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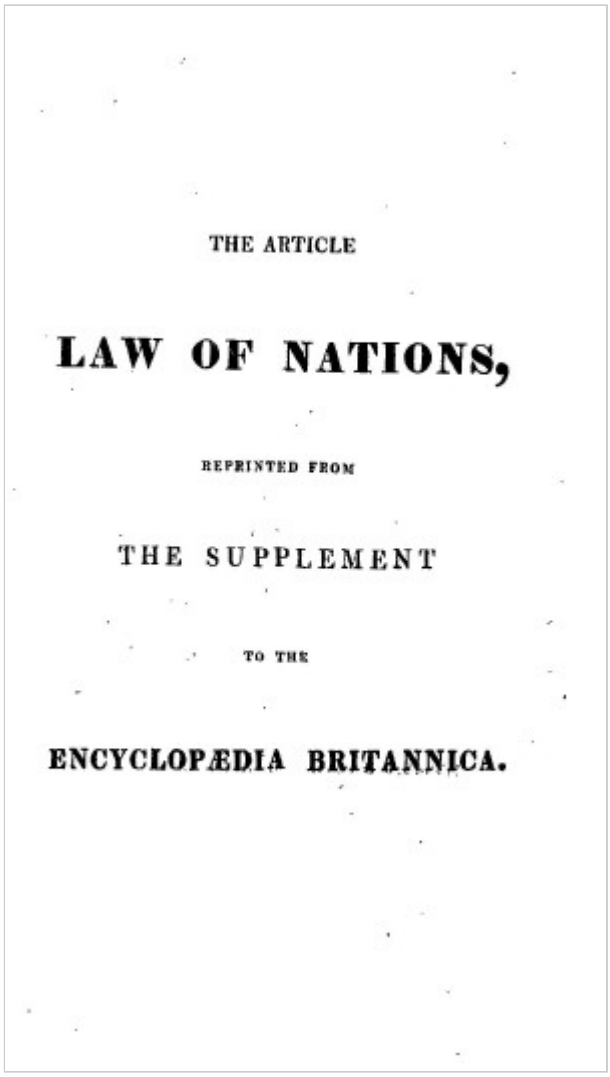
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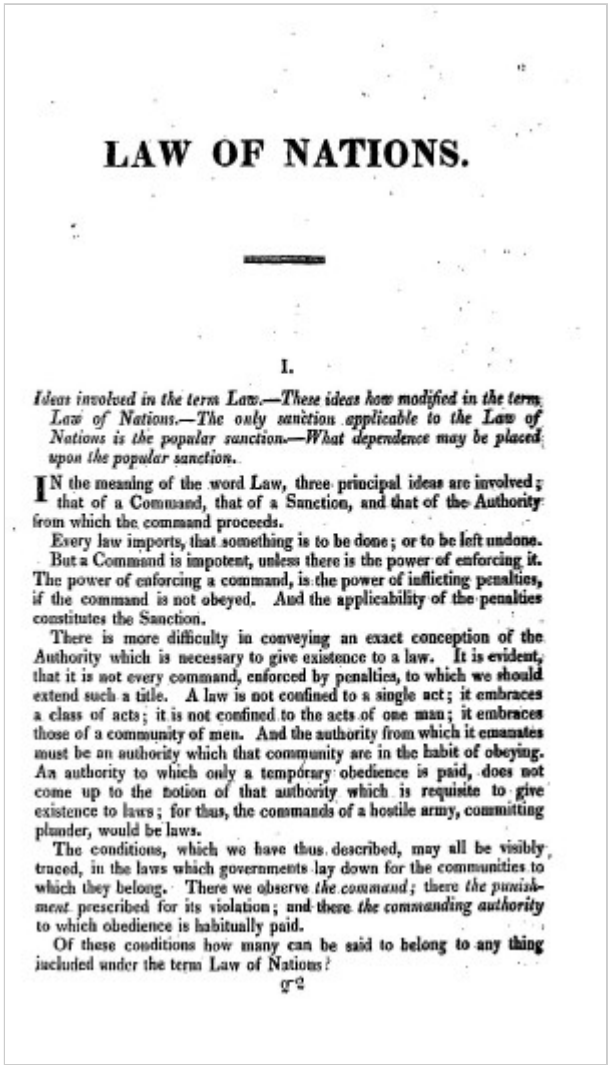

LAW OF NATIONS.

I.

Ideas involved in the term Law.—These ideas how modified in the term Law of Nations.—The only sanction applicable to the Law of Nations is the popular sanction.—What dependence may be placed upon the popular sanction.

IN the meaning of the word Law, three principal ideas are involved; that of a Command, that of a Sanction, and that of the Authority from which the command proceeds.

Every law imports, that something is to be done; or to be left undone. But a Command is impotent, unless there is the power of enforcing it. The power of enforcing a command, is the power of inflicting penalties, if the command is not obeyed. And the applicability of the penalties constitutes the Sanction.

There is more difficulty in conveying an exact conception of the Authority which is necessary to give existence to a law. It is evident, that it is not every command, enforced by penalties, to which we should extend such a title. A law is not confined to a single act; it embraces a class of acts; it is not confined to the acts of one man; it embraces those of a community of men. And the authority from which it emanates must be an authority which that community are in the habit of obeying. An authority to which only a temporary obedience is paid, does not come up to the notion of that authority which is requisite to give existence to laws; for thus, the commands of a hostile army, committing plunder, would be laws.

The conditions, which we have thus described, may all be visibly traced, in the laws which governments lay down for the communities to which they belong. There we observe *the command*; there *the punishment* prescribed for its violation; and there *the commanding authority* to which obedience is habitually paid.

Of these conditions how many can be said to belong to any thing included under the term Law of Nations?

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LAW OF NATIONS.

I.

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By that term is understood, something which either does, or which, it is supposed, ought to bind the conduct of one nation towards another.

But it is not understood, that one nation has a right to command another. When one nation can be commanded by another, it is dependent upon that other; and the laws of dependence are different from those which we are at present considering. An independent nation would resent, instead of obeying, a command delivered to it by

another. Neither can it properly be said, that nations, taken aggregately, prescribe those laws to one another severally; for when did they ever combine in any such prescription? When did they ever combine to vindicate the violations of them? It is therefore clear, that the term Command cannot be applied, at least in the ordinary sense, to the laws of nations.

In the next place, it would not seem, that any thing, deserving the name of Sanction, belongs to them. Sanction, we have already seen, is punishment. Suppose nations to threaten one another with punishment, for the violation of any thing understood to be a law of nations. To punish implies superiority of strength. For the strong, therefore, the law of nations, may perhaps have a sanction, as against the weak. But what can it have as against the strong? Is it the strong, however, or is it the weak, by whom it is most liable to be violated? The answer is obvious and undeniable.—As against those from whom almost solely any violation of the laws of nations need be apprehended, there appears, therefore, to be no sanction at all.

If it be said, that several nations may combine to give it a sanction in favour of the weak, we might, for a practical answer, appeal to experience. Has it been done? Have nations, in reality, combined, so constantly and steadily, in favour of the law of nations, as to create, by the certainty of punishment, an overpowering motive, to unjust powers, to abstain from its violation? For, as the laws against murder would have no efficacy, if the punishment prescribed were not applied once in fifty, or a hundred times, so the penalty against the violations of the law of nations can have no efficacy, if it is applied unsteadily and rarely.

On the mode in which it has been applied, we may appeal to a great authority. Montesquieu says—"Le droit public est plus connu en Europe qu'en Asie: cependant on peut dire que les passions des princes—la patience des peuples—la flatterie des ecrivains, en ont corrompu tous les principes. Ce droit, tel qu'il est aujourd'hui, est une science qui apprend aux princes jusqu'à quel point ils peuvent violer la justice, sans choquer leurs intérêts."—*(Lett. Persanes,* XCIV.)

To go a little deeper, we may consider, whether the interest of nations, that which, in the long run, governs them all, can ever produce combinations, from which an effectual sanction, of the nature in question, can be expected to proceed. That they would derive some advantage from the general observation of those maxims which have been called laws of nations, frivolous as are the points upon which the greater part of them turn, cannot be denied. These advantages, however, are seen at a distance, and with the mind's eye; they are speculative, rather than sensible. The inconveniencies, on the other hand, which must result from any movement to lend effect to the law of nations, are immediate and formidable; the whole train of the evils of war are almost sure to arise from them. The latter class of impressions must, in general, be far more powerful than the former; and thus the interposition, in favour of the law of nations, will generally be shunned. A nation is often but too easily stimulated to make war in resentment of injuries done to itself. But it looks with too much coolness upon the injuries done to other nations, to incur the chance of any great inconvenience for the redress of them.

Besides, the object is to be gained by the means of combination. But the combinations of nations are very difficult things. Nations hardly ever combine without quarrelling.

Again, all nations ought to combine for an object common to all. But for all nations to combine in any one enterprise is impossible. Suppose a prince to have violated the law of nations, it would be absurd to suppose that all the countries on earth should conspire to punish him. But if not all, what is to be the selection? Who shall come forward; who stand excused? By those who are condemned to the sacrifice, in what proportion are the contributions to be made? Who is to afford the greatest, and who may come with the least?

It is unnecessary to pursue any farther the analysis of this extraordinary hypothesis. It is evident from what has been said, that it is full of impracticabilities.

Are we, then, obliged to consider the maxims or rules, which pass under the name of Laws of Nations, as utterly without force and influence; and the discourse which is made about them, as mere affectation and impertinence?

Not wholly so. It is of use, that the ordinary intercourse of nations should be conducted according to certain forms, generally known and approved; because they will be observed on all occasions, when there is no particular motive to violate them, and will often prevent disputes which might arise on frivolous occasions. They resemble, in this respect, the ceremonial of a court, or the established forms of polished society.

The objects, however, which are understood to be embraced by the law of nations, are of two sorts. The first are those minor objects, which partake more of form than of substance. The other are objects which deeply affect humanity. That there are certain interests of nations, which it were good to have considered as their rights, and of which it is infinitely to be desired that the violation could be prevented, is most true. But if national law has no penalty annexed to it; if the weaker party, who is wronged, has no means of redress; where, it may be said, is the advantage of such a law? Or where the propriety of calling that a law, which is only a declaration respecting rights; violated by the more powerful party with impunity, as often, and to as great an extent, as he pleases?

There is still, however, a power, which, though it be not the physical force, either of one state, or of a combination of states, applied to vindicate a violation of the law of nations, is not without a great sway in human affairs; and which, as it is very nearly the whole of the power which can be applied to secure the observation of that law, deserves to be carefully considered, that, by duly appreciating its efficacy in this important affair, we may neither trust to it where it will disappoint our expectation, nor neglect the use of it where it may be turned to advantage.

That the human mind is powerfully acted upon by the approbation or disapprobation, by the praise or blame, the contempt and hatred, or the love and admiration, of the rest of mankind, is a matter of fact, which, however it may be accounted for, is beyond the limits of dispute. Over the whole field of morality, with the exception of that narrow

part which is protected by penal laws, it is the only power which binds men to good conduct, and renders man agreeable and useful to man. It is evident, also, that where there is not great inequality, it is a power, the binding force of which must be necessarily great. Because every individual, considered in himself, is weak and helpless as compared with the rest of the community. Unless, therefore, he can prevail upon them to abstain from injuring him, he must be exposed to unlimited suffering. And if, on the other hand, he can prevail upon them to combine in doing, or in desiring to do him good, he is put in the way of receiving perpetually the greatest advantages. His motive, therefore, to obtain the favourable, and to avoid the unfavourable regards of the members of the society in which he lives, is of the highest order. But he can obtain their favourable, and avoid their unfavourable sentiments, only by abstaining with scrupulous anxiety from doing any injury to them, and observing all such modes of conduct as are calculated to be useful and agreeable to them.

The value which men set upon these favourable regards of the persons among whom they live, is strikingly manifested by some of the most ordinary forms of their discourse and behaviour. What is more esteemed than character? What injury reckoned more deep and unpardonable than that of the man who exerts himself to take away unworthily any part of the reputation of his neighbours? But what is character, if not the title to the favourable sentiments of other men? And what is the loss of character, but the opinion of other men, that we do not deserve those favourable sentiments, with which they have been accustomed to regard us?

Honour and shame, those emotions, the intensity of which is proved by so many phenomena of human life, are but the feelings which attend upon those different situations. When a man finds himself in possession of the love, the esteem, and admiration of those by whom he is surrounded, he is filled with that delight which the belief of the secure possession of a great source of benefit, cannot fail to inspire: he is fearless, elated, and confident; the principal characteristics of that state of mind which we denominate pride. When he is conscious, on the other hand, of having forfeited in any degree the favourable sentiments of those among whom he lives, he suffers that depression which the loss of a highly valued possession is calculated to create; he ceases, in some degree, to look forward to his fellow men for good, and feels more or less the apprehension of evil at their hands; he fears to prove how far their disapprobation of him reaches, or to excite them to define it too accurately for themselves; he hangs down his head, and dares not so much as look them in the face.

When men are favourably situated for having those impressions deeply struck; or, more correctly speaking, when those combinations of ideas have consistently and habitually been presented to their minds, the association becomes at last so indissoluble and strong, as to operate, even where the connection among the things themselves may not exist.

When persons, who have been educated in a virtuous society, have, from their infancy, associated the idea of certain actions with the favourable sentiments, and with all the advantages which flow from the favourable sentiments of mankind; and, on the other hand, have associated the idea of certain other actions with the

unfavourable sentiments, and all the disadvantages which flow from the unfavourable sentiments of mankind; so painful a feeling comes in time to be raised in them at the very thought of any such action, that they recoil from the perpetration of it, even in cases in which they may be perfectly secure against any unfavourable sentiments, which it might be calculated to inspire.

It will, we apprehend, upon the most accurate investigation, be found, that this is the only power to which we can look for any considerable sanction to the laws of nations;—for almost the only species of punishment to which the violation of them can ever become amenable: it is the only security, therefore, which mankind can ever enjoy for the benefit which laws, well contrived for this purpose, might be calculated to yield.

It is in the next place incumbent upon us to inquire, what dependence can be placed upon this security, in the set of cases now under consideration; and in what circumstances it is calculated to act with the greatest, in what with the least efficacy, toward this important end.

A power, which is wholly derived, from the good which may follow the favourable, the evil which may follow the unfavourable sentiments of mankind, will act most efficaciously upon him who is the most, least efficaciously upon him who is the least exposed to receive good and evil from the immediate inclination of his fellow men.

It seems to be evident, that he who is most weak, as compared with the rest of the community, is the most exposed to receive good or evil in consequence of their favourable or unfavourable sentiments; and that he, on the other hand, who is the most powerful, as compared with them, is the least exposed to receive good or evil in consequence of those sentiments.

When men are nearly upon equality, no one has any chance of inducing other people to abstain from hurting him, but by his abstaining from doing hurt in any way to them. He has no means of inducing them to do him any acts of service, but by their expectation of receiving similar acts of service from him. He is, therefore, intensely interested in its being generally believed of him, that he is a man who is careful to abstain from injuring, and ever ready to exert himself to do services to others.

The case is exceedingly different, where one man is lifted high above others. In that case he has powerful means of protection against their hurtful acts, powerful means of obtaining their services, altogether independent of his conduct, altogether independent of his disposition either to abstain from injuring them, or to render them service.

So far, therefore, as good conduct arises from a man’s dependence upon the sentiments of others; and from this is derived the moral power, to which alone the term moral sanction or obligation can properly belong; the security for good conduct is apt to be lessened, in exact proportion as any one is raised above the level of those composing the mass of the community. If any man possesses absolute power over the rest of the community, he is set free from all dependence upon their sentiments. In this, or nearly in this situation is every despot, having a well established authority. So

far as a man is educated as a despot, he can therefore have but few of those associations, on which a conduct, beneficent to others, depends. He is not accustomed to look—for the services which he needs, or the evils which he apprehends, from others—to the opinion which they may entertain of the goodness or badness of his conduct; he cannot, therefore, have that salutary train of transitions from the idea of an evil act to that of the condemnatory sentiments of mankind, and from the condemnatory sentiments of mankind to the forfeiture of all those delights and advantages which spring to him from the operation of their favourable regards;—associations which in men favourably situated become at last habitual, and govern the conduct, as it were, mechanically, without any distinct recurrence to the consequences, upon the thought of which, nevertheless, this salutary and ennobling sentiment ultimately depends, and from which it has been originally derived.

If such is the situation of the despot with regard to these important associations, it is in a proportional degree the situation of all those who partake of that species of elevation. In an Aristocratical country, for example, a country in which there is great inequality of wealth, those who possess the large fortunes, are raised to a great degree above any chance of receiving evil, or of standing deprived of any good, because the great mass, the lower orders, of their countrymen, think unfavourably of them. They are, no doubt, to a considerable degree dependent upon what the people of their own class may think of them; and it is accordingly found, that those qualities and acts, which are useful to that class, are formed into a particular, an Aristocratical code of morality, which is very effectually sanctioned by the favourable and unfavourable sentiments of the Aristocratical body, at the same time that it is exceedingly different from that more enlarged and all-comprehensive code, on which the happiness of the greatest number depends, and to which alone the epithet moral in propriety belongs.

Such being the state of the facts connected with this important case, it remains to see what are the inferences, bearing upon it, which we are entitled to draw from them. We have already ascertained, that the only power which can operate to sanction the laws of nations; in other words, to reward or punish any nation, according as it obeys, or as it disobeys them, is the approbation and disapprobation of mankind. It follows, that the restraining force is, in this case, determined by the associations which they who govern it may have formed with the approbation and disapprobation of mankind. If they have formed strong associations of a pleasurable kind, with the approbation, strong associations, of the painful kind, with the disapprobation of mankind, the restraining force will be great; if they have not formed such associations, it will be feeble and insignificant. It has, however, appeared, immediately above, that the rulers of a country, of which the government is either monarchical, or aristocratical, can have these associations in but a very low degree; as those alone, who are placed on a level with the great body of other men, are placed in circumstances calculated to produce them. It is only then in countries, the rulers of which are drawn from the mass of the people, in other words, in democratical countries, that the sanction of the laws of nations can be expected to operate with any considerable effect.

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II.

*What Is Required To Give To The Law Of Nations Its Greatest Perfection.—Necessity For A*Code*Of International Law.—Rights Of Nations.*

Having thus ascertained, what is the power which restrains from violating the laws of nations, and what the description of rulers upon whom its restraining force is the greatest, we are next to inquire, by what expedients the force of it may be raised to the greatest pitch, and the greatest amount of benefit may be derived from it.

It is sufficiently recognized, that whatever is intended to produce any effect as a punishment, produces it in a greater degree, in proportion as it operates with greater precision and certainty. The inquiry, then, regards the means of giving precision and certainty to those sentiments of the world, on which the binding power of the laws of nations so greatly depends.

Two things are necessary to give precision and certainty to the operation of laws within a community. The one is, a strict determination of what the law is; the second, a tribunal so constituted as to yield prompt and accurate execution to the law. It is evident, that these two are indispensible requisites. Without them no penalties can operate with either precision or certainty. And the case is evidently the same, whether we speak of the laws which regulate the actions of individual and individual within the state, or those which regulate the actions of one state towards another.

It is obvious to remark, in the first place, that with regard to the laws of nations, not one of those two indispensible requisites has ever yet had any existence. It has neither been determined what the laws in question are, nor has any common tribunal for cognizance of the violations of them ever been constituted. With respect to the last, not so much as the idea of it seems to have been entertained. And with respect to the first, though much has been written, it has been almost wholly in the way of vague and general discourse. Hardly a single accurate definition has yet been applied to any part of the subject.

Here, then, we come to what is obviously the grand enquiry; namely, *first,* What can be done towards defining the laws of nations? and *secondly,* What can be done towards providing a tribunal for yielding prompt and accurate decisions in conformity with them? in other words, for applying with the greatest possible efficacy the opinion of the world for restraining the violation of them?

In the Article Jurisprudence, to which it is necessary for us here to revert, we have sufficiently made it appear, that the foundation of all law is the constitution of rights. Of two parties, unless it is previously determined what each shall enjoy, it can never be determined whether one has improperly disturbed the enjoyment of the other. To determine, however, what a party is to enjoy, is to determine his rights.

Now, then, with regard to nations, the question is, what ought to be constituted rights? or in other words, what would it be desirable for the good of mankind upon the whole, that the several nations should respect as the rights of each other?

This, it is pretty obvious, is one of the most extensive of all inquiries, far exceeding the limits of an article in the present work. We can attempt little more than to show the way in which the inquiry may be carried on.

In the Article Jurisprudence, we have endeavoured to clear up the meaning which in legislation can, without leading to confusion, be alone attached to the term *Rights;* and we have there likewise seen, that there are but two classes of objects, in which individuals can have rights; namely, Things, and Persons.

The case, we believe, will be found the same with respect to nations. They also can have rights, in nothing but Persons, and Things. Of course, it follows, that they can receive injury in nothing but in Persons, or Things.

The inquiry, however, with respect to the rights of nations, is not so simple, as that with respect to the rights of individuals; because between individuals, subject to the same system of laws, the legislature recognizes no state of hostility; but between nations there is the State of War, and the State of Peace, and the rights which are understood to belong to nations, are different in these two different states. In the state of war, nations recognize in one another very few rights respecting either persons or things; they kill the one, and take and destroy the other, with little other limit than the want of ability. In the state of peace they respect as rights belonging to one another, nearly the same things which are constituted rights of individuals, by the ordinary systems of national law.

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III.

What Should Be Recognized As Rights In Time Of Peace.—The Property Of Individuals.—The Persons Of Individuals.—The Property Or Dominion Of The State.—Dominion In Land.—Dominion In Water.

We shall begin with the consideration of those things which it would be desirable that nations should respect as the rights of one another, in the time of peace.

And, *first,* of rights with respect to things. As the subject of the rights of nations, things may be divided into two sorts; things belonging to some individual member of the nation, and things belonging to the nation in its collective, or corporate, capacity.

Those rights in things which the nation guarantees to its individual members, within the nation, it would be desirable, with hardly any exception, that nations should respect in regard to one another; that those things, for example, which the government of the country to which a man belongs, would regard, and would compel all its subjects to regard, as his property, the governments of all other countries should respect, and compel all their subjects to respect as his property.

There are two states of circumstances in which questions may arise between nations, respecting the property of their respective subjects. The first, where the property in question, when the cause of dispute arises, is within the country of the individual to whom it belongs: The second, where the property has, by its owner, been previously removed into the foreign country, with which, or some of the inhabitants of which, the dispute has arisen.

1. The first set of circumstances exists between two conterminous countries; the bordering inhabitants of which being neighbours to one another, may, as any other neighbours, infringe the properties of one another. The proper mode of settling these disputes seems to be sufficiently obvious. The rights of the party complaining should be adjudged, according to the laws of the country to which he belongs. But the party sued or prosecuted should be amenable only to the tribunals of the country to which he belongs; that is to say, the question should be tried before the tribunals of the country of the defendant; but the definition of the right in question should be taken from the law of the country to which the plaintiff belongs. It might in some cases be convenient for countries in this situation, to agree in constituting a common judicature, appropriated to these disputes, to consist, for example, of two judges, one of each country, with power to chuse a third, when they could not agree.

The injury complained of may be capable of redress by a remedy of the nature of a civil suit merely; or it may be of that more atrocious sort, theft or robbery, for which the remedy of punishment is required.

It would appear that punishment ought to be apportioned according to the laws of the country to which the party who has incurred it belongs. Whatever would be the punishment decreed for the offence, if committed against a man of his own country, such a punishment he ought to sustain, for the offence against the man of the other country. The question of punishment is here understood, as extraneous to that of compensation. This ought always to be made to the party injured, where it is capable of being made, and in a case of property it is always capable; if not by the author of the injury, from want of property, or other cause, at least by the government of the country to which he belongs.

2. Where a man has removed his property from his own into another country, there seems to be no peculiar reason why it should be regulated by any other laws than those of the country into which he has removed it; why the rights which it confers should be otherwise determined; or the violation of them otherwise punished.

We have now considered, though in a very general manner (and our limits preclude us from attempting any thing more), the mode in which nations should agree about the rights of one another (in other words, the laws they should establish), in as far as the property of individuals‘ belonging to them, is concerned. After the *property* of individuals, their *persons* are to be considered as requiring the protection of laws.

There is more difficulty in determining what is desirable, as international law, with regard to this part of the subject, than that which regards the property of individuals. It is desirable that the persons of the inhabitants of every country should receive protection, according to the laws of their own country. But it is also desirable that each man should sustain punishment according to the laws of his country; and these two objects are to a certain extent inconsistent with one another.

The inconvenience, however, seems to be greater, in permitting the inhabitants of one country to be punished, according to the laws of another; than in leaving the inhabitants of one country to the same measure of protection against injury to their persons from the inhabitants of other countries, as is afforded to the inhabitants of those countries by their own laws. Many cases, indeed, may be conceived, in which this is a measure of protection which all reasonable men would allow to be inadequate. In such cases, however, the only remedy seems to be the formation of a compact, by which a mode of proceeding, agreeable to the sentiments of both parties, may be positively prescribed. This latter expedient is of course extraneous to that equitable construction which ought to be uniformly applied by the tribunals of one country to the injuries perpetrated, by those whom they may have to judge, upon the inhabitants of another country. If an inhabitant of Persia, for example, should force cow-broth down the throat of an inhabitant and native of Hindostan, the tribunals of Persia should not punish this outrage, as they would punish one Persian for making another swallow the same liquid. To the Persian it would be a trifling injury, and more than a trifling punishment would not be required. To the Hindu, it would be one of the greatest of all conceivable injuries. It ought to be, therefore, put upon the same footing, with an injury of an equal degree, done to a Persian: the nature of the injury, not the external act, should be the object of consideration: and whatever the punishment which would be awarded against a Persian for one of the greatest injuries

of which he could be guilty to a Persian, the same ought to be inflicted upon him, for this, one of the greatest which he could occasion to a Hindu.

Besides the cases in which a government, as representative of the country, may be injured through the individuals who live under its protection, there are cases in which it may be injured more directly. Certain things belong as property to the government, without belonging to any individual; and there are persons, members of the government, or agents of the government, who may receive injuries in that capacity, distinct from those which affect them, as private individuals. These are the cases to which it now remains that we direct our attention.

Those things which belong to government as goods and chattels; its moveables, for example; or the lands which it holds, as any individual holds them, in the way of an estate; there seems to be no reason for considering as subject to any other rules, than those applicable to the goods and chattels which belong to individuals.

Of other things, those to which any government can claim a right, as representative of a nation, must be, either, first, Portions of Land, or, secondly, Portions of Water.

1. The questions which relate to the rights which any nation may claim in any portion of land, are questions regarding boundaries; and these involve the whole of the questions respecting the acquisition of dominion.

To have any standard for determining questions with regard to dominion, the different modes of acquiring dominion, must be recognized; those which are proper to be allowed and respected by other nations must be distinguished from those which are improper, must be accurately defined, and the definitions made known.

For this purpose it is easy to perceive, that the same process is necessary, as that for the definition of rights, described, at some length, in the Article in this work, entitled Jurisprudence, to which we must again refer.

It is necessary, according to that example, that the events which are to be considered as giving commencement to a right of dominion, and those which are to be considered as putting an end to it, should be fully enumerated, and accurately defined.

This is the first part of the process. The other part is, to distinguish the different degrees of dominion. There is a dominion which is perfect, which includes every power over the subject in question, and leaves nothing farther to be acquired, a *dominium plenum:* there is also a dominion, which is but the commencement, as it were, of dominion, and includes the smallest possible fragment of a full dominion. These are the two extremes; and between them are various distinguishable degrees. All these should be fully enumerated, and accurately defined.

When any of those events occurs which are to be considered as giving commencement to rights, it often happens that they are accompanied by circumstances which limit the right they would otherwise convey, and render the dominion less than full. These circumstances ought, also, to be completely enumerated; and the power of each to be accurately defined.

If this were done, an international code would be composed, in which the rights of dominion would be accurately defined; and to determine any question about boundaries, or about the degree of dominion, nothing farther would then be necessary than an adequate inquiry respecting the state of the facts.

The questions would exactly resemble those, which we have already described, in the Article Jurisprudence, in analyzing what is called pleading in judicature. In a question about boundaries there is, let us suppose, a district, over which one country affirms that it has a right of dominion, a dominion more or less complete; and another country denies that it has that right. The first question is, Whether any of those events has occurred, which would give the affirming country a right of dominion? The second question is, Whether, if such an event had occurred, it was accompanied with any of those circumstances which limit dominion, and render it less than full, and if so, under what degree of limiting power they are classed? The third question is, Whether, if an event, thus giving commencement to a right of dominion had occurred, any other event, putting an end to that right, had subsequently occurred?

We need not here enlarge upon these several topics; because they will be sufficiently understood by those readers who bear in mind the expositions already given in the article referred to; and to those, who do not, we suggest the propriety of recurring to that article, as a preparation for the perusal of this.

It is evidently disproportionate to the limits which we must here prescribe to ourselves, to enumerate the events which it would be agreeable to the interests of mankind in general that nations should regard as giving, and alone giving, commencement and termination to rights of dominion; because, in order to afford an enumeration which would be in any degree instructive, the reasons must be given why one set of events, and not another, should have the privilege in question conferred upon them.

It may be proper, however, in the mean time, to observe, that the events in question will not be found to be numerous, nor very difficult to discover. In fact, they are, and among civilized nations, almost always have been, pretty nearly agreed upon; and they are the questions of modification, and questions of fact, upon which, chiefly, differences have arisen. For example, there is no dispute, that Occupancy, where there is no prior right, is an event which should be considered as giving commencement to a right of dominion. Neither is there any doubt, that the Consent of those who have a right, may transfer that right to others: or in other words, that such consent is an event which gives commencement to a right in those others. Conquest, also, made in a lawful war, is recognized as an event of the same description; and, it will be found upon inquiry that these do, in fact, constitute the whole. For on every occasion on which dominion is acquired, the territory so acquired must, beforehand, either have belonged to some body, or have belonged to no body. If it belonged to nobody, occupancy is the only event which can be supposed to give commencement to the right. If it belonged to some body, it must be taken from him, either willingly, or by force. If it is taken from him willingly, we have his consent. If it is taken by force, it is by conquest in war, that the new right is created.

It is evidently, however, farther necessary, that the different species of consent should be distinguished; and those to which it would be proper to attach this investitive power, separated accurately from those from which it should be withheld. It is here accordingly, that the doctrine of contracts, would need to be introduced; that the different species of them applicable to this subject, in which all treaties would be included, should be enumerated; that the effects proper to be given to each of them should be defined; and the mode of interpreting them, or fixing the sense which they ought to bear, accurately laid down.

It would also be expedient, after the principal contracts, applicable to international concerns, are ascertained, to exhibit in the international code, *formulæ,* with blanks to be filled up, which should be employed by nations on all occasions of such contracts, and being framed with the greatest possible accuracy, would go as far as it would be possible by words to go, in excluding ambiguity, and the grounds of dispute.

With respect to conquest, the last event, calculated to give commencement to rights of dominion, mentioned in the above general enumeration, it is allowed, that as there are some conquests which ought not to be considered as conferring rights of dominion, there are others which ought to be considered as doing so. It is evidently necessary, therefore, that the line of separation should be drawn.

Whether a conquest, however, should or should not be considered as conferring a right of dominion, depends very much upon the nature of the war, through which it is made. If the war be what is regarded as just, and the mode of warfare conformable to the recognized rules, the conquest is apt to be regarded as conferring a legitimate title; if the war, and mode of war, be of a contrary description, the validity of the title conferred by the conquest may be liable to dispute.

It is evident, therefore, that in order to define the species of conquest on which the investitive power in question should be conferred, the circumstances which render a war justifiable, and the mode in which it is justifiable to carry it on, must first be ascertained. This forms the second part of our inquiry: and the question regarding the investitive power of conquest must be deferred, till that enquiry is performed.

2. Having thus far considered the mode in which should be determined the rights which nations acquire over portions of territory, or Land, it remains that we consider the mode in which their rights should be determined with regard to Waters.

Waters, as concerns the present purpose, are either rivers or the sea.

As the sea involves the questions of greatest extent and importance, we shall attend to that part of the subject first.

Even in the language of ordinary discourse, the sea is denominated the common domain of nations.

The first principle with regard to the sea is this, that all nations have an equal right to the use of it. The utility of recognizing this principle is so apparent, that it has never been the subject of any dispute. And all the rights assigned to nations severally, in the

enjoyment of this common domain, ought to rise out of this principle; and to be limited by it. Whatever use any nation makes of it, should be such as not to prevent a similar and equal use from being made by other nations. And every use which cannot be shown to have that effect, should be recognized as a right by the law of nations.

The principal use which nations make of the sea, is that of a passage for their ships. Agreeably to the principle which we have recognized, the ships of one nation should pass in such a manner as not to obstruct the passage of those of another. The rules according to which the possible cases of interference should be regulated, are very simple; and are, in fact, laid down and acted upon, with considerable accuracy. They resemble, in all respects, those according to which the vessels of the same country are made to avoid and to regulate their interferences in the rivers of the country, or upon its coasts. There would be no difficulty, therefore, in making accurate definitions of the requisite rights, for insertion in the international code.

The rights being established, the violations of them should be punished, on the same principles as those which we have laid down in regard to the preceding cases. Either property has been injured, or persons. In either case, compensation is an indisputable part of the remedial process, wherever it is practicable. In loss of property it is fully practicable. It is also practicable in many of the injuries done to the person. As in the case of offences committed on land, the rights of the individual who has suffered should be estimated according to the laws of the country to which he belongs; but the punishment of the offender should be measured according to the laws of the country to which he belongs. In the case of piracy, which is robbery, or murder, committed by persons whom no country recognizes, and upon whom, therefore, justice can be demanded from no foreign government, it has hitherto been the practice, that the nation suffering has taken the punishment into its own hands. Accordingly, the punishment of piracy has always been extremely severe. It would be, no doubt, better, if a mode were adopted, by which it would not be necessary for a nation to be judge in its own cause. A rule does not seem impossible to be framed, according to which the punishment of piracy might be provided for, by referring those accused of it, either to some general tribunal, constituted for that purpose, or to the tribunals of some nation other than that against which the offence has been perpetrated. A general law, on this subject, to be observed by all nations, would be highly desirable.

Rules, therefore, seem not difficult to be laid down, for regulating the proceedings of nations on the high seas. A distinction, however, is drawn between what is called the *high,* and what is called the *narrow seas.* By the narrow seas is commonly meant, some portion of sea, to a greater or less extent, immediately surrounding a particular country; and in which that country claims peculiar privileges. The question is, whether any such privileges should be allowed, and if allowed, to what extent?

The regulating principle in this, as in other cases, is the general advantage, the principle of utility. There are cases, in which certain privileges, in the waters surrounding a particular country, are of so much importance to that country; and the exercise of those advantages occasions so very little inconvenience to other nations, that what is lost, by all of them taken together, bears no comparison with what is gained by that particular nation. In these cases, the exercise of such privileges should

be allowed; they should, however, be defined, in as many instances as possible, and promulgated by insertion in an international code.

Of the privileges in question, are all those which are essential, or to a considerable degree subservient, to the national security. In some cases, the exclusive right of fishing might perhaps come under the same rule. But this is in general provided for, by the necessity of drawing the nets, or curing the fish, upon the land, a privilege which, of course, it is in the power of any nation to give or to withhold.

In obedience to this equitable principle, it appears, that such foppish privileges, as have sometimes been insisted upon, affording no advantage to one nation, which is not wholly at the cost of others—lowering the flag, for example, and such like impositions—should not be recognized by the code of nations.

It appears, also, that those tolls which have been, sometimes, and are levied, at the narrow inlets of some seas, deserve to fall under the same condemnation. The passage through these inlets is a common good to all the nations of the earth which may have a motive to use them; a good of the highest importance to the nations which are situated within, and to which it is the only means of maritime communication; and, while it imparts no evil to the conterminous nation, the toll which that nation levies is an advantage obtained wholly at the cost of others; and imposing upon them a burthen, in the way of obstruction and trouble, which is compensated for by advantage to nobody.

The waters, we have said, in respect to which rights should be assigned to nations, are rivers and the sea. Having stated what appears necessary on the present occasion with respect to the sea, it remains that we offer the few observations required, on the subject of rivers.

Rivers are either the boundary between two countries, or they are wholly within a particular country.

Those which are wholly within a particular country, it seems most agreeable to the principle of utility to regard as wholly belonging to that country. In the case of navigable rivers which pass through several countries, it would indeed be desirable for those countries which are situated higher up than that at the mouth of each, as well as for all those who might thus have intercourse with them, that the navigation of such rivers should be free; but it would be difficult so to regulate this right, as not to affect the security of the country through which a free navigation should thus be allowed; and a slight diminution in its security would be so great a loss to that country as would require, to compensate for it, a very great advantage to those by whom the navigation was enjoyed. Unless where this advantage were very great, it would not, therefore, be agreeable to the principle which should dictate the laws of nations, that the freedom of the navigation should be regulated on any other principles than those of mutual agreement.

In regard to those rivers which flow between two countries, the principle of regulation is sufficiently plain. The benefits derivable from the river should be shared equally

between them. Its principle benefits arise from the fishing and from the navigation. The right of fishing in most cases may be fitly distributed, by each party fishing from its own bank to the middle of the stream. The right of navigating of each must be so exercised as not to obstruct the right of the other. In this case the same sort of rules are required, to prevent the ships of the two nations from obstructing one another, in a common river, as are found available to prevent the ships of different individuals from obstructing one another, in a river belonging to one country. There is no difficulty, therefore, here, which it is worth stopping to show how to remove.

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IV.

What Should Be Recognized As Rights In Time Of War.—What Should Be Regarded As Necessary To Render The Commencement Of A War Just.—What Should Be Regarded As Just And Unjust In The Modes Of Carrying On A War.

We have now adduced, what our limits admit to be said, upon the first great branch of the inquiry relative to the law of nations; namely, the rights which they should recognize in one another in the state of peace. We proceed to the second branch, relating wholly to the state of war.

The questions which present themselves for solution relating to the state of war, are either those which respect its commencement, or those which respect the mode of carrying it on.

With respect to the commencement of a war, the principal question is, What are the conditions which should be regarded as necessary to render it just?

As men, in a situation where laws, and the protection derived from them, do not exist, are left to their own protection, and have no means of deterring other men from injuring them, but making them dread injury in return, so nations, which, with respect to one another, have, as we have seen before, but little protection from the legal sanction, are left to supply its place by this dread of injury in return, which, in the case both of individuals and of nations, may be called the *retributive sanction,* and of which, in the case of nations, war is the principal organ.

From this view of the essence and end of war, we lay down immediately one pretty extensive proposition with regard to the conditions necessary to render it just.

As the legal sanction, or punishment for the offences of individuals ought to operate only where some right has been violated, and the violation has been such as to require it, so the retributive sanction of nations, which is war, ought to operate only where some right of the nation, or something which ought to be traced as a right, has been violated, and where the violation has been such as to require that desperate remedy.

But as not all violations which may possibly be committed of the rights of a nation will justify it in inflicting war, the next object is, to draw the line of separation, and distinguish between those violations of the rights of nations which justify, and those which do not justify, the extremity of war.

As the evils which war produces are exceedingly great, it is, first of all, evident, that no violation of rights which is not very great, will, upon the principle which we have

so often recognized, suffice to justify it. Of two evils the least is the choice of all sound legislation.

Of the violation of the rights of individuals, in the same country, the cases meet for punishment are capable of being pointed out, with a degree of accuracy, not wanting much of perfection. Of the violation of the rights of nations, committed by one nation against another, the cases which would justify the remedial operation of war are much more difficult to define. The difficulty, indeed, is not universal; for there are cases which may be very satisfactorily defined; and as far as definition can go, it is of the utmost importance that it should be carried. Uncertainty, then, pervades only one part of the field; which the more we are able to lessen, the greater is the advantage in favour of humanity. If a proper code of international law were formed, there would be certain defined violations of the rights of nations which would be pointed out, not only as deserving the indignation and hatred of all the world, but as justifying the injured nation before all the world, in inflicting upon its injurer the calamities of war. There would also be certain other injuries pointed out, of a more doubtful character, which might, or might not, according to circumstances not easy to define, be such as to justify recourse to war. The injuries of this secondary character, also, which might, or might not, according to circumstances, justify a war, are capable of being pointed out with a certain degree of accuracy. To a certain degree, likewise, the circumstances which would convert them into justifying causes, are capable of being foreseen. So far definition is capable of extending, and so far, of course, it ought to be carried.

In illustration of this latter class of injuries, we may select the most remarkable, perhaps, and important of all the instances; preparations for a threatened attack. A sense of security is one of the most valuable treasures of a nation; and to be deprived of that sense of security, is one of the greatest injuries. But what state of preparation shall, or shall not be considered as justifying the threatened nation in striking the first blow, in order not to give its enemy the advantage of completing his preparations, and making his attack just at the moment when it would be most destructive, it is perhaps impossible to determine for all cases beforehand; though, no doubt, a certain progress may be made towards that determination, and the bounds of uncertainty may be greatly reduced.

We are aware how general, and therefore how unsatisfactory, these observations are, on the important subject of defining those violations of the rights of nations, which ought to be regarded as justificatory causes of war; but at the same time it is to be observed, that not much more could have been done without framing the code, by actually enumerating and defining the violations for which that remedy should be reserved.

Another consideration is now to be weighed. It is evident that whatever injuries are done by one nation to another, compensation may almost always be made for them. It is equally evident, that whatever injury may have been sustained, if compensation is made for it, the justificatory cause of war is removed.

The doctrine of compensation, therefore, is an important part of international jurisprudence. Before recourse is had to war, for any violation of rights, compensation

ought first to be demanded; and no war, except in cases fit for exception, should be regarded as just, which this demand had not preceded; a demand which should be made through a constituted organ, and in a predetermined mode, as we shall more fully describe in a subsequent page, when we come to treat of an international tribunal.

As there can be no reason why the demand of compensation should not always precede the use of arms, except in cases of such a necessity as will not allow time for demanding compensation—a necessity for the immediate use of arms, in order to prevent an evil immediately impending—those cases of urgent necessity should, as far as possible, be sought out, and defined.

Other circumstances may be enumerated, as belonging to this first stage of the remedy against a nation which places itself in an attitude affecting the sense of security of any of its neighbours. If a nation is making preparations, or executing any other measures, calculated to excite alarm, it may be called upon to desist from them; or it may be called upon to give security, that it will not make a hostile use of them. Of these securities, hostages are one of the most familiar instances. Various other instances will easily present themselves to the consideration of our readers. Upon this part of the subject, therefore, it is unnecessary for us to enlarge.

It thus appears that we may lay down, with a considerable degree of precision, the conditions upon which the commencement of a war ought to be regarded as just. It remains, under this head of enquiry, that we show how it may, as far as possible, be determined, what ought to be regarded as just and unjust in the modes of carrying it on.

This is an enquiry of more complexity, a good deal, than the first. In looking out for a guiding principle, it is evidently necessary to keep in view the end to which every just war is of necessity restricted. That is, compensation for an injury received, and security that a fresh injury shall not be committed. Combining this with the grand principle of humanity and utility, in other words, of morality; namely, that all evil, wilfully occasioned, and not calculated to produce a more than equivalent good, is wicked, and to be opposed, we obtain one comprehensive and highly important rule; which is this: That in the modes of carrying on war, every thing should be condemned by the law of nations, which, without being more conducive, or more in any considerable degree, to the attainment of the just end of the war, is much more mischievous to the nation against whom it is done.

As the end is to be gained, in most cases, only by inflicting a loss of men and property, upon the opposing nation, it would be desirable that the distinction should be drawn between the modes of inflicting this loss, which are the most, and those which are the least calculated, to inflict pain and suffering, without being more conducive to the end.

One distinction is sufficiently remarkable; namely, the distinction between the men who are in arms, or actually opposed to the designs of the belligerent, and the men

who are not so; also between the property which belongs to the government of the opposing nation, and that which belongs to private individuals composing the nation.

With respect to the first class of objects, the men in arms, and the property of the government, there is not much difficulty. To produce the loss of them, as rapidly as possible, till the end or purpose of the war is obtained, appears to be a privilege which cannot be separated from the right of warring at all.

With respect to the loss of men, indeed, there is an important restriction. It means the loss of them for the purposes of the war, and no more. If it be practicable to put them in a situation in which they can no longer be of any service to the war, all farther injury to them should be held unjustifiable. Under this rule falls the obligation, so generally recognized, of making our enemies, as often as possible, prisoners, instead of killing them, and of treating them with humanity, while retained in that condition.

That part of the subject, therefore, which relates to men in arms, and to such property as belongs immediately to the government, it is not impossible to include in rules of tolerable precision. The difficulty is, with respect to those individuals who, composing the body of the nation, form no part of the men in arms, and with respect to the property of such individuals.

Though it would not be correct to say, that these do not contribute, or rather that they may not be made to contribute, to the means with which the government carries on the war; yet it would be absurd not to recognize a very broad distinction between them, and the men and things which are immediately applied, or applicable to the war. A difference, therefore, equally broad, ought, in reason, to be made in the mode of treating them. The mode of treating the one ought to be very different from that of treating the other. As the rule of destruction must be the rule with regard to the first, only limited by certain restrictions; so the rule of forbearance and preservation ought to be the rule with regard to the latter, only to be infringed upon special and justifying circumstances.

Thus far we seem to have travelled with the advantage of light to our path. We may go a little farther with equal certainty, and say, that as far as regards the persons of those who are not engaged in the immediate business of hostility, very few occasions can occur, in which it would be allowable, upon any just principle of international law, to do them any injury. Leaving them out of the question, we narrow it to the case of the property belonging to individuals; and shall now proceed to see how far the protection of it can be embraced within general rules.

We must suppose the case, which is the strongest, that of an invading army. The advantage which is capable of being derived to such an enemy, by seizing and destroying the property of individuals, bears, unless in certain very extraordinary instances, no sort of proportion to the evil inflicted upon the individuals. This, we presume, cannot admit of a dispute. Upon the principle, therefore, so often recognized, as dictating the rules which ought in this affair to be solely obeyed, no such destruction, unless in such instances, ought to be sanctioned by the law of nations. Such property, it is well known, can rarely be counted upon, as any

considerable resource; because it is to a very great extent in the power of the people invaded to drive their property away, or to destroy it. The property of individuals, in an invaded country, would in general be a much more certain resource to an invading army, if that army were to purchase from them the articles which it desired. And, perhaps, this would be the most advantageous compromise, of which the circumstances admit; namely, that the invading army should abstain from the violation of private property; but that it should in return have the benefit of an unrestricted market; that nothing should be done on the part of the government of the invaded country to prevent its subjects from buying and selling with the invaders, as they would with any other parties.

It may no doubt be true, that the plunder and devastation of a province, or other portion of a country, must have an effect in diminishing the resources of the government for carrying on the war. In this point of view it must be allowed that the destruction of private property is of some importance to the invading nation with regard to the result of the war. But the question, in settling the difficulties of international jurisprudence, is not whether an advantage is gained, but whether the advantage, such as it is, be not gained, at too great a cost.

If it be certain that the losing party, in consequence of the destruction in question, loses more than the gaining party gains, it is certain that the two parties, taken together, are losers by the proceeding; and of course that nations, in the aggregate, are losers upon the whole. Nay, it is certain that each nation, taken by itself, is a loser, upon the balance of the cases in which it is liable to lose, and those in which it is liable to gain. If it loses more in the cases in which it bears, than it gains in the cases in which it inflicts invasion; and if it is as liable to bear, as to inflict, which is the usual condition of nations, it follows clearly that it is its interest to concur in a rule which shall protect the property of individuals, in cases of invasion.

Even in that more civilized mode, which has been adopted by invading armies, of availing themselves of the property of individuals, by exacting contributions through the instrumentality of the local authorities; contributions which these authorities are left to partition among the people, as they may deem equitable; though it is admitted that this is a much less hurtful proceeding than military rapine, still we think, it will easily appear, that the evil inflicted upon the contributors is greater than the benefits derived to the receivers.

Unless the amount thus received by an invading army is very considerable, the benefit which is derived, the aid which is gained towards accomplishing the end of the war, must be considered as trifling. But if a contribution, the amount of which can be of any considerable avail towards attaining the object of the war, is levied suddenly upon a particular district, a comparatively small portion of the invaded country, it must operate upon the contributors with a dreadful weight of oppression. Upon an equitable estimate of the circumstances, it can, therefore, hardly fail to appear, that, whether the contribution exacted is heavy or light (it must always be heavy to those who sustain it), the loss to those who suffer must greatly outweigh the advantage to those who receive. If it be so, this mode of exaction should, it is evident, be forbidden by the law of nations.

If these are the principles, upon which an international code, regarding this branch of the subject ought to be constructed, they will enable us to determine the question with regard to the property of individuals in another set of circumstances, to which the rules of civilized society have hardly yet begun to be applied. Whatever rules apply to the property of individuals found upon the land, the same rules ought, by parity of reason, it should seem, to apply to it when found upon the sea.

The conduct of nations, however, has hitherto not been conformable to the parity which appears to belong to the two sets of cases. Some tenderness, more or less, according to the progress in civilization, appears to have been shown, by all but savages, to the property of individuals upon the land. To this hour the property of individuals upon the sea is made prize of without mercy, by the most civilized nations in the world.

The notions of piracy, in fact, have, on this subject, unhappily prevailed, and governed the minds of men. Pirates make prey of every thing. Sailors, originally, were all pirates. The seafaring state was a belligerent state, of almost every vessel against every other vessel. Even when nations had gradually advanced into a more civilized state, and when their vessels abstained from injury to one another in a period of peace, they appear, when the ties of peace were dissolved, and they were placed with respect to one another in a state of war upon the seas, to have felt the force of none but their old associations, and to have looked upon the state of war as a state of piracy. Two nations at war with one another continue to act towards the property of individuals belonging to one another at sea, exactly as two nations of pirates would do.

Assuredly this is a state of things, to which the present intelligence and morality of the world ought speedily to put an end. The very same reasoning which we have applied to the case of the property of individuals upon the land, is not less conclusive when applied to the property of individuals upon the sea. The loss to the party losing is more than an equivalent for the gain to the party that gains.

There is another consideration of great importance. All nations gain by the free operations of commerce. If then we were to suppose that the losses and gains of the two belligerent parties balanced one another, which yet they never do, there is an advantage derived from their commerce to every nation on the earth to which, in any degree, either directly or indirectly, that commerce extends; which advantage is either lost or diminished, by their preying upon the property of the individuals belonging to one another. This, therefore, is an unquestionable balance of loss, to the general community of nations, which the law of that community ought to endeavour to prevent.

If, then, we should suppose that it were enacted as the law of nations, that the property of individuals passing on the seas should be equally respected, in peace and in war, we may proceed to consider whether any disadvantage, nearly countervailing the general good, would thence accrue to the belligerents.

It may be alleged, that a nation at war with another is retarded in reducing its antagonist, by the riches which the commerce of that antagonist, if undisturbed, will

place at its disposal. But it is evident that an advantage to one of two antagonists, when compensated to the other, by a power to overcome that advantage, exactly equivalent, is in reality no advantage at all. Such is the case with the advantage accruing to the nation with which another is at war, when the property of individuals upon the sea is allowed to pass unmolested. If its riches are increased by freedom of commerce, so are those of its antagonist. The advantages are equal, where the circumstances are equal, which, in the majority of cases, they undoubtedly are.

If it be still objected, that there may be cases in which they are not equal, the answer is obvious, and incontrovertible. There is no general rule without its exceptions, but partial evil must be admitted for general good. Besides, if the case were very remarkable, it might be excepted from the general rule.

If this were adopted as part of the law of nations, all those questions respecting the maritime traffic of *Neutrals,* questions which have been the source of so much troublesome inquiry, so much animosity, and so much mischief, would be immediately at an end. If the traffic of the belligerents, so far as concerned the property of individuals, were free, so would be that of all neutral nations.

Places actually blockaded, that is surrounded with an hostile force for the immediate purpose of being reduced, either by arms, or by famine, would still form exceptions; because the admission of ships into them, with supplies either of food, or munition of war, would be directly at variance with the very object of the blockade.

In all other cases, the admission either of provisions or of instruments of war into a belligerent country, ought, undoubtedly, upon the principle of utility, not to be disturbed. The benefit, except in rare and remarkable cases, could not be material to the country into which they might enter, nor hence the injury to its antagonist; on the other hand, that antagonist would enjoy the same privilege of the free admission of those commodities, and thus they would be equal in all respects. The inconvenience, however, which would thus be saved to the neutrals—the annoyance of search, the loss by detention, the occasions of quarrel—are known to be evils of no ordinary magnitude.

The desertion of sailors from the ships of a belligerent to those of a neutral has given rise to disputes in one instance only, that of Great Britain and the United States of America. The question to be determined, in laying down the principles of international jurisprudence, is, whether this desertion ought to be considered as constituting a ground for the general right of search; in other words, whether the evil to which a belligerent is exposed by desertion, or rather by that portion of desertion which can be prevented by the right of search, is an equivalent for all the evil which is unavoidably produced by it.

Desertion must take place either from the ships of war of the belligerent, or from its merchant ships.

In respect to ships of war, it is so easy for a belligerent to prevent desertion to neutrals, at least in any such degree as to constitute a great evil, that it would be

altogether absurd to speak of it as fit to be compared with the evils arising from the right of search. The only occasions on which ships of war can be exposed to desertion to neutrals, must be those on which they go into a neutral port. But on those, comparatively rare, occasions, they can so easily take precaution against desertion, that the danger to which they are exposed is hardly worth regarding.

When the sailors belonging to merchant ships transfer their services to the ships of a neutral, it is not to be called desertion. It can only take place, in very considerable numbers, when seamen's wages in the neutral country are much higher than in the belligerent. The sailor, in this case, leaves his own for another country, only because he improves his situation by so doing. This is a liberty, which, as it ought to belong to every body, so it ought not to be withheld from the sailor. If, indeed, any nation thinks proper to forbid any class of its people to leave their country, as England with regard to its artificers, other countries cannot help that; but they ought not to be called upon to lend their aid to such an antisocial regulation, by allowing their vessels to be searched, as security against its infringement. Besides, it is evident, that there is a much greater security, arising from the very nature of the case, against the chance of a nation's being, to any considerable degree, deprived of its sailors by any such means. If the sailors go into the neutral country because wages are higher there, a small number only will have gone, when wages, from diminution of the numbers, will begin to rise in the country which they have left, and from increase of the numbers, will begin to fall in the country to which they have been tempted to repair. When the wages of seamen have thus sufficiently risen, in the belligerent country, which they are sure to do if the demand for them rises, the sailors will not only come back from every country in the world, but the sailors of other countries will hurry along with them; and the evil of desertion cures itself.

Only two questions, of any great importance, appear to remain; that relating to the march of troops, for a hostile purpose, through a neutral country, and that relating to the extent to which the operations of a successful war ought to be pursued.

According to the principles which we have already laid down for regulating the proceedings of a hostile army even in the invaded country, namely, that of committing no plunder, and enjoying the right of market, it appears that the right of passing through a neutral country on similar terms should be refused to no party. This rule, while it holds out equal advantages to all belligerents, admits, less than any other rule, grounds of dispute.

The end, which we have already described as that alone the pursuit of which can render any war justifiable, sufficiently defines the extent to which the operations of a successful war ought to proceed. The end of every justifiable war is to obtain compensation for an injury sustained, and security against the repetition of it. The last point, that of security, alone admits any uncertainty. Nations are apt to exaggerate the demand for security; to require too much; very often unconsciously, from the mere cravings of self-love; sometimes fraudulently, as a cover for ambitious views. As the question, however, respecting what may or may not, in each instance, be sufficient security, is a question of fact, not of law, it must be determined, if determined at all, by a tribunal empowered to take cognizance of the facts.

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V.

Of The Construction Of An International Code, And An International Tribunal.—How The Nations Might Concur In Framing An International Code.—How An International Tribunal Should Be Constructed.—Form Of Procedure Before The International Tribunal.

We have now then laid down the principles by which, in our opinion, the rights of nations, in respect to one another, ought to be determined; and we have shown in what manner those principles should be applied, in order to come to a decision, in the most remarkable cases. The minor points it is, of course, not in our power to illustrate in detail; but that will not, we should hope, be difficult, after the exemplification exhibited, and the satisfactory solutions, at which we seem to have arrived, of all the more considerable questions which the subject presents.

From what has been shown, it is not difficult to see, what would be the course pursued by nations, if they were really actuated by the desire of regulating their general intercourse, both in peace and war, on the principles most advantageous to them all.

Two grand practical measures are obviously not only of primary importance toward the attainment of this end, but are of indispensable necessity toward the attainment of it in any tolerable degree. These are, first, the construction of a Code; and, secondly, the establishment of a Tribunal.

It is perfectly evident, that nations will be much more likely to conform to the principles of intercourse which are best for all, if they have an accurate set of rules to go by, than if they have not. In the first place, there is less room for mistake; in the next, there is less room for plausible pretexts; and last of all, the approbation and disapprobation of the world is sure to act with tenfold concentration, where a precise rule is broken, familiar to all the civilized world, and venerated by all.

How the nations of the civilized world might concur in the framing of such a code, it is not difficult to devise. They might appoint delegates to meet, for that purpose, in any central and convenient place; where, after discussion, and coming to as full an understanding as possible upon all the material points, they might elect some one person, the most capable that could be found, to put these their determinations into the proper words and form, in short, to make a draught of a code of international law, as effectually as possible providing for all the questions, which could arise, upon their interfering interests, between two nations. After this draught was proposed, it should be revised by the delegates, and approved by them, or altered till they deemed it worthy of their approbation. It should then be referred to the several governments, to receive its final sanction from their approbation; but, in the mean time, it should be published in all the principal languages, and circulated as extensively as possible, for

the sake of two important advantages. The first would be, that, the intelligence of the whole world being brought to operate upon it, and suggestions obtained from every quarter, it might be made as perfect as possible. The second would be, that the eyes of all the world being fixed upon the decision of every nation with respect to the code, every nation might be deterred by shame from objecting to any important article in it.

As the sanction of general opinion is that upon which chiefly, as we have already seen, such a code must rely for its efficiency, not a little will depend upon the mode in which it is recognized and taught. The recognition should in each country have all possible publicity and solemnity. Every circumstance which can tend to diffuse the opinion throughout the earth, that the people of each country attach the highest importance to such a code, is to themselves a first-rate advantage; because it must be of the utmost importance to them, that all the nations of the earth should behave towards them upon the principles of mutual beneficence; and nothing which they can do can have so great a tendency to produce this desirable effect, as its being generally known that they venerate the rules which are established for its attainment.

If nations, then, were really actuated by the desire of regulating their mutual intercourse upon principles mutually beneficent, they would adopt measures for having a code of international law constructed, solemnly recognized, and universally diffused and made known.

But it is not enough that a code should exist; every thing should be done to secure a conduct conformable to it. Nothing is of so much importance for this purpose as a tribunal; before which every case of infringement should be tried, the facts of it fully and completely explored, the nature and degree of the infringement ascertained; and from which a knowledge of every thing material to the case should be as rapidly as possible diffused through the world; before which also all cases of doubt should regularly come for determination: and thus wars, between nations which meant justly, would always be avoided, and a stigma would be set upon those which justice could not content.

The analogy of the code, which is, or ought to be, framed by each state for regulating the intercourse of its own people within its own territory, throws all the illustration which is necessary upon the case of a tribunal for the international code. It is well known, that laws, however carefully and accurately constructed, would be of little avail in any country, if there was not some organ, by means of which it might be determined when individuals had acted in conformity with them, and when they had not; by which also, when any doubt existed respecting the conduct which in any particular case the law required, such doubt might be authoritatively removed, and one determinate line of action prescribed. Without this, it is sufficiently evident, that a small portion of the benefit capable of being derived from laws would actually be attained. It will presently be seen how much of the benefit capable of being derived from an international code must be lost, if it is left destitute of a similar organ. We shall first consider, in what manner an international tribunal might be constructed; and, next, in what manner it might be appointed to act.

As it is understood that questions relating to all nations should come before it, what is desirable is, that all nations should have equal security for good judicature from it, and should look with equal confidence to its decisions.

An obvious expedient for this purpose is, that all nations should contribute equally to its formation; that each, for example, should send to it a delegate, or judge. Its situation should be chosen for its accessibility, and for the means of publicity which it might afford; the last being, beyond comparison, the advantage of greatest importance. As all nations could not easily, or would not, send, it would suffice if the more civilized and leading nations of the world concurred in the design, with such a number of the less considerable as would be sure to follow their example, and would be desirous of deriving advantage from an instrument of protection, which to them would be of peculiar importance.

As it is found by specific experience, and is, indeed, a consequence of the ascertained laws of human nature, that a numerous assembly of men cannot form a good judicatory; and that the best chance for good judicial service is always obtained when only one man judges, under the vigilant eyes of interested and intelligent observers, having full freedom to deliver to the world their sentiments respecting his conduct; the whole of these advantages may be obtained, in this case, by a very effectual expedient. If precedent, also, be wanted, a thing which in certain minds holds the place of reason, it is amply furnished by the Roman law; according to which, a great number of judges having been chosen for the judicial business generally of the year, a selection was made out of that number, according to certain rules, for each particular case.

Every possible advantage, it appears, would be combined in the international tribunal, if the whole body of delegates, or judges, assembled from every country, should, as often as any case for decision came before them, hold a conference, and, after mature deliberation, choose some one individual of their body, upon whom the whole duty of judge should, in that case, devolve; it being the strict duty of the rest to be present during the whole of his proceedings, and each of them to record separately his opinion upon the case, after the decision of the acting judge had been pronounced.

It would be, no doubt, a good general rule, though one can easily foresee cases in which it would be expedient to admit exceptions, that the judge, who is in this manner chosen for each instance of the judicial service, should not be the delegate from any of the countries immediately involved in the dispute. The motive to this is sufficiently apparent.

We apprehend, that few words will be deemed necessary to show how many securities are thus provided for the excellence of the judicial service.

In the first place, it seems impossible to question, that the utmost fairness and impartiality are provided for, in the choice of the judge; because, of the two parties involved in the dispute, the one is represented by a delegate as much as the other, and the rest of the delegates are indifferent between them. In general, therefore, it is evident, that the sinister interest on the two sides being balanced, and there being a

great preponderance of interest in favour of nothing but a just decision, that interest will prevail.

The best choice being made of a judge, it is evident that he would be so situated, as to act under the strongest securities for good conduct. Acting singly, he would bear the whole responsibility of the service required at his hands. He would act under the eyes of the rest of the assembled delegates, men versed in the same species of business, chosen on account of their capacity for the service, who could be deceived neither with respect to the diligence which he might exert, nor the fairness and honesty with which he might decide; while he would be watched by the delegates of the respective parties, having the power of interest stimulating them to attention; and would be sure that the merits or demerits of his conduct would be made fully known to the whole, or the greater part of the world.

The judicatory being thus constituted, the mode of proceeding before it may be easily sketched.

The cases may be divided into those brought before it by the parties concerned in the dispute; and those which it would be its duty to take up, when they were not brought before it by any of the parties.

A variety of cases would occur, in which two nations, having a ground of dispute, and being unable to agree, would unite in an application to the international tribunal for an adjustment of their differences. On such occasions, the course of the tribunal would be sufficiently clear. The parties would plead the grounds of their several claims: the judge would determine how far, according to the law, they were competent to support those claims; the parties would adduce their evidence for and against the facts, on which the determination of the claims was found to depend; the judge would receive that evidence, and finally decide. All this is so perfectly conformable to the course of pleading, and receiving proof, in the case of suits between individuals, as analyzed and explained in the Article Jurisprudence, that it is unnecessary to be more particular here. If farther exposition is required, it will be found upon a reference to the article to which we allude. Decision, in this case, it is observable, fully accomplishes its end; because the parties come with an intention of obeying it.

Another, and a numerous class of cases, would probably be constituted, by those who would come before it, complaining of a violation of their rights by another nation, and calling for redress.

This set of cases is analogous to that, in private judicature, when one man prosecutes another for some punishable offence.

It should be incumbent upon the party thus applying to give notice of its intention to the party against which it is to complain, and of the day on which it means that its complaint should be presented.

If both parties are present, when the case comes forward for trial, they both plead, according to the mode described in the Article Jurisprudence; evidence is taken upon

the decisive facts; and if injury has been committed, the amount of compensation is decreed. When it happens that the defendant is not present, and refuses to plead, or to submit, in this instance, to the jurisdiction of the court, the inquiry should notwithstanding go on; the allegations of the party present should be heard, and the evidence which it adduces should be received. The non-appearance of the party defendant should be treated as an article of evidence to prove the truth of its opponent's allegations. And the fact of not appearing should, itself, be treated as an offence against the law of nations.

It happens, not unfrequently, when nations quarrel, that both parties are in the wrong; and on some of these occasions neither party might think proper to apply to an equitable tribunal. This fact, namely, that of their not applying to the international tribunal, should, itself, as stated before, be marked in the code as an international offence, and should be denounced as such by the international tribunal. But even when two offending parties do not ask for a decision from the international tribunal, it is not proper that other nations should be deprived of the benefit of such a decision. If these decisions constitute a security against injustice from one another to the general community of nations, that security must not be allowed to be impaired by the refractory conduct of those who dread an investigation of their conduct.

Certain forms, not difficult to devise, should be laid down, according to which, on the occurrence of such cases, the tribunal should proceed. First of all, it is evident, that the parties in question should receive intimation of the intention of the court to take cognisance of their disputes, on a certain day. If the parties, one or both, appeared, the case would fall under one of those which have been previously as above considered. If neither party appeared, the court would proceed to estimate the facts which were within its cognisance.

It would have before it one important article of evidence, furnished by the parties themselves, namely, the fact of their non-appearance. This ought to be considered as going far to prove injurious conduct on both sides. The evidence which the court would have before it, to many specific facts, would be liable to be scanty, from the neglect of the parties to adduce their pleas and evidence. The business of the court, in these circumstances, would be, to state correctly such evidence, direct or circumstantial, as it had before it; giving its full weight to the evidence contained in the fact of non-appearance; and to pronounce the decision, which the balance of the evidence, such as it was, might be found to support.

Even in this case, in which the practical effect of a decision of the international court may be supposed to be the least, where neither party is disposed to respect the jurisdiction, the benefit which would be derived would by no means be inconsiderable. A decision solemnly pronounced by such a tribunal, would always have a strong effect upon the imaginations of men. It would fix, and concentrate the disapprobation of mankind.

Such a tribunal would operate as a great school of political morality. By sifting the circumstances, in all the disputes of nations, by distinguishing accurately between the false colours and the true, by stripping off all disguises, by getting at the real facts,

and exhibiting them in the true point of view, by presenting all this to the world, and fixing the attention of mankind upon it by all the celebrity of its elevated situation, it would teach men at large to distinguish. By habit of contemplating the approbation of such a court attached to just proceeding, its disapprobation to unjust; men would learn to apply correctly their own approbation and disapprobation; whence would flow the various important effects, which those sentiments justly excited, would naturally and unavoidably produce.

As, for the reasons adduced at the beginning of this article, the intention should never be entertained of supporting the decisions of the international court by force of arms, it remains to be considered what means of another kind could be had recourse to, in order to raise to as high a pitch as possible the motive of nations respectively to yield obedience to its decisions.

We have already spoken of the effect which would be produced, in pointing the sentiments of mankind, and giving strength to the moral sanction, by the existence of an accurate code, and the decisions themselves of a well-constituted tribunal.

To increase this effect to the utmost, publicity should be carried to the highest practicable perfection. The code, of course, ought to be universally promulgated and known. Not only that, but the best means should be in full operation for diffusing a knowledge of the proceedings of the tribunal; a knowledge of the cases investigated, the allegations made, the evidence adduced, the sentence pronounced, and the reasons upon which it is grounded.

The book of the law of nations, and selections from the book of the trials before the international tribunal, should form a subject of study in every school, and a knowledge of them a necessary part of every man’s education. In this manner a moral sentiment would grow up, which would, in time, act as a powerful restraining force upon the injustice of nations, and give a wonderful efficacy to the international jurisdiction. No nation would like to be the object of the contempt and hatred of all other nations; to be spoken of by them on all occasions with disgust and indignation. On the other hand, there is no nation, which does not value highly the favourable sentiments of other nations; which is not elevated and delighted with the knowledge that its justice, generosity, and magnanimity, are the theme of general applause. When means are taken to make it certain that what affords a nation this high satisfaction will follow a just and beneficial course of conduct; that what it regards with so much aversion, will infallibly happen to it, if it fails in the propriety of its own behaviour, we may be sure that a strong security is gained for a good intercourse among nations.

Besides this, it does not seem impossible to find various inconveniences, to which, by way of penalties, those nations might be subjected, which refused to conform to the prescriptions of the international code.

Various privileges granted to other nations, in their intercourse with one another, might be withheld from that nation which thus demeaned itself in a way so contrary to the general interests. In so far as the withholding of these privileges might operate unfavourably upon individuals belonging to the refractory nations,—individuals who

might be little, or not at all, accessary to the guilt, the effect would be the subject of proportional regret. Many, however, in the concerns of mankind, are the good things which can only be attained with a certain accompaniment of evil. The rule of wisdom, in such cases, is, to make sure that the good outweighs the evil, and to reduce the evil to its narrowest dimensions.

We may take an instance first from trivial matters. The ceremonial of other nations might be turned against the nation, which, in this common concern, set itself in opposition to the interests of others. The lowest place in company, the least respectful situation on all occasions of ceremony, might be assigned to the members of that nation, when travelling or residing in other countries. Many of those marks of disrespect, implying injury neither to person nor property, which are checked by penalties in respect to others, might be free from penalties in respect to them. From these instances, adduced merely to illustrate our meaning, it will be easy to see in what manner a number of considerable inconveniences might, from this source, be made to bear upon nations refusing to conform to the beneficial provisions of the international code.

Besides the ceremonial of other nations, means to the same end might be derived from the law. A number of cases might be found in which certain benefits of the law, granted to other foreigners, might be refused to them. They might be denied the privilege of suing in the courts, for example, on account of any thing except some of the higher crimes, the more serious violations of person or property.

Among other things it is sufficiently evident, that this tribunal would be the proper organ for the trial of piracy. When preponderant inconvenience might attend the removing of the trial to the usual seat of the tribunal, it might delegate for that purpose the proper functionaries to the proper spot.

By the application of the principles, which we have thus expounded, an application which implies no peculiar difficulty, and requires nothing more than care in the detail, we are satisfied that all might be done, which is capable of being done, toward securing the benefits of international law.

(F. F.)

J. Innes, Printer, 61, Wells-street, Oxford-street, London.