Section 7.—De Facto Governments.

(a) Recognition of Belligerency.

OPINION OF DANA.

(Dana’s Edition of Wheaton, p. 34, note.)

"The occasion for the accordance of belligerent rights arises when a civil conflict exists within a foreign state. The reason which requires and which can alone justify this step by the government of another country, is, that its own rights and interests are so far affected as to require a definition of its own relations to the parties. 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. But the situation of a foreign state with reference to the contest and the condition of affairs between the contending parties, may be such as to justify this act. It is important, therefore, to determine what state of affairs, and what relations of the foreign state, justify the recognition.

"It is certain that 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. The tests to determine the question are various, and far more decisive where there is maritime war and commercial relations with foreigners. * * *

"As to the relation of the foreign state to the contest, if it is solely on land, and the foreign state is not contiguous, it is difficult to imagine a call for the recognition. If, for instance, the United States should formally recognize belligerent rights of an insurgent community at the center of Europe, with no seaports, it would require a hardly supposable necessity to make it else than a mere demonstration of moral support. But a case may arise where a foreign state must decide whether to hold the parent state responsible for acts done by the insurgents or to deal with the insurgents as a de facto government. (Mr. Canning to Lord Granville on the Greek War, June 22, 1826.) 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. (Mr. Adams to Mr. Seward, June 11, 1861, Dip. Con. 105.) In a contest wholly upon land, a contiguous state may be obliged to make the decision whether or not to regard it as war; but, in practice this has not been done by a general and prospective declaration, but by actual treatment of cases as they arise. Where the insurgents and the parent state are maritime, and the foreign nation has extensive commercial relations and trade at the ports of both, and the foreign nation and either or both of the contending parties have considerable naval force, and the domestic contest must extend itself over the sea, then the relations of the foreign state to this contest are far different. In such a state of things, the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the status of the three parties involved. 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. 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. If it is war, foreign nations must await the adjudication of prize tribunals. If it is not war, no such tribunal can be opened. 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. 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. 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. 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.

"Now, all private citizens of a foreign state, and all its executive officers, and judicial magistrates, look to the political department of their government to prescribe the rules of their conduct, in all their possible relations with the parties to the contest. This rule is prescribed in the best and most intelligible manner for all possible contingencies by the simple declaration that the contest is, or is not, to be treated as war. If the state of things requires the decision, it must be made by the political department of the government. It is not fit that cases should be left to be decided as they may arise, by private citizens, or naval or judicial officers, at home or abroad, by sea or land. It is, therefore, the custom of nations for the political department of a foreign state to make the decision. It owes it to its own citizens, to the contending parties, and to the peace of the world, to make that decision seasonably. If it issues a formal declaration of belligerent rights prematurely, or in a contest with which it has no complexity, it is a gratuitous and unfriendly act. If the parent government complains of it, the complaint must be upon one of these grounds. To decide whether the recognition was uncalled for and premature, requires something more than a consideration of proximate facts, and the overt and formal acts, of the contending parties. The foreign state is bound and entitled to consider the preceding history of the parties; the magnitude and completeness of the political and military organization and preparations on each side; the probable extent of the conflict by sea and land; the probable extent and rapidity of its development; and, above all, the probability that its own merchant-vessels, naval officers, and consuls may be precipitated into sudden and difficult complications abroad. The best that can be said is, that the foreign state may protect itself by a seasonable decision, either upon a test case that arises, or by a general prospective decision; while, on the other hand, if it makes the recognition prematurely, it is liable to the suspicion of an unfriendly purpose to the parent state. The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized status, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nations. They can obtain abroad loans, military, and naval materials, and enlist men, as against everything but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a quasi political recognition.