

A DIGEST OF THE CLASSICAL DOCTRINE OF CIVIL WAR

Ville Kari



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Foreword

In the classical law of nations there was a doctrine of civil war. It emerged in the state practice of the age of sail and developed into a scholarly subject of international law during the long nineteenth and early twentieth centuries. This ‘classical doctrine of civil war in international law’ was characterised by the concepts of *belligerency* and *insurgency*, as well as a common understanding among lawyers that an insurgency which attained the status of civil war proper became thereupon a *public* war, where the international laws of war and *neutrality* applied in full. After the mid-twentieth century, civil war as a legal concept was mostly abandoned from international law.

This Digest contains a selection of illustrative citations, rules and principles from the long lifespan of the classical law of civil war. It is a rather eclectic compilation of elements from which jurists, judges, scholars and statesmen argued the classical doctrine consisted of. Despite their seeming organisation, the elements included here do not form, nor are they intended to form, a seamless ‘system’. Instead, this is a mosaic of overtly contradictory principles and positions that were deployed (or could be deployed) as building blocks for international legal arguments concerning internal armed conflicts. Even if the doctrine of civil war was irreconcilably indeterminate, it was nevertheless useful for lawyers and governments. Its ‘essence’ was a tradition of language that could be deployed by diplomats and jurists for explaining and justifying the positions of their governments or their clients, as well as for reacting to the justifications and positions of others. Its meaning and utility always manifested itself in relation to particular situations and confrontations, and it is unlikely that any amount of sheer logic could ever have fully overcome its contradictions.

This Digest is a work of academic research. It is not intended as a normative proposal, but rather as an illustrative portrait of this past international legal language on civil wars. It is released as an unofficial companion to my forthcoming monograph *The Classical Doctrine of Civil War in International Law* (Cambridge University Press 2026), as a map of statements to help scholars wading through the oftentimes contradictory law found in that book. As a collage and a portrait, this Digest seeks to illustrate, but not complete, the vague collective vision of a legal system of civil war which many jurists once pursued.

This Digest started out as a research notebook and a separate appendix to my doctoral thesis published at the Erik Castrén Institute of the University of Helsinki in 2020. Although the digest took its systematic form quite early on, its origin means that a small number of inaccuracies is likely to remain in its citations, for example inaccurate [square bracketing], or *italics* that differ from the originals. Some citations were translated from the originals by myself on the go, without specifically noting this down. I therefore warmly recommend the reader to look up and examine the actual originals of the sources included here.

PARIS, JANUARY 2026,

Ville Kari

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A Digest of the Classical Doctrine of Civil War

I – GENERAL PRINCIPLES

1 §. *On War and Peace.* When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So, when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped so as the courts of justice be as it were shut up, *et silent legis inter arma*, then it is said to be time of warre. [Coke, I.412]

The rule of the common law is that, when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and the hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. The converse is also regularly true; so that, when the courts of a government are open, it is ordinarily a time of peace. [J Cadwaladr, *The Parkhill* (1861)]

‘War’, says Demosthenes, ‘is made against those who cannot be controlled by the laws, but judicial decisions are rendered in the case of private citizens.’ [Gentili, I, iii]

CALLISTRATUS, *Judicial Examinations, book 5*: For there exists a decree of the divine Marcus in these words: It is best that where you think you have a claim you bring an action. When Marcianus said, ‘I have used no force,’ the emperor replied, ‘do you think that force is used only if men are wounded?’ There is also force whenever someone demands what he thinks is due to him without going to court. [Dig. 4.2.13]

Where there is no judge on earth, the appeal lies to God in heaven. [Locke II §21]

WAR is that state in which a nation prosecutes its right by force. [Vattel III.1.1] War is the condition of those contending by force, viewed simply as such. [Grotius I.1.2]

For WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time,

wherein the Will to contend by Battell is sufficiently known: and therefore the notion of *Time*, is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes together: So the nature of War, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE. [Hobbes, I.13]

War is the contention between two or more States through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases. [Oppenheim II.1.1 §54]

We also understand by this term, the act itself, or the manner of prosecuting right by force: but it is common and indeed more proper, in a treatise on the law of war, to understand this term in the sense we have given it. [Vattel III.I.1]

Public war is that betwixt nations or sovereigns, and carried on in the name of the public power, and by its order. This is the war we are here to consider; *private war*, or that carried on between particulars, or private persons, properly belonging to the law of nature. [Vattel III.1.2]

I ANSWER THAT, In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. ... [A]nd for this reason Augustine says (*Contra Faust. xxii, 75*): “The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.” [Aquinas, II–II.40.1]

The right to make war ... belongs solely to the sovereign power. Not only is it for the sovereign to decide whether it is proper to go to war, and to declare it, but it is his duty also to direct

all the operations of the war as a matter of the utmost importance to the welfare of the State. Accordingly, the subjects may not act in this case on their own account, and they may not commit any acts of hostility without the order of the sovereign. [Vattel III.15 §223]

This general definition includes all the classes of wars which it will hereafter be necessary to discuss. For I do not exclude private war, since in fact it is more ancient than public war and has, incontestably, the same nature as public war; wherefore both should be designated by one and the same term. [Grotius I.2.2]

If, to be sure, the term ‘war’ is at times limited to public war, that implies no objection to our view, since it is perfectly certain that the name of a genus is often applied in a particular way to a species, especially a species that is more prominent. [Grotius I.I.2.3]

I do not include justice in my definition because this very question forms a part of our investigation, whether there can be a just war, and what kind of a war is just; and a subject which is under investigation ought to be distinguished from the object towards which the investigation is directed. [Grotius I.I.2.3]

Private war is absurd and illegitimate because it denies the social nature of man. [Olivart 86]

2 §. *On rebellion.* The name of *rebels* is given to all subjects who unjustly take up arms against the ruler of the society, whether with the design of deposing him from the supreme authority, or of merely resisting his orders in some particular instance and making him accept their terms. [Vattel III § 288]

Rebels are defined as subjects who without just cause take up arms against the ruler of the state. And that condition is not called war but rebellion, in our native vernacular *ein Aufruhr* (a tumult). . . . We define a riot as that situation in which a crowd congregates and uses force against magistrates or minor powers or their property, and also against private persons and their property, or at least threatens it. In our native vernacular we call it *ein Aufstand* (an uprising). [Wolff, §§ 1010, 1013]

Why, you see, there is a difference in the names ‘discord’ [*stasis*] and ‘war’ [*polemos*] and I imagine that there is also a difference in their natures; the one is expressive of what is internal and domestic, the other of what is external and foreign; and the first of the two is termed discord, and only the second, war. . . . And therefore when Hellenes fight with barbarians and barbarians with Hellenes, they will be described by us as being at war when they fight, and by nature enemies, and this kind of antagonism should be called war; but when Hellenes fight with one another we shall say that Hellas is then in a state of disorder and discord, they being by nature friends; and such enmity is to be called discord. [Plato, *Rep.* §470]

POMPONIUS, *Quintus Mucius, book 2*: “Enemies” are those who have publicly declared war on us or on whom we have publicly declared war; others are “brigands” or “pirates.” (*Latrones* or *Pradones*) [Dig. 50.16.118]

ULPIAN, *Institutes, book 1*: The enemy are those on whom the Roman people has publicly declared war, or who themselves [declare war] on the Roman people; others are termed robbers or bandits. [Dig. 49.14.24]

“The enemy are those who have officially declared war upon us, or upon whom we have officially declared war; all others are brigands or pirates”, says Pomponius. Ulpian uses the same language: “The enemy are those upon whom the Roman people has officially declared war, or who have themselves declared war upon the Roman people. All others are termed brigands or pirates.” That is to say, the war on both sides must be public and official and there must be sovereigns on both sides to direct the war. This is the view both of Augustine and of the other theologians, and reason shows that war has its origin in necessity; and this necessity arises because there cannot be judicial processes between supreme sovereigns or free peoples unless they themselves consent, since they acknowledge no judge or superior. [Gentili I, iii]

For ‘enemy’ and ‘rebel’ are two very different things, according to the laws cited; and I do not understand how the rights of enslavement and postliminy could here apply (for these are rights which are brought into play in dealings with outsiders, i.e. enemies or foreigners), unless the Emperor shall have declared the parties ‘enemies’, as Innocent says. [Belli, I.5.10.]

A commonwealth or state does not immediately cease to be such if it commits an injustice, even as a body; and a gathering of pirates and brigands is not a state, even if they do perhaps mutually maintain a sort of equality, without which no association can exist. . . . What persons have the sovereign power, we have already stated. Hence it may be understood that, if any possess the sovereign power in part, they may to that extent wage a lawful war. [Grotius III.3.2–3.]

A popular tumult is a disorderly gathering of people who refuse to listen to the voice of their superiors, whether they be disaffected towards their superiors themselves or merely towards certain private individuals. These violent movements occur when the people believe themselves harassed, and they are more often caused by tax-collectors than by any other class of public officers. If the anger of the people is directed particularly against the magistrates or other officers invested with the public authority, and if it is carried so far as to result in positive disobedience or acts of violence, the movement is called a *sedition*. [Vattel III. §289]

See also 7 §, 24 §.

3 §. *On Insurrection.* When the evil extends and wins over the majority of the citizens in a town or province, and gains such strength that the sovereign is no longer obeyed, it is usual to distinguish such an uprising more particularly by the name of an *insurrection*. [Vattel III.18. §289]

In reality, there exists between the state of complete peace and that of neutrality resulting from the recognition of the insurgents as belligerents an intermediate state, during the period of which the powers acknowledge an *insurrection*. [Wiesse 115]

Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view. [Lieber §149]

The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own. [Lieber §151]

4 §. *On Civil War.* When a party is formed within the State which ceases to obey the sovereign and is strong enough to make a stand against him, or when a Republic is divided into two opposite factions, and both sides take up arms, there exists a *civil war*. [Vattel III.18. §292]

Civil war is defined as one in which subjects take up arms for a just cause against the ruler of a state. Therefore, since rebellion has an unjust cause, but civil war a just cause, a rebellion is not a civil war and civil war is not rebellion; consequently subjects who stir up a civil war are not rebels. [Wolff, § 1011]

A civil war ... becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. [J Grier, *The Prize Cases* (1863)]

Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government. [Lieber §150]

Some authors limit the term to a just uprising on the part of subjects against their sovereign, in order to distinguish such lawful resistance from the open and unlawful resistance which

is termed a *rebellion*. But what name will they apply to a war which breaks out in a Republic between two contending factions, or in a monarchy between two claimants to the throne? Custom applies the name of civil war to every war between the members of the same political society; if the war is between a body of the citizens on the one hand and the sovereign with those loyal to him on the other, nothing further is required to entitle the insurrection to be called *civil war*, and not *rebellion*, than that the insurgents have some cause for taking up arms. The term *rebellion* is only applied to an uprising against lawful authority, which is lacking in any semblance of justice. The sovereign never fails to stigmatize as *rebels* all subjects who openly resist his authority; but when the latter become sufficiently strong to make a stand against him, and to force him to make formal war upon them, he must necessarily submit to have the contest called civil war. [Vattel III.18. §292]

La guerre civile est un conflit armé qui a pour but un intérêt général, et qui se poursuit, soit entre un État et une partie de ses ressortissants, soit entre deux États unis par un lien d'allégeance, en vertu duquel ces États ou l'un d'eux ont aliéné l'exercice de leur souveraineté externe. [Sadoul 20]

Civil war breaks the bonds of society and of government, or at least suspends the force and effect of them; it gives rise, within the Nation, to two independent parties, who regard each other as enemies and acknowledge no common judge. Of necessity, therefore, these two parties must be regarded as forming thenceforth, for a time at least, two separate bodies politic, two distinct Nations. [Vattel III.18. §293]

When an insurrection turns into a war between two regularly organized belligerent parties, when it is conducted on both sides by veritable governments, by means of armies which respect the laws and customs of international wars, such a civil war assumes the character of an international war that shall end either by the definitive triumph of the lawful government and the restoration of the previous unity in the state, or by the division of the country into two separate states. [F Martens III, 185]

First, then, it should be understood that this law of nations ... pertains to those representatives whom rulers with sovereign powers send to one another. ... In civil wars, however, necessity sometimes opens the way for the exercise of [the right of legation], though in an irregular fashion. Such a case will arise when a people has been divided into parts so nearly equal that it is doubtful which of the two sides possesses sovereignty; and again, when two persons with practically equal rights are contending for the succession to the throne. Un-

der such circumstances, a single people is considered for the time being as two peoples. [Grotius II.18.2.]

Although one of the two parties may have been wrong in breaking up the unity of the State and in resisting the lawful authority, still they are none the less divided in fact. Moreover, who is to judge them, and to decide which side is in the wrong and which in the right? They have no common superior upon earth. They are therefore in the situation of two Nations which enter into a dispute and, being unable to agree, have recourse to arms. [Vattel III.18. §293]

That being so, it is perfectly clear that the established laws of war, those principles of humanity, forbearance, truthfulness, and honor, which we have earlier laid down, should be observed on both sides in a civil war. [Vattel III.18. §294]

See also 7 §, 34 §.

An armed contention between a Federal State and its member-States, or between a suzerain and its vassal, ought to be considered as war because both parties are real States, although the Federal State and the suzerain may correctly designate it as rebellion. [Oppenheim II.2.1. §59]

In confederated states, wars between the central government (*Reich* or federal) and the troops of individual states is merely an executive war (*executionskrieg*) if its aim is to preserve the *Reich* or federal law, and therefore it is not a war between separate states under international law. However, in the interests of humanity, modern international law treats both parties as belligerents. [Bluntschli §514]

5 §. *Pirate et latrones.* Pirates and brigands, who do not constitute a state, cannot avail themselves of the law of nations. [Grotius II.18.2]

A pirate is not included in the number of lawful enemies, but is the common foe of all the world: and with him there ought not to be any pledged word nor any oath mutually binding. [Cic., *De Officiis* III.29]

Although any one is allowed to defend himself and every one may act within the limits of his jurisdiction, yet the laws of war will only apply in a war waged by the authority and in the name of the prince; for it can not otherwise be called war. But the hostilities in which rebels engage are admittedly the very opposite of just war and so rebels can not proceed under the law of war. [Ayala, I.2.15]

Sometimes, nevertheless, persons of such a character obtain the right of legation on the strength of a pledge of good faith, as in ancient times fugitives in the passes of the Pyrenees. [Grotius II.18.2]

There is also another reason why [brigands] do not come under the law of war; namely, because that law is derived from the law of nations, and malefactors do not enjoy the privileges of a law to which they are foes. How can the law, which is nothing but an agreement and a compact, extend to those who have withdrawn from the agreement and broken the treaty of the human race, as Florus puts it. Pirates are the common enemies of all mankind and therefore Cicero says that the laws of war cannot apply to them. [Gentili, I, iv]

When Alexander inquired of a pirate by what right he dared to infest the sea with his little brigantine: "By the same right (he replied) which is your warrant for conquering the world." This pirate was, forsooth, something of a philosopher in his way, for worldly wisdom and prudence instructs by all means to increase our power, riches, and estates. [Cic., *De res publica*, III p. 263]

The answer which a captured pirate gave to the celebrated Alexander the Great was perfectly accurate and correct. When that king asked the man what he meant by infesting the sea, he boldly replied: "What you mean by warring on the whole world. I do my fighting on a tiny ship, and they call me a pirate; you do yours with a large fleet, and they call you Commander." [St. Augustine IV.4.]

With pirates and brigands, who violate all laws, no laws remain in force. And it is for the above-mentioned reasons, and not because Alexander ranged the seas with many ships and the pirate with one galley, that Cicero is in error, who perhaps did not think of these reasons when he seemed to commend the pirate's reply. So too Augustine, who calls the pirate's reply truthful and witty. Unless you regard Alexander himself as a brigand (an opinion shared by others) and a plunderer of the whole world; for in that event you would commend the reply made by the pirate as true and witty. [Gentili, I, iv]

Pirates may follow the customs of war, and not those of brigands, as Paterculus writes of those against whom Pompey made his campaign; yet they do not wage war. [...] For the Roman people never applied the term 'civil wars' to the contests with Spartacus, or Crixus, or even with the proscribed citizens Sertorius and Perpenna. As a rule, they granted an ovation and not a triumph to those who had gained a victory, not over regular enemies, but over pirates, slaves, and such like, who seemed unworthy of the title of enemy. For the word *hostis*, 'enemy', while it implies equality, like the word 'war', since names are general and include several varieties, is sometimes extended to those who are not equal, namely, to pirates, proscribed persons, and rebels; nevertheless it cannot confer the rights due to enemies, properly so called, and the privileges of regular warfare. [Gentili, I.4.40–41]

6 §. *On the permissibility of civil war.* As regards international law, and particularly its written rules, there are at present no general conventions, or even treaties between particular States, condemning civil war. Customary international law has been unanimously interpreted as not prohibiting, but permitting, civil war. As the expression itself suggests, civil war is generally to be regarded as an internal matter. [Castrén 18–20]

AUTHORITIES IN FAVOUR OF PERMISSIBILITY:

In the absence of justice, what is sovereignty but organized brigandage? For, what are bands of brigands but petty kingdoms? They also are groups of men, under the rule of a leader, bound together by a common agreement, dividing their booty according to a settled principle. If this band of criminals, by recruiting more criminals, acquires enough power to occupy regions, to capture cities, and to subdue whole populations, then it can with fuller right assume the title of kingdom, which in the public estimation is conferred upon it, not by the renunciation of greed, but by the increase of impunity. [St. Augustine IV.4.]

Civil war is left within the sphere of exclusive competence of States, which must from the point of view of international law still be assumed as the premise. When at the end of the world war limits were sought to be imposed on international war, interventions have at the same time been made in favour of the right of peoples to govern themselves. The question may very naturally arise whether the international community ought not to meddle in a civil war for special reasons. But to prohibit civil war would be to deny the right which people have to determine themselves. International law must therefore deal with the possibility of civil wars without being in the position to impose limits upon them, as it can upon an international war. [Wehberg, 9]

A civil war is sometimes legitimate, let us say even necessary. For there are circumstances in which outgoing governments may, under positive law and natural law, through their excesses put their citizens in a necessity to engage in their self-defence. It does not seem possible to suggest that subjects ought to submit absolutely and blindly to all acts of government, whatever they may be. ... In such a case, the civil war is justified. Despotic governments themselves have in fact received absolute power only so as to manage the general interests of the state, and if they systematically and continuously violate natural rights, such as the liberty of conscience or property, the subjects will end up against them in self-defence. We can clearly see that the authors favour granting a right of resistance to nations. [Stéfanescu, 6–7]

Thus our people under their protection did indeed live in freedom and peace up to the time

when that mighty prince the King of the English, Edward ... came in a guise of a friend and ally to harass them as an enemy. ... But from these countless evils we have been set free, by the help of Him who though He afflicts yet heals and restores, by our most tireless prince, King and lord, the lord Robert. ... Yet if he should give up what he has begun, seeking to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own right and ours, and make some other man who was well able to defend us our King; for, as long as a hundred of us remain alive, never will we on any conditions be subjected to the lordship of the English. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom alone, which no honest man gives up but with life itself. ... Therefore it is, Reverend Father and Lord, that we beseech your Holiness with our most earnest prayers and suppliant hearts ... that ... you will look with the eyes of a father on the troubles and privations brought by the English upon us and upon the Church of God. May it please you to admonish and exhort the King of the English, who ought to be satisfied with what belongs to him ... [The Declaration of Arbroath, 1320]

Just as individuals are inferior to the prince, so all together as a whole, and those who represent all together as a whole (the officers of the kingdom), are superior to the prince. In constituting a prince, there is a covenant between him and the people, whether tacit or explicit, whether according to natural or even civil law, to the effect that as long as he commands well, it should obey him well; that as long as he serves the commonwealth, all will serve him; that as long as he complies with the laws, all will submit to him; and so on. The officers of the kingdom are the vindicators and custodians of this covenant or contract. Whoever perfidiously and persistently breaks this contract, is truly a tyrant by practice. So the officers of the kingdom are bound by their office both to judge him according to the laws and, if he resists, to restrain him by force if they cannot do so by other means. [*Vindiciae contra tyrannos*, f. 214 (p. 172)]

It is common knowledge that the prince of a country is appointed by God to be the head of his subjects to protect and shield them from all iniquity, trouble and violence as a shepherd is called to protect his sheep, and that the subjects are not created by God for the benefit of the prince, to submit to all that he decrees, whether godly or ungodly, just or unjust, and to serve him as slaves. On the contrary, the prince is created for the subjects (without whom he cannot be a prince) to govern them according to right and reason and defend and love them as a father does his children and a shepherd does his sheep when he risks his body and life for their safety. It is clear therefore that

if he acts differently and instead of protecting his subjects endeavours to oppress and molest them and to deprive them of their ancient liberty, privileges and customs and to command and use them like slaves, he must be regarded not as a prince but as a tyrant. And according to right and reason his subjects, at any rate, must no longer recognise him as a prince (notably when this is decided by the States of the country), but should renounce him; in his stead another must be elected to be an overlord called to protect them. This becomes even more true when these subjects have been unable either to soften their prince's heart through explanations humbly made or to turn him away from his tyrannical enterprises, and have no other means left to protect their ancient liberty (for the defence of which they must according to the law of nature be prepared to risk life and property) as well as that of their wives, children and descendants. [Dutch Act of Abjuration, 1581]

[I]t was undoubtedly incumbent upon Philip himself – to whom so many entreaties had been addressed – to defend the Dutch and the other peoples of the Low Countries who were being crushed by armed force, and to bring the offenders to justice. For such are the two sole functions motivating the establishment of any principate. Furthermore, leading authorities on law declare that a nation may break away from its prince on the ground that he has neglected to defend them; and, according to the same authorities, not even the power to choose another ruler should be denied to such a nation. [...] “Therefore,” [Vázquez adds,] “princes ought to observe the greatest caution lest, while they *wrongfully* and hastily deny justice, the subjects themselves in their turn should rush *rightfully* into disobedience and *rebellion*.” [*De Iure Praedae* 13.2]

Man naturally has the right to defend himself, to recover his property, and demand payment of debts. But a private citizen does not, by virtue of this right, also possess the power to pass judgment, insofar he has an overlord, for no private citizen can pass judgment in his own case; *Codex*, 7.4.6; *Digest*, 4.2.13. However, in the event that recourse to one's overlord is not possible, the individual receives a sort of a right to pass judgment, that is, as far as is necessary for the just execution of his rights. This does not come about by the force of positive law, but of natural law, since this is the practice among all nations; and there can be no doubt that if we imagined a state existing before positive law, then this would be the prevailing situation. [*Theses XI*, §42]

By nature all men have the right of resisting in order to ward off injury, as we have said above. But as civil society was instituted in order to maintain public tranquillity, the state forthwith acquires over us and our possessions a greater right, to the extent necessary to accom-

plish this end. The state, therefore, in the interest of public peace and order, can limit that common right of resistance. [...] Now beyond doubt the most important element in public affairs is the constituted order of bearing rule and rendering obedience, regarding which I have spoken. This truly cannot coexist with individual licence to offer resistance. [Grotius I.4.2–4] More serious is the question whether the law of non-resistance should bind us in case of extreme and imminent peril. [...] Now this law which we are discussing – the law of non-resistance – seems to draw its validity from the will of those who associate themselves together in the first place to form a civil society; from the same source, furthermore, derives the right which passes into the hands of those who govern. [...] I readily understand that in proportion as that which is preserved is of greater importance, the equity of admitting an exception to the letter of a law is increased. But on the other hand I should hardly dare indiscriminately to condemn either individuals, or a minority which at length availed itself of the last resource of necessity in such a way as meanwhile not to abandon consideration of the common good. [...] Meanwhile the caution must be observed that even in such danger, the person of the king must be spared. [Grotius I.4.7]

That the said Charles Stuart, being admitted King of England, and therein trusted with a limited Power to govern by, and according to the Laws of the Land, and not otherwise, and by his Trust, Oath and Office, being obliged to use the Power committed to him for the Good and Benefit of the People, and for the Preservation of their Rights and Liberties, yet nevertheless out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his Will, and to overthrow the Rights and Liberties of the People, yea to take away and make void the foundations thereof ... hath traitorously and maliciously levied War against the present Parliament and the people therein represented ... All which wicked designs, Wars, and evil practices of him the said Charles Stuart, have been, and are carried on for the advancement and upholding of a personal interest of Will, Power, and pretended Prerogative to himself and his family, against the public interest, common right, liberty, justice, and peace of the people of this Nation, by and from whom he was instructed as aforesaid. By all which it appeareth that the said Charles Stuart hath been, and is the occasioner, author, and continuer of the said unnatural, cruel, and bloody Wars, and therein guilty of all the treasons, murders, rapines, burnings, spoils, desolations, damages, and mischiefs, to this nation, acted and committed in the said Wars, or occasioned thereby. [Articles of Impeachment of Charles I, 1649]

The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than

the power lasteth, by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished. The Sovereignty is the Soule of the Commonwealth; which once departed from the Body, the members doe no more receive their motion from it. The end of Obedience is Protection; which, wheresoever a man seeth it, either in his own, or in anothers sword, Nature applyeth his obedience to it, and his endeavour to maintaine it. And though Sovereignty, in the intention of them that make it, be immortal; yet is it in its own nature, not only subject to violent death, by foreigne war; but also through the ignorance, and passions of men, it hath in it, from the very institution, many seeds of a naturall mortality, by Intestine Discord. [Hobbes II.21.]

The reason why men enter into society is the preservation of their property ; and the end why they choose and authorize a legislative is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society : to limit the power, and moderate the dominion, of every part and member of the society : for since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence. Whensoever therefore the legislative shall transgress this fundamental rule of society ; and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society. [Locke II §222]

To avoid this state of war (wherein there is no appeal but to Heaven, and wherein every the least difference is apt to end, where there is no authority to decide between the contenders) is one great reason of men's putting themselves into society, and quitting the state of nature : for where there is an authority, a power on earth, from which relief can be had by appeal, there the continuance of the state of war is excluded, and the controversy is decided by that power.

[But] Where there is no judge on earth, the appeal lies to God in heaven. [Locke II §21]

But when a man seizes the sovereignty by driving out the lawful prince, and acts the king, although he is in fact a usurper of another's right, what should a good citizen do under such circumstances, who apparently still owes fealty to his lawful prince so long as he still lives ? Here our decision must be that the matter may come to such a pass that it is not only lawful but also obligatory to obey as one's sovereign him who has possession, no matter how secured, of the kingdom, it being understood that the lawful lord is reduced to such a state that he can no longer fulfil any of his duties as a prince toward his subjects. For although the other's commands lack the force to obligate, because they lack lawful power, it is still the part of a prudent man to take counsel for himself and his affairs, and to watch out for the future. [Pufendorf, VII.8.10]

Since that is a civil war in which subjects take up arms for a just cause against the ruler of a state, and since arms are not understood to be taken up for a just cause, except when it is allowable to resist the ruler of a state by force, a thing which we have proved elsewhere is allowable in certain cases; a civil war is allowable in every case in which it is allowable to resist the ruler of a state by force. Since it is allowable for subjects simply to petition, when the ruler commands what seems too harsh or unjust, and, if he cannot give a hearing to their petitions, they are bound to obey, nay more, since magistrates have not the right to resist his wrongful acts; if there should be resistance to the wrongs of a ruler of a state, this is not civil war, but rebellion. [Wolff, § 1012]

Sovereignty does not prevent a Nation from putting restraint upon an insupportable tyrant. It may even pass sentence upon him, respecting in his person the dignity of his rank, and withdraw itself from obedience to him. It is to this incontestable right that a powerful republic owes its birth. Owing to the tyranny of Philip II in the Netherlands, those provinces revolted; seven of them, in a close confederation, courageously maintained their liberty under the leadership of the House of Orange; and Spain, after ineffectual and disastrous efforts, recognized them as sovereign and independent States. If the authority of the Prince is limited and regulated by the fundamental laws, whenever he goes beyond the limits prescribed to him he commands without right and even without title; the Nation is not bound to obey him and may resist his unlawful undertakings. The moment he attacks the Constitution of the State the Prince breaks the contract which bound the people to him; and the people become free by the act of the sovereign and henceforth they regard him as an usurper seeking to oppress them. This truth is recognized

by every thinking writer whose pen is not under the influence of fear or of self-interest. [Vattel I.4. §51]

We most solemnly, before *God* and the world, *declare*, that, exerting the utmost energy of those powers which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance, employ for the preservation of our liberties; being, with one mind, resolved to die freemen rather than live slaves. [...] In our own native land, in defence of the freedom that is our birth-right, and which we ever enjoyed till the late violation of it; for the protection of our property, acquired solely by the honest industry of our forefathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before. With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the Universe, we most devoutly implore his divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the Empire from the calamities of civil war. [Jefferson 1775]

WHEN a Government has ceased to protect the lives, liberty, and property of the people, from whom its legitimate powers are derived, and for the advancement of whose happiness it was instituted, and so far from being a guarantee for the enjoyment of their inestimable and inalienable rights, becomes an instrument in the hands of evil rulers for their oppression [&c]: in such a crisis, the first law of nature, the right of self-preservation, the inherent and inalienable right of the people to appeal to first principles, and take their political affairs into their own hands in extreme cases, enjoins it as a right towards themselves, and a sacred obligation to their posterity, to abolish such Government, and create another in its stead, calculated to rescue them from impending dangers, and to secure their future welfare and happiness. [Texan independence 1836]

There are in revolutions those who swim against the current; these are the old parties. To the old parties, who cling to hereditary rule by the grace of God, it appears that since revolutions spring from the right to revolt, one also has a right to rebel against them. Wrong. For in revolutions the rebel is not the people; it is the king. Revolution is the exact opposite of rebellion. Every revolution, being the normal course of events, bears its own legitimacy, which false revolutionaries dishonour at times but which persists even when befouled, which survives even when stained in blood. Revolutions erupt not from an accident but from necessity. A revolution is a return from the fabricated to the real. It exists because it so must. [*Les Misérables* IV.4.1.]

AUTHORITIES AGAINST PERMISSIBILITY:

But if the prince be an absolute Sovereign, as are the true Monarques of Fraunce, of Spain, of England, Scotland, Turkie, Moschouie, Tartarie, Persia, Æthiopia, India, and of almost all the kingdoms of Africke and Asia, where the kings themselves have the sovereignty without all doubt or question; not divided with their subjects: in this case it is not lawfull for any one of the subjects in particular, or all of them in generall, to attempt any thing either by way or fact, or of justice against the honour, life, or dignitie of the sovereign: albeit that he had committed all the wickednes, impietie, and crueltie that could be spoken; For as to proceed against him by way of justice, the subject hath no such jurisdiction over his Sovereign prince: of whom dependeth all power and authoritie to commaund: and who may not onely revoke all the power of his Magistrats; but even in whose presence the power of all Magistrats, Corporations, Colleges, Estates, and Communities cease, as we have said, and shall yet more fully in due place say. Now if it be not lawfull for the subject by way of justice to proceed against his prince; the vassall against his lord; nor the slave against his master; and in breife, if it be not lawfull, by way and course of justice to proceed against a king, how should it then be lawfull to proceed against him by way of fact, or force. For question is not here, what men are able to doe by strength and force, but what they ought of right to do: as not whether the subjects have power and strength, but whether they have lawfull power to condemne their sovereign prince. Now the subject is not only guiltie of treason in the highest degree, who hath slaine his sovereign prince, but even he also which hath attempted the same; who hath given councill or consent thereunto; yea if he have concealed the same, or but so much as thought it. ... I say therefore that the subject is never to be suffered to attempt any thing against his sovereign prince, how naughty & cruel soever he be: lawfull it is, not to obey him in things contrarie unto the laws of God & nature; to flie and hide our selves from him; but yet to suffer stripes, yea and death also rather than to attempt any thing against his life or honour. [Bodin II.5]

A war waged by a prince with rebels is a most just one and all measures allowed in war are available against them, such as killing them as enemies, enslaving them as prisoners, and, much more, confiscating their property as booty: for consequences are deduced from their causes. ... And this I think a correct statement where the war is carried on under the direct sanction of the prince. ... But the hostilities in which rebels engage are admittedly the very opposite of just war. [Ayala, I.2.15]

But individuals or private men may not draw the sword against tyrants by practice, because these are constituted not by individuals, but by

all together as a whole. Yet such action is permitted indiscriminately against tyrants who force their way in without title, because there is no contract. [*Vindiciae contra tyrannos*, 172]

Favonius used to say, 'Civil war is a worse evil than unlawful government.' 'To me', Cicero declared, 'peace on any terms between citizens seems more advantageous than civil war.' Titus Quintius affirmed that it was better that the tyrant Nabis be left in power in Sparta, for the reason that his expulsion could be accomplished only with utter ruin of the state, which through the attempt to retain its liberty would be brought to destruction. Of similar purport is the thought of Aristophanes, that a lion ought not to be reared in a city; but if a lion has been so reared, the people must endure it. [Grotius I.4.19]

Remember, I am your King – your lawful King ... Therefore let me know by what lawful authority I am seated here and I shall not be unwilling to answer. In the meantime ... I have a trust committed to me by God, by old and lawful descent. I will not betray it to answer to a new unlawful authority. ... England was never an elective kingdom but an hereditary kingdom for near these thousand years. Therefore, let me know by what authority I am called hither. I do stand more for the liberty of my people than any here that come to be my pretended judges. And therefore let me know by what lawful authority I am seated here, and I will answer it. Otherwise I will not answer it. [Charles I's response to charges, 1649]

The only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth, they may nourish themselves and live contentedly; is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will ... This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in latine CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence. ... And he that carryeth this Person, is called SOVERAIGNE, and said to have *Soveraigne Power*; and every one besides, his SUBJECT. [Hobbes II.17.]

But the Rights, and Consequences of Sovereignty, are the same in both. His Power cannot, without his consent, be Transferred to another: He cannot Forfeit it: He cannot be Accused by any of his Subjects, of Injury: He cannot be Punished by them: He is Judge of what is necessary for Peace; and Judge of Doctrines: He is Sole Legislator; and Supreme Judge of Controversies; and of the Times, and

Occasions of Warre, and Peace: to him it belongeth to choose Magistrates, Counsellours, Commanders, and all other Officers, and Ministers; and to determine of Rewards, and Punishments, Honour, and Order. [Hobbes, II.20]

I observe the *Diseases* of a Common-wealth, that proceed from the poyson of seditious doctrines; whereof one is, *That every private man is Judge of Good and Evill actions*. This is true in the condition of meer Nature, where there are no Civill Lawes; and also under Civill Government, in such cases as are not determined by the Law. But otherwise, it is manifest, that the measure of Good and Evill actions, is the Civill Law; and the Judge the Legislator, who is alwayes Representative of the Common-wealth. [Hobbes II.29]

For the Cognisance or Judicature of *Good* and *Evill*, being forbidden by the name of the fruit of the tree of Knowledge, as a triall of *Adams* obedience; The Diavel to enflame the Ambition of the woman, to whom that fruit already seemed beautifull, told her that by tasting it, they should be as Gods, knowing *Good* and *Evill*. Whereupon having both eaten, they did indeed take upon them Gods office, which is Judicature of Good and Evill; but acquired no new ability to distinguish between them aright ... And thereupon God saith, *Hast thou eaten, &c.* as if he should say, doest thou that owest me obedience, take upon thee to judge of my Commandements? Whereby it is cleerly, (though Allegorically,) signified, that the Commands of them that have the right to command, are not by their Subjects to be censured, nor disputed. [Hobbes, II.20]

The Governments, in establishing the principle of *stability*, will in no wise exclude the development of what is good, for stability is not immobility. But it is for those who are burdened with the heavy task of government to augment the well-being of their people! It is for Governments to regulate it according to necessity and to suit the times. It is not by concessions, which the factious strive to force from legitimate power, and which they have neither the right to claim nor the faculty of keeping within just bounds, that wise reforms can be carried out. [...] The first principle to be followed by the monarchs, united as they are by the coincidence of their desires and opinions, should be that of maintaining the stability of political institutions against the disorganised excitement which has taken possession of men's minds; the immutability of principles against the madness of their interpretation; and respect for laws actually in force against a desire for their destruction. [...] The first and greatest concern for the immense majority of every nation is the stability of the laws, and their uninterrupted action – never their change. [...] In short, let the great monarchs strengthen their union, and prove to the world that if it exists, it is beneficent, and ensures the

political peace of Europe: that it is powerful only for the maintenance of tranquillity at a time when so many attacks are directed against it; that the principles which they profess are paternal and protective, menacing only the disturbers of public tranquillity. [...] To every great State determined to survive the storm there still remain many chances of salvation, and a strong union between the States on the principles we have announced will overcome the storm itself. [Metternich 1820]

7 §. *The effects of a public war.* It is permitted to harm an enemy, both in his person and in his property. [Grotius III.4.4.]

As a consequence, he who happens to be caught in another's territory cannot for that reason be punished as a murderer or a thief, and war cannot be waged upon him by another on the pretext of such an act. [Grotius III.4.4.]

In addition to this effect of permissibility, that is of impunity, there is another, that of ownership. [Grotius III.6.2.]

By the law of nations not merely he who wages war for a just cause, but in a public war also any one at all becomes owner, without limit or restriction, of what he has taken from the enemy. That is true in this sense, at any rate, that both the possessor of such booty, and those who hold their title from him, are to be protected in their possession by all nations; and such a condition one may call ownership so far as its external effects are concerned. [Grotius III.6.2.]

There is no such thing as a war for arms, and a peace for commerce. The commerce of the enemy has in all ages been considered as the legitimate prize of war. [Chitty (1812) 65]

Private property on land. Private property on land, is now, as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest. Even where the conquest of a country is confirmed by the unconditional relinquishment of sovereignty by the former owner, there can be no general or partial transmutation of private property, in virtue of any rights of conquest. That which belonged to the government of the vanquished, passes to the victorious state, which also takes the place of the former sovereign, in respect to the right of eminent domain; but private rights, and private property, both movable and immovable, are, in general, unaffected by the operations of a war, whether such operations be limited to mere military occupation, or extend to complete conquest. *General exceptions to rule of exemption.* But it must also be remembered that there are many exceptions to this rule, or rather, that the rule itself is not, by any means, absolute or universal. The general theory of war is, as heretofore stated, that all private property may be taken by the conqueror, and such was the ancient practice. But the modern

usage is, not to touch private property on land, without making compensation, except in certain specified cases. These exceptions may be stated under four general heads: 1st, confiscations or seizures by way of penalty for military offenses; 2d, forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants; and 3d, property taken on the field of battle, or in storming a fortress or town; and 4th, where the mass of the people take up arms, and the entire population engage in hostilities. [Halleck, *Elements*, Ch. 19 §§ 12–13]

The humanity of modern times has abstained from the taking of private property not liable to use in war, when on land. Some of the reasons for this, are, the infinite varieties of its character, the difficulty of discriminating among these varieties, the need of much of it to support the life of non-combatant persons and animals, and, above all, the moral dangers attending searches and captures in households. But on the high seas, these reasons do not apply. Strictly personal effects are not taken. Merchandise sent to sea, is sent voluntarily, embarked by merchants on an enterprise of profit taking the risks, is in the custody of men trained and paid for in the business, and its value is usually capable of compensation in money. The sea is *res omnium*. It is the common field of war, as well as of commerce. The object of maritime commerce is the enriching of the owner by the transit over the common field; and it is the most usual object of revenue to the power under whose government the owner resides. For these and other reasons, the rule of coercion by capture is applied to private property at sea. [Dana, *Prize Cases* (1862)]

See also 35 §.

Since two enemies are regarded as having an equally just cause, whatever is permitted to one because of the state of war is also permitted to the other. [Vattel III.12. §191]

To concede to one party the exercise of any belligerent right, is either to become the ally and adherent of that one, or to concede all such rights to both. [Bernard, 113]

See also 2 §, 24 §.

8 §. *On Neutrality.* When a war breaks out between two Nations, all the others who are not bound by treaties are free to remain neutral. [Vattel III.7. §106]

When ... the political bonds between a sovereign and his people are broken, or at least suspended, they may be considered as two distinct parties, and since both are independent of all foreign authority, no one has the right to judge them. Either may be in the right, and those who assist the one or the other may think they are upholding the just cause. Hence, by virtue of the voluntary Law of Nations, the two parties must be allowed to act as if possessed of

equal right, and to be treated accordingly, until the affair is decided. [Vattel, II.4 § 56]

Where a revolution takes place in a sovereign empire, by a province or colony shaking off the dominion of the parent country, and asserting its independence, until that independence is acknowledged by the metropolitan country, and whilst the civil war between these two parts of the empire still continues, there appear to be three courses which may lawfully be pursued by other foreign nations: 1st. Whilst the contest for the sovereignty still continues, and the civil war still rages, any other foreign State may remain passive, allowing to both the contending parties all the rights which public war gives to independent sovereign States. 2d. Such foreign State may expressly acknowledge the independence of the new State, forming with it treaties of amity and commerce, and at the same time remaining neutral in the war. 3d. It may join in alliance with one party against the other, and thus render that other its enemy. [Wheaton 1843]

In such contests a nation may engage itself with one party or the other – may observe absolute neutrality – may recognize the new state absolutely – or may make a limited recognition of it. [Marshall J, *U.S. v. Palmer* (1818)]

There are two rights and two duties deriving from neutrality for neutrals, and likewise two for belligerents.

a) Duties of neutrals are, in the first place, to act toward belligerents in accordance with their attitude of impartiality; and, secondly, to acquiesce in the exercise by either belligerent of the right to punish neutral merchantmen for breach of blockade, carriage of contraband, and rendering unneutral service to the enemy, and, accordingly, to visit, search, and eventually capture them.

b) The duties of belligerents are, in the first place, to act towards neutrals in accordance with their attitude of impartiality; and, secondly, not to suppress their intercourse, and in particular their commerce, with the enemy. [Oppenheim, II. §314]

The territory of neutral Powers is inviolable. [Hague V 1907, Art. 1]

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality. [Hague XIII 1907, Art. 1]

9 §. *The principle of non-intervention.* Foreign Nations must not interfere in the domestic affairs of an independent State. [Vattel III §296]

It is not their part to decide between citizens whom civil discord has driven to take up arms, nor between the sovereign and his subjects.

The two parties are equally alien to them, and equally independent of their authority. It only remains for them to interpose their good offices for the re-establishment of peace, and this they are called upon to do by the natural law. [Vattel III §296]

Since the decision does not rest with foreign nations as to matters arising between subjects and ruler of any state, inasmuch as they ought not to intrude themselves in the affairs of others; they will not call it rebellion if subjects take up arms against a ruler, unless the wrong on the part of the subjects is perfectly plain; they will rather speak of *innerliche Unruhe* [internal unrest], in our native vernacular, and of malcontents using force against a ruler. [Wolff, § 1011]

States are therefore to firmly respect the legal relations between governmental authorities of a country and the subjects or citizens subjected to that country's sovereignty. For a State to enter into official relations with persons who have rebelled against the authority of their sovereign and to treat with them as with an independent power constitutes therefore a violation of the law of nations. [Wiesse, 2]

Every third Power, at peace with an independent nation, is bound not to interfere with the measures which this nation takes for the re-establishing of internal peace. [*Institut* (1900a) 2.1]

Internal political transformations that may occur in a State do not affect its international personality nor its rights and obligations with respect to other States. ... Revolutions are confined in internal constitutional law; foreign Powers must treat indifferently with all governments that succeed one another, without enquiries to their origins or aims, seeing in them nothing else but the one and the same person: the State. It is very true that the principle of *legitimacy*, or better *legality*, which occupies such an important role in constitutional law, is of null value in international law. [Rougier 483–484]

See also UN Charter Art 2(4); UNGA Res. 2625 (XXV) 1970.

10 §. *On foreign intervention.* But if their efforts are without avail, those Nations which are not bound by treaty obligations may, in order to determine upon their own conduct, decide for themselves the merits of the case, and assist the party which seems to have justice on its side, should that party ask for their help or accept the offer of it; they may do so, I say, just as they are at liberty to take up the quarrel of one Nation with another, if they find it a just one. [Vattel III §296]

Just as tyrants have arisen in every locality, so, amongst historians, examples exist everywhere

of tyranny being avenged and the people defended by neighbouring princes. Contemporary princes ought to follow these examples in repressing tyranny, whether over bodies or souls, whether over the commonwealth or the church of Christ, unless they would wish themselves to be most deservedly and rightfully entitled tyrants. [*Vindiciae contra tyrannos*, 185]

I INQUIRE whether it is also just for us to defend the subjects of another against their sovereign? [...] But so far as I am concerned, the subjects of others do not seem to me to be outside of that kinship of nature and the society formed by the whole world. And if you abolish that society, you will also destroy the union of the human race, by which life is supported, as Seneca nobly says. And unless we wish to make sovereigns exempt from law and bound by no statutes and no precedents, there must also of necessity be some one to remind them of their duty and hold them in restraint. [Gentili, I.xvi]

It is only as an exception that foreign nations are permitted to interfere by giving aid or protection to one of the two parties, and thereby departing from the bounds of neutrality. Now, morality authorizes the aid of the oppressed, and forbids the support of the usurper; it is therefore the justice or injustice of the cause which they embrace that justifies or condemns them before their conscience; but the party against whom they act, contrary to the justice of the cause, interprets this aid as an injury to the law of nations, and circumstances alone decide to what extent he will express his resentment. [G F von Martens III.2.81]

Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against its enemy; or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign State fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party. [Wheaton in Dana's *Wheaton* §23]

But if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid. ... As for those monsters who, under the name of sovereigns, act as a scourge and plague of the

human race, they are nothing more than wild beasts, of whom every man of courage may justly purge the earth. [Vattel, II.4 § 56]

It is for [the neutrals] alone to determine whether they have any reason for taking sides; and there are two things for them to consider: (1) The justice of the cause. If that is clear, they can not aid the unjust party; on the contrary, it is honorable to give their aid to oppressed innocence when they can do so. If the cause be of doubtful justice, the other Nations may suspend their judgment, and not enter into a quarrel which does not concern them. (2) When they are convinced which party is in the right, it still remains for them to determine whether it be for the good of the State to intervene in the affair and take up the war. [Vattel III §106]

No state shall violently interfere with the constitution and administration of another. For what can justify it in so doing? ... In this connection, it is true, we cannot count the case of a state which has become split up through internal corruption into two parts, each of them representing by itself an individual state which lays claim to the whole. Here the yielding of assistance to one faction could not be reckoned as interference on the part of a foreign state with the constitution of another, for here anarchy prevails. So long, however, as the inner strife has not yet reached this stage the interference of other powers would be a violation of the rights of an independent nation which is only struggling with internal disease. It would therefore itself cause a scandal, and make the autonomy of all states insecure. [Kant, Sect I §5]

On many occasions, States have arrogated to themselves the right to intervene in civil wars to put an end to cruelties that bloodied them or to stop religious persecutions. This manner of proceeding, if admitted, would have the effect of depriving a people of the right to direct their internal affairs as they see fit. It would, moreover, be too easy for the powers to invoke the horror they experience in the spectacle of internal struggles to justify their interference in the internal affairs of a foreign nation. We cannot therefore admit the legitimacy of this kind of intervention. [Wiesse 88]

The principle of non-intervention is the general rule which States must observe; but intervention is a right whenever it aims to prevent or to put an end to a harm, a harm which results from another State neglecting its *international duty*. [Rougier 330]

What is probably still the prevailing view is that the incumbent government, but not insurgents, has the right to ask for assistance from foreign governments, at least as long as insurgents are not recognized as "belligerents" or "insurgents". [Friedmann, *Rôle*, 72]

It is generally maintained, and seems to be in accord with the practice of States, that foreign

States may be permitted to support the lawful government and come to its assistance if requested. [Castrén 110]

There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of being at peace with the legitimate Government. But matters are different after recognition. The insurgents are then a belligerent Power, and the civil war is then a real war. Foreign States can either become a party to the war or remain neutral, and in the latter case all the duties and rights of neutrality devolve upon them. [Oppenheim, II. §298]

When a threatened government requests a foreign power to intervene, the validity of this appeal depends on whether the said government can still be considered as an organ and representative of the State. ... If the government has already lost all power in the country and can no longer find sufficient support among the people, it no longer has the right to provoke an intervention by a foreign state and thus place the independence of the state and the liberty of its citizens in the hands of a foreign military might. [Bluntschli §476]

11 §. *Foreign enlistment.* If ... there is no law to prevent it, subjects may change their allegiance from one country to another, as all writers on public law agree. [Bynkershoek I.22.]

Those who enter into [mercenary] contracts without the express or implied consent of their sovereign are wanting in their duty as citizens. But when the sovereign leaves them at liberty to follow their inclination for the profession of arms, they become free in that respect. Now, every free man may join whatever society pleases him best and seems most to his advantage, and may make common cause with it and take up its quarrels. [Vattel III.2.13.]

If indeed a power prohibits its subjects from transferring their allegiance or serving as soldiers in other countries, it is clear that other powers may not hire such subjects for service in their armies; but when no such prohibition exists, and it is indeed seldom found in the states of Europe, subjects may, in my opinion, leave their own country, migrate to another, and serve under a foreign prince. ... And since it is lawful to emigrate into the territory of another prince, it must also be lawful for the emigrant to seek honourable means of livelihood there, and why not by means of military or naval service? [Bynkershoek I.22.]

And surely, that the nationals of a state cannot depart in large bodies is quite clear from the necessity underlying its purpose, which in moral matters takes the place of law. For if such migration were permissible the civil society could not exist. The withdrawal of individuals, on the contrary, seems a different matter, just as it is one thing to draw water from a river

and another to conduct the stream into a canal. [Grotius, II.5.24]

Although Captain Clark individually may have been an American citizen, his captures, while in command of an Uruguay privateer, were Uruguay captures, and that any claim to be preferred against Colombia, on account of the spoliations committed by the Venezuelan navy, must be preferred by Uruguay and can not possibly be made or enforced by the United States. That Clark's family resided in the United States, that he returned to the country of his birth and died there, does not change the aspect of the case, which is not determined by the nativity of the individual, but by the flag of the belligerent. [*The Good Return* and *The Medea* (1865)]

Among the obligations that are incumbent upon the sovereign as a strict consequence of his neutrality is that which completely prohibits on his territory any enlistment to the land or sea armies of the belligerents, or at least of not authorizing enlistment in favour of one of them while prohibiting it for the other. ... For a long time, belligerents were forbidden to offer letters of marque to nationals of neutral States until, in 1856, the Declaration of Paris abolished privateering, making such offers obsolete at least with respect to countries that adhere to that convention. ... On this point, just as in the matter of enlistments, civilized States have declared themselves in favour of a complete abolition, for the reason that irregular hostilities, including privateering, must be left to nationals alone, without allowing foreigners to take part in them. [Wiesse 139–140]

[But] the enrolments we have just mentioned are those made *en masse* in the knowledge and plain sight of the authorities. By contrast, their responsibility is in no way engaged by the fact that nationals of a neutral State would in isolation enter the service of one of the belligerents, or of an insurgent party. Individuals acting on their own do not in any way represent the country to which they belong; they are always free to expatriate unarmed and to choose the country that suits them best for service. Regardless, on several occasions neutral states have formally prohibited their nationals from entering the service of either belligerent. [Wiesse 142]

We are, however, speaking only of friendly powers, for it is never permissible to enter the employment of the enemy for service either in the land or the naval forces. [Bynkershoek I.22.]

12 §. *Foreign loans.* The basic principles of neutrality prohibit neutral states from providing money to one of the belligerents. This prohibition has also been alleged to apply to neutral individuals. [Wiesse 144]

The developments in financial affairs in the course of this century have led to an attenuation in the rigor of this doctrine. The consequence is that at present, neutral individuals are permitted to provide money to belligerents, and neutral States are no longer obliged to prohibit transactions of this kind. [Wiesse 144–145]

Money is, in fact, a special, easily transportable merchandise; it would be impossible to prevent the transactions involving it without taking measures of extreme rigor, which would be contrary to the very freedom of commerce between neutrals and belligerents. [Wiesse 145]

13 §. *Trade of arms to the belligerents.* The supply of arms, ships, and other war material are prohibited to neutral states, as are those of money. [Wiesse 146]

It is permissible for individuals, nationals or inhabitants of the neutral State, to trade in arms or war material, just as they are free to lend their money to the belligerents and, as we have said above, the neutral state is not obliged to prohibit this trade. [Wiesse 146–147]

A government cannot intervene in the sale of arms otherwise than by prohibiting its officials from lending their direct assistance for the validation of the acts passed between the belligerent and the neutral individual. The American government acted thus in 1885 with regard to the sale of several steamers made by American citizens to the Chinese government, while the latter was at war with France. To be valid, this sale should have been made through the American Consul of Shanghai, but the US government forbade him to lend his offices to this end. [Wiesse 148]

14 §. *Political asylum.* There is a customary right of political asylum in foreign legations and warships. [Padelford 200]

15 §. *Rights of diplomats.* The rights of foreign diplomats must be respected during civil strife. ... Freedom of diplomatic communications must be respected and insured during civil strife. [Padelford 200]

II – INSURGENCIES WHERE BELLIGERENCY HAS NOT BEEN RECOGNIZED

16 §. *Duty of humanity.* Both the insurgents and the parent state must so far as possible observe the rules of civilized warfare. [Grafton Wilson 54]

This is expedient in order that the parent state may maintain the respect of sister states and in

order that the insurgents may, if successful, be more readily admitted into the family of nations. [Grafton Wilson 54]

It is true that the change from a struggle between a legitimate Government and insurgents to a war in which both parties enjoy the rights of belligerents takes place quite gradually; and it would therefore seem to be a rule of international ethics that the principles of humanity should be applied to the relationship between the parties as soon as the conflict reaches a certain degree of severity – even before the parties are “recognised”. [Wehberg (b) 169]

Unrecognized insurgents have no rights against the State, which may solely judge the means employed in defeating the resistance; and the international law of war becomes applicable to a civil war only if the insurgents are recognized as belligerents. But this rigorous rule must be applied with two mitigations in mind: On the one hand, certain laws of war of a purely humanitarian interest, such as the Geneva Convention or [the declaration] of Saint-Petersburg, always apply to unrecognized insurgents as well; they apply in full as law as soon as the battle has begun. On the other hand, the international law of war may apply to an unrecognized civil war in the special case where there is a convention between the chiefs of the two opposing armies. [Rougier 234]

There are certain laws of a purely humanitarian interest, such as the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, and the St Petersburg Declaration relating to Explosive Projectiles, of which the insurgents always benefit. [Sadoul 23]

Even when justice, strictly speaking, is not violated, one may sin against the duty which consists of loving others, especially the duty prescribed by the Christian law. A case of this character might arise if it should be apparent that plundering by such persons would not be especially harmful to the enemy as a whole, nor to the king, nor to those who are in fact guilty, but would harm innocent persons, and in fact to such an extent that it would plunge them into the greatest misfortunes, into which it would be the negation of mercy to cast those who are privately indebted to us. Now if to this is added the consideration that such plundering will have no notable effect in ending the war, or in weakening the public strength of the enemy, then gain acquired solely in consequence of the unhappy condition of the times ought to be considered unworthy of a just man, and especially of a Christian. [Grotius III.18.4.]

But if a soldier or any other person, even in a just war, has burned houses belonging to the enemy, has devastated fields and caused losses of this character without orders: when, furthermore, there was no necessity or just cause, the

theologians rightly hold that he is bound to make good the losses. [Grotius III.18.6]

Merely by way of avenging a wrong it is not always lawful to kill all the guilty. The proof is that even among citizens it would not be lawful, not even where the wrong was done by the whole city or district, to kill all the delinquents; nor in a common rebellion would it be permissible to slay and destroy the whole population. Accordingly, for such a deed, St. Ambrose interdicted Theodosius from the church. For such conduct would not be for the public good, which is nevertheless the end and aim of both war and peace. Therefore, it is not right to kill all the guilty among the enemy. [Vitoria, *De Iure Belli* § 47]

The River Apsus alone separated the two camps of Pompeius and Caesar, and the men engaged in frequent conversations, nor meanwhile did a single missile cross the line, by a compact made between the speakers. Caesar sends his legate P. Vatinius to the bank of the river to urge points that seemed most conducive to peace and to exclaim frequently in a loud voice: "Should not citizens be permitted to send envoys in safety to their fellow-citizens about peace, a privilege granted even to fugitive slaves from the Pyrenean forests and to pirates, especially when their object is to prevent citizens from contending in arms against citizens?" [Caesar, III, 19]

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience. [Hague 1899, preamble]

See also 31 §; 1949 Geneva Conventions common article 3.

17 §. *Insurgency as treason.* Acts of the insurgents are liable to such penalties as the parent state may inflict. [Grafton Wilson 54]

Now rebels ought not to be classed as enemies, the two being quite distinct, and so it is more correct to term the armed contention with rebel subjects execution of legal process, or prosecution, and not war. There is, therefore, no need of the authority of the prince; the authority of a local magistrate will suffice. [Ayala I, ii, 14]

Sometimes the injustice of their cause, or the baseness of their resistance, may be so great that [rebellious subjects] may be punished severely. Nevertheless, if they have been treated with as one would treat deserters or rebels, punishment cannot be inflicted contrary to a promise. [Grotius III.19.6.]

Since a riot disturbs the public peace it is a crime or a public wrong, and those arousing a riot or encouraging it or mingling in it are

guilty of a crime; consequently according to the variation in circumstances they are to be punished by their ruler. [Wolff, § 1014]

Whenever a rebellion really and truly exists, which is as easily known in fact as it is difficult to define in words, government has not entered into such military conventions, but has ever declined all intermediate treaty which should put rebels in possession of the law of nations with regard to war. Commanders would receive no benefits at their hands, because they could make no return for them. Who has ever heard of capitulation, and parole of honor, and exchange of prisoners in the late rebellions in this kingdom? The answer to all demands of that sort was, "We can engage for nothing; you are at the king's pleasure." We ought to remember, that, if our present enemies be in reality and truth rebels, the king's generals have no right to release them upon any conditions whatsoever; and they are themselves answerable to the law, and as much in want of a pardon, for doing so, as the rebels whom they release. [Burke (1777)]

18 §. *Promises to rebels must be kept.* In general, the sovereign, scrupulous in the observance of his word, must be faithful in keeping whatever promises he has made even to the rebels – I mean to those of his subjects who have revolted without reason or without necessity. [Vattel III §291]

Agreements [with rebels] do not in fact share in that special community of legal obligations which the law of nations has introduced between enemies engaged in a formal and complete war. But because [the parties] are human beings, they have a common share in the law of nature ... From this follows the consequence that the agreements must be kept [even with such persons as pirates and brigands]. [Grotius III.19.2.]

If they have been treated with as one would treat deserters or rebels, punishment cannot be inflicted contrary to a promise ... In their scrupulousness the ancients held that faith must be kept even with slaves. [Grotius III.19.6.]

Hotman adds that it is clear from the ruling of the jurist Tryphoninus that even brigands have a share in the law of nations. For that jurist decided that if anything is deposited by a robber with one who is unaware of his character, according to the law of nations no obligation is contracted; but if the deposit is made with one who is aware, an obligation is contracted. [Gentili I, iv]

The promises which are made by the sovereign powers to rebels and rioters in order to quell the rebellion or riot are to be observed. This is shown in the same way as we have shown above that those promises are to be kept which are made to an enemy as an enemy, to a robber and brigand as a robber and brigand. A treaty

of peace is not indeed made with rebels and rioters, since only sovereign powers make peace with each other; nevertheless this does not prevent an agreement being made for settling a rebellion, or riot if to settle it otherwise is impossible, or at least unwise. But these stipulations, even if they are bare promises on the part of the ruler, are no less to be observed than are treaties made with an enemy during the continuance of a war. [Wolff, § 1015]

See also Cic., *De officiis* III.29.

19 §. *Unrecognized insurgents as pirates.* In accepted theory, prior to the acknowledgement of a condition of insurgency, the rebellious bodies are in the eyes not only of their own State but also of foreign States law-breakers pure and simple. Acts of violence committed against foreign States or their nationals on the high seas are clearly unlawful and may be assimilated to acts of piracy. [Lauterpacht 278]

[T]he laws of war and of captivity and of postliminy, which apply to enemies, do not apply to rebels, any more than they apply to pirates and robbers (these not being included in the term “enemy” [*hostes*]). Our meaning is that these persons themselves can not proceed under the laws of war and so, e. g., they do not acquire the ownership of what they capture, this only being admitted in the case of enemies [*hostes*]; but all the modes of stress known to the laws of war may be employed against them, even more than in the case of enemies, for the rebel and the robber merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his. [Ayala, I, ii, 15]

It is true that where the subjects of one country may rebel against the ruling power, and commit divers acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy. But however this may be, I do not think it necessary to follow up that disquisition on the present occasion. I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion. [*The Magellan Pirates* (1853)]

In the absence of recognition by any government of their belligerent rights, insurgents that send out vessels of war are, in legal contemplation, merely combinations of private persons engaged in unlawful depredations on the high seas; that they are civilly and criminally respon-

sible in the tribunals for all their acts of violence; that in blockading ports which all nations are entitled to enter, they attack the rights of all mankind, and menace with destruction the lives and property of all who resist their unlawful acts; that such acts are therefore piratical, and entitle the ships and tribunals of every nation whose interests are attacked or menaced, to suppress, at their discretion, such unauthorized warfare by the seizure and confiscation of the vessels engaged in it. [*The Ambrose Light* (1885)]

The vessels of non-recognized insurgents could be treated as piratical according to earlier practice. Views changed, however, in this respect, and such severe treatment of insurgents was considered unreasonable, since their primary motive is political, without *animus furandi*. [Castrén 208]

20 §. *But insurgents are not hostes humani generis.* Except in cases of proved ruthlessness and inhumanity, enlightened practice has been limited to resistance to unlawful acts by insurgents without an attempt to treat the offenders with the extreme severity applied to *hostes generis humani*. [Lauterpacht 278]

Foreign States have a right to refuse to regard as binding upon them the decrees of the lawful government declaring the rebels to be pirates. [Lauterpacht 296]

That a government qualifies its rebels as pirates is not sufficient for that perspective to be imposed *ipso facto* upon foreign states. [Wiesse 126]

The Spanish rebel Ships are sailing under circumstances entirely different from those under which piratical vessels in the legal & well known sense of the term ‘piratical’ are found at Sea. The Spanish Rebel Ships have not committed and are not cruising, with the intent to commit any act which a foreign nation can properly call or treat as piratical. These Spanish ships are manned by crews whose only alleged crime or offence is that they are in revolt against the Government at Madrid & in our opinion they cannot properly be visited or detained or seized unless the Government which orders or approves of such visit, detention or seizure is prepared to support the Government at Madrid against all persons and parties who may be in insurrection against that government. [Lauterpacht 328 (Cit.)]

21 §. *Without a recognition of belligerency there is no right of visit and search.* The obligation to submit to this interference with the freedom of commerce rests upon a neutral only when there is war, and until there is war there can be no neutral in the sense of international law. [Grafton Wilson 54]

The right to visit and search neutral vessels is denied to the parent state on the same grounds as to the insurgent. [Grafton Wilson 54]

No rights of war and neutrality exist. In particular, neither the legitimate Government nor the insurgents possess the right of seizure on the high seas. [Wehberg (b) 169]

22 §. *Blockades by unrecognized insurgents do not bind foreign powers.* As long as a foreign state has not itself recognized the belligerency, it is not required to respect blockades established by the insurgents. [Institut (1900) Art. 5.2]

23 §. *Closure of insurgent ports by Government decree is a paper blockade.* When a port is in the *de facto* possession of forces in open rebellion against the recognized Government of the country, that Government cannot claim to close such ports to commerce by Municipal Decree, but can only do so, according to international law, by means of an official blockade *jure gentium* the existence of which in itself constitutes an admission on the part of the Government instituting it that a state of belligerency exists. [Lauterpacht 218 (Cit.)]

Irrespective of any consideration to the fact that insurgents have not been recognized as belligerents, the government of a country cannot close a port which it does not effectively control. Such a right could only be derived from sovereignty exercised on land, because the sovereignty exercised over the seas adjoining a country is only an extension of that which it has on the virtue of possessing its territory. This theory is confirmed in the international practices respected by all the maritime powers. [Wiesse 230]

No belligerent power has a right, by mere prohibitory enactment, to require neutral nations to abstain from all commercial dealings with another belligerent power. Such a right can extend only to ports of which the belligerent is in actual possession, and into which he can therefore not only forbid entry, but by competent force upon the spot, give effect to such prohibition. [Lauterpacht 215 (Cit.)]

The majority of writers are of the opinion that at this stage of a civil war it is not permissible for the lawful Government to avail itself of blockade, and this opinion seems justified. Some writers are prepared to approve of a blockade whose effect does not extend outside the territorial waters of the State concerned and which is enforced on that territory only. Once again, however, it may be asked to what degree can such blockades be made effective? The practice of States, generally speaking, has been in accordance with the views of the majority of writers. [Castrén 102]

The establishing of a blockade in the absence of a state of war should not be considered as permissible under the law of nations except under the following conditions: 1. Ships under a foreign flag shall enter freely in spite of the blockade. 2. Pacific blockade must be officially declared and notified, and maintained by a sufficient force. 3. The ships of the blockaded Power which do not respect such a blockade may be sequestered. When the blockade is over, they shall be restored to their owners together with their cargoes, but without any compensation whatsoever. [Institut decl. (1887)]

24 §. *Partisans and guerrilla warfare.* Partisan and guerrilla troops are bands of men, self-organised and self-controlled, who carry on war against the public enemy, without being under the direct authority of the State. They have no commissions or enlistments, nor are they enrolled as any part of the military force of the State. [Halleck 2 ed, I.18.8]

Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war. [Lieber §81]

All civilized nations have agreed in the position that war, to be a defense to an indictment for homicide or other wrong, must be conducted by a belligerent state, and that it cannot avail voluntary combatants not acting under the commission of a belligerent. But freebooters, or detached bodies of volunteers, acting in subordination to a general system, if they wear a distinctive uniform, are to be regarded as soldiers of a belligerent army. There must, however, be a military uniform, and this test was insisted on by the Government of the United States in its articles of war issued in 1863, and by the German Government in its occupation of France in 1871. The privileges of belligerents attach to subsidiary forces, camp followers, etc. [Wharton § 351]

Ununiformed predatory *guerrilla bands* are regarded as outlaws, and may be punished by a belligerent as robbers and murderers. [Wharton § 351]

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers – such men, or squads

of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates. [Lieber §82]

Where the mass of the people of a city or district bear arms under the direction of the Government, they have become a legitimate part of the army, and the whole State is chargeable with any breach of the laws of war which they may commit. [Halleck 2 ed I.18.9]

Any non-combatant may become a combatant without incurring any other penalty than that of being made subject to the laws applicable to active belligerents. If captured, they are entitled to the treatment of ordinary prisoners of war. The law of nations has, not unfrequently, been violated in European wars by disregarding the distinction which we have here pointed out between the unauthorised acts of self-constituted guerrilla bands, and the authorised acts of levies *en masse*, organised and armed under the authority of the State. [Halleck 2 ed I.18.9]

If authorised and employed by the State, [partisan and guerrilla troops] become a portion of its troops, and the State is as much responsible for their acts as for the acts of any other part of its army. [Halleck 2 ed, I.18.8]

See also 2 §, 7 §.

III – RECOGNITION OF BELLIGERENCY

25 §. *Definition.* Recognition of belligerency is a declaration, express or implied, that hostilities waged between two communities, of which one is not, or possibly, both are not sovereign States, are of such character and scope as to entitle the parties to be treated as belligerents engaged in a war in the sense ordinarily attached to that term by international law. [Lauterpacht 175]

The recognition of belligerency is thus the assertion made by the State itself of the existence of a state of war between itself and a collective of people which does not form a state. [Rougier 197]

Belligerency may be recognized formally or tacitly. [Castrén 146]

To claim or to concede the exercise of any belligerent right as against a friendly power, is to recognize the existence of war, with the entire train of consequences attached to the fact by the law of nations; to claim the discharge of any neutral obligation is to concede the exercise of all neutral rights. [Bernard, 113]

Recognition of belligerent rights may be tacit, implied, or express. It is express when made by a proclamation of neutrality, as by the queen of England's proclamation of May 13, 1861. It is implied in a declaration of blockade, as in that of President Lincoln of April 19, 1861. And, when there is long acquiescence in belligerent acts affecting another nation's interests, without protest or objection, such as the blockade of ports, or the use of a nation's ports as a harbor for prizes, a tacit recognition of belligerent rights is to be reasonably inferred. [Brown, *The Ambrose Light* (1885)]

See also 30 §–32 §.

26 §. *The Gazette principle.* It is for the executive to decide questions of foreign policy and not courts. [*Tinoco* arbitration (1923), 382]

The first point made on the part of the claimants is, that St. Domingo is not to be considered as a French colony, but as in a state of independence... In proof of the allegation an attempt was made to introduce extracts from the common English newspapers, which the Court would not permit to be read; the *Gazette* is the only authority of this species admitted and respected by the Court for reasons too obvious to require a particular notice. [Scott], *The Immanuel* (1799)]

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. [Marshall], *U.S. v. Palmer* (1818)]

It may be said, generally, that if the government remains neutral, and recognises the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. [Marshall], *U.S. v. Palmer* (1818)]

This question [of recognition] must be determined by the sovereign legislative or executive power of these other States, and not by any subordinate authority, or by the private judgment of their individual subjects. Until the independence of the new State has been acknowledged, either by the foreign State where its sovereignty is drawn in question, or by the government of the country of which it was before a province, courts of justice and private individuals are bound to consider the ancient state of things as remaining unaltered. [Wheaton's *Elements* I.2. §27]

Recognition of belligerency, or the accordance of belligerent rights to communities in revolt, belongs solely to the political and executive departments of each government... Courts cannot inquire into the internal condition of foreign communities in order to determine

whether a state of civil war, as distinguished from sedition or armed revolt, exists there or not. They must follow the political and executive departments, and recognize only what those departments recognize; and, in the absence of any recognition by them, must regard the former legal conditions as unchanged. [*The Ambrose Light* (1885)]

27 §. *Constitutive theory of recognition.* It is by recognition alone that the insurgents are conceded the status of a subject of international law with limited rights. [Castrén 138]

Positive international law does not impose on foreign States any obligation to recognize foreign belligerencies. [Castrén 173]

The constitutive theory, as commonly propounded, culminates in two assertions: the first is that, prior to recognition, the community in question possesses neither the rights nor the obligations which international law associates with full statehood; the second is that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the community concerned. [Lauterpacht 2]

In order for the insurgents to obtain the benefits of a belligerent status, foreign States must declare that they no longer consider them, either provisionally or permanently, as subjects of the government against which they are revolting. [Wiesse 18]

Contesting parties have no legal right to demand that they be accorded belligerent rights at any time or stage of affairs. The accordance of such rights remains exclusively within the discretion of the political department of each foreign state. Determination of whether belligerent rights shall be accorded may be taken collectively. Refusal to accord such rights may not be treated by either contestant as an unfriendly act. [Padelford 199]

It is a rule of International Law that no new State has a right as against other States to be recognised by them, and that no State has a duty to recognise a new State. It is generally agreed that a new State before its recognition cannot claim any right which a member of the Family of Nations has as against other members. It can, therefore, not be seen what the function of recognition could be, if a State entered at its birth really of right into the membership of the Family of Nations. There is no doubt that statehood itself is independent of recognition. International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law. [Oppenheim I.I.1.2. §71]

Grotius makes a distinction in this matter based upon the relative size of the factions and

would consider whether the two are almost equal. But this principle will hardly form a basis for definition, nor does it seem to me to be applicable here. It is wholly a question of where the legal authority lies. [Bynkershoek, Bk II Ch III]

[T]here existed a war between the parent state and her colony. It was not only a fact of the most universal notoriety, but officially notified in the gazettes of the United States, by the proclamation of the French president M. Pichon, who at the same time publishes the prohibition to trade with the revolters, with a declaration that seizure and confiscation should be the consequence of disobedience to this prohibition. Here then was notice of the existence of war, and an assertion of the rights consequent upon it. The object of the measure was not the promotion of any particular branch of agriculture, manufacture, or commerce, but solely the reduction of an *enemy*. It was therefore not merely municipal, but belligerent in its nature and object. [Johnson], *Rose v. Himely* (1808)]

Insurgents do not, from the mere fact of revolt, or by their acquisition of a seaport, become entitled to the rights of sovereignty on the high seas, nor to the right of recognition from other nations, whether they will or no. Recognition may rightfully be given or withheld by other nations, according to their views of their own interests, their moral sympathies, their ties of blood, or their treaty obligations; or according to their views of the merits or demerits of the revolt, its extent, or probabilities of success. [*The Ambrose Light* (1885)]

28 §. *Declarative theory of recognition.* War is a fact recognised, and with regard to many points regulated, but not established, by International Law. [Oppenheim II.1.1 §54]

We recognize things that exist. When a foreign government recognizes a new State, it asserts, thereupon, that it finds itself in front of a fact, an organized state of affairs whose existence appears to it as incontestable. It is recognized because it exists. It is not recognized so that it might be born. [Erich 461]

And just as such a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such. But, in the same way, as it would entail an injury for the sovereignty of such a king to be called in question by a foreigner, so it would also be an injury to deny him the royal title. Nor does the fact that such a ruler may hold sway in a state which is content with modest bounds, militate against this view, for a kingdom signifies not a specific quantity of land and power, but a certain form of state, which can be great or small. [Pufendorf VII.3.9.]

The question whether a given community is a Sovereign State, and the question who is or are sovereign in a given community, are thus, properly speaking, pure questions of fact. [Bernard, 107]

A State exists as a subject of international law – i.e. as a subject of international rights and duties – as soon as it ‘exists’ in fact, i.e. as soon as it fulfils the conditions of statehood as laid down in international law. Recognition merely declares the existence of that fact. [Lauterpacht 41]

Many writers ... maintain that, if a new civilised State comes into existence either by breaking off from an existing recognised State, as Belgium did in 1831, or otherwise, such new State enters of right into the Family of Nations and becomes of right an International Person. They do not deny that in practice such recognition is necessary to enable every new State to enter into official intercourse with other States. Yet they assert that theoretically every new State becomes a member of the Family of Nations *ipso facto* by its rising into existence, and that recognition supplies only the necessary evidence for this fact. If the real facts of international life are taken into consideration, this opinion cannot stand. [Oppenheim I.1.2. §71]

An illustration that [a] new state possesses complete international capacity before the declaration by third states is the case where “recognition” is made by treaty. It would be a contradiction of fact to say that only at the completion of the treaty was the new state completely legalized, for unless it possessed in the first place international capacity, the third state could not deal with it as a legal equal. Hence the conclusion of a treaty would *ipso facto* be impossible. [Goebel 64]

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. ... Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco’s government, according to the standard set by international law. [*Tinoco* arbitration (1923) 381]

In political matters, at any rate, it is expedient that possession be nine points of the law. [Bynkershoek Bk II Ch III]

To assure our consciences of a Justifiable obedience during the confusions or revolutions of

Warre, it is best and enough for us to consider, Whether the invading party (just or unjust) have us or the means of our subsistence in their possession or no. [Ascham, I.8.]

That the whole of America is also satisfied with its own strength and resources, is aware of its natural advantages, and means of defence; and is, besides, well assured that there is no sufficient power on Earth again to bind them to Spain. ... Wherefore ... the Republic of Venezuela, by divine and human right, is emancipated from the Spanish Nation, and is constituted into an Independent, Free, and Sovereign State. [Bolívar (1818)]

As soon as the movement assumed such a steady and consistent form as to make the success of the provinces probable, the rights to which they were entitled by the law of nations, as equal parties to a civil war, were extended to them. Each party was permitted to enter our ports with its public and private ships, and to take from them every article which was the subject of commerce with other nations. Our citizens, also, have carried on commerce with both parties, and the Government has protected it with each in articles not contraband of war. Through the whole of this contest the United States have remained neutral, and have fulfilled with the utmost impartiality all the obligations incident to that character. [Monroe (1822)]

Recognition is not in the nature of a grant of a favour or a matter of unfettered political discretion, but a duty imposed by the facts of the situation. [Lauterpacht 175]

To refuse to recognize the insurgents as belligerents although the conditions are present is to act in a manner which finds no warrant in international law. [Lauterpacht 176]

As in the analogous case of recognition of States ... whenever conditions are present which make the grant of recognition permissible and lawful in relation to the lawful government, their existence renders recognition obligatory in relation both to that government and to the rebellious community. [Lauterpacht 185]

This opinion has since been supported by certain authors, for example, during the Spanish Civil War, but of the more recent writers comparatively few have adopted it. It must be admitted forthwith that there are various quite valid arguments in support of this opinion. Formerly, ethical and humanitarian viewpoints were often referred to. It was necessary to effect a measure of regularity in warfare and to ameliorate the methods of warfare in civil wars too. These arguments must not, however, be given decisive importance, since the principal legal effects of recognition by third States are concerned, as will presently be observed, with the entering into force of the laws of neu-

trality and hardly at all with the hostilities conducted within the country in which the civil war is being waged. [Castrén 174]

The new state has a right to enter into the international legal society of states and to be recognized by other powers when its existence is doubtless and certain. It has this right because it exists, and because international law binds the existing states of the world together by its common legal order. [Bluntschli, I.2. §35]

The situation changes completely from the moment when the rebellion has acquired what could be called a *pre-statal consistency*, and where it possesses that which forms the triple base of the state: an occupation of the territory; a power of authority over a community; an organized government and, in particular, an army. [...] The international community is confronted with a *partial new government* and cannot refuse the continuity of social life from the collectivity controlled, by force or by will, by the rebel authorities. [...] There is a whole range of reasons in favour of an *obligation to recognize* belligerent insurgents. In our opinion, this recognition is *due*, like that of the new governments. [Scelle (1937) 67]

The legal position changes as soon as the insurgents obtain possession of a certain part of the area of the State, establish an orderly government therein, and carry on the conflict with the help of an organized army which observes the laws and customs of war. From this time onwards it cannot be denied that the insurgents constitute a *de facto* government. A system of international law based on natural justice must recognise this fact and must grant the insurgents the right of recognition as belligerents. [Wehberg (b) 169–70]

In the case of a civil wars, ... to say ... that the granting of recognition to a new government is a matter of discretion unfettered by legal principle is to maintain that ... the line dividing law and arbitrariness is altogether illusory. [Lauterpacht 5]

When the result of such a contest is manifestly settled, the new Governments have a claim to recognition by other Powers, which ought not to be resisted. [Monroe (1822)]

It is reasonable that the power of any possessor should be binding, provided he rule like a lawful prince, inasmuch as it is to the interest of all citizens for the state to be under the oversight of one man, rather than to be involved in constant turmoil with no certain head. Therefore, since citizens are understood to have given their consent, at least tacitly, to the sovereignty of such invaders, they will be fully obligated to accord them obedience. [...] These conclusions are all the more to the point with respect to foreigners, who have no concern in examining the title whereby a man secures sovereignty, but merely follow along with the pos-

session, especially when the usurper of the sovereignty can rely upon great resources. [Pufendorf VII.8.9.]

In every question relating to the independence of a nation, two principles are involved: one of *right*, and the other of *fact*; the former exclusively depending upon the determination of the nation itself, and the latter resulting from the successful execution of that determination. [...] In the conflicts which have attended these revolutions, the United States have carefully abstained from taking any part respecting the right of the nations concerned in them to maintain or newly organize their own political constitutions, and observing, wherever it was a contest by arms, the most impartial neutrality. But the civil war in which Spain was for some years involved with the inhabitants of her colonies in America has, in substance, ceased to exist. [...] Under these circumstances, the Government of the United States, far from consulting the dictates of a policy questionable in its morality, has yielded to an obligation of duty of the highest order, by recognising as independent states nations which, after deliberately asserting their right to that character, had maintained and established it against all the resistance which had been or could be brought to oppose it. This recognition is neither intended to invalidate any right of Spain, nor to affect the employment of any means which she may yet be disposed or enabled to use, with the view of reuniting those provinces to the rest of her dominions. It is the mere acknowledgment of existing facts, with the view to the regular establishment with the nations newly formed of those relations, political and commercial, which it is the moral obligation of civilized and Christian nations to entertain reciprocally with one another. [John Quincy Adams 1822]

It is sometimes said that recognition to this extent is due as of right to any body of people whose numbers and organization enable them to carry on regular warfare, and who are actually engaged in it. It is not only the right of the neutral to recognize – it is the right of the belligerent to have recognition accorded to him. I am averse to the use of language which appears vague and abstract. But this, I think, cannot be denied – that recognition in such cases has been sanctioned by the practice and opinion of nations, not solely with a view to the protection of the neutral, but on wider grounds of general expediency. [Bernard, 115]

A legal order may be judged to be unjust from the point of view of a certain norm of justice. But the fact that the content of an effective coercive order may be judged unjust, is no reason to refuse to acknowledge this coercive order as a legal order. After the victory of the French Revolution in the eighteenth century and after the victory of the Russian Revolution in the twentieth, the other states showed the distinct inclination not to interpret the coercive orders established by the revolution as legal orders

and the acts of the revolutionary governments as legal acts, because the one government had violated the monarchic principle of legitimacy and the other had abolished private property of the means of production. For the last-named reason, even American courts refused to acknowledge acts of the revolutionary Russian government as legal acts; the courts declared that these were not acts of a state, but of a robber gang. However, as soon as the revolution-born coercive orders turned out to be effective, they were recognized as legal orders, the governments as state governments, and their acts as state acts, that is, legal acts. [Kelsen 1967, 49]

29 §. *Preconditions for the Recognition of Belligerency.* It is a pre-requisite for belligerent recognition that the conflict at issue be a civil war. [Castrén 138]

The factual conditions which must be met before a belligerency may be recognized are:

a) There must exist within the State an armed conflict of a general (as distinguished from a purely local) character;

b) The insurgents must occupy and administer a substantial portion of national territory;

c) The insurgents must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority;

c) There must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency. [Lauterpacht 176, Institut (1900) Art 8]

It is mainly for practical reasons that the notion of belligerency, and consequently the application of the law of nations, as opposed to criminal law, has instead of being restricted to two foreign states at war one with the other, been extended to an integral part of the population of a State, which

a) is organized as a military force;

b) observes the laws of war in their conduct of hostilities, and

c) believes to be fighting in good faith in place of a State (*an States Staat*) in defence of its public law. [Bluntschli, *Alabama*]

As for the mere recognition, although the fact of the possession of independence acquired by the one of the two parties which has deviated from the order of things hitherto received, does not decide on its legitimacy, it seems that a foreign nation, not being obliged to judge of this legitimacy, may, whenever it is doubtful, allow itself to attach itself to the mere fact of possession, and treat as independent of its former government the state or the province which, in the act of independence, enjoys independence, and, in the same way, to treat as monarch the

person who in fact holds the reins of government, without thereby wounding the duties of a rigorous neutrality. It would not be the same if the injustice of the revolt was manifest. [G F von Martens III.2.80]

When a revolution occurring in a foreign country fulfils all the external conditions of statehood, with a defined territory communicating freely with foreign peoples, an organized Government with political and ethical purposes conforming to the great Christian principles of freedom and law, and which is being defended by regular and organized armies at war with those of the Government, their belligerence can be recognized by third States, whereby they consider themselves bound to observe the laws of neutrality during the hostilities, inasmuch as they find it necessary due to the conflict at sea or in a frontier territory and as either the legitimate Government or the revolutionary forces have demanded to invoke the rights of war with respect to the subjects of that recognizing State. [Olivart §2]

It is a customary rule of the Law of Nations that any State may recognise insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war. [Oppenheim, II. §76]

The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions: 1. That they have at their head a person responsible for his subordinates; 2. That they wear some settled distinctive badge recognizable at a distance; 3. That they carry arms openly; and 4. That, in their operations, they conform to the laws and customs of war. In those countries where the militia forms the whole or part of the army, they shall be included under the denomination of "army." * The population of a non-occupied territory, who, on the approach of the enemy, of their own accord take up arms to resist the invading troops, without having had time to organize themselves in conformity with the aforesaid criteria, shall be considered as belligerents, if they respect the laws and customs of war. [Brussels declaration (1874) arts. IX, X]

It [ie. recognition of belligerency] presupposes a civil war. Under certain conditions determined by international law, this civil war may assume the character of an international war. These are the conditions: (1) The insurgents must have a government and a military organization of their own. (2) The insurrection must be conducted in the technical forms of war, i.e., it must be more than a petty revolt and must assume the true characteristics of a war, especially regarding the means of destruction used by the parties. (3) The government of the

insurgents must in fact control a certain part of the territory of the state in which the civil war takes place, i.e., the order established by the insurgents must be effective for a certain part of the territory of this state. [Kelsen (1952) 291]

Regard for considerations of humanity, for instance, are frequently mentioned among the reasons justifying a State in recognising insurgents as belligerents. Westlake goes so far as to mention, along with self-interest, "the general political good of the world" as an important factor. But in every case the general interests of the world at large are mentioned only *in addition* to the special interests of the individual State that grants the recognition. This fact in itself is sufficient to show that the system of recognition of belligerents, as conceived by the current doctrine on the matter, can no longer satisfy modern requirements. A measure that so deeply affects the life of a foreign State and of the commonwealth of nations as the recognition of insurgents as belligerents should be defended only on the basis of the general interests of mankind. [Wehberg (b) 173]

To grant recognition of belligerency when these conditions are absent or prematurely is to commit an international wrong as against the lawful government. [Lauterpacht 176]

Where a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent government does not concede, a recognition by a foreign State of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government. ... The state of things between the parent State and insurgents must amount in fact to a *war*, in the sense of international law; that is, powers and rights of war must be in actual exercise: otherwise the recognition is falsified, for the recognition is of a fact. [Dana's *Wheaton* §23]

Until independence is so consummated that it may reasonably be expected to be permanent, insurgents remain legally subject to the state from which they are trying to separate. Premature recognition therefore is a wrong done to the parent state; in effect indeed it amounts to an act of intervention. [Hall II.I §26]

Where the Spaniards had practically abandoned the struggle to reestablish their sovereignty, the State, the independence of which was thus established *de facto* beyond the probability or almost the possibility of reverse, was admitted to be entitled to recognition. Where a partial contest was still sustained, as in Peru, it seems to have been taken for granted that recognition was inadmissible. While the issue can be still considered in any degree *in ambiguo*, the presumption is necessarily in favour of the former Sovereign. And a friendly State is bound to exact very conclusive and indisput-

able evidence that the sovereignty of a government with which it has existing relations over any part of its former dominions has been finally and permanently divested. It is not a liberty during the pendency of an actual struggle to speculate on the result, or to assume the probability of the ultimate failure of the ancient Sovereign, however plausible may be the grounds for such an inference. What the claimant to recognition has to show is an accomplished and *de facto*, not a probable or *paulo post futurum* independence. [Historicus, 7-8]

There is no doubt that recognition accorded prematurely or in an otherwise irregular manner may be looked upon as a hostile act by the lawful Government, for by such an action the third State concerned - contrary to the actual state of affairs - declares that it regards the lawful Government as incapable of controlling the situation occasioned by insurrection. This in itself means moral support to the insurgents and a decline in the authority enjoyed by the lawful Government. [...] On the other hand, difficulties arise when attempts are made to prove that such recognition constitutes illegal interference in the domestic affairs of another State or can otherwise be regarded as international delict. Opinions vary greatly even as to what type of intervention is to be considered illegal. [Castrén 183]

30 §. *Recognition of belligerency by a third State.* If the belligerency is recognized by third Powers, such recognition entails all the usual consequences of neutrality [Institut (1900) Art 7]

a) *A formal proclamation of neutrality* by a State constitutes an unequivocal mode of recognition of belligerency. Limited municipal enactments or announcements enjoining upon individuals an attitude of restraint and non-interference do not constitute a formal proclamation. [Lauterpacht 177]

b) [*Tacit*] *recognition* of belligerency occurs through the actual pursuance of an attitude of neutrality identical with that obtaining in ordinary wars - an attitude of which the essence is impartiality of treatment and submission to measures of interference necessitated by the conduct of war. [Lauterpacht 177]

c) In particular, *acquiescence in the exercise of the right of blockade* may, in the absence of indications to the contrary, not improperly be regarded as recognition of belligerency. [Lauterpacht 177]

Whenever conditions are present which make the grant of recognition permissible and lawful in relation to the lawful government, their existence renders recognition obligatory in relation both to that government and to the rebellious community. [Lauterpacht 185]

The legitimate Government maintains its right to exercise both in its territory and outside it the same powers as before the recognition, with the sole exception of those acts that concern the rights and duties of the recognizing neutral with the other belligerent, and it also acquires the new faculties which this confession of war confers it against and with respect to the neutral and his subjects. [Olivart §8]

See also 25 §.

31 §. *Recognition of belligerency by the lawful government.* The government of a country where a civil war has broken out may recognize the insurgents as belligerents either explicitly by a categorical declaration, or implicitly by a series of acts which leaves no doubt as to its intentions. [Institut (1900) Art 4.1]

Recognition of belligerency has mostly been granted by implication, but this practice is defective in that such recognition is not always evident, and so leaves room for a divergence of opinion as to the kind of acts to be considered as constitutive of such a grant. Still, it is quite commonly held that if the lawful Government declares a blockade on the insurgent ports or coastal regions with a real intent to make the blockade effective, a situation generally requiring forcible measures against foreign merchant vessels on the high seas too, this is to be regarded as recognition of the insurgents as belligerents. For the lawful Government is not, as pointed out above, entitled to demand belligerent rights solely for itself, and by initiating a blockade its intention is to exercise these rights even outside the national territory. [Castrén 147]

Treaties entered into with the insurgents on territorial concession, suspension of hostilities and, of course, peace have to be judged similarly, for in a way these relations acknowledge their legal capacity; the same may apply to what is merely a proposal of peace and the acceptance of an offer of mediation. On the other hand, more difficulty is encountered in regard to arrangements for the exchange of prisoners of war and the question whether the addressing to the insurgents of a request to observe the rules of war is to be interpreted as recognition of belligerency. The latter cases must evidently be decided *in casu* according to the circumstances. [Castrén 148]

The Lieber reservation. The simple fact of applying, for humanitarian reasons, certain laws of war to the insurgents, does not in itself constitute a recognition of a state of belligerency. [Institut (1900) Art 4.2]

The observance of the rules of war on a limited or even a more extensive scale must not be deemed a tacit recognition of belligerency. [Castrén 148]

When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power. [Lieber §152] Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties. [Lieber §153]

See also 16 §.

32 §. *Assertion of belligerent rights by the lawful government.* First of all, the point is settled beyond controversy, that arms may be taken up against subordinates by those who are armed with the authority of the sovereign power. [Grotius I.4.1.]

The right to wage war is, in the absence of obligations to the contrary, an undoubted right of the State. [Lauterpacht 194?] If the lawful government arrives at the conclusion that the position is such as to make it necessary to treat the hostilities on the same footing as war in the ordinary sense, with all the concomitant rights and obligations of warfare, it does not lie with outside States to deny to it that right. [Lauterpacht 194]

A lawful government has the right to proclaim a blockade, provided it is maintained effectively and otherwise in conformity with international law. The proclamation of a blockade by the lawful government amounts to an assertion of belligerent rights which must be recognized subject to the further consequence that such rights are thus automatically conferred to the insurgent party. [Lauterpacht 194, Castrén 147]

As there must always be two parties in any war, it would be entirely unfair to recognize either the legitimate Government only, or the insurgents only, as having the rights of belligerents. [Wehberg (b) 176]

Neutral States will not accord the Status of a Belligerent, and the right to visit on the high Seas, try, and condemn Neutral Vessels, to the United States Government, unless it recognizes the usual obligations which, according to International Law, accompany and balance those rights; unless they also concede to their enemy the *status* of a belligerent for all *international* purposes, and as to all matters that relate to the necessary intercourse of Neutral States with that enemy, preeminent among which is the recognition of a duly constituted Prize Court, the existence of which the Neutral has a right to demand at the hands of *every* belligerent. [McNair I, 140 (Cit.)]

See also 7 §.

IV – RECOGNIZED BELLIGERENCIES

33 §. *General interconnectedness of the laws of war and neutrality.* Since neutrality is an attitude during a state of war only, it calls into existence special rights and duties which do not generally obtain. They come into existence through the outbreak of war having been notified, or having otherwise unmistakably become known to third States who take up an attitude of impartiality, and are not dragged into the war by the belligerents; they expire *ipso facto* with the termination of the war, or with the outbreak of war between neutrals and a belligerent. [Oppenheim, II. §295]

34 §. *Principal effects of the recognition of belligerency.* Belligerent recognition ordinarily signifies that the rules of war are brought into effect on both sides. [Castrén 153]

If the contest is a war, all foreign citizens and officers, whether executive or judicial are to follow one line of conduct. If it is not a war, they are to follow a totally different line. [Dana's *Wheaton* §23]

Recognized belligerents are legally entitled to be treated internationally as if they are engaged in a war waged by two sovereign States. [Lauterpacht 175]

The State which recognizes the insurgents as belligerents admits that a war exists in fact, and decides that the rules of international law concerning this state [of affairs] must be applied to the reciprocal relations between the two adversaries, but nothing more. [Rougier 197]

In an international war, a declaration of war announces the beginning of hostilities. From this moment on, nationals of each state are divided to *combatants* and *non-combatants*. The rights and duties inherent to the one and the

other form a special branch of the law of nations: the law of war, which becomes applicable *de plano*. In an intestine war, by contrast, the *jus belli* does not enter into force by itself. ... In principle, unrecognized insurgents have no rights against the State, which may solely judge the means employed to defeat the resistance; and the international laws of war become applicable to a civil war only if the insurgents are recognized as belligerents. [Rougier 233–4]

The recognition [of belligerency] is the capital point in the relations between the insurgents and third parties. It is legally the most consequential act, which gives the civil war an international magnitude. [Rougier 373]

If the insurgents are recognized as a belligerent power, the rules of general international law concerning the conduct of war and neutrality apply to their relations with other states. Hence they are subjects of international law, although the effective control which the government of the insurgents exercises over a certain territory and its population is not yet definitely stabilized because the civil war is still going on. [Kelsen 1952, 161]

Subsequent to recognition [of belligerency] the lawful Government is under an obligation to comply with the international rules of war in warfare against the insurgents, and is likewise entitled to expect the insurgents to observe them. This, though not the only legal effect of recognition, is the foremost and most significant one, and recognition is important chiefly with regard to the relationships between the contending parties. Yet it is obvious that in so far as hostilities are conducted within the territory of the State engaged in civil war, foreign States and their nationals too are under an obligation to acquiesce in those measures taken by the contending sides which are permitted by the laws of war. [Castrén 152]

The effects of belligerent recognition are not confined to the actual fighting, i.e., the conduct of hostilities; they also extend to warfare in general, including the treatment of the wounded, prisoners of war and the civilian population, and include the sanctions of warfare (e.g. the right to prosecute for war crimes and the recourse to reprisals). [Castrén 153]

See also 5 §.

1. *Visit and search.* If it is a war, the commissioned cruisers of both sides may stop, search, and capture the foreign merchant-vessel; and that vessel must make no resistance, and must submit to adjudication by a prize court. If it is not a war, the cruisers of neither party can stop or search the foreign merchant-vessel; and that vessel may resist all attempts in that direction, and the ships of war of the foreign State may attack

and capture any cruiser persisting in the attempt. [Dana's *Wheaton* §23]

A belligerent has the right of visit and search on and over the high seas and on or over territorial waters that are not neutral. [Jessup, Draft Art. 49]

The right of visiting and searching merchantships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that free ships make free goods, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. [Scott], *The Maria* (1799)]

The carriage of contraband can not be prevented unless the belligerent searches the neutral ships which he meets at sea. Hence follows the right to search them. [Vattel Bk. III. Ch. VIII, §114]

The rights of a belligerent nation against the delinquencies of neutrals would exist in vain, if she were not armed with a practical power, by which those rights may be enforced. Such a power, by the law of nations, regularly exists; and it is called the power of visitation and search. [Chitty p. 190]

2. *Prize jurisdiction.* If it is war, foreign nations must await the adjudication of prize tribunals. If it is not war, no such tribunal can be opened. [Dana's *Wheaton* §23]

Toute prise doit être jugée. By the maritime law of nations universally and immemorially received, there is an established method of determination whether the capture be, or be not, lawful prize. Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize in a court of Admiralty, judging by the law of nations and treaties. The proper and regular court for these condemnations is the court of that State to whom the captor belongs. [Lord Mansfield, 1753]

Particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not: this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it. In case of prizes also in time of war, between our own nation and another, or between two other nations, which are taken at sea, and brought into our ports, the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations. [Blackstone III 69, 108]

La raison primitive & essentielle de cette police, est en effet le maintien des loix de la course, qui sans cela dégénéreroit bien-tôt en brigandage, si la conduite tenue à l'occasion de chaque prise n'étoit plus éclairée, pour juger si elle a été faite dans les regles ou non. [Valin I 176]

As regards ... the acquisition of property captured in war, it must be observed that subjects who take up arms against their sovereign, without ceasing to acknowledge his authority, in general can not claim the benefit of those effects. [...] But when the Nation is divided into two absolutely independent parties, who acknowledge no common superior, the State is broken up and the war between the two parties falls, in all respects, into the class of a public war between two different Nations. [...] Here, then, we have two bodies which claim to be absolutely independent and which have no judge to decide between them. They settle their dispute by having recourse to arms, just as two distinct Nations would do. The obligation upon the two parties to observe towards each other the customary laws of war is therefore absolute and indispensable, and the same which the natural law imposes upon all Nations in contests between State and State [Vattel III §295]

The whole system of litigation and jurisprudence in the Prize Court, is peculiar to itself: it is no more like the Court of Admiralty, than it is to any Court in Westminster-Hall. ... Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a Court for the trial of prize. Every country sues in these Courts of the others, which are all governed by one and the same law, equally known to each other. [Mansfield, *Lindo v Rodney* (1781)]

I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me — namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States,

some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm... [Scott J, *The Maria* (1799)]

See also Hague XII 1907, Arts 1–2 et seq.

3. *Blockade*. If it is a war, the parent State may institute a blockade *jure gentium* of the insurgent ports, which foreigners must respect; but, if it is not a war, foreign nations, having large commercial intercourse with the country, will not respect a closing of insurgent ports by paper decrees only. [Dana's *Wheaton* §23]

Effective blockade. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy. [Declaration of Paris 1856]

4. *Distinction from pirates*. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials, at sea and in port, as lawful belligerents. If it is not a war, those cruisers are pirates, and may be treated as such. [Dana's *Wheaton* §23]

When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates, than the subjects who adhere to their allegiance; and whatever immunity the law of nations gives to the ship, it extends to all who serve on board of her, excepting only the responsibility of individuals to the laws of their respective countries. [Johnson J, *U.S. v. Palmer* (1818)]

See also above, Part III, esp 15–16 §.

5. *Contraband*. If it is a war, the rules and risks respecting carrying contraband, or despatches, or military persons come into play. If it is not a war, they do not. [Dana's *Wheaton* §23]

Things which are of special use in war, and of which the transportation to the enemy is forbidden, are called contraband goods. Such are arms, ammunition, timber and materials used in constructing and arming war vessels, horses, and even provisions on certain occasions when it is hoped to starve the enemy into submission. [Vattel Bk.III, Ch.VII, § 112]

6. *Acts of insurgents in neutral territory*. Within foreign jurisdiction, if it is a war, acts of the insurgents, in the way of preparation and equipments for hostility, may be breaches of neutrality laws; while, if it is not a war, they do not come into that category, but into the category of piracy, or of crimes by municipal law. [Dana's *Wheaton* §23]

35 §. *Right of capture*. When two Powers are at war, they have a Right to make Prizes of the Ships, Goods, and Effects, of each other upon the High Seas: Whatever is the Property of the Enemy, may be acquired by Capture at Sea; but the Property of a Friend, cannot be taken, provided he observes his Neutrality. [Lord Mansfield, 1753]

The right of prize and capture has its origin in the *jus belli*, and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*. [J Grier, *The Prize Cases* (1863)]

Now this external right of acquiring things taken in war is so peculiar to a war that is public according to the law of nations that, in other wars, it finds no place. For in other wars with foreigners, property is not acquired by the violence of war but as compensation for a debt which cannot otherwise be obtained. In wars between citizens, whether these be great or small, no change of ownership is made except by the authority of a judge. [Grotius III.6.27]

The enemy may be deprived of his property and of whatever may add to his strength and put him in a position to make war. Every belligerent pursues this object in the manner best suited to him. He takes possession, when he can, of the enemy's property, and confiscates it; and thereby he not only reduces the strength of his opponent, but increases his own, and obtains at least a partial indemnity, or equivalent, whether for the object itself of the war or for the expenditures and losses attendant upon it; he thus obtains justice for himself. [Vattel Bk III, Ch IX, § 161]

The Consolato rule (ca. 1400). There is no need to discuss a situation when an armed vessel sets out on a journey, is cruising around, or is returning to its home port and intercepts a merchantman, and the latter vessel and its cargo belong to enemy nationals, because all informed persons know what will happen under such circumstances, and what is to be done, and therefore it would be misleading to try to set some sort of a rule about this. However, if an intercepted vessel belonged to friendly nationals and the cargo aboard it belonged to unfriendly nationals, the admiral in command of the armed vessel may force the patron of the merchantman to surrender all the enemy goods to him, or to keep these goods aboard the vessel until they reach safer waters. This provision should be interpreted in the following manner: that the admiral or a person designated by him shall attach a line to such merchantman, if the vessels are located in waters where there is no possibility that an enemy craft would be able to take such a vessel away from him. The admiral shall pay the patron the full lading fees he would have been paid for such confiscated cargo had it been delivered to its destination, as confirmed by the entry made

in the ship's register. Should such a register not be located, the patron's deposition under oath as to the amount of lading fees due him shall be accepted as valid. ... If it should happen that such a vessel belonged to enemy nationals and the cargo aboard it belonged to friendly nationals, the merchants who are aboard the vessel, and to whom all or most of this cargo belongs, should reach an understanding with the admiral as to the amount of ransom the vessel shall pay, the value of the booty, and the amount they are able to pay him, and the admiral shall conclude a sensible agreement with them, which will be possible for them to accept. Further, if these merchants should fail or would refuse to reach an agreement or an understanding with the admiral, the admiral shall put a prize crew aboard this vessel that will sail the vessel to the location from which he had sailed forth, while the merchants shall pay him the lading charges equal to the fees they would have paid had the vessel delivered the cargo to its original destination, but not anything more. [*Consolato* § 276]

While [Tunisians] are infidels they are likewise enemies and, therefore, what has been captured by them has thereby become their property, and further, so true is this that the citizen who buys the property back makes it his own; and further, that any one of the original owners who may chance to have bought it, holds it now by a different right. [*Hisp. Adv.* I. 111]

See also 7 §.

36 §. *Prisoners of war.* Subsequent to belligerent recognition all norms of international law concerning prisoners of war enter into force in regard to the interrelationships of the contending sides. It should follow that the insurgents can no longer be punished, either during the civil war or after its conclusion, for participating in the fighting, whether they are common soldiers or even officers of high rank. [Castrén 155–156]

The fact that revolutionaries have been recognized as belligerents by a foreign nation has no influence or bearing whatsoever in their criminal and political standing against the legitimate Government, which can continue to punish them as rebels and to deny them all rights to the considerations of international war. [Olivart §7]

37 §. *Insurgent leaders may still be prosecuted.* However, the initiators and leaders of the insurrection, and by that the political and not the military leadership must be meant, can still be convicted of high treason either during or after the civil war. [Castrén 156]

Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels

for high treason, and from treating them accordingly, unless they are included in a general amnesty. [Lieber §154]

38 §. *Duty to respect neutral territory.* Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden. [Hague XIII 1907, Art. 2]

Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents. [Hague V 1907, arts 2, 4]

A neutral Power may authorize the passage over its territory of the sick and wounded belonging to the belligerent armies [Hague V 1907, Art 14]

39 §. *Neutral duty of impartiality.* Those at peace should show themselves impartial to either side in permitting transit, in furnishing supplies to troops, and in not assisting those under siege. [Grotius III.17.3.]

A neutral State, in the exercise of its neutral rights and in the performance of its neutral duties, shall be impartial and shall refrain from discrimination between belligerents. [Jessup, Draft Art 4]

A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes. [Hague XIII 1907, Art 9(1)]

A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea. The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden. [Hague XIII 1907, Arts 4–6]

Neutrality requires active measures from neutral States. Neutrals must prevent belligerents from making use of their neutral territories, and of their resources, for military and naval purposes during the war. [Oppenheim, II. §294]

This applies not only to actual fighting on neutral territories, but also to the transport of troops, war materials, and provisions for the

troops, the fitting out of men-of-war and privateers, the activity of Prize Courts, and the like. [Oppenheim, II. §294]

The neutral State should not only to abstain from providing ships of war to either of the belligerent Powers, but is also obliged in good faith to prevent its private persons from arming ships of war in its territory and delivering them to either of the belligerents. [Bluntschli, *Völkerrecht* §763]

A neutral Government is bound —

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to war-like use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. [Treaty of Washington 1871, Art VI]

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war. [Hague XIII 1907, Art 8]

When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew. [Hague XIII 1907, Art 3]

A neutral Power must not allow any [belligerent troop and supply movements, or recruitment] to occur on its territory. [Hague V 1907, Art 5(1)]

A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war. The neutral Power

shall supply the interned with the food, clothing, and relief required by humanity. A neutral Power which receives escaped prisoners of war shall leave them at liberty. [Hague V 1907, Arts 11-13]

40 §. *Neutral duty of acquiescence.* Belligerents are permitted by International Law to punish subjects of neutrals for breach of blockade, for carriage of contraband, and for rendering unneutral service to the enemy. The right of belligerents to punish subjects of neutrals for the acts specified corresponds the duty of neutral States to acquiesce in the exercise of this right by either belligerent. [Oppenheim, II. §296]

Contestants in a civil strife have the right to govern the movement of foreign persons and property within the land, air, and marginal sea areas subject to their control, regardless of the possession of belligerent rights. Foreigners venturing into or arbitrarily remaining in areas subject to hostile operations must assume their own risk. [Padelford 198]

41 §. *Limits of neutral liability.* Apart from carriage of contraband, breach of blockade, and unneutral service to the enemy, which a belligerent may punish by capturing and confiscating the vessels or goods concerned, subjects of neutrals are perfectly free in their movements, and neutral States have in particular no duty to prevent their subjects from selling arms, munitions, and provisions to a belligerent, from enlisting in his forces, and the like. [Oppenheim, II. §296]

Territorial limits. A neutral Power is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory. [Hague V 1907, Art 5(2)]

Private volunteers. The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents. [Hague V 1907, art 6]

Private trade. A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet. [Hague V 1907, art 7]

Private communications. A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals. [Hague V 1907, art 8]

42 §. *Continuity of treaties.* The recognition of belligerence cannot modify the treaties made previously between the nation which declares itself neutral and the legitimate

Government, which may continue to demand strict compliance with their provisions. [Olivart §9]

V – RECOGNITION OF INSURGENCY

43 §. *A status of no status.* Sometimes a state recognizes the existence of an insurrection within another state, without recognizing the insurgents as a belligerent power because they do not fulfill the conditions under which such a recognition is admissible. A state may recognize insurgents as such in order to avoid treating them as criminals. But so-called recognition of insurgency does not confer upon the insurgents a legal status under international law. [Kelsen (1952) 292]

Recognition of a condition of insurgency in a foreign country is merely a reckoning with a state of facts. It confers no special rights on the insurgents; it manifests no design to aid them; it affords no ground of complaint to the parent State; it imposes on the foreign State none of the burdens of a neutral. [Hyde I, §50]

The condition of insurgency in international law is one of considerable elasticity. It is a factual relation in the meaning that legal rights and duties as between insurgents and third States exist only in so far as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interests. [Lauterpacht (1939) 4]

Insurgency, as conceived in relation to foreign States, is the sum total of rights and privileges which these States concede to the rebellious party during a civil war. It is not a well-defined status resulting from an express declaration in the form of recognition or an implied equivalent thereof. The difference between the status of belligerency and that of insurgency in relation to foreign States may best be expressed in the form of the proposition that belligerency is a relation giving rise to definite rights and obligations, while insurgency is not. [Lauterpacht 270]

In juridical theory, opinions differ as to the effect of recognition of insurgency by the lawful Government, i.e., which rights are embraced in this recognition. [Castrén 216] The legal effects of recognition of insurgency on the part of a foreign State also vary to a great extent. [Castrén 219]

When we are notified by a foreign sovereign that an armed insurrection is in existence within his domains, the fact is one of which we are bound to take notice. We cannot, it is true, give such insurgents hospitality in our ports; nor do we release their titular sovereign, as we

would do in case we recognize their belligerency from responsibility for their acts. But while such is the case, we respond to such an announcement by applying to him and to them the rule of non-intervention in foreign disturbances on which our whole system of extraterritorial policy rests. ... We recognize foreign insurgency by refusing to send our military and naval forces to attack its armies or its fleets, and by refusing to deliver up those concerned in it when they take refuge on our shores. We say in such cases to the titular government, whether it be despotic or liberal, "We cannot intervene to fight your battles, either on land or at sea; neither will we surrender political fugitives who have escaped from you to our ships or our shores." But a recognition of foreign belligerency is a very different thing. It is never determined on until an insurrection has obtained permanency, and stands on something like settled parity with the government it assails. Such a recognition is announced by a proclamation of neutrality, and is followed by placing insurgent and titular governments on the same terms of access to the ports of the sovereign by whom the proclamation has been issued. [Wharton (1886)]

This special situation has consequences that can be summarized as follows: Insurgents need not be considered as common criminals nor as pirates or bandits. The incumbent government, therefore, will not be entitled to ask foreign powers to join their military or naval forces in their own to combat them. Foreign powers also ought to refuse to hand over to the government the insurgents who have taken refuge on their territory or who have sought asylum aboard their warships. On the other hand, ships belonging to insurgents may not be received in foreign ports in the same way as those belonging to a friendly nation; they must peremptorily be refused all hospitality. A large number of other acts might still be characterized as direct intervention and would therefore be prohibited to foreign powers. The variety here is so great that it is impossible to determine them in advance and to lay down precise rules for them. Circumstances alone can in each case provide the necessary indications for deciding the questions that arise. [Wiesse 114–115]

A DISTINCTION is to be drawn in time of domestic strife between the *de facto* use of armed force and the legal status and rights of belligerency. A status of insurgency may be admitted by the established government and by foreign states. This is an acknowledgment of the fact that an organized uprising for political ends involving the use of armed force and temporarily beyond the control of the civil authorities is taking place. Admission of insurgency does not alter the legal status of the insurgents within their own state. They remain, as previously, engaged in an unlawful attempt to overthrow the established government, and their illegal

status can be altered only by an amnesty or by successfully establishing themselves as *the* government of the state. Admission of insurgency by the established government may be accomplished by an official announcement; by a decree closing insurgent ports to foreign trade; by the institution of military rule; or by the method of conducting hostilities. The admission may be made by foreign states, either individually or acting collectively, through such means as an official announcement; the invocation of an embargo upon the exportation of materials of war; the presentation of demands that compensation be provided for foreign property taken over for "war purposes"; the entering of protests against warlike interference with foreign vessels upon the high seas. [Padelford 196]

The grant of recognition of insurgency was considered to indicate that the insurgents were no longer identified with pirates or other law-breakers. As can be seen, the adoption of the institution of recognition of insurgency was originally connected with maritime warfare. In time it developed many new characteristics and its evolution depended principally on statements by the Presidents and Secretaries of State of the United States as well as on decisions of the Supreme Court of that State. The recognition of insurgency by the United States has always been conferred by municipal enactments alone. International measures such as treaties concluded to that effect and other outwardly binding obligations have been avoided. This has made the American policy extremely elastic but, concomitantly, somewhat inconsistent. The United States has, prudently enough, reserved full freedom either to recognize insurgents or to refrain from doing so, and in the former case to confer upon them such rights as seem desirable in each particular case. [...] It was not until the Spanish Civil War of 1936–39 that some European States also appear to have adopted the institution of recognition of insurgency developed by the United States. [Castrén 208–210]

Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention. [*The Three Friends* (1896)]

44 §. *Recognition of Insurgents as a de facto Government.* The refusal to recognize the status of belligerency is fully consistent with

the concession to the insurgents of a substantial measure of freedom of action and of extended intercourse with their authorities. The latter is compatible with their recognition as a *de facto* government. [Lauterpacht 279]

It is clear, on the other hand, that to recognize them as a *de jure* government, while the contest is still in progress, is to take a step which is contrary to international law. [Lauterpacht 279]

Admission of insurgency does not alter the international status of the established government. It continues to represent the state abroad, until overthrown or until its appointees are no longer received by foreign states or international organizations. Premature rupture of diplomatic relations with the established government and recognition of the insurgents as the *de jure* government of the state may be regarded as an unfriendly act. An admission of insurgency by foreign states may not be regarded as an unfriendly act by the established government, provided an armed uprising exists in fact. Such an admission may be necessary for the information of the subjects of the foreign state and for the enforcement of certain domestic legislation. [Padelford 196–7]

VI – RESPONSIBILITY FOR DAMAGE TO ALIEN PROPERTY IN CIVIL WAR OR INSURRECTION

45 §. *State responsibility.* A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it. But if he delivers up either the party to the property of the criminal, by way of indemnification when the case admits of it, or the criminal himself to undergo the punishment of his crime, the injured party has nothing further to demand. [Vattel II.6.§77]

If no other agreement has been made, in every peace it ought to be considered settled that there shall be no liability on account of the damages which have been caused by the war. This is to be understood also as to damages suffered by private persons; for such damages also are the result of war. In case of doubt, it is presumed that the belligerents intended to make such an agreement that neither would be condemned as guilty of injustice. [Grotius III.20.15.]

There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign by all the efforts in his power. [Adams to Onis 1818]

46 §. Diplomatic protection. Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection. [Vattel II.6.§71]

The Law of Nations permits reprisals only when the case is a manifestly just one or where the debt is definite and undeniable; for where the claim is of doubtful validity the claimant can not at first demand anything more than a fair investigation of his right. In the next place, before resorting to reprisals, justice must have been asked for in vain, or at least there must have been good reason to think that the demand for it would be ineffectual. [Vattel II.18.§343]

It is certain that foreigners who establish themselves in a country have the same right to protection as local nationals, but they cannot claim a more extensive protection. If they suffer some attack, they must count on the Government of the country to prosecute the offenders, but they can not claim any compensation from the State to which the perpetrators of the violence belong. [Calvo, VI §256]

47 §. Continuity of states. Changes in the government or the internal polity of a state do not as a rule affect its position in international law. [Moore's *Digest* I, 249]

As to public debts – whether due to or from the revolutionized state – a mere change in the form of government, or in the person of the ruler, does not affect their obligation. The essential form of the state, that which constitutes it an independent community, remains the same; its accidental form only is changed. [Wheaton's *Elements* § I.2. §30]

A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired. There may be produced, however, a change in rank, as by the conversion of a kingdom into a principality, or the reverse. The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. The governments of Louis XVIII and

Louis Philippe so far as practicable indemnified the citizens of foreign states for losses caused by the government of Napoleon; and the King of the Two Sicilies made compensation to citizens of the United States for the wrongful acts of Murat. [Moore's *Digest* I, 249]

Responsibility comes because it is the same nation. Nations do not die when there is a change of their rulers or in their forms of government. These are but expressions of a change of national will. "The king is dead; long live the king!" has typified this thought for ages. The nation is responsible for the debts contracted by its titular government, and that responsibility continues through all changing forms of government until the obligation is discharged. The nation is responsible for the obligations of a successful revolution from its beginning, because, in theory, it represented ab initio a changing national will, crystallizing in the finally successful result. [*Bolívar Railway Co v. Venezuela* (1903), 394]

48 §. State responsibility over insurrections. Independently of the cases in which indemnities may be due to aliens by virtue of the general laws of the country, aliens have a right to compensation when they are injured in their person or their property in the course of a riot, of an insurrection, or of a civil war:

a) When the act from which they have suffered is directed against aliens as such in general, or against them as *ressortissants* of a particular State, or

b) When the act from which they have suffered consists in closing a port without previous and timely notification, or in detaining foreign ships in a port, or

c) When the injury is the result of an illegal act committed by a government agent, or

d) When the obligation to compensate is well founded on the general principles of the law of war. [Institut (1900 II) Arts. 1–1d]

Were anything to keep alive the spirit of universal commotions and revolutions in Mexico, it would surely be the fatal doctrine that no indemnity should ever be granted, either to foreigners or natives for the losses which they may sustain in these intestine disorders. Such doctrines foment disorders, and tend to perpetuate anarchy: proclaim the contrary, and civilization, order, and the laws would all be gainers. When a nation knows not how to maintain order within its bosom, it must learn how to punish itself. [Baudin (1838)]

In April 1838 Mr. Forsyth accepted a proposition from Mr. Martinez to enter upon a negotiation for the settlement of the claims by arbitration. ... It was also proposed that special instructions should be given to the commission-

ers by their respective governments on questions of international law and that these instructions should embrace two subjects. (1) Losses in consequence of revolutionary movements, (2) indemnifications for denials of justice by the judicial authorities. As to the first subject, Mr. Martinez proposed that the commissioners should be instructed that a government is not responsible for losses incurred in political convulsions unless it has failed to take all the precautions necessary for preserving order and as to the second, that there should be no responsibility unless the judicial decision was either notoriously unjust or notoriously contrary to the principles of international law. [Moore's *Int. Arb.* 1216]

Aucune théorie, dans l'état actuel du droit des gens, ne permet donc de déclarer un Etat responsable en principe et de plein droit, envers les étrangers qui ont eu souffrir des troubles intérieurs. La règle générale, c'est l'irresponsabilité de l'Etat. L'Etat n'est en principe pas responsable des dommages causés aux étrangers par la guerre civile - cas de force majeure. Toutefois cette irresponsabilité cesse lorsque la lésion subie par l'étranger résulte de la volonté libre de l'Etat : de sa faute ou de son imprudence. Et nous revenons ainsi au premier système quasi-délictuel, le seul possible, en dépit de ses inconvénients pratiques, celui qu'a adopté l'Institut de Droit international. [Rougier §122]

Since in time of war on the pretext of necessity many things are done at the expense of those who are at peace, especially if they are neighbours, we must briefly repeat here what we have said elsewhere, that the necessity which gives any right over another's property must be extreme; furthermore, that it is requisite that the owner himself should not be confronted with an equal necessity; that even in case there is no doubt as to the necessity more is not to be taken than the necessity demands; that is, if retention is sufficient, then the use of a thing is not to be assumed; if the use is sufficient, then not the consumption; if consumption is necessary, the value of the thing must then be repaid. [Grotius III.17.1.]

If subjects do anything by armed attack without public orders, it will be necessary to see whether the act of individuals can be said to have been publicly approved. From what we have said above, it can be easily be understood that, to show public approval, three requisites are necessary: knowledge of the act, power to punish, and neglect to punish. Knowledge is shown by the fact that the acts are manifest, or have been made subject to complaint. Power is assumed, unless the lack of it is apparent. Neglect is evidenced by the expiration of the period of time ordinarily taken for the punishment of crimes in each state. Such neglect is equivalent to a decree. [Grotius III.20.30]

49 §. *State responsibility over injuries caused by insurgents.* The obligation is equally well founded when the injury has been committed on the territory of an insurrectionary government, either by the said government itself, or by one of its functionaries. [Institut (1900 II) Art. 2]

One doctrine, supported by Brusa, Bar and other distinguished publicists, holds that the state is distinguishable publicists, holds that the state is responsible on principle for all such damage sustained by aliens. This doctrine of responsibility, briefly, is based on one of several theories: (1) the fault of the state in permitting a revolution to arise; (2) the theory of expropriation, according to which the state at the sacrifice of individual property derives a public benefit from the suppression of a revolution; (3) the theory of risk, according to which the state assumes the risk of maintaining order, or, in other words, the state becomes a guarantor of safety; or (4) the theory of social insurance, by which the state fulfills its highest mission in preserving its integrity and should compensate those individuals who suffer accidental sacrifices in the attainment of this end. [Borchard § 93]

50 §. *Limits of liability: due diligence.* The State is not responsible for injuries caused in case of mob, riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to nationals. It is especially obligated to give to foreigners the benefits of the same indemnities as to nationals with regard to communes or other persons. [Institut (1927) Art 7.1]

In the absence of any fault on its part, it is not possible that the government is forced to compensate foreign victims for violence committed by its nationals: a State can not be pledged to acts of private individuals. [Calvo, VI §256]

The doctrine which has now received general support is that on principle the state is not responsible for the injuries sustained by aliens at the hands of insurgents in civil war unless there is proven fault or a want of due diligence on the part of the authorities in preventing the injury or in suppressing the revolution. [Borchard §93]

Kings and public officials are liable for neglect if they do not employ the remedies which they can and ought to employ for the prevention of robbery and piracy. ... Kings, again, are not liable if their soldiers or sailors have injured friends contrary to orders; and this rule has been approved by witness of France and England. The liability of one for the acts of his

servants without fault of his own does not belong to the law of nations, according to which this question has to be settled, but to municipal law. [Grotius II.17.20]

This doctrine is predicated on the assumption that the government is reasonably well ordered, and that revolution and disorder are abnormal conditions. "Where a state has fallen into anarchy, or the administration of law has been nerveless or inefficient, or the government has failed to grant to a foreigner the protection afforded citizens, or measures within the power of the government have not been taken to protect those under its jurisdiction from the acts of revolutionists," the general rule is suspended and foreign states may not only intervene by force for the protection of their subjects, but may demand indemnities, whether the injuries were sustained at the hands of the government forces or the insurgents. The mere fact that the state is subject to frequent revolution does not, however, affect the general rule of non-liability. [Borchard §93]

Le principe de la non-responsabilité n'exclut point le devoir d'exercer une certaine vigilance. Si l'État n'est pas responsable des événements révolutionnaires eux-mêmes, il peut être néanmoins responsable de ce que les autorités font ou ne font pas, pour parer, dans la mesure possible, aux suites. La responsabilité pour l'action ou l'inaction de la puissance publique est tout autre chose que la responsabilité pour des actes imputables à des personnes échappant à l'influence des autorités ou leur étant ouvertement hostiles. Le principe de la non-intervention dans les rapports entre un État et les étrangers établis sur son territoire, présuppose non seulement des conditions normales d'administration et de justice, mais aussi la volonté de l'État de réaliser son but primordial: le maintien de la paix intérieure et de l'ordre social. L'État est tenu à une certaine vigilance. [*British Goods in the Spanish Morocco* (1925)]

51 §. *Limits of liability: recognition of belligerency.* The responsibility of the State by reason of acts committed by insurgents ceases when it recognizes the latter as a belligerent party, and in all cases in regard to States which have recognized them as such. [*Institut* (1927) Art. 7.1]

Certain demands for indemnity may be set aside when they rest on acts occurring after the government of the State to which the injured person belongs has recognized the insurrectionary government as a belligerent Power, and when the injured person has continued to keep his domicile or his habitation on the territory of the insurrectionary government. [*Institut* (1900 II) Art. 2]

The primary and most immediate effect of the recognition of the belligerency of an insurgent

party is to detach the Government from responsibility for acts carried out in the territory of the insurgents. [Wiesse (1893) 67]

If the recognition is granted by the government itself, it is released from responsibility towards all foreign nations; if the recognition is granted by the foreign states themselves, or only some of them, it affects only the powers concerned. [Wiesse 54]

The recognition of the rebels as belligerents by the legitimate government also has an ulterior consequence upon which there has been a strong insistence. It is said that by this very act the legitimate government is, with regard to third Powers, liberated from all responsibility for damage inflicted by the insurgents on third Powers or their nationals. It is maintained that a government cannot be held accountable further than for the means at its disposal. If it declares its own powerlessness by recognizing the insurgents the right to belligerence, it is, as we say, released from all responsibility. [Wehberg 99]

If the foreign State recognizes belligerency in the insurgents, it releases the parent State from responsibility for whatever may be done by the insurgents, or not done by the parent State where the insurgent power extends. [Dana's *Wheaton* § 23]

As long as the insurrectionary government is considered as a belligerent Power by the government of the person alleged to be injured, the demands may only be addressed to the insurrectionary government and not to the legitimate government. [*Institut* (1900 II) Art. 2]

It is desirable that foreign Governments should establish diplomatic relations with the authority to which [insurgent] people pay practical obedience, in order that they may be the means of obtaining redress for any international injuries which may from time to time be committed. But this reasoning must not be pushed too far nor applied too early. All States in a condition of civil war are necessarily, to some degree, exposed to this inconvenience. During the war in La Vendee, the insurgents did not admit nor obey the authority of the Government of France. For a considerable time before his execution, Charles I. could not have redressed international wrongs committed by the forces of Cromwell. When the Pretender was at Holyrood, it would have been in vain to have applied to the King of England for compensation for offences committed in the Firth of Forth. It is not till this state of things has become chronic that it affords a real and pressing ground for recognition. And all prudent and moderate Governments have acted on this principle. The Government of the United States alone has exhibited habitually a less decent decorum in the haste it has shown to tread upon the heel of sovereignties whose last agony of dissolution is hardly consummated. It is not

true, however, in the meanwhile, that foreign powers are entirely without the means of redress against the persons owning the allegiance of the new and inchoate Government. The recognition of the insurgents as belligerents gives them quite a sufficient personality to enable foreign powers to address to them remonstrance, and to receive at their hands satisfaction. [Historicus 13]

To the same effect Mr. Adams, Minister in London, in adverting, June 14, 1861, to the concession of belligerent rights to the Confederates, remarks : "At any rate there was one compensation; the act had released the government of the United States from responsibility for any misdeeds of the rebels towards Great Britain. If any of their people should capture or maltreat a British vessel on the ocean, the reclamation must be made only on those who had authorized the wrong. The United States would not be liable." [Lawrence 44 (Cit.)]

52 §. *Limits of liability: own fault.* The obligation to compensate disappears when the injured persons themselves have caused the event which has brought on the injury. [Institut (1900 II) Art. 3]

Notably no obligation exists to indemnify those who have returned to the country in contravention of a decree of expulsion, nor those who betake themselves to a country or seek to engage in commerce or industry there, when they know, or ought to know, that troubles have broken out there, nor those who establish themselves or sojourn in a country which offers no security on account of the presence of savage tribes, unless the government of the country has given express assurances to the immigrants. [Institut (1900 II) Art. 3]

The effect of a continuous residence by aliens in the territory rent by civil war is to place them for practically all purposes in the same legal position as nationals. By remaining, they assume the risk of injury, within the limitations prescribed by the rules of war. [...] Aliens who participate in an insurrection should and do generally forfeit the protection of their own government. [Borchard 236–237]

53 §. *Recommendation of arbitration.* Recourse to international commissions of inquiry and to international tribunals is in general recommended for all differences that may arise from injuries suffered by aliens during a riot, an insurrection, or a civil war. [Institut (1900 II) *Voeu* 2]

The Institute of International Law expresses the *voeu* that States avoid inserting in treaties clauses of reciprocal absence of responsibility. It believes that these clauses are wrong in excusing States from accomplishing their duty of protection of their nationals abroad and their duty of protection of aliens in their territory. It believes that States which, in consequence of

extraordinary circumstances, do not feel themselves in a position to ensure in a sufficiently efficacious manner the protection of aliens on their territory can only withdraw themselves from the consequences of this state of things by temporarily forbidding aliens access to that territory. [Institut (1900 II) *Voeu* 1]

VII – ON THE LEGAL EFFECTS OF INSURGENT AND *DE FACTO* GOVERNMENTS

54 §. *In civil war there is no postliminium.* In wars between citizens, whether these be great or small, no change of ownership is made except by the authority of a judge. [Grotius III.6.27]

For 'enemy' and 'rebel' are two very different things, according to the laws cited; and I do not understand how the rights of enslavement and postliminy could here apply (for these are rights which are brought into play in dealings with outsiders, i.e. enemies or foreigners), unless the Emperor shall have declared the parties 'enemies', as Innocent says. [Belli, I.5.10.]

Then no Hellene should be owned by them as a slave; that is a rule which they will observe and advise the other Hellenes to observe. ... Again, as to the devastation of Hellenic territory or the burning of houses, what is to be the practice? [Plato, *Rep.* §469]

ULPIAN, *Institutes, book 1*: The enemy are those on whom the Roman people has publicly declared war, or who themselves [declare war] on the Roman people; others are termed robbers or bandits. Therefore, a person who is captured by brigands is not the brigands' slave, nor does he need *postliminium*; after capture by the enemy however as, say, by the Germans and the Parthians, he is the slave of the enemy and recovers his former status with *postliminium*. [Dig. 49.14.24]

PAUL, *Sabinus, book 16*: *Postliminium* is the right, established by customs and laws between ourselves and free peoples and kings, of recovering from a foreigner property which has been lost and restoring it to its former condition. For what we have lost in war, or even short of war, if we recover it again, we are said to recover by *postliminium*. And this was introduced by natural justice, so that a person wrongfully detained by foreigners might, when he had returned to his own country, recover his former rights. ... 2. Persons captured by pirates and brigands continue to be freemen. 3. A person is seen as having returned with *postliminium* when he enters our territories, just as he was lost when he went outside them. However, if he comes to an allied or friendly *civitas*, or to the court of an allied or friendly king, he

is forthwith seen as having returned with *postliminium*, because it is there that he first, by the authority of the state, begins to be safe. [Dig. 49.15.19]

ULPIAN, *Opinions, book 5*: In civil dissensions, although the state is often wounded by them, the contest is not fought for the destruction of the state; and those who go off to join one or other side are not counted as true enemies among whom the rights of captivity and *postliminium* apply. Accordingly, it has been agreed that it is quite pointless for persons captured, sold, and thereafter manumitted, to petition the emperor for the restoration of their free-born status, since they had not lost it by any [true] captivity. [Dig. 49.15.21.1.]

ULPIAN, *Sabinus, book 13*: A person who comes home from enemy hands is retrospectively regarded as having been in the *civitas*. [Dig. 49.15.16]

ULPIAN, *Sabinus, book 35*: In every branch of the law, a person who fails to return from enemy hands is regarded as having died at the moment when he was captured. [Dig. 49.15.18]

55 §. *Foreign obligations and insurgents.* Those who have been recognized as belligerents can only request, and with only the moral sanctions of opinion, that the neutral government which has recognized them fulfil their duties (in what does not follow from the previous conclusion) and that they respect their use of belligerent rights, but they can neither demand, nor the other accord them, such an act or treatment that would signify their existence as an independent international State; for example, the admission or dispatch of Ambassadors and Consuls, diplomatic negotiations, the conclusion treaties of any kind, etc. [Olivart §10]

56 §. *Validity of private contracts.* All contracts (transfers of property or other agreements) concluded between private persons during an insurgency remain valid, provided that they are in no way contrary to the constitution of the restored legitimate power, and that they conformed to the law in force in the territory occupied by the rebels at the moment they were concluded. [Wiesse (1898) 257]

57 §. *State responsibility of victorious insurgents.* A successful revolution stands on an entirely different basis. The government created through its efforts is liable for the acts of the revolutionists as well as for those of the titular government it has replaced. [Borchard § 96]

All agreements of the [victorious] insurgent Government with foreign States concluded during the civil war whose duration has not been limited to that period only are still binding and they now become treaties of the State itself. Similarly all other, e.g., economic, commitments made by the insurgent Government to third States as well as similar arrangements and legal dealings made with private foreign persons such as loan agreements, are valid or now become valid. [...] But the responsibility of a victorious insurgent Government is far more extensive than that, since it is also bound by the treaties, civil law contracts and other legal acts of the former lawful Government within its authority with outside parties prior to the conclusion of the civil war. [Castrén 236–7]

The question of the degree to which a State is responsible for acts of insurgents, even when recognized as a belligerent party, in case they have become the government of the country, is reserved. [*Institut* (1927) Art 7.2]

As regards the injuries suffered by foreign subjects as a result of the insurrection, the new Government must first make reparation for all the damage that it has itself as the insurgent Government done or that other insurgent organs or persons belonging to its armed forces have done either by acting contrary to the rules of war or through other illegal acts or omissions. In other words, in cases where it has emerged victorious in civil war, its responsibility is identical with that of the lawful Government. Damage and losses caused in connection with legitimate military operations need not be compensated for in this case either. The insurgent regime is, however, held responsible for the other damage mentioned above, and this responsibility extends as far back as to the start of the civil war (and insurrection). Whether the insurgents have been recognized or not is therefore of no relevance to this responsibility. [...] The new Government is also responsible for damage of a similar kind that has been inflicted on outside parties by the former, defeated Government and its armed forces in the course of the civil war. Such a responsibility is simply a consequence of the fact that the State remains the same in spite of a change of Government. [Castrén 238–9]

See also 45 §.

58 §. At the conclusion of peace the expenses caused by the internment of belligerent troops in neutral territory shall be made good. [Hague V 1907, Art 12(2)]

END OF DIGEST