THE GREAT EUROPEAN TREATIES OF THE NINETEENTH CENTURY

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INTRODUCTION

It is now generally accepted that the substantial basis on which International Law rests is the usage and practice of nations. And this makes it of the first importance that the facts from which that usage and practice are to be deduced should be correctly appreciated, and in particular that the great treaties which have regulated the status and territorial rights of nations should be studied from the point of view of history and international law. It is the object of this book to present materials for that study in an accessible form.

The scope of the book is limited, and wisely limited, to treaties between the nations of Europe, and to treaties between those nations from 1815 onwards. To include all treaties affecting all nations would require many volumes; nor is it necessary, for the purpose of obtaining a sufficient insight into the history and usage of European States on such matters as those to which these treaties relate, to go further back than the settlement which resulted from the Napoleonic wars. The aim of the authors is to present an historical summary of the international position at the time of each treaty; to state the points at issue and the contentions of the parties; and so to make readily accessible the materials on which international lawyers have to work. For this reason the pure law-making treaties have been omitted; the Hague Conventions, for instance, speak for themselves, and in their construction the jurist needs little help from general history.

A special chapter has been written on diplomatic forms and procedure with regard to treaties, and this must take rank as a high authority on these points. It will be found of particular value in studying the details of the negotiations which have resulted in international agreements.

With the general law relating to treaties the authors make no attempt to deal, and in that they are well-advised; both because it is beyond the province of their work, and because on some points as to the continuance and avoidance of treaties the law is still indeterminate and lawyers differ. But there is one point of law on which an opinion has been pronounced in the chapter to which reference has been made, which is a point of much present importance; and since it is one that is likely to come up for decision in the near future, it may be useful to explain it at somewhat greater length than has been possible in that chapter. It is as to the effect of war on treaties. It may be that the peace settlement will make special provision for the treaties which existed between the belligerents before war, but if that be not done questions must arise as to the revival and continuance of former treaties.

The authors state the general proposition that a treaty is terminated by the occurrence of war between the parties, 'war being considered with certain exceptions as having the effect of abrogating treaties'. That statement of the law is well founded on authority, but there has been a tendency of late to advocate another view, and there are jurists who maintain that the rule is, or at least ought to be, that, subject to certain exceptions, treaties are *suspended* only by war and revive on the return of peace. It is desirable on general

grounds to limit the effect of war on the relation of states as far as may be possible, but the usage of nations up to the present time affords no sufficient foundation for this opinion, in so far as it purports to be a statement of existing law.

The effect of war on any particular treaty must depend in the first instance on the character of the treaty itself. There are some treaties which are expressed to operate in the event of war and have been concluded with that object. Such, for instance, are the Hague Conventions and treaties providing for the neutralization of particular territories. These obviously cannot be suspended or annulled by war; on the contrary, they are brought into operation by the occurrence of war. Further, there are some treaties which affect third parties, and so far as their rights are concerned it is equally obvious as a general proposition that no belligerent can affect them by a declaration of war against any other nation. Again, there are some treaties which have been fully executed, that is, there are cases in which the obligations imposed by the treaty have been performed so that there is no longer any outstanding liability under them. Such are treaties of cession under which territory has been ceded and sovereignty assumed by the State to whom the cession has been made. It is clear that war does not divest that sovereignty, for it rests on the accomplished transfer and no longer on treaty obligation. So in the case of a treaty imposing the payment of a sum of money by way of indemnity or otherwise, and payment made; war does not open up that again, for the money has passed and the obligation of the treaty was thereupon ended. Martens and others have classified treaties such as these by the name of 'transi-

tory ', because the property has passed under them. But the term is misleading to us because of the sense in which it is ordinarily used in the English language, nor is the alternative ' dispositive ' suggested by later English writers much more lucid. It serves little useful purpose, however, to dwell on a question of pure terminology ; the English lawyer will understand what is meant if these treaties be called ' executed '. The real reason of the exception of this class of treaties is that title rests on a completed act, and not on a treaty obligation of which the liability is still continuing.

It has been said that within the class of treaties which remain unaffected by war are included treaties which create rights over land, and are sometimes called international servitudes. But in the absence of express stipulation the usage of nations affords no sufficient foundation for the recognition of a special class of treaty rights vested with special attributes, and in particular with the attribute of permanency in spite of war, such as is assumed in the conception of international servitudes. The distinction is largely the creation of text-writers, working on the analogy of the rights known as servitudes in Roman law ; a dangerous analogy since the rules of private property cannot be applied with any degree of exactness to the sovereign rights of States. There seems no reason why rights conferred by treaty on one State to be exercised in the territory of another State should be in any different position from that of other treaty rights ; and, indeed, that this is so would appear from the personal element which is inherent in most such grants to a greater or less extent. State A before war may be willing to admit the subjects of State B to the enjoyment of certain rights in the A territories ; but after war,

relations stand on an altogether different footing. The fact is, that the personal element enters largely into treaty concessions and that they bear no real analogy to private rights of servitude. Moreover, if that analogy were to apply at all, it must apply equally to the common case of treaties conferring rights of entering and residing for the purposes of trade, for those are rights to be exercised on the soil, if the connexion with the soil is to be the test. But any extension such as that would be opposed to well-established usage. The general question of servitudes was threshed out in the North Atlantic Fisheries Arbitration at The Hague in 1910, and the Award of the Tribunal is an express decision that treaty rights of fishing in territorial waters stand in no different position from any other treaty rights and that there is no special law of servitudes applicable to such a case, even if there be any such special class of servitude rights at all. The decision on this point has not been accepted in its entirety by all text-writers; some of them already committed to the theory of servitudes are reluctant to acquiesce in an adverse judgement. But it is thought that the Award is a correct statement of international law and that it is in accordance with the practice of nations; for though there is authority for the general doctrine of servitudes to be found in the opinion of jurists (and even they are not in agreement as to the extent and the attributes of a servitude), there is little or no precedent in the usage of nations.[1] Indeed, the investigation of the matter at The Hague demonstrated, as is submitted, that the doctrine could

[1] For instance, the French treaty-right of fishing on the Newfoundland coast (Treaty of Utrecht, 1713) was renewed in express terms after every war between France and Great Britain.

not be maintained, or at least could not be maintained to anything like the extent which has been claimed for it. The Mediatized States which formed the Germanic Confederation had mutual agreements relating to rights of way and the like which have been called servitudes, but this was a special case; the States in those respects were really in the position of landowners rather than sovereigns and the rights were analogous to those of *dominium* rather than of *imperium*. Nor has this precedent ever become part of international law. The better opinion, therefore, seems to be that so-called servitudes created by treaty stand in no different position than other treaty rights, and are affected by war in no different way.

There is another class of treaties which it seems reasonable to hold suspended only during war and to revive on the termination of hostilities, in the absence of any agreement to the contrary; such, for instance, are the treaties which provide for extradition or the mutual enforcement of judgements. These treaties are intended to be permanent, and depend on no personal considerations; they are matters of mutual convenience. But the law cannot be said to be definite on this point.

Subject to these observations the general rule is that treaties are terminated by war. And indeed this is only natural. The more common kind of treaties regulating, for instance, the alliances of States, the economic relations of States, mutual facilities for commerce—all these must obviously depend on the personal relations of the contracting parties, and, as has been already observed, those personal relations cannot fail to be affected by war. Trade with a friend is one thing, trade with a nation which has till lately been a bitter

enemy is another thing; the conditions are altered, and the rule that treaties generally are abrogated at the outbreak of war is based on good reason.

It has therefore been the common practice to make express provision in treaties of peace for the renewal or confirmation of such treaties existing before the war as the parties may agree to continue. In the absence of express provision it is of course still open to the parties to agree to the continuance in any other way, by diplomatic negotiation or by acquiescence. But in default of agreement, the general rule comes into force and treaties are held abrogated by war.

It will be observed that a large number of treaties discussed in this book fall within the class of executed contracts to which States other than belligerents are parties. But economic treaties between the belligerents are at an end, in default of provision to the contrary, and that gives to the opposing States the power of adjusting their trade relations in accordance with the altered conditions which will prevail after the war.

H. ERLE RICHARDS.

NOTE

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A. H. O.
R. B. M.

March, 1918.

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USAGE has not prescribed any necessary form of international contract.[1]

Treaties, Conventions, Agreements, Declarations, &c., are all assumed to have the same binding force,[2] and their observance or repudiation are matters of conscience (or the want of it) on the part of the contracting parties, provided always that there are no considerations such as *force majeure* to prevent their fulfilment.

In order to conclude or negotiate the more formal of these instruments, that is to say, Treaties and in many instances Conventions or Agreements, it is the practice to provide the negotiator with a full power from his sovereign, or in the case of a republic from the head of the state, investing him with the necessary powers for accomplishing his mission.

Full powers, in the practice of Great Britain, are of two kinds, called, respectively, general and special full powers. An ambassador, for instance, appointed to reside at a foreign court, may be provided with a general full power covering

[1] Hall's *International Law*, 4th ed., p. 343, § 109.

[2] Treaties, and some Conventions, are concluded in the names of the Sovereigns of the respective countries. Other Conventions, and as a rule Agreements and Declarations, are concluded in the name of the respective 'Governments'. To this extent they are of a less formal nature.

any negotiations with a view to the conclusion of a treaty which he may enter upon in the course of his residence at that court; a special full power, on the other hand, is limited to a particular occasion which is indicated. Both are otherwise couched in identical terms to the following effect:

George, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas King, Defender of the Faith, Emperor of India. To all and singular to whom these Presents shall come, Greeting!

Whereas, for the better treating of and arranging any matters [*certain matters*] which are now in discussion or which may come into discussion between Us and . . . We have judged it expedient to invest a fit person with Full Power to conduct negotiations [*to conduct the said discussion*] on Our part: Know ye, therefore, that We, reposing especial Trust and Confidence in the Wisdom, Loyalty, Diligence, and Circumspection of Our [name, style and title of Plenipotentiary], have named, made, constituted and appointed, as we do by these Presents name, make, constitute and appoint him Our undoubted Commissioner, Procurator and Plenipotentiary: Giving to him all manner of Power and Authority to treat, adjust and conclude with such Minister or Ministers as may be vested with similar Power and Authority on the part of . . . any Treaty, Convention or Agreement between Us and . . . [*any Treaty, Convention or Agreement that may tend to the attainment of the above-mentioned end*] and to sign for Us and in Our name, everything so agreed upon and concluded, and to do and transact all such other matters as may appertain thereto, in as ample manner and form, and with equal force and efficacy, as We Ourselves could do, if personally present: Engaging and Promising, upon Our Royal Word, that whatever things shall be so transacted and concluded by Our said Commissioner, Procurator, and Plenipotentiary, shall, subject if necessary to Our Ratification, be agreed to, acknowledged and accepted by Us in the fullest manner, and that We will never suffer, either in the whole or in part, any person whatsoever to infringe the same, or act contrary thereto, as far as it lies in Our power.

In witness whereof We have caused the Great Seal of

Our United Kingdom of Great Britain and Ireland to be affixed to these Presents, which We have signed with Our Royal Hand.

Given at Our Court of . . . the . . . day of . . . in the year of Our Lord one thousand nine hundred and . . . and in the . . . Year of Our Reign.

The words printed in italics between square brackets are those of the *special* full power.

The document bears the Royal sign manual.

Before entering upon negotiations, the Plenipotentiaries produce to each other their respective full powers. Every treaty, after reciting in its preamble its object and the names of the Plenipotentiaries, goes on to say, ' Who, after having communicated to each other their respective Full Powers, found in good and due form, have agreed upon the following articles. . . .'

The treaty between two states which results from the negotiations thus authorized, is signed in duplicate by the respective Plenipotentiaries, and in the language of each of them in parallel columns. In a treaty between, say, Great Britain and France, the signature of the British Plenipotentiary comes first in the copy to be retained by the British Government, and that of the French Plenipotentiary last. Conversely, in the copy to be retained by the French Government the signature of the French Plenipotentiary comes first and that of the British Plenipotentiary last. Similarly, in the preamble of the English copy, the name of the English monarch is mentioned first, and in that of the French copy the name of the President of the French Republic.

On the conclusion of the treaty, the English copy is sent home for preservation amongst the British official archives, and the ratification of the Sovereign is prepared in the following form :

George, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions

beyond the seas King, Defender of the Faith, Emperor of India. To all and singular to whom these Presents shall come, Greeting !

Whereas a [Treaty or as the case may be] between Us and . . . was concluded and signed at . . . on the . . . day of . . . in the year of Our Lord one thousand nine hundred and . . . by the Plenipotentiaries of Us and of . . . duly and respectively authorized for that purpose, which [Treaty] is word for word as follows :—[here follows a copy of the Treaty from beginning to end in both texts, as in the original, including the signatures and seals (L. S.)[1] also in copy].

We, having seen and considered the [Treaty] aforesaid, have approved, accepted and confirmed the same in all and every one of its Articles and Clauses, as We do by these Presents approve, accept, confirm and ratify it for Ourselves, Our Heirs and Successors ; engaging and promising upon Our Royal Word that We will sincerely and faithfully perform and observe all and singular the things which are contained and expressed in the [Treaty] aforesaid, and that We will never suffer the same to be violated by any one, or transgressed in any manner, as far as it lies in Our power. For the greater testimony and validity of all which We have caused the Great Seal of Our United Kingdom of Great Britain and Ireland to be affixed to these Presents, which We have signed with Our Royal Hand.

Given at Our Court of . . . the . . . day of . . . in the year of Our Lord one thousand nine hundred and . . . and in the . . . year of Our Reign. [Here follows the Royal signature.]

This ratification is then sent to the British representative at the Court of the other signatory Power, to be exchanged against a similar document issuing from the latter, which is then sent home to be preserved amongst the official

[1] The letters L. S., enclosed in a circle, and placed on the left of the copy of a signature to a treaty or other document, indicate the place where the seal is affixed in the original document (*Locus sigilli*). It is usual in treaties occupying more than one folio page to connect the several pages together with a narrow ribbon of the national colours. The ends of the ribbons are then collected together on the last page of the document opposite the signatures, and the seals of the different Plenipotentiaries are impressed in wax upon them as a security against fraudulent abstraction of any of the pages.

archives. It is customary for the representative in question and the Minister for Foreign Affairs of the other signatory Power to sign a protocol recording the fact that the exchange of the ratifications has been duly effected.

In the case of a general treaty between several Powers, the ratifications are sometimes deposited in the archives of the country in which the treaty is signed, as, for instance, those of the London Treaty of March 10, 1883, respecting the navigation of the Danube; those of the General Act of Brussels of July 2, 1890, respecting the African Slave Trade, &c.: thus the multiplication of ratifications is avoided.

The practice of the United States differs in one respect from the procedure above indicated. According to the constitution of that country, the treaty-making power is vested in the President, subject to the approval of two-thirds of the Senate, and there are instances on record in which the Senate has introduced amendments into a treaty as a condition of its acceptance. If such amendments are not accepted by the other party to the treaty, the treaty remains inoperative, as in the case of the 'Clarendon-Dallas' Treaty of October 17, 1856, relating to Central America,[1] or the Treaty of Versailles, 1919.

In the United States a treaty duly ratified by the Senate, and entering into force, becomes *ipso facto* a portion of the law of the land. This is not so in England, and care has therefore to be taken in negotiating a treaty that its stipulations are not antagonistic to the law, or if they are so, that the law be amended so that it shall agree with the

[1] *State Papers*, vol. xlvii, p. 677. See also United States Ratification with Amendments on p. 687 of the same volume. The question whether it would be possible for the Queen to ratify an engagement which had not been signed by a Plenipotentiary on the part of Her Majesty, was incidentally raised by Lord Clarendon on the receipt of the United States Ratification with Amendments; but as the Amendments were not accepted by Great Britain, this question did not assume a concrete form, but remained an open problem (see p. 692 of the same volume).