recours à la Cour n'a pas lieu si l'autre Partie déclare qu'à son avis le différend n'appartient pas à la catégorie des différends à soumettre à un arbitrage obligatoire, à moins que le Traité d'arbitrage ne confère au Tribunal arbitral le pouvoir de décider cette question préalable;

2°. d'un différend provenant de dettes contractuelles réclamées à une Puissance par une autre Puissance comme dues à ses nationaux, et pour la solution duquel l'offre d'arbitrage a été acceptée. Cette disposition n'est pas applicable si l'acceptation a été subordonnée à la condition que le compromis soit établi selon un autre mode.

Article 54.

Dans les cas prévus par l'article précédent, le compromis sera établi par une commission composée de cinq membres désignés de la manière prévue à l'article 45 alinéas 3 à 6.

Le cinquième membre est de droit Président de la commission.

Article 55.

Les fonctions arbitrales peuvent être conférées à un arbitre unique ou à plusieurs arbitres désignés par les Parties à leur gré, ou choisis par Elles parmi les Membres de la Cour permanente d'arbitrage établie par la présente Convention.

A défaut de constitution du Tribunal par l'accord des Parties, il est procédé de la manière indiquée à l'article 45 alinéas 3 à 6.

Article 56.

Lorsqu'un Souverain ou un Chef d'Etat est choisi pour arbitre, la procédure arbitrale est réglée par Lui.

Article 57.

Le surarbitre est de droit Président du Tribunal.

Lorsque le Tribunal ne comprend pas de surarbitre, il nomme lui-même son Président.

Article 58.

En cas d'établissement du compromis par une commission, telle qu'elle est visée à l'article 54, et sauf stipulation contraire, la commission elle-même formera le Tribunal d'arbitrage.

Article 59.

En cas de décès, de démission ou d'empêchement, pour quelque cause que ce soit, de l'un des arbitres, il est pourvu à son remplacement selon le mode fixé pour sa nomination.

Article 60.

A défaut de désignation par les Parties, le Tribunal siège à La Haye.

Le Tribunal ne peut siéger sur le territoire d'une tierce Puissance qu'avec l'assentiment de celle-ci.

Le siège une fois fixé ne peut être changé par le Tribunal qu'avec l'assentiment des Parties.

Article 61.

Si le compromis n'a pas déterminé les langues à employer, il en est décidé par le Tribunal.

Article 62.

Les Parties ont le droit de nommer auprès du Tribunal des agents spéciaux, avec la mission de servir d'intermédiaires entre Elles et le Tribunal.

Elles sont en outre autorisées à charger de la défense de leurs droits et intérêts devant le Tribunal, des conseils ou avocats nommés par Elles à cet effet.

Les Membres de la Cour permanente ne peuvent exercer les fonctions d'agents, conseils ou avocats, qu'en faveur de la Puissance qui les a nommés Membres de la Cour.

Article 63.

La procédure arbitrale comprend en règle générale deux phases distinctes: l'instruction écrite et les débats.

L'instruction écrite consiste dans la communication faite par les agents respectifs, aux membres du Tribunal et à la Partie adverse, des mémoires, des contre-mémoires et, au besoin, des répliques; les Parties y joignent toutes pièces et documents invoqués dans la cause. Cette communication aura lieu, directement ou par l'intermédiaire du Bureau International, dans
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l'ordre et dans les délais déterminés par le compromis.

Les délais fixés par le compromis pourront être prolongés de commun accord par les Parties, ou par le Tribunal quand il le juge nécessaire pour arriver à une décision juste.

Les débats consistent dans le développement oral des moyens des Parties devant le Tribunal.

Article 64.

Toute pièce produite par l'une des Parties doit être communiquée, en copie certifiée conforme, à l'autre Partie.

Article 65.

A moins de circonstances spéciales, le Tribunal ne se réunit qu'après la clôture de l'instruction.

Article 66.

Les débats sont dirigés par le Président.

Ils ne sont publics qu'en vertu d'une décision du Tribunal, prise avec l'assentiment des Parties.

Ils sont consignés dans des procès-verbaux rédigés par des secrétaires que nomme le Président. Ces procès-verbaux sont signés par le Président et par un des secrétaires; ils ont seuls caractère authentique.

Article 67.

L'instruction étant close, le Tribunal a le droit d'écarter du débat tous actes ou documents nouveaux qu'une des Parties voudrait lui soumettre sans le consentement de l'autre.

Article 68.

Le Tribunal demeure libre de prendre en considération les actes ou documents nouveaux sur lesquels les agents ou conseils des Parties appelleraient son attention.

En ce cas, le Tribunal a le droit de requérir la production de ces actes ou documents, sauf l'obligation d'en donner connaissance à la Partie adverse.

Article 69.

Le Tribunal peut, en outre, requérir des agents des Parties la production de tous actes et demander toutes explications nécessaires. En cas de refus, le Tribunal en prend acte.

Article 70.

Les agents et les conseils des Parties sont autorisés à présenter oralement au Tribunal tous les moyens qu'ils jugent utiles à la défense de leur cause.

Article 71.

Ils ont le droit de soulever des exceptions et des incidents. Les décisions du Tribunal sur ces points sont définitives et ne peuvent donner lieu à aucune discussion ultérieure.

Article 72.

Les membres du Tribunal ont le droit de poser des questions aux agents et aux conseils des Parties et de leur demander des éclaircissements sur les points douteux.

Ni les questions posées, ni les observations faites par les membres du Tribunal pendant le cours des débats ne peuvent être regardées comme l'expression des opinions du Tribunal en général ou de ses membres en particulier.

Article 73.

Le Tribunal est autorisé à déterminer sa compétence en interprétant le compromis ainsi que les autres Traités qui peuvent être invoqués dans la matière, et en appliquant les principes du droit.

Article 74.

Le Tribunal a le droit de rendre des ordonnances de procédure pour la direction du procès, de déterminer les formes, l'ordre et les délais dans lesquels chaque Partie devra prendre ses conclusions finales, et de procéder à toutes les formalités que comporte l'administration des preuves.

Article 75.

Les Parties s'engagent à fournir au Tribunal, dans la plus large mesure qu'Elles jugeront possible, tous les moyens nécessaires pour la décision du litige.

Article 76.

Pour toutes les notifications que le Tribunal aurait à faire sur le territoire d'une tierce Puissance contractante, le Tribunal s'adressera directement au Gouvernement de cette Puissance. Il en sera de même s'il s'agit de faire procéder sur place à l'établissement de tous moyens de preuve.

Les requêtes adressées à cet effet seront exécutées suivant les moyens dont la Puissance requise dispose d'après sa législation intérieure. Elles ne peuvent être refusées que si cette Puissance les juge de nature à porter atteinte à sa souveraineté ou à sa sécurité.

Le Tribunal aura aussi toujours la faculté de recourir à l'intermédiaire de la Puissance sur le territoire de laquelle il a son siège.

Article 77.

Les agents et les conseils des Parties ayant présenté tous les éclaircissements et preuves à [Pg 600] l'appui de leur cause, le Président prononce la clôture des débats.

Article 78.

Les délibérations du Tribunal ont lieu à huis clos et restent secrètes.

Toute décision est prise à la majorité de ses membres.

Article 79.

La sentence arbitrale est motivée. Elle mentionne les noms des arbitres; elle est signée par le Président et par le greffier ou le secrétaire faisant fonctions de greffier.

Article 80.

La sentence est lue en séance publique, les agents et les conseils des Parties présents ou dûment appelés.

Article 81.

La sentence, dûment prononcée et notifiée aux agents des Parties, décide définitivement et sans appel la contestation.

Article 82.

Tout différend qui pourrait surgir entre les Parties, concernant l'interprétation et l'exécution de la sentence, sera, sauf stipulation contraire, soumis au jugement du Tribunal qui l'a rendue.

Article 83.

Les Parties peuvent se réserver dans le compromis de demander la révision de la sentence arbitrale.

Dans ce cas, et sauf stipulation contraire, la demande doit être adressée au Tribunal qui a rendu la sentence. Elle ne peut être motivée que par la découverte d'un fait nouveau qui eût été de nature à exercer une influence décisive sur la sentence et qui, lors de la clôture des débats, était inconnu du Tribunal lui-même et de la Partie qui a demandé la révision.

La procédure de révision ne peut être ouverte que par une décision du Tribunal constatant expressément l'existence du fait nouveau, lui reconnaissant les caractères prévus par le paragraphe précédent et déclarant à ce titre la demande recevable.

Le compromis détermine le délai dans lequel la demande de révision doit être formée.

Article 84.

La sentence arbitrale n'est obligatoire que pour les Parties en litige.

Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Puissances que les Parties en litige, celles-ci avertissent en temps utile toutes les Puissances signataires. Chacune de ces Puissances a le droit d'intervenir au procès. Si une ou plusieurs d'entre Elles ont profité de cette faculté, l'interprétation contenue dans la sentence est également obligatoire à leur égard.

Article 85.

Chaque Partie supporte ses propres frais et une part égale des frais du Tribunal.

CHAPITRE IV.—*De la procédure sommaire d'arbitrage.*

Article 86.

En vue de faciliter le fonctionnement de la justice arbitrale, lorsqu'il s'agit de litiges de nature à comporter une procédure sommaire, les Puissances contractantes arrêtent les règles ci-après qui seront suivies en l'absence de stipulations différentes, et sous réserve, le cas échéant, de l'application des dispositions du chapitre III. qui ne seraient pas contraires.

Article 87.

Chacune des Parties en litige nomme un arbitre. Les deux arbitres ainsi désignés choisissent un surarbitre. S'ils ne tombent pas d'accord à ce sujet, chacun présente deux candidats pris sur la liste générale des Membres de la Cour permanente, en dehors des Membres indiqués par chacune des Parties Elles-mêmes et n'étant les nationaux d'aucune d'Elles; le sort détermine lequel des candidats ainsi présentés sera le surarbitre.

Le surarbitre préside le Tribunal, qui rend ses décisions à la majorité des voix.

Article 88.

A défaut d'accord préalable, le Tribunal fixe, dès qu'il est constitué, le délai dans lequel les deux Parties devront lui soumettre leurs mémoires respectifs.

Article 89.

Chaque Partie est représentée devant le Tribunal par un agent qui sert d'intermédiaire entre le Tribunal et le Gouvernement qui l'a désigné.

Article 90.

La procédure a lieu exclusivement par écrit. Toutefois, chaque Partie a le droit demander la comparution de témoins et d'experts. Le Tribunal a, de son côté, la faculté de demander des explications orales aux agents des deux Parties, ainsi qu'aux experts et aux témoins dont il juge la comparution utile.

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Titre V.—Dispositions finales.

Article 91.

La présente Convention dûment ratifiée remplacera, dans les rapports entre les Puissances contractantes, la Convention pour le règlement pacifique des conflits internationaux du 29 juillet 1899.

Article 92.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Etrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification, sera immédiatement remise, par les soins du Gouvernement des Pays-Bas et par la voie diplomatique aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement Leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 93.

Les Puissances non signataires qui ont été conviées à la Deuxième Conférence de la Paix pourront adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances conviées à la Deuxième Conférence de la Paix copie certifiée conforme de la notification ainsi que l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 94.

Les conditions auxquelles les Puissances qui n'ont pas été conviées à la Deuxième Conférence de la Paix, pourront adhérer à la présente Convention formeront l'objet d'une entente ultérieure entre les Puissances contractantes.

Article 95.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 96.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 97.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 92 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 93 alinéa 2) ou de dénonciation (article 96 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION II.

Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.

Article premier.

Les Puissances contractantes sont convenues de ne pas avoir recours à la force armée pour le recouvrement de dettes contractuelles réclamées au Gouvernement d'un pays par le Gouvernement d'un autre pays comme dues à ses nationaux.

Toutefois, cette stipulation ne pourra être appliquée quand l'État débiteur refuse ou laisse sans réponse une offre d'arbitrage, ou, en cas d'acceptation, rend impossible l'établissement du compromis, ou, après l'arbitrage, manque de se conformer à la sentence rendue.

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Article 2.

Il est de plus convenu que l'arbitrage, mentionné dans l'alinéa 2 de l'article précédent, sera soumis à la procédure prévue par le titre IV chapitre 3 de la Convention de La Haye pour le règlement pacifique des conflits internationaux. Le jugement arbitral détermine, sauf les arrangements particuliers des Parties, le bien-fondé de la réclamation, le montant de la dette, le temps et le mode de paiement.

Article 3.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères

des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification, sera immédiatement remise, par les soins du Gouvernement des Pays-Bas et par la voie diplomatique, aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 4.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances conviées à la Deuxième Conférence de la Paix copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 5.

La présente Convention produira effet pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 6.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 7.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 3 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 4 alinéa 2) ou de dénonciation (article 6 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION III.

Convention relative to the Opening of Hostilities.

Article premier.

Les Puissances contractantes reconnaissent que les hostilités entre elles ne doivent pas commencer sans un avertissement préalable et non équivoque, qui aura, soit la forme d'une déclaration de guerre motivée, soit celle d'un ultimatum avec déclaration de guerre conditionnelle.

Article 2.

L'état de guerre devra être notifié sans retard aux Puissances neutres et ne produira effet à leur égard qu'après réception d'une notification qui pourra être faite même par voie télégraphique. Toutefois les Puissances neutres ne pourraient invoquer l'absence de notification, s'il était établi d'une manière non douteuse qu'en fait elles connaissaient l'état de guerre.

Article 3.

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L'article 1 de la présente Convention produira effet en cas de guerre entre deux ou plusieurs des Puissances contractantes.

L'article 2 est obligatoire dans les rapports entre un belligérant contractant et les Puissances neutres également contractantes.

Article 4.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent ainsi que des instruments de ratification, sera immédiatement remise par les soins du Gouvernement des Pays-Bas et par la voie diplomatique aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 5.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 6.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt, et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 7.

S'il arrivait qu'une des Hautes Parties contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 8.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 4 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 5 alinéa 2) ou de dénonciation (article 7 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION IV.

Convention concerning the Laws and Customs of War on Land.

Article premier.

Les Puissances contractantes donneront à leurs forces armées de terre des instructions qui seront conformes au Règlement concernant les lois et coutumes de la guerre sur terre, annexé à la présente Convention.

Article 2.

Les dispositions contenues dans le Règlement visé à l'article 1er ainsi que dans la présente Convention, ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention.

Article 3.

La Partie belligérante qui violerait les dispositions dudit Règlement sera tenue à indemnité, s'il y a lieu. Elle sera responsable de tous actes commis par les personnes faisant partie de sa force armée.

Article 4.

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La présente Convention dûment ratifiée remplacera, dans les rapports entre les Puissances contractantes, la Convention du 29 juillet 1899 concernant les lois et coutumes de la guerre sur terre.

La Convention de 1899 reste en vigueur dans les rapports entre les Puissances qui l'ont signée et qui ne ratifieraient pas également la présente Convention.

Article 5.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères

des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent ainsi que des instruments de ratification, sera immédiatement remise par les soins du Gouvernement des Pays-Bas et par la voie diplomatique aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 6.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 7.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 8.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 9.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 5 alinéas 3 et 4 ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 6 alinéa 2) ou de dénonciation (article 8 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

ANNEXE À LA CONVENTION.

Règlement concernant les lois et coutumes de la guerre sur terre.

SECTION I.—DES BELLIGÉRANTS.

CHAPITRE I.—*De la qualité de belligérant.*

Article premier.

Les lois, les droits et les devoirs de la guerre ne s'appliquent pas seulement à l'armée, mais encore aux milices et aux corps de volontaires réunissant les conditions suivantes:

1°. d'avoir à leur tête une personne responsable pour ses subordonnés;

2°. d'avoir un signe distinctif fixe et reconnaissable à distance;

3°. de porter les armes ouvertement et

4°. de se conformer dans leurs opérations aux lois et coutumes de la guerre.

Dans les pays où les milices ou des corps de volontaires constituent l'armée ou en font partie, ils sont compris sous la dénomination d'*armée*.

Article 2.

La population d'un territoire non occupé qui, à l'approche de l'ennemi, prend spontanément les armes pour combattre les troupes d'invasion sans avoir eu le temps de s'organiser
[Pg 605]
conformément à l'article premier, sera considérée comme belligérante si elle porte les armes ouvertement et si elle respecte les lois et coutumes de la guerre.

Article 3.

Les forces armées des parties belligérantes peuvent se composer de combattants et de non-combattants. En cas de capture par l'ennemi, les uns et les autres ont droit au traitement des prisonniers de guerre.

CHAPITRE II.—*Des prisonniers de guerre.*

Article 4.

Les prisonniers de guerre sont au pouvoir du Gouvernement ennemi, mais non des individus ou des corps qui les ont capturés.

Ils doivent être traités avec humanité.

Tout ce qui leur appartient personnellement, excepté les armes, les chevaux et les papiers militaires, reste leur propriété.

Article 5.

Les prisonniers de guerre peuvent être assujettis à l'internement dans une ville, forteresse, camp ou localité quelconque, avec obligation de ne pas s'en éloigner au delà de certaines limites déterminées; mais ils ne peuvent être enfermés que par mesure de sûreté indispensable, et seulement pendant la durée des circonstances qui nécessitent cette mesure.

Article 6.

L'État peut employer, comme travailleurs, les prisonniers de guerre, selon leur grade et leurs aptitudes, à l'exception des officiers. Ces travaux ne seront pas excessifs et n'auront aucun rapport avec les opérations de la guerre.

Les prisonniers peuvent être autorisés à travailler pour le compte d'administrations publiques ou de particuliers, ou pour leur propre compte.

Les travaux faits pour l'État sont payés d'après les tarifs en vigueur pour les militaires de l'armée nationale exécutant les mêmes travaux, ou, s'il n'en existe pas, d'après un tarif en rapport avec les travaux exécutés.

Lorsque les travaux ont lieu pour le compte d'autres administrations publiques ou pour des particuliers, les conditions en sont réglées d'accord avec l'autorité militaire.

Le salaire des prisonniers contribuera à adoucir leur position, et le surplus leur sera compté au moment de leur libération, sauf défalcation des frais d'entretien.

Article 7.

Le Gouvernement au pouvoir duquel se trouvent les prisonniers de guerre est chargé de leur entretien.

A défaut d'une entente spéciale entre les belligérants, les prisonniers de guerre seront traités pour la nourriture, le couchage et l'habillement, sur le même pied que les troupes du Gouvernement qui les aura capturés.

Article 8.

Les prisonniers de guerre seront soumis aux lois, règlements et ordres en vigueur dans l'armée de l'État au pouvoir duquel ils se trouvent. Tout acte d'insubordination autorise, à leur égard, les mesures de rigueur nécessaires.

Les prisonniers évadés, qui seraient repris avant d'avoir pu rejoindre leur armée ou avant de quitter le territoire occupé par l'armée qui les aura capturés, sont passibles de peines disciplinaires.

Les prisonniers qui, après avoir réussi à s'évader, sont de nouveau faits prisonniers, ne sont passibles d'aucune peine pour la fuite antérieure.

Article 9.

Chaque prisonnier de guerre est tenu de déclarer, s'il est interrogé à ce sujet, ses véritables noms et grade et, dans le cas où il enfreindrait cette règle, il s'exposerait à une restriction des avantages accordés aux prisonniers de guerre de sa catégorie.

Article 10.

Les prisonniers de guerre peuvent être mis en liberté sur parole, si les lois de leur pays les y autorisent, et, en pareil cas, ils sont obligés, sous la garantie de leur honneur personnel, de remplir scrupuleusement, tant vis-à-vis de leur propre Gouvernement que vis-à-vis de celui qui les a faits prisonniers, les engagements qu'ils auraient contractés.

Dans le même cas, leur propre Gouvernement est tenu de n'exiger ni accepter d'eux aucun service contraire à la parole donnée.

Article 11.

Un prisonnier de guerre ne peut être contraint d'accepter sa liberté sur parole; de même le Gouvernement ennemi n'est pas obligé d'accéder à la demande du prisonnier réclamant sa mise en liberté sur parole.

Article 12.

Tout prisonnier de guerre, libéré sur parole et repris portant les armes contre le Gouvernement envers lequel il s'était engagé d'honneur, ou contre les alliés de celui-ci, perd
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le droit au traitement des prisonniers de guerre et peut être traduit devant les tribunaux.

Article 13.

Les individus qui suivent une armée sans en faire directement partie, tels que les correspondants et les reporters de journaux, les vivandiers, les fournisseurs, qui tombent au pouvoir de l'ennemi et que celui-ci juge utile de détenir, ont droit au traitement des prisonniers de guerre, à condition qu'ils soient munis d'une légitimation de l'autorité militaire de l'armée qu'ils accompagnaient.

Article 14.

Il est constitué, dès le début des hostilités, dans chacun des États belligérants, et, le cas échéant, dans les pays neutres qui auront recueilli des belligérants sur leur territoire, un bureau de renseignements sur les prisonniers de guerre. Ce bureau, chargé de répondre à toutes les demandes qui les concernent, reçoit des divers services compétents toutes les

indications relatives aux internements et aux mutations, aux mises en liberté sur parole, aux échanges, aux évasions, aux entrées dans les hôpitaux, aux décès, ainsi que les autres renseignements nécessaires pour établir et tenir à jour une fiche individuelle pour chaque prisonnier de guerre. Le bureau devra porter sur cette fiche le numéro matricule, les nom et prénom, l'âge, le lieu d'origine, le grade, le corps de troupe, les blessures, la date et le lieu de la capture, de l'internement, des blessures et de la mort, ainsi que toutes les observations particulières. La fiche individuelle sera remise au Gouvernement de l'autre belligérant après la conclusion de la paix.

Le bureau de renseignements est également chargé de recueillir et de centraliser tous les objets d'un usage personnel, valeurs, lettres, etc., qui seront trouvés sur les champs de bataille ou délaissés par des prisonniers libérés sur parole, échangés, évadés ou décédés dans les hôpitaux et ambulances, et de les transmettre aux intéressés.

Article 15.

Les sociétés de secours pour les prisonniers de guerre, régulièrement constituées selon la loi de leur pays et ayant pour objet d'être les intermédiaires de l'action charitable, recevront, de la part des belligérants, pour elles et pour leurs agents dûment accrédités, toute facilité, dans les limites tracées par les nécessités militaires et les règles administratives, pour accomplir efficacement leur tâche d'humanité. Les délégués de ces sociétés pourront être admis à distribuer des secours dans les dépôts d'internement, ainsi qu'aux lieux d'étape des prisonniers rapatriés, moyennant une permission personnelle délivrée par l'autorité militaire, et en prenant l'engagement par écrit de se soumettre à toutes les mesures d'ordre et de police que celle-ci prescrirait.

Article 16.

Les bureaux de renseignements jouissent de la franchise de port. Les lettres, mandats et articles d'argent, ainsi que les colis postaux destinés aux prisonniers de guerre ou expédiés par eux, seront affranchis de toutes les taxes postales, aussi bien dans les pays d'origine et de destination que dans les pays intermédiaires.

Les dons et secours en nature destinés aux prisonniers de guerre seront admis en franchise de tous droits d'entrée et autres, ainsi que des taxes de transport sur les chemins de fer exploités par l'État.

Article 17.

Les officiers prisonniers recevront la solde à laquelle ont droit les officiers de même grade du pays où ils sont retenus, à charge de remboursement par leur Gouvernement.

Article 18.

Toute latitude est laissée aux prisonniers de guerre pour l'exercice de leur religion, y compris l'assistance aux offices de leur culte, à la seule condition de se conformer aux mesures d'ordre et de police prescrites par l'autorité militaire.

Article 19.

Les testaments des prisonniers de guerre sont reçus ou dressés dans les mêmes conditions que pour les militaires de l'armée nationale.

On suivra également les mêmes règles en ce qui concerne les pièces relatives à la constatation des décès, ainsi que pour l'inhumation des prisonniers de guerre, en tenant compte de leur grade et de leur rang.

Article 20.

Après la conclusion de la paix, le rapatriement des prisonniers de guerre s'effectuera dans le plus bref délai possible.

Chapitre III.—*Des malades et des blessés.*

Article 21.

Les obligations des belligérants concernant le service des malades et des blessés sont régies [Pg 607] par la Convention de Genève.

SECTION II.—DES HOSTILITÉS.

Chapitre I.—*Des moyens de nuire à l'ennemi, des sièges et des bombardements.*

Article 22.

Les belligérants n'ont pas un droit illimité quant au choix des moyens de nuire à l'ennemi.

Article 23.

Outre les prohibitions établies par des conventions spéciales, il est notamment interdit:

(*a*) d'employer du poison ou des armes empoisonnées;

(*b*) de tuer ou de blesser par trahison des individus appartenant à la nation ou à l'armée ennemie;

(*c*) de tuer ou de blesser un ennemi qui, ayant mis bas les armes ou n'ayant plus les moyens de se défendre, s'est rendu à discrétion;

(*d*) de déclarer qu'il ne sera pas fait de quartier;

(*e*) d'employer des armes, des projectiles ou des matières propres à causer des maux

superflus;

(*f*) d'user indûment du pavillon parlementaire, du pavillon national ou des insignes militaires et de l'uniforme de l'ennemi, ainsi que des signes distinctifs de la Convention de Genève;

(*g*) de détruire ou de saisir des propriétés ennemies, sauf les cas où ces destructions ou ces saisies seraient impérieusement commandées par les nécessités de la guerre;

(*h*) de déclarer éteints, suspendus ou non recevables en justice, les droits et actions des nationaux de la Partie adverse.

Il est également interdit à un belligérant de forcer les nationaux de la Partie adverse à prendre part aux opérations de guerre dirigées contre leur pays, même dans le cas où ils auraient été à son service avant le commencement de la guerre.

Article 24.

Les ruses de guerre et l'emploi des moyens nécessaires pour se procurer des renseignements sur l'ennemi et sur le terrain sont considérés comme licites.

Article 25.

Il est interdit d'attaquer ou de bombarder, par quelque moyen que ce soit des villes, villages, habitations ou bâtiments qui ne sont pas défendus.

Article 26.

Le commandant des troupes assaillantes, avant d'entreprendre le bombardement, et sauf le cas d'attaque de vive force, devra faire tout ce qui dépend de lui pour en avertir les autorités.

Article 27.

Dans les sièges et bombardements, toutes les mesures nécessaires doivent être prises pour épargner, autant que possible, les édifices consacrés aux cultes, aux arts, aux sciences et à la bienfaisance, les monuments historiques, les hôpitaux et les lieux de rassemblement de malades et de blessés, à condition qu'ils ne soient pas employés en même temps à un but militaire.

Le devoir des assiégés est de désigner ces édifices ou lieux de rassemblement par des signes visibles spéciaux qui seront notifiés d'avance à l'assiégeant.

Article 28.

Il est interdit de livrer au pillage une ville ou localité même prise d'assaut.

CHAPITRE II.—*Des espions.*

Article 29.

Ne peut être considéré comme espion que l'individu qui, agissant clandestinement ou sous de faux prétextes, recueille ou cherche à recueillir des informations dans la zone d'opérations d'un belligérant, avec l'intention de les communiquer à la partie adverse.

Ainsi les militaires non déguisés qui ont pénétré dans la zone d'opérations de l'armée ennemie, à l'effet de recueillir des informations, ne sont pas considérés comme espions. De même, ne sont pas considérés comme espions: les militaires et les non militaires, accomplissant ouvertement leur mission, chargés de transmettre des dépêches destinées, soit à leur propre armée, soit à l'armée ennemie. A cette catégorie appartiennent également les individus envoyés en ballon pour transmettre les dépêches, et, en général, pour entretenir les communications entre les diverses parties d'une armée ou d'un territoire.

Article 30.

L'espion pris sur le fait ne pourra être puni sans jugement préalable.

Article 31.

L'espion qui, ayant rejoint l'armée à laquelle il appartient, est capturé plus tard par l'ennemi, est traité comme prisonnier de guerre et n'encourt aucune responsabilité pour ses
[Pg 608] actes d'espionnage antérieurs.

CHAPITRE III.—*Des parlementaires.*

Article 32.

Est considéré comme parlementaire l'individu autorisé par l'un des belligérants à entrer en pourparlers avec l'autre et se présentant avec le drapeau blanc. Il a droit à l'inviolabilité ainsi que le trompette, clairon ou tambour, le porte-drapeau et l'interprète qui l'accompagneraient.

Article 33.

Le chef auquel un parlementaire est expédié n'est pas obligé de le recevoir en toutes circonstances.

Il peut prendre toutes les mesures nécessaires afin d'empêcher le parlementaire de profiter de sa mission pour se renseigner.

Il a le droit, en cas d'abus, de retenir temporairement le parlementaire.

Article 34.

Le parlementaire perd ses droits d'inviolabilité, s'il est prouvé, d'une manière positive et irrécusable, qu'il a profité de sa position privilégiée pour provoquer ou commettre un acte de trahison.

CHAPITRE IV.—*Des capitulations.*

Article 35.

Les capitulations arrêtées entre les parties contractantes doivent tenir compte des règles de l'honneur militaire.

Une fois fixées, elles doivent être scrupuleusement observées par les deux parties.

CHAPITRE V.—*De l'armistice.*

Article 36.

L'armistice suspend les opérations de guerre par un accord mutuel des parties belligérantes. Si la durée n'en est pas déterminée, les parties belligérantes peuvent reprendre en tout temps les opérations, pourvu toutefois que l'ennemi soit averti en temps convenu, conformément aux conditions de l'armistice.

Article 37.

L'armistice peut être général ou local. Le premier suspend partout les opérations de guerre des États belligérants; le second, seulement entre certaines fractions des armées belligérantes et dans un rayon déterminé.

Article 38.

L'armistice doit être notifié officiellement et en temps utile aux autorités compétentes et aux troupes. Les hostilités sont suspendues immédiatement après la notification ou au terme fixé.

Article 39.

Il dépend des parties contractantes de fixer, dans les clauses de l'armistice, les rapports qui pourraient avoir lieu, sur le théâtre de la guerre, avec les populations et entre elles.

Article 40.

Toute violation grave de l'armistice, par l'une des parties, donne à l'autre le droit de le dénoncer et même, en cas d'urgence, de reprendre immédiatement les hostilités.

Article 41.

La violation des clauses de l'armistice, par des particuliers agissant de leur propre initiative, donne droit seulement à réclamer la punition des coupables et, s'il y a lieu, une indemnité pour les pertes éprouvées.

SECTION III.—DE L'AUTORITÉ MILITAIRE SUR LE TERRITOIRE DE L'ÉTAT ENNEMI.

Article 42.

Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie.

L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.

Article 43.

L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.

Article 44.

Il est interdit à un belligérant de forcer la population d'un territoire occupé à donner des renseignements sur l'armée de l'autre belligérant ou sur ses moyens de défense.

Article 45.

Il est interdit de contraindre la population d'un territoire occupé à prêter serment à la Puissance ennemie.

Article 46.

L'honneur et les droits de la famille, la vie des individus et la propriété privée, ainsi que les convictions religieuses et l'exercice des cultes, doivent être respectés.

La propriété privée ne peut pas être confisquée.

Article 47.

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Le pillage est formellement interdit.

Article 48.

Si l'occupant prélève, dans le territoire occupé, les impôts, droits et péages établis au profit de l'État, il le fera, autant que possible, d'après les règles de l'assiette et de la répartition en vigueur, et il en résultera pour lui l'obligation de pourvoir aux frais de l'administration du territoire occupé dans la mesure où le Gouvernement légal y était tenu.

Article 49.

Si, en dehors des impôts visés à l'article précédent, l'occupant prélève d'autres contributions en argent dans le territoire occupé, ce ne pourra être que pour les besoins de l'armée ou de l'administration de ce territoire.

Article 50.

Aucune peine collective, pécuniaire ou autre, ne pourra être édictée contre les populations à raison de faits individuels dont elles ne pourraient être considérées comme solidairement

responsables.

Article 51.

Aucune contribution ne sera perçue qu'en vertu d'un ordre écrit et sous la responsabilité d'un général en chef.

Il ne sera procédé, autant que possible, à cette perception que d'après les règles de l'assiette et de la répartition des impôts en vigueur.

Pour toute contribution, un reçu sera délivré aux contribuables.

Article 52.

Des réquisitions en nature et des services ne pourront être réclamés des communes ou des habitants, que pour les besoins de l'armée d'occupation. Ils seront en rapport avec les ressources du pays et de telle nature qu'ils n'impliquent pas pour les populations l'obligation de prendre part aux opérations de la guerre contre leur patrie.

Ces réquisitions et ces services ne seront réclamés qu'avec l'autorisation du commandant dans la localité occupée.

Les prestations en nature seront, autant que possible, payées au comptant; sinon, elles seront constatées par des reçus, et le paiement des sommes dues sera effectué le plus tôt possible.

Article 53.

L'armée qui occupe un territoire ne pourra saisir que le numéraire, les fonds et les valeurs exigibles appartenant en propre à l'État, les dépôts d'armes, moyens de transport, magasins et approvisionnements et, en général, toute propriété mobilière de l'État de nature à servir aux opérations de la guerre.

Tous les moyens affectés sur terre, sur mer et dans les airs à la transmission des nouvelles, au transport des personnes ou des choses, en dehors des cas régis par le droit maritime, les dépôts d'armes et, en général, toute espèce de munitions de guerre, peuvent être saisis, même s'ils appartiennent à des personnes privées, mais devront être restitués et les indemnités seront réglées à la paix.

Article 54.

Les câbles sous-marins reliant un territoire occupé à un territoire neutre ne seront saisis ou détruits que dans le cas d'une nécessité absolue. Ils devront également être restitués et les indemnités seront réglées à la paix.

Article 55.

L'État occupant ne se considérera que comme administrateur et usufruitier des édifices publics, immeubles, forêts et exploitations agricoles appartenant à l'État ennemi et se trouvant dans le pays occupé. Il devra sauvegarder le fonds de ces propriétés et les administrer conformément aux règles de l'usufruit.

Article 56.

Les biens des communes, ceux des établissements consacrés aux cultes, à la charité et à l'instruction, aux arts et aux sciences, même appartenant à l'État seront traités comme la propriété privée.

Toute saisie, destruction ou dégradation intentionnelle de semblables établissements, de monuments historiques, d'œuvres d'art et de science, est interdite et doit être poursuivie.

CONVENTION V.

Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land.

Chapitre I.—*Des Droits et des Devoirs des Puissances neutres.*

Article premier.

Le territoire des Puissances neutres est inviolable.

Article 2.

[Pg 610] Il est interdit aux belligérants de faire passer à travers le territoire d'une Puissance neutre des troupes ou des convois, soit de munitions, soit d'approvisionnements.

Article 3.

Il est également interdit aux belligérants:

(*a*) d'installer sur le territoire d'une Puissance neutre une station radiotélégraphique ou tout appareil destiné à servir comme moyen de communication avec des forces belligérantes sur terre ou sur mer;

(*b*) d'utiliser toute installation de ce genre établie par eux avant la guerre sur le territoire de la Puissance neutre dans un but exclusivement militaire, et qui n'a pas été ouverte au service de la correspondance publique.

Article 4.

Des corps de combattants ne peuvent être formés, ni des bureaux d'enrôlement ouverts, sur le

territoire d'une Puissance neutre au profit des belligérants.

Article 5.

Une Puissance neutre ne doit tolérer sur son territoire aucun des actes visés par les articles 2 à 4.

Elle n'est tenue de punir des actes contraires à la neutralité que si ces actes ont été commis sur son propre territoire.

Article 6.

La responsabilité d'une Puissance neutre n'est pas engagée par le fait que des individus passent isolément la frontière pour se mettre au service de l'un des belligérants.

Article 7.

Une Puissance neutre n'est pas tenue d'empêcher l'exportation ou le transit, pour le compte de l'un ou de l'autre des belligérants, d'armes, de munitions, et, en général, de tout ce qui peut être utile à une armée ou à une flotte.

Article 8.

Une Puissance neutre n'est pas tenue d'interdire ou de restreindre l'usage, pour les belligérants, des câbles télégraphiques ou téléphoniques, ainsi que des appareils de télégraphie sans fil, qui sont, soit sa propriété, soit celle de compagnies ou de particuliers.

Article 9.

Toutes mesures restrictives ou prohibitives prises par une Puissance neutre à l'égard des matières visées par les articles 7 et 8 devront être uniformément appliquées par elle aux belligérants.

La Puissance neutre veillera au respect de la même obligation par les compagnies ou particuliers propriétaires de câbles télégraphiques ou téléphoniques ou d'appareils de télégraphie sans fil.

Article 10.

Ne peut être considéré comme un acte hostile le fait, par une Puissance neutre, de repousser, même par la force, les atteintes à sa neutralité.

CHAPITRE II.—*Des belligérants internés et des blessés soignés chez les neutres.*

Article 11.

La Puissance neutre qui reçoit sur son territoire des troupes appartenant aux armées belligérantes, les internera, autant que possible, loin du théâtre de la guerre.

Elle pourra les garder dans des camps, et même les enfermer dans des forteresses ou dans des lieux appropriés à cet effet.

Elle décidera si les officiers peuvent être laissés libres en prenant l'engagement sur parole de ne pas quitter le territoire neutre sans autorisation.

Article 12.

A défaut de convention spéciale, la Puissance neutre fournira aux internés les vivres, les habillements et les secours commandés par l'humanité.

Bonification sera faite, à la paix, des frais occasionnés par l'internement.

Article 13.

La Puissance neutre qui reçoit des prisonniers de guerre évadés les laissera en liberté. Si elle tolère leur séjour sur son territoire, elle peut leur assigner une résidence.

La même disposition est applicable aux prisonniers de guerre amenés par des troupes se réfugiant sur le territoire de la Puissance neutre.

Article 14.

Une Puissance neutre pourra autoriser le passage sur son territoire des blessés ou malades appartenant aux armées belligérantes, sous la réserve que les trains qui les amèneront ne transporteront ni personnel, ni matériel de guerre. En pareil cas, la Puissance neutre est tenue de prendre les mesures de sûreté et de contrôle nécessaires à cet effet.

Les blessés ou malades amenés dans ces conditions sur le territoire neutre par un des belligérants, et qui appartiendraient à la partie adverse, devront être gardés par la Puissance neutre de manière qu'ils ne puissent de nouveau prendre part aux opérations de la guerre. Cette Puissance aura les mêmes devoirs quant aux blessés ou malades de l'autre armée qui lui seraient confiés.

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Article 15.

La Convention de Genève s'applique aux malades et aux blessés internés sur territoire neutre.

CHAPITRE III.—*Des personnes neutres.*

Article 16.

Sont considérés comme neutres les nationaux d'un État qui ne prend pas part à la guerre.

Article 17.

Un neutre ne peut pas se prévaloir de sa neutralité:

(*a*) s'il commet des actes hostiles contre un belligérant;

(*b*) s'il commet des actes en faveur d'un belligérant, notamment s'il prend volontairement du service dans les rangs de la force armée de l'une des Parties.

En pareil cas, le neutre ne sera pas traité plus rigoureusement par le belligérant contre lequel il s'est départi de la neutralité que ne pourrait l'être, à raison du même fait, un national de l'autre État belligérant.

Article 18.

Ne seront pas considérés comme actes commis en faveur d'un des belligérants, dans le sens de l'article 17, lettre b:

(*a*) les fournitures faites ou les emprunts consentis à l'un des belligérants, pourvu que le fournisseur ou le prêteur n'habite ni le territoire de l'autre Partie, ni le territoire occupé par elle, et que les fournitures ne proviennent pas de ses territoires;

(*b*) les services rendus en matière de police ou d'administration civile.

CHAPITRE IV.—*Du matériel des chemins de fer.*

Article 19.

Le matériel des chemins de fer provenant du territoire de Puissances neutres, qu'il appartienne à ces Puissances ou à des sociétés ou personnes privées, et reconnaisable comme tel, ne pourra être réquisitionné et utilisé par un belligérant que dans le cas et la mesure où l'exige une impérieuse nécessité. Il sera renvoyé aussitôt que possible dans le pays d'origine.

La Puissance neutre pourra de même, en cas de nécessité, retenir et utiliser, jusqu'à due concurrence, le matériel provenant du territoire de la Puissance belligérante.

Une indemnité sera payée de part et d'autre, en proportion du matériel utilisé et de la durée de l'utilisation.

CHAPITRE V.—*Dispositions finales.*

Article 20.

Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention.

Article 21.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification sera immédiatement remise par les soins du Gouvernement des Pays-Bas et par la voie diplomatique aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 22.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 23.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la
[Pg 612] notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 24.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances, en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 25.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt des ratifications effectué en vertu de l'article 21 alinéas 3 et 4, ainsi que la date à laquelle

auront été reçues les notifications d'adhésion (article 22 alinéa 2) ou de dénonciation (article 24 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION VI.

Convention relative to the Status of Merchantmen at the Outbreak of Hostilities.

Article premier.

Lorsqu'un navire de commerce relevant d'une des Puissances belligérantes se trouve, au début des hostilités, dans un port ennemi, il est désirable qu'il lui soit permis de sortir librement, immédiatement ou après un délai de faveur suffisant, et de gagner directement, après avoir été muni d'un laissez-passer, son port de destination ou tel autre port qui lui sera désigné.

Il en est de même du navire ayant quitté son dernier port de départ avant le commencement de la guerre et entrant dans un port ennemi sans connaître les hostilités.

Article 2.

Le navire de commerce qui, par suite de circonstances de force majeure n'aurait pu quitter le port ennemi pendant le délai visé à l'article précédent, ou auquel la sortie n'aurait pas été accordée, ne peut être confisqué.

Le belligérant peut seulement le saisir moyennant l'obligation de le restituer après la guerre sans indemnité, ou le réquisitionner moyennant indemnité.

Article 3.

Les navires de commerce ennemis, qui ont quitté leur dernier port de départ, avant le commencement de la guerre et qui sont rencontrés en mer ignorants des hostilités, ne peuvent être confisqués. Ils sont seulement sujets à être saisis, moyennant l'obligation de les restituer après la guerre sans indemnité, ou à être réquisitionnés, ou même à être détruits, à charge d'indemnité et sous l'obligation de pourvoir à la sécurité des personnes ainsi qu'à la conservation des papiers de bord.

Après avoir touché à un port de leur pays ou à un port neutre, ces navires sont soumis aux lois et coutumes de la guerre maritime.

Article 4.

Les marchandises ennemies se trouvant à bord des navires visés aux articles 1 et 2 sont également sujettes à être saisies et restituées après la guerre sans indemnité, ou à être réquisitionnées moyennant indemnité, conjointement avec le navire ou séparément.

Il en est de même des marchandises se trouvant à bord des navires visés à l'article 3.

Article 5.

La présente Convention ne vise pas les navires de commerce dont la construction indique qu'ils sont destinés à être transformés en bâtiments de guerre.

Article 6.

Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention.

Article 7.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratifications, sera [Pg 613] immédiatement remise par les soins du Gouvernement des Pays-Bas et par la voie diplomatique aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 8.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 9.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 10.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 11.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 7 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 8 alinéa 2) ou de dénonciation (article 10 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION VII.

Convention relative to the Conversion of Merchantmen into Men-of-War.

Article premier.

Aucun navire de commerce transformé en bâtiment de guerre ne peut avoir les droits et les obligations attachés à cette qualité, s'il n'est placé sous l'autorité directe, le contrôle immédiat et la responsabilité de la Puissance dont il porte le pavillon.

Article 2.

Les navires de commerce transformés en bâtiments de guerre doivent porter les signes extérieurs distinctifs des bâtiments de guerre de leur nationalité.

Article 3.

Le commandant doit être au service de l'État et dûment commissionné par les autorités compétentes. Son nom doit figurer sur la liste des officiers de la flotte militaire.

Article 4.

L'équipage doit être soumis aux règles de la discipline militaire.

Article 5.

Tout navire de commerce transformé en bâtiment de guerre est tenu d'observer dans ses opérations, les lois et coutumes de la guerre.

Article 6.

Le belligérant, qui transforme un navire de commerce en bâtiment de guerre, doit, le plus tôt possible, mentionner cette transformation sur la liste des bâtiments de sa flotte militaire.

Article 7.

Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention.

Article 8.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

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Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification, sera immédiatement remise, par les soins du Gouvernement des Pays-Bas, et par la voie diplomatique, aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 9.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-

Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 10.

La présente Convention produira effet, pour les Puissances qui auront participé au première dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt, et pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 11.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 12.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 8 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 9 alinéa 2) ou de dénonciation (article 11 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION VIII.

Convention relative to the Laying of Automatic Submarine Contact Mines.

Article premier.

Il est interdit:

1°. de placer des mines automatiques de contact non amarrées, à moins qu'elles ne soient construites de manière à devenir inoffensives une heure au maximum après que celui qui les a placées en aura perdu le contrôle;

2°. de placer des mines automatiques de contact amarrées, qui ne deviennent pas inoffensives dès qu'elles auront rompu leurs amarres;

3°. d'employer des torpilles, qui ne deviennent pas inoffensives lorsqu'elles auront manqué leur but.

Article 2.

Il est interdit de placer des mines automatiques de contact devant les côtes et les ports de l'adversaire, dans le seul but d'intercepter la navigation de commerce.

Article 3.

Lorsque les mines automatiques de contact amarrées sont employées, toutes les précautions possibles doivent être prises pour la sécurité de la navigation pacifique.

Les belligérants s'engagent à pourvoir, dans la mesure du possible, à ce que ces mines deviennent inoffensives après un laps de temps limité, et, dans le cas où elles cesseraient d'être surveillées, à signaler les régions dangereuses, aussitôt que les exigences militaires le permettront, par un avis à la navigation, qui devra être aussi communiqué aux Gouvernements par la voie diplomatique.

Article 4.

Toute Puissance neutre qui place des mines automatiques de contact devant ses côtes, doit observer les mêmes règles et prendre les mêmes précautions que celles qui sont imposées aux belligérants.

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La Puissance neutre doit faire connaître à la navigation, par un avis préalable, les régions où seront mouillées des mines automatiques de contact. Cet avis devra être communiqué d'urgence aux Gouvernements par voie diplomatique.

Article 5.

A la fin de la guerre, les Puissances contractantes s'engagent à faire tout ce qui dépend d'elles pour enlever, chacune de son côté, les mines qu'elles ont placées.

Quant aux mines automatiques de contact amarrées, que l'un des belligérants aurait posées le long des côtes de l'autre, l'emplacement en sera notifié à l'autre partie par la Puissance qui les a posées et chaque Puissance devra procéder dans le plus bref délai à l'enlèvement des mines qui se trouvent dans ses eaux.

Article 6.

Les Puissances contractantes, qui ne disposent pas encore de mines perfectionnées telles qu'elles sont prévues dans la présente Convention, et qui, par conséquent, ne sauraient actuellement se conformer aux règles établies dans les articles 1 et 3, s'engagent à transformer, aussitôt que possible, leur matériel de mines, afin qu'il réponde aux prescriptions susmentionnées.

Article 7.

Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention.

Article 8.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification, sera immédiatement remise, par les soins du Gouvernement des Pays-Bas et par la voie diplomatique, aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 9.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 10.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt, et pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 11.

La présente Convention aura une durée de sept ans à partir du soixantième jour après la date du premier dépôt de ratifications.

Sauf dénonciation, elle continuera d'être en vigueur après l'expiration de ce délai.

La dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les Puissances, en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et six mois après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 12.

Les Puissances contractantes s'engagent à reprendre la question de l'emploi des mines automatiques de contact six mois avant l'expiration du terme prévu par l'alinéa premier de l'article précédent, au cas où elle n'aurait pas été reprise et résolue à une date antérieure par
[Pg 616] la troisième Conférence de la Paix.

Si les Puissances contractantes concluent une nouvelle Convention relative à l'emploi des mines, dès son entrée en vigueur, la présente Convention cessera d'être applicable.

Article 13.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 8 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 9 alinéa 2) ou de dénonciation (article 11 alinéa 3).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION IX.

Convention respecting Bombardment by Naval Forces in Time of War.

CHAPITRE Ier.—*Du bombardement des ports, villes, villages, habitations ou bâtiments non défendus.*

Article premier.

Il est interdit de bombarder, par des forces navales, des ports, villes, villages, habitations ou bâtiments, qui ne sont pas défendus.

Une localité ne peut pas être bombardée à raison du seul fait que, devant son port, se trouvent mouillées des mines sous-marines automatiques de contact.

Article 2.

Toutefois, ne sont pas compris dans cette interdiction les ouvrages militaires, établissements militaires ou navals, dépôts d'armes ou de matériel de guerre, ateliers et installations propres à être utilisés pour les besoins de la flotte ou de l'armée ennemie, et les navires de guerre se trouvant dans le port. Le commandant d'une force navale pourra, après sommation avec délai raisonnable, les détruire par le canon, si tout autre moyen est impossible et lorsque les autorités locales n'auront pas procédé à cette destruction dans le délai fixé.

Il n'encourt aucune responsabilité dans ce cas pour les dommages involontaires, qui pourraient être occasionnés par le bombardement.

Si des nécessités militaires, exigeant une action immédiate, ne permettaient pas d'accorder de délai, il reste entendu que l'interdiction de bombarder la ville non défendue subsiste comme dans le cas énoncé dans l'alinéa 1er et que le commandant prendra toutes les dispositions voulues pour qu'il en résulte pour cette ville le moins d'inconvénients possible.

Article 3.

Il peut, après notification expresse, être procédé au bombardement des ports, villes, villages, habitations ou bâtiments non défendus, si les autorités locales, mises en demeure par une sommation formelle, refusent d'obtempérer à des réquisitions de vivres ou d'approvisionnements nécessaires au besoin présent de la force navale qui se trouve devant la localité.

Ces réquisitions seront en rapport avec les ressources de la localité. Elles ne seront réclamées qu'avec l'autorisation du commandant de ladite force navale et elles seront, autant que possible, payées au comptant; sinon elles seront constatées par des reçus.

Article 4.

Est interdit le bombardement, pour le non paiement des contributions en argent, des ports, villes, villages, habitations ou bâtiments, non défendus.

CHAPITRE II.—*Dispositions générales.*

Article 5.

Dans le bombardement par des forces navales, toutes les mesures nécessaires doivent être prises par le commandant pour épargner, autant que possible, les édifices consacrés aux cultes, aux arts, aux sciences et à la bienfaisance, les monuments historiques, les hôpitaux et les lieux de rassemblement de malades ou de blessés, à condition qu'ils ne soient pas employés en même temps à un but militaire.

Le devoir des habitants est de désigner ces monuments, ces édifices ou lieux de rassemblement, par des signes visibles, qui consisteront en grands panneaux rectangulaires rigides, partagés, suivant une des diagonales, en deux triangles de couleur, noire en haut et blanche en bas.

Article 6.

Sauf le cas où les exigences militaires ne le permettraient pas, le commandant de la force navale assaillante doit, avant d'entreprendre le bombardement, faire tout ce qui dépend de lui pour avertir les autorités.

Article 7.

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Il est interdit de livrer au pillage une ville ou localité même prise d'assaut.

CHAPITRE III.—*Dispositions finales.*

Article 8.

Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention.

Article 9.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications, mentionnées à l'alinéa précédent, ainsi que des instruments de ratification, sera immédiatement remise, par les soins du Gouvernement des Pays-Bas et par la voie diplomatique, aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent,

ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 10.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 11.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 12.

S'il arrivait qu'une des Puissances Contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 13.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 9 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 10 alinéa 2) ou de dénonciation (article 12 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION X.

Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare.

Article premier.

Les bâtiments-hôpitaux militaires, c'est-à-dire les bâtiments construits ou aménagés par les États spécialement et uniquement en vue de porter secours aux blessés, malades et naufragés, et dont les noms auront été communiqués, à l'ouverture ou au cours des hostilités, en tout cas avant toute mise en usage, aux Puissances belligérantes, sont respectés et ne peuvent être capturés pendant la durée des hostilités.

Ces bâtiments ne sont pas non plus assimilés aux navires de guerre au point de vue de leur séjour dans un port neutre.

Article 2.

Les bâtiments hospitaliers, équipés en totalité ou en partie aux frais des particuliers ou des sociétés de secours officiellement reconnues, sont également respectés et exempts de capture, si la Puissance belligérante dont ils dépendent, leur a donné une commission officielle et en a notifié les noms à la Puissance adverse à l'ouverture ou au cours des hostilités, en tout cas avant toute mise en usage.

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Ces navires doivent être porteurs d'un document de l'autorité compétente déclarant qu'ils ont été soumis à son contrôle pendant leur armement et à leur départ final.

Article 3.

Les bâtiments hospitaliers, équipés en totalité ou en partie aux frais des particuliers ou des sociétés officiellement reconnues de pays neutres, sont respectés et exempts de capture, à condition qu'ils se soient mis sous la direction de l'un des belligérants, avec l'assentiment préalable de leur propre Gouvernement et avec l'autorisation du belligérant lui-même et que ce dernier en ait notifié le nom à son adversaire dès l'ouverture ou dans le cours des hostilités, en tout cas, avant tout emploi.

Article 4.

Les bâtiments qui sont mentionnés dans les articles 1, 2 et 3, porteront secours et assistance aux blessés, malades et naufragés des belligérants sans distinction de nationalité.

Les Gouvernements s'engagent à n'utiliser ces bâtiments pour aucun but militaire.

Ces bâtiments ne devront gêner en aucune manière les mouvements des combattants.

Pendant et après le combat, ils agiront à leurs risques et périls.

Les belligérants auront sur eux le droit de contrôle et de visite; ils pourront refuser leur concours, leur enjoindre de s'éloigner, leur imposer une direction déterminée et mettre à bord un commissaire, même les détenir, si la gravité des circonstances l'exigeait.

Autant que possible, les belligérants inscriront sur le journal de bord des bâtiments hospitaliers les ordres qu'ils leur donneront.

Article 5.

Les bâtiments-hôpitaux militaires seront distingués par une peinture extérieure blanche avec une bande horizontale verte d'un mètre et demi de largeur environ.

Les bâtiments qui sont mentionnés dans les articles 2 et 3, seront distingués par une peinture extérieure blanche avec une bande horizontale rouge d'un mètre et demi de largeur environ.

Les embarcations des bâtiments qui viennent d'être mentionnés, comme les petits bâtiments qui pourront être affectés au service hospitalier, se distingueront par une peinture analogue.

Tous les bâtiments hospitaliers se feront reconnaître en hissant, avec leur pavillon national, le pavillon blanc à croix-rouge prévu par la Convention de Genève et, en outre, s'ils ressortissent à un État neutre, en arborant au grand mât le pavillon national du belligérant sous la direction duquel ils se sont placés.

Les bâtiments hospitaliers qui, dans les termes de l'article 4, sont détenus par l'ennemi, auront à rentrer le pavillon national du belligérant dont ils relèvent.

Les bâtiments et embarcations ci-dessus mentionnés, qui veulent s'assurer la nuit le respect auquel ils ont droit, ont, avec l'assentiment du belligérant qu'ils accompagnent, à prendre les mesures nécessaires pour que la peinture qui les caractérise soit suffisamment apparente.

Article 6.

Les signes distinctifs prévus à article 5 ne pourront être employés, soit en temps de paix, soit en temps de guerre, que pour protéger ou désigner les bâtiments qui y sont mentionnés.

Article 7.

Dans le cas d'un combat à bord d'un vaisseau de guerre, les infirmeries seront respectées et ménagées autant que faire se pourra.

Ces infirmeries et leur matériel demeurent soumis aux lois de la guerre, mais ne pourront être détournés de leur emploi, tant qu'ils seront nécessaires aux blessés et malades.

Toutefois le commandant, qui les a en son pouvoir, a la faculté d'en disposer, en cas de nécessité militaire importante, en assurant au préalable le sort des blessés et malades qui s'y trouvent.

Article 8.

La protection due aux bâtiments hospitaliers et aux infirmeries des vaisseaux cesse si l'on en use pour commettre des actes nuisibles à l'ennemi.

N'est pas considéré comme étant de nature à justifier le retrait de la protection le fait que le personnel de ces bâtiments et infirmeries est armé pour le maintien de l'ordre et pour la défense des blessés ou malades, ainsi que le fait de la présence à bord d'une installation radio-télégraphique.

Article 9.

Les belligérants pourront faire appel au zèle charitable des commandants de bâtiments de commerce, yachts ou embarcations neutres, pour prendre à bord et soigner des blessés ou des malades.

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Les bâtiments qui auront répondu à cet appel ainsi que ceux qui spontanément auront recueilli des blessés, des malades ou des naufragés, jouiront d'une protection spéciale et de certaines immunités. En aucun cas, ils ne pourront être capturés pour le fait d'un tel transport; mais, sauf les promesses qui leur auraient été faites, ils restent exposés à la capture pour les violations de neutralité qu'ils pourraient avoir commises.

Article 10.

Le personnel religieux, médical et hospitalier de tout bâtiment capturé est inviolable et ne peut être fait prisonnier de guerre. Il emporte, en quittant le navire, les objets et les instruments de chirurgie qui sont sa propriété particulière.

Ce personnel continuera à remplir ses fonctions tant que cela sera nécessaire et il pourra ensuite se retirer, lorsque le commandant en chef le jugera possible.

Les belligérants doivent assurer à ce personnel tombé entre leurs mains, les mêmes allocations et la même solde qu'au personnel des mêmes grades de leur propre marine.

Article 11.

Les marins et les militaires embarqués, et les autres personnes officiellement attachées aux marines ou aux armées, blessés ou malades, à quelque nation qu'ils appartiennent, seront respectés et soignés par les capteurs.

Article 12.

Tout vaisseau de guerre d'une partie belligérante peut réclamer la remise des blessés, malades ou naufragés, qui sont à bord de bâtiments-hôpitaux militaires, de bâtiments hospitaliers de société de secours ou de particuliers, de navires de commerce, yachts et embarcations, quelle que soit la nationalité de ces bâtiments.

Article 13.

Si des blessés, malades ou naufragés sont recueillis à bord d'un vaisseau de guerre neutre, il devra être pourvu, dans la mesure du possible, à ce qu'ils ne puissent pas de nouveau prendre part aux opérations de la guerre.

Article 14.

Sont prisonniers de guerre les naufragés, blessés ou malades d'un belligérant, qui tombent au pouvoir de l'autre. Il appartient à celui-ci de décider, suivant les circonstances, s'il convient de les garder, de les diriger sur un port de sa nation, sur un port neutre ou même sur un port de l'adversaire. Dans ce dernier cas, les prisonniers ainsi rendus à leur pays ne pourront servir pendant la durée de la guerre.

Article 15.

Les naufragés, blessés ou malades, qui sont débarqués dans un port neutre, du consentement de l'autorité locale, devront, à moins d'un arrangement contraire de l'État neutre avec les États belligérants, être gardés par l'État neutre de manière qu'ils ne puissent pas de nouveau prendre part aux opérations de la guerre.

Les frais d'hospitalisation et d'internement seront supportés par l'État dont relèvent les naufragés, blessés ou malades.

Article 16.

Après chaque combat, les deux Parties belligérantes, en tant que les intérêts militaires le comportent, prendront des mesures pour rechercher les naufragés, les blessés et les malades et pour les faire protéger, ainsi que les morts, contre le pillage et les mauvais traitements.

Elles veilleront à ce que l'inhumation, l'immersion ou l'incinération des morts soit précédée d'un examen attentif de leurs cadavres.

Article 17.

Chaque belligérant enverra, dès qu'il sera possible, aux autorités de leur pays, de leur marine ou de leur armée, les marques ou pièces militaires d'identité trouvées sur les morts et l'état nominatif des blessés ou malades recueillis par lui.

Les belligérants se tiendront réciproquement au courant des internements et des mutations, ainsi que des entrées dans les hôpitaux et des décès survenus parmi les blessés et malades en leur pouvoir. Ils recueilleront tous les objets d'un usage personnel, valeurs, lettres, etc. qui seront trouvés dans les vaisseaux capturés, ou délaissés par les blessés ou malades décédés dans les hôpitaux, pour les faire transmettre aux intéressés par les autorités de leur pays.

Article 18.

Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention.

Article 19.

Les commandants en chef des flottes des belligérants auront à pourvoir aux détails d'exécution des articles précédents, ainsi qu'aux cas non prévus, d'après les instructions de
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leurs Gouvernements respectifs et conformément aux principes généraux de la présente Convention.

Article 20.

Les Puissances signataires prendront les mesures nécessaires pour instruire leurs marines, et spécialement le personnel protégé, des dispositions de la présente Convention et pour les porter à la connaissance des populations.

Article 21.

Les Puissances signataires s'engagent également à prendre ou à proposer à leurs législatures, en cas d'insuffisance de leurs lois pénales, les mesures nécessaires pour réprimer en temps de guerre, les actes individuels de pillage et de mauvais traitements envers des blessés et malades des marines, ainsi que pour punir, comme usurpation d'insignes militaires, l'usage abusif des signes distinctifs désignés à l'article 5 par des bâtiments non protégés par la présente Convention.

Ils se communiqueront, par l'intermédiaire du Gouvernement des Pays-Bas, les dispositions relatives à cette répression, au plus tard dans les cinq ans de la ratification de la présente convention.

Article 22.

En cas d'opérations de guerre entre les forces de terre et de mer des belligérants, les dispositions de la présente Convention ne seront applicables qu'aux forces embarquées.

Article 23.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des

notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification, sera immédiatement remise par les soins du Gouvernement des Pays-Bas et par la voie diplomatique aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 24.

Les Puissances non signataires qui auront accepté la Convention de Genève du 6 juillet 1906, sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer, notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 25.

La présente Convention, dûment ratifiée, remplacera dans les rapports entre les Puissances contractantes, la Convention du 29 juillet 1899 pour l'adaptation à la guerre maritime des principes de la Convention de Genève.

La Convention de 1899 reste en vigueur dans les rapports entre les Puissances qui l'ont signée et qui ne ratifieraient pas également la présente Convention.

Article 26.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt, et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 27.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas, qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 28.

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Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt des ratifications effectué en vertu de l'article 23 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 24 alinéa 2) ou de dénonciation (article 27 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION XI.

Convention relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War.

Chapitre I.—*De la Correspondance postale.*

Article premier.

La correspondance postale des neutres ou des belligérants, quel que soit son caractère officiel ou privé, trouvée en mer sur un navire neutre ou ennemi, est inviolable. S'il y a saisie du navire, elle est expédiée avec le moins de retard possible par le capteur.

Les dispositions de l'alinéa précédent ne s'appliquent pas, en cas de violation de blocus, à la correspondance qui est à destination ou en provenance du port bloqué.

Article 2.

L'inviolabilité de la correspondance postale ne soustrait pas les paquebots-poste neutres aux lois et coutumes de la guerre sur mer concernant les navires de commerce neutres en général. Toutefois, la visite n'en doit être effectuée qu'en cas de nécessité, avec tous les ménagements et toute la célérité possibles.

Chapitre II.—*De l'exemption de capture pour certains bateaux.*

Article 3.

Les bateaux exclusivement affectés à la pêche côtière ou à des services de petite navigation locale sont exempts de capture, ainsi que leurs engins, agrès, apparaux et chargement.

Cette exemption cesse de leur être applicable dès qu'ils participent d'une façon quelconque aux hostilités.

Les Puissances contractantes s'interdisent de profiter du caractère inoffensif desdits bateaux pour les employer dans un but militaire en leur conservant leur apparence pacifique.

Article 4.

Sont également exempts de capture les navires chargés de missions religieuses, scientifiques ou philanthropiques.

CHAPITRE III.—*Du régime des équipages des navires de commerce ennemis capturés par un belligérant.*

Article 5.

Lorsqu'un navire de commerce ennemi est capturé par un belligérant, les hommes de son équipage, nationaux d'un État neutre, ne sont pas faits prisonniers de guerre.

Il en est de même du capitaine et des officiers, également nationaux d'un État neutre, s'ils promettent formellement par écrit de ne pas servir sur un navire ennemi pendant la durée de la guerre.

Article 6.

Le capitaine, les officiers et les membres de l'équipage, nationaux de l'État ennemi, ne sont pas faits prisonniers de guerre, à condition qu'ils s'engagent, sous la foi d'une promesse formelle écrite, à ne prendre, pendant la durée des hostilités, aucun service ayant rapport avec les opérations de la guerre.

Article 7.

Les noms des individus laissés libres dans les conditions visées à l'article 5 alinéa 2 et à l'article 6, sont notifiés par le belligérant capteur à l'autre belligérant. Il est interdit à ce dernier d'employer sciemment lesdits individus.

Article 8.

Les dispositions des trois articles précédents ne s'appliquent pas aux navires qui prennent part aux hostilités.

CHAPITRE IV.—*Dispositions finales.*

Article 9.

Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous Parties à la Convention.

Article 10.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères
[Pg 622] des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent ainsi que des instruments de ratification, sera immédiatement remise par les soins du Gouvernement des Pays-Bas et par la voie diplomatique aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 11.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 12.

La présente Convention produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par le Gouvernement des Pays-Bas.

Article 13.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 14.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt des ratifications effectué en vertu de l'article 10 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 11 alinéa 2) ou de dénonciation (article 13 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

CONVENTION XII.

CONVENTION CONCERNING THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT.

TITRE I.—*Dispositions générales.*

Article premier.

La validité de la capture d'un navire de commerce ou de sa cargaison est, s'il s'agit de propriétés neutres ou ennemies, établie devant une juridiction des prises conformément à la présente Convention.

Article 2.

La juridiction des prises est exercée d'abord par les tribunaux de prises du belligérant capteur.

Les décisions de ces tribunaux sont prononcées en séance publique ou notifiées d'office aux parties neutres ou ennemies.

Article 3.

Les décisions des tribunaux de prises nationaux peuvent être l'objet d'un recours devant la Cour internationale des prises:

1°. lorsque la décision des tribunaux nationaux concerne les propriétés d'une Puissance ou d'un particulier neutres;

2°. lorsque ladite décision concerne des propriétés ennemies et qu'il s'agit:

(*a*) de marchandises chargées sur un navire neutre,

(*b*) d'un navire ennemi, qui aurait été capturé dans les eaux territoriales d'une Puissance neutre, dans le cas où cette Puissance n'aurait pas fait de cette capture l'objet d'une réclamation diplomatique,

(*c*) d'une réclamation fondée sur l'allégation que la capture aurait été effectuée en violation, soit d'une disposition conventionnelle en vigueur entre les Puissances belligérantes, soit d'une disposition légale édictée par le belligérant capteur.

[Pg 623] Le recours contre la décision des tribunaux nationaux peut être fondé sur ce que cette décision ne serait pas justifiée, soit en fait, soit en droit.

Article 4.

Le recours peut être exercé:

1°. par une Puissance neutre, si la décision des tribunaux nationaux a porté atteinte à ses propriétés ou à celles de ses ressortissants (article 3—1°) ou s'il est allégué que la capture d'un navire ennemi a eu lieu dans les eaux territoriales de cette Puissance (article 3—2° *b*);

2°. par un particulier neutre, si la décision des tribunaux nationaux a porté atteinte à ses propriétés (article 3—1°), sous réserve toutefois du droit de la Puissance dont il relève, de lui interdire l'accès de la Cour ou d'y agir elle-même en ses lieu et place;

3°. par un particulier relevant de la Puissance ennemie, si la décision des tribunaux nationaux a porté atteinte à ses propriétés dans les conditions visées à l'article 3—2°, à l'exception du cas prévu par l'alinéa *b*.

Article 5.

Le recours peut aussi être exercé, dans les mêmes conditions qu'à l'article précédent, par les ayants-droit, neutres ou ennemis, du particulier auquel le recours est accordé, et qui sont intervenus devant la juridiction nationale. Ces ayants-droit peuvent exercer individuellement le recours dans la mesure de leur intérêt.

Il en est de même des ayants-droit, neutres ou ennemis, de la Puissance neutre dont la propriété est en cause.

Article 6.

Lorsque, conformément à l'article 3 ci-dessus, la Cour internationale est compétente, le droit de juridiction des tribunaux nationaux ne peut être exercé à plus de deux degrés. Il appartient à la législation du belligérant capteur de décider si le recours est ouvert après la décision rendue en premier ressort ou seulement après la décision rendue en appel ou en

cassation.

Faute par les tribunaux nationaux d'avoir rendu une décision définitive dans les deux ans à compter du jour de la capture, la Cour peut être saisie directement.

Article 7.

Si la question de droit à résoudre est prévue par une Convention en vigueur entre le belligérant capteur et la Puissance qui est elle-même partie au litige ou dont le ressortissant est partie au litige, la Cour se conforme aux stipulations de ladite Convention.

A défaut de telles stipulations, la Cour applique les règles du droit international. Si des règles généralement reconnues n'existent pas, la Cour statue d'après les principes généraux de la justice et de l'équité.

Les dispositions ci-dessus sont également applicables en ce qui concerne l'ordre des preuves ainsi que les moyens qui peuvent être employés.

Si, conformément à l'article 3—2° c, le recours est fondé sur la violation d'une disposition légale édictée par le belligérant capteur, la Cour applique cette disposition.

La Cour peut ne pas tenir compte des déchéances de procédure édictées par la législation du belligérant capteur, dans les cas où elle estime que les conséquences en sont contraires à la justice et à l'équité.

Article 8.

Si la Cour prononce la validité de la capture du navire ou de la cargaison, il en sera disposé conformément aux lois du belligérant capteur.

Si la nullité de la capture est prononcée, la Cour ordonne la restitution du navire ou de la cargaison et fixe, s'il y a lieu, le montant des dommages-intérêts. Si le navire ou la cargaison ont été vendus ou détruits, la Cour détermine l'indemnité à accorder de ce chef au propriétaire.

Si la nullité de la capture avait été prononcée par la juridiction nationale, la Cour n'est appelée à statuer que sur les dommages et intérêts.

Article 9.

Les Puissances contractantes s'engagent à se soumettre de bonne foi aux décisions de la Cour internationale des prises et à les exécuter dans le plus bref délai possible.

TITRE II.—*Organisation de la Cour internationale des prises.*

Article 10.

La Cour internationale des prises se compose de juges et de juges suppléants nommés par les Puissances contractantes et qui tous devront être des jurisconsultes d'une compétence reconnue dans les questions de droit international maritime et jouissant de la plus haute considération morale.

La nomination de ces juges et juges suppléants sera faite dans les six mois qui suivront la ratification de la présente Convention.

Article 11.

Les juges et juges suppléants sont nommés pour une période de six ans, à compter de la date où la notification de leur nomination aura été reçue par le Conseil administratif institué [Pg 624] par la Convention pour le règlement pacifique des conflits internationaux du 29 juillet 1899. Leur mandat peut être renouvelé.

En cas de décès ou de démission d'un juge ou d'un juge suppléant, il est pourvu à son remplacement selon le mode fixé pour sa nomination. Dans ce cas, la nomination est faite pour une nouvelle période de six ans.

Article 12.

Les juges de la Cour internationale des prises sont égaux entre eux et prennent rang d'après la date où la notification de leur nomination aura été reçue (article 11 alinéa 1), et, s'ils siègent à tour de rôle (article 15 alinéa 2), d'après la date de leur entrée en fonctions. La préséance appartient au plus âgé, au cas où la date est la même.

Les juges suppléants sont, dans l'exercice de leurs fonctions, assimilés aux juges titulaires. Toutefois ils prennent rang après ceux-ci.

Article 13.

Les juges jouissent des privilèges et immunités diplomatiques dans l'exercice de leurs fonctions et en dehors de leur pays.

Avant de prendre possession de leur siège, les juges doivent, devant le Conseil administratif, prêter serment ou faire une affirmation solennelle d'exercer leurs fonctions avec impartialité et en toute conscience.

Article 14.

La Cour fonctionne au nombre de quinze juges; neuf juges constituent le quorum nécessaire.

Le juge absent ou empêché est remplacé par le suppléant.

Article 15.

Les juges nommés par les Puissances contractantes dont les noms suivent: l'Allemagne, les États-Unis d'Amérique, l'Autriche-Hongrie, la France, la Grande-Bretagne, l'Italie, le Japon et

la Russie sont toujours appelés à siéger.

Les juges et les juges suppléants nommés par les autres Puissances contractantes siègent à tour de rôle d'après le tableau annexé à la présente Convention; leurs fonctions peuvent être exercées successivement par la même personne. Le même juge peut être nommé par plusieurs desdites Puissances.

Article 16.

Si une Puissance belligérante n'a pas, d'après le tour de rôle, un juge siégeant dans la Cour, elle peut demander que le juge nommé par elle prenne part au jugement de toutes les affaires provenant de la guerre. Dans ce cas, le sort détermine lequel des juges siégeant en vertu du tour de rôle doit s'abstenir. Cette exclusion ne saurait s'appliquer au juge nommé par l'autre belligérant.

Article 17.

Ne peut siéger le juge qui, à un titre quelconque, aura concouru à la décision des tribunaux nationaux ou aura figuré dans l'instance comme conseil ou avocat d'une partie.

Aucun juge, titulaire ou suppléant, ne peut intervenir comme agent ou comme avocat devant la Cour internationale des prises ni y agir pour une partie en quelque qualité que ce soit, pendant toute la durée de ses fonctions.

Article 18.

Le belligérant capteur a le droit de désigner un officier de marine d'un grade élevé qui siégera en qualité d'assesseur avec voix consultative. La même faculté appartient à la Puissance neutre, qui est elle-même partie au litige, ou à la Puissance dont le ressortissant est partie au litige; s'il y a, par application de cette dernière disposition, plusieurs Puissances intéressées, elles doivent se concerter, au besoin par le sort, sur l'officier à désigner.

Article 19.

La Cour élit son Président et son Vice-Président à la majorité absolue des suffrages exprimés. Après deux tours de scrutin, l'élection se fait à la majorité relative et, en cas de partage des voix, le sort décide.

Article 20.

Les juges de la Cour internationale des prises touchent une indemnité de voyage fixée d'après les règlements de leur pays et reçoivent, en outre, pendant la session ou pendant l'exercice de fonctions conférées par la Cour, une somme de cent florins néerlandais par jour.

Ces allocations, comprises dans les frais généraux de la Cour prévus par l'article 47, sont versées par l'entremise du Bureau international institué par la Convention du 29 juillet 1899.

Les juges ne peuvent recevoir de leur propre Gouvernement ou de celui d'une autre Puissance aucune rémunération comme membres de la Cour.

Article 21.

La Cour internationale des prises a son siège à La Haye et ne peut, sauf le cas de force [Pg 625] majeure, le transporter ailleurs qu'avec l'assentiment des parties belligérantes.

Article 22.

Le Conseil administratif, dans lequel ne figurent que les représentants des Puissances contractantes, remplit, à l'égard de la Cour internationale des prises, les fonctions qu'il remplit à l'égard de la Cour permanente d'arbitrage.

Article 23.

Le Bureau international sert de greffe à la Cour internationale des prises et doit mettre ses locaux et son organisation à la disposition de la Cour. Il a la garde des archives et la gestion des affaires administratives.

Le secrétaire général du Bureau international remplit les fonctions de greffier.

Les secrétaires adjoints au greffier, les traducteurs et les sténographes nécessaires sont désignés et assermentés par la Cour.

Article 24.

La Cour décide du choix de la langue dont elle fera usage et des langues dont l'emploi sera autorisé devant elle.

Dans tous les cas, la langue officielle des tribunaux nationaux, qui ont connu de l'affaire, peut être employée devant la Cour.

Article 25.

Les Puissances intéressées ont le droit de nommer des agents spéciaux ayant mission de servir d'intermédiaires entre Elles et la Cour. Elles sont, en outre, autorisées à charger des conseils ou avocats de la défense de leurs droits et intérêts.

Article 26.

Le particulier intéressé sera représenté devant la Cour par un mandataire qui doit être soit un avocat autorisé à plaider devant une Cour d'appel ou une Cour suprême de l'un des Pays contractants, soit un avoué exerçant sa profession auprès d'une telle Cour, soit enfin un professeur de droit à une école d'enseignement supérieur d'un de ces pays.

Article 27.

Pour toutes les notifications à faire, notamment aux parties, aux témoins et aux experts, la

Cour peut s'adresser directement au Gouvernement de la Puissance sur le territoire de laquelle la notification doit être effectuée. Il en est de même s'il s'agit de faire procéder à l'établissement de tout moyen de preuve.

Les requêtes adressées à cet effet seront exécutées suivant les moyens dont la Puissance requise dispose d'après sa législation intérieure. Elles ne peuvent être refusées que si cette Puissance les juge de nature à porter atteinte à sa souveraineté ou à sa sécurité. S'il est donné suite à la requête, les frais ne comprennent que les dépenses d'exécution réellement effectuées.

La Cour a également la faculté de recourir à l'intermédiaire de la Puissance sur le territoire de laquelle elle a son siège.

Les notifications à faire aux parties dans le lieu où siège la Cour peuvent être exécutées par le Bureau international.

TITRE III.—*Procédure devant la Cour internationale des prises.*

Article 28.

Le recours devant la Cour internationale des prises est formé au moyen d'une déclaration écrite, faite devant le tribunal national qui a statué, ou adressée au Bureau international; celui-ci peut être saisi même par télégramme.

Le délai du recours est fixé à cent vingt jours à dater du jour où la décision a été prononcée ou notifiée (article 2 alinéa 2).

Article 29.

Si la déclaration de recours est faite devant le tribunal national, celui-ci, sans examiner si le délai a été observé, fait, dans les sept jours qui suivent, expédier le dossier de l'affaire au Bureau international.

Si la déclaration de recours est adressée au Bureau international, celui-ci en prévient directement le tribunal national, par télégramme s'il est possible. Le tribunal transmettra le dossier comme il est dit à l'alinéa précédent.

Lorsque le recours est formé par un particulier neutre, le Bureau international en avise immédiatement par télégramme la Puissance dont relève le particulier, pour permettre à cette Puissance de faire valoir le droit que lui reconnaît l'article 4—2°.

Article 30.

Dans le cas prévu à l'article 6 alinéa 2, le recours ne peut être adressé qu'au Bureau international. Il doit être introduit dans les trente jours qui suivent l'expiration du délai de deux ans.

Article 31.

Faute d'avoir formé son recours dans le délai fixé à l'article 28 ou à l'article 30, la partie sera, sans débats, déclarée non recevable.

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Toutefois, si elle justifie d'un empêchement de force majeure et si elle a formé son recours dans les soixante jours qui ont suivi la cessation de cet empêchement, elle peut être relevée de la déchéance encourue, la partie adverse ayant été dûment entendue.

Article 32.

Si le recours a été formé en temps utile, la Cour notifie d'office et sans délai à la partie adverse une copie certifiée conforme de la déclaration.

Article 33.

Si, en dehors des parties qui se sont pourvues devant la Cour, il y a d'autres intéressés ayant le droit d'exercer le recours, ou si, dans le cas prévu à l'article 29 alinéa 3, la Puissance qui a été avisée, n'a pas fait connaître sa résolution, la Cour attend, pour se saisir de l'affaire, que les délais prévus à l'article 28 ou à l'article 30 soient expirés.

Article 34.

La procédure devant la Cour internationale comprend deux phases distinctes: l'instruction écrite et les débats oraux.

L'instruction écrite consiste dans le dépôt et l'échange d'exposés, de contre-exposés et, au besoin, de répliques dont l'ordre et les délais sont fixés par la Cour. Les parties y joignent toutes pièces et documents dont elles comptent se servir.

Toute pièce, produite par une partie, doit être communiquée en copie certifiée conforme à l'autre partie par l'intermédiaire de la Cour.

Article 35.

L'instruction écrite étant terminée, il y a lieu à une audience publique, dont le jour est fixé par la Cour.

Dans cette audience, les parties exposent l'état de l'affaire en fait et en droit.

La Cour peut, en tout état de cause, suspendre les plaidoiries, soit à la demande d'une des parties, soit d'office, pour procéder à une information complémentaire.

Article 36.

La Cour internationale peut ordonner que l'information complémentaire aura lieu, soit conformément aux dispositions de l'article 27, soit directement devant elle ou devant un ou plusieurs de ses membres en tant que cela peut se faire sans moyen coercitif ou comminatoire.

Si des mesures d'information doivent être prises par des membres de la Cour en dehors du territoire où elle a son siège, l'assentiment du Gouvernement étranger doit être obtenu.

Article 37.

Les parties sont appelées à assister à toutes mesures d'instruction. Elles reçoivent une copie certifiée conforme des procès-verbaux.

Article 38.

Les débats sont dirigés par le Président ou le Vice-Président et, en cas d'absence ou d'empêchement de l'un et de l'autre, par le plus ancien des juges présents.

Le juge nommé par une partie belligérante ne peut siéger comme Président.

Article 39.

Les débats sont publics sauf le droit pour une Puissance en litige de demander qu'il y soit procédé à huis clos.

Ils sont consignés dans des procès-verbaux, que signent le Président et le greffier et qui seuls ont caractère authentique.

Article 40.

En cas de non comparution d'une des parties, bien que régulièrement citée, ou faute par elle d'agir dans les délais fixés par la Cour, il est procédé sans elle et la Cour décide d'après les éléments d'appréciation qu'elle a à sa disposition.

Article 41.

La Cour notifie d'office aux parties toutes décisions ou ordonnances prises en leur absence.

Article 42.

La Cour apprécie librement l'ensemble des actes, preuves et déclarations orales.

Article 43.

Les délibérations de la Cour ont lieu à huis clos et restent secrètes.

Toute décision est prise à la majorité des juges présents. Si la Cour siège en nombre pair et qu'il y ait partage des voix, la voix du dernier des juges dans l'ordre de préséance établi d'après l'article 12 alinéa 1 n'est pas comptée.

Article 44.

L'arrêt de la Cour doit être motivé. Il mentionne les noms des juges qui y ont participé, ainsi que les noms des assesseurs, s'il y a lieu; il est signé par le Président et par le greffier.

Article 45.

L'arrêt est prononcé en séance publique, les parties présentes ou dûment appelées; il est notifié d'office aux parties.

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Cette notification une fois faite, la Cour fait parvenir au tribunal national des prises le dossier de l'affaire en y joignant une expédition des diverses décisions intervenues ainsi qu'une copie des procès-verbaux de l'instruction.

Article 46.

Chaque partie supporte les frais occasionnés par sa propre défense.

La partie qui succombe supporte, en outre, les frais causés par la procédure. Elle doit, de plus, verser un centième de la valeur de l'objet litigieux à titre de contribution aux frais généraux de la Cour internationale. Le montant de ces versements est déterminé par l'arrêt de la Cour.

Si le recours est exercé par un particulier, celui-ci fournit au Bureau international un cautionnement dont le montant est fixé par la Cour et qui est destiné à garantir l'exécution éventuelle des deux obligations mentionnées dans l'alinéa précédent. La Cour peut subordonner l'ouverture de la procédure au versement du cautionnement.

Article 47.

Les frais généraux de la Cour internationale des prises sont supportés par les Puissances contractantes dans la proportion de leur participation au fonctionnement de la Cour telle qu'elle est prévue par l'article 15 et par le tableau y annexé. La désignation des juges suppléants ne donne pas lieu à contribution.

Le Conseil administratif s'adresse aux Puissances pour obtenir les fonds nécessaires au fonctionnement de la Cour.

Article 48.

Quand la Cour n'est pas en session, les fonctions qui lui sont conférées par l'article 32, l'article 34 alinéas 2 et 3, l'article 35 alinéa 1 et l'article 46 alinéa 3, sont exercées par une Délégation de trois juges désignés par la Cour. Cette Délégation décide à la majorité des voix.

Article 49.

La Cour fait elle-même son règlement d'ordre intérieur qui doit être communiqué aux Puissances contractantes.

Dans l'année de la ratification de la présente Convention, elle se réunira pour élaborer ce règlement.

Article 50.

La Cour peut proposer des modifications à apporter aux dispositions de la présente

Convention qui concernent la procédure. Ces propositions sont communiquées, par l'intermédiaire du Gouvernement des Pays-Bas, aux Puissances contractantes qui se concerteront sur la suite à y donner.

TITRE IV.—*Dispositions finales.*

Article 51.

La présente Convention ne s'applique de plein droit que si les Puissances belligérantes sont toutes parties à la Convention.

Il est entendu, en outre, que le recours devant la Cour internationale des prises ne peut être exercé que par une Puissance contractante ou le ressortissant d'une Puissance contractante.

Dans les cas de l'article 5, le recours n'est admis que si le propriétaire et l'ayant-droit sont également des Puissances contractantes ou des ressortissants de Puissances contractantes.

Article 52.

La présente Convention sera ratifiée et les ratifications en seront déposées à La Haye dès que toutes les Puissances désignées à l'article 15 et dans son annexe seront en mesure de le faire.

Le dépôt des ratifications aura lieu en tout cas, le 30 juin 1909, si les Puissances prêtes à ratifier peuvent fournir à la Cour neuf juges et neuf juges suppléants, aptes à siéger effectivement. Dans le cas contraire, le dépôt sera ajourné jusqu'au moment où cette condition sera remplie.

Il sera dressé du dépôt des ratifications un procès-verbal dont une copie, certifiée conforme, sera remise par la voie diplomatique à chacune des Puissances désignées à l'alinéa premier.

Article 53.

Les Puissances désignées à l'article 15 et dans son annexe sont admises à signer la présente Convention jusqu'au dépôt des ratifications prévu par l'alinéa 2 de l'article précédent.

Après ce dépôt, elles seront toujours admises à y adhérer, purement et simplement. La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant, en même temps, l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement. Celui-ci enverra, par la voie diplomatique, une copie certifiée conforme de la notification et de l'acte d'adhésion à toutes les Puissances désignées à l'alinéa précédent, en leur faisant savoir la date où il a reçu la notification.

Article 54.

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La présente Convention entrera en vigueur six mois à partir du dépôt des ratifications prévu par l'article 52 alinéas 1 et 2.

Les adhésions produiront effet soixante jours après que la notification en aura été reçue par le Gouvernement des Pays-Bas et, au plus tôt, à l'expiration du délai prévu par l'alinéa précédent.

Toutefois, la Cour internationale aura qualité pour juger les affaires de prises décidées par la juridiction nationale à partir du dépôt des ratifications ou de la réception de la notification des adhésions. Pour ces décisions, le délai fixé à l'article 28 alinéa 2, ne sera compté que de la date de la mise en vigueur de la Convention pour les Puissances ayant ratifié ou adhéré.

Article 55.

La présente Convention aura une durée de douze ans à partir de sa mise en vigueur, telle qu'elle est déterminée par l'article 54 alinéa 1, même pour les Puissances ayant adhéré postérieurement.

Elle sera renouvelée tacitement de six ans en six ans sauf dénonciation.

La dénonciation devra être, au moins un an avant l'expiration de chacune des périodes prévues par les deux alinéas précédents, notifiée par écrit au Gouvernement des Pays-Bas qui en donnera connaissance à toutes les autres Parties contractantes.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée. La Convention subsistera pour les autres Puissances contractantes, pourvu que leur participation à la désignation des juges soit suffisante pour permettre le fonctionnement de la Cour avec neuf juges et neuf juges suppléants.

Article 56.

Dans le cas où la présente Convention n'est pas en vigueur pour toutes les Puissances désignées dans l'article 15 et le tableau qui s'y rattache, le Conseil administratif dresse, conformément aux dispositions de cet article et de ce tableau, la liste des juges et des juges suppléants pour lesquels les Puissances contractantes participent au fonctionnement de la Cour. Les juges appelés à siéger à tour de rôle seront, pour le temps qui leur est attribué par le tableau susmentionné, répartis entre les différentes années de la période de six ans, de manière que, dans la mesure du possible, la Cour fonctionne chaque année en nombre égal. Si le nombre des juges suppléants dépasse celui des juges, le nombre de ces derniers pourra être complété par des juges suppléants désignés par le sort parmi celles des Puissances qui ne nomment pas de juge titulaire.

La liste ainsi dressée par le Conseil administratif sera notifiée aux Puissances contractantes. Elle sera révisée quand le nombre de celles-ci sera modifié par suite d'adhésions ou de dénonciations.

Le changement à opérer par suite d'une adhésion ne se produira qu'à partir du 1er janvier qui suit la date à laquelle l'adhésion a son effet, à moins que la Puissance adhérente ne soit une Puissance belligérante, cas auquel elle peut demander d'être aussitôt représentée dans la Cour, la disposition de l'article 16 étant du reste applicable, s'il y a lieu.

Quand le nombre total des juges est inférieur à onze, sept juges constituent le quorum nécessaire.

Article 57.

Deux ans avant l'expiration de chaque période visée par les alinéas 1 et 2 de l'article 55, chaque Puissance contractante pourra demander une modification des dispositions de l'article 15 et du tableau y annexé, relativement à sa participation au fonctionnement de la Cour. La demande sera adressée au Conseil administratif qui l'examinera et soumettra à toutes les Puissances des propositions sur la suite à y donner. Les Puissances feront, dans le plus bref délai possible, connaître leur résolution au Conseil administratif. Le résultat sera immédiatement, et au moins un an et trente jours avant l'expiration dudit délai de deux ans, communiqué à la Puissance qui a fait la demande.

Le cas échéant, les modifications adoptées par les Puissances entreront en vigueur dès le commencement de la nouvelle période.

Annexe de l'article 15.

DISTRIBUTION DES JUGES ET JUGES SUPPLÉANTS PAR PAYS POUR CHAQUE ANNÉE DE LA PÉRIODE DE SIX ANS.

JUGES.	**JUGES SUPPLÉANTS.**
Première Année.	
1 Argentine	Paraguay
2 Colombie	Bolivie
3 Espagne	Espagne
4 Grèce	Roumanie
5 Norvège	Suède
6 Pays-Bas	Belgique
7 Turquie	Perse
Deuxième Année.	
1 Argentine	Panama
2 Espagne	Espagne
3 Grèce	Roumanie
4 Norvège	Suède
5 Pays-Bas	Belgique
6 Turquie	Luxembourg
[Pg 629] 7 7 Uruguay	Costa Rica
Troisième Année.	
1 Brésil	Dominicaine
2 Chine	Turquie
3 Espagne	Portugal
4 Pays-Bas	Suisse
5 Roumanie	Grèce
6 Suède	Danemark
7 Vénézuéla	Haïti
Quatrième Année.	
1 Brésil	Guatémala
2 Chine	Turquie
3 Espagne	Portugal
4 Pérou	Honduras
5 Roumanie	Grèce
6 Suède	Danemark
7 Suisse	Pays-Bas
Cinquième Année.	
1 Belgique	Pays-Bas
2 Bulgarie	Monténégro
3 Chili	Nicaragua
4 Danemark	Norvège
5 Mexique	Cuba
6 Perse	Chine
7 Portugal	Espagne
Sixième Année.	
1 Belgique	Pays-Bas
2 Chili	Salvador
3 Danemark	Norvège

4 Mexique	Equateur
5 Portugal	Espagne
6 Serbie	Bulgarie
7 Siam	Chine

CONVENTION XIII.

Convention concerning the Rights and duties of Neutral Powers in Maritime War.

Article premier.

Les belligérants sont tenus de respecter les droits souverains des Puissances neutres et de s'abstenir, dans le territoire ou les eaux neutres, de tous actes qui constitueraient de la part des Puissances qui les toléreraient un manquement à leur neutralité.

Article 2.

Tous actes d'hostilité, y compris la capture et l'exercice du droit de visite, commis par des vaisseaux de guerre belligérants dans les eaux territoriales d'une Puissance neutre, constituent une violation de la neutralité et sont strictement interdits.

Article 3.

Quand un navire a été capturé dans les eaux territoriales d'une Puissance neutre, cette Puissance doit, si la prise est encore dans sa juridiction, user des moyens dont elle dispose pour que la prise soit relâchée avec ses officiers et son équipage, et pour que l'équipage mis à bord par le capteur soit interné.

Si la prise est hors de la juridiction de la Puissance neutre, le Gouvernement capteur, sur la demande de celle-ci, doit relâcher la prise avec ses officiers et son équipage.

Article 4.

Aucun tribunal des prises ne peut être constitué par un belligérant sur un territoire neutre ou sur un navire dans des eaux neutres.

Article 5.

Il est interdit aux belligérants de faire des ports et des eaux neutres la base d'opérations navales contre leurs adversaires, notamment d'y installer des stations radio-télégraphiques ou tout appareil destiné à servir comme moyen de communication avec des forces belligérantes sur terre ou sur mer.

Article 6.

La remise à quelque titre que ce soit, faite directement ou indirectement par une Puissance neutre à une Puissance belligérante, de vaisseaux de guerre, de munitions, ou d'un matériel de guerre quelconque, est interdite.

Article 7.

Une Puissance neutre n'est pas tenue d'empêcher l'exportation ou le transit, pour le compte de l'un ou de l'autre des belligérants, d'armes, de munitions, et, en général, de tout ce qui peut être utile à une armée ou à une flotte.

Article 8.

Un Gouvernement neutre est tenu d'user des moyens dont il dispose pour empêcher dans sa juridiction l'équipement ou l'armement de tout navire, qu'il a des motifs raisonnables de croire destiné à croiser ou à concourir à des opérations hostiles contre une Puissance avec laquelle il est en paix. Il est aussi tenu d'user de la même surveillance pour empêcher le départ hors de sa juridiction de tout navire destiné à croiser ou à concourir à des opérations hostiles, et qui aurait été, dans ladite juridiction, adapté en tout ou en partie à des usages de guerre.

Article 9.

Une Puissance neutre doit appliquer également aux deux belligérants les conditions, restrictions ou interdictions, édictées par elle pour ce qui concerne l'admission dans ses ports, rades ou eaux territoriales, des navires de guerre belligérants ou de leurs prises.

[Pg 630]

Toutefois, une Puissance neutre peut interdire l'accès de ses ports et de ses rades au navire belligérant qui aurait négligé de se conformer aux ordres et prescriptions édictés par elle ou qui aurait violé la neutralité.

Article 10.

La neutralité d'une Puissance n'est pas compromise par le simple passage dans ses eaux territoriales de navires de guerre et des prises des belligérants.

Article 11.

Une Puissance neutre peut laisser les navires de guerre des belligérants se servir de ses pilotes brevetés.

Article 12.

A défaut d'autres dispositions spéciales de la législation de la Puissance neutre, il est interdit aux navires de guerre des belligérants de demeurer dans les ports et rades ou dans les eaux territoriales de ladite Puissance, pendant plus de 24 heures, sauf dans les cas prévus par la présente Convention.

Article 13.

Si une Puissance avisée de l'ouverture des hostilités apprend qu'un navire de guerre d'un belligérant se trouve dans un de ses ports et rades ou dans ses eaux territoriales, elle doit notifier audit navire qu'il devra partir dans les 24 heures ou dans le délai prescrit par la loi locale.

Article 14.

Un navire de guerre belligérant ne peut prolonger son séjour dans un port neutre au delà de la durée légale que pour cause d'avaries ou à raison de l'état de la mer. Il devra partir dès que la cause du retard aura cessé.

Les règles sur la limitation du séjour dans les ports, rades et eaux neutres, ne s'appliquent pas aux navires de guerre exclusivement affectés à une mission religieuse, scientifique ou philanthropique.

Article 15.

A défaut d'autres dispositions spéciales de la législation de la Puissance neutre, le nombre maximum des navires de guerre d'un belligérant qui pourront se trouver en même temps dans un de ses ports ou rades, sera de trois.

Article 16.

Lorsque des navires de guerre des deux parties belligérantes se trouvent simultanément dans un port ou une rade neutres, il doit s'écouler au moins 24 heures entre le départ du navire d'un belligérant et le départ du navire de l'autre.

L'ordre des départs est déterminé par l'ordre des arrivées, à moins que le navire arrivé le premier ne soit dans le cas où la prolongation de la durée légale du séjour est admise.

Un navire de guerre belligérant ne peut quitter un port ou une rade neutres moins de 24 heures après le départ d'un navire de commerce portant le pavillon de son adversaire.

Article 17.

Dans les ports et rades neutres, les navires de guerre belligérants ne peuvent réparer leurs avaries que dans la mesure indispensable à la sécurité de leur navigation et non pas accroître, d'une manière quelconque, leur force militaire. L'autorité neutre constatera la nature des réparations à effectuer qui devront être exécutées le plus rapidement possible.

Article 18.

Les navires de guerre belligérants ne peuvent pas se servir des ports, rades et eaux territoriales neutres, pour renouveler ou augmenter leurs approvisionnements militaires ou leur armement ainsi que pour compléter leurs équipages.

Article 19.

Les navires de guerre belligérants ne peuvent se ravitailler dans les ports et rades neutres que pour compléter leur approvisionnement normal du temps de paix.

Ces navires ne peuvent, de même, prendre du combustible que pour gagner le port le plus proche de leur propre pays. Ils peuvent, d'ailleurs, prendre le combustible nécessaire pour compléter le plein de leurs soutes proprement dites, quand ils se trouvent dans les pays neutres qui ont adopté ce mode de détermination du combustible à fournir.

Si, d'après la loi de la Puissance neutre, les navires ne reçoivent du charbon que 24 heures après leur arrivée, la durée légale de leur séjour est prolongée de 24 heures.

Article 20.

Les navires de guerre belligérants, qui ont pris du combustible dans le port d'une Puissance neutre, ne peuvent renouveler leur approvisionnement qu'après trois mois dans un port de la même Puissance.

Article 21.

[Pg 631]

Une prise ne peut être amenée dans un port neutre que pour cause d'innavigabilité, de mauvais état de la mer, de manque de combustible ou de provisions.

Elle doit repartir aussitôt que la cause qui en a justifié l'entrée a cessé. Si elle ne le fait pas, la Puissance neutre doit lui notifier l'ordre de partir immédiatement; au cas où elle ne s'y conformerait pas, la Puissance neutre doit user des moyens dont elle dispose pour la relâcher avec ses officiers et son équipage et interner l'équipage mis à bord par le capteur.

Article 22.

La Puissance neutre doit, de même, relâcher la prise qui aurait été amenée en dehors des conditions prévues par l'article 21.

Article 23.

Une Puissance neutre peut permettre l'accès de ses ports et rades aux prises escortées ou non, lorsqu'elles y sont amenées pour être laissées sous séquestre en attendant la décision du tribunal des prises. Elle peut faire conduire la prise dans un autre de ses ports.

Si la prise est escortée par un navire de guerre, les officiers et les hommes mis à bord par le capteur sont autorisés à passer sur le navire d'escorte.

Si la prise voyage seule, le personnel placé à son bord par le capteur est laissé en liberté.

Article 24.

Si, malgré la notification de l'autorité neutre, un navire de guerre belligérant ne quitte pas

un port dans lequel il n'a pas le droit de rester, la Puissance neutre a le droit de prendre les mesures qu'elle pourra juger nécessaires pour rendre le navire incapable de prendre la mer pendant la durée de la guerre et le commandant du navire doit faciliter l'exécution de ces mesures.

Lorsqu'un navire belligérant est retenu par une Puissance neutre, les officiers et l'équipage sont également retenus.

Les officiers et l'équipage ainsi retenus peuvent être laissés dans le navire ou logés, soit sur un autre navire, soit à terre, et ils peuvent être assujettis aux mesures restrictives qu'il paraîtrait nécessaire de leur imposer. Toutefois, on devra toujours laisser sur le navire les hommes nécessaires à son entretien.

Les officiers peuvent être laissés libres en prenant l'engagement sur parole de ne pas quitter le territoire neutre sans autorisation.

Article 25.

Une Puissance neutre est tenue d'exercer la surveillance, que comportent les moyens dont elle dispose, pour empêcher dans ses ports ou rades et dans ses eaux toute violation des dispositions qui précèdent.

Article 26.

L'exercice par une Puissance neutre des droits définis par la présente Convention ne peut jamais être considéré comme un acte peu amical par l'un ou par l'autre belligérant qui a accepté les articles qui s'y réfèrent.

Article 27.

Les Puissances contractantes se communiqueront réciproquement, en temps utile, toutes les lois, ordonnances et autres dispositions réglant chez elles le régime des navires de guerre belligérants dans leurs ports et leurs eaux, au moyen d'une notification adressée au Gouvernement des Pays-Bas et transmise immédiatement par celui-ci aux autres Puissances contractantes.

Article 28.

Les dispositions de la présente Convention ne sont applicables qu'entre les Puissances contractantes et seulement si les belligérants sont tous parties à la Convention.

Article 29.

La présente Convention sera ratifiée aussitôt que possible.

Les ratifications seront déposées à La Haye.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les représentants des Puissances qui y prennent part et par le Ministre des Affaires Étrangères des Pays-Bas.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification, sera immédiatement remise par les soins du Gouvernement des Pays-Bas et par la voie diplomatique aux Puissances conviées à la Deuxième Conférence de la Paix, ainsi qu'aux autres Puissances qui auront adhéré à la Convention. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Article 30.

Les Puissances non signataires sont admises à adhérer à la présente Convention.

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La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification.

Article 31.

La présente Convention produira effet pour les Puissances qui auront participé au premier dépôt des ratifications, soixante jours après la date du procès-verbal de ce dépôt et, pour les Puissances qui ratifieront ultérieurement ou qui adhéreront, soixante jours après que la notification de leur ratification ou de leur adhésion aura été reçue par la Gouvernement des Pays-Bas.

Article 32.

S'il arrivait qu'une des Puissances contractantes voulût dénoncer la présente Convention, la dénonciation sera notifiée par écrit au Gouvernement des Pays-Bas qui communiquera immédiatement copie certifiée conforme de la notification à toutes les autres Puissances en leur faisant savoir la date à laquelle il l'a reçue.

La dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée et un an après que la notification en sera parvenue au Gouvernement des Pays-Bas.

Article 33.

Un registre tenu par le Ministère des Affaires Étrangères des Pays-Bas indiquera la date du dépôt de ratifications effectué en vertu de l'article 29 alinéas 3 et 4, ainsi que la date à laquelle auront été reçues les notifications d'adhésion (article 30 alinéa 2) ou de dénonciation (article 32 alinéa 1).

Chaque Puissance contractante est admise à prendre connaissance de ce registre et à en demander des extraits certifiés conformes.

XIV.—DECLARATION

CONCERNING THE PROHIBITION OF THE DISCHARGE OF PROJECTILES AND EXPLOSIVES FROM BALLOONS.

Les soussignés, Plénipotentiaires des Puissances conviées à la Deuxième Conférence Internationale de la Paix à La Haye, dûment autorisés à cet effet par leurs Gouvernements,

s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de St. Pétersbourg du 29 novembre/11 décembre 1868, et désirant renouveler la déclaration de La Haye du 29 juillet 1899, arrivée à expiration,

Déclarent:

Les Puissances contractantes consentent, pour une période allant jusqu'à la fin de la troisième Conférence de la Paix, à l'interdiction de lancer des projectiles et des explosifs du haut de ballons ou par d'autres modes analogues nouveaux.

La présente Déclaration n'est obligatoire que pour les Puissances contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où, dans une guerre entre des Puissances contractantes, une Puissance non contractante se joindrait à l'un des belligérants.

La présente Déclaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt des ratifications un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances contractantes.

Les Puissances non signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

ANNEX TO THE FIRST VŒU OF THE SECOND PEACE CONFERENCE

XV.—DRAFT CONVENTION CONCERNING THE CREATION OF A JUDICIAL ARBITRATION COURT.

TITRE I.—*Organisation de la Cour de justice arbitrale.*

Article premier.

[Pg 633] Dans le but de faire progresser la cause de l'arbitrage, les Puissances contractantes conviennent d'organiser, sans porter atteinte à la Cour permanente d'arbitrage, une Cour de justice arbitrale, d'un accès libre et facile, basée sur l'égalité juridique des États, réunissant des juges représentant les divers systèmes juridiques du monde, et capable d'assurer la continuité de la jurisprudence arbitrale.

Article 2.

La Cour de justice arbitrale se compose de juges et de juges suppléants choisis parmi les personnes jouissant de la plus haute considération morale et qui tous devront remplir les conditions requises, dans leurs pays respectifs, pour l'admission dans la haute magistrature ou être des jurisconsultes d'une compétence notoire en matière de droit international.

Les juges et les juges suppléants de la Cour sont choisis, autant que possible, parmi les membres de la Cour permanente d'arbitrage. Le choix sera fait dans les six mois qui suivront la ratification de la présente Convention.

Article 3.

Les juges et les juges suppléants sont nommés pour une période de douze ans à compter de la date où la nomination aura été notifiée au Conseil administratif institué par la Convention pour le règlement pacifique des conflits internationaux. Leur mandat peut être renouvelé.

En cas de décès ou de démission d'un juge ou d'un juge suppléant, il est pourvu à son remplacement selon le mode fixé pour sa nomination. Dans ce cas, la nomination est faite pour une nouvelle période de douze ans.

Article 4.

Les juges de la Cour de justice arbitrale sont égaux entre eux et prennent rang d'après la date de la notification de leur nomination. La préséance appartient au plus âgé, au cas où la date est la même.

Les juges suppléants sont, dans l'exercice de leurs fonctions, assimilés aux juges titulaires. Toutefois, ils prennent rang après ceux-ci.

Article 5.

Les juges jouissent des privilèges et immunités diplomatiques dans l'exercice de leurs fonctions et en dehors de leurs pays.

Avant de prendre possession de leur siège, les juges et les juges suppléants doivent, devant le Conseil administratif, prêter serment ou faire une affirmation solennelle d'exercer leurs fonctions avec impartialité et en toute conscience.

Article 6.

La Cour désigne annuellement trois juges qui forment une Délégation spéciale et trois autres destinés à les remplacer en cas d'empêchement. Ils peuvent être réélus. L'élection se fait au scrutin de liste. Sont considérés comme élus ceux qui réunissent le plus grand nombre de voix. La Délégation élit elle-même son Président, qui, à défaut d'une majorité, est désigné par le sort.

Un membre de la Délégation ne peut exercer ses fonctions quand la Puissance qui l'a nommé, ou dont il est le national, est une des Parties.

Les membres de la Délégation terminent les affaires qui leur ont été soumises, même au cas où la période pour laquelle ils ont été nommés juges serait expirée.

Article 7.

L'exercice des fonctions judiciaires est interdit au juge dans les affaires au sujet desquelles il aura, à un titre quelconque, concouru à la décision d'un Tribunal national, d'un Tribunal d'arbitrage ou d'une Commission d'enquête, ou figuré dans l'instance comme conseil ou avocat d'une Partie.

Aucun juge ne peut intervenir comme agent ou comme avocat devant la Cour de justice arbitrale ou la Cour permanente d'arbitrage, devant un Tribunal spécial d'arbitrage ou une Commission d'enquête, ni y agir pour une Partie en quelque qualité que ce soit, pendant toute la durée de son mandat.

Article 8.

La Cour élit son Président et son Vice-Président à la majorité absolue des suffrages exprimés. Après deux tours de scrutin, l'élection se fait à la majorité relative et, en cas de partage des voix, le sort décide.

Article 9.

Les juges de la Cour de justice arbitrale reçoivent une indemnité annuelle de six mille florins néerlandais. Cette indemnité est payée à l'expiration de chaque semestre à dater du jour de la première réunion de la Cour.

Pendant l'exercice de leurs fonctions au cours des sessions ou dans les cas spéciaux prévus par la présente Convention, ils touchent une somme de cent florins par jour. Il leur est alloué, en outre, une indemnité de voyage fixée d'après les règlements de leur pays. Les dispositions du présent alinéa s'appliquent aussi aux juges suppléants remplaçant les juges.

[Pg 634] Ces allocations, comprises dans les frais généraux de la Cour, prévus par l'article 33, sont versées par l'entremise du Bureau international institué par la Convention pour le règlement pacifique des conflits internationaux.

Article 10.

Les juges ne peuvent recevoir de leur propre Gouvernement ou de celui d'une autre Puissance aucune rémunération pour des services rentrant dans leurs devoirs comme membres de la Cour.

Article 11.

La Cour de justice arbitrale a son siège à La Haye et ne peut, sauf le cas de force majeure, le transporter ailleurs.

La Délégation peut, avec l'assentiment des Parties, choisir un autre lieu pour ses réunions si des circonstances particulières l'exigent.

Article 12.

Le Conseil administratif remplit à l'égard de la Cour de justice arbitrale les fonctions qu'il remplit à l'égard de la Cour permanente d'arbitrage.

Article 13.

Le Bureau international sert de greffe à la Cour de justice arbitrale et doit mettre ses locaux et son organisation à la disposition de la Cour. Il a la garde des archives et la gestion des affaires administratives.

Le Secrétaire Général du Bureau remplit les fonctions de greffier.

Les secrétaires adjoints au greffier, les traducteurs et les sténographes nécessaires sont désignés et assermentés par la Cour.

Article 14.

La Cour se réunit en session une fois par an. La session commence le troisième mercredi de juin et dure tant que l'ordre du jour n'aura pas été épuisé.

La Cour ne se réunit pas en session, si la Délégation estime que cette réunion n'est pas nécessaire. Toutefois, si une Puissance est partie à un litige actuellement pendant devant la Cour et dont l'instruction est terminée ou va être terminée, elle a le droit d'exiger que la session ait lieu.

En cas de nécessité, la Délégation peut convoquer la Cour en session extraordinaire.

Article 15.

Un compte-rendu des travaux de la Cour sera dressé chaque année par la Délégation. Ce compte-rendu sera transmis aux Puissances contractantes par l'intermédiaire du Bureau international. Il sera communiqué aussi à tous les juges et juges suppléants de la Cour.

Article 16.

Les juges et les juges suppléants, membres de la Cour de justice arbitrale, peuvent aussi être nommés aux fonctions de juge et de juge suppléant dans la Cour internationale des prises.

Titre II.—*Compétence et procédure.*

Article 17.

La Cour de justice arbitrale est compétente pour tous les cas qui sont portés devant elle, en vertu d'une stipulation générale d'arbitrage ou d'un accord spécial.

Article 18.

La Délégation est compétente:

1. pour juger les cas d'arbitrage visés à l'article précédent, si les Parties sont d'accord pour réclamer l'application de la procédure sommaire, réglée au Titre IV Chapitre 4 de la Convention pour le règlement pacifique des conflits internationaux;

2. pour procéder à une enquête en vertu et en conformité du Titre III de ladite Convention en tant que la Délégation en est chargée par les Parties agissant d'un commun accord. Avec l'assentiment des Parties et par dérogation à l'article 7 alinéa 1, les membres de la Délégation ayant pris part à l'enquête peuvent siéger comme juges, si le litige est soumis à l'arbitrage de la Cour ou de la Délégation elle-même.

Article 19.

La Délégation est, en outre, compétente pour l'établissement du compromis visé par l'article 52 de la Convention pour le règlement pacifique des conflits internationaux, si les Parties sont d'accord pour s'en remettre à la Cour.

Elle est également compétente, même si la demande est faite seulement par l'une des Parties, après qu'un accord par la voie diplomatique a été vainement essayé, quand il s'agit:

1º. d'un différend rentrant dans un traité d'arbitrage général conclu ou renouvelé après la mise en vigueur de cette Convention et qui prévoit pour chaque différend un compromis, et n'exclut pour l'établissement de ce dernier ni explicitement ni implicitement la compétence de la Délégation. Toutefois, le recours à la Cour n'a pas lieu si l'autre Partie déclare qu'à son avis le différend n'appartient pas à la catégorie [Pg 635] des questions à soumettre à un arbitrage obligatoire, à moins que le traité d'arbitrage ne confère au tribunal arbitral le pouvoir de décider cette question préalable.

2º. d'un différend provenant de dettes contractuelles réclamées à une Puissance par une autre Puissance comme dues à ses nationaux, et pour la solution duquel l'offre d'arbitrage a été acceptée. Cette disposition n'est pas applicable si l'acceptation a été subordonnée à la condition que le compromis soit établi selon un autre mode.

Article 20.

Chacune des Parties a le droit de désigner un juge de la Cour pour prendre part, avec voix délibérative, à l'examen de l'affaire soumise à la Délégation.

Si la Délégation fonctionne en qualité de Commission d'enquête, ce mandat peut être confié à des personnes prises en dehors des juges de la Cour. Les frais de déplacement et la rétribution à allouer auxdites personnes sont fixés et supportés par les Puissances qui les ont nommées.

Article 21.

L'accès de la Cour de justice arbitrale, instituée par la présente Convention, n'est ouvert qu'aux Puissances contractantes.

Article 22.

La Cour de justice arbitrale suit les règles de procédure édictées par la Convention pour le règlement pacifique des conflits internationaux, sauf ce qui est prescrit par la présente Convention.

Article 23.

La Cour décide du choix de la langue dont elle fera usage, et des langues dont l'emploi sera autorisé devant elle.

Article 24.

Le Bureau international sert d'intermédiaire pour toutes les communications à faire aux juges au cours de l'instruction prévue à l'article 63 alinéa 2 de la Convention pour le règlement pacifique des conflits internationaux.

Article 25.

Pour toutes les notifications à faire, notamment aux Parties, aux témoins et aux experts, la Cour peut s'adresser directement au Gouvernement de la Puissance sur le territoire de laquelle la notification doit être effectuée. Il en est de même s'il s'agit de faire procéder à l'établissement de tout moyen de preuve.

Les requêtes adressées à cet effet ne peuvent être refusées que si la Puissance requise le juge de nature à porter atteinte à sa souveraineté ou à sa sécurité. S'il est donné suite à la requête, les frais ne comprennent que les dépenses d'exécution réellement effectuées.

La Cour a également la faculté de recourir à l'intermédiaire de la Puissance sur la territoire de laquelle elle a son siège.

Les notifications à faire aux Parties dans le lieu où siège la Cour peuvent être exécutées par le Bureau international.

Article 26.

Les débats sont dirigés par le Président ou le Vice-Président et, en cas d'absence ou d'empêchement de l'un et de l'autre, par le plus ancien des juges présents.

Le juge nommé par une des Parties ne peut siéger comme Président.

Article 27.

Les délibérations de la Cour ont lieu à huis clos et restent secrètes.

Toute décision est prise à la majorité des juges présents. Si la Cour siège en nombre pair et qu'il y ait partage des voix, la voix du dernier des juges, dans l'ordre de préséance établi d'après l'article 4 alinéa 1, ne sera pas comptée.

Article 28.

Les arrêts de la Cour doivent être motivés. Ils mentionnent les noms des juges qui y ont participé; ils sont signés par le Président et par le greffier.

Article 29.

Chaque Partie supporte ses propres frais et une part égale des frais spéciaux de l'instance.

Article 30.

Les dispositions des articles 21 à 29 sont appliquées par analogie dans la procédure devant la Délégation.

Lorsque le droit d'adjoindre un membre à la Délégation n'a été exercé que par une seule Partie, la voix du membre adjoint n'est pas comptée, s'il y a partage de voix.

Article 31.

[Pg 636] Les frais généraux de la Cour sont supportés par les Puissances contractantes.

Le Conseil administratif s'adresse aux Puissances pour obtenir les fonds nécessaires au fonctionnement de la Cour.

Article 32.

La Cour fait elle-même son règlement d'ordre intérieur qui doit être communiqué aux Puissances contractantes.

Après la ratification de la présente Convention, la Cour se réunira aussitôt que possible, pour élaborer ce règlement, pour élire le Président et le Vice-Président ainsi que pour désigner les membres de la Délégation.

Article 33.

La Cour peut proposer des modifications à apporter aux dispositions de la présente Convention qui concernent la procédure. Ces propositions sont communiquées par l'intermédiaire du Gouvernement des Pays-Bas aux Puissances contractantes qui se concerteront sur la suite à y donner.

TITRE III.—*Dispositions finales.*

Article 34.

La présente Convention sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances signataires.

Article 35.

La Convention entrera en vigueur six mois après sa ratification.

Elle aura une durée de douze ans, et sera renouvelée tacitement de douze ans en douze ans, sauf dénonciation.

La dénonciation devra être notifiée, au moins deux ans avant l'expiration de chaque période, au Gouvernement des Pays-Bas qui en donnera connaissance aux autres Puissances.

La dénonciation ne produira effet qu'à l'égard de la Puissance qui l'aura notifiée. La [Pg 637] Convention restera exécutoire dans les rapports entre les autres Puissances.

APPENDIX VII

DECLARATION OF LONDON OF 1909
(Not yet ratified)

With the Report of the Drafting Committee on each Article

[945]

[945] The several articles of the Declaration of London are printed in italics, whereas the Report of the Drafting Committee on each article is printed in roman type.

Disposition Préliminaire.

Les Puissances Signataires sont d'accord pour constater que les règles contenues dans les Chapitres suivants répondent, en substance, aux principes généralement reconnus du droit international.

Cette disposition domine toutes les règles qui suivent. L'esprit en a été indiqué dans les considérations générales placées en tête de ce Rapport. La Conférence a eu surtout en vue de constater, de préciser, de compléter au besoin, ce qui pouvait être considéré comme un droit coutumier.

CHAPITRE PREMIER.—*Du blocus en temps de guerre.*

Le blocus est envisagé ici uniquement comme opération de guerre, et l'on n'a entendu en rien toucher à ce qu'on appelle le *blocus pacifique*.

Article 1.

Le blocus doit être limité aux ports et aux côtes de l'ennemi ou occupés par lui.

Le blocus, opération de guerre, ne peut être dirigé par un belligérant que contre son adversaire. C'est la règle très simple qui est posée tout d'abord. Elle n'a toute sa portée que si on la rapproche de l'article 18.

Article 2.

Conformément à la Déclaration de Paris de 1856, le blocus, pour être obligatoire, doit être effectif, c'est-à-dire maintenu par une force suffisante pour interdire réellement l'accès du littoral ennemi.

La première condition pour qu'un blocus soit obligatoire est qu'il soit effectif. Il y a longtemps que tout le monde est d'accord à ce sujet. Quant à la définition du blocus effectif, nous avons pensé que nous n'avions qu'à nous approprier celle qui se trouve dans la Déclaration de Paris du 16 avril 1856, qui lie conventionnellement un grand nombre d'États et qui est acceptée de fait par les autres.

Article 3.

La question de savoir si le blocus est effectif est une question de fait.

On comprend que souvent des difficultés s'élèvent sur le point de savoir si un blocus est ou non effectif; il y a en jeu des intérêts opposés. Le belligérant bloquant veut limiter son effort, et les neutres désirent que leur commerce soit le moins gêné possible. Des protestations diplomatiques ont été parfois formulées à ce sujet. L'appréciation peut être délicate, parce qu'il n'y a pas de règle absolue à poser sur le nombre et la situation des navires de blocus. Tout dépend des circonstances de fait, des conditions géographiques. Suivant les cas, un navire suffira pour bloquer un port aussi efficacement que possible, alors qu'une flotte pourra être insuffisante pour empêcher réellement l'accès d'un ou de plusieurs ports déclarés bloqués. C'est donc essentiellement une *question de fait*, à trancher dans chaque espèce, et non d'après une formule arrêtée à l'avance. Qui la tranchera? L'autorité judiciaire. Ce sera d'abord le tribunal national appelé à statuer sur la validité de la prise, et auquel le navire capturé pour violation de blocus pourra demander de déclarer la nullité de la prise, parce que le blocus, n'ayant pas été effectif, n'était pas obligatoire. Ce recours a toujours existé; il pouvait ne pas donner une satisfaction suffisante aux Puissances intéressées, parce qu'elles pouvaient estimer que le tribunal national était assez naturellement porté à considérer comme effectif le blocus déclaré tel par son Gouvernement. Mais, quand la Convention sur la Cour Internationale des Prises entrera en [Pg 638] vigueur, il y aura une juridiction absolument impartiale à laquelle les neutres pourront s'adresser et qui décidera si, dans tel cas, le blocus était effectif ou non. La possibilité de ce recours, outre qu'elle permettra de réparer certaines injustices, aura vraisemblablement un effet préventif, en ce qu'un Gouvernement se préoccupera d'établir ses blocus de telle façon que l'effet ne puisse pas en être annulé par des décisions qui lui causeraient un grand préjudice. L'article 3 a donc toute sa portée, si on l'entend en ce sens que la question prévue doit être tranchée judiciairement. C'est pour écarter toute équivoque que l'explication précédente est insérée dans le Rapport à la demande de la Commission.

Article 4.

Le blocus n'est pas considéré comme levé si, par suite du mauvais temps, les forces bloquantes se sont momentanément éloignées.

Il ne suffit pas que le blocus soit établi; il faut qu'il soit maintenu. S'il vient à être levé, il pourra être repris, mais alors il exigera les mêmes formalités que s'il était établi pour la première fois. Traditionnellement, on ne considère pas le blocus comme levé, lorsque c'est par suite du mauvais temps que les forces bloquantes se sont momentanément éloignées. C'est ce que dit l'article 4. Il doit être tenu pour limitatif en ce sens que le mauvais temps est le seul cas de force majeure qui puisse être allégué. Si les forces bloquantes s'éloignaient pour toute autre cause, le blocus serait considéré comme levé, et, au cas où il viendrait à être repris, les articles 12 *in fine* et 13 seraient

applicables.

Article 5.

Le blocus doit être impartialement appliqué aux divers pavillons.

Le blocus, opération de guerre légitime, doit être respecté par les neutres en tant qu'il reste vraiment une opération de guerre ayant pour but d'interrompre toutes les relations commerciales du port bloqué. Ce ne peut être un moyen pour un belligérant de favoriser certains pavillons en les laissant passer. C'est ce qu'indique l'article 5.

Article 6.

Le commandant de la force bloquante peut accorder à des navires de guerre la permission d'entrer dans le port bloqué et d'en sortir ultérieurement.

L'interdiction qui s'applique à tous les navires de commerce, s'applique-t-elle aussi aux navires de guerre? Il n'y a pas de réponse absolue à faire. Le commandant des forces de blocus peut estimer qu'il a avantage à intercepter toute communication de la place bloquée, et refuser l'accès aux navires de guerre neutres; rien ne lui est imposé. S'il accorde l'entrée, c'est affaire de courtoisie. Si on a consacré une règle pour dire simplement cela, c'est pour qu'on ne puisse pas prétendre que le blocus a cessé d'être effectif par suite de la permission accordée à tels et tels navires de guerre neutres.

Le commandant du blocus doit agir impartialement, comme il est dit dans l'article 5. Toutefois, par cela seul qu'il a laissé entrer un navire de guerre, il ne peut être obligé de laisser passer tous les navires de guerre neutres qui se présenteront. C'est une question d'appréciation. La présence d'un navire de guerre neutre dans un port bloqué peut ne pas avoir les mêmes conséquences à toutes les phases du blocus, et le commandant doit être laissé maître de juger s'il peut être courtois sans rien sacrifier de ses intérêts militaires.

Article 7.

Un navire neutre, en cas de détresse constatée par une autorité des forces bloquantes, peut pénétrer dans la localité bloquée et en sortir ultérieurement à la condition de n'y avoir laissé ni pris aucun chargement.

La détresse peut expliquer l'entrée d'un navire neutre dans la localité bloquée. C'est, par exemple, un navire qui manque de vivres ou d'eau, qui a besoin d'une réparation immédiate. Sa détresse une fois constatée par une autorité de la force bloquante, il *peut* franchir la ligne de blocus; ce n'est pas une faveur qu'il ait à solliciter de l'humanité ou de la courtoisie de l'autorité bloquante. Celle-ci peut contester l'état de détresse, mais, l'état une fois vérifié, la conséquence suit d'elle-même. Le navire qui aura ainsi pénétré dans le port bloqué ne sera pas obligé d'y rester tout le temps que durera le blocus; il pourra en sortir quand il sera en état de le faire, quand il se sera procuré les vivres ou l'eau qui lui sont nécessaires, quand il aura été réparé. Mais la permission qui lui a été accordée n'a pu servir de prétexte à des opérations commerciales; c'est pour cela qu'on exige qu'il n'ait laissé ou pris aucun chargement.

Il va sans dire que l'escadre de blocus, qui voudrait absolument empêcher de passer, pourrait le faire, si elle mettait à la disposition du navire en détresse les secours dont il a besoin.

Article 8.

Le blocus, pour être obligatoire, doit être déclaré conformément à l'article 9 et notifié conformément aux articles 11 et 16.

[Pg 639]

Indépendamment de la condition d'effectivité formulée par la Déclaration de Paris, un blocus, pour être obligatoire, doit être *déclaré* et *notifié*. L'article 8 se borne à poser le principe qui est appliqué par les articles suivants.

Il suffit, pour éviter toute équivoque, d'indiquer nettement le sens des deux expressions qui vont être fréquemment employées. La *déclaration de blocus* est l'acte de l'autorité compétente (Gouvernement ou chef d'escadre), constatant qu'un blocus est établi ou va l'être dans des conditions qui doivent être précisées (article 9). La *notification* est le fait de porter à la connaissance des Puissances neutres ou de certaines autorités la déclaration de blocus (article 11).

Le plus souvent, ces deux choses—la déclaration et la notification—auront lieu préalablement à l'application des règles du blocus, c'est-à-dire, à l'interdiction réelle du passage. Toutefois, comme on le verra plus loin, il est parfois possible que le passage soit interdit à raison du fait même du blocus qui est porté à la connaissance d'un navire approchant d'un port bloqué, au moyen d'une *notification* qui est *spéciale*, tandis que la notification qui vient d'être définie, et dont il est parlé à l'article 11, a un caractère général.

Article 9.

La déclaration de blocus est faite, soit par la Puissance bloquante, soit par les autorités navales agissant en son nom.

Elle précise:

1° *La date du commencement du blocus;*

2° *Les limites géographiques du littoral bloqué;*

3° *Le délai de sortie à accorder aux navires neutres.*

La déclaration de blocus émane le plus souvent du Gouvernement belligérant lui-même. Le

Gouvernement peut avoir laissé au commandant de ses forces navales la faculté de déclarer lui-même un blocus selon les circonstances. Cette latitude aura peut-être lieu de s'appliquer moins souvent qu'autrefois à raison de la facilité et de la rapidité des communications. Cela importe peu: il y a là une question d'ordre intérieur.

La déclaration de blocus doit préciser certains points que les neutres ont intérêt à connaître pour se rendre compte de l'étendue de leurs obligations. Il faut que l'on sache exactement quand commence l'interdiction de communiquer avec la localité bloquée. Il importe, pour l'obligation du bloquant comme pour l'obligation des neutres, qu'il n'y ait pas d'incertitude sur les points réellement bloqués. Enfin, depuis longtemps, s'est établi l'usage de laisser sortir les navires neutres qui sont dans le port bloqué. On confirme ici cet usage en ce sens que le bloquant *doit accorder* un délai de sortie; on ne fixe pas la durée de ce délai, parce que cette durée est évidemment subordonnée aux circonstances très variables. Il a été seulement entendu qu'il y aurait un délai *raisonnable*.

Article 10.

Si la Puissance bloquante ou les autorités navales agissant en son nom ne se conforment pas aux mentions qu'en exécution de l'article 9—1º et 2º, elles ont dû inscrire dans la déclaration de blocus, cette déclaration est nulle, et une nouvelle déclaration est nécessaire pour que le blocus produise ses effets.

Cet article a pour but d'assurer l'observation de l'article 9. La déclaration de blocus contient des mentions qui ne correspondent pas à la réalité des faits; elle indique que le blocus a commencé ou commencera tel jour, et, en fait, il n'a commencé que plusieurs jours après. Les limites géographiques sont exactement tracées; elles sont plus étendues que celles dans lesquelles opèrent les forces de blocus. Quelle sera la sanction? La nullité de la déclaration de blocus, ce qui fait que cette déclaration ne produira aucun effet. Si, donc, en pareil cas, un navire neutre est saisi pour violation de blocus, il pourra opposer la nullité de la saisie en se fondant sur la nullité de la déclaration de blocus; si son moyen est repoussé par le tribunal national, il pourra se pourvoir devant la Cour Internationale.

Il faut remarquer la portée de la disposition pour qu'il n'y ait pas de surprise. La déclaration porte que le blocus commence le 1er février; en fait, il n'a commencé que le 8. Il va sans dire que la déclaration n'a produit aucun effet du 1er au 8, puisqu'à ce moment-là, il n'y avait pas de blocus du tout; la déclaration constate un fait, mais n'en tient pas lieu. La règle va plus loin: la déclaration ne produira pas même effet à partir du 8; elle est nulle définitivement, et il faut en faire une autre.

Il n'est pas parlé ici du cas où l'article 9 aurait été méconnu, en ce qu'aucun délai de sortie n'aurait été accordé aux navires neutres se trouvant dans le port bloqué. La sanction ne saurait être la même. Il n'y a pas de raison d'annuler la déclaration en ce qui touche les bâtiments neutres voulant pénétrer dans le porte bloqué. Il faut une sanction spéciale, qui est indiquée dans l'article 16, alinéa 2.

Article 11.

La déclaration de blocus est notifiée:

[Pg 640]

1º *Aux Puissances neutres, par la Puissance bloquante, au moyen d'une communication adressée aux Gouvernements eux-mêmes ou à leurs représentants accrédités auprès d'elle;*

2º *Aux autorités locales, par le commandant de la force bloquante. Ces autorités, de leur côté, en informeront, aussitôt que possible, les consuls étrangers qui exercent leurs fonctions dans le port ou sur le littoral bloqués.*

La déclaration de blocus ne vaut que si elle est notifiée. On ne peut exiger l'observation d'une règle que de ceux qui ont été en mesure de la connaître.

Il y a deux notifications à faire:

1. La première est adressée aux Puissances neutres par la Puissance belligérante, qui la communique aux Gouvernements eux-mêmes ou à leurs représentants accrédités auprès d'elle. La communication aux Gouvernements se fera le plus souvent au moyen des agents diplomatiques: il pourrait arriver qu'un belligérant ne fût pas en rapports diplomatiques avec un pays neutre; il s'adressera directement au Gouvernement de ce pays, ordinairement par la voie télégraphique. C'est aux Gouvernements neutres avisés de la déclaration de blocus à prendre les mesures nécessaires pour en faire parvenir la nouvelle sur les divers points de leur territoire, spécialement dans leurs ports.

2. La seconde notification est faite par le commandant de la force bloquante aux autorités locales. Celles-ci doivent informer, aussitôt que possible, les consuls étrangers qui résident dans la place ou sur le littoral bloqués. Ces autorités engageraient leur responsabilité en ne s'acquittant pas de cette obligation. Les neutres pourraient éprouver un préjudice du fait de n'avoir pas été prévenus du blocus en temps utile.

Article 12.

Les règles relatives à la déclaration et à la notification de blocus sont applicables dans le cas où le blocus serait étendu ou viendrait à être repris après avoir été levé.

Un blocus est étendu au-delà de ses limites primitives; c'est, pour la partie nouvelle, un blocus

nouveau et, par suite, les règles de la déclaration et de la notification doivent s'y appliquer. Il en est de même dans le cas où, après avoir été levé, un blocus est repris; il n'y a pas à tenir compte du fait qu'un blocus a déjà existé pour la même localité.

Article 13.

La levée volontaire du blocus, ainsi que toute restriction qui y serait apportée, doit être notifiée dans la forme prescrite par l'article 11.

S'il est indispensable de connaître l'établissement d'un blocus, il serait utile que le public fût renseigné sur la levée du blocus, puisqu'elle fait cesser l'entrave apportée aux relations des neutres avec le port bloqué. Aussi a-t-on jugé à propos de demander à la Puissance qui lève un blocus de le faire savoir dans la forme où elle a notifié l'établissement du blocus (article 11). Seulement, il y a lieu de remarquer que la sanction ne saurait être la même dans les deux cas. Pour la notification de la déclaration de blocus, il y a une sanction directe, adéquate: le blocus non notifié n'est pas obligatoire. Pour la levée, il ne saurait y avoir rien d'analogue. Le public profitera, en fait, de cette levée, quand même on ne la lui aurait pas fait connaître officiellement. La Puissance bloquante qui n'aurait pas notifié la levée s'exposerait à des réclamations diplomatiques motivées par l'inaccomplissement d'un devoir international. Cet inaccomplissement aura des conséquences plus ou moins graves suivant les circonstances. Parfois, la levée du blocus aura été, en fait, immédiatement connue, et la notification officielle n'ajouterait rien à cette publicité effective.

Il va sans dire qu'il ne s'agit que de la levée *volontaire* du blocus; si le bloquant a été chassé par l'arrivée de forces ennemies, il ne peut être tenu de faire connaître sa défaite, que son adversaire se chargera d'annoncer sans retard. Au lieu de lever un blocus, un belligérant peut se contenter de le restreindre; il ne bloque plus qu'un port au lieu de deux. Pour le port qui cesse d'être compris dans le blocus, c'est comme s'il y avait levée volontaire; en conséquence, la même règle s'applique.

Article 14.

La saisissabilité d'un navire neutre pour violation de blocus est subordonnée à la connaissance réelle ou présumée du blocus.

Pour qu'un navire soit saisissable pour violation de blocus, la première condition est qu'il ait eu connaissance du blocus, parce qu'il n'est pas juste de punir quelqu'un pour inobservation d'une règle qu'il aurait ignorée. Toutefois, il est des circonstances où, même en l'absence d'une connaissance réelle prouvée, on peut présumer cette connaissance, sauf à réserver à l'intéressé la faculté de démentir la présomption (article 15).

Article 15.

La connaissance du blocus est, sauf preuve contraire, présumée, lorsque le navire a quitté un port neutre postérieurement à la notification, en temps utile, du blocus à la Puissance dont relève ce port.

[Pg 641]

Un navire a quitté un port neutre postérieurement à la notification du blocus faite à la Puissance dont relève le port. Cette notification avait-elle été faite en temps utile, c'est-à-dire de manière à parvenir dans le port même où elle a dû être divulguée par les autorités du port? C'est une question de fait à examiner. Si elle est résolue affirmativement, il est naturel de supposer que le navire avait eu, lors de son départ, connaissance du blocus. Cette présomption n'est pourtant pas absolue et la preuve contraire est réservée. Ce sera au navire inculpé à la fournir, en justifiant de l'existence de circonstances qui expliquent son ignorance.

Article 16.

Si le navire qui approche du port bloqué n'a pas connu ou ne peut être présumé avoir connu l'existence du blocus, la notification doit être faite au navire même par un officier de l'un des bâtiments de la force bloquante. Cette notification doit être portée sur le livre de bord avec indication de la date et de l'heure, ainsi que de la position géographique du navire à ce moment.

Le navire neutre qui sort du port bloqué, alors que, par la négligence du commandant de la force bloquante, aucune déclaration de blocus n'a été notifiée aux autorités locales ou qu'un délai n'a pas été indiqué dans la déclaration notifiée, doit être laissé libre de passer.

On suppose un navire approchant du port bloqué sans qu'on puisse dire qu'il connaît ou qu'il est présumé connaître l'existence du blocus; il n'a été touché par aucune notification dans le sens de l'article 11. Dans ce cas, une notification spéciale est nécessaire pour faire connaître régulièrement le fait du blocus au navire. Cette notification est faite au navire même par un officier de l'un des bâtiments de la force bloquante et portée sur le livre de bord; elle peut être faite aux navires d'une flotte convoyée par un vaisseau de guerre neutre, grâce à l'intermédiaire du commandant du convoi qui en donne reçu et qui prend les mesures nécessaires pour l'inscription de la notification sur le livre de bord de chaque navire. Elle mentionne les circonstances de temps et de lieu dans lesquelles elle est faite, ainsi que les lieux bloqués. Le navire est empêché de passer, ce qui fait que le blocus est *obligatoire* pour lui, bien que n'ayant pas été *préalablement* notifié; c'est pour cela que cet adverbe a été omis dans l'article 8. Il n'est pas admissible qu'un navire de commerce ait la prétention de ne pas tenir compte d'un blocus réel et de forcer le blocus, par cette seule raison qu'il n'en avait pas personnellement connaissance. Seulement, s'il peut être empêché de passer il ne peut être saisi que lorsqu'il essaie de forcer le blocus après avoir reçu la notification. Comme on le voit, cette notification spéciale joue un rôle très restreint, et ne doit pas être confondue avec la notification spéciale exigée d'une manière absolue dans la pratique de certaines marines.

Ce qui vient d'être dit se réfère au navire venant du large. Il faut aussi s'occuper du navire

sortant du port bloqué. Si une notification régulière du blocus a été faite aux autorités locales (article 11—2°), la situation est simple: le navire connaît, ou est présumé connaître, le blocus, et s'expose donc à la saisie dans le cas où il n'a pas observé le délai donné par le bloquant. Mais il peut arriver qu'aucune déclaration de blocus n'ait été notifiée aux autorités locales ou que cette déclaration ait été muette au sujet du délai de sortie, malgré la prescription de l'article 9—3°. La sanction de la faute du bloquant est que le navire doit être laissé libre de passer. C'est une sanction énergique qui correspond exactement à la nature de la faute commise, et sera le meilleur moyen d'empêcher de la commettre.

Il va sans dire que cette disposition ne concerne que les navires auxquels le délai de sortie avait dû profiter—c'est-à-dire, les navires neutres qui étaient dans le port au moment de l'établissement du blocus; elle est absolument étrangère aux navires qui seraient dans le port après avoir forcé le blocus.

Le commandant de l'escadre de blocus est toujours à même de réparer son omission ou son erreur, de faire une notification du blocus aux autorités locales ou de compléter celle qu'il aurait déjà faite.

Comme on le voit par ces explications, on suppose le cas le plus ordinaire, celui où l'absence de notification implique une négligence du commandant des forces de blocus. La situation se trouve évidemment tout à fait changée, si le commandant a fait tout ce qui dépendait de lui pour faire la notification et s'il en a été empêché par le mauvais vouloir des autorités locales qui ont intercepté toute communication avec le dehors. Dans ce cas, il ne peut être forcé de laisser passer les navires qui veulent sortir et qui, en l'absence de la notification exigée et de la connaissance présumée du blocus, sont dans une situation analogue à celle qui est prévue par l'article 16, alinéa 1er.

Article 17.

La saisie des navires neutres pour violation de blocus ne peut être effectuée que dans le rayon [Pg 642] *d'action des bâtiments de guerre chargés d'assurer l'effectivité du blocus.*

L'autre condition de la saisissabilité du navire est que celui-ci se trouve dans le rayon d'action des bâtiments de guerre chargés d'assurer l'effectivité du blocus: il ne suffit pas qu'il soit en route pour le port bloqué.

Quant à ce qui constitue le *rayon d'action*, il a été fourni une explication qui a été universellement acceptée, et qui est reproduite ici comme le meilleur commentaire de la règle de l'article 17:

> "Lorsqu'un Gouvernement décide d'entreprendre une opération de blocus contre une partie quelconque de côte ennemie, il désigne un certain nombre de navires de guerre qui devront participer au blocus, et il en confie le commandement à un officier qui aura pour mission d'assurer par leur moyen l'effectivité du blocus. Le commandant de la force navale ainsi constituée repartit les navires mis à sa disposition suivant la configuration de la côte et la situation géographique des points bloqués, et donne à chacun d'eux des instructions sur le rôle qu'il aura à remplir, et en particulier sur la zone confiée à sa surveillance. C'est l'ensemble de ces zones de surveillance, organisées de telle manière que le blocus soit effectif, qui forme le rayon d'action de la force navale bloquante.

"Le rayon d'action ainsi compris est étroitement lié à l'effectivité du blocus et aussi au nombre des bâtiments qui y sont affectés.

"Il peut se présenter des cas où un seul navire suffira pour maintenir un blocus effectif—par exemple, à l'entrée d'un port ou à l'embouchure d'un fleuve dont l'estuaire est peu étendu—à la condition que les circonstances permettent au bloqueur de se tenir suffisamment rapproché de l'entrée. Dans ce cas, le rayon d'action est lui-même rapproché de la côte. Mais, si les circonstances le forcent, au contraire, à se tenir éloigné, il pourra se faire que le navire soit insuffisant pour assurer l'effectivité, et il deviendra alors nécessaire de lui adjoindre d'autres navires pour la maintenir. De ce fait le rayon d'action devient plus étendu et plus éloigné de la côte. Il pourra donc varier suivant les circonstances et suivant le nombre des navires bloqueurs, mais sera toujours limité par la condition que l'effectivité soit assurée.

"Il ne semble pas possible d'assigner au rayon d'action des limites en chiffres fixes et invariables, pas plus qu'il n'est possible de fixer à l'avance et invariablement le nombre des bâtiments nécessaires pour assurer l'effectivité de tout blocus. Ces éléments doivent être déterminés, suivant les circonstances, pour chaque cas particulier de blocus; peut-être pourrait-on le faire au moment de la déclaration.

"Il est évident qu'un blocus ne sera pas établi de la même façon pour une côte sans défense et pour une côte possédant tous les moyens modernes de défense. Il ne saurait être question dans ce dernier cas d'appliquer une règle telle que celle qui exigeait autrefois des vaisseaux arrêtés et suffisamment proches des points bloqués; la situation serait trop dangereuse pour les navires de la force bloquante qui, par ailleurs, possèdent aujourd'hui des moyens plus puissants leur permettant de surveiller d'une façon effective une zone beaucoup plus étendue que jadis.

"Le rayon d'action d'une force navale bloquante pourra s'étendre assez loin, mais, comme il dépend du nombre des bâtiments concourant à l'effectivité du blocus, et comme il reste toujours limité par la condition d'effectivité, il n'atteindra jamais des mers éloignées sur lesquelles naviguent des navires de commerce, peut-être destinés aux ports bloqués, mais dont la destination est subordonnée aux modifications que les circonstances sont susceptibles d'apporter au blocus au cours du voyage. En résumé, l'idée de rayon d'action liée à celle d'effectivité telle

que nous avons essayé de la définir, c'est-à-dire, comprenant la zone d'opérations des forces bloquantes, permet au belligérant d'exercer d'une manière efficace le droit de blocus qui lui est reconnu, et, d'un autre côté, elle évite aux neutres d'être exposés à grande distance aux inconvénients du blocus, tout en leur laissant courir les dangers auxquels ils s'exposent sciemment en s'approchant des points dont l'accès est interdit par le belligérant."

Article 18.

Les forces bloquantes ne doivent pas barrer l'accès aux ports et aux côtes neutres.

Cette règle a été jugée nécessaire pour mieux sauvegarder les intérêts commerciaux des pays neutres; elle complète l'article 1er, d'après lequel un blocus doit être limité aux ports et côtes de l'ennemi, ce qui implique que, puisque c'est une opération de guerre, il ne saurait être dirigé contre un port neutre, malgré l'intérêt que pourrait y avoir un belligérant à raison du rôle de ce
[Pg 643] port neutre pour le ravitaillement de son adversaire.

Article 19.

La violation du blocus est insuffisamment caractérisée pour autoriser la saisie du navire, lorsque celui-ci est actuellement dirigé vers un port non bloqué, quelle que soit la destination ultérieure du navire ou de son chargement.

C'est la destination réelle du navire qui doit être envisagée, quand il s'agit de violation de blocus, et non la destination ultérieure de la cargaison. Cette destination prouvée ou présumée ne peut donc suffire à autoriser la saisie, pour violation de blocus, d'un navire actuellement destiné à un port non bloqué. Mais le croiseur pourrait toujours établir que cette destination à un port non bloqué est apparente et qu'en réalité, la destination immédiate du navire est bien le port bloqué.

Article 20.

Le navire qui, en violation du blocus, est sorti du port bloqué ou a tenté d'y entrer, reste saisissable tant qu'il est poursuivi par un bâtiment de la force bloquante. Si la chasse en est abandonnée ou si le blocus est levé, la saisie n'en peut plus être pratiquée.

Un navire est sorti du port bloqué ou a tenté d'y entrer. Sera-t-il indéfiniment saisissable? L'affirmative absolue serait excessive. Ce navire doit rester saisissable tant qu'il est poursuivi par un bâtiment de la force bloquante; il ne suffirait pas qu'il fût rencontré par un croiseur de l'ennemi bloquant qui ne ferait pas partie de l'escadre de blocus. La question de savoir si la chasse est ou non abandonnée est une question de fait; il ne suffit pas que le navire se soit réfugié dans un port neutre. Le navire qui le poursuit peut attendre sa sortie, de telle sorte que la chasse est forcément suspendue, mais non abandonnée. La saisie n'est plus possible quand le blocus a été levé.

Article 21.

Le navire reconnu coupable de violation de blocus est confisqué. Le chargement est également confisqué, à moins qu'il soit prouvé qu'au moment où la marchandise a été embarquée, le chargeur n'a ni connu ni pu connaître l'intention de violer le blocus.

Le navire est confisqué dans tous les cas. Le chargement est aussi confisqué en principe, mais on laisse à l'intéressé la possibilité d'exciper de sa bonne foi, c'est-à-dire, de prouver que, lors de l'embarquement de la marchandise, le chargeur ne connaissait pas et ne pouvait connaître l'intention de violer le blocus.

Chapitre II.—*De la contrebande de guerre.*

Ce chapitre est l'un des plus importants, sinon le plus important, de la Déclaration. Il traite d'une matière qui a parfois provoqué de graves conflits entre les belligérants et les neutres. Aussi a-t-on souvent réclamé d'une manière pressante un règlement qui établirait d'une manière précise les droits et devoirs de chacun. Le commerce pacifique pourra être reconnaissant de la précision qui, pour la première fois, est apportée à ce sujet, qui l'intéresse au plus haut point.

La notion de contrebande de guerre comporte deux éléments: il s'agit d'objets d'une certaine espèce et d'une certaine destination. Des canons, par exemple, sont transportés sur un navire neutre. Sont-ils de la contrebande? Cela dépend: non, s'ils sont destinés à un Gouvernement neutre; oui, s'ils sont destinés à un Gouvernement ennemi. Le commerce de certains objets n'est nullement interdit d'une manière générale pendant la guerre; c'est le commerce de ces objets avec l'ennemi qui est illicite et contre lequel le belligérant, au détriment duquel il se fait, peut se protéger par les mesures qu'admet le droit des gens.

Les articles 22 et 24 énumèrent les objets et matériaux qui sont susceptibles de constituer de la contrebande de guerre et qui en constituent effectivement, quand ils ont une certaine destination, qui est déterminée par les articles 30 et 33. La distinction traditionnelle de la contrebande *absolue* et de la contrebande *conditionnelle* est maintenue: à la première se réfèrent les articles 22 et 30, à la seconde les articles 24 et 33.

Article 22.

Sont de plein droit considérés comme contrebande de guerre les objets et matériaux suivants, compris sous le nom de contrebande absolue, savoir:

1º *Les armes de toute nature, y compris les armes de chasse, et les pièces détachées caractérisées.*

2º *Les projectiles, gargousses, et cartouches de toute nature, et les pièces détachées caractérisées.*

3º *Les poudres et les explosifs spécialement affectés à la guerre.*

4º *Les affûts, caissons, avant-trains, fourgons, forges de campagne, et les pièces détachées caractérisées.*

5º *Les effets d'habillement et d'équipement militaires caractérisés.*

6º *Les harnachements militaires caractérisés de toute nature.*

7º *Les animaux de selle, de trait et de bât, utilisables pour la guerre.*

8º *Le matériel de campement et les pièces détachées caractérisées.*

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9º *Les plaques de blindage.*

10º *Les bâtiments et embarcations de guerre et les pièces détachées spécialement caractérisées comme ne pouvant être utilisées que sur un navire de guerre.*

11º *Les instruments et appareils exclusivement faits pour la fabrication des munitions de guerre, pour la fabrication et la réparation des armes et du matériel militaire, terrestre ou naval.*

Cette liste est celle qui avait été arrêtée à la Deuxième Conférence de la Paix par le Comité chargé d'étudier spécialement la question de la contrebande. Elle était le résultat de concessions mutuelles, et il n'a pas paru sage de rouvrir les discussions à ce sujet, soit pour retrancher, soit pour ajouter des articles.

Les mots *sont de plein droit* veulent dire que la disposition produit son effet, par le fait même de la guerre, et qu'aucune déclaration des belligérants n'est nécessaire. Le commerce est averti dès le temps de paix.

Article 23.

Les objets et matériaux qui sont exclusivement employés à la guerre peuvent être ajoutés à la liste de contrebande absolue au moyen d'une déclaration notifiée.

La notification est adressée aux Gouvernements des autres Puissances ou à leurs représentants accrédités auprès de la Puissance qui fait la déclaration. La notification faite après l'ouverture des hostilités n'est adressée qu'aux Puissances neutres.

Certaines découvertes ou inventions pourraient rendre insuffisante la liste de l'article 22. Une addition pourra y être faite à condition qu'il s'agisse d'objets et matériaux *qui sont exclusivement employés à la guerre*. Cette addition doit être notifiée aux autres Puissances, qui prendront les mesures nécessaires pour la faire connaître à leurs nationaux. Théoriquement, la notification peut se faire en temps de paix ou en temps de guerre. Sans doute, le premier cas se présentera rarement, parce qu'un État faisant une pareille notification pourrait être soupçonné de songer à une guerre; cela aurait néanmoins l'avantage de renseigner le commerce à l'avance. Il n'y avait pas de raison d'en exclure la possibilité.

On a trouvé excessive la faculté accordée à une Puissance de faire une addition à la liste en vertu de sa simple déclaration. Il est à remarquer que cette faculté ne présente pas les dangers qu'on lui suppose. D'abord, bien entendu, la déclaration ne produit d'effet que pour celui qui la fait, en ce sens que l'article ajouté ne sera de la contrebande que pour lui, en tant que belligérant; les autres États pourront d'ailleurs faire une déclaration analogue. L'addition ne peut concerner que des objets *exclusivement employés à la guerre*; actuellement il serait difficile d'indiquer de tels objets ne rentrant pas dans la liste. L'avenir est réservé. Si une Puissance avait la prétention d'ajouter à la liste de contrebande absolue des articles non exclusivement employés à la guerre, elle pourrait s'attirer des réclamations diplomatiques, puisqu'elle méconnaîtrait une règle acceptée. De plus, il y aurait un recours éventuel devant la Cour Internationale des Prises. On peut supposer que la Cour estime que l'objet mentionné dans la déclaration de contrebande absolue y figure à tort, parce qu'il n'est pas exclusivement employé à la guerre, mais qu'il aurait pu rentrer dans une déclaration de contrebande conditionnelle. La confiscation pourra se justifier si la saisie a été faite dans les conditions prévues pour cette espèce de contrebande (articles 33 à 35), qui diffèrent de celles qu'on applique à la contrebande absolue (article 30).

Il avait été suggéré que, dans l'intérêt du commerce neutre, un délai devrait s'écouler entre la notification et son application. Mais cela aurait été très préjudiciable au belligérant qui veut précisément se protéger, puisque, pendant le délai, le commerce des articles jugés par lui dangereux aurait été libre, et que l'effet de sa mesure aurait été manqué. Il a été tenu compte, sous une autre forme, des considérations d'équité qui avaient été invoquées (voir article 43).

Article 24.

Sont de plein droit considérés comme contrebande de guerre les objets et matériaux susceptibles de servir aux usages de la guerre comme à des usages pacifiques, et compris sous le nom de contrebande conditionnelle, savoir:

1º *Les vivres.*

2º *Les fourrages et les graines propres à la nourriture des animaux.*

3º *Les vêtements et les tissus d'habillement, les chaussures, propres à des usages militaires.*

4º *L'or et l'argent monnayés et en lingots, les papiers représentatifs de la monnaie.*

5º *Les véhicules de toute nature pouvant servir à la guerre, ainsi que les pièces détachées.*

6º *Les navires, bateaux et embarcations de tout genre, les docks flottants, parties de bassins, ainsi que les pièces détachées.*

7º *Le matériel fixe ou roulant des chemins de fer, le matériel des télégraphes, radiotélégraphes et téléphones.*

8º *Les aérostats et les appareils d'aviation, les pièces détachées caractérisées ainsi que* [Pg 645] *les accessoires, objets et matériaux caractérisés comme devant servir à l'aérostation ou à l'aviation.*

9º *Les combustibles; les matières lubrifiantes.*

10º *Les poudres et les explosifs qui ne sont pas spécialement affectés à la guerre.*

11º *Les fils de fer barbelés, ainsi que les instruments servant à les fixer ou à les couper.*

12º *Les fers à cheval et le matériel de maréchalerie.*

13º *Les objets de harnachement et de sellerie.*

14º *Les jumelles, les télescopes, les chronomètres et les divers instruments nautiques.*

Sur l'expression *sont de plein droit*, il faut faire la même observation qu'à propos de l'article 22. Les objets énumérés ne constituent de la contrebande conditionnelle que s'ils ont la destination prévue par l'article 33.

Les *vivres* comprennent les produits nécessaires ou utiles à l'alimentation de l'homme, solides ou liquides.

Les *papiers représentatifs de la monnaie* ne comprennent que le papier-monnaie, les billets de banque ayant ou non cours légal. Les lettres de change et les chèques n'y rentrent pas.

Les machines et chaudières rentrent dans l'énumération du 6º.

Le matériel des chemins de fer comprend le matériel fixe, comme les rails, les traverses, les plaques tournantes, les pièces destinées à la construction des ponts, et le matériel roulant, comme les locomotives, les wagons.

Article 25.

Les objets et matériaux susceptibles de servir aux usages de la guerre comme à des usages pacifiques, et autres que ceux visés aux articles 22 et 24, peuvent être ajoutés à la liste de contrebande conditionnelle au moyen d'une déclaration qui sera notifiée de la manière prévue à l'article 23, deuxième alinéa.

Cette disposition correspond, pour la contrebande conditionnelle, à la disposition de l'article 23 pour la contrebande absolue.

Article 26.

Si une Puissance renonce, en ce qui la concerne, à considérer comme contrebande de guerre des objets et matériaux qui rentrent dans une des catégories énumérées aux articles 22 et 24, elle fera connaître son intention par une déclaration notifiée de la manière prévue à l'article 23, deuxième alinéa.

Un belligérant peut vouloir ne pas user du droit de considérer comme contrebande de guerre les articles rentrant dans les listes ci-dessus. Il peut lui convenir ou de faire rentrer dans la contrebande conditionnelle un article compris dans la contrebande absolue ou de déclarer libre, en ce qui le concerne, le commerce de tel article rentrant dans l'une ou dans l'autre catégorie. Il est à désirer qu'il fasse connaître son intention à ce sujet, et il est probable qu'il le fera pour avoir le mérite de la mesure. S'il ne le fait pas, et s'il se contente de donner des instructions à ses croiseurs, les navires visités seront agréablement surpris si le visiteur ne leur reproche pas de transporter ce qu'eux-mêmes considéraient comme de contrebande. Rien n'empêche une Puissance de faire une pareille déclaration en temps de paix. Voir ce qui est dit à propos de l'article 23.

Article 27.

Les objets et matériaux qui ne sont pas susceptibles de servir aux usages de la guerre, ne peuvent pas être déclarés contrebande de guerre.

L'existence d'une liste dite *libre* (article 28) rend utile cette affirmation que les objets qui ne sont pas susceptibles de servir aux usages de la guerre ne peuvent être déclarés contrebande de guerre. On aurait pu croire que les objets ne rentrant pas dans cette liste peuvent être déclarés au moins de contrebande conditionnelle.

Article 28.

Ne peuvent pas être déclarés contrebande de guerre les articles suivants, savoir:

1º *Le coton brut, les laines, soies, jutes, lins, chanvres bruts, et les autres matières premières des industries textiles, ainsi que leurs filés.*

2º *Les noix et graines oléagineuses; le coprah.*

3º *Les caoutchoucs, résines, gommes et laques; le houblon.*

4º *Les peaux brutes, les cornes, os et ivoires.*

5º *Les engrais naturels et artificiels, y compris les nitrates et phosphates pouvant servir à l'agriculture.*

6º *Les minerais.*

7º *Les terres, les argiles, la chaux, la craie, les pierres y compris les marbres, les briques, ardoises et tuiles.*

8º *Les porcelaines et verreries.*

9º *Le papier et les matières préparées pour sa fabrication.*

10º *Les savons, couleurs, y compris les matières exclusivement destinées à les produire, et les vernis.*

11º *L'hypochlorite de chaux, les cendres de soude, la soude caustique, le sulfate de soude en pains, l'ammoniaque, le sulfate d'ammoniaque et le sulfate de cuivre.*

12º *Les machines servant à l'agriculture, aux mines, aux industries textiles et à l'imprimerie.*

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13º *Les pierres précieuses, les pierres fines, les perles, la nacre et les coraux.*

14º *Les horloges, pendules, et montres autres que les chronomètres.*

15º *Les articles de mode et les objets de fantaisie.*

16º *Les plumes de tout genre, les crins et soies.*

17º *Les objets d'ameublement ou d'ornement; les meubles et accessoires de bureau.*

C'est pour diminuer les inconvénients de la guerre pour le commerce qu'il a été jugé utile de dresser cette *liste* dite *libre*, ce qui ne veut pas dire, comme il a été expliqué plus haut, que tous les objets restés en dehors pourraient être déclarés contrebande de guerre.

Les *minerais* sont les produits des mines servant à obtenir des métaux (*metallic ores*).

On avait demandé de faire rentrer dans le 10º les *produits tinctoriaux*; cela a paru trop général; il y a des matières d'où on tire des couleurs, comme le charbon, mais qui servent aussi à d'autres usages. Les produits qui ne sont utilisés que pour obtenir des couleurs bénéficient de l'exemption.

Les "articles de Paris" dont tout le monde comprend la signification rentrent dans le 15º.

Dans le 16º, il s'agit des soies de certains animaux comme les porcs et les sangliers.

Les tapis et les nattes rentrent dans les objets d'ameublement et d'ornement (17º).

Article 29.

Ne peuvent non plus être considérés comme contrebande de guerre:

1º *Les objets et matériaux servant exclusivement à soigner les malades et les blessés. Toutefois, ils peuvent, en cas de nécessité militaire importante, être réquisitionnés, moyennant une indemnité, lorsqu'ils ont la destination prévue à l'article 30.*

2º *Les objets et matériaux destinés à l'usage du navire où ils sont trouvés, ainsi qu'à l'usage de l'équipage et des passagers de ce navire pendant la traversée.*

Si les objets énumérés dans l'article 29 ne sont pas non plus considérés comme contrebande de guerre, c'est pour des motifs autres que ceux qui ont fait admettre la liste de l'article 28.

Des raisons d'humanité ont fait écarter les objets et matériaux servant exclusivement à soigner les malades et les blessés, ce qui comprend naturellement les drogues et les divers médicaments. Il ne s'agit pas des bateaux hospitaliers, pour lesquels une immunité spéciale est assurée par la Convention de La Haye du 18 octobre 1907, mais de navires de commerce ordinaires dont le chargement comprendrait des objets de la nature indiquée. Le croiseur a toutefois le droit, en cas de nécessité importante, de réquisitionner ces objets pour les besoins de son équipage ou de sa flotte; cette réquisition ne peut être faite que moyennant indemnité. Mais il faut remarquer que ce droit de réquisition ne peut s'exercer dans tous les cas. Les objets dont il s'agit doivent avoir la destination prévue à l'article 30, c'est-à-dire, la destination ennemie. Autrement le droit commun reprend son empire: un belligérant ne saurait avoir le droit de réquisition à l'égard des navires neutres en pleine mer.

On ne peut non plus considérer comme contrebande les objets et matériaux destinés à l'usage du navire et qui pourraient, en eux-mêmes et par leur nature, constituer de la contrebande de guerre, par exemple les armes destinées à défendre le navire contre les pirates ou à faire des signaux. Il en est de même de ce qui est destiné à l'usage de l'équipage et des passagers pendant

la traversée; l'équipage comprend ici tout le personnel du navire en général.

De la destination de la contrebande.—Comme il a été dit, le deuxième élément de la notion de contrebande est *la destination*. De grandes difficultés se sont produites à ce sujet et se symbolisent dans la *théorie du voyage continu*, souvent combattue ou invoquée sans que l'on se rende bien compte de son exacte signification. Il faut envisager simplement les situations en elles-mêmes et voir comment elles doivent être réglées de manière à ne pas tracasser inutilement les neutres et à ne pas sacrifier les droits légitimes des belligérants.

Pour amener un rapprochement entre des théories et des pratiques contraires, on a séparé, à ce point de vue, la contrebande absolue de la contrebande conditionnelle.

A la contrebande absolue se rapportent les articles 30 à 32, à la contrebande conditionnelle les articles 33 à 36.

Article 30.

Les articles de contrebande absolue sont saisissables, s'il est établi qu'ils sont destinés au territoire de l'ennemi ou à un territoire occupé par lui ou à ses forces armées. Peu importe que le transport de ces objets se fasse directement ou exige, soit un transbordement, soit un trajet par terre.

Les objets compris dans la liste de l'article 22 constituent de la contrebande absolue, quand ils sont destinés à un territoire de l'ennemi ou à un territoire occupé par lui ou à ses forces armées
[Pg 647] de terre ou de mer. Ces objets sont saisissables, du moment qu'une pareille destination finale peut être établie par le capteur. Ce n'est donc pas la destination du navire qui est décisive, c'est la destination de la marchandise. Celle-ci a beau être à bord d'un navire qui doit la débarquer dans un port neutre; du moment que le capteur est à même d'établir que cette marchandise doit, de là, être transportée en pays ennemi par voie maritime ou terrestre, cela suffit pour justifier la saisie et ensuite la confiscation de la cargaison. C'est le principe même du voyage continu qui est ainsi consacré, pour la contrebande absolue, par l'article 30. On regarde comme ne faisant qu'un tout le trajet suivi par la marchandise.

Article 31.

La destination prévue à l'article 30 est définitivement prouvée dans les cas suivants:

1° *Lorsque la marchandise est documentée pour être débarquée dans un port de l'ennemi ou pour être livrée à ses forces armées.*

2° *Lorsque le navire ne doit aborder qu'à des ports ennemis, ou lorsqu'il doit toucher à un port de l'ennemi ou rejoindre ses forces armées, avant d'arriver au port neutre pour lequel la marchandise est documentée.*

Comme il a été dit, c'est au capteur qu'incombe l'obligation de prouver que la marchandise de contrebande a bien la destination prévue par l'article 30. Dans certains cas prévus par l'article 31, cette destination est *définitivement* prouvée, c'est-à-dire que la preuve contraire n'est pas admise.

Premier Cas.—La marchandise est *documentée* pour être débarquée dans un port ennemi, c'est-à-dire que, d'après les papiers de bord qui se réfèrent à cette marchandise, elle doit bien y être débarquée. Il y a alors un véritable aveu, de la part des intéressés eux-mêmes, de la destination ennemie.

Deuxième Cas.—Le navire ne doit aborder qu'à des ports ennemis ou bien il doit toucher à un port ennemi avant d'arriver au port neutre pour lequel la marchandise est documentée. Ainsi cette marchandise doit bien, d'après les papiers qui la concernent, être débarquée dans un port neutre, mais le navire qui la porte doit, avant d'arriver à ce port, toucher à un port ennemi. Elle sera saisissable et on ne réserve pas la possibilité de prouver que la destination neutre est réelle et conforme aux intentions des intéressés. La circonstance que, avant de parvenir à cette destination, le navire touchera à un port ennemi, ferait naître un trop grand risque pour le belligérant dont le croiseur visite le navire. Sans supposer même une fraude préméditée, il pourrait y avoir, pour le capitaine du navire de commerce, une forte tentation de débarquer la contrebande dont il trouverait un prix avantageux, et, pour l'autorité locale, la tentation de réquisitionner cette marchandise.

Le cas où le navire, avant d'arriver au port neutre, doit rejoindre les forces armées de l'ennemi, est identique.

Pour simplifier, la disposition ne parle que d'un *port ennemi*; il va de soi qu'il faut lui assimiler le *port occupé par l'ennemi*, comme cela résulte de la règle générale de l'article 30.

Article 32.

Les papiers de bord font preuve complète de l'itinéraire du navire transportant de la contrebande absolue, à moins que le navire soit rencontré ayant manifestement dévié de la route qu'il devrait suivre d'après ses papiers de bord et sans pouvoir justifier d'une cause suffisante de cette déviation.

Les papiers de bord font donc preuve complète de l'itinéraire du navire, à moins que ce navire soit rencontré dans des circonstances qui montrent que l'on ne peut se fier à leurs allégations. Voir, d'ailleurs, les explications données à propos de l'article 35.

Article 33.

Les articles de contrebande conditionnelle sont saisissables, s'il est établi qu'ils sont destinés à l'usage des forces armées ou des administrations de l'État ennemi, à moins, dans ce dernier cas,

que les circonstances établissent qu'en fait ces articles ne peuvent être utilisés pour la guerre en cours; cette dernière réserve ne s'applique pas aux envois visés par l'article 24—4º.

Les règles qui concernent la contrebande conditionnelle diffèrent de celles qui ont été posées pour la contrebande absolue, à un double point de vue: 1º il ne s'agit pas d'une destination à l'ennemi en général, mais d'une destination à l'usage de ses forces armées ou de ses administrations; 2º la doctrine du voyage continu est écartée. A la première idée correspondent les articles 33 et 34; à la seconde correspond l'article 35.

Les objets compris dans la liste de la contrebande conditionnelle peuvent servir à des usages pacifiques comme à des emplois hostiles. Si, d'après les circonstances, l'emploi pacifique est certain, la saisie ne se justifie pas; il en est autrement si l'emploi hostile doit se supposer, ce qui arrive, par exemple, s'il s'agit de vivres destinés à une armée ou à une flotte de l'ennemi, de charbon destiné à une flotte ennemie. En cas pareil, il n'y a évidemment pas de doute. Mais que
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faut-il décider quand c'est à l'usage des administrations civiles d'État ennemi que les objets sont destinés? C'est de l'argent qui est envoyé à une administration civile et qui doit être employé au paiement du salaire de ses agents, des rails de chemin de fer qui sont expédiés à une administration des travaux publics. Il y aura, dans ces cas, *destination ennemie* rendant la marchandise saisissable d'abord et confiscable ensuite. Cela s'explique pour des raisons à la fois juridiques et pratiques. L'État est un, quoique les fonctions nécessaires à son action soient confiées à diverses administrations. Si une administration civile peut recevoir librement des vivres ou de l'argent, cela ne profite pas à elle seule, mais à l'État tout entier, y compris l'administration militaire, puisque les ressources générales de l'État augmentent ainsi. Il y a plus: ce que reçoit une administration civile peut être jugé plus nécessaire à l'administration militaire et attribué directement à celle-ci. L'argent ou les vivres réellement destinés à une administration civile peuvent se trouver ainsi directement employés aux besoins de l'armée. Cette possibilité, qui existe toujours, explique pourquoi la destination aux administrations de l'État ennemi est assimilée à la destination aux forces armées.

Il s'agit des *administrations de l'État*, qui sont des dépendances du pouvoir central, et non de toutes les administrations qui peuvent exister dans l'État ennemi; les administrations locales, municipales, par exemple, n'y rentrent pas, et ce qui serait destiné à leur usage ne constituerait pas de la contrebande.

La guerre peut se poursuivre dans des circonstances telles que la destination à l'usage d'une administration civile ne puisse être suspectée et ne puisse, par conséquent, donner à la marchandise le caractère de contrebande. Par exemple, une guerre existe en Europe et les colonies des pays belligérants ne sont pas, en fait, atteintes par la guerre. Les vivres ou autres objets de la liste de contrebande conditionnelle qui seraient destinés à l'usage d'une administration civile coloniale ne seraient pas réputés contrebande de guerre, parce que les considérations invoquées plus haut ne s'appliquent pas dans l'espèce; il ne peut y avoir emprunt pour les besoins de la guerre des ressources de l'administration civile. Exception est faite pour l'or et l'argent ou les papiers représentatifs de la monnaie, parce qu'une somme d'argent peut facilement se transmettre d'un bout du monde à l'autre.

Article 34.

Il y a présomption de la destination prévue à l'article 33, si l'envoi est adressé aux autorités ennemies, ou à un commerçant établi en pays ennemi et lorsqu'il est notoire que ce commerçant fournit à l'ennemi des objets et matériaux de cette nature. Il en est de même si l'envoi est à destination d'une place fortifiée ennemie, ou d'une autre place servant de base aux forces armées ennemies; toutefois, cette présomption ne s'applique point au navire de commerce lui-même faisant route vers une de ces places et dont on entend établir le caractère de contrebande.

A défaut des présomptions ci-dessus, la destination est présumée innocente.

Les présomptions établies dans le présent article admettent la preuve contraire.

Ordinairement les articles de contrebande ne seront pas expressément adressés aux autorités militaires ou aux administrations de l'État ennemi. On dissimulera plus ou moins la destination véritable; c'est au capteur à l'établir pour justifier la saisie. Mais on a cru raisonnable d'établir des présomptions, soit à raison de la qualité du destinataire, soit à raison du caractère de la place à laquelle sont destinés les objets. C'est une autorité ennemie ou un commerçant établi en pays ennemi, qui est le fournisseur notoire du Gouvernement ennemi pour les articles dont il s'agit. C'est une place fortifiée ennemie ou une place servant de base aux forces armées ennemies, que ce soit une base d'opérations ou une base de ravitaillement.

Cette présomption générale ne saurait s'appliquer au navire de commerce lui-même qui se dirigerait vers une place fortifiée et qui peut bien, par lui-même, constituer de la contrebande relative, mais à la condition que sa destination à l'usage des forces armées ou des administrations de l'État ennemi soit directement prouvée.

A défaut des présomptions précédentes, la destination est présumée innocente. C'est le droit commun, d'après lequel le capteur doit prouver le caractère illicite de la marchandise qu'il prétend saisir.

Enfin, toutes les présomptions ainsi établies dans l'intérêt du capteur ou contre lui admettent la preuve contraire. Les tribunaux nationaux d'abord, la Cour Internationale ensuite, apprécieront.

Article 35.

Les articles de contrebande conditionnelle ne sont saisissables que sur le navire qui fait route vers le territoire de l'ennemi ou vers un territoire occupé par lui ou vers ses forces armées et que ne doit pas les décharger dans un port intermédiaire neutre.

Les papiers de bord font preuve complète de l'itinéraire du navire ainsi que du lieu de déchargement des marchandises, à moins que ce navire soit rencontré ayant manifestement dévié de la route qu'il devrait suivre d'après ses papiers de bord et sans pouvoir justifier d'une cause suffisante de cette déviation.

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Comme il a été dit plus haut, la doctrine du voyage continu a été écartée pour la contrebande conditionnelle. Celle-ci n'est donc saisissable que si elle doit être débarquée dans un port ennemi. Du moment que la marchandise est documentée pour être débarquée dans un port neutre, elle ne peut constituer de la contrebande, et il n'y a pas à rechercher si, de ce port neutre, elle doit être expédiée à l'ennemi par mer ou par terre. C'est la différence essentielle avec la contrebande absolue.

Les papiers de bord font preuve complète de l'itinéraire du navire et du lieu de déchargement de la cargaison; il en serait autrement si le navire était rencontré ayant manifestement dévié de la route qu'il devrait suivre d'après ses papiers et sans pouvoir justifier d'une cause suffisante de cette déviation.

Cette règle sur la preuve fournie par les papiers de bord a pour but d'écarter des prétentions élevées à la légère par un croiseur et amenant des saisies injustifiées. Elle ne doit pas être entendue d'une manière trop absolue qui faciliterait toutes les fraudes. Ainsi elle n'est pas maintenue quand le navire est rencontré en mer ayant manifestement dévié de la route qu'il aurait dû suivre et sans pouvoir justifier de cette déviation. Les papiers de bord sont alors contredits par la réalité des faits et perdent toute force probante; le croiseur se décidera librement suivant les cas. De même, la visite du navire peut permettre de constater des faits qui prouvent d'une manière irréfutable que la destination du navire ou le lieu de déchargement de la marchandise sont faussement indiqués dans les papiers de bord. Le croiseur apprécie alors librement les circonstances et saisit ou non le navire suivant cette appréciation. En résumé, les papiers de bord font preuve, à moins que la fausseté de leurs indications ne soit démontrée par les faits. Cette restriction de la force probante des papiers de bord a paru aller de soi et ne pas avoir besoin d'être expressément mentionnée. On n'a pas voulu avoir l'air de diminuer la force de la règle générale, qui est une garantie pour le commerce neutre.

De ce qu'une indication est reconnue fausse, il ne résulte pas que la force probante des papiers de bord soit infirmée dans son ensemble. Les indications pour lesquelles aucune allégation de fausseté ne peut être vérifiée conservent leur valeur.

Article 36.

Par dérogation à l'article 35, si le territoire de l'ennemi n'a pas de frontière maritime, les articles de contrebande conditionnelle sont saisissables, lorsqu'il est établi qu'ils ont la destination prévue à l'article 33.

Le cas prévu est assurément rare, mais cependant il s'est présenté dans des guerres récentes. Pour la contrebande absolue, il n'y a pas de difficulté, puisque la destination à l'ennemi peut toujours être prouvée, quel que soit l'itinéraire à suivre par la marchandise (article 30). Il en est autrement pour la contrebande conditionnelle, et une dérogation doit être apportée à la règle générale de l'article 35, alinéa 1er, de manière à permettre au capteur d'établir que la marchandise suspecte a bien la destination spéciale prévue à l'article 33, sans qu'on puisse objecter le fait du déchargement dans un port neutre.

Article 37.

Le navire transportant des articles, qui sont saisissables comme contrebande absolue ou conditionnelle, peut être saisi, en haute mer ou dans les eaux des belligérants, pendant tout le cours de son voyage, même s'il a l'intention de toucher à un port d'escale avant d'atteindre la destination ennemie.

Le navire peut être saisi pour cause de contrebande pendant tout le cours de son voyage, pourvu qu'il soit dans des eaux où un acte de guerre est licite. Le fait qu'il aurait l'intention de toucher à un port d'escale avant d'atteindre la destination ennemie n'empêche pas la saisie, du moment que, dans l'espèce, la destination ennemie est établie conformément aux règles établies par les articles 30 à 32 pour la contrebande absolue, par les articles 33 à 35 pour la contrebande conditionnelle, et sous la réserve de l'exception de l'article 36.

Article 38.

Une saisie ne peut être pratiquée en raison d'un transport de contrebande antérieurement effectué et actuellement achevé.

Un navire est saisissable quand il transporte de la contrebande, mais non pour en avoir transporté.

Article 39.

Les articles de contrebande sont sujets à confiscation.

Cela ne présente aucune difficulté.

Article 40.

La confiscation du navire transportant de la contrebande est permise, si cette contrebande forme, soit par sa valeur, soit par son poids, soit par son volume, soit par son fret, plus de la moitié de la cargaison.

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Tout le monde admettait bien que, dans certains cas, la confiscation de la contrebande ne suffit pas et que la confiscation doit atteindre le navire lui-même, mais les opinions différaient sur la détermination de ces cas. On s'est arrêté à une certaine proportion à établir entre la contrebande et l'ensemble de la cargaison. Mais la question se subdivise: 1^{o} Quelle sera cette proportion? La

solution adoptée tient le milieu entre les solutions proposées, qui allaient du quart aux trois quarts. 2º Comment sera calculée cette proportion? La contrebande devra-t-elle former plus de la moitié de la cargaison en volume, en poids, en valeur, en fret? L'adoption d'un critérium déterminé prête à des objections théoriques et facilite aussi des pratiques destinées à éviter la confiscation du navire malgré l'importance de la cargaison. Si on prend le volume ou le poids, le capitaine prendra des marchandises licites assez volumineuses ou pesantes pour que le volume ou le poids de la contrebande soit inférieur. Une observation analogue peut être faite en ce qui concerne la valeur ou le fret. La conséquence est qu'il suffit, pour justifier la confiscation, que la contrebande forme plus de la moitié de la cargaison à l'un quelconque des points de vue indiqués. Cela peut paraître sévère; mais, d'une part, en procédant autrement, on faciliterait des calculs frauduleux, et d'autre part, il est permis de dire que la confiscation du navire est justifiée, lorsque le transport de la contrebande était une partie notable de son trafic, ce qui est vrai pour chacun des cas prévus.

Article 41.

Si le navire transportant de la contrebande est relâché, les frais occasionnés au capteur par la procédure devant la juridiction nationale des prises ainsi que par la conservation du navire et de sa cargaison pendant l'instruction sont à la charge du navire.

Il n'est pas juste que, d'une part, le transport de contrebande au-delà d'une certaine proportion entraîne la confiscation du navire, tandis qu'au-dessous de cette proportion, il n'y a que la confiscation de la contrebande, ce qui souvent n'est pas une perte pour le capitaine, le fret de cette contrebande ayant été payé à l'avance. N'y a-t-il pas là un encouragement à la contrebande, et ne conviendrait-il pas de faire subir une certaine peine pour le transport inférieur à la proportion requise pour la confiscation? On avait proposé une espèce d'amende qui aurait pu être en rapport avec la valeur des articles de contrebande. Des objections d'ordre divers ont été formulées contre cette proposition, bien que le principe d'une perte pécuniaire infligée à raison du transport de la contrebande eût paru justifié. On est arrivé au même but d'une autre façon en disposant que les frais occasionnés au capteur par la procédure devant la juridiction nationale des prises, comme par la conservation du navire et de sa cargaison pendant l'instruction, sont à la charge du navire; les frais de conservation du navire comprennent, le cas échéant, les frais d'entretien du personnel du navire capturé. Il convient d'ajouter que le dommage causé au navire par sa conduite et son séjour dans un port de prise est de nature à produire l'effet préventif le plus sérieux en ce qui concerne le transport de la contrebande.

Article 42.

Les marchandises qui appartiennent au propriétaire de la contrebande et qui se trouvent à bord du même navire sont sujettes à confiscation.

Le propriétaire de la contrebande est puni d'abord par la confiscation de sa propriété illicite; il l'est ensuite par la confiscation des marchandises, même licites, qu'il peut avoir sur le même navire.

Article 43.

Si un navire est rencontré en mer naviguant dans l'ignorance des hostilités ou de la déclaration de contrebande applicable à son chargement, les articles de contrebande ne peuvent être confisqués que moyennant indemnité; le navire et le surplus de la cargaison sont exempts de la confiscation et des frais prévus par l'article 41. Il en est de même si le capitaine, après avoir eu connaissance de l'ouverture des hostilités ou de la déclaration de contrebande, n'a pu encore décharger les articles de contrebande.

Le navire est réputé connaître l'état de guerre ou la déclaration de contrebande, lorsqu'il a quitté un port neutre, après que la notification de l'ouverture des hostilités ou de la déclaration de contrebande a été faite, en temps utile, à la Puissance dont relève ce port. L'état de guerre est, en outre, réputé connu par le navire lorsqu'il a quitté un port ennemi après l'ouverture des hostilités.

La disposition a pour but de ménager les neutres qui, en fait, transporteraient de la contrebande, mais auxquels on ne pourrait rien reprocher, ce qui peut se présenter dans deux cas. Le premier est celui où ils ne connaissent pas l'ouverture des hostilités; le second est celui où, tout en connaissant cette ouverture, ils ignorent la déclaration de contrebande qu'a faite un belligérant conformément aux articles 23 et 25, et qui est précisément applicable à tout ou partie
[Pg 651] du chargement. Il serait injuste de saisir le navire et de confisquer la contrebande; d'autre part, le croiseur ne peut être obligé de laisser aller à l'ennemi des produits propres à la guerre et dont celui-ci peut avoir grand besoin. Les intérêts en présence sont conciliés en ce sens qu'alors la confiscation ne peut avoir lieu que moyennant indemnité (voir, dans un ordre d'idées analogue, la Convention du 18 octobre 1907, sur le régime des navires de commerce ennemis au début des hostilités).

Article 44.

Le navire arrêté pour cause de contrebande et non susceptible de confiscation à raison de la proportion de la contrebande peut être autorisé, suivant les circonstances, à continuer sa route, si le capitaine est prêt à livrer la contrebande au bâtiment belligérant.

La remise de la contrebande est mentionnée par le capteur sur le livre de bord du navire arrêté, et le capitaine de ce navire doit remettre au capteur copie certifiée conforme de tous papiers utiles.

Le capteur a la faculté de détruire la contrebande qui lui est ainsi livrée.

Un navire neutre est arrêté pour cause de contrebande. Il n'est pas susceptible de confiscation,

parce que la contrebande n'atteint pas la proportion prévue par l'article 40. Il peut néanmoins être conduit dans un port de prise pour qu'il y ait un jugement relatif à la contrebande. Ce droit du capteur paraît excessif dans certains cas, si on compare le peu d'importance que peut avoir la contrebande (une caisse de fusils ou de revolvers, par exemple) et le grave préjudice qu'entraînent pour le navire ce détournement de sa route et sa retenue pendant le temps de l'instruction. Aussi s'est-on demandé s'il n'était pas possible de reconnaître au navire neutre le droit de continuer sa route moyennant la remise des objets de contrebande au capteur qui, de son côté, n'aurait pu les refuser que pour des motifs suffisants, par exemple, le mauvais état de la mer, qui rend le transbordement impossible ou difficile, des soupçons fondés au sujet de la quantité véritable de contrebande que porte le navire de commerce, la difficulté de loger les objets à bord du navire de guerre, etc. Cette proposition n'a pas réuni les suffrages suffisants. On a prétendu qu'il était impossible d'imposer une pareille obligation au croiseur pour lequel cette remise présenterait presque toujours des inconvénients. Si, par hasard, il n'y en a pas, le croiseur ne la refusera pas, parce qu'il aura lui-même avantage à ne pas être détourné de sa route par la nécessité de conduire le navire dans un port. Le système de l'obligation étant ainsi écarté, on a décidé de réglementer la remise facultative qui, espère-t-on, sera pratiquée toutes les fois que ce sera possible, au grand avantage des deux parties. Les formalités prévues sont très simples et n'exigent pas d'explication.

Un jugement du tribunal des prises devra intervenir au sujet de la marchandise ainsi remise. C'est pour cela que le capteur doit se munir des papiers nécessaires. On pourrait concevoir qu'il y eût doute sur le caractère de certains objets que le croiseur prétend être de contrebande; le capitaine du navire de commerce conteste, mais il préfère les livrer pour avoir la faculté de continuer sa route. Il n'y a là qu'une saisie devant être confirmée par la juridiction des prises.

La contrebande livrée par le navire de commerce peut embarrasser le croiseur qui doit être laissé libre de la détruire au moment même de la remise ou postérieurement.

Chapitre III.—*De l'assistance hostile.*

D'une manière générale, on peut dire que le navire de commerce qui manque à la neutralité, soit en transportant de la contrebande de guerre, soit en violant un blocus, fournit une assistance à l'ennemi, et c'est à ce titre que le belligérant au préjudice duquel il agit peut lui faire subir certaines pertes. Mais il y a des cas où cette assistance hostile est particulièrement caractérisée et qu'on a jugé nécessaire de prévoir spécialement. On en a fait deux catégories d'après la gravité du fait reproché au navire neutre.

Dans les cas qui rentrent dans la première catégorie (article 45), le navire est confisqué, et on lui applique le traitement du navire sujet à confiscation pour transport de contrebande. Cela signifie que le navire ne perd pas sa qualité de neutre et a droit aux garanties admises pour les navires neutres; par exemple, il ne pourrait être détruit par le capteur que dans les conditions établies pour les navires neutres (articles 48 et suivants); la règle *le pavillon couvre la marchandise* s'applique en ce qui concerne la marchandise qui se trouve à bord.

Dans les cas plus graves qui appartiennent à la seconde catégorie (article 46), le navire est encore confisqué; de plus, il n'est pas traité seulement comme un navire confiscable comme porteur de contrebande, mais comme un navire de commerce ennemi, ce qui entraîne certaines conséquences. Le règlement sur la destruction des prises neutres ne s'applique pas au navire, et, celui-ci devenant navire ennemi, ce n'est plus la seconde, mais c'est la troisième règle de la
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Déclaration de Paris qui est applicable. La marchandise qui sera à bord sera présumée ennemie; les neutres auront le droit de réclamer leur propriété en justifiant de leur neutralité (article 59). Il ne faut cependant pas exagérer jusqu'à penser que le caractère neutre originaire du navire est complètement effacé, de telle sorte qu'il doive être traité comme s'il avait toujours été ennemi. Le navire peut soutenir que la prétention élevée contre lui n'est pas fondée, que l'acte qui lui est reproché n'a pas le caractère d'une assistance hostile. Il a donc le droit de recourir à la juridiction internationale en vertu des dispositions qui protègent les propriétés neutres.

Article 45.

Un navire neutre est confisqué et, d'une manière générale, passible du traitement que subirait un navire neutre sujet à confiscation pour contrebande de guerre:

1° *Lorsqu'il voyage spécialement en vue du transport de passagers individuels incorporés dans la force armée de l'ennemi, ou en vue de la transmission de nouvelles dans l'intérêt de l'ennemi.*

2° *Lorsqu'à la connaissance soit du propriétaire, soit de celui qui a affrété le navire en totalité, soit du capitaine, il transporte un détachement militaire de l'ennemi ou une ou plusieurs personnes qui, pendant le voyage, prêtent une assistance directe aux opérations de l'ennemi.*

Dans les cas visés aux numéros précédents, les marchandises appartenant au propriétaire du navire sont également sujettes à confiscation.

Les dispositions du présent article ne s'appliquent pas si, lorsque le navire est rencontré en mer, il ignore les hostilités, ou si le capitaine, après avoir appris l'ouverture des hostilités, n'a pu encore débarquer les personnes transportées. Le navire est réputé connaître l'état de guerre lorsqu'il a quitté un port ennemi après l'ouverture des hostilités ou un port neutre postérieurement à la notification en temps utile de l'ouverture des hostilités à la Puissance dont relève ce port.

Le premier cas suppose des passagers voyageant *individuellement*; le cas d'un *détachement*

militaire est visé ci-après. Il s'agit d'individus *incorporés* dans la force armée de terre ou de mer de l'ennemi. Il y a eu quelque hésitation sur le sens de l'*incorporation* qui est prévue. Comprend-elle seulement les individus qui, appelés à servir en vertu de la loi de leur pays, ont effectivement rejoint le corps dont ils doivent faire partie? ou comprend-elle même ces individus dès qu'ils sont appelés et avant qu'ils aient rejoint leur corps? La question a une grande importance pratique. Que l'on suppose des individus originaires d'un pays de l'Europe continentale et établis en Amérique; ces individus sont tenus à des obligations militaires envers leur pays d'origine; ils doivent, par exemple, faire partie de la réserve de l'armée active de ce pays. Leur patrie étant en guerre, ils s'embarquent pour aller faire leur service. Seront-ils considérés comme *incorporés* pour l'application de la disposition dont nous nous occupons? Si on s'attachait à la législation intérieure de certains pays, l'affirmation pourrait être soutenue. Mais, indépendamment des raisons purement juridiques, l'opinion contraire a paru plus conforme aux nécessités pratiques et, dans un esprit de conciliation, elle a été acceptée par tous. Il serait difficile, ou peut-être même impossible, de distinguer, sans des mesures vexatoires que les Gouvernements neutres n'accepteraient pas, entre les passagers d'un navire, ceux qui sont tenus d'un service militaire, et qui voyagent pour y satisfaire.

La transmission de nouvelles dans l'intérêt de l'ennemi est assimilée au transport de passagers incorporés dans sa force armée. On parle du navire qui voyage *spécialement* pour indiquer qu'il ne s'agit pas du service normal du navire. Il s'est détourné de sa route; il a relâché dans un port où il ne s'arrête pas ordinairement, pour effectuer le transport en question. Il n'est pas nécessaire qu'il soit *exclusivement* affecté au service de l'ennemi; ce dernier cas rentrerait dans la seconde catégorie, article 56, 4º.

Dans les deux hypothèses dont il vient d'être parlé, il s'agit d'une opération isolée faite par le navire; il a été chargé d'effectuer tel transport ou de transmettre telles nouvelles; il n'est pas attaché d'une manière continue au service de l'ennemi. Il en résulte qu'il peut bien être saisi pendant le voyage où il se livre à l'opération qui lui est confiée; ce voyage terminé, tout est fini en ce sens qu'il ne pourrait être saisi pour avoir fait l'opération prévue; c'est analogue à ce qui est admis en matière de contrebande (article 38).

Le deuxième cas se subdivise également.

Transport d'un détachement militaire de l'ennemi ou transport d'une ou de plusieurs personnes qui, pendant le voyage, prêtent une assistance directe aux opérations de l'ennemi, par exemple en faisant des signaux. S'il s'agit de militaires ou de marins en uniforme, il n'y a pas de difficulté: le navire est évidemment confiscable. S'il s'agit de militaires ou de marins en costume civil
[Pg 653] pouvant être pris pour des passagers ordinaires, on exige la connaissance du capitaine ou du propriétaire, celui qui a affrété le navire en totalité étant assimilé au propriétaire. La règle est la même pour l'hypothèse des personnes prêtant une assistance directe à l'ennemi pendant le voyage.

Dans ces cas, si le navire est confisqué à raison de son assistance hostile, l'on doit confisquer également les marchandises appartenant au propriétaire du navire.

Ces dispositions supposent que l'état de guerre était connu du navire qui se livre aux opérations prévues; cette connaissance motive et justifie la confiscation. La situation est tout autre lorsque le navire ignore l'ouverture des hostilités, de telle sorte qu'il s'est chargé de l'opération en temps normal. Il a pu apprendre en mer l'ouverture des hostilités, mais sans pouvoir débarquer les personnes transportées. La confiscation serait alors injuste, et la règle équitable qui a été adoptée est d'accord avec les dispositions déjà acceptées dans d'autres matières. Si le navire a quitté un port ennemi après l'ouverture des hostilités, ou un port neutre après que l'ouverture des hostilités avait été notifiée à la Puissance d'où relève ce port, la connaissance de l'état de guerre sera présumée.

Il n'est question ici que d'empêcher la confiscation du navire. Les personnes trouvées à bord et qui font partie des forces armées de l'ennemi pourront être prises par le croiseur comme prisonniers de guerre.

Article 46.

Un navire neutre est confisqué et, d'une manière générale, passible du traitement qu'il subirait s'il était un navire de commerce ennemi:

1º *Lorsqu'il prend une part directe aux hostilités.*

2º *Lorsqu'il se trouve sous les ordres ou sous le contrôle d'un agent placé à bord par le Gouvernement ennemi.*

3º *Lorsqu'il est affrété en totalité par le Gouvernement ennemi.*

4º *Lorsqu'il est actuellement et exclusivement affecté, soit au transport de troupes ennemies, soit à la transmission de nouvelles dans l'intérêt de l'ennemi.*

Dans les cas visés par le présent article, les marchandises appartenant au propriétaire du navire sont également sujettes à confiscation.

Les cas prévus ici sont plus graves que ceux de l'article 45, ce qui justifie le traitement plus sévère infligé au navire, ainsi qu'il a été expliqué plus haut.

Premier cas.—Le navire prend une part directe aux hostilités. Cela peut se présenter sous diverses formes. Il va sans dire que, s'il y a lutte armée, le navire est exposé à tous les risques d'une pareille lutte. On suppose qu'il est tombé au pouvoir de l'ennemi qu'il combattait, et qui est

autorisé à le traiter comme un navire de commerce ennemi.

Deuxième cas.—Le navire est sous les ordres ou sous le contrôle d'un agent placé à bord par le Gouvernement ennemi. Cette présence caractérise le lien qui existe entre l'ennemi et le navire. Dans d'autres circonstances, le navire peut bien avoir un lien avec l'ennemi; mais pour être sujet à la confiscation, il faudrait alors qu'il rentrât dans le troisième cas.

Troisième cas.—Le navire est affrété en totalité par le Gouvernement ennemi. Il est donc complètement à la disposition de ce Gouvernement, qui peut s'en servir pour des buts divers se rattachant plus ou moins directement à la guerre, notamment pour effectuer des transports; c'est la situation de navires charbonniers qui accompagnent une flotte belligérante. Souvent il y aura une charte-partie entre le Gouvernement belligérant et le propriétaire ou le capitaine du navire; mais il n'y a là qu'une question de preuve. Le fait de l'affrètement en totalité suffit, de quelque façon qu'il soit établi.

Quatrième cas.—Le navire est actuellement et exclusivement affecté, soit au transport de troupes ennemies, soit à la transmission de nouvelles dans l'intérêt de l'ennemi. A la différence des cas visés dans l'article 45, il s'agit ici d'un service permanent auquel est affecté le navire. Aussi faut-il décider que, tant que l'affectation dure, le navire est saisissable, encore qu'au moment où un croiseur ennemi visite le navire, celui-ci ne transporte pas de troupes ou ne serve pas à la transmission de nouvelles.

Comme pour les cas de l'article 45, et par les mêmes raisons, les marchandises appartenant au propriétaire du navire, et qui pourraient se trouver à bord, sont également sujettes à confiscation.

On avait proposé de considérer comme navire de commerce ennemi le navire neutre faisant actuellement et avec l'autorisation du Gouvernement ennemi un trajet auquel il n'a été autorisé qu'après l'ouverture des hostilités ou dans les deux mois qui l'ont précédée. Cela se serait appliqué notamment aux navires de commerce neutres qui seraient admis par un belligérant à une navigation réservée en temps de paix à la marine nationale de ce belligérant—par exemple, au cabotage. Plusieurs Délégations ont repoussé formellement cette proposition, de sorte que la question ainsi soulevée est restée entière.

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Article 47.

Tout individu incorporé dans la force armée de l'ennemi et qui sera trouvé à bord d'un navire de commerce neutre, pourra être fait prisonnier de guerre, quand même il n'y aurait pas lieu de saisir ce navire.

Des individus incorporés dans les forces armées de terre ou de mer d'un belligérant peuvent se trouver à bord d'un navire de commerce neutre visité. Si le navire est sujet à confiscation, le croiseur le saisira et le conduira dans un de ses ports avec les personnes qui se trouvent à bord. Évidemment les militaires ou marins de l'État ennemi ne seront pas laissés libres, mais seront considérés comme prisonniers de guerre. Il peut arriver que l'on ne soit pas dans le cas de saisir le navire—par exemple, parce que le capitaine ne connaissait pas la qualité d'un individu qui s'était présenté comme un simple passager. Faut-il alors laisser libre le ou les militaires qui sont sur le navire? Cela n'a pas paru admissible. Le croiseur belligérant ne peut être contraint de laisser libres des ennemis actifs qui sont matériellement en son pouvoir et qui sont plus dangereux que tels et tels articles de contrebande; naturellement il doit agir avec une grande discrétion, et c'est sous sa responsabilité qu'il exige la remise de ces individus, mais son droit existe; aussi a-t-il été jugé nécessaire de s'expliquer sur ce point.

Chapitre IV.—*De la destruction des prises neutres.*

La destruction des prises neutres était à l'ordre du jour de la Deuxième Conférence de la Paix et n'a pu y être réglée. Elle se retrouve à l'ordre du jour de la présente Conférence et, cette fois, un accord a été possible. Il y a lieu de s'applaudir d'un pareil résultat qui témoigne d'un sincère désir d'entente de la part de tous. On a constaté ici, une fois de plus, que des formules tranchantes et opposées ne répondent pas toujours à la réalité et que, si on veut descendre dans le détail et arriver aux applications précises, on aura souvent à peu près la même manière de faire, quoiqu'on ait paru se réclamer d'opinions tout à fait contraires. Pour s'accorder, il faut d'abord se bien comprendre, ce qui n'est pas toujours le cas. Ainsi, on a constaté que ceux qui proclamaient le droit de détruire les prises neutres, ne prétendaient pas user de ce droit capricieusement et à tout propos, mais seulement d'une manière exceptionnelle, et qu'à l'inverse, ceux qui affirmaient le principe de l'interdiction de la destruction, admettaient que ce principe devait céder dans des cas exceptionnels. Il s'agissait donc de s'entendre sur ces cas exceptionnels auxquels, dans les deux opinions, devait se borner le droit de destruction. Ce n'était pas tout: il fallait aussi une garantie contre les abus dans l'exercice de ce droit; l'arbitraire dans l'appréciation des cas exceptionnels devait être diminué au moyen d'une responsabilité effective imposée au capteur. C'est ici qu'est intervenu, dans le règlement de l'affaire, un élément nouveau, grâce auquel l'accord a pu se faire. L'intervention possible de la justice fera réfléchir le capteur en même temps qu'elle assurera une réparation dans le cas d'une destruction sans motif.

Tel est l'esprit général des dispositions de ce chapitre.

Article 48.

Un navire neutre saisi ne peut être détruit par le capteur, mais il doit être conduit dans tel port qu'il appartiendra pour y être statué ce que de droit sur la validité de la capture.

Le principe général est très simple. Un navire neutre saisi ne peut être détruit par le capteur; cela peut être admis par tout le monde, quelle que soit la manière dont on envisage l'effet de la saisie. Le navire doit être conduit dans un port pour y être statué sur la validité de la prise. Il

sera ou non amariné suivant les cas.

Article 49.

Par exception, un navire neutre, saisi par un bâtiment belligérant et qui serait sujet à confiscation, peut être détruit, si l'observation de l'article 48 peut compromettre la sécurité du bâtiment de guerre ou le succès des opérations dans lesquelles celui-ci est actuellement engagé.

La première condition pour que le navire saisi puisse être détruit est qu'il soit susceptible de confiscation d'après les circonstances. Si le capteur ne peut pas même songer à obtenir la confiscation du navire, comment pourrait-il avoir la prétention de le détruire?

La seconde est que l'observation du principe général soit de nature à compromettre la sécurité du bâtiment de guerre ou le succès des opérations dans lesquelles il est actuellement engagé. C'est la formule à laquelle on s'est arrêté après quelques tâtonnements. Il a été entendu que *compromettre la sécurité* était synonyme de mettre en danger la navire, et pourrait être traduit en anglais par *involve danger*. C'est naturellement au moment où a lieu la destruction qu'il faut
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se placer pour voir si les conditions sont ou non remplies. Le danger qui n'existait pas au moment même de la saisie peut s'être manifesté quelque temps après.

Article 50.

Avant la destruction, les personnes qui se trouvent à bord devront être mises en sûreté, et tous les papiers de bord et autres pièces, que les intéressés estimeront utiles pour le jugement sur la validité de la capture, devront être transbordés sur le bâtiment de guerre.

La disposition prévoit des précautions à prendre dans l'intérêt des personnes et dans celui de l'administration de la justice.

Article 51.

Le capteur qui a détruit un navire neutre doit, préalablement à tout jugement sur la validité de la capture, justifier en fait n'avoir agi qu'en présence d'une nécessité exceptionnelle, comme elle est prévue à l'article 49. Faute par lui de ce faire, il est tenu à indemnité vis-à-vis des intéressés, sans qu'il y ait à rechercher si la capture était valable ou non.

Ce texte donne une garantie contre la destruction arbitraire des prises par l'établissement d'une responsabilité effective du capteur qui a opéré la destruction. Ce capteur doit, en effet, avant tout jugement sur la validité de la prise, justifier en fait qu'il était bien dans un des cas exceptionnels qui sont prévus. La justification sera faite contradictoirement avec le neutre qui, s'il n'est pas content de la décision du tribunal national des prises, pourra se pourvoir devant la juridiction internationale. Cette justification est donc une condition préalable à remplir par le capteur. S'il ne le fait pas, il doit indemniser les intéressés au navire et au chargement, sans qu'il y ait à rechercher si la prise était valable ou nulle. Il y a donc là une sanction sérieuse de l'obligation de ne détruire la prise que dans des cas déterminés, c'est une peine pécuniaire qui frappe le capteur. Si, au contraire, la justification est faite, le procès de prise se suit comme à l'ordinaire; lorsque la prise est déclarée valable, aucune indemnité n'est due; quand elle est déclarée nulle, les intéressés ont droit à être indemnisés. Le recours devant la Cour Internationale ne peut être formé que quand la décision du tribunal des prises est intervenue sur le fond et non pas aussitôt après que la question préalable a été jugée.

Article 52.

Si la capture d'un navire neutre, dont la destruction a été justifiée, est ensuite déclarée nulle, le capteur doit indemniser les intéressés en remplacement de la restitution à laquelle ils auraient droit.

Article 53.

Si des marchandises neutres qui n'étaient pas susceptibles de confiscation ont été détruites avec le navire, le propriétaire de ces marchandises a droit à une indemnité.

Le navire détruit contenait des marchandises neutres non susceptibles de confiscation; le propriétaire de ces marchandises a, en tout cas, droit à une indemnité, c'est-à-dire sans qu'il y ait à distinguer suivant que la destruction était ou non justifiée. C'est équitable et c'est une garantie de plus contre une destruction arbitraire.

Article 54.

Le capteur a la faculté d'exiger la remise ou de procéder à la destruction des marchandises confiscables trouvées à bord d'un navire qui lui-même n'est pas sujet à confiscation, lorsque les circonstances sont telles que, d'après l'article 49, elles justifieraient la destruction d'un navire passible de confiscation. Il mentionne les objets livrés ou détruits sur le livre de bord du navire arrêté et se fait remettre par le capitaine copie certifiée conforme de tous papiers utiles. Lorsque la remise ou la destruction a été effectuée et que les formalités ont été remplies, le capitaine doit être autorisé à continuer sa route.

Les dispositions des articles 51 et 52 concernant la responsabilité du capteur qui a détruit un navire neutre sont applicables.

Un croiseur rencontre un navire de commerce neutre portant de la contrebande dans une proportion inférieure à celle qui est prévue par l'article 40. Il peut amariner le navire et le conduire dans un port pour y être jugé. Il peut, conformément à ce qui est réglé par l'article 44, accepter la remise de la contrebande qui lui est offerte par le navire arrêté. Mais, qu'arrivera-t-il si aucune de ces solutions n'intervient? Le navire arrêté n'offre pas de remettre la contrebande et le croiseur n'est pas en situation de conduire le navire dans un de ses ports. Le croiseur est-il obligé de laisser aller un navire neutre avec la contrebande qu'il porte? Cela a paru excessif, au moins dans certaines circonstances exceptionnelles. Ce sont celles-là mêmes qui justifieraient la

destruction du navire, s'il était susceptible de confiscation. En pareil cas, le croiseur pourra exiger la remise ou procéder à la destruction des marchandises confiscables. Les raisons qui ont fait admettre la destruction du navire pourront justifier la destruction des marchandises de contrebande, d'autant plus que les considérations d'humanité qui peuvent être invoquées en cas
[Pg 656] de destruction du navire sont écartées ici. Contre une exigence arbitraire du croiseur, il y a les mêmes garanties qui ont permis de reconnaître la faculté de détruire le navire. Le croiseur doit préalablement justifier qu'il se trouvait bien dans les circonstances exceptionnelles prévues; sinon, il est condamné à la valeur des marchandises livrées ou détruites, sans qu'il y ait à rechercher si elles constituaient ou non de la contrebande de guerre.

La disposition prescrit des formalités qui sont nécessaires pour constater le fait même et pour mettre la juridiction des prises à même de statuer.

Naturellement, une fois que la remise a été effectuée ou que la destruction a été opérée et que les formalités ont été remplies, le navire arrêté doit être laissé libre de continuer sa route.

Chapitre V.—*Du transfert de pavillon.*

Un navire de commerce ennemi est sujet à capture, tandis qu'un navire de commerce neutre est respecté. On comprend, dès lors, qu'un croiseur belligérant, rencontrant un navire de commerce qui se réclame d'une nationalité neutre, ait à rechercher si cette nationalité a été légitimement acquise ou si elle n'a pas eu pour but de soustraire le navire aux risques auxquels il aurait été exposé s'il avait gardé son ancienne nationalité. La question se présente naturellement quand le transfert est de date relativement récente, au moment où a lieu la visite, que ce transfert soit, du reste, antérieur ou postérieur à l'ouverture des hostilités. Elle est résolue différemment suivant qu'on se place plutôt au point de vue de l'intérêt du commerce ou plutôt au point de vue de l'intérêt des belligérants. Il est heureux que l'on se soit entendu sur un règlement qui concilie les deux intérêts dans la mesure du possible et qui renseigne les belligérants et le commerce neutre.

Article 55.

La transfert sous pavillon neutre d'un navire ennemi, effectué avant l'ouverture des hostilités, est valable à moins qu'il soit établi que ce transfert a été effectué en vue d'éluder les conséquences qu'entraîne le caractère de navire ennemi. Il y a néanmoins présomption de nullité si l'acte de transfert ne se trouve pas à bord, alors que le navire a perdu la nationalité belligérante moins de soixante jours avant l'ouverture des hostilités; la preuve contraire est admise.

Il y a présomption absolue de validité d'un transfert effectué plus de trente jours avant l'ouverture des hostilités, s'il est absolu, complet, conforme à la législation des pays intéressés, et s'il a cet effet que le contrôle du navire et le bénéfice de son emploi ne restent pas entre les mêmes mains qu'avant le transfert. Toutefois, si le navire a perdu la nationalité belligérante moins de soixante jours avant l'ouverture des hostilités et si l'acte de transfert ne se trouve pas à bord, la saisie du navire ne pourra donner lieu à des dommages et intérêts.

La règle générale, posée par l'alinéa 1er, est que le transfert sous pavillon neutre d'un navire ennemi est valable, en supposant, bien entendu, que les conditions juridiques ordinaires de validité ont été remplies. C'est au capteur, s'il veut faire annuler ce transfert, à établir que le transfert a eu pour but d'éluder les conséquences de la guerre que l'on prévoyait. Il y a un cas considéré comme suspect, celui dans lequel l'acte de transfert ne se trouve pas à bord, alors que le navire a changé de nationalité moins de soixante jours avant l'ouverture des hostilités. La présomption de validité établie au profit du navire par l'alinéa 1er est renversée au profit du capteur. Il y a présomption de nullité du transfert, mais la preuve contraire est admise. Il peut être prouvé, pour l'écarter, que le transfert n'a pas été opéré en vue d'éluder les conséquences de la guerre; il va sans dire que les conditions juridiques ordinaires de validité doivent avoir été remplies.

On a voulu donner au commerce cette garantie que le droit de faire considérer un transfert comme nul pour ce motif qu'il aurait eu pour but d'éluder les conséquences de la guerre ne s'étendrait pas trop loin et ne comprendrait pas une période trop étendue. En conséquence, si le transfert a été effectué plus de trente jours avant l'ouverture des hostilités, il ne peut être attaqué pour cette seule cause, et il est considéré comme absolument valable, s'il a été fait dans des conditions qui en démontrent le caractère sérieux et définitif et qui sont les suivantes: le transfert doit être absolu, complet, et conforme à la législation des pays intéressés et il a pour effet de mettre le contrôle et les bénéfices du navire entre d'autres mains. Ces conditions établies, le capteur n'est pas admis à prétendre que le vendeur prévoyait la guerre dans laquelle son pays allait être engagé et voulait, par la vente, se soustraire aux risques qu'elle lui aurait fait courir pour les navires dont il opérait le transfert. Si, même dans cette hypothèse, le navire est rencontré par un croiseur et qu'il n'ait pas l'acte de transfert à bord, il pourra être saisi lorsque le changement de nationalité a eu lieu moins de soixante jours avant l'ouverture des hostilités;
[Pg 657] cette circonstance le rend suspect. Mais si, devant la juridiction des prises, il fait les justifications prévues par l'alinéa 2, il doit être relâché; seulement il ne pourra obtenir des dommages et intérêts, attendu qu'il y avait eu motif suffisant pour saisir le navire.

Article 56.

Le transfert sous pavillon neutre d'un navire ennemi, effectué après l'ouverture des hostilités, est nul, à moins qu'il soit établi que ce transfert n'a pas été effectué en vue d'éluder les conséquences qu'entraîne le caractère de navire ennemi.

Toutefois, il y a présomption absolue de nullité:

1° *Si le transfert a été effectué pendant que le navire est en voyage ou dans un port bloqué.*

2° *S'il y a faculté de réméré ou de retour.*

3° *Si les conditions, auxquelles est soumis le droit de pavillon d'après la législation du pavillon arboré, n'ont pas été observées.*

Pour le *transfert postérieur à l'ouverture des hostilités*, la règle est plus simple: le transfert n'est valable que s'il est établi qu'il n'a pas eu pour but d'éluder les conséquences qu'entraîne le caractère de navire ennemi. C'est la solution inverse de celle qui est admise pour le transfert antérieur à l'ouverture des hostilités; présomption de validité dans ce dernier, présomption de nullité dans celui dont il s'agit maintenant, sauf la possibilité de faire la preuve contraire. Il pourrait être établi, par exemple, que le transfert est la suite d'une transmission héréditaire.

L'article 56 indique des cas dans lesquels la présomption de nullité est absolue pour des motifs qui se comprennent aisément: dans le premier, le lien entre le transfert et le risque de guerre couru par le navire apparaît clairement; dans le second, l'acquéreur se présente comme un prête-nom devant être considéré comme propriétaire du navire pendant une période dangereuse, après laquelle le vendeur reprendra son navire; enfin, le troisième cas aurait pu à la rigueur être sous-entendu, le navire qui se réclame d'une nationalité neutre devant naturellement justifier qu'il a droit à cette nationalité.

On avait d'abord prévu le cas où le navire est, après le transfert, maintenu dans le service auquel il était affecté auparavant. Il y a là une circonstance suspecte au plus haut point; le transfert paraît fictif, puisque rien n'est changé dans le service du navire. Cela s'applique, par exemple, au cas d'une même ligne de navigation desservie par le navire après et avant le transfert. On a objecté que, parfois, la présomption absolue serait trop rigoureuse, que certains navires, comme les navires pétroliers, ne pouvaient, à raison de leur construction, être affectés qu'à un service déterminé. Pour tenir compte de cette observation, le mot *trajet* avait été ajouté, de sorte qu'il aurait fallu que le navire eût été maintenu *dans les mêmes service et trajet*; il semblait que l'on donnait, de cette façon, une satisfaction suffisante à la réclamation. Néanmoins, sur une insistance en vue de la suppression du cas dans l'énumération, cette suppression a été admise. Il en résulte que le transfert rentre alors dans l'application de la règle générale; il est bien présumé nul, mais la preuve contraire est admise.

Chapitre VI.—*Du caractère ennemi.*

La règle inscrite dans la Déclaration de Paris, "le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre," répond trop au progrès des mœurs, a trop pénétré l'opinion publique pour qu'en présence d'une application si générale, on n'y voie pas un principe de droit commun, qu'il n'est plus même question de discuter. Aussi le caractère neutre ou ennemi des navires de commerce n'a-t-il pas seulement pour conséquence de décider de la validité de leur capture, mais encore du sort des marchandises, autres que la contrebande, qui sont trouvées à leur bord. Une remarque générale analogue peut être faite au sujet du caractère neutre ou ennemi de la marchandise. Personne ne songe à contester aujourd'hui le principe d'après lequel, "la marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi." Ce n'est donc que dans le cas où elle est trouvée à bord d'un navire ennemi, que se pose la question de savoir si une marchandise est neutre ou ennemie.

La détermination du caractère neutre ou ennemi apparaît ainsi comme le développement des deux principes consacrés en 1856, ou mieux comme le moyen d'en assurer la juste application pratique.

L'utilité de dégager, à cet égard, des pratiques des différents pays des règles claires et simples n'a, pour ainsi dire, pas besoin d'être démontrée. Pour le commerce, l'incertitude des risques de capture, si elle n'est pas une cause d'arrêt total, est tout au moins la pire des entraves. Le commerçant doit savoir les risques qu'il court en chargeant sur tel ou tel navire; l'assureur, s'il ignore la gravité de ces risques, est forcé d'exiger des primes de guerre souvent exorbitantes ou insuffisantes.

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Les règles qui forment ce chapitre ne sont malheureusement pas complètes; quelques points importants ont dû être laissés de côté, comme on l'a déjà vu par ce qui a été dit dans les explications préliminaires et comme cela sera précisé plus loin.

Article 57.

Sous réserve des dispositions relatives au transfert de pavillon, le caractère neutre ou ennemi du navire est déterminé par le pavillon qu'il a le droit de porter.

Le cas où le navire neutre se livre à une navigation réservée en temps de paix reste hors de cause et n'est nullement visé par cette règle.

Le principe est donc que *le caractère neutre ou ennemi du navire est déterminé par le pavillon qu'il a le droit de porter*. C'est une règle simple qui paraît bien répondre à la situation spéciale des navires, si on les compare aux autres biens meubles et notamment aux marchandises. A plus d'un point de vue, ils ont une sorte d'individualité; notamment ils ont une nationalité, un *caractère* national. Cette nationalité est manifestée par le droit de pavillon; elle place les navires sous la protection et le contrôle de l'État dont ils relèvent; elle les soumet à la souveraineté et aux lois de cet État et, le cas échéant, à ses réquisitions. C'est là le critérium le plus sûr que le navire est bien un des éléments de la force maritime marchande d'un pays et, par conséquent, le meilleur critérium pour déterminer s'il est neutre ou ennemi. Aussi convient-il de s'y attacher exclusivement et d'écarter ce qui se rattache à la personnalité du propriétaire.

Le texte dit: le pavillon que le navire a le *droit de porter*; cela s'entend naturellement du pavillon que le navire est, s'il ne l'a fait, en droit d'arborer, conformément aux lois qui régissent le port de ce pavillon.

L'article 57 réserve les dispositions relatives au transfert de pavillon pour lesquelles il suffit de renvoyer aux articles 55 et 56; il pourra se faire qu'un navire ait bien le droit de porter un pavillon neutre, au point de vue de la législation du pays dont il se réclame, mais soit considéré comme ennemi par un belligérant, parce que le transfert à la suite duquel il a porté le pavillon neutre tombe sous le coup de l'article 55 ou de l'article 56.

Enfin, la question de savoir si un navire perd son caractère neutre, lorsqu'il effectue une navigation que l'ennemi réservait avant la guerre aux seuls navires nationaux a été soulevée. Une entente n'a pu avoir lieu, comme cela a été expliqué plus haut à propos du chapitre sur *l'Assistance hostile*, et la question est restée absolument entière, comme l'alinéa 2 de l'article 57 prend soin de le dire.

Article 58.

Le caractère neutre ou ennemi des marchandises trouvées à bord d'un navire ennemi est déterminé par le caractère neutre ou ennemi de leur propriétaire.

A la différence des navires, les marchandises n'ont pas une individualité propre; on fait dépendre leur caractère neutre ou ennemi de la personnalité de leur propriétaire. C'est ce qui a prévalu après un examen approfondi de diverses opinions tendant à s'attacher à l'origine des marchandises, à la personne du porteur de risques, du réclamateur ou de l'expéditeur. Le critérium adopté par l'article 58 paraît, d'ailleurs, conforme aux termes de la Déclaration de Paris comme à ceux de la Convention de La Haye du 18 octobre 1907, sur l'établissement d'une Cour Internationale des prises, où il est parlé des *propriétés neutres ou ennemies* (articles 1, 3, 4 et 8).

Mais il ne faut pas se dissimuler que l'article 58 ne résout qu'une partie du problème, la plus simple; c'est le caractère neutre ou ennemi du propriétaire qui détermine le caractère des marchandises, mais à quoi s'attachera-t-on pour déterminer le caractère neutre ou ennemi du propriétaire? On ne le dit pas, parce qu'il a été impossible d'arriver à une entente sur ce point. Les opinions ont été partagées entre le *domicile* et la *nationalité*; il est inutile de reproduire ici les arguments invoqués dans les deux sens. On avait pensé à une sorte de transaction ainsi formulée:

> "Le caractère neutre ou ennemi des marchandises trouvées à bord d'un navire ennemi est déterminé par la nationalité neutre ou ennemie de leur propriétaire et, en cas d'absence de nationalité ou en cas de double nationalité neutre et ennemie de leur propriétaire, par le domicile de celui-ci en pays neutre ou ennemi."
>
> "Toutefois, les marchandises appartenant à une société anonyme ou par actions sont considérées comme neutres ou ennemies selon que la société a son siège social en pays neutre ou ennemi."

L'unanimité n'a pu être obtenue.

Article 59.

Si le caractère neutre de la marchandise trouvée à bord d'un navire ennemi n'est pas établi, la marchandise est présumée ennemie.

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L'article 59 formule la règle traditionnelle d'après laquelle la marchandise trouvée à bord d'un navire ennemi est présumée ennemie sauf la preuve contraire; ce n'est qu'une présomption simple laissant au revendiquant le droit, mais la charge de prouver ses droits.

Article 60.

Le caractère ennemi de la marchandise chargée à bord d'un navire ennemi subsiste jusqu'à l'arrivée à destination, nonobstant un transfert intervenu pendant le cours de l'expédition, après l'ouverture des hostilités.

Toutefois, si, antérieurement à la capture, un précédent propriétaire neutre exerce, en cas de faillite du propriétaire ennemi actuel, un droit de revendication légale sur la marchandise, celle-ci reprend le caractère neutre.

Cette disposition envisage le cas où une marchandise, étant propriété ennemie au moment de son départ, a été l'objet d'une vente ou d'un transfert pendant le cours du voyage. La facilité qu'il y aurait à garantir, au moyen d'une vente, la marchandise ennemie contre l'exercice du droit de capture, sauf à s'en faire rétrocéder la propriété à l'arrivée, a toujours conduit à ne pas tenir compte de ces transferts; le caractère ennemi subsiste.

Au point de vue du moment à partir duquel une marchandise doit être considérée comme devant prendre et conserver le caractère ennemi de son propriétaire, le texte est inspiré du même esprit d'équité qui a présidé à la Convention de La Haye sur le régime des bâtiments de commerce au début des hostilités, et du même désir de garantir les opérations entreprises dans la confiance du temps de paix. C'est seulement lorsque le transfert a lieu après l'ouverture des hostilités qu'il est, jusqu'à l'arrivée, inopérant au point de vue de la perte du caractère ennemi. Ce qu'on considère ici, c'est la date du transfert, et non la date du départ du navire. Car, bien que le navire parti avant la guerre, et resté peut-être dans l'ignorance de l'ouverture des hostilités, jouisse de ce chef d'une certaine exemption, la marchandise peut cependant avoir le caractère ennemi; le propriétaire ennemi de cette marchandise est à même de connaître la guerre, et c'est précisément pour cela qu'il cherchera à échapper à ses conséquences.

On a cru, toutefois, devoir ajouter sinon une restriction, du moins un complément jugé

nécessaire. Dans un grand nombre de pays, le vendeur non payé a, en cas de faillite de l'acheteur, un droit de revendication légale (*stoppage in transitu*) sur les marchandises déjà devenues la propriété de l'acheteur, mais non encore parvenues jusqu'à lui. En pareil cas la vente est résolue, et, par l'effet de sa revendication, le vendeur reprend sa marchandise, sans être réputé avoir jamais cessé d'être propriétaire. Il y a là pour le commerce neutre, en cas de faillite non simulée, une garantie trop précieuse pour être sacrifiée, et le deuxième alinéa de l'article 60 a pour but de la sauvegarder.

Chapitre VII.—*Du convoi.*

La pratique du convoi a, dans le passé, soulevé parfois de graves difficultés et même des conflits. Aussi peut-on constater avec satisfaction l'accord intervenu pour la régler.

Article 61.

Les navires neutres sous convoi de leur pavillon sont exempts de visite. Le commandant du convoi donne par écrit, à la demande du commandant d'un bâtiment de guerre belligérant, sur le caractère des navires et sur leur chargement, toutes informations que la visite servirait à obtenir.

Le principe posé est simple: un navire neutre convoyé par un navire de guerre de sa nation est exempt de visite. Le motif en est que le croiseur belligérant doit trouver dans les affirmations du commandant du convoi la garantie que lui procurerait l'exercice même du droit de visite; il ne peut, en effet, révoquer en doute ces affirmations, données par l'agent officiel d'un Gouvernement neutre, sans manquer à la courtoisie internationale. Si les Gouvernements neutres laissent les belligérants visiter les navires portant leur pavillon, c'est qu'ils ne veulent pas prendre la charge de la surveillance de ces navires, et qu'alors ils permettent aux belligérants de se protéger eux-mêmes. La situation change quand un Gouvernement neutre entend prendre cette charge; le droit de visite n'a plus la même raison d'être.

Mais il résulte de l'explication de la règle donnée pour le convoi que le Gouvernement neutre s'engage à donner aux belligérants toute garantie que les navires convoyés ne profitent pas de la protection qui leur est assurée pour agir contrairement à la neutralité—par exemple, pour transporter de la contrebande de guerre, pour fournir à un belligérant une assistance hostile, pour tenter de violer un blocus. Il faudra donc une surveillance sérieuse exercée au départ sur les navires devant être convoyés, et cette surveillance devra se poursuivre au cours du voyage. Le Gouvernement devra procéder avec vigilance pour empêcher tout abus du convoi, et il donnera en ce sens des instructions précises à l'officier chargé de commander un convoi.

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Un croiseur belligérant rencontre un convoi: il s'adresse au commandant de ce convoi, qui doit, sur sa demande, lui donner par écrit toutes les informations utiles sur les navires qui sont sous sa protection. On exige une déclaration écrite, parce qu'elle empêche les équivoques et les malentendus, qu'elle engage plus la responsabilité du commandant. Cette déclaration a pour but de rendre la visite inutile par le fait même qu'elle procure au croiseur les renseignements que la visite elle-même lui aurait fournis.

Article 62.

Si le commandant du bâtiment de guerre belligérant a lieu de soupçonner que la religion du commandant du convoi a été surprise, il lui communique ses soupçons. C'est au commandant du convoi seul qu'il appartient en ce cas de procéder à une vérification. Il doit constater le résultat de cette vérification par un procès-verbal dont une copie est remise à l'officier du bâtiment de guerre. Si des faits ainsi constatés justifient, dans l'opinion du commandant du convoi, la saisie d'un ou de plusieurs navires, la protection du convoi doit leur être retirée.

Le plus souvent le croiseur s'en tiendra à la déclaration que lui aura donnée le commandant du convoi, mais il peut avoir de sérieuses raisons de croire que la religion de ce commandant a été surprise, qu'un navire convoyé dont les papiers paraissent en règle, et ne présentent rien de suspect, transporte, en fait, de la contrebande adroitement dissimulée. Le croiseur peut communiquer ses soupçons au commandant du convoi. Une vérification peut être jugée nécessaire. Elle est faite par le commandant du convoi; c'est lui seul qui exerce l'autorité sur les navires placés sous sa protection. Il a paru toutefois que l'on éviterait souvent bien des difficultés, s'il était permis au belligérant d'assister à cette vérification; autrement il lui serait toujours possible de suspecter, sinon la bonne foi, du moins la vigilance ou la perspicacité du visiteur. Mais on n'a pas cru devoir imposer au commandant du convoi l'obligation de laisser l'officier du croiseur assister à la vérification. Il agira comme il le jugera bon: s'il accepte l'assistance d'un officier du croiseur, ce sera un acte de courtoisie ou de bonne politique. Il devra, dans tous les cas, dresser un procès-verbal de la vérification et en donner une copie à l'officier du croiseur.

Des divergences peuvent s'élever entre les deux officiers, spécialement à propos de la contrebande conditionnelle. Le caractère du port auquel sont destinés des blés peut être contesté; est-ce un port de commerce ordinaire? est-ce un port qui sert de base de ravitaillement pour les forces armées? La situation de fait produite par le convoi doit être, en ce cas, maintenue. Il pourra seulement y avoir une protestation de la part de l'officier du croiseur, et la difficulté sera réglée par la voie diplomatique.

La situation est tout autre si un navire convoyé est trouvé porteur de contrebande sans qu'une contestation puisse s'élever. Le navire n'a plus droit à la protection, parce que la condition à laquelle cette protection était subordonnée n'a pas été remplie. Il a trompé son propre Gouvernement d'abord et essayé de tromper un belligérant. Il doit alors être traité comme un navire de commerce neutre qui, dans les circonstances ordinaires, rencontre un croiseur belligérant et est visité par lui. Il ne peut se plaindre d'être ainsi traité rigoureusement, parce qu'il y a dans son cas une aggravation de la faute commise par un transporteur de contrebande.

Chapitre VIII.—*De la résistance à la visite.*

Le sujet traité dans ce chapitre n'est pas mentionné dans le programme soumis en février 1908 par le Gouvernement Britannique; il se rattache étroitement à plusieurs des questions de ce programme, aussi s'est-il naturellement présenté à l'esprit au cours des discussions, et il a paru nécessaire de poser une règle sur laquelle on s'est facilement accordé.

Un croiseur belligérant rencontre un navire de commerce et le somme de s'arrêter pour qu'il soit procédé à la visite. Le navire sommé ne s'arrête pas et essaie de se soustraire à la visite par la fuite. Le croiseur peut employer la force pour l'arrêter, et le navire de commerce, s'il est avarié ou coulé, n'a pas le droit de se plaindre, puisqu'il a contrevenu à une obligation imposée par le droit des gens. S'il est arrêté et s'il est établi que c'est seulement pour éviter les ennuis de la visite qu'il avait recouru à la fuite, qu'il n'avait d'ailleurs commis aucun acte contraire à la neutralité, il ne sera pas puni pour sa tentative. S'il est constaté, au contraire, que le navire a de la contrebande à bord ou qu'il a, d'une façon quelconque, violé ses devoirs de neutre, il subira les conséquences de son infraction à la neutralité, mais il ne subira non plus aucune peine pour avoir tenté la fuite. Certains pensaient, au contraire, que le navire devrait être puni pour une tentative
[Pg 661] de fuite caractérisée comme pour une résistance violente. La possibilité de la confiscation engagerait, disait-on, le croiseur à ménager, dans la mesure du possible, le navire en fuite. Mais cette idée n'a pas prévalu.

Article 63.

La résistance opposée par la force à l'exercice légitime du droit d'arrêt, de visite et de saisie, entraîne, dans tous les cas, la confiscation du navire. Le chargement est passible du même traitement que subirait le chargement d'un navire ennemi; les marchandises appartenant au capitaine ou au propriétaire du navire sont considérées comme marchandises ennemies.

La situation est différente s'il y a résistance violente à l'action légitime du croiseur. Le navire commet un acte d'hostilité et doit, dès lors, être traité en ennemi; il sera donc soumis à confiscation, quand même la visite ne révélerait aucun fait contraire à la neutralité, et cela semble ne pouvoir soulever aucune difficulté.

Que faut-il décider du chargement? La formule qui a semblé la meilleure est celle d'après laquelle ce chargement sera traité comme celui qui serait à bord d'un navire ennemi. Cette assimilation entraîne les conséquences suivantes: le navire neutre qui a résisté devenant navire ennemi, la marchandise se trouvant à bord est présumée ennemie. Les neutres intéressés pourront réclamer leur propriété, conformément à la 3e règle de la Déclaration de Paris, mais la marchandise ennemie sera confisquée parce que la règle *le pavillon couvre la marchandise* ne peut plus être invoquée, le navire saisi sur lequel elle se trouve étant considéré comme ennemi. On remarquera que le droit de réclamer la marchandise est reconnu à tous les neutres, même à ceux qui ont la nationalité du navire saisi; il paraîtrait excessif de les faire souffrir de l'acte du capitaine. Il y a toutefois une exception à l'égard des marchandises appartenant au propriétaire du navire. Il semble naturel qu'il supporte les conséquences des actes de son agent. Sa propriété à bord du navire sera donc traitée en marchandise ennemie. A plus forte raison, en est-il de même de la marchandise appartenant au capitaine.

Chapitre IX.—*Des dommages et intérêts.*

Ce chapitre a une portée très générale, puisque la disposition qu'il contient trouve son application dans les cas nombreux où un croiseur peut saisir un navire ou des marchandises.

Article 64.

Si la saisie du navire ou des marchandises n'est pas validée par la juridiction des prises ou si, sans qu'il y ait eu de mise en jugement, la saisie n'est pas maintenue, les intéressés ont droit à des dommages et intérêts, à moins qu'il y ait eu des motifs suffisants de saisir le navire ou les marchandises.

Un croiseur a saisi un navire neutre, par exemple, pour transport de contrebande ou violation de blocus. Le tribunal des prises relâche le navire en annulant la saisie. Cela ne suffit évidemment pas à dédommager les intéressés de la perte éprouvée par suite de la saisie, et cette perte a pu être considérable, puisque le navire a été, pendant un temps souvent très long, empêché de se livrer à son trafic ordinaire. Peuvent-ils demander à être indemnisés de ce préjudice? Rationnellement il faut admettre l'affirmative, si ce préjudice est immérité, c'est-à-dire si la saisie n'a pas été amenée par leur faute. Il peut arriver, en effet, que la saisie ait été motivée, parce que le capitaine du navire visité n'a pas produit des justifications qui devaient se trouver normalement à sa disposition et qui ont été fournies plus tard. Dans ce cas, il serait injuste que des dommages et intérêts fussent accordés. A l'inverse, s'il y a eu vraiment faute du croiseur, s'il a saisi dans un cas où il n'y avait pas de motifs suffisants de le faire, il est juste que des dommages et intérêts soient alloués.

Il peut arriver aussi qu'un navire saisi et conduit dans un port ait été relaxé par voie administrative sans intervention d'un tribunal de prises. En pareil cas, la pratique varie: dans certains pays, la juridiction des prises n'intervient que dans le cas d'une capture et ne pourrait statuer sur une demande de dommages-intérêts fondée sur ce que la saisie aurait été injustifiée; dans d'autres, la juridiction des prises serait compétente pour une demande de ce genre. Il y a là une inégalité peu équitable et il convient d'établir une règle qui produise le même effet dans tous les pays. Il est raisonnable que toute saisie pratiquée sans motifs suffisants donne droit à des dommages-intérêts au profit des intéressés, sans qu'il y ait à distinguer suivant que la saisie a été ou non suivie d'une décision du tribunal des prises, et d'autant plus que c'est quand la saisie aura été le moins justifiée, que le navire pourra être relaxé par voie administrative. On a donc employé une formule générale pouvant comprendre tous les cas de saisie.

[Pg 662] Il convient de remarquer que la question de savoir si les tribunaux nationaux de prises sont compétents pour statuer sur les dommages-intérêts n'est pas visée dans le texte. En tant qu'il y a un procès sur les propriétés saisies, aucun doute n'est possible. Dans la procédure engagée sur la validité de la capture, les intéressés auront l'occasion de faire valoir leur droit à une indemnité, et, si la décision du tribunal national ne leur donne pas satisfaction, ils pourront se pourvoir devant la Cour Internationale des prises. Si, au contraire, l'action du belligérant s'est bornée à une saisie, la législation du belligérant capteur décide si des tribunaux sont compétents pour connaître d'une demande en indemnité et, en cas d'affirmative, quels tribunaux sont compétents dans l'espèce; la Cour Internationale n'a, dans ce cas, aucune compétence d'après la Convention de La Haye. Au point de vue international, la voie diplomatique est la seule ouverte pour faire valoir la réclamation, qu'il s'agisse de se plaindre d'une décision effectivement rendue ou de suppléer à l'absence de juridiction.

On a posé la question de savoir s'il y avait lieu de distinguer les dommages directs et les dommages indirects subis par le navire ou la marchandise. Il a semblé qu'il valait mieux laisser la juridiction des prises libre d'apprécier le dédommagement dû, qui variera suivant les circonstances et dont le montant ne peut être déterminé à l'avance par des règles trop minutieuses.

Il n'a été parlé que du navire pour simplifier; mais ce qui a été dit s'applique naturellement à la cargaison saisie, puis relâchée. Ainsi la marchandise innocente, se trouvant à bord du navire saisi, subit tous les inconvénients de la saisie du navire. S'il y a eu des motifs suffisants de saisir le navire, que cette saisie soit maintenue ou non, les propriétaires de la cargaison n'ont aucun droit à des dommages et intérêts.

Il peut être utile d'indiquer certains cas dans lesquels la saisie du navire serait justifiée, quelle que pût être la décision du tribunal des prises. C'est notamment celui de jet, de suppression ou de destruction volontaire de tout ou partie des papiers de bord, provenant du fait du capitaine, de quelqu'un de l'équipage ou des passagers. Il y a là quelque chose qui justifie tous les soupçons et qui explique que le navire soit saisi, sauf au capitaine à rendre compte de sa conduite devant le tribunal des prises. Même si ce tribunal acceptait les explications données et ne trouvait pas de causes suffisantes de confiscation, les intéressés ne pourraient songer à réclamer des dommages-intérêts.

Un cas analogue serait celui où l'on trouverait à bord des papiers doubles, faux, ou falsifiés, alors que cette irrégularité se rattache à des circonstances de nature à influer sur la saisie du navire.

Il a semblé suffisant que ces cas où la saisie s'expliquerait raisonnablement fussent mentionnés dans le Rapport sans faire l'objet d'une disposition expresse, et cela parce que l'indication de deux cas particuliers aurait pu faire croire que c'étaient les seuls dans lesquels la saisie se justifierait.

Tels sont les principes de droit international que la Conférence Navale s'est efforcée de reconnaître comme propres à régir pratiquement les rapports des peuples dans d'importantes matières pour lesquelles des règles précises faisaient jusqu'à présent défaut. Elle a continué ainsi l'œuvre de codification commencée par la Déclaration de Paris de 1856. Elle a travaillé dans le même esprit que la Deuxième Conférence de la Paix et, profitant des travaux faits à La Haye, elle a pu résoudre un certain nombre de problèmes que, faute de temps, cette Conférence avait dû laisser sans solution. Souhaitons que l'on puisse dire que ceux qui ont élaboré la Déclaration de Londres de 1909 n'ont pas été trop indignes de leurs prédécesseurs de 1856 et de 1907.

Dispositions Finales.

Ces dispositions ont trait à diverses questions qui touchent à l'effet de la Déclaration, à sa ratification, à sa mise en vigueur, à sa dénonciation, à l'adhésion des Puissances non représentées.

Article 65.

Les dispositions de la présente Déclaration forment un ensemble indivisible.

Cet article est très important et conforme à ce qui avait été admis pour la Déclaration de Paris.

Les règles contenues dans la présente Déclaration touchent à des points très importants et très différents. Elles n'ont pas toutes été acceptées avec le même empressement par toutes les Délégations; des concessions ont été faites sur un point en vue de concessions obtenues sur un autre. L'ensemble a été, tout balancé, reconnu satisfaisant. Une attente légitime serait trompée, si une Puissance pouvait faire des réserves à propos d'une règle à laquelle une autre Puissance
[Pg 663] attache une importance particulière.

Article 66.

Les Puissances Signataires s'engagent à s'assurer, dans le cas d'une guerre où les belligérants seraient tous parties à la présente Déclaration, l'observation réciproque des règles contenues dans cette Déclaration. Elles donneront, en conséquence, à leurs autorités et à leurs forces armées les instructions nécessaires et prendront les mesures qu'il conviendra pour en garantir l'application par leurs tribunaux, spécialement par leurs tribunaux de prises.

D'après l'engagement qui résulte de cet article, la Déclaration s'applique dans les rapports entre les Puissances Signataires, quand les belligérants sont également parties à la Déclaration.

Ce sera à chaque Puissance à prendre les mesures nécessaires pour assurer l'observation de la Déclaration. Ces mesures pourront varier suivant les pays, exiger ou non l'intervention du pouvoir législatif. C'est une affaire d'ordre intérieur.

Il faut remarquer que les Puissances neutres peuvent être aussi dans le cas de donner des instructions à leurs autorités, spécialement aux commandants des convois, comme on l'a vu plus haut.

Article 67.

La présente Déclaration sera ratifiée aussitôt que possible.

Les ratifications seront déposées à Londres.

Le premier dépôt de ratifications sera constaté par un procès-verbal signé par les Représentants des Puissances qui y prennent part, et par le Principal Secrétaire d'État de Sa Majesté Britannique au Département des Affaires Étrangères.

Les dépôts ultérieurs de ratifications se feront au moyen d'une notification écrite adressée au Gouvernement Britannique et accompagnée de l'instrument de ratification.

Copie certifiée conforme du procès-verbal relatif au premier dépôt de ratifications, des notifications mentionnées à l'alinéa précédent, ainsi que des instruments de ratification qui les accompagnent, sera immédiatement, par les soins du Gouvernement Britannique et par la voie diplomatique, remise aux Puissances Signataires. Dans les cas visés par l'alinéa précédent, ledit Gouvernement leur fera connaître en même temps la date à laquelle il a reçu la notification.

Cette disposition toute de protocole n'a pas besoin d'explication. On a emprunté la formule admise à La Haye par la Deuxième Conférence de la Paix.

Article 68.

La présente Déclaration produira effet, pour les Puissances qui auront participé au premier dépôt de ratifications, soixante jours après la date du procès-verbal de ce dépôt et, pour les Puissances qui ratifieront ultérieurement, soixante jours après que la notification de leur ratification aura été reçue par le Gouvernement Britannique.

Article 69.

S'il arrivait qu'une des Puissances Signataires voulût dénoncer la présente Déclaration, elle ne pourra le faire que pour la fin d'une période de douze ans commençant à courir soixante jours après le premier dépôt de ratifications et, ensuite, pour la fin de périodes successives de six ans, dont la première commencera à l'expiration de la période de douze ans.

La dénonciation devra être, au moins un an à l'avance, notifiée par écrit au Gouvernement Britannique, qui en donnera connaissance à toutes les autres Puissances. Elle ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

Il résulte implicitement de l'article 69 que la Déclaration à une durée indéfinie. Les périodes après lesquelles la dénonciation peut se faire ont été fixées par analogie de ce qui est admis dans la Convention pour l'établissement d'une Cour Internationale des prises.

Article 70.

Les Puissances représentées à la Conférence Navale de Londres, attachant un prix particulier à la reconnaissance générale des règles adoptées par elles, expriment l'espoir que les Puissances qui n'y étaient pas représentées adhéreront à la présente Déclaration. Elles prient le Gouvernement Britannique de vouloir bien les inviter à le faire.

La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement Britannique en lui transmettant l'acte d'adhésion, qui sera déposé dans les archives dudit Gouvernement.

Ce Gouvernement transmettra immédiatement à toutes les autres Puissances copie certifiée conforme de la notification, ainsi que de l'acte d'adhésion, en indiquant la date à laquelle il a reçu la notification. L'adhésion produira effet soixante jours après cette date.

La situation des Puissances adhérentes sera, en tout ce qui concerne cette Déclaration, assimilée à la situation des Puissances Signataires.

La Déclaration de Paris contenait déjà une invitation adressée aux Puissances non représentées, à l'effet d'adhérer à la Déclaration. L'invitation officielle, au lieu d'être faite [Pg 664] individuellement par chacune des Puissances représentées à la Conférence, sera plus aisément faite par la Grande-Bretagne agissant au nom de toutes.

Les formes de l'adhésion sont très simples. L'assimilation des Puissances adhérentes aux Puissances Signataires entraîne naturellement pour les premières l'observation de l'article 65; on ne peut adhérer à une partie de la Déclaration, mais seulement à l'ensemble.

Article 71.

La présente Déclaration, qui portera la date du 26 février 1909, pourra être signée à Londres, jusqu'au 30 juin 1909, par les Plénipotentiaires des Puissances représentées à la Conférence Navale.

Comme à La Haye, on a tenu compte des convenances de certaines Puissances dont les Représentants peuvent ne pas être en situation de signer dès à présent la Déclaration et qui cependant veulent être considérées comme des Puissances Signataires, non comme des Puissances adhérentes.

Il va sans dire que les *Plénipotentiaires des Puissances* dont il est parlé à l'article 71 ne sont pas nécessairement ceux qui avaient été délégués comme tels à la Conférence Navale.

En foi de quoi, les Plénipotentiaires ont revêtu la présente Déclaration de leurs signatures et y ont apposé leurs cachets.

Fait à Londres, le vingt-six février mil neuf cent neuf, en un seul exemplaire, qui restera déposé

dans les archives du Gouvernement Britannique et dont des copies, certifiées conformes, seront
[Pg 665] *remises par la voie diplomatique aux Puissances représentées à la Conférence Navale.*

APPENDIX VIII

ADDITIONAL PROTOCOL TO THE CONVENTION CONCERNING THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT

Signed at the Hague, September 19, 1910

Article premier.

Les puissances signataires de la convention de La Haye du 18 octobre 1907, relative à l'établissement d'une Cour Internationale des prises ou y adhérant, pour lesquelles des difficultés d'ordre constitutionnel s'opposent à l'acceptation, sous sa forme actuelle, de ladite convention, ont la faculté de déclarer, dans l'acte de ratification ou d'adhésion, que, dans les affaires de prises rentrant dans la compétence de leurs tribunaux nationaux, le recours devant la Cour Internationale des prises ne pourra être exercé contre elles que sous la forme d'une action en indemnité du préjudice causé par la capture.

Article 2.

Dans le cas de recours exercé devant la Cour Internationale des prises sous la forme d'une action en indemnité, l'article 8 de la convention est sans application; la Cour n'a pas à prononcer la validité ou la nullité de la capture, non plus qu'à infirmer ou confirmer la décision des tribunaux nationaux.

Article 3.

Les conditions auxquelles est subordonné par la convention l'exercice du recours devant la Cour Internationale des prises sont applicables à l'exercice de l'action en indemnité.

Article 4.

Sous réserve des dispositions ci-après, les règles de procédure établies par la convention pour le recours devant la Cour Internationale des prises seront observées pour l'action en indemnité.

Article 5.

Par dérogation à l'article 28, § 1, de la convention, l'instance en indemnité ne peut être introduite devant la Cour Internationale des prises qu'au moyen d'une déclaration écrite, adressée au Bureau International de la Cour permanente d'arbitrage. Le Bureau peut être saisi même par télégramme.

Article 6.

Par dérogation à l'article 29 de la convention, le Bureau International notifie directement et par télégramme, s'il est possible, au Gouvernement du belligérant capteur la déclaration d'instance dont il est saisi. Le Gouvernement du belligérant capteur, sans examiner si les délais prescrits ont été observés, fait, dans les sept jours de la réception de la notification, transmettre au Bureau International le dossier de l'affaire en y joignant, le cas échéant, une copie certifiée conforme de la décision rendue par le tribunal national.

Article 7.

Par dérogation à l'article 45, § 2, de la convention, la Cour, après le prononcé et la notification de son arrêt aux parties en cause, fait parvenir directement au Gouvernement du belligérant capteur le dossier de l'affaire qui lui a été soumise, en y joignant l'expédition des diverses décisions intervenues ainsi que la copie des procès-verbaux de l'instruction.

Article 8.

Le présent protocole additionnel sera considéré comme faisant partie intégrante de la convention et sera ratifié en même temps que celle-ci. Si la déclaration prévue à l'article 1 ci-dessus est faite dans l'acte de ratification, une copie certifiée conforme en sera insérée dans le
[Pg 666] procès-verbal de dépôt des ratifications visé à l'article 52, § 3, de la convention.

Article 9.

L'adhésion à la convention est subordonnée à l'adhésion au présent protocole additionnel.

En foi de quoi les Plénipotentiaires ont signé le présent protocole additionnel.

Fait à La Haye le 19 septembre 1910, en un seul exemplaire qui sera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises, par la voie diplomatique, aux Puissances désignées dans l'article 15 de la convention relative à
[Pg 667] l'établissement d'une Cour Internationale des prises du 18 octobre 1907 et dans son Annexe.

APPENDIX IX

FOREIGN ENLISTMENT ACT, 1870

33 & 34 VICT., CHAPTER 90

An Act to regulate the conduct of Her Majesty's Subjects during the existence of hostilities between foreign states with which Her Majesty is at peace.
[9 August 1870.]

Whereas it is expedient to make provision for the regulation of the conduct of Her Majesty's subjects during the existence of hostilities between foreign states with which Her Majesty is at peace:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short Title of Act.

1. This Act may be cited for all purposes as "The Foreign Enlistment Act, 1870."

Application of Act

2. This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters.

Commencement of Act.

3. This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act.

Illegal Enlistment.

Penalty on enlistment in service of foreign state.

4. If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid,—

> He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on leaving Her Majesty's Dominions with intent to serve a Foreign State.

5. If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent,—

> He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on embarking Persons under False Representations as to Service.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state,—

> He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

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Penalty on taking illegally enlisted Persons on board Ship.

7. If the master or owner of any ship, without the license of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,—

> (1) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the license of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state:
>
> (2) Any person, being a British subject, who, without the license of Her Majesty, is about to quit Her Majesty's dominions with the intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state:

(3) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state:

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,—

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour: and

(2) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace: and

(3) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

Illegal Shipbuilding and Illegal Expeditions.

Penalty on illegal Shipbuilding and illegal Expeditions.

8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say,—

(1) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(2) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state:

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1) The offender shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty:

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; (that is to say,)

(1) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State:

(2) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.

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Presumption as to Evidence in case of Illegal Ship.

9. Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign

state.

Penalty on aiding the Warlike Equipment of Foreign ships.

10. If any person within the dominions of Her Majesty, and without the license of Her Majesty, —

By adding to the number of guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign state at war with any friendly state,—

Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on fitting out Naval or Military Expeditions without License.

11. If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

Punishment of Accessories.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

Limitation of Term of Imprisonment.

13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

Illegal Prize.

Illegal Prize brought into British Ports restored.

14. If during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandize captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act are brought within the limits of Her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with the knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorised in that behalf by the Government of the foreign state to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal as in the case of any order made in the exercise of the ordinary jurisdiction of such court; and in the meantime and until a final order has been made on such application the court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandize, and (if the same be of perishable nature, or incurring risk of deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such court in the exercise of its ordinary jurisdiction.

General Provision.

License by Her Majesty, how granted.

15. For the purpose of this Act, a license by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.

Legal Procedure.

Jurisdiction in respect of Offences by Persons against Act.

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16. Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

Venue in respect of Offences by Persons. 24 & 25 Vict. c. 97.

17. Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been

committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

Power to remove Offenders for Trial.

18. The following authorities, that is to say, in the United Kingdom any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the court having the highest criminal jurisdiction in that place, may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

Jurisdiction in respect of Forfeiture of Ships for Offences against Act.

19. All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court; and the Court of Admiralty shall, in addition to any power given to the court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

Regulations as to Proceedings against the Offender and the Ship.

20. Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

Officer authorised to seize offending Ships.

21. The following officers, that is to say,—

(1) Any officer of customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs or any officer of the Board of Trade, subject nevertheless to any special or general instructions from the Board of Trade;

(2) Any officer of customs or public officer in any British possession, subject nevertheless to any special or general instructions from the governor of such possession;

(3) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer;

(4) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer,

may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the "local authority"; but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

Powers of Officers authorised to seize Ships.

22. Any officer authorised to seize or detain any ship in respect of any offence against this Act may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of Her Majesty's army or navy or marines, or any excise officer
[Pg 671]
or officers of customs, or any harbour-master or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same, and to enforce the provisions of this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as

well against the Queen's Majesty, Her heirs and successors, as against all persons so killed, maimed, or hurt.

Special Power of Secretary of State or Chief Executive Authority to detain Ship.

23. If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner herein-after mentioned.

The owner of the ship so detained, or his agent, may apply to the Court of Admiralty for its release, and the court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

If the applicant establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped or intended to be despatched contrary to this Act, the ship shall be released and restored.

If the applicant fail to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

The court may in cases where no proceedings are pending for its condemnation release any ship detained under this section on the owner giving security to the satisfaction of the court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed contrary to this Act, or may release the ship without such security if the Secretary of State or chief executive authority think fit so to release the same.

If the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the court, and any amount so assessed shall be payable by the Commissioners of the Treasury out of any moneys legally applicable for that purpose. The Court of Admiralty shall also have power to make a like order for the indemnity of the owner, on the application of such owner to the court, in a summary way, in cases where the ship is released by the order of the Secretary of State or the chief executive authority, before any application is made by the owner or his agent to the court for such release.

Nothing in this section contained shall affect any proceedings instituted or to be instituted for the condemnation of any ship detained under this section where such ship is liable to forfeiture subject to this provision, that if such ship is restored in pursuance of this section all proceedings for such condemnation shall be stayed; and where the court declares that the owner is to be indemnified by the payment of costs and damages for the detainer, all costs, charges, and expenses incurred by such owner in or about any proceedings for the condemnation of such ship shall be added to the costs and damages payable to him in respect of the detention of the ship.

Nothing in this section contained shall apply to any foreign non-commissioned ship despatched from any part of Her Majesty's dominions after having come within them under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character has taken place in this country.

Special Power of Local Authority to detain Ship.

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24. Where it is represented to any local authority, as defined by this Act, and such local authority believes the representation, that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority.

Upon the receipt of such communication the Secretary of State or chief executive authority may order the ship to be released if he thinks there is no cause for detaining her, but if satisfied that there is reasonable and probable cause for believing that such ship was built, commissioned, or equipped or intended to be despatched in contravention of this Act, he shall issue his warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner as he is entitled to be indemnified where the Secretary of State having issued his warrant under this Act releases the

ship before any application is made by the owner or his agent to the court for such release.

Power of Secretary of State or Executive Authority to grant Search Warrant.

25. The Secretary of State or the chief executive authority may, by warrant, empower any person to enter any dockyard or other place within Her Majesty's dominions and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign state at war with a friendly state, and to search such ship.

Exercise of Powers of Secretary of State or Chief Executive Authority.

26. Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of Her Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say,

(1) In Ireland by the Lord Lieutenant or other the chief governor or governors of Ireland for the time being, or the chief secretary to the Lord Lieutenant:

(2) In Jersey by the Lieutenant Governor:

(3) In Guernsey, Alderney, and Sark, and the dependent islands by the Lieutenant Governor:

(4) In the Isle of Man by the Lieutenant Governor:

(5) In any British possession by the Governor:

A copy of any warrant issued by a Secretary of State or by any officer authorised in pursuance of this Act to issue such warrant in Ireland, the Channel Islands, or the Isle of Man shall be laid before Parliament.

Appeal from Court of Admiralty.

27. An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the court as a Court of Admiralty.

Indemnity to Officers.

28. Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a ship by the Court of Admiralty no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

Indemnity to Secretary of State or Chief Executive Authority.

29. The Secretary of State shall not, nor shall the chief executive authority, be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness, except at his own request, in any court of justice in respect of the circumstances which led to the issue of the warrant.

Interpretation Clause.

Interpretation of Terms.

30. In this Act, if not inconsistent with the context, the following terms have the meanings herein-after respectively assigned to them; that is to say,

"Foreign State:"

"Foreign state" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people:

"Military Service:"

"Military service" shall include military telegraphy and any other employment whatever, in or in connection with any military operation:

"Naval Service:"

"Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque:

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"United Kingdom:"

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"British Possessions:"

"British possession" means any territory, colony, or place being part of Her Majesty's dominions, and not part of the United Kingdom, as defined by this Act:

"The Secretary of State:"

"The Secretary of State" shall mean any one of Her Majesty's Principal Secretaries of State:

"Governor:"

"The Governor" shall as respects India mean the Governor General or the Governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor General of the whole possession or the Governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a governor shall be included under the term "Governor":

"Court of Admiralty:"

"Court of Admiralty" shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within Her Majesty's dominions:

"Ship:"

"Ship" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water:

"Building:"

"Building" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly:

"Equipping:"

"Equipping" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly:

"Ship and Equipment:"

"Ship and equipment" shall include a ship and everything in or belonging to a ship:

"Master:"

"Master" shall include any person having the charge or command of a ship.

Repeal of Acts, and Saving Clauses.

Repeal of Foreign Enlistment Act. 59 G. 3, c. 69.

31. From and after the commencement of this Act, an Act passed in the fifty-ninth year of the reign of His late Majesty King George the Third, chapter sixty-nine, intituled "An Act to prevent the enlisting or engagement of His Majesty's subjects to serve in foreign service, and the fitting out or equipping, in His Majesty's dominions, vessels for warlike purposes, without His Majesty's license," shall be repealed: Provided that such repeal shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, nor the institution of any investigation or legal proceeding, or any other remedy for enforcing any such penalty, forfeiture, or punishment as aforesaid.

Saving as to Commissioned Foreign Ships.

32. Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state, or give to any British court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign state any jurisdiction which it would not have had if this Act had not passed.

Penalties not to extend to Persons entering into Military Service in Asia. 59 G. 3, c. 69, s. 12.

33. Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military services of princes, states, or potentates of Asia.

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APPENDIX X

THE NAVAL PRIZE ACT, 1864

27 & 28 VICT., CHAPTER 25

An Act for regulating Naval Prize of War.
[*23rd June 1864.*]

Whereas it is expedient to enact permanently, with Amendments, such Provisions concerning Naval Prize, and Matters connected therewith, as have heretofore been usually passed at the Beginning of a War:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short Title.

1. This Act may be cited as the Naval Prize Act, 1864.

2. In this Act—

Interpretation of Terms.

The Term "the Lords of the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the Office of Lord High Admiral:

The Term "the High Court of Admiralty" means the High Court of Admiralty of *England*:

The Term "any of Her Majesty's Ships of War" includes any of Her Majesty's Vessels of War, and any hired armed Ship or Vessel in Her Majesty's Service:

The Term "Officers and Crew" includes Flag Officers, Commanders, and other Officers, Engineers, Seamen, Marines, Soldiers, and others on board any of Her Majesty's Ships of War:

The Term "Ship" includes Vessel and Boat, with the Tackle, Furniture, and Apparel of the Ship, Vessel, or Boat:

The Term "Ship Papers" includes all Books, Passes, Sea Briefs, Charter Parties, Bills of Lading, Cockets, Letters, and other Documents and Writings delivered up or found on board a captured Ship:

The Term "Goods" includes all such Things as are by the Course of Admiralty and Law of Nations the Subject of Adjudication as Prize (other than Ships).

I.—Prize Courts.

High Court of Admiralty and other Courts to be Prize Courts for Purposes of Act.

3. The High Court of Admiralty, and every Court of Admiralty or of Vice-Admiralty, or other Court exercising Admiralty Jurisdiction in Her Majesty's Dominions, for the Time being authorised to take cognizance of and judicially proceed in Matters of Prize, shall be a Prize Court within the Meaning of this Act.

Every such Court, other than the High Court of Admiralty, is comprised in the Term "Vice-Admiralty Prize Court," when hereafter used in this Act.

High Court of Admiralty.

Jurisdiction of High Court of Admiralty.

4. The High Court of Admiralty shall have Jurisdiction throughout Her Majesty's Dominions as a Prize Court.

The High Court of Admiralty as a Prize Court shall have Power to enforce any Order or Decree of a Vice-Admiralty Prize Court, and any Order or Decree of the Judicial Committee of the Privy Council in a Prize Appeal.

Appeal; Judicial Committee.

Appeal to Queen in Council, in what Cases.

5. An Appeal shall lie to Her Majesty in Council from any Order or Decree of a Prize Court, as of Right in case of a Final Decree, and in other Cases with the Leave of the Court making the Order or Decree.

Every Appeal shall be made in such Manner and Form and subject to such Regulations (including Regulations as to Fees, Costs, Charges, and Expenses) as may for the Time being be directed by Order in Council, and in the Absence of any such Order, or so far as any such Order does not extend, then in such Manner and Form and subject to such Regulations as are for the Time being prescribed or in force respecting Maritime Causes of Appeal.

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Jurisdiction of Judicial Committee in Prize Appeals.

6. The Judicial Committee of the Privy Council shall have Jurisdiction to hear and report on any such Appeal, and may therein exercise all such Powers as for the Time being appertain to them in respect of Appeals from any Court of Admiralty Jurisdiction, and all such Powers as are under this Act vested in the High Court of Admiralty, and all such Powers as were wont to be exercised by the Commissioners of Appeal in Prize Causes.

Custody of Processes, Papers, &c.

7. All Processes and Documents required for the Purposes of any such Appeal shall be transmitted to and shall remain in the Custody of the Registrar of Her Majesty in Prize Appeals.

Limit of Time for Appeal.

8. In every such Appeal the usual Inhibition shall be extracted from the Registry of Her Majesty in Prize Appeals within Three Months after the Date of the Order or Decree appealed from if the Appeal be from the High Court of Admiralty, and within Six Months after that Date if it be from a Vice-Admiralty Prize Court.

The Judicial Committee may, nevertheless, on sufficient Cause shown, allow the Inhibition to be extracted and the Appeal to be prosecuted after the Expiration of the respective Periods aforesaid.

Vice-Admiralty Prize Courts.

Enforcement of Orders of High Court, &c.

9. Every Vice-Admiralty Prize Court shall enforce within its Jurisdiction all Orders and Decrees of the Judicial Committee in Prize Appeals and of the High Court of Admiralty in Prize Causes.

Salaries of Judges of Vice-Admiralty Prize Courts.

10. Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court a Salary not exceeding Five Hundred Pounds a Year, payable out of Money provided by Parliament, subject to such Regulations as seem meet.

A Judge to whom a Salary is so granted shall not be entitled to any further Emolument, arising from Fees or otherwise, in respect of Prize Business transacted in his Court.

An Account of all such Fees shall be kept by the Registrar of the Court, and the Amount thereof shall be carried to and form Part of the Consolidated Fund of the United Kingdom.

Retiring Pensions of Judges, as in 22 & 23 Vict. c. 26.

11. In accordance, as far as Circumstances admit, with the Principles and Regulations laid down in the Superannuation Act, 1859, Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court an annual or other Allowance, to take effect on the Termination of his Service, and to be payable out of Money provided by Parliament.

Returns from Vice-Admiralty Prize Courts.

12. The Registrar of every Vice-Admiralty Prize Court shall, on the First Day of *January* and First Day of *July* in every year, make out a Return (in such Form as the Lords of the Admiralty from Time to Time direct) of all cases adjudged in the Court since the last half-yearly Return, and shall with all convenient Speed send the same to the Registrar of the High Court of Admiralty, who shall keep the same in the Registry of that Court, and who shall, as soon as conveniently may be, send a Copy of the Returns of each Half Year to the Lords of the Admiralty, who shall lay the same before both Houses of Parliament.

General.

General Orders for Prize Courts.

13. The Judicial Committee of the Privy Council, with the Judge of the High Court of Admiralty, may from Time to Time frame General Orders for regulating (subject to the Provisions of this Act) the Procedure and Practice of Prize Courts, and the Duties and Conduct of the Officers thereof and of the Practitioners therein, and for regulating the Fees to be taken by the Officers of the Courts, and the Costs, Charges, and Expenses to be allowed to the Practitioners therein.

Any such General Orders shall have full Effect, if and when approved by Her Majesty in Council, but not sooner or otherwise.

Every Order in Council made under this Section shall be laid before both Houses of Parliament.

Every such Order in Council shall be kept exhibited in a conspicuous Place in each Court to which it relates.

Prohibition of Officer of Prize Court acting as Proctor, &c.

14. It shall not be lawful for any Registrar, Marshal, or other Officer of any Prize Court, or for the Registrar of Her Majesty in Prize Appeals, directly or indirectly to act or be in any manner concerned as Advocate, Proctor, Solicitor, or Agent, or otherwise, in any Prize Cause or Appeal, on pain of Dismissal or Suspension from Office, by Order of the Court or of the Judicial Committee (as the Case may require).

Prohibition of Proctors being concerned for adverse Parties in a Cause.

15. It shall not be lawful for any Proctor or Solicitor, or Person practising as a Proctor or Solicitor, being employed by a Party in a Prize Cause or Appeal, to be employed or concerned, by himself or his Partner, or by any other Person, directly or indirectly by or on behalf of any adverse Party in that Cause or Appeal, on pain of Exclusion or Suspension from Practice in Prize Matters, by Order of the Court or of the Judicial Committee (as the Case may require).

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II.—Procedure in Prize Causes.

Proceedings by Captors.

Custody of Prize Ship.

16. Every Ship taken as Prize, and brought into Port within the Jurisdiction of a Prize Court, shall forthwith and without Bulk broken, be delivered up to the Marshal of the Court.

If there is no such Marshal, then the Ship shall be in like Manner delivered up to the Principal Officer of Customs at the Port.

The Ship shall remain in the Custody of the Marshal, or of such Officer, subject to the Orders of the Court.

Bringing in of Ship Papers.

17. The Captors shall, with all practicable Speed after the Ship is brought into Port, bring the Ship Papers into the Registry of the Court.

The Officer in Command, or One of the Chief Officers of the Capturing Ship, or some other Person who was present at the Capture, and saw the Ship Papers delivered up or found on board,

shall make Oath that they are brought in as they were taken, without Fraud, Addition, Subduction, or Alteration, or else shall account on Oath to the Satisfaction of the Court for the Absence or altered Condition of the Ship Papers or any of them.

Where no Ship Papers are delivered up or found on board the captured Ship, the Officer in Command, or One of the Chief Officers of the capturing Ship, or some other Person who was present at the Capture, shall make Oath to that Effect.

Issue of Monition.

18. As soon as the Affidavit as to Ship Papers is filed, a Monition shall issue, returnable within Twenty Days from the Service thereof, citing all Persons in general to show Cause why the captured Ship should not be condemned.

Examinations on Standing Interrogatories.

19. The Captors shall, with all practicable Speed after the captured Ship is brought into Port, bring Three or Four of the Principal Persons belonging to the captured Ship before the Judge of the Court or some Person authorised in this behalf, by whom they shall be examined on Oath on the Standing Interrogatories.

The Preparatory Examinations on the Standing Interrogatories shall, if possible, be concluded within Five Days from the Commencement thereof.

Adjudication by Court.

20. After the Return of the Monition, the Court shall, on Production of the Preparatory Examinations and Ship Papers, proceed with all convenient Speed either to condemn or to release the captured Ship.

Further Proof.

21. Where, on Production of the Preparatory Examinations and Ship Papers, it appears to the Court doubtful whether the captured Ship is good Prize or not, the Court may direct further Proof to be adduced, either by Affidavit or by Examination of Witnesses, with or without Pleadings, or by Production of further Documents; and on such further Proof being adduced the Court shall with all convenient Speed proceed to Adjudication.

Custody, &c. of Ships of War.

22. The foregoing Provisions, as far as they relate to the Custody of the Ship, and to Examination on the Standing Interrogatories, shall not apply to Ships of War taken as Prize.

Claim.

Entry of Claim; Security for Costs.

23. At any Time before Final Decree made in the Cause, any Person claiming an Interest in the Ship may enter in the Registry of the Court a Claim, verified on Oath.

Within Five Days after entering the Claim, the Claimant shall give Security for Costs in the Sum of Sixty Pounds; but the Court shall have Power to enlarge the Time for giving Security, or to direct Security to be given in a larger Sum, if the Circumstances appear to require it.

Appraisement.

Power to Court to direct Appraisement.

24. The Court may, if it thinks fit, at any Time direct that the captured Ship be appraised.

Every Appraisement shall be made by competent Persons sworn to make the same according to the best of their Skill and Knowledge.

Delivery on Bail.

Power to Court to direct Delivery to Claimant on Bail.

25. After Appraisement, the Court may, if it thinks fit, direct that the captured Ship be delivered up to the Claimant, on his giving Security to the Satisfaction of the Court to pay to the Captors the appraised Value thereof in case of Condemnation.

Sale.

Power to Court to order Sale.

26. The Court may at any Time, if it thinks fit, on account of the Condition of the captured Ship, or on the Application of a Claimant, order that the captured Ship be appraised as aforesaid (if not already appraised), and be sold.

Sale on Condemnation.

27. On or after Condemnation the Court may, if it thinks fit, order that the Ship be appraised as aforesaid (if not already appraised), and be sold.

How Sales to be made.

28. Every Sale shall be made by or under the Superintendence of the Marshal of the Court or of the Officer having the Custody of the captured Ship.

Payment of Proceeds to Paymaster General or Official Accountant.

29. The Proceeds of any Sale, made either before or after Condemnation, and after Condemnation the appraised Value of the captured Ship, in case she has been delivered up to a Claimant on Bail, shall be paid under an Order of the Court either into the Bank of *England* to the Credit of Her Majesty's Paymaster General, or into the Hands of an Official Accountant (belonging to the Commissariat or some other Department) appointed for this Purpose by the Commissioners of Her Majesty's Treasury or by the Lords of the Admiralty, subject in either case to such Regulations as may from Time to Time be made, by order in Council, as to the Custody

and Disposal of Money so paid.

Small armed Ships.

One Adjudication as to several small Ships.

30. The Captors may include in One Adjudication any Number, not exceeding Six, of armed Ships not exceeding One hundred Tons each, taken within Three Months next before Institution of Proceedings.

Goods.

Application of foregoing Provisions to Prize Goods.

31. The foregoing Provisions relating to Ships shall extend and apply, *mutatis mutandis*, to goods taken as Prize on board Ship; and the Court may direct such goods to be unladen, inventoried, and warehoused.

Monition to Captors to proceed.

Power to Court to call on Captors to proceed to Adjudication.

32. If the Captors fail to institute or to prosecute with Effect Proceedings for Adjudication, a Monition shall, on the Application of a Claimant, issue against the Captors, returnable within Six Days from the Service thereof, citing them to appear and proceed to Adjudication; and on the Return thereof the Court shall either forthwith proceed to Adjudication or direct further Proof to be adduced as aforesaid and then proceed to Adjudication.

Claim on Appeal.

Person intervening on Appeal to enter Claim.

33. Where any Person, not an original Party in the Cause, intervenes on Appeal, he shall enter a Claim, verified on Oath, and shall give Security for Costs.

III.—Special Cases of Capture.

Land Expeditions.

Jurisdiction of Prize Court in case of Capture in Land Expedition.

34. Where, in an Expedition of any of Her Majesty's Naval or Naval and Military Forces against a Fortress or Possession on Land, Goods belonging to the State of the Enemy or to a Public Trading Company of the Enemy exercising Powers of Government are taken in the Fortress or Possession, or a Ship is taken in Waters defended by or belonging to the Fortress or Possession, a Prize Court shall have Jurisdiction as to the Goods or Ship so taken, and any Goods taken on board the Ship as in case of Prize.

Conjunct Capture with Ally.

Jurisdiction of Prize Court in case of Expedition with Ally.

35. Where any Ship or Goods is or are taken by any of Her Majesty's Naval or Naval and Military Forces while acting in conjunction with any Forces of any of Her Majesty's Allies, a Prize Court shall have Jurisdiction as to the same as in the case of Prize, and shall have Power, after Condemnation, to apportion the due share of the Proceeds to Her Majesty's Ally, the proportionate Amount and the Disposition of which Share shall be such as may from Time to Time be agreed between Her Majesty and Her Majesty's Ally.

Joint Capture.

Restriction on Petitions by asserted joint Captors.

36. Before Condemnation, a Petition on behalf of asserted joint Captors shall not (except by special Leave of the Court) be admitted, unless and until they give Security to the Satisfaction of the Court to contribute to the actual Captors a just Proportion of any Costs, Charges, and Expenses or Damages that may be incurred by or awarded against the actual Captors on account of the Capture and Detention of the Prize.

After Condemnation, such a Petition shall not (except by special Leave of the Court) be admitted unless and until the asserted joint Captors pay to the actual Captors a just Proportion of the Costs, Charges, and Expenses incurred by the actual Captors in the Case, and give such Security as aforesaid, and show sufficient Cause to the Court why their Petition was not presented before Condemnation.

Provided, that nothing in the present Section shall extend to the asserted Interest of a Flag Officer claiming to share by virtue of his Flag.

Offences against Law of Prize.

In case of Offence by Captors, Prize to be reserved for Crown.

37. A Prize Court, on Proof of any Offence against the Law of Nations, or against this Act, or any Act relating to Naval Discipline, or against any Order in Council or Royal Proclamation, or of any Breach of Her Majesty's Instructions relating to Prize, or of any Act of Disobedience to the Orders of the Lords of the Admiralty, or to the Command of a Superior Officer, committed by the Captors in relation to any Ship or Goods taken as Prize, or in relation to any Person on Board any such Ship, may, on Condemnation, reserve the Prize to Her Majesty's Disposal, notwithstanding any Grant that may have been made by Her Majesty in favour of Captors.

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Pre-emption.

Purchase by Admiralty for Public Service of Stores on board Foreign Ships.

38. Where a Ship of a Foreign Nation passing the Seas laden with Naval or Victualling Stores intended to be carried to a Port of any Enemy of Her Majesty is taken and brought into a Port of

the United Kingdom, and the Purchase for the Service of Her Majesty of the Stores on board the Ship appears to the Lords of the Admiralty expedient without the Condemnation thereof in a Prize Court, in that Case the Lords of the Admiralty may purchase, on the Account or for the Service of Her Majesty, all or any of the Stores on board the Ship; and the Commissioners of Customs may permit the Stores purchased to be entered and landed within any Port.

Capture by Ship other than a Ship of War.

Prizes taken by Ships other than Ships of War to be Droits of Admiralty.

39. Any Ship or Goods taken as Prize by any of the Officers and Crew of a Ship other than a Ship of War of Her Majesty shall, on Condemnation, belong to Her Majesty in Her Office of Admiralty.

IV.—Prize Salvage.

Salvage to Re-captors of British Ship or Goods from Enemy.

40. Where any Ship or Goods belonging to any of Her Majesty's Subjects, after being taken as Prize by the Enemy, is or are retaken from the Enemy by any of Her Majesty's Ships of War, the same shall be restored by Decree of a Prize Court to the Owner, on his paying as Prize Salvage One Eighth Part of the Value of the Prize to be decreed and ascertained by the Court, or such Sum not exceeding One Eighth Part of the estimated Value of the Prize as may be agreed on between the Owner and the Re-captors, and approved by Order of the Court; Provided, that where the Re-capture is made under circumstances of Special Difficulty or Danger, the Prize Court may, if it thinks fit, award to the Re-captors as Prize Salvage a larger Part than One Eighth Part, but not exceeding in any Case One Fourth Part, of the Value of the Prize.

Provided also, that where a Ship after being so taken is set forth or used by any of Her Majesty's Enemies as a Ship of War, this Provision for Restitution shall not apply, and the Ship shall be adjudicated on as in other Cases of Prize.

Permission to re-captured Ship to proceed on Voyage.

41. Where a Ship belonging to any of Her Majesty's Subjects, after being taken as Prize by the Enemy, is retaken from the Enemy by any of Her Majesty's Ships of War, she may, with the Consent of the Re-captors, prosecute her Voyage, and it shall not be necessary for the Re-captors to proceed to Adjudication till her Return to a Port of the United Kingdom.

The Master or Owner, or his Agent, may, with the Consent of the Re-captors, unload and dispose of the Goods on board the Ship before Adjudication.

In case the Ship does not, within Six Months, return to a Port of the United Kingdom, the Re-captors may nevertheless institute Proceedings against the Ship or Goods in the High Court of Admiralty, and the Court may thereupon award Prize Salvage as aforesaid to the Re-captors, and may enforce Payment thereof, either by Warrant of Arrest against the Ship or Goods, or by Monition and Attachment against the Owner.

V.—Prize Bounty.

Prize Bounty to Officers and Crew present at Engagement with an Enemy.

42. If, in relation to any War, Her Majesty is pleased to declare, by Proclamation or Order in Council, Her Intention to grant Prize Bounty to the Officers and Crews of Her Ships of War, then such of the Officers and Crew of any of Her Majesty's Ships of War as are actually present at the taking or destroying of any armed Ship of any of Her Majesty's Enemies shall be entitled to have distributed among them as Prize Bounty a Sum calculated at the Rate of Five Pounds for each Person on board the Enemy's Ship at the Beginning of the Engagement.

Ascertainment of Amount of Prize Bounty by Decree of Prize Court.

43. The Number of the Persons so on board the Enemy's Ship shall be proved in a Prize Court, either by the Examinations on Oath of the Survivors of them, or of any Three or more of the Survivors, or if there is no Survivor by the Papers of the Enemy's Ship, or by the Examinations on Oath of Three or more of the Officers and Crew of Her Majesty's Ship, or by such other Evidence as may seem to the Court sufficient in the Circumstances.

The Court shall make a Decree declaring the Title of the Officers and Crew of Her Majesty's Ship to the Prize Bounty, and stating the Amount thereof.

The Decree shall be subject to Appeal as other Decrees of the Court.

Payment of Prize Bounty awarded.

44. On Production of an official Copy of the Decree the Commissioners of Her Majesty's Treasury shall, out of Money provided by Parliament, pay the Amount of Prize Bounty decreed, in such Manner as any Order in Council may from Time to Time direct.

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VI.—Miscellaneous Provisions.

Ransom.

Power for regulating Ransom by Order in Council.

45. Her Majesty in Council may from Time to Time, in relation to any War, make such Orders as may seem expedient, according to Circumstances, for prohibiting or allowing, wholly or in certain Cases, or subject to any Conditions or Regulations or otherwise, as may from Time to Time seem meet, the ransoming or the entering into any contract or Agreement for the ransoming of any Ship or Goods belonging to any of Her Majesty's Subjects, and taken as Prize by any of Her Majesty's Enemies.

Any Contract or Agreement entered into, and any Bill, Bond, or other Security given for

Ransom of any Ship or Goods, shall be under the exclusive Jurisdiction of the High Court of Admiralty as a Prize Court (subject to Appeal to the Judicial Committee of the Privy Council), and if entered into or given in contravention of any such Order in Council shall be deemed to have been entered into or given for an illegal Consideration.

If any Person ransoms or enters into any Contract or Agreement for Ransoming any Ship or Goods, in contravention of any such Order in Council, he shall for every such Offence be liable to be proceeded against in the High Court of Admiralty at the Suit of Her Majesty in Her Office of Admiralty, and on Conviction to be fined, in the Discretion of the Court, any Sum not exceeding Five hundred Pounds.

Convoy.

Punishment of Masters of Merchant Vessels under Convoy disobeying Orders or deserting Convoy.

46. If the Master or other Person having the Command of any Ship of any of Her Majesty's Subjects, under the Convoy of any of Her Majesty's Ships of War, wilfully disobeys any lawful Signal, Instruction, or Command of the Commander of the Convoy, or without Leave deserts the Convoy, he shall be liable to be proceeded against in the High Court of Admiralty at the Suit of Her Majesty in Her Office of Admiralty, and upon Conviction to be fined, in the Discretion of the Court, any Sum not exceeding Five hundred Pounds, and to suffer Imprisonment for such Time, not exceeding One Year, as the Court may adjudge.

Customs Duties and Regulations.

Prize Ships and Goods liable to Duties and Forfeiture.

47. All Ships and Goods taken as Prize and brought into a Port of the United Kingdom shall be liable to and be charged with the same Rates and Charges and Duties of Customs as under any Act relating to the Customs may be chargeable on other Ships and Goods of the like Description; and

All Goods brought in as Prize which would on the voluntary Importation thereof be liable to Forfeiture or subject to any Restriction under the Laws relating to the Customs, shall be deemed to be so liable and subject, unless the Commissioners of Customs see fit to authorise the Sale or Delivery thereof for Home Use or Exportation, unconditionally or subject to such Conditions and Regulations as they may direct.

Regulations of Customs to be observed as to Prize Ships and Goods.

48. Where any Ship or Goods taken as Prize is or are brought into a Port of the United Kingdom, the Master or other Person in charge or command of the Ship which has been taken or in which the Goods are brought shall, on Arrival at such Port, bring to at the proper Place of Discharge, and shall, when required by any Officer of Customs, deliver an Account in Writing under his Hand concerning such Ship and Goods, giving such Particulars relating thereto as may be in his Power, and shall truly answer all Questions concerning such Ship or Goods asked by any such Officer, and in default shall forfeit a Sum not exceeding One hundred Pounds, such Forfeiture to be enforced as Forfeitures for Offences against the Laws relating to the Customs are enforced, and every such Ship shall be liable to such Searches as other Ships are liable to, and the Officers of the Customs may freely go on board such Ship and bring to the Queen's Warehouse any Goods on board the same, subject, nevertheless, to such Regulations in respect of Ships of War belonging to Her Majesty as shall from Time to Time be issued by the Commissioners of Her Majesty's Treasury.

Power for Treasury to remit Customs Duties in certain cases.

49. Goods taken as Prize may be sold either for Home Consumption or for Exportation; and if in the former Case the Proceeds thereof, after payment of Duties of Customs, are insufficient to satisfy the just and reasonable claims thereon, the Commissioners of Her Majesty's Treasury may remit the whole or such Part of the said Duties as they see fit.

Perjury.

Punishment of Persons guilty of Perjury.

50. If any Person wilfully and corruptly swears, declares, or affirms falsely in any Prize Cause or Appeal, or in any Proceeding under this Act, or in respect of any Matter required by this Act to be verified on Oath, or suborns any other Person to do so, he shall be deemed guilty of Perjury, or
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of Subornation of Perjury (as the Case may be), and shall be liable to be punished accordingly.

Limitation of Actions, &c.

Actions against Persons executing Act not to be brought without Notice, &c.

51. Any Action or Proceeding shall not lie in any Part of Her Majesty's Dominions against any Person acting under the Authority or in the Execution or intended Execution or in pursuance of this Act for any alleged Irregularity or Trespass, or other Act or Thing done or omitted by him under this Act, unless Notice in Writing (specifying the Cause of the Action or Proceeding) is given by the intending Plaintiff or Prosecutor to the intended Defendant One Month at least before the Commencement of the Action or Proceeding, nor unless the Action or Proceeding is commenced within Six Months next after the Act or Thing complained of is done or omitted, or, in case of a Continuation of Damage, within Six Months next after the doing of such Damage has ceased.

In any such action the Defendant may plead generally that the Act or Thing complained of was done or omitted by him when acting under the authority or in the Execution or intended Execution or in pursuance of this Act, and may give all special Matter in Evidence; and the Plaintiff shall not succeed if Tender of sufficient Amends is made by the Defendant before the

Commencement of the Action; and in case no Tender has been made, the Defendant may, by Leave of the Court in which the Action is brought, at any Time pay into Court such Sum of Money as he thinks fit, whereupon such Proceeding and Order shall be had and made in and by the Court as may be had and made on the Payment of Money into Court in an ordinary Action; and if the Plaintiff does not succeed in the Action, the Defendant shall receive such full and reasonable Indemnity as to all Costs, Charges, and Expenses incurred in and about the Action as may be taxed and allowed by the proper Officer, subject to Review; and though a Verdict is given for the Plaintiff in the Action he shall not have Costs against the Defendant, unless the Judge before whom the Trial is had certifies his Approval of the Action.

Any such Action or Proceeding against any Person in Her Majesty's Naval Service, or in the Employment of the Lords of the Admiralty, shall not be brought or instituted elsewhere than in the United Kingdom.

Petitions of Right.

Jurisdiction of High Court of Admiralty on Petitions of Right in certain Cases, as in 23 & 24 Vict. c. 34.

52. A Petition of Right, under The Petitions of Right Act, 1860, may, if the Suppliant thinks fit, be intituled in the High Court of Admiralty, in case the Subject Matter of the Petition or any material part thereof arises out of the Exercise of any Belligerent Right on behalf of the Crown, or would be cognizable in a Prize Court within Her Majesty's Dominions if the same were a Matter in dispute between private Persons.

Any Petition of Right under the last-mentioned Act, whether intituled in the High Court of Admiralty or not, may be prosecuted in that Court, if the Lord Chancellor thinks fit so to direct.

The Provisions of this Act relative to Appeal, and to the framing and Approval of General Orders for regulating the Procedure and Practice of the High Court of Admiralty, shall extend to the Case of any such Petition of Right intituled or directed to be prosecuted in that Court; and, subject thereto, all the Provisions of The Petitions of Right Act, 1860, shall apply, *mutatis mutandis*, in the Case of any such Petition of Right; and for the Purposes of the present Section the Terms "Court" and "Judge" in that Act shall respectively be understood to include and to mean the High Court of Admiralty and the Judge thereof, and other Terms shall have the respective Meanings given to them in that Act.

Orders in Council.

Power to make Orders in Council.

53. Her Majesty in Council may from Time to Time make such Orders in Council as seem meet for the better Execution of this Act.

Order in Council to be gazetted, &c.

54. Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within Thirty Days after the making thereof, if Parliament is then sitting, and, if not, then within Thirty Days after the next Meeting of Parliament.

Savings.

Not to affect Rights of Crown; Effect of Treaties, &c.

55. Nothing in this Act shall—

(1) give to the Officers and Crew of any of Her Majesty's Ships of War any Right or Claim in or to any Ship or Goods taken as Prize or the Proceeds thereof, it being the intent of this Act that such Officers and Crews shall continue to take only such Interest (if any) in the Proceeds of Prizes as may be from Time to Time granted to them by the Crown; or

(2) affect the Operation of any existing Treaty or Convention with any Foreign Power; or

(3) take away or abridge the Power of the Crown to enter into any Treaty or Convention with
[Pg 681] any Foreign Power containing any Stipulation that may seem meet concerning any Matter to which this Act relates; or

(4) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any Right, Power, or Prerogative of Her Majesty the Queen in right of Her Crown, or in right of Her Office of Admiralty, or any Right or Power of the Lord High Admiral of the United Kingdom, or of the Commissioners for executing the Office of Lord High Admiral; or

(5) take away, abridge, or control, further or otherwise than as expressly provided by this Act, the Jurisdiction or Authority of a Prize Court to take cognizance of and judicially proceed upon any Capture, Seizure, Prize, or Reprisal of any Ship or Goods, or to hear and determine the same, and, according to the Course of Admiralty and the Law of Nations, to adjudge and condemn any Ship or Goods, or any other Jurisdiction or Authority of or exerciseable by a Prize Court.

Commencement.

Commencement of Act.

56. This Act shall commence on the Commencement of The Naval Agency and Distribution Act,
[Pg 682] 1864.

APPENDIX XI

THE PRIZE COURTS ACTS, 1894

57 & 58 VICT., CHAPTER 39

An Act to make further provision for the establishment of Prize Courts, and for other purposes connected therewith.
[*17th August 1894.*]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short Title.

1. This Act may be cited as the Prize Courts Act, 1894.

Constitution of Prize Courts in British Possessions.

2.—(1) Any commission, warrant, or instructions from Her Majesty the Queen or the Admiralty for the purpose of commissioning or regulating the procedure of a prize court at any place in a British possession may, notwithstanding the existence of peace, be issued at any time, with a direction that the court shall act only upon such proclamation as herein-after mentioned being made in the possession.

(2) Where any such commission, warrant, or instructions have been issued, then, subject to instructions from Her Majesty, the Vice-Admiral of such possession may, when satisfied, by information from a Secretary of State or otherwise, that war has broken out between Her Majesty and any foreign State, proclaim that war has so broken out, and thereupon the said commission, warrant, and instructions shall take effect as if the same had been issued after the breaking out of such war and such foreign State were named therein.

53 & 54 Vict. c. 27.

(3) The said commission and warrant may authorise either a Vice-Admiralty Court or a Colonial Court of Admiralty, within the meaning of the Colonial Courts of Admiralty Act, 1890, to act as a prize court, and may establish a Vice-Admiralty Court for that purpose.

(4) Any such commission, warrant, or instructions may be revoked or altered from time to time.

(5) A court duly authorised to act as a prize court during any war shall after the conclusion of the war continue so to act in relation to, and finally dispose of, all matters and things which arose during the war, including all penalties and forfeitures incurred during the war.

Rules of Court for and Fees in Prize Courts. 27 & 28 Vict. c. 25.

3.—(1) Her Majesty the Queen in Council may make rules of court for regulating, subject to the provisions of the Naval Prize Act, 1864, and this Act, the procedure and practice of prize courts within the meaning of that Act, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the courts, and the costs, charges, and expenses to be allowed to the practitioners therein.

(2) Every rule so made shall, whenever made, take effect at the time therein mentioned, and shall be laid before both Houses of Parliament, and shall be kept exhibited in a conspicuous place in each court to which it relates.

27 & 28 Vict. c. 25.

(3) This section shall be substituted for section thirteen of the Naval Prize Act, 1864, which section is hereby repealed.

53 & 54 Vict c. 27.

(4) If any Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, is authorised under this Act or otherwise to act as a prize court, all fees arising in respect of prize business transacted in the court shall be fixed, collected, and applied in like manner as the fees arising in respect of the Admiralty business of the court under the said Act.

As to Vice-Admiralty Courts.

4. Her Majesty the Queen in Council may make rules of court for regulating the procedure and practice, including fees and costs, in a Vice-Admiralty Court, whether under this Act or otherwise.

Repeal of 39 & 40 Geo. 3, c. 79, s. 25.

[Pg 683]

5. Section twenty-five of the Government of India Act, 1800, is hereby repealed.

APPENDIX XII

NAVAL PRIZE BILL OF 1911

Passed by the House of Commons, but thrown out by the House of Lords

A Bill to Consolidate, with Amendments, the Enactments relating to Naval Prize of War.

Whereas at the Second Peace Conference held at The Hague in the year nineteen hundred and seven a Convention, the English translation whereof is set forth in the First Schedule to this Act, was drawn up, but it is desirable that the same should not be ratified by His Majesty until such amendments have been made in the law relating to naval prize of war as will enable effect to be given to the Convention:

And whereas for the purpose aforesaid it is expedient to consolidate the law relating to naval prize of war with such amendments as aforesaid and with certain other minor amendments:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Part I.—Courts and Officers.

The Prize Court in England.

The High Court. [54 & 55 Vict. c. 53, s. 4.]

1.—(1) The High Court shall, without special warrant, be a prize court, and shall, on the high seas, and throughout His Majesty's Dominions, and in every place where His Majesty has jurisdiction, have all such jurisdiction as the High Court of Admiralty possessed when acting as a prize court, and generally have jurisdiction to determine all questions as to the validity of the capture of a ship or goods, the legality of the destruction of a captured ship or goods, and as to the payment of compensation in respect of such a capture or destruction.

For the purposes of this Act the expression "capture" shall include seizure for the purpose of the detention, requisition, or destruction of any ship or goods which, but for any convention, would be liable to condemnation, and the expressions "captured" and "taken as prize" shall be construed accordingly, and where any ship or goods have been so seized the court may make an order for the detention, requisition, or destruction of the ship or goods and for the payment of compensation in respect thereof.

(2) Subject to rules of court, all causes and matters within the jurisdiction of the High Court as a prize court shall be assigned to the Probate, Divorce, and Admiralty Division of the Court.

Power of High Court to enforce decrees of other courts. [27 & 28 Vict. c. 25. s. 4.]

2. The High Court as a prize court shall have power to enforce any order or decree of a prize court in a British possession, and any order of the Supreme Prize Court constituted under this Act in a prize appeal.

Prize Courts in British Possessions.

Prize courts in British possessions. [57 & 58 Vict. c. 39. s. 2 (1) and (3). 53 & 54 Vict. c. 27, s. 2 (3) and s. 9.] 53 & 54 Vict. c. 27.

3. His Majesty may, by commission addressed to the Admiralty, empower the Admiralty to authorise, and the Admiralty may thereupon by warrant authorise, either a Vice-Admiralty court or a Colonial Court of Admiralty, within the meaning of the Colonial Courts of Admiralty Act, 1890, to act as a prize court in a British possession, or may in like manner establish a Vice-Admiralty court for the purpose of so acting; and any court so authorised shall, subject to the terms of the warrant from the Admiralty, have all such jurisdiction as is by this Act conferred on the High Court as a prize court.

Commissions. [57 & 58 Vict. c. 39, s. 2 (1), (2).]

4.—(1) Any commission, warrant, or instructions from His Majesty the King or the Admiralty for the purpose of commissioning a prize court at any place in a British possession may, [Pg 684] notwithstanding the existence of peace, be issued at any time, with a direction that the court shall act only upon such proclamation as herein-after mentioned being made in the possession.

(2) Where any such commission, warrant, or instructions have been issued, then, subject to instructions from His Majesty the Vice-Admiral of such possession may, when satisfied by information from a Secretary of State or otherwise that war has broken out between His Majesty and any foreign State, proclaim that war has so broken out, and thereupon the said commission, warrant, and instructions shall take effect as if the same had been issued after the breaking out of such war and such foreign State were named therein.

(3) Any such commission, warrant, or instructions may be revoked or altered from time to time.

Enforcement of orders.

5. Every prize court in a British possession shall enforce within its jurisdiction all orders and decrees of the High Court and of any other prize court in a British possession in prize causes, and all orders of the Supreme Prize Court constituted under this Act in prize appeals.

Remuneration of certain judges of prize courts in a British possession. [27 & 28 Vict. c. 25, ss. 10, 11.] 53 & 54 Vict. c. 27.

6.—(1) His Majesty in Council may, with the concurrence of the Treasury, grant to the judge of any prize court in a British possession, other than a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, remuneration, at a rate not exceeding five hundred pounds a year, payable out of money provided by Parliament, subject to such regulations as seem meet.

(2) A judge to whom remuneration is so granted shall not be entitled to any further emolument, arising from fees or otherwise, in respect of prize business transacted in his court.

(3) An account of all such fees shall be kept by the registrar of the court, and the amount thereof shall be carried to and form part of the Consolidated Fund of the United Kingdom.

Returns from prize courts in British possessions. [27 & 28 Vict. c. 25, s. 12.]

7. The registrar of every prize court in a British possession shall, on the first day of January and first day of July in every year, make out a return (in such form as the Admiralty from time to time direct) of all cases adjudged in the court since the last half-yearly return, and shall with all convenient speed send the same to the Admiralty registrar of the Probate, Divorce, and Admiralty Division of the High Court, who shall keep the same in the Admiralty registry of that Division, and who shall as soon as conveniently may be, send a copy of the returns of each half year to the

Admiralty, and the Admiralty shall lay the same before both houses of Parliament.

Fees. [57 & 58 Vict. c. 39 s. 3 (4).] 53 & 54 Vict. c. 27.

8. If any Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, is authorised under this Act or otherwise to act as a prize court, all fees arising in respect of prize business transacted in the court shall be fixed, collected, and applied in like manner as the fees arising in respect of the Admiralty business of the court under the first-mentioned Act.

Appeals.

Appeals to Supreme Prize Court. [54 & 55 Vict. c. 53, s. 4 (3).]

9.—(1) Any appeal from the High Court when acting as a prize court, or from a prize court in a British possession, shall lie only to a court (to be called the Supreme Prize Court) consisting of such members for the time being of the Judicial Committee of the Privy Council as may be nominated by His Majesty for that purpose.

(2) The Supreme Prize Court shall be a court of record with power to take evidence on oath, and the seal of the court shall be such as the Lord Chancellor may from time to time direct.

(3) Every appeal to the Supreme Prize Court shall be heard before not less than three members of the court sitting together.

(4) The registrar and other officers for the time being of the Judicial Committee of the Privy Council shall be registrar and officers of the Supreme Prize Court.

Procedure on, and conditions of, appeals. [27 & 28 Vict. c. 25, s. 5.]

10.—(1) An appeal shall lie to the Supreme Prize Court from any order or decree of a prize court, as of right in case of a final decree, and in other cases with the leave of the court making the order or decree or of the Supreme Prize Court.

(2) Every appeal shall be made in such manner and form and subject to such conditions and regulations (including regulations as to fees, costs, charges, and expenses) as may for the time being be directed by order in Council.

Jurisdiction of the Supreme Prize Court in prize appeals. [27 & 28 Vict. c. 25, s. 6; 54 & 55 Vict. c. 53, s. 4 (3).]

11. The Supreme Prize Court shall have jurisdiction to hear and determine any such appeal, and may therein exercise all such powers as are under this Act vested in the High Court, and all such powers as were wont to be exercised by the Commissioners of Appeal or by the Judicial Committee of the Privy Council in prize causes.

Rules of Court.

Rules of court. [57 & 58 Vict c. 39, s. 3.]

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12. His Majesty in Council may make rules of court for regulating, subject to the provisions of this Act, the procedure and practice of the Supreme Prize Court and of the Prize Courts within the meaning of this Act, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the courts, and the costs, charges, and expenses to be allowed to the practitioners therein.

Officers of Prize Courts.

Prohibition of officer of prize court acting as advocate, &c. [27 & 28 Vict. c. 25, ss. 14, 15.]

13. It shall not be lawful for any registrar, marshal, or other officer of the Supreme Prize Court or of any other prize court, directly or indirectly to act or be in any manner concerned as advocate, proctor, solicitor, or agent, or otherwise, in any prize appeal or cause.

Protection of persons acting in execution of Act. [27 & 28 Vict. c. 25, s. 51.]

14. The Public Authorities Protection Act, 1893, shall apply to any action, prosecution, or other proceeding against any person for any act done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act whether commenced in the United Kingdom or elsewhere within His Majesty's dominions.

Continuance of Proceedings.

Continuance of proceedings after conclusion of war. [57 & 58 Vict. c. 39, s. 2 (5).]

15. A court duly authorised to act as a prize court during any war shall after the conclusion of the war continue so to act in relation to, and finally dispose of, all matters and things which arose during the war, including all penalties, liabilities and forfeitures incurred during the war.

Part II.—Procedure in Prize Causes.

Custody of ships taken as prize. [27 & 28 Vict. c. 25, s. 16.]

16. Where a ship (not being a ship of war) is taken as prize, and is or is brought within the jurisdiction of a prize court, she shall forthwith be delivered up to the marshal of the court, or, if there is no such marshal, to the principal officer of customs at the port, and shall remain in his custody, subject to the orders of the court.

Bringing in of ship papers. [27 & 28 Vict. c. 25, s. 17.]

17.—(1) The captors shall in all cases, with all practicable speed, bring the ship papers into the registry of the court.

(2) The officer in command, or one of the chief officers of the capturing ship, or some other person who was present at the capture and saw the ship papers delivered up or found on board, shall make oath that they are brought in as they were taken, without fraud, addition, subduction, or alteration, or else shall account on oath to the satisfaction of the court for the absence or

altered condition of the ship papers or any of them.

(3) Where no ship papers are delivered up or found on board the captured ship, the officer in command, or one of the chief officers of the capturing ship, or some other person who was present at the capture, shall make oath to that effect.

Examination of persons from captured ship. [27 & 28 Vict. c. 25, s. 19.]

18. The captors shall also, unless the court otherwise directs, with all practicable speed after the captured ship is brought into port, bring a convenient number of the principal persons belonging to the captured ship before the judge of the court or some person authorised in this behalf, by whom they shall be examined on oath.

Delivery of ship on bail. [27 & 28 Vict. c. 25, s. 25.]

19. The court may, if it thinks fit, at any time after a captured ship has been appraised direct that the ship be delivered up to the claimant on his giving security to the satisfaction of the court to pay to the captors the appraised value thereof in case of condemnation.

Power to order sale. [27 & 28 Vict. c. 25, ss. 26 & 27.]

20. The court may at any time, if it thinks fit, on account of the condition of the captured ship, or on the application of a claimant, or on or after condemnation, order that the captured ship be appraised (if not already appraised), and be sold.

Power to award compensation notwithstanding release of ship.

21. Where a ship has been taken as prize, a prize court may award compensation in respect of the capture notwithstanding that the ship has been released, whether before or after the institution of any proceedings in the court in relation to the ship.

Application and effect of Part II. [27 & 28 Vict. c. 25, s. 31.]

22.—(1) The provisions of this Part of this Act relating to ships shall extend and apply, with the necessary adaptations, to goods taken as prize.

(2) The provisions of this Part of this Act shall have effect subject to any rules of court dealing with the subject-matter thereof.

Part III.—International Prize Court.

Appointment of British judge and deputy judge of International Court. [*See* 39 & 40 Vict. c. 59, s. 6.]

23.—(1) In the event of an International Prize Court being constituted in accordance with the said Convention or with any Convention entered into for the purpose of enabling any power to become a party to the said Convention or for the purpose of amending the said Convention in matters subsidiary or incidental thereto (hereinafter referred to as the International Prize Court), it shall be lawful for His Majesty from time to time to appoint a judge and deputy judge of the court.

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(2) A person shall not be qualified to be appointed by His Majesty a judge or deputy judge of the court unless he has been, at or before the time of his appointment, the holder, for a period of not less than two years, of some one or more of the offices described as high judicial offices by the Appellate Jurisdiction Act, 1876, as amended by any subsequent enactment.

Payment of contribution towards expenses of International Prize Court.

24. Any sums required for the payment of any contribution towards the general expenses of the International Prize Court payable by His Majesty under the said Convention shall be charged on and paid out of the Consolidated Fund and the growing proceeds thereof.

Appeals to International Prize Court.

25. In cases to which this Part of this Act applies an appeal from the Supreme Prize Court shall lie to the International Prize Court.

Transfer of cases to the International Prize Court.

26. If in any case to which this Part of this Act applies final judgment is not given by the prize court, or on appeal by the Supreme Prize Court, within two years from the date of the capture, the case may be transferred to the International Prize Court.

Rules as to appeals and transfers to International Prize Court.

27. His Majesty in Council may make rules regulating the manner in which appeals and transfers under this Part of this Act may be made and with respect to all such matters (including fees, costs, charges, and expenses) as appear to His Majesty to be necessary for the purpose of such appeals and transfers, or to be incidental thereto or consequential thereon.

Enforcement of orders of International Prize Court.

28. The High Court and every prize court in a British possession shall enforce within its jurisdiction all orders and decrees of the International Prize Court in appeals and cases transferred to the Court under this Part of this Act.

Application of Part III.

29. This part of this Act shall apply only to such cases and during such period as may for the time being be directed by Order in Council, and His Majesty may by the same or any other Order in Council apply this Part of this Act subject to such conditions, exceptions and qualifications as may be deemed expedient.

Part IV.—Prize Salvage and Prize Bounty.

Prize Salvage.

Salvage to re-captors of British ship or goods from enemy.

30. Where any ship or goods belonging to any of His Majesty's subjects, after being taken as prize by the enemy, is or are retaken from the enemy by any of His Majesty's ships of war, the same shall be restored by decree of a prize court to the owner.

Permission to recaptured ship to proceed on voyage and postponement of proceedings. [27 & 28 Vict. c. 25, s. 41.]

31.—(1) Where a ship belonging to any of his Majesty's subjects, after being taken as prize by the enemy, is retaken from the enemy by any of His Majesty's ships of war, she may, with the consent of the re-captors, prosecute her voyage, and it shall not be necessary for the re-captors to proceed to adjudication till her return to a port of His Majesty's dominions.

(2) The master or owner, or his agent, may, with the consent of the re-captors, unload and dispose of the goods on board the ship before adjudication.

(3) If the ship does not, within six months, return to a port of His Majesty's dominions, the re-captors may nevertheless institute proceedings against the ship or goods in the High Court, or in any prize court in a British possession, and the court may thereupon award prize salvage as aforesaid to the re-captors, and may enforce payment thereof, either by warrant of arrest against the ship or goods, or in the same manner as a judgment of the court in which the proceedings are instituted may be enforced.

Prize Bounty.

Prize bounty to officers and crew present in case of capture or destruction of enemy's ship. [27 & 28 Vict. c. 25, s. 42.]

32. If, in relation to any war, His Majesty is pleased to declare, by proclamation or Order in Council, his intention to grant prize bounty to the officers and crews of his ships of war, then such of the officers and crew of any of His Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of His Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at such rates and in such manner as may be specified in the proclamation or Order in Council.

Ascertainment of amount of prize bounty. [27 & 28 Vict. c. 25, s. 43.]

33.—(1) A prize court shall make a decree declaring the title of the officers and crew of His Majesty's ship to the prize bounty, and stating the amount thereof.

(2) The decree shall be subject to appeal as other decrees of the court.

Part V.—Special Cases of Jurisdiction.

Jurisdiction in case of capture in land expedition. [27 & 28 Vict. c. 25, s. 34.]

34. Where, in an expedition of any of His Majesty's naval or naval and military forces against a fortress or possession on land goods belonging to the state of the enemy, or to a public trading company of the enemy exercising powers of government, are taken in the fortress or possession, or a ship is taken in waters defended by or belonging to the fortress or possession, a prize court shall have jurisdiction as to the goods or ships so taken, and any goods taken on board the ship, as in case of prize.

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Jurisdiction in case of prize taken in expedition with ally. [27 & 28 Vict. c. 25, s. 35.]

35. Where any ship or goods is or are taken by any of His Majesty's naval or naval and military forces while acting in conjunction with any forces of any of His Majesty's allies, a prize court shall have jurisdiction as to the same as in case of prize, and shall have power, after condemnation, to apportion the due share of the proceeds to His Majesty's ally, the proportionate amount and the disposition of which share shall be such as may from time to time be agreed between His Majesty and His Majesty's ally.

Jurisdiction of High Court on petitions of right as under 23 & 24 Vict. c. 34. [27 & 28 Vict. c. 25, s. 52.]

36.—(1) In any case where a petition of right under the Petitions of Right Act, 1860, is presented and the subject-matter of the petition or any material part thereof arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognizable in a prize court within His Majesty's dominions if the same were a matter in dispute between private persons, the petition may, if the subject thinks fit, be intituled in the High Court as a prize court.

(2) Any petition of right under the last-mentioned Act, whether intituled in the High Court or not, may be prosecuted in that court if the Lord Chancellor thinks fit so to direct.

(3) The provisions of this Act relative to appeal, and to the making of orders for regulating the procedure and practice of the High Court as a prize court, shall extend to the case of any such petition of right intituled or directed to be prosecuted in that court; and, subject thereto, all the provisions of the Petitions of Right Act, 1860, shall apply with such adaptations as may be necessary in the case of any such petition of right; and for the purposes of this section the terms "court" and "judge" in that Act shall respectively be understood to include the High Court as a prize court and the judges thereof, and other terms shall have the respective meanings given to them in that Act.

Part VI.—Offences.

Offences by captors. [27 & 28 Vict. c. 25, s. 37.]

37. A prize court, on proof of any offence against the law of nations, or against this Act, or any Act relating to naval discipline, or against any Order in Council or royal proclamation, or of any breach of His Majesty's instructions relating to prize, or of any act of disobedience to the orders of the Admiralty, or to the command of a superior officer, committed by the captors in relation to any ship or goods taken as prize, or in relation to any person on board any such ship, may, on condemnation, reserve the prize to His Majesty's disposal, notwithstanding any grant that may have been made by His Majesty in favour of captors.

Perjury. [27 & 28 Vict. c. 25, s. 50.]

38. If any person wilfully and corruptly swears, declares, or affirms falsely in any prize cause or appeal, or in any proceeding under this Act, or in respect of any matter required by this Act to be verified on oath, or suborns any other person to do so, he shall be deemed guilty of perjury, or of subornation of perjury (as the case may be), and shall be liable to be punished accordingly.

Disobedience to, or desertion of, convoy. [27 & 28 Vict. c. 25, s. 46.]

39. If the master or other person having the command of any British ship under the convoy of any of His Majesty's ships of war, wilfully disobeys any lawful signal, instruction, or command of the commander of the convoy, or without leave deserts the convoy, he shall be liable to be proceeded against in the High Court at the suit of His Majesty in His Office of Admiralty, and upon conviction to be fined, in the discretion of the Court, any sum not exceeding five hundred pounds, and to suffer imprisonment for such time, not exceeding one year, as the Court may adjudge.

Part VII.—Miscellaneous Provisions.

Ransom.

Power for regulating ransom by Order in Council. [27 & 28 Vict. c. 25, s. 45.]

40.—(1) His Majesty in Council may, in relation to any war, make such orders as may seem expedient according to circumstances for prohibiting or allowing, wholly or in certain cases or subject to any conditions or regulations or otherwise as may from time to time seem meet, the ransoming or the entering into any contract or agreement for the ransoming of any ship or goods belonging to any of His Majesty's subjects, and taken as prize by any of His Majesty's enemies.

(2) Any contract or agreement entered into, and any bill, bond, or other security given for ransom of any ship or goods, shall be under the exclusive jurisdiction of the High Court as a prize court (subject to appeal to the Supreme Prize Court), and if entered into or given in contravention of any such Order in Council shall be deemed to have been entered into or given for an illegal consideration.

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(3) If any person ransoms or enters into any contract or agreement for ransoming any ship or goods, in contravention of any such Order in Council, he shall for every such offence be liable to be proceeded against in the High Court at the suit of His Majesty in His Office of Admiralty, and on conviction to be fined, in the discretion of the Court, any sum not exceeding five hundred pounds.

Customs Duties and Regulations.

Prize ships and goods liable to customs duties and forfeiture. [27 & 28 Vict. c. 25, s. 47.]

41.—(1) All ships and goods taken as prize and brought into a port of His Majesty's dominions shall be liable to and be charged with the same rates and charges and duties of customs as under any Act relating to the customs in force at the port may be chargeable on other ships and goods of the like description.

(2) All goods brought in as prize which would on the voluntary importation thereof be liable to forfeiture, or subject to any restriction, under the laws relating to the customs, shall be deemed to be so liable and subject, unless the Customs authority see fit to authorise the sale or delivery thereof for home use or exportation, unconditionally or subject to such conditions and regulations as they may direct.

Regulations of customs as to prize ships and goods. [27 & 28 Vict. c. 25, s. 48.]

42. Where any ship or goods taken as prize is or are brought into a port of His Majesty's dominions, the master or other person in charge or command of the ship which has been taken or in which the goods are brought shall, on arrival at such port, bring to at the proper place of discharge, and shall, when required by any officer of customs, deliver an account in writing under his hand concerning such ship and goods, giving such particulars relating thereto as may be in his power, and shall truly answer all questions concerning such ship or goods asked by any such officer, and in default shall forfeit a sum not exceeding one hundred pounds, such forfeiture to be enforced as forfeitures for offences against the laws relating to the customs in force at the port are enforced, and every such ship shall be liable to such searches as other ships are liable to, and the officers of the customs may freely go on board such ship and bring to the King's or other warehouse any goods on board the same, subject, nevertheless, to such regulations in respect of ships of war belonging to His Majesty as shall from time to time be issued by His Majesty.

Sale of prize goods and power to remit customs duties. [27 & 28 Vict. c. 25, s. 49.]

43. Goods taken as prize may be sold either for home consumption or for exportation; and if in the former case the proceeds thereof, after payment of duties of customs, are insufficient to satisfy the just and reasonable claims thereon, the Customs authority may remit the whole or such part of the said duties as they see fit.

Capture by Ship other than a Ship of War.

Prizes taken by Ships other than ships of war to be droits of Admiralty. [27 & 28 Vict. c. 25, s. 39.]

44. Any ship or goods taken as prize by any of the officers and crew of a ship other than a ship of war of His Majesty shall, on condemnation, belong to His Majesty in His office of Admiralty.

Supplemental.

Saving for rights of Crown; effect of treaties, &c. [27 & 28 Vict. c. 25, s. 55.]

45. Nothing in this Act shall—

(1) give to the officers and crew of any of His Majesty's ships of war any right or claim in or to any ship or goods taken as prize or the proceeds thereof, it being the intent of this Act that such officers and crews shall continue to take only such interest (if any) in the proceeds of prizes as may be from time to time granted to them by the Crown; or

(2) affect the operation of any existing treaty or convention with any foreign power; or

(3) take away or abridge the power of the Crown to enter into any treaty or convention with any foreign power containing any stipulation that may seem meet concerning any matter to which this Act relates; or

(4) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any right, power, or prerogative of His Majesty the King in right of His Crown, or in right of His office of Admiralty, or any right or power of the Admiralty; or

(5) take away, abridge, or control, further or otherwise than as expressly provided by this Act, the jurisdiction or authority of a prize court to take cognizance of and judicially proceed upon any capture, seizure, prize, or reprisal of any ship or goods, and to hear and determine the same, and, according to the course of Admiralty and the law of nations, to adjudge and condemn any ship or goods, or any other jurisdiction or authority of or exerciseable by a prize court.

Power to make Orders in Council. [27 & 28 Vict. c. 25, ss. 53, 54.]

46.—(1) His Majesty in Council may from time to time make such Orders in Council as seem meet for the better execution of this Act.

(2) Every Order in Council under this Act and all rules made in pursuance of this Act shall be notified in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and, if not, then within thirty days
[Pg 689] after the next meeting of Parliament, and shall have effect as if enacted in this Act.

Definitions. 27 & 28 Vict. c. 25, s. 2.

47. In this Act unless the context otherwise requires—

The expression "the High Court" means the High Court of Justice in England:

The expression "any of His Majesty's ships of war" includes any of His Majesty's vessels of war, and any hired armed ship or vessel in His Majesty's service:

The expression "officers and crew" includes flag officers, commanders, and other officers, engineers, seamen, marines, soldiers, and others on board any of His Majesty's ships of war:

The expression "ship" includes vessel and boat, with the tackle, furniture, and apparel of the ship, vessel, or boat:

The expression "ship papers" includes all books, papers, and other documents and writings delivered up or found on board a captured ship, and, where certified copies only of any papers are delivered to the captors, includes such copies:

The expression "goods" includes all such things as are by the course of Admiralty and law of nations the subject of adjudication as prize (other than ships):

The expression "Customs authority" means the Commissioners or other authority having control of the administration of the law relating to customs.

Short title and repeal.

48.—(1) This Act may be cited as the Naval Prize Act, 1911.

(2) The enactments mentioned in the second Schedule to this Act are hereby repealed to the
[Pg 690] extent specified in the third column of that Schedule.

APPENDIX XIII

GENEVA CONVENTION ACT, 1911

1 & 2 GEO. 5, CHAPTER 20

An Act to make such amendments in the Law as are necessary to enable certain reserved provisions of the Second Geneva Convention to be carried into effect.
[*18th August 1911.*]

Whereas His Majesty has ratified, with certain reservations, the Convention for the amelioration of the condition of the wounded and sick of armies in the field, drawn up in Geneva in the year one thousand nine hundred and six, and it is desirable, in order that those reservations may be withdrawn, that such amendments should be made in the law as are in this Act contained:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

Prohibition of use of emblem of red cross on white ground, &c.

1.—(1) As from the commencement of this Act it shall not be lawful for any person to use for the purposes of his trade or business, or for any other purpose whatsoever, without the authority of the Army Council, the heraldic emblem of the red cross on a white ground formed by reversing the Federal colours of Switzerland, or the words "Red Cross" or "Geneva Cross," and, if any person acts in contravention of this provision, he shall be guilty of an offence against this Act, and shall be liable on summary conviction to a fine not exceeding ten pounds, and to forfeit any goods upon or in connection with which the emblem or words were used.

(2) Where a company or society is guilty of any such contravention, without prejudice to the liability of the company or society, every director, manager, secretary, and other officer of the company or society who is knowingly a party to the contravention shall be guilty of an offence against this Act and liable to the like penalty.

(3) Nothing in this section shall affect the right (if any) of the proprietor of a trade mark registered before the passing of this Act, and containing any such emblem or words, to continue to use such trade mark for a period of four years from the passing of this Act, and, if the period of the registration or of the renewal of registration of any such trade mark expires during those four years, the registration thereof may be renewed until the expiration of those four years, but without payment of any fee.

(4) Proceedings under this Act shall not in England or Ireland be instituted without the consent of the Attorney-General.

(5) This Act shall extend to His Majesty's possessions outside the United Kingdom, subject to such necessary adaptations as may be made by Order in Council.

Short title.

2. This Act may be cited as the Geneva Convention Act, 1911.

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