A PERMANENT UNITED NATIONS

A PERMANENT UNITED NATIONS

by

AMOS J. PEASLEE

G. P. PUTNAM'S SONS
NEW YORK

MANUFACTURED IN THE UNITED STATES OF AMERICA

For not only is each commonwealth kept together by good faith, as Cicero says, but that greater society of which nations are the members. If faith be taken away, as Aristotle says, the intercourse of men is abolished.

HUGO GROTIUS (1625)

The ambitions of great men, the suspicions of little men, the constant misunderstandings of all men, may undermine any structure that this generation builds. If, however, we build with wisdom and with courage, and with patience, those that come after us will be helped by our work. Our building may fall, but if we have built aright some of the foundation-stones will remain and become a part of the structure that will ultimately abide.

DWIGHT MORROW (1919)

*The building of the institutions of peace is the most distinctive enterprise of our time. * * * The difficulties do not make the task any the less the supreme task of modern civilization. * * * We shall have to build and rebuild and then mayhap, to build again, but the construction process must go on.*

CHARLES EVANS HUGHES (1929)

Contents

Foreword

This book contains observations of the writer in moments borrowed from a busy law practice and during brief periods of public service.

The earliest document is placed last in the collection. It was published in 1916 in the American Journal of International Law when the writer was still in his immature twenties; but the twenty-six years which followed have not materially changed his views.

The document reproduced as (4) of the Appendix was prepared in Paris three years later while the writer, as an officer of the American Army, was attached to the American Commission to Negotiate Peace.

Most of the remainder of the material has appeared in the New York Times, the American Bar Association Journal, the American Scholar, or as part of the proceedings of the American Society of International Law or the American Bar Association. Very few changes have been

made in the original text. A summary containing certain conclusions and suggestions has been added as an opening chapter.

The aim of the author has been to select from his writings those which relate most directly to the problem which all good citizens—the world over—are now pondering. If this presentation offers any constructive idea to those who, in positions of power, may mold the world's future; or if the volume finds even an ungrudged niche in current literature upon this topic, its author will be content.

AMOS J. PEASLEE

Justice House
Clarksboro, New Jersey
November 15, 1942

A PERMANENT UNITED NATIONS

I

SUMMARY

Any book which leaves the reader in doubt as to the author's views is not satisfactory. These are my conclusions and suggestions; and, lest you tire of the text which follows, I put them first:

Conclusions

(1)

No safe plans for the post war world can be made without considering Germany's record as a sovereign member of the Society of Nations.

The German race has produced exceptional scientists, brilliant musicians, poets and philosophers, and industrious businessmen and farmers. But Germany for generations has been a chief disturber of the peace of the world. Her exaltation of war, her sullen satisfaction

in killing those whom others love and in destroying things which others toil to build—those have led to crimes of an habitual offender.

A restoration of full sovereign status to Germany after her military defeat this time, without at the same time erecting far stronger organs of World Government, would be unsafe. To create merely a Germany of more restricted territory than before 1939 might be even less safe; since that would supply a cry of "lost provinces" around which another group of brigands would soon rally.

The German people are accustomed to being controlled. A control over them has become a necessary duty of the international community. Such control, however, is not the duty of the United States of America nor of any nation or nations in their national capacities.

Whether sovereign status is to be restored to Germany, and if so, when, should be decided in the light of the welfare of the remainder of the world.

(2)

The protection of the world from this recurring menace, and the temporary or permanent governing of the German people, should be

undertaken by a United Society of Nations as a governmental organization.

Other methods have failed and will fail if repeated. Though Germany from 1914 to 1919 and from 1939 to the present moment, has brutally caused the sacrifice of millions of innocent human lives and has destroyed more property of her neighbors than all the property within Germany, she has never paid any reparations. She reaped a financial profit under the elaborate "reparation" scheme of 1919. The human losses were irreparable.

Equally impotent was the plan of "sanctions," attempted to be applied by voluntary separate action of individual nations. No loose agreements or association of individual nations will ever protect the world from international banditry and outlawry organized under the guise of sovereign nationality.

(3)

The rights of nations which may not be infringed by any superior international authority and which belong to all nations entitled to sovereign status in the international community should be defined, declared and reserved to those nations.

That is a basic requirement without which the delegation of permanent power to international institutions of government may become dangerous. But people who erect governments which constantly menace the remainder of the human family or who cannot prevent the erection of such governments within their territory, must expect to forfeit the right of sovereign nationality.

(4)

Subject to defined sovereign rights reserved to nations entitled to sovereignty, there should be a great deal more international government. Real power and adequate means with which to exercise power, should be vested in a permanent United Nations. Concrete and courageous steps should be taken to erect better international legislative, executive and judicial organs of government.

This is desirable notwithstanding all the dangers which lie in too much government and all the wastes of excessive bureaucracy. It should be done with realization that the United States of America may from time to time not be fully satisfied with action taken by international authorities, that no millennium will be wrought

overnight, and that violence will continue to appear even though outlawed, just as crime continues even though controlled.

(5)

The International Community should be organized, as recommended recently by the Inter-American Juridical Committee of the Pan American Union, with "no nation privileged to remain aloof from the organization".

It should adopt a written Constitution which will reserve to nations entitled to national status, their inviolate sovereign rights, and which will delegate to a permanent United Nations powers of government which lie outside the national spheres, and the power to administer temporarily or permanently those areas whose inhabitants cannot safely be entrusted with sovereignty.

Reasons

I reach these conclusions for two major reasons. The lower reason is because we are faced with a choice. The evils that we "know not of" can scarcely be worse than those which we know.

The higher reason is because I believe in the essential goodness of man. The chances are excellent that strong, democratic World Government would work far better than timid souls believe. Ninety-five per cent of this planet's population are honest, friendly and reasonably intelligent people. Braggarts, bullies and fiends exist, but they are vastly in the minority. They can cause destruction far out of proportion to their numbers. That is precisely why we must organize more effectively to control them.

Suggestions

But while reaching these conclusions I believe that the United States of America has a role to play in post war organization which calls for the sagacity of her ablest statesmen. At Paris in 1919 we were out-traded. We accepted in the League plan a flattering title and a penalty for our prior federation as a nation, in lieu of representation comparable to our population and political background. But, more serious than that, we were not faithful to the American idea of government. Although the American constitutional system had already expanded to become the model for the vast majority of na-

tional governments, and although great headway had been made in extending it into the realm of international institutions, we forsook the American system in the League plan.

There was no bill of rights. We frowned upon suggestions of any popular election of members of the Assembly and Council. There was no provision for any judicial bodies in the original American draft of the Covenant. We accepted an institution of diplomats rather than a government of elected representatives and an independent judiciary.

We insisted upon a weak confederation although we had tried and discarded that a century and a quarter earlier in our own governmental experience.

We accepted the scheme of military and economic sanctions applied by separate nations rather than by the International Authority, although such sanctions had been considered and discarded in our Constitutional Convention of 1787 as unworkable and undesirable.

We did not do our best at Versailles in 1919. Another opportunity lies ahead. The International Community has again determined to organize itself on a more permanent basis. The problems of the Post War Conference will be problems of Constitutional and International

Law. If a self-contained democratic World Authority is set up with adequate powers and instrumentalities and with means of financial self-support, the faults of 1919 may be overcome, and we may embark upon a brilliant era of prosperity through a Permanent United Nations.

II

THE PROSPECT FOR PERMANENCE

(Address before the International Law Section of the American Bar Association, Detroit, Michigan, Tuesday, August 25, 1942)

It may be accepted as a major probability that an effort will be made at the conclusion of this war—more determined than at Vienna in 1815, or at Paris in 1919, or at any of the Pan American Conferences—to set up stronger permanent organs of international government.[1]

Whether the effort should be undertaken immediately upon the conclusion of hostilities in the glow of unity and victory, or whether it should be delayed until after a "temporary relief" and "cooling off" period, is being debated and may be debatable; but such a prospect is

[1] Prof. Wigmore in the August 1942 American Bar Association Journal says that a conference to establish "some sort of World Federation" "seems entirely certain", and propounds 53 constitutional questions for consideration.

forecast by declarations of leading spokesmen among the United Nations and neutrals as well.[1]

The Common Cause

The cause which now binds the United Nations is to "defend life, liberty, independence and religious freedom, and to preserve human rights and justice in our lands as well as in other lands."[2] It is not dissimilar to the ancient "hue and cry" against highwaymen, pirates and arbitrary monarchs.

Germany, as a government, stands before the world as the modern symbol of what Secretary Hull describes as "barbaric savagery and organized wickedness."[3] Unfortunately the record is a long one.

Frederick the so-called "Great" in his letters to Podewils[4] started Germany on her career as a nation with this advice:

[1] See Annex (1).

[2] Joint Declaration by United Nations, January 1, 1942, Dept. of State Bulletin January 3, 1942.

[3] From the statement of Secretary Hull January 2, 1942, Dept. of State Bulletin January 3, 1942.

[4] Politische Correspondenz Friedrichs des Grossen, Berlin, 1879, Vol. I, pp. 244-45 as translated by Dr. James Brown Scott "Survey of International Relations between the United States and Germany". Oxford Univ. Press, 1917, p. xxii.

"If there is anything to be gained by it we will be honest; if deception is necessary let us be cheats."

The War Book of the German General Staff reads:[1]

"International law is in no way opposed to the exploitation of the crimes of third parties, assassination, incendiarism, robbery and the like."

And Prof. Banse, who was granted a special Chair of Honor at Hanover in the Spring of 1935, writes:[2]

"War is * * * the ground whereon the human soul can most richly and most strongly reveal itself, bursting forth from deeper springs and more variously than in any single achievement of learning or art."

The United Nations deny that those precepts represent either morality or the law which is to govern the modern world. They are determined to tolerate the ghastly medieval crimes born of

[1] War Book of the German General Staff, pp. 113, 114.
[2] Opening pages of "Wehrwissenschaft".

such nonsense no longer. It may be no more possible to abolish war and war worshipers than to abolish crime and criminals, but it is possible to outlaw and to control them through permanent organs of the International Community *strong enough to do that job.*

We would prefer not to deny to Germany the right of nationality. We dislike the term "criminal" as applied to a nation, or even to a corporation. But we do deprive habitual criminals of the right to citizenship. We dissolve unlawful corporations. And if Germany must be governed for a time after this war by territorial administrative organs it will be better that it be done by the United Nations as a unit than by any concert of separate powers.

Permanent organs of World Government are needed for other purposes, too. Not only Axis Powers but many other national governments, including our own, have enlarged their peacetime functions into a vast control of domestic and international economy. They have become tremendous business enterprises. No existing organs of Government have any possibility of dealing adequately or fairly with the civil controversies which are bound to increase with that expansion.

Wartime Organs

During hostilities a certain amount of United Nations' machinery has already been[1] and will further be, erected. It is in a sense "governmental" machinery, but it is designed to subdue by military force the international outlaws who are spreading terror and destruction under the cloak of national power. Such war organization is not well equipped for permanent peacetime purposes.

Written or Unwritten Constitution?

Delegates to the Post War Convention on

[1] Combined Chiefs of Staff, Munitions Assignment Board, Combined Raw Materials Board and Combined Shipping Adjustment Board, Combined Production and Resources Board, Combined Food Board, United States Canadian Joint Defense Board, Joint War Production Committee, Joint Raw Materials Co-ordinating Committee and Joint Economic Committee, Inter American Financial and Economic Advisory Committee, Inter American Development Commission, Inter American Defense Board; Pacific Councils in Washington and London; Central and Eastern European Planning Board; Eastern Group Supply Council; London Bureau and Committee for Reconstruction; and various special Commissions. See "The United Nations, What They Are and What They May Become", by Henri Bonnet, World Citizens Association, Chicago, Illinois; also "Machinery of Collaboration between the United Nations", by Payson S. Wild, Jr., Foreign Policy Reports July 1, 1942.

Permanent Organization will no doubt come from neutral as well as belligerent governments.[1] The preliminary questions will be:

(1) Shall the World Community attempt to adopt a single written constitution for future government of the inter-relations of nations and peoples of the world?

(2) If not, what further isolated organs of international government—executive, judicial or legislative—shall be erected?

I favor a written constitution. We should not envisage a federation exactly paralleling our own. The Society of Nations has a unique pattern. It requires its own peculiar organs of government.

But if we accept the Atlantic Charter principle that nationalities and national rights are to be preserved and protected, must we not face fearlessly the concept of a "super-sovereignty"?

Every organ of international government—and we already have many of them—exercises in a sense "super-sovereign power." By the Pact of Paris, which Germany was the first nation to

[1] Eleven nations which had not participated as belligerents sent official delegates to the Paris Conference of 1919. 62 nations out of a possible number of approximately 65 were at one time or another members of the League of Nations.

sign, the leading nations have already renounced unrestricted sovereignty—if it ever existed.

President Wilson's first draft of the League Covenant employed the word "Constitution" in its preamble.[1] Happier results might have followed if the final document had risen to the dignity which that word imports, and if there had been less timidity then in admitting the necessity for adequate instrumentalities.

A complete written constitution for the United Nations seems desirable for several reasons:

(1) It could declare at the outset accepted sovereign rights which may not be infringed.

The American Institute of International Law made a noble first draft of possibly acceptable clauses in its "Declarations of the Rights and Duties of the Nations", adopted as part of the "Recommendations of Habana" in 1916.[2] The

[1] See Lansing "The Peace Negotiations," Appendix, p. 1. The term "Constitution" instead of "Covenant" was currently employed during the early armistice period of 1919. The draft document submitted at the Plenary Session of the Versailles Conference on February 14 omitted the word probably as a result of action taken by the Conferees on January 19, 1919. See N. Y. Times Index for this period for current use of the term "Constitution."

[2] See The Recommendations of Habana concerning International Organization, Scott, Oxford University Press 1917, pp. 22, 67.

American Law Institute has been working on a similar project for a draft "International Bill of Rights."[1]

The post war World Convention will do well to study those documents. An official declaration of inviolate national rights should go far in removing hesitation to entrust more power to international governmental institutions.

(2) A written World Constitution could declare precisely what permanent organs of world government are to be sanctioned and clothed with effective powers and given adequate means of financial self-support.

We should not underestimate the difficulties or the dangers of creating permanent self-sustaining organs of World Government. The practical difficulties can be overcome. The dangers of not acting boldly are more serious than the dangers of doing so.

In the supreme hour of our own national power which will exist when the present hostilities cease we can make no nobler gift to humanity than to insist, as a condition of meeting the clamoring demands which will be made upon us, that the International Community

[1] American Law Institute Proceedings, May, 1942, An International Bill of Rights.

shall build a political order which will enable it to share the blessings which we have enjoyed under functioning constitutional government.

(3) Written Constitutions containing bills of rights have grown apace among nations in recent years. The growth is significant in indicating public confidence in them.

Even the British Foreign Office, in a little observed announcement in 1938, published a volume purporting to set forth the written "Constitution of the British Empire". It reproduces and cites in about 650 pages approximately 300 parliamentary statutes, orders in council, letters patent, royal instructions, and other documents as constituting the British Empire's Constitution. It is an Empire document. It omits Magna Charta, the Bill of Rights, and other documents which we usually associate with the "British Constitution". It hardly employs the term "Constitution" in the sense elsewhere used in the world, but it is probably the first time that the British Foreign Office has sanctioned the labeling of any particular documents as constituting a written Constitution of the British Empire.

If a written Constitution is to be adopted by the United Nations it should resemble in form and extent more nearly the great majority of

other national Constitutions but it must necessarily deal with the peculiar problems of World Government and it will certainly take account of experimental organs which already have been tried.

Legislative Organs

The span of the natural lives of the delegates to the next Peace Conference will be insufficient to "settle" all of the problems which will be presented to them. If they attempt to deal with all of them they will tire and err. They will crystallize results where what is needed is constant legislative study and review.

The creation of a permanent World Congress would not be a radical departure from the procedure already experimented with in the League of Nations and in the Pan American Union except in one respect. International "legislation"—which now usually takes the form of resolutions or multipartite treaties—must at present be approved by each government affected by it. This system is as though a domestic law were only operative against particular citizens who vote expressly in favor of the law; or as though each act of our Congress were re-

quired to be ratified by each state affected by the Act.

If a permanent Congress is created, and if it is not confined to mere diplomatic representatives of governments, it may be an easy step to grant to such a legislative body the power to promulgate its own international statutes, freed from the necessity of national ratification.

Executive Organs

The United States already is a member of, or participates in the work of, 64 international organizations.[1] It would not be particularly revolutionary to place those various agencies, as well as some others, under control of a permanent organization of the United Nations.

The chief difficulty with the Versailles Treaty was not the provisions which it contained, but the fact that they were not enforced and that no adequate organs of World Government were provided to enforce them.

The sanction provisions of the League Cove-

[1] Manual of the United States Government, 1942, p. 122. See also "International organizations in which the United States participates." Schmeckebier, Brookings Institution, 1935.

nant called for the application by *individual nations* of their separate military establishments and economic powers. It was as though the States of Michigan and Minnesota were asked to agree to intervene *as state governments* in any controversy between the States of Rhode Island and Massachusetts. As co-ordinate political units they would hesitate to undertake that; and their efforts, if undertaken, would be resented. Nations, as such, should not be called upon to meddle in the disagreements of other nations, nor to put down public international brawls and breaches of the peace. That function belongs to the World Community.

Our own Constitution and most federal national Constitutions, quite wisely omit any express provisions upon the sensitive issue of sanctions and the question of right of withdrawal.

The United Nations, as a functioning permanent organism, should itself be provided with adequate machinery for the preservation of the public peace and the promotion of the common welfare. Let it confine itself to a few very simple delegated powers.

National armaments are not an obstacle to, nor an adequate excuse for delay in, the creation of adequate executive organs. When we founded our own Federal Government we did

not abolish military establishments of the States. We did not prohibit citizens from carrying arms. On the contrary we inserted a provision expressly guaranteeing the right to "keep and bear arms", and we approved the maintenance by States of a "well regulated militia."[1] In so far as our Federal Constitution is concerned a state may maintain whatever military establishment it chooses. A citizen may keep a whole arsenal of firearms if he wants to do it. We find it cheaper and more effective to support a police force, but that is our legal right, though we may not use either the militia or the firearms to commit aggression against a neighbor.

Judicial Organs

Fortunately we have a hundred and fifty years of experience with international judicial procedure in the modern world. We have operated under many claims commissions and arbitral tribunals. Indeed the torrent of conciliation, arbitration and compulsory adjudication treaties which descended during the past thirty years has confronted us with an *"embarras de*

[1] Amendment II to Constitution of the U.S.A.

choix" rather than with any dearth of paper judicial machinery.

In so far as the "optional clause" of the statute creating the Permanent Court of International Justice became effective, it provided a method of procuring a judicial determination of an international controversy whether or not the defendant government chose to be sued respecting a particular issue.

The procedure for selecting the members of such a court should be simplified. Compulsory jurisdiction should be accorded to it; and a complete system of lower courts, sitting regularly or riding on circuit in various parts of the world, should be created.

Lawyers are not impressed with the objection occasionally offered that the founding of permanent International Courts must await the codification of International Law. If that theory had been followed in municipal law there would still be no domestic courts in many of the most highly civilized states and nations of the world.

III

SOME FINANCIAL PROBLEMS OF WORLD GOVERNMENT

(Address before Institute of Foreign Affairs, Earlham College, Friday Evening, May 15, 1942)

At the Peace Conference in Paris in 1919, to which I was attached in a minor capacity, I offered a prophecy that the League of Nations would not succeed because there was no provision for its own financial self-support.

Obviously that was not the sole reason for its failure. The fact that League members gradually defaulted upon their quotas attracted little public attention. Nevertheless, I again suggest that if the Society of Nations is to have more effective and permanent organs of government, it must be clothed with power to collect its own revenues.

We have on the face of this globe a vast population of human beings who have associated themselves into nations. Those nations

during the past 300 years have developed a haphazard system for governing their inter-relations. Ninety-five per cent of their peoples love peace and detest war. But their affairs have become infiintely complex.

There is, moreover, and always will be, a minority of persons with criminal instincts. They do not want to live peaceably and to prosper with their neighbors. They are sullen and morbid in temperament. They prefer to destroy and to defraud. They poison entire national governments.

Our objective, however, is not a perpetual and placid peace. Most of the needed organs of international government relate to healthy, competitive commerce. Crime and violence will always be with us. They will not be eliminated, but international crime, like any other kind, must be curbed, controlled and punished—even perhaps to the point of denying the right of nationality to habitual offenders.

The Post War Plans

The torrent of post war plans which is now pouring from press, platform and pulpit pre-

sents little or no difference of opinion on these basic points, but the plans vary widely in methods which they propose.

We may classify them for convenience into those suggesting:

(1) An Enforced Anglo-American Peace,
(2) A Regional Grouping and Balance of Power,
(3) A Union of so-called "Democratic Nations",
(4) Another Confederated League of Nations, and
(5) A United Universal Society of Nations.

This classification is arbitrary. There is no intention to tag any particular plan or planner with a copyrighted label.

It is not surprising that the problem is approached from a variety of viewpoints. Lawyers, journalists, executives, scientists, sociologists, economists, merchants, laborers and farmers are contributing ideas from their several backgrounds of experience, which are as diverse as they are valuable.

A Pax Anglo-Americana?

Many substantial citizens in this country and England believe that a world peace enforced by the overwhelming might of the United States and the British Empire is the only practical solution. They recall the 500 years of reasonably stable government supplied by Rome. They observe that the English speaking people already exercise vast leadership in the modern world, and that their language is spoken by more people than any other, except Chinese. They propose therefore that we police the world to the extent necessary to preserve order and that we guarantee the rights of small nations and minorities unable to defend themselves.

Such a result may come about by default, because of inability to do anything better. The plan contains the possible merit of avoiding the risks of vesting future police powers in unscrupulous hands.

A peace enforced by the British and American people has, however, serious objections. No matter how benevolently intended, it would be misunderstood. It would be viewed by other nations as imperialistic in design. It would per-

petually germinate seeds of revolution. Hostile national blocs would continue to arise.

The financial cost of such a world government, if borne entirely by the English speaking people, would be a tremendous burden. Other nations would not contribute to it voluntarily and if we should attempt to spread the burden by force, the efforts would be deemed the levy of tribute.

We can take a solemn lesson from the last war and the present one. The French and Belgian peoples bore the brunt of the human and physical suffering from 1914 to 1918. But the United States and Great Britain paid the financial bill. We not only paid the costs of our own military and naval efforts but we financed much of the war expenses of the nations allied or associated with us.

There was no recoupment of those expenditures from defeated Germany. On the contrary Germany made a net profit of about 50% on the reparation deal. She borrowed from the governments and peoples of the Allied and Associated Powers about one and one-half times the amount which she nominally paid in reparations. She then defaulted on the loans, pocketed the proceeds, and spent them in preparing for another war.

Though the financial cost of attempting, unsuccessfully, to preserve the peace during the past 25 years has been a heavy one, that cost is insignificant as compared with our present outlay. President Roosevelt in his broadcast of April 28, 1942, said that the national government of the United States of America was then paying out approximately 100 million dollars per day for munitions, and that before the end of this year the amount will be doubled. That will be one billion dollars every five days. One billion dollars is equivalent to the total indemnity exacted from France after the Franco-Prussian War of 1870. By Christmas we shall be spending *every month* more than the combined annual armament budgets of ten years ago of all of the nations of the world!

The latest Lend-Lease Report to Congress states that goods costing over $48,000,000,000 can be provided and transferred from the United States to foreign governments under present acts of Congress. We expect to lend or lease to other nations more than ten times the total amount spent for arms in any single peacetime year by the entire world; and in addition, we expect to spend as much or more in the costs of our own military and naval operations.

We shall pay the present bill, whatever it

may be. But it is obvious that the cost to the people of the United States of an effort to maintain world peace through the enforced might of Great Britain and the United States is a high one. We, of all people, are interested in a better and cheaper solution.

We may be pardoned for observing in passing that whenever goods or funds are to be sent by the United States to any foreign country no "transfer problem", or problem of "foreign exchange" ever seems to arise. But when a flow the other way is suggested—as it frequently was during the decade from 1920 to 1930—there appear always to be "insuperable" obstacles.

Regional Grouping and Balance of Power?

Dr. Felix Morley[1] in a recent leading article in the Saturday Evening Post, advances the thesis that the prestige of the white race has been irretrievably lost, and that what lies ahead is a division of the world into regional "spheres

[1] Dr. Morley spoke at the same meeting of the Earlham Institute of Foreign Affairs before which this address was delivered. For a view of the situation differing from his Saturday Evening Post article, see Dr. Morley's earlier work "The Society of Nations, Its Organization and Constitutional Development".

of influence". That, of course, has long been one of the programs of Germany and Japan.

Dr. Morley regards the present conflict as one of "evenly matched" contestants. He suggests that in what he sees as the "evenly matched" military power of the present contestants lies "the promise of an eventual stabilized peace, in which the balanced relationship of reasonably equivalent groups will give no scope for future Hitlers."

I am unable to accept either the facts or the logic.

The bandits of Berlin and Tokyo unquestionably have built up a dangerous arsenal. They have designed for years a premeditated assault on civilization. But any view which concedes to Germany and Japan a position co-ordinate either in power or political status with that of the nations which have taken up the "hue and cry" against them, is an unfortunate one.

If regional spheres of influence and a revived effort to create another "balance of power" are the only results from this conflict, we shall merely have elevated the Dillingers and their gangs to the dignity of recognized governmental groups in the Society of Nations. Not only will there be no "stabilized peace", but

even if there were, self-respecting men would not want to live under half of it.

The financial cost to the people of the United States of participating in that sort of world government would be as staggering as would be the maintenance of an enforced Anglo-American peace, because no scheme to reduce armaments by voluntary agreement has the remotest chance of success until and unless adequate organs of World Government are provided in substitution for national armies and navies.

Regional grouping and another so-called "balance of power" will rotate the eternal rivalry of armaments, recessed by bloody conflicts.

A Union of so-called "Democratic Nations"?

In reaction to the failure of the Versailles Conference to produce an effective World Government some of our writers have gone to the other extreme and advocate that we superimpose our Federal Constitution, in its own image, upon a selected group of nations of the world.

The history of the American Federation pre-

sents a rich source of inspiration for the architects of better world government. Our national constitution, now the oldest in operation, has been the model for most of the national constitutions of the world. It is thrilling to contemplate that with only about three exceptions, every nation in 1939 possessed a written constitution patterned closely upon ours.

But it does not follow that the problems of World Government can be solved merely by taking as a blueprint the national constitution of any federal national government and shifting around its phraseology so as to make it applicable verbally to a selected group of nations.

To begin with, while most nations are becoming willing to bow to the superior power of the Society of Nations as an entirety, within its proper sphere; they would not renounce their national sovereignties merely to create still another federation among a large group of other nations.

France would not join the British Empire even to save its life. Canada for many years had a standing invitation to join the United States of America which it never accepted.

Moreover, it is unsound to apply the term "democracies" in the manner which many have recently employed. Not only do most of the

sovereign nations possess democratic constitutions, but practically every national constitution contains a "bill of rights" similar to the first ten amendments to the Constitution of the United States of America. No Union of a limited number of so-called "democracies" could be created without driving promptly into a solid bloc or blocs the nations excluded from the new fraternity.

Some of the methods which have been proposed for financing a "Union of the Democracies" are naïve. It is suggested that, following the pattern of the Federal Constitution of the United States of America, such a Union could derive its support from an international income tax. If any new super-imposed government can find any residue of income available for further taxation among the citizens of this country it will be fortunate. International government cannot expect to find financial support, within any period of time now visible on the horizon, through direct taxation.

Another Confederated League of Nations?

The lessons learned from the League of Nations experiment have been immensely valua-

ble. It has charted rocks and reefs to be avoided by mariners of the sea of international politics of the future.

The fate which befell the League was forecast from the start by the history of similar loose associations, and particularly by the complete inability of the Confederacy of the 13 American colonies to cope with the problems which sustained government constantly meets. The League Covenant copied too closely and too crudely our own Articles of Confederation of 1776 to provide a permanent constitutional document.

Many there were who earnestly hoped that history would repeat itself and that, before the present cataclysm engulfed us, a veritable written constitution for the Society of Nations could be promulgated, fitted to the peculiar problems which government of the Society of Nations presents. That did not seem possible, but we must not lose heart and we must try again.

The Peace Conference at Paris was not entirely barren of proposals which would have yielded a firmer federation. The French and the Dutch delegations were leaders in perceiving the possibilities presented. Both the British and the American delegates stood firm, however,

against the creation of any representative legislative bodies, and against any international police force. The original American draft of the Covenant even omitted any provision for a judicial system.

The plan for financing the League which was finally adopted, i.e. a basis of voluntary graduated national contributions, provided no revenue whatever which the League could collect in its own right. By 1934 thirty-five nations, among those then remaining in the League, were in default. Several had defaulted as early as 1923. The League's total annual income in 1933 and 1934 from all sources whatever, including special contributions from our own government, from the Rockefeller Foundation and from the contributing member governments, was about $6,000,000 to $7,000,000. It had available to apply toward world government less money in a year than our single national government will soon be spending for munitions every hour of the day!

The system of voluntary national contributions, plus the unrestricted right of withdrawal from the League, were complete obstacles to the erection and permanent maintenance within the League of Nations of effective governmental institutions.

A United and Universal Society of Nations

The Society of Nations is and for many years has been, a political entity. It had—long prior to 1919—its own governmental institutions including scattered judicial tribunals, a crude legislative system, a body of law, and even a few executive officials. As a system of world government it is pitifully inadequate. But it exists, and it deals with very practical realities.

The Society of Nations has, however, always been a pauper in its own right. It has been obliged to pass the hat among the nations to feed even the meager crumbs of government which it has supplied to a hungry world.

Saddest of all, this mother of the family of political institutions has repeatedly been disowned and denied. So fearful have our scholars and statesmen been of offending national pride, that they have told us over and over again that there is no sovereign power superior to that of the nations.

They are wrong. Countless examples will occur to you in which the modern world has acted upon the principle that national sovereignty has its limits. We are giving our all for

that principle now. In the name of international justice we propose to enforce the rights of the peoples of the world, which surpass the will of any single nation.

Dr. Philip Jessup[1], an outstanding young leader among the authorities in the field of International Law, in his able treatise published in 1935 entitled "International Security—the American Role in Effective Action for Peace", refers in one place to the conception of a super state as a "ghostly specter". He took issue with one of President Harding's observations that the League of Nations was an organization with "super powers". I would like to raise the question with Dr. Jessup, whether he still thinks it wise to refer to "super powers" as a "ghostly specter". Perhaps that was one of the times when President Harding was right.

Isolationists have been wrong in their fear to strengthen the sovereign powers of the Society of Nations. But they have been completely right in recognizing that the attributes of a "super state" exist and will exist in any effective international organization. The creators of the confederate League of Nations in 1919 denied

[1] Dr. Jessup was also one of the speakers of the sessions of the Earlham Institute of Foreign Affairs before which this address was delivered.

the sovereign existence of any super state, yet they actually sought to strengthen it. Their opponents recognized that they were dealing with a super-national organism, but they feared that it would become too strong.

It is desirable now, both to admit honestly that the Society of Nations is a super-sovereignty, and then to confer upon it sufficient powers to do its job.

How can a united, universal and sovereign Society of Nations be made financially self-supporting?

There are possible approaches to that problem which will occur at once to you as they do to me:

(1) The functions of the government of the Society of Nations should be defined and restricted to those which affect the world as a whole, and which interfere in the least possible way with the domestic economy and system of government of any particular nation. But there is an ample field within which such government should operate and where indirect taxes could be applied and collected in support of very valuable institutions. A substantial volume of revenue could be obtained, for example,

through the administration of fair rules of international trade, travel and communication. If the right to harass travelers and traders across national boundaries by the levying of multiple tribute and trouble by each of the 65 nations could be struck down, and power to regulate international commerce could be vested exclusively in the Society of Nations, we would have unlocked a secret which perhaps more than any other factor accounts for the tremendous prosperity of the United States of America. Unhappily the drift at present is all the other way. But let us face the east, however black the night.

(2) One of the greatest boons which could be conferred upon a harried and almost prostrate commercial world, would be the establishment of a sound system of world currency. Gresham's law that "bad money drives out good money" defines a difficulty which cannot be overcome without a surrender of national powers which most governments will resist until and unless a very concrete workable scheme can be offered. The best minds of the world have not yet been able to produce an acceptable project for a universal currency. But it may come, and, if it does, the resulting value

would be worth a substantial service charge. The United States of America, with its present immense holding of gold, has an opportunity to influence the course of world action in this respect. Let us fervently hope that if it attempts to do so, it will do it with wisdom and discretion.

IV

WORLD GOVERNMENT TODAY AND TOMORROW[1]

(Address before American Society of International Law, Washington, D. C., Friday evening April 25th, 1941)

Does the "Society of Nations" exist as a political entity?

Have we already, in a sense, a "super-sovereignty"—a system of World Government superior to the will of any single nation?

Is there such a thing as an International Constitution? If so, what sort of an instrument is it? What does it provide? What does it lack?

It would be easy to become bogged in definitions of terms. Rather than risk that, I propose to recall certain of the factual phenomena which have appeared during the past 300 years

[1] Reprinted from the American Scholar, Autumn 1941; the American Bar Association Journal, June 1941; the Congressional Record, October 2, 1941.

of the world's history, and let you answer the questions according to your own choice of language.

It is fruitless to embark on these speculations without considering at the outset the gravity of the present challenge to International Government and to International Law. Let no one underestimate the extent of that challenge. Germany's war aims go far beyond the destruction of the Treaty of Versailles of 1919. They are directed at the Peace of Westphalia of 1648, which gave birth to the modern concept of a Society of Free Nations.

Germany's war is a revolution—a civil war —against World Government, as we know it.

To those who urge that the existing international situation proves that such a government does not exist, my reply is that it proves precisely the opposite. The "hue and cry" is rising today, just as it did in the three years following August 1914. Sooner or later—whether it requires three years or thirty—it will swing the will and the might of most of the civilized nations of the world to enforce the cardinal concept that there is a *right* to live at peace with, and to be free from brutal attacks by, other nations.

That passion to live and let live and to be free, is as prevalent among our South and Central American neighbors as it is among our English speaking cousins. It is to be found, with a few unfortunate exceptions, in every corner of the globe.

If "Democracy" were confined—as some of our present day philosophers tell us—to only about 15 of the 65 (more or less) nations of the world, or to 6 nations, or to our own nation alone, we would view with great alarm the possible outcome of this challenge. But there is no justification for so limited a definition of the "Democracies", either in the constitutions of the nations or in their governmental operations. About 95% of the 65 nations possessed in 1939 written constitutions providing for a form of government very similar to our own. Over half of those constitutions had been adopted since 1920 and about a quarter, since 1930. With rare exceptions each contained a "Bill of Rights" guaranteeing liberty and equality of the individual, freedom of speech, freedom of the press, freedom of thought and conscience, and guaranties against arbitrary powers of the State.

If democratic institutions and free thought and free speech have proved anything within the span of a single generation, they have dem-

onstrated that there are underlying conceptions which are common to the minds of most men—that friendliness and neighborliness and justice, are predominant instincts among 90% of the people of the World.

The "Declaration of the Rights and Duties of the Nations" adopted by the American Institute of International Law at its first session in 1916 enumerated five fundamental national rights—

(1) The "right to exist and to protect and to conserve its existence", but not "by the commission of unlawful acts against innocent and unoffending states".

(2) The right of "independence" and the "pursuit of happiness" and the right "to develop itself" with due regard to the rights of other states.

(3) The right to equality before the law and before other nations.

(4) The right to exercise "exclusive jurisdiction over its territory and all persons, whether native or foreign, found therein".

(5) The right to have its rights "respected and protected by all other nations"; for, said the Institute, "right and duty are correlative and the right of one is the duty of all to observe".

World Government is not synonymous with Universal Peace. Man has outlawed crime in Municipal Law but he has not abolished it. Better World Government will not soon, if ever, mean a state of perfect peace, but it will mean the discarding in the Law of Nations of many concepts held a generation ago of unrestricted national rights.

The vigor of the fiction that neutrality and isolation are possibilities when international crime develops on a wholesale scale, are evidence of the indignant demand of each nation that it has the right to be let alone.

Mr. Root in his presidential address to the American Society of International Law in 1908 called attention to the fact that the first public national act in the new world of the Western Hemisphere, as found in our Declaration of Independence, was an appeal to the "decent respect for the opinions of mankind".

One of our human peculiarities is that we seem to require a common antagonist in order to combine effectively for a common purpose. I have sometimes thought that the organization of the Society of Nations has been retarded because it is an all-inclusive concept. Perhaps the assaults against free nations which were launched in 1914, and again with intensified

fury in 1939, have had at least one use. They have proved that without effective World Government no individual nation can be assured of the enjoyment of its basic rights, or even of its independent existence.

In the field of International legislation up to the present time lawmaking processes have differed basically from those of National Governments. There is not and never has been a Congress or Parliament of the Nations, or of any considerable number of them, to which the nations have delegated legislative power.

The phenomenon of international relations which most closely resembles a national legislature is the International Conference. Some conferences have been occasional, such as the Hague Conferences of 1899 and 1907, the London Naval Conference of 1908-9, the Versailles Conference of 1918-19, the Washington Disarmament Conference of 1921-22, the "Conference for the Progressive Codification of International Law" held at The Hague in 1930, the "Inter-American Conference for the Maintenance of Peace" held at Buenos Aires in 1936, and—in earlier times—the Congress of Vienna of 1815, and the "European Congress of Catholic and Protestant States" of 1644-1648. Other

International Conferences have been periodic or more or less permanent in their character, such as the Sessions of the Assembly and Council of the League of Nations and the eight periodic "International Conferences of the American States" held from 1887 to 1938.

But whether periodic or permanent, International Conferences have never assumed to exercise the final sovereign powers of a legislature.

They merely draft and propose measures. The measures become effective when, and only to the extent that, they are ratified by the nations represented at the Conferences.

International legislation is, of course, not limited to the products of International Conferences. Many multipartite treaties partaking of the nature of legislation have been negotiated entirely through diplomatic channels. Some conventions such as the one providing for the creation of the Permanent Court of International Justice, are described within their own terms as "statutes".

If we go as far as Judge Hudson[1] we should place in the category of International legislation some 257 conventions, treaties, protocols,

[1] "International Legislation from 1919 to 1934", Manley O. Hudson.

declarations, acts or agreements signed during the 50 years preceding 1914, and not less than 400 which were signed during the 20 subsequent years. Personally I should describe some of the documents which Judge Hudson terms "legislation" as being more in the nature of contracts. Many of them, however, undoubtedly belong to the field of legislation.

Some conception of the rate at which international legislation is now being ground out is to be gathered by recalling that at the single Seventh International Conference of American States held at Montevideo in 1933, 95 resolutions, 6 conventions and 1 protocol were adopted, and at the Special Inter-American Conference for the Maintenance of Peace at Buenos Aires in 1936, 11 treaties and conventions were signed, all of which were in the nature of legislative acts.

Criss-crossing among the nations there is a vast network of legislative documents which are becoming ever more important in the relations of the nations and somewhat appalling in their increasing complexity.

Finally, in contemplating the field of international legislation we should recall the progress which has been made toward codification of International Law. The work in the western

hemisphere which began by the appointment of the Commission of Jurists at the Rio Conference of the American States in 1906 has finally ripened into the creation of the Committee of Experts which held its first meeting at the Pan American Union in April, 1937. The League of Nations Assembly and Council provided in 1924 for the creation of a Committee for the Progressive Codification of International Law. At the first International Conference which met at The Hague in March and April, 1930 under the inspiration of that Committee, 48 states were represented. The draft conventions prepared by the Harvard Research experts trace their roots to that committee and that conference.

The most serious handicap which confronts any effort to codify or improve International Law is the cumbersome existing machinery for accomplishing international legislation. We know the difficulties experienced by the Assembly of the League of Nations under the principle of unanimous consent, and of its efforts to avoid or circumvent that principle in procedural measures. International legislation will continue to be lacking in simplicity of enactment, and will always be of scattered geographical application unless and until the na-

tions are willing to delegate to permanent representatives actual legislative powers.

The Judicial Department of the Constitution of the Society of Nations—if we may employ that term—is, as we should expect, more mature than its legislative department; for, as we know, the development of law by custom and through arbiters and judges has almost always preceded legislation chronologically in the evolution of governmental organisms.

The Permanent Court of International Justice within the past two decades has become a functioning and living body. The Mixed Arbitral Tribunals in Europe and the German and Mexican Mixed Claims Commission which operated in the western hemisphere after 1919, dealt with a volume of cases surpassing in number and importance anything hitherto known in the history of international arbitrations. The Mixed Claims Commission, United States and Germany, alone handled over 15,000 separate cases. Several of its single cases or groups of cases involved larger sums and graver issues than the entire Alabama Arbitration or any other single arbitration to which the United States had previously been a party.

Not less than 130[1] separate conciliation, arbitration or compulsory adjudication treaties were signed by nations during the single decade which followed the conclusion of World War No. I, in addition to such general conventions as the Geneva Protocol of October 2, 1924, the General Act for the Pacific Settlement of International Disputes of September 26, 1928, and the Inter-American Treaties of Conciliation and Arbitration signed at Washington on January 5, 1929.

Six separate drafts of projects for the establishment of an "Inter American Court of International Justice" submitted to several of the International Conferences of the American States from 1923 to 1936 have been made the subject of a study and report by the Governing Board of the Pan American Union.[2]

Useful as these and other developments of

[1] For list of these see "Post War Treaties for the Pacific Settlement of International Disputes", Habicht, Cambridge Univ. Press, 1931.

[2] "Report of Projects on the Establishment of the Inter-American Court of International Justice" submitted to the Governments of the American Republics by the Governing Board of the Pan American Union in Compliance with Resolution IV of the Inter-American Conference for the Maintenance of Peace (See Bar Ass'n N. Y. Pamphlets, Fol. Vol. 187).

international judicial organs have been, they are, with few exceptions, still haphazard in their character. At the Versailles Conference in 1919 I was bold enough to suggest[3] that in addition to provision for a World Court in the Covenant of the League of Nations (whose first draft lacked any such provision) authority should be granted for the creation from time to time of inferior courts—much in the same manner as our United States Federal Courts were established, in order ultimately to create a permanent unified International Judicial system.

Any super-sovereign Executive Power for the Secretariat of the League of Nations was repeatedly disclaimed when the League was founded, and from time to time thereafter.

The Governing Board of the Pan American Union also shrinks from admitting any executive powers among the nations of the western hemisphere. At the Buenos Aires Inter-American Conference for the Maintenance of Peace in 1936, attended by President Roosevelt, a resolution was adopted recommending extension of the scope of the work of the Pan Ameri-

[3] See "Proposed Amendments to the Judiciary Articles of the Constitution of the League of Nations", Peaslee, February 27, 1919, submitted to the American members of the American Commission to Negotiate Peace, infra. p. 118.

can Union. On January 3, 1938 the Governing Board approved a comprehensive Committee report which said:[1]

> "It is true that at successive International Conferences of American states an elaborate mechanism for the maintenance of peace has been developed, but the organs for this purpose are not integral parts of the Pan American Union, but may be said to run parallel to it. * * * "

Since the Pan American Union traces its origin to a section of the State Department of the United States Government, and since its Governing Board still consists of diplomatic representatives of the 21 nations of the western hemisphere resident at Washington, D. C., it is easy to understand why, for these reasons alone, it would hesitate to admit that its functions are executive in any super-sovereign sense. The report approved by the Governing Board refers, however, to "an elaborate mechanism for the maintenance of peace", which runs "parallel to" the functioning of the Pan American Union.

Whatever terminology we may employ, as to the functions of the Governing Board of the

[1] See Report of Director General, Pan American Union, 1938.

Pan American Union or of the Secretariat of the League of Nations, we certainly find not only within those bodies but also within a great many other international organs, many of the attributes of administrative and executive institutions. The Bureau of Universal Postal Union has long been a most valuable organ of that character. So have the International Telegraphic Bureau, founded in 1868, the Bureau for the Protection of Industrial Property founded in 1883, the Union for Protection of Literary and Artistic Property, created in 1888, and various boundary commissions, plebiscite commissions, commissions for the control of navigable rivers, and commissions dealing with air navigation. At one single American Conference—the Seventh International Conference of American States at Montevideo in 1935—8 international commissions were created.

How far it is to the interest of the nations to continue to disclaim any super-sovereign attributes for these various agencies may be open to question.

What then are your answers to the questions which this topic has raised? Is there a supersovereignty? Is there already an unwritten Constitution of the Society of Nations?

Whatever your answers may be, we must face frankly the fact that such government as the Society of Nations now possesses has proved inadequate to preserve peace and order and to guarantee the rights of the nations. The Constitution of the Society of Nations at best is an infant organism which has not developed the immunity to disease or the vigor which we shall expect of it in its riper maturity.

Rapidly changing social customs inevitably demand changing institutions. The nations of the world during the past few decades have become vast economic organisms. They require, if complete chaos is to be avoided, far more effective instrumentalities of international government than now exist. Such organs must be financially self-supporting. They should be all-embracing in their concept. With 300 years of failure of mere alliances and associations, and with the experience of two world wars in a single generation costing[1] per day in money alone more than what should be the normal cost per year of effective organs of international government, we can afford to take daring risks.

[1] See Thomas J. Watson's estimate of the cost of World War No. I at 23,000,000 lives and $337,846,000,000; International Conciliation, October, 1938 No. 343, p. 339.

V

THE WORLD COURT

(Reprinted from the New York Times, February 5, 1922)

If the Permanent Court of International Justice, which opened at The Hague on January 30, 1922, should fulfill the hopes held for it, it will be forever a monument to Elihu Root, John Bassett Moore and James Brown Scott, three of America's foremost international jurists, who led in the efforts of the preceding quarter of a century to establish a World Court based upon American ideals of constitutional government and the American conception of the supreme importance of justice and judicial institutions.

From the time of the Peace of Westphalia, in 1648, and with the writings of Hugo Grotius, a new school of international thought has been developing. The importance of individual freedom, of democratic institutions of government,

of constitutional liberty, of justice and fair play among men and among the governments which they create, have become the dominant motives of advanced political theories.

The French writers of the late eighteenth century were great exponents of these ideals, and the people of our thirteen Colonies founded the United States of America, as one of the first practical experiments in their application.

What is the essence of the theory of government as we hold it in the United States? It is (1) that the people of the United States are the supreme sovereign power; (2) that their representatives in Congress and other legislative bodies and their President, their Governors and all other Government officials are their servants and not their lords and masters; (3) that by supreme declarations in the form of the Constitution of the United States and the constitutions of the States, the people have defined the powers and the duties of their political servants and have reserved to themselves certain fundamental rights and liberties which cannot be infringed; and (4) that if their political servants do attempt to infringe those rights, any citizen who suffers thereby may apply to the courts of the nation and finally to the Supreme Court of the United States, and, though he may be the

poorest and lowliest person in the most remote town, he may have the entire action of the Congress of the United States, of the President, or of a dozen States, if necessary, set aside and rendered null and void.

The cornerstones of governmental institutions, therefore, according to American ideals, are (1) a Bill of Rights declaring and reserving the rights of the people and of the federated states, nations, or other units, and (2) a Judicial System for the protection of those rights. In modern society the rights of individuals and of separate nations must always be circumscribed by the rights of the people as a whole. The legislative and executive departments of government are highly important as instruments for expressing and carrying out the will of the people, but the courts and the judicial system stand as the bulwarks to guard against possible usurpation of power.

We do not claim that our system of government has worked perfectly. Serious miscarriages of justice have sometimes occurred, but we do believe our ideals to be superior to those of any other plan which has yet been tried; and when we contemplate the prestige and the leadership which the American system has achieved; when

we recall the oppression which has occurred in other countries under the guise of governmental power; when we contemplate the nations which are staggering bankrupt under a heritage of superofficialism and a superfluity of government, we do well to hold carefully to the protections of liberty, and the restrictions on governmental powers which our American system contains.

The analogy between national government institutions and international institutions should not be pressed too far. The difference in the nature of the problems, the traditions of diplomacy and international custom, the theories of sovereignty and equality of States, and the host of complicated issues and historical prejudices among nations, create situations which will always make it necessary to differentiate carefully between them.

We may be certain of one thing, however, that, just as domestic peace within nations is never stable unless there is an adequate system for the realization of justice, so there will be no permanent peace among nations until there is a complete system for realizing not only a state of calm, but also justice among them. The passive ideal of peace—mere peace—whether just or unjust, will never satisfy the aspirations of hu-

man nature. Until some satisfactory mechanism is smoothly functioning to which aggrieved parties can apply, when international wrongs are threatened or committed, for a determination and protection of their rights by impartial tribunals on the basis of the facts and the justice of the case, the aggrieved parties and their champions will continue to resort to force in an endeavor to realize justice through the only means that they find available.

At various international conferences in which the United States had participated prior to the Peace Conference at Paris in 1919 our delegates had been consistently emphasizing the American theory of government and had been endeavoring to open the way for its more universal application.

The history of the work of the American delegates at The Hague conferences of 1899 and 1907, in their endeavors to establish a permanent court of justice through which could be developed a system of international law, and which could decide controversies upon the basis of the actual right and wrong involved, and not on the basis of diplomatic expediency, is well known. The American draft plan for a Court of Arbitral Justice presented to The Hague Conference of 1907 contemplated a strictly judicial

and permanent court, in which justice and not expediency should reign supreme.

The United States need not be entirely ashamed of the fact that it does not enjoy a reputation for excessive cunning and skill in the field of diplomacy. It may be justly proud of its championship of the supremacy of the ideal of justice. Although co-operating heartily with the development of arbitration treaties and of actual arbitration under those treaties as a vast improvement upon the settlement of international disputes by force, the United States has always felt that there is a still higher ideal, superior to the methods of diplomacy or the methods of arbitration, and that is the method of judicial settlement through orderly, permanent, impartial courts of justice.

In view of this seasoned policy of the United States and of the tremendous struggles which our delegates at prior international conferences had made to apply the American ideals of Government to international relations, it was indeed something of a shock to observe the treatment of that policy at the conference at Versailles.

The Covenant of the League of Nations was intended to be the greatest constitutional docu-

ment ever produced. It was to be a Constitution of the World. It was quite unfortunate for its defenders to take any other position. They would have been stronger if they had come forward frankly and said so. The people of the United States knew it. They, of all people, are not afraid of a constitution—not even of a constitution of the world, if that really means a guarantee of the rights and liberties of the nations and the protection of the best interests and the welfare of the people of the world. But before they agree to be bound by any world constitution they are entitled to be certain that it is consistent with the ideals of government which they have cherished and championed for a century and a quarter.

In the American plan for a League of Nations not only was no reference made to the prior endeavors to establish a world court, but there was no provision for any court whatever. The powers of the League were placed indiscriminately in a legislative body composed of the diplomatic representatives of the different nations and there was not even any clause authorizing the legislative body to create judicial institutions. The historical error was repeated of allotting the function of settling disputes to the

legislative body and to an impractical system of arbitration instead of to an impartial judicial organization.

The defects of the American draft were rectified in part before the final completion of the treaty. In the covenant as adopted the following provision appeared as Article XIV:

> "The Council shall formulate and submit to the members of the League for adoption plans for establishment of a permanent court of international justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

This article was an improvement over the prospect of not having any judicial system whatever, but it was open to three serious criticisms: (1) that it did not supply the omission of a Bill of Rights in the covenant, (2) that it did not give the World Court the dignity of constitutional creation but made it at best the mere creature of the legislative or executive will, and (3) that it gave to any recalcitrant nation against which a just claim might be filed, the constitutional right to oust the court of jurisdic-

tion by claiming the right not to be sued without its consent.

Instead of Article XIV and the unsatisfactory provisions for arbitration and the settlement of disputes by the legislative body of the League, the covenant should have contained a full Bill of Rights and a brief Judiciary Article somewhat along the following lines:

"The judicial power of the League of Nations shall be vested in a court of justice to be called the 'World Court' and in such inferior courts as the Council and the Assembly may from time to time establish.

"The World Court shall consist of fifteen justices selected by the Council and the Assembly. They shall hold office during good behavior and shall sit in official session at the seat of the League. Judges exercising the judicial powers of the League shall receive a compensation fixed by the Council and the Assembly and paid as part of the expenses of the League.

"The judicial power of the League of Nations extends to all cases:

"(*a*) Arising under this constitution or under treaties or other international conventions or agreements;

"(*b*) Involving conflicting national laws;

"(*c*) Involving ambassadors, ministers, diplomatic agents or consuls;

"(*d*) Between the nations, or between the League of Nations and one or more nations, or between individuals or corporations of different nations; provided, in the last instance, that the amount involved exceeds a certain sum to be fixed by the body of delegates;

"(*e*) Involving international transportation on the high seas or in the air.

"The apportionment of original and appellate jurisdiction among the courts provided for by this article shall be determined by the Council and the Assembly.

"The proceedings and records of the courts provided for by this article shall be public, except where such publicity is in the judgment of the court to which the case is presented, prejudicial to peace or order or to the maintenance of public morality.

"The Council may be constituted a court of impeachment for the trial of any member of the Secretariat, or of the Council or of the Assembly or of any officer exercising the judicial power of the League, for dereliction of official duty, upon charges alleged by the Assembly, and the Council as a court of impeachment shall have exclusive jurisdiction over such cases."

Changes of this character were suggested in certain "Proposed Amendments to the Judiciary

Articles of the Constitution of the League of Nations," which I took the liberty of submitting to the Commissioners at Paris while the matter was under consideration.

After the ratification of the Treaty of Versailles by a sufficient number of signatory powers to make it effective, and the organization of the Council of the League of Nations, the Council on Feb. 13, 1920, sent out an invitation to various eminent statesmen asking them to constitute themselves as an "Advisory Committee of Jurists" to formulate a definite plan for the establishment of a World Court, pursuant to this article of the Covenant of the League of Nations.

The jurists who accepted this invitation and who served on the Advisory Committee were as follows:

Elihu Root of the United States, with whom was associated James Brown Scott, Lord Phillimore of Great Britain, Albert de Lapradelle of France, B. C. J. Loder of The Netherlands, Arturo Ricci-Busatti of Italy, Mineichiro Adatci of Japan, Rafael Altamira of Spain, Clovis Bevilaqua of Brazil, for whom Raoul Fernandes was substituted for a portion of the time; Baron

Descamps of Belgium, and Francis Hagerup of Norway.

This Advisory Committee met at The Hague on June 16, 1920, and immediately adopted as a working basis the prior efforts for the establishment of a World Court at The Hague Conferences of 1899 and 1907. After numerous sessions, the Advisory Committee produced a "Project for a Permanent Court of International Justice" containing provisions setting forth its plan of organization and its powers.

The Advisory Committee recognized the limitations upon the judiciary system which the Covenant of the League of Nations unfortunately contained and sought to enlarge the powers of the Court even beyond the scope permitted by the Covenant. Both the Council and the Assembly of the League of Nations, however, made certain amendments to the project as reported by the Advisory Committee. The amendments restricted the powers of the Court to the scope provided by the Covenant of the League of Nations, but they opened the way for an enlargement of the Court's powers by providing that the nations may at their option confer obligatory jurisdiction upon the Court under certain conditions.

Although the language of the Covenant of the League of Nations refers to a "court," and although its founders evidently intended that the court should act only in cases where nations are parties before it, the statute providing for its organization created several divisions of the court, one to deal with "labor cases" and another to deal with "cases relating to transit and communications." Ultimately there should be a complete system of international courts to meet the requirements of international controversies.

The project submitted by the Advisory Committee of Jurists, after having been modified by the Council on Oct. 27, 1920, and by the Assembly on Dec. 13, 1920, was then submitted to the members of the League for ratification.

More than the necessary majority of the forty-eight members of the League of Nations had ratified it by Sept. 1, 1921, and on Sept. 14, 1921, the Assembly and Council proceeded with the election of Judges in the manner which had been provided for in accordance with the suggestion of Mr. Root to the Advisory Committee.

The following eleven Judges were elected: Señor Altamira (Spain), Signor Anzilotti (Italy), Dr. Ruy Barboza (Brazil), Dr. de Bus-

tamente (Cuba), Lord Finlay (Great Britain), Dr. Loder (Holland), Dr. John Bassett Moore (America), Dr. Oda (Japan), M. Andre Weiss (France), Dr. Max Huber (Switzerland), and Dr. Nyholm (Denmark). The following four persons were elected as Deputy Judges: M. Negulesco (Rumania), M. Jovanovitch (Jugoslavia), Dr. Wang Chung-hui (China), and Dr. Beichmann (Norway).

Those gentlemen became the first members of the World Court, which held its opening session at The Hague on January 30, 1922.

Although it seems certain that before the United States will enter an association or league or federation of nations under any one supreme constitutional document, it will require that such a document shall be in complete accordance with American governmental ideals, there is almost universal approval in America of the application of the principle of judicial settlement to international disputes.

The exact relations of the United States to the Court were complicated by the manner of its organization. The solution of that problem, however, is not too great a problem for statesmanship of the future, and perhaps the dilemma presented by the history of the League Cove-

nant may furnish an opening for the extension of American ideals even more completely throughout the world than originally seemed possible.

VI

OBLIGATORY JURISDICTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

(Address before the American Society of International Law, April 24, 1931)

Within less than a decade after the establishment of the Permanent Court of International Justice, it became necessary to look to over 300 separate treaties and conventions, as well as to a variety of forms of ratifications of the Optional Clause of paragraph 36 of the Statute creating the court, in order to determine the extent of its "obligatory jurisdiction."

The term "obligatory jurisdiction" as currently employed means the right, resting upon prior agreement, of one nation to institute judicial proceedings against another, whether or not at the moment of controversy the defendant nation desires to be subjected to suit. The word "obligatory" is, of course, in a sense a misnomer, for the original grant of power is always volun-

tary, just as the original concession made by free individual citizens to governmental institutions is a voluntary one. The practical differences, however, between "obligatory jurisdiction" of a permanent judicial body and the unsatisfactory results, or lack of results, from arbitration, go to the essence of usefulness of a World Court.

History of "Obligatory Jurisdiction"

The subcommittee which dealt with the subject of obligatory jurisdiction at the 1907 Hague Conference considered some twenty-two categories of possible subjects for compulsory judicial or arbitral settlement. Taking separate votes on each category, the committee recommended only 8 of these categories as being in the judgment of the majority of the committee suitable for obligatory jurisdiction. The opposition, led by the Central European Powers, however, did not prevent the adoption unanimously, except for three nations not voting, of the resolution of October 16th, "admitting the principle of compulsory arbitration" and "in declaring that certain disputes, in particular those relating to the interpretation and application

of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction."

One reason why no more practical results were achieved by The Hague Conferences both in 1899 and 1907 was because of inherent difficulties of applying the principle of compulsory or obligatory jurisdiction to any arbitral tribunal, which by its very nature cannot ordinarily even come into existence as an actively functioning body except by voluntary agreement after the cause of action has arisen. The same inherent difficulties apply to many bilateral treaties, declaring that all disputes of certain kinds shall in the future be settled by arbitration or other pacific means. Those documents for the most part do not provide for any effective "obligatory jurisdiction," for they fail to create effective machinery to enable the complaining party to summon the other either to appear before an authoritative existing body or upon failure thereof to suffer judgment by default. Hence they may fail of usefulness just when they are most needed.

One of the first plans for the organization of a League of Nations, prepared by Colonel House at President Wilson's request, and which

was sent to the President on July 16, 1918, about four months before the termination of hostilities in the World War, proposed the creation of an International Court with jurisdiction to (Art. 10):

> determine any difference between nations which has not been settled by diplomacy, arbitration, or otherwise, and which relates to the existence, interpretation, or effect of a treaty, or which may be submitted by consent, or which relates to matters of commerce, including in such matter, the validity or effect internationally of a statute, regulation or practice.[1]

This plan obviously contemplated real obligatory jurisdiction for the proposed international court. When President Wilson came to edit this plan, he first eliminated the obligatory feature of the court proposed by Colonel House. Finally, before making any plan public at the Peace Conference, he eliminated all direct reference to any court whatever.

Neither General Smuts' plan of December 16, 1918, nor the British draft of the Covenant sent to President Wilson by Lord Robert Cecil on January 20, 1919, provides for obligatory jurisdiction. General Smuts' plan speaks of a "Court

[1] Baker, Woodrow Wilson and World Settlement, Vol. 3, p. 83.

of Arbitration and Conciliation," and the British draft referred to a "Court of International Law" and to the "creation of a Permanent Court of International Justice." The plan of the Italian delegation at the Versailles Conference, which was the only official plan for a Court submitted by any of the Allied and Associated Powers, did provide for "obligatory jurisdiction" in certain cases. The so-called "joint compromise plan" of the technical experts of the United States and Great Britain, which followed the session of the conference of January 25, 1919, when it was decided to create the League of Nations, unfortunately permitted the idea of arbitration rather than judicial settlement to predominate.

The first joint official draft of the Covenant submitted at the plenary session of the Peace Conference on February 14, 1919, failed to set up as one of its constitutional creations any permanent judicial authority. It contained a first draft of the provisions later found in Article 14, providing that the Council of the League should formulate plans for the formation of a Permanent Court of International Justice. Article 14 originally read:

> This Court [*i.e.*, the court to be created under plans to be formulated by the Council] shall, when established, be competent to hear

> and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing article.[1]

Article 13, as amended at the plenary session on April 28th, specified certain particular classes of disputes as being within the category of those which the parties agreed to be "generally suitable for submission to arbitration or judicial settlement" as follows:

> Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach. . . .

Coincident with this amendment to Article 13, however, Article 14 was also amended, eliminating the obligatory feature which it would otherwise have imposed, and Article 14 was made to read

> The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it.

This amendment had the effect of avoiding in the Covenant of the League itself any element of general obligatory jurisdiction.

[1] *Ibid.*, p. 167.

The preliminary draft of the Statute creating the Permanent Court of International Justice submitted at the meeting of the Advisory Committee of Jurists in June, 1920, as well as the final draft submitted by the Advisory Committee to the Council of the League of Nations, both contained general provisions for "obligatory jurisdiction" in certain specific groups of cases, in the absence of express reservations to the contrary by signatory states. If those provisions had been accepted by the Council and Assembly of the League of Nations before submission of the protocol for signature by the various governments, the constitutional sources of "obligatory power" would have been greatly simplified. However, there was much force to the point raised by Mr. Balfour in his note submitted to the Council of the League at the meeting in October, 1920, in which he pointed out that the draft statute "goes considerably beyond the Covenant." The original error was attributable to the final form in which Articles 12, 13 and 14 of the Covenant were left by the Versailles Conference rather than to the amendments made by the Council of the League of Nations to the draft statute submitted by the Advisory Committee of Jurists.

After extensive debates in both the Council

and the Assembly of the League of Nations on the entire subject of "obligatory jurisdiction," both Articles 33 and 34 of the original draft of the Statute submitted by the Advisory Committee of Jurists were modified. The Brazilian compromise resulted in the new Article 36 containing the famous Optional Clause.

Extent of "Obligatory Jurisdiction"

The extent of "obligatory jurisdiction" of the Permanent Court of International Justice is not merely co-extensive with the ratifications of the Optional Clause in Article 36 of the Statute. There are at least two classes of sources of possible obligatory jurisdiction, as follows:

(1) Treaties and conventions which have expressly conferred upon the Court compulsory jurisdiction over certain categories of controversies, and
(2) The optional clause of Article 36 of the Statute.

Treaties and Conventions

The court's sixth annual report listed 312 of these which had come into force up to April 28,

1930. The number was increasing at the rate of about one for each week of the year.

Our Secretary of State's letter to the President of November 18, 1929, which led up to the signing by the United States of the two protocols for adherence to the court and the protocol for amendment of the statute, might seem upon a hasty reading to imply that the only way in which the United States can confer compulsory jurisdiction on the court in any class of cases is by adherence to the Optional Clause. It would not be correct to read the Secretary of State's letter in that way. Indeed the United States already was signatory to a number of documents which indicated a willingness to confer obligatory jurisdiction in certain cases upon the Permanent Court of International Justice at The Hague quite irrespective of ratification of the Optional Clause. That is evident, for example, from the exchange of notes at the time of signing of the treaty of June 23, 1922, at Washington between the United Kingdom and the United States relating to the renewal of an arbitration convention; the treaty of July 19, 1923, between France and the United States of America providing for the renewal of an arbitration convention, and a similar treaty of Au-

gust 23, 1923, between Japan and the United States, and of September 5, 1923, between Portugal and the United States, and November 26, 1923, between Norway and the United States, and February 13, 1924, between the Netherlands and the United States, and also at the time of the signing of the arbitration treaty of June 24, 1924, between Sweden and the United States. The collective treaty of November 8, 1927, signed at Geneva relative to import and export prohibitions and restrictions provides for compulsory jurisdiction of the Permanent Court of International Justice over controversies under it, and although the United States was not an original signer of that treaty, it subsequently adhered to and ratified it.

Neither the signing by the United States on December 9, 1929, of the three protocols mentioned above, nor the ratifications of the three protocols by the Senate, if that should occur, would mark the beginning of official approval by the United States of obligatory jurisdiction of the Permanent Court of International Justice in certain classes of controversies. It will also be remembered in this connection that the United States, as well as most other governments, have already consented to being sued in their own national courts of claims. Most self-respecting

and honest governments do not wish to shirk obligations which they justly owe.

When the subject of international disputes is mentioned, most of us are too prone to think only of some great political public crisis threatening a major breach of the peace. Such disputes are of almost secondary importance as compared with the thousands of claims and controversies of a business and commercial character, which should and will pass through the gristmill of international judicial institutions as they develop, instead of being left to haphazard commissions or to national courts.

It is impossible within the limits of space to go into the details of the various treaties and conventions, of which there are several hundred, which have conferred upon the Permanent Court of International Justice obligatory jurisdiction in various classes of cases. They are manifold and far reaching. Many of them are multilateral treaties signed by a large number of nations. The so-called General Act of Geneva of 1928 was a sweeping document within this classification. In addition to its scheme for multiplying the kinds of tribunals, it proposed, with confusing modifications of language, the accomplishment in another way of substantially the same result which the ratification of the

Optional Clause in Section 36 of the Statute creating the court, accomplishes. However, since the General Act of Geneva of 1928 has been ratified by several countries, including Great Britain and France, it unquestionably is a document which must be included as one of the important constitutional sources of the court's obligatory powers.

The Optional Clause of Article 36

The Optional Clause contained in Article 36 of the Statute creating the Permanent Court of International Justice permits any state, either when signing or ratifying the protocol to which the Statute is adjoined, or at a later moment, to declare that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other member or state accepting the same obligation, the jurisdiction of the court in all or in certain specified classes of legal disputes. The declaration may be made unconditionally, or on condition of reciprocity, or for a certain time. Up to the date of the issuance of the sixth annual report of the Court of International Justice of June 15, 1930, the Optional Clause had been signed by 43 states, of which signatures 14 required ratification and had been

ratified and ten required ratification and had not been ratified. Nineteen did not require ratification. A total of 29 states at that time were considered by the court's reporter to be then bound by the Optional Clause. Since the date of the issuance of that report of June 15, 1930, a number of additional states have ratified or signed the Optional Clause.

Many of the states in signing the Optional Clause exercised the right to do so upon certain conditions. Most of these conditions fall into the following classes:

(1) Reservations respecting reciprocity and duration of time.

(2) A condition restricting the obligatory jurisdiction to controversies arising out of "situations or facts subsequent to ratification."

This in practice is an important reservation. It has been made by Australia, Belgium, Canada, Czechoslovakia, France, Great Britain, Germany, India, Latvia, New Zealand, Peru, South Africa and Spain.

(3) A condition excluding disputes among members of the British Commonwealth of Nations. This reservation was made by all of the members of the British Commonwealth of Nations except the Irish Free State.

(4) A condition excluding cases where the

parties have agreed to some other method of settlement. This is mentioned by about twenty of those which have signed the optional clause.

(5) The condition that compulsory jurisdiction should be accepted by two Powers represented on the Council. This was a condition imposed by Brazil, which has now become operative.

(6) The reservation of the right to submit the dispute first to the Council of the League of Nations. This reservation was made by Czechoslovakia, France, Italy, Peru, Great Britain, the Union of South Africa, New Zealand, India, Australia and Canada.

(7) Greece makes an exception of disputes relating to her territorial status.

(8) Finally we find a condition excepting disputes "which by international law fall exclusively within the jurisdiction" of the signatory Power. This somewhat nebulous reservation appeared first in September, 1929, in the signatures of the members of the British Commonwealth of Nations, excepting the Irish Free State. It was adopted subsequently by Jugoslavia.

It will be remembered that under Article 36 of the Statute the Permanent Court of International Justice itself has the power to interpret

the conditions and reservations imposed by any state which signed the Optional Clause, so that it will be for the court to decide in the future what this reservation means. A memorandum issued by the British Government at the time apparently interprets this reservation as not intending to do more than declare an existing principle of international law.

Sir John Fischer Williams in his very able discussion of the Optional Clause in the 1930 British Yearbook of International Law, says that "the optional clause has never yet been put into operation; there has never yet been an action brought in the Permanent Court against a signatory Power in which jurisdiction has been asserted, as a result of the clause, by one party against the opposition of the other." The accuracy of this statement, even if limited to strict acceptance of the optional clause, seems subject to some question in view of the Sino-Belgian case submitted to the court on November 25, 1926, by means of an application filed by the Belgian Government and based on the acceptance by both Belgium and China of the Optional Clause. Certainly the principle of obligatory jurisdiction, whether conferred by the Optional Clause or by special treaties, has already had a very considerable number of actual

tests in the cases which have been adjudicated by the court.

The S. S. Wimbledon case, which was the first actually litigated case as distinguished from an advisory opinion, involved the unilateral arraignment by France, Great Britain, Italy and Japan of Germany under Article 380 of the Treaty of Versailles. That article certainly conferred obligatory jurisdiction, as that phrase is generally understood, upon the Permanent Court of International Justice.

The Eastern Carelia case, though involving merely an advisory opinion, would unquestionably have subjected Soviet Russia to a measure of compulsory adjudication, if I may employ that term, with respect to its rights, and it was for the very reason that there had been no original voluntary surrender of such jurisdiction by Russia to the court that the court refused to entertain jurisdiction.

The Mavrommatis Palestine concessions case was a unilateral proceeding initiated by Greece against Great Britain. Great Britain vigorously contested the jurisdiction of the court over various aspects of the controversy.

The German-Polish Upper Silesia controversy, considered at the eighth session of the court, also was brought squarely under a pro-

vision of alleged compulsory jurisdiction of the court. The court, exercising its right to interpret the extent of its power, upheld its jurisdiction over strenuous objections by Poland.

With this necessarily summary review of the present status of obligatory jurisdiction of the Permanent Court of International Justice, what general conclusions may be reached and what guide posts can be found for the future?

Our great Society of Nations, which includes of course all nations, whether they were or are members of the League of Nations seems now to have an unfortunate multiplication of constitutional sources of power of its institutions, as well as a complexity of the institutions themselves. Any one who has studied, however, the tortuous path of the creation of the great court which has been born in our generation at The Hague, and who has observed the almost sublime patience of those who succeeded in constructing it upon even the imperfect constitutional foundations upon which it now rests, will hesitate long in adopting the rôle of the destructive critic.

International relations by their very nature are not simple. Let no student of the law embarking on this field of practice or academic

pursuit have any misgivings as to the arduous character of the career before him. It is conceivable that some great world convention in the future, brought about by cataclysmic developments, may strike off a single, simple Constitution of the World creating completely new institutions, judicial, legislative and executive. Or we may travel along the less simple but perhaps surer path of building on the present foundations. In any event, future historians and practitioners will certainly look back to the documents and developments which we have been considering as part of the historical or constitutional sources of the flourishing system of international courts toward which we confidently move.

VII

THE SANCTION OF INTERNATIONAL LAW

(Reprinted from the American Journal of International Law, April 1916)

In a recent editorial of one of the legal periodicals, the author quotes Alexander Hamilton's statement in the Federalist, that "it is essential to the idea of law that it be attended with a *sanction*, or in other words, a penalty or punishment for disobedience," and from this premise draws the following conclusion:[1]

> "The law of nations, so-called, is a mere empty term or phrase, a high resounding name for something in and of itself vain and impotent."

To most authorities and students of international law, the author's conclusion is somewhat astounding, but the fact that the statement

[1] Bench and Bar, Vol. 9, No. 11, p. 478.

could be made by a prominent legal editor, illustrates the extent of the present popular distrust of the science.

From the substantive point of view, international law has reached an advanced stage of development. The methods of enforcing it are yet imperfect, but it is certainly not now wholly without "sanction." In his Digest of International Law, John Bassett Moore enumerates the following "modes of redress" for infringements of international rights:

(1) Negotiation; (2) good offices and mediation; (3) arbitration; (4) withdrawal of diplomatic relations; (5) retortion or retaliation; (6) display of force; (7) use of force; (8) reprisals; (9) pacific blockade; (10) embargo; (11) nonintercourse.

Intranational or municipal law relies ultimately for its enforcement on two instruments: (1) the power of public officers to whom the duty of enforcing the law has been delegated by common consent, and (2) the instrument of "self-help."

The present methods of enforcing international rights partake almost wholly of the nature of "self-help." In so far, however, as a nation employing them correctly interprets its

rights, it is enforcing international law and gives to it "sanction."

Even with such remedies, inadequate though they are, the law is enforced in by far the large majority of cases. As in the administration of law within nations, the spectacular examples of miscarriage of justice, the armed revolts against the law are the exceptions. The records of the Foreign Office of any great nation, the many historical instances where recalcitrant nations have been forced to obey the law by the employment of some one of these "modes of redress," are evidence that enforcement of the law is the rule.

"Legal" and "Illegal" War

War is recognized in international law at present as, under some circumstances at least, a legal method of enforcing rights.[1] It is not

[1] By the so-called "Kellogg-Briand Pact" of August 27, 1928, which was signed twelve years after the date of original publication of this chapter, sixty-three nations undertook to "renounce war as an instrument of national policy". Germany was the first nation to sign that treaty. International law would still consider self defense as "legal," but it denounces aggression as contrary to Law.

countenanced as legal when prosecuted for plunder or oppression, or except as an ultimate remedy; nor is there in international law any recognition of the theory that it is beneficial as a sort of national virulent exercise, or that it is the necessary permanent fruit of irreconcilable racial differences. The theory of "legal war" was stated in the Instructions for the Government of the Armies of the United States in the Field, issued in 1863, as follows:[1]

> "Modern times are distinguished from earlier ages by the existence at one and the same time of many nations and great governments related to one another in close intercourse.
>
> Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. * * *
>
> Ever since the formation and co-existence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong."

Some writers in international law, including Vattel[2] and Bynkershoek,[3] have defined war

[1] General Orders No. 100, War of the Rebellion, Official Records, Series III, 151.
[2] Book 3, Ch. 1, Par. 1.
[3] Book 1, Ch. 1.

generally as the method by which nations prosecute their "rights." Grotius was more discriminating and said:[1] "We do not say that war is a state of *just* contention, because precisely the point to be examined is, whether there be just war, and what war is just." Obviously, war prosecuted by a nation which incorrectly interprets the law and its rights thereunder, operates not to enforce but to defeat the law.

It is difficult to reconcile the theory of some writers that aggressive war is "legal" under certain circumstances, with the prevalent theory of the unlimited right of self-defense by nations. Most authorities state unqualifiedly that a nation attacked with force has not only the right but the duty to repel the attack, wholly regardless of its cause. Halleck says:[2]

> "Self-preservation * * * is one of the most essential and important rights incident to State sovereignty. * * * It is not only a right with respect to other states, but a duty with respect to its own members and one of the most solemn and important duties which it owes to them."

Even Sir Edward Fry, a Quaker, and former

[1] *Ibid.*, Par. 2.
[2] Halleck, International Law, Vol. I, p. 120.

Law Justice of Great Britain, said at The Hague in 1907:

> * * * "My government recognizes that it belongs to the duty of every country to protect itself against its enemies and against the dangers by which it may be threatened, and that every government has the right and the duty to decide what its own country ought to do for this purpose."

If the right of a nation to defend itself is unlimited, and if there is also the right to prosecute aggressive war in the enforcement of rights, the curious anomaly, repulsive to standards of legal consistency, would result that two warring nations might both be acting quite within their international legal rights and the enforcement of either right would be inconsistent with the other.

In the evolution of law among individuals there was once a time when "self-help" was used extensively as a means by which rights were enforced. Pollock and Maitland, speaking of mediæval English law, say:[1]

> "For a long time, law was very weak, and as a matter of fact, it could not prevent "self-help" of the most violent kind. Nevertheless, at

[1] Pollock and Maitland, History of the English Law, Vol. II, p. 574.

> a fairly early stage in its history it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment. * * * So fierce is it against "self-help" that it can hardly be induced to find a place even for self-defense."

As the law has developed, the duty of enforcing it and the right to employ force for this purpose have been under most circumstances taken from individuals and delegated to public officials who act after rights have been judicially determined. "Self-help" has, however, been retained as a supplementary means of enforcing the law in certain instances, notably in the right to abate nuisances and to restrict certain trespasses, and to defend against assaults. The New York Penal Law provides[1] that the use of "force or violence upon or towards the person of another is not unlawful" in six enumerated classes of cases. Self-defense is specifically authorized, but at the same time, the right is strictly limited in the following language:[2]

> "An act, otherwise criminal, is justifiable when it is done to protect the person committing it, or another whom he is bound to protect,

[1] Section 246.
[2] Section 42.

> from inevitable and irreparable personal injury, and the injury could only be prevented by the act, nothing more being done than is necessary to prevent the injury."

An individual does not have the legal right to employ "self-help," except as so authorized, and has no right to defend himself against the acts of either individuals or police officers legally engaged in enforcing the law.

Drawing conclusions from analogies is always dangerous, but if the evolution of international law is to follow at all the evolution of intranational law, it seems probable that the future will realize neither the theory that the right of individual nations to use force will be entirely abolished, nor the theory that the right to employ it will continue without limit; but that the responsibility of enforcing international law will at some time be delegated to specially authorized officials, and national "self-help" will be permitted, so far and only so far as it assists in establishing justice and order.

International "Civil" and International "Criminal" Law?

Intranational law is divided into two classes, civil law and criminal law. Civil law deals with

acts and rights affecting primarily individuals only and not the community as a whole. Criminal law deals with acts which, though usually infringing the rights of specific individuals, are also conceived as affecting the public welfare and the order of the entire state.

International law has not drawn a similar distinction in dealing with the acts of nations. A recognition that there are certain controversies which are essentially of a civil nature has been evident in many recent conferences and conventions. The Russian project at The Hague in 1907 for "compulsory arbitration" enumerated a long list of such controversies, including "conflicts regarding pecuniary damages suffered by a state or its citizens in consequence of illegal or negligent action on the part of any state or the citizens of the latter," disagreements regarding interpretations of treaties concerning postal and telegraphic service and railways, patents, trade-marks, weights and measures, inheritances, and similar subjects.

It seems also obvious that certain international treaties partake wholly of the nature of private contracts, and that others signed by many nations may partake of the nature of international legislation, and are of such a character that their breach may involve moral turpi-

tude and may so affect the entire community as to partake of the nature of a crime against the community. Mr. Theodore Roosevelt applied this theory with characteristic emphasis in his interpretation of Germany's admitted violation of the treaty guaranteeing Belgium's neutrality,[1] in the following language:

> "When Germany thus broke her promise, we broke our promise by failing at once to call her to account. The treaty was a joint and several guarantee and it was the duty of every signer to take action when it was violated. * * * All (Germany's acts) separately and collectively were criminal actions against international right, against civilization, against justice and humanity throughout the world. * * * Even if not called upon to act by the Hague Convention, she (the United States) has the right and the duty as soon as any such gross violations of international law occur. This is the only way to establish proper precedents in international law and to save it from becoming a farce."

In so far as this purported to state the *legal obligation* of the United States, it was not in accordance with previously accepted principles of international law. Andrew Jackson took a similar position regarding certain acts of France

[1] Metropolitan Magazine, Oct., 1915.

in 1835 and was answered by Mr. Gallatin in a letter to Mr. Everett as follows:[1]

> "The general position assumed by the President, and apparently sustained by Judge Wayne and others, is, that whenever a nation has a claim clearly founded in justice, as that in question undoubtedly is, and justice is denied, resort must ultimately be had to war for redress of the injury sustained. This, as an abstract proposition, is wholly untenable, supported neither by the practice of nations nor by common sense. The denial of justice gives to the offending nation the right of resorting to arms, and such a war is just so far as relates to the offending party. But to assert that a nation *must* in such a case, without attending either to the magnitude or nature of the injury, and without regard either to its own immediate interest or to political considerations of a higher order affecting perhaps its foreign and domestic concerns, inflict upon itself the calamities of war, under the penalty of incurring disgrace, is a doctrine which, if generally adopted, would keep the world in perpetual warfare, and sink the civilized nations of Christendom to a level with the savage tribes of our forests."

Whether a nation which so acts as to disturb the rights and good order of the entire world

[1] 2 Gallatin's Writings, 494.

be termed legally a "delinquent," or a "criminal," is perhaps a matter of terminology. Whatever the term, the conception is growing that a nation's acts which, as a matter of fact, have this effect, should in some way be subject to the world's control.

The theory is not new. Daniel Webster in 1842, as Secretary of State, wrote to the American Minister at Mexico as follows:

> "Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states. * * *
>
> No community can be allowed to enjoy the benefit of national character in modern times without submitting to all the duties which that character imposes."

Mr. Evarts, as Secretary of State, in 1877, said:

> "If a government confesses itself unable or unwilling to conform to those international obligations which must exist between established governments of friendly states, it would thereby confess that it is not entitled to be regarded or

recognized as a sovereign and independent Power."—Ms. Instr. Mexico, XIX 357.

An interesting attempt to harmonize the theory of inviolable national sovereignty and the conception of the existence of certain rights of the "international community" is found in Internoscia's Code of International Law, published in 1910. He defines the "international community" as follows:[1]

> "The International Community is the voluntary union of the States that aim at the attainment by their common endeavors of the full development of their powers and of the satisfaction of their needs, in order to assure the good of all men."

In his introduction he explains his theory of world organization as follows:[2]

> "The community of states to be organized for the juridical protection of international law must be a supreme power destined to respect and to command the respect of the independence of the people. * * *
>
> When a state, contrary to the rules of international law, conquers or abuses another state, the former state although sovereign becomes

[1] Part 1, Book 1, Tit. 1, par. 13.
[2] P. xv, xxvii.

liable to be brought before the authority that represents the strength of the rest of the world, and if it refuses to recognize such authority, while left free to combat the whole world, it must incur the penalty of its folly even to the point of destruction, if need be, in order that the disturbance it has caused may be removed. The peace and tranquillity, the good and the welfare of the whole of humanity must be secured even at the cost of annihilating a rebellious part of it. * * *

This code * * * is not opposed to the well-established belief of the freedom of a state. This code recognizes the freedom of a state to act as it pleases so far that it grants the rights of a belligerent to a state when it contests the execution of the judgment rendered against it."

In the development of the law of crimes in intranational law, the process was gradual by which certain acts originally viewed solely as torts affecting only single individuals were brought within the conception of being crimes against the entire state. The whole law of crimes has been evolved from the ancient law of torts. In this development the individual has been required to surrender many of what were previously considered his rights, in the interest of the rights of others and the good order of the community.

In our own national organization, though we have formed a strong federal government, the theory that the States are sovereign political units has always excluded the conception that a State is legally capable of committing a crime. It seems probable from present indications and the natural necessities of the situation, that international law will ultimately provide for some method of central control over acts of nations of a quasi-criminal nature, and that individual nations will find it to their mutual interest to surrender some of what are at present deemed their sovereign rights, in the interest of the welfare and order of the community of nations.

International law does therefore at the present time have "sanction." That sanction rests almost wholly on the ultimate force of "self-help." The tendency will be to delegate the duties both of enforcing civil rights and of controlling quasi-criminal acts to authorized officials and to preserve "self-help" so far and only so far as it proves an orderly auxiliary.

In the law's evolution, the conception of the collective rights of the community of nations will enlarge. National acts and rights will fall naturally into two classes, one comprising those of a civil and the other those of a quasi-criminal nature.

Finally, international law must and will ultimately be looked upon as a law and a force not merely between and among, but also above even sovereign nations.

APPENDIX

(1)

Some Official Intimations Respecting Post War Permanent Organization

In his annual message to Congress on January 6, 1942 *President Roosevelt* said:

> "I know that I speak for the American people and I have good reason to believe that I speak also for other peoples that fight with us when I say that this time we are determined not only to win the war but also to maintain the security of the peace that will follow."

Secretary Hull in his radio broadcast of July 23, 1942, said:

> "There must be international co-operative action to set up the mechanisms which can thus ensure peace."

Mr. Welles in his Arlington address on Memorial Day said:

"These voices of the men who will make our victory possible * * * will insist that the United Nations undertake the maintenance of an international police power in the years after the war to insure freedom from fear to peace loving peoples until there is established that permanent security promised by the Atlantic Charter."

Henry A. Wallace, in an address in New York on May 8, 1942, said:

"We failed in our job after World War No. 1. We did not know how to go about it to build an enduring world peace. We did not have the nerve to follow through to prevent Germany from rearming. We did not insist that she 'learn war no more'."

Winston Churchill, in his speech to the Joint Session of the American Congress on December 26, 1941, said:

"If we had kept together after the last war, if we had taken common measures for our safety, this renewal of the curse need never have fallen upon us.

Do we not owe it to ourselves, to our children, to tormented mankind, to make sure that these catastrophies do not engulf us for the third time? * * *

Duty and prudence alike command * * *

that an adequate organization should be set up to make sure that the pestilence can be controlled at its earliest beginning before it spreads and rages throughout the entire earth."

Anthony Eden, British Secretary of State for the Dominions, in a broadcast of September 11, 1939, said:

"For some of us the challenge has come a second time in our generation. There must be no second mistake. Out of the welter of suffering to be endured we must fashion a new world that is something better than a stale reflection of the old, bled white. * * * "

Prime Minister Menzies of Australia, in a declaration of December 20, 1939, said:

"We, the British people, went into this war for no conquest whatever. We do not aim to capture permanently one foot of German territory, but we do aim at establishing a system of law and order in the world which will prevent independent nations in the future from being invaded and overrun."

President Lebrun of France, in a speech at Verdun on January 13, 1940, said:[1]

"Made wise by an experience which was not

[1] Le Temps, January 14, 1940.

altogether a happy one, in agreement with our gallant British Allies and with the other nations engaged in the war and proclaiming the same ideals as we do, we shall lay down the foundations of a just and lasting peace in which the world may at last resume the course of its peaceful destinies."

Premier Daladier of France, in an address to the Senatorial Commission for Foreign Affairs of the French Parliament on October 7, 1939, said:

"The Allies have taken up arms to put an end to the rule of aggression, to stop having to mobilize every six months. What they want is a lasting peace, a peace based on the respect of the plighted word and on honor, a peace guaranteeing the security of France and of all the other nations."

Prime Minister Reynaud of France, in an article in the London News Chronicle of April 3, 1940, said:

"The authors of the Versailles Treaty might with profit have been inspired by the example of America wherein forty-eight sovereign States, free to organize themselves in the political, administrative, and juridical domains, represent nevertheless throughout the world

the widest territory of free commercial exchanges open to human activity."

Ambassador Litvinov of Russia, in an address before the American Academy of Political and Social Science, on April 10, 1942, said:

"But the infliction of defeat and the attainment of victory cannot be our ultimate aim. United efforts are also required for the final eradication of the Nazi-fascist tree with its poisoned fruits, for the healing of the wounds suffered by humanity in this bloodthirsty war, for the creation of a new basis of future economies and political international relations."

General Chiang Kai-shek of China, in his message to President Roosevelt of December 9, 1941, said:[1]

"To our now common battle we offer all we are and all we have to stand with you until the Pacific and the world are freed from the curse of brute force and endless perfidy."

Mr. Paderwiski, Speaker of the Polish Council of State, in a declaration of January 23, 1940, said:

"The bloodshed and the misfortunes incurred

[1] Dept. of State Bulletin Dec. 13, 1941, p. 508.

should be a lesson from which to draw guidance for the future, in finding some form of political regime which could reconcile the principle of democratic equality for each citizen before the law, and his individual liberty, with that of stable and strong government."

President Vargas of Brazil telegraphed President Roosevelt on December 8, 1941:[1]

"I have the honor to inform your Excellency that it was unanimously resolved that Brazil declare itself 'solidary' with the United States in accordance with its traditions and obligations to continental policy."

The New York Times in an editorial published January 4, 1942, said:

"The world has now a great military alliance of twenty-six nations. Let us treat it as a beginning. Let us determine that from this seed shall grow the permanent international organization which will make future war impossible. In union there is strength."

[1] Dept. of State Bulletin, Dec. 13, 1941, at p. 488.

(2)

The Atlantic Charter of August 14, 1941

The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future of the world.

First: Their countries seek no aggrandizement, territorial or other;

Second: They desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned;

Third: They respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign

rights and self-government restored to those who have been forcibly deprived of them;

Fourth: They will endeavor, with due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.

Fifth: They desire to bring about the fullest collaboration between all nations in the economic field, with the object of securing for all improved labor standards, economic advancement and social security;

Sixth: After the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;

Seventh: Such a peace should enable all men to traverse the high seas and oceans without hindrance;

Eighth: They believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to

be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

Franklin D. Roosevelt
Winston S. Churchill

(3)

Joint Declaration by the United Nations of January 1, 1942

The Governments signatory hereto,

Having subscribed to a common program of purposes and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland dated August 14, 1941, known as the Atlantic Charter,

Being convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world, *Declare:*

(1) Each Government pledges itself to employ its full resources, military or economic, against those members of the Tripartite Pact and its adherents with which such government is at war.

(2) Each Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.

The foregoing declaration may be adhered to by other nations which are, or which may be, rendering material assistance and contributions in the struggle for victory over Hitlerism.

United States of America
United Kingdom of Great Britain and Northern Ireland
Union of Soviet Socialist Republics
China
Australia
Belgium
Canada
Costa Rica
Cuba
Czechoslovakia
Dominican Republic
El Salvador
Greece
Guatemala
Haiti
Honduras
India
Luxembourg
Netherlands
New Zealand
Nicaragua
Norway
Panama
Poland
South Africa
Jugoslavia

(4)

Proposed Amendment to the Judiciary Articles of the Constitution of the League of Nations

(As submitted to the American Peace Commissioners at the Versailles Conference, February 27, 1919)[1]

It is suggested that Articles XII to XV, inclusive, of the proposed Constitution of the League of Nations be supplanted by the following Articles:

ARTICLE XII.

"The judicial power of the League of Nations shall be vested in a Court of Justice to be called the "World Court" and in such inferior courts as the Body of Delegates may from time to time establish.

The World Court shall consist of fifteen justices appointed by the Executive Council. They shall hold office during good behavior and shall sit in official session at the seat of

[1] These proposals were not adopted, and Mr. Peaslee was requested by the Legal Advisers of the American Delegation not to release them for publication at that time. Ed.

the League. Judges exercising the judicial powers of the League shall receive a compensation fixed by the Body of Delegates and paid as part of the expenses of the Secretariat of the League.

The judicial power of the League of Nations extends to all cases:

(a) Arising under this constitution, or under treaties or other international conventions or agreements,

(b) Involving conflicting national laws,

(c) Involving ambassadors, ministers, diplomatic agents or consuls,

(d) Between the nations, or between the League of Nations and one or more nations, or between one or more nations and the individuals or corporations of another nation, or between individuals or corporations of different nations, provided in the last instance that the amount involved exceeds a certain sum to be fixed by the Body of Delegates,

(e) Involving maritime or aerial law or transportation on the high seas or in the air.

The apportionment of original and appellate jurisdiction among the courts provided for by this article shall be determined by the Body of Delegates.

The proceedings and records of the courts provided for by this article shall be public except where such publicity is in the judgment

of the court to which the case is presented, prejudicial to peace or order or to the maintenance of public morality.

The Executive Council may be constituted a Court of Impeachment for the trial of any member of the Secretariat, or of the Executive Council or of the Body of Delegates or of any officer exercising the judicial power of the League, for dereliction of official duty, upon charges alleged by the Body of Delegates, and the Executive Council as a Court of Impeachment shall have exclusive jurisdiction over such cases.

ARTICLE XIII.

The Executive Council shall provide for such measures as may be necessary to carry into effect the judgments and decrees of the courts exercising the judicial power of the League of Nations."

The theory that legislative, executive, and judicial functions should be separated, is not entitled to worship as a fetich; but for practical purposes, every successful form of government has found it necessary to make certain more or less clearly defined divisions of that character.

If for no other reason than the physical limitations of the men who may constitute the Executive Council and the Body of Delegates,

there should be some separation of these now intermingled powers which have been conferred upon them by the draft of the Constitution which has been submitted to the Peace Conference. Any attempt to perform all of their judicial duties would not only result in the failure of justice because of limited time to give proper consideration to the many international controversies which should receive attention, but would also seriously impair the ability of those bodies to consider broad matters of general policy.

The present form of the Articles, which are objectionable from this point of view, is as follows:

ARTICLE XII.

"The High Contracting Parties agree that should disputes arise between them which cannot be adjusted by the ordinary processes of diplomacy, they will in no case resort to war without previously submitting the questions and matters involved either to arbitration or to inquiry by the Executive Council; and until three months after the award by the arbitrators or a recommendation by the Executive Council; and that they will not even then resort to war as against a member of the League which complies with the award of the arbitra-

tors or the recommendation of the Executive Council.

In any case under this Article, the award of the arbitrators shall be made within a reasonable time and the recommendation of the Executive Council shall be made within six months after the submission of the dispute.

ARTICLE XIII.

The High Contracting Parties agree that whenever any dispute or difficulty shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration. For this purpose the Court of Arbitration to which the case is referred shall be the court agreed on by the parties or stipulated in any Convention existing between them. The High Contracting Parties agree that they will carry out in full good faith any award that may be rendered. In the event of any failure to carry out the award the Executive Council shall propose what steps can best be taken to give effect thereto.

ARTICLE XIV.

The Executive Council shall formulate plans for the establishment of a Permanent Court of International Justice and this Court shall,

when established be competent to hear and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing Article.

ARTICLE XV.

If there should arise between States members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration as above, the High Contracting Parties agree that they will refer the matter to the Executive Council; either party to the dispute may give notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof. For this purpose the parties agree to communicate to the Secretary-General as promptly as possible, statements of their case with all the relevant facts and papers, and the Executive Council may forthwith direct the publication thereof.

Where the efforts of the Council lead to the settlement of the dispute, a statement shall be published indicating the nature of the dispute and the terms of settlement, together with such explanations as may be appropriate. If the dispute has not been settled, a report by the Council shall be published, setting forth with all necessary facts and explanations the recommendation which the Council think just

and proper for the settlement of the dispute. If the report is unanimously agreed to by the members of the Council other than the parties to the dispute, the High Contracting Parties agree that they will not go to war with any party which complies with the recommendation and that, if any party shall refuse so to comply, the Council shall propose the measures necessary to give effect to the recommendation. If no such unanimous report can be made, it shall be the duty of the majority and the privilege of the minority to issue statements indicating what they believe to be the facts and containing the recommendations which they consider to be just and proper.

The Executive Council may in any case under this Article refer the dispute to the Body of Delegates. The dispute shall be so referred at the request of either party to the dispute, provided that such request must be made within fourteen days after the submission of the dispute. In any case referred to the Body of Delegates all the provisions of the Article and of Article XII relating to the action and powers of the Executive Council shall apply to the action and powers of the Body of Delegates."

For practical purposes, a nation claiming a grievance against another is left almost as help-

less for redress under the foregoing articles as it has been heretofore, except for the right conferred by Article XV, to petition a body whose time should not be occupied by the examination of witnesses and the threshing out of intricate questions of fact.

It is true that the articles authorize the employment of "arbitration." The historical difficulty with solemn agreements to submit matters to arbitration, however, has been that when the concrete situation arises, the parties will not "agree" that there are just grounds for a dispute between them. The nation which does not wish the *status quo* disturbed, has everything to lose and nothing to gain by agreeing to submit the claim of the other party to arbitration.

It is also true that Article XIV directs the formation of plans for a "Permanent Court of International Justice." This article, however, is open to the grave objection that it makes any court organized under it the mere child of the executive or legislative will without the dignity of constitutional creation.

Furthermore, the Article contains the additional difficulty that it destroys the usefulness of the very court which it contemplates. Not only are judgments by default precluded under it, but every nation under such a clause could

claim constitutional exemption from being sued at all, because such courts would have no jurisdiction unless the "parties," that is to say all of them, agreed to the institution of the suit. Any recalcitrant state against which a just claim might be filed, could immediately oust the court of jurisdiction, by claiming its constitutional right not to be sued without its consent.

Contrast the confusion of executive, legislative and judicial powers in the proposed Constitution of the League of Nations with other constitutions adopted during the past century and a half.

The Constitution of Argentine adopted in 1860 for fourteen provinces, provides:

> "Article 94. The judicial power of the nation shall be vested in a Supreme Court of Justice and in such other inferior courts as Congress may establish in the national territory.
>
> Article 95. The President of the nation shall in no case exercise judicial functions, assume jurisdiction of any pending case, or re-open cases already decided."

The Constitution of Denmark, adopted in 1849, provides:

> "Article 71. The judicial power shall be dis-

tinct from the executive power, in accordance with the rules to be established by law."

The Constitution of Australia, adopted in 1900, for six colonies, provides:

"Article 74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, however arising, as to the limits *inter se* of the Constitutional Powers of the Commonwealth and those of any State or States or as to the limit *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

The Constitution of Chili, adopted in 1833, provides:

"Article 99. The power to try civil and criminal cases shall belong exclusively to the courts established by law. Neither Congress nor the President of the Republic shall in any case exercise judicial functions, remove pending cases to a superior court, or revive cases already decided."

The Constitution of Japan, adopted in 1889, provides:

"Article 57. The judicial power shall be exercised by the courts of law according to law, in the name of the Emperor."

The fundamental law concerning the establishment of an Imperial Court of Austria, adopted in 1867, provides:

> "Article 14. Justice shall be separated from administration in every case."

The Constitution of Norway, adopted in 1814, provides:

> "Article 90. The decisions of the Supreme Court shall in no case be appealed or reviewed."

The Constitutional Charter of Portugal of 1826, provides:

> "Article 118. The judicial power shall be independent and shall be composed of judges and juries which shall act in civil and criminal cases, in the manner which the codes shall determine."

The Constitution of Brazil, adopted in 1901, for four provinces, provides:

> "Article 55. The judicial power of the Union shall be vested in a Federal Supreme Court, sitting at the Capital of the Republic, and in as many inferior federal courts and tribunals distributed throughout the country, as the Congress may create."

The Constitution of the Swiss Confederation adopted for "Twenty-two Sovereign Cantons" in 1874, provides:

> "Article 106. There shall be a Federal Court for the administration of justice in federal matters."

The Constitution of Mexico, adopted in 1857, provides:

> "Article 90. The judicial power of the Federation shall be vested in a Supreme Court and in the district and circuit courts."

The Constitution of the Netherlands, as amended in 1887, provides:

> "Article 162. There shall be a supreme court called the High Court of the Netherlands, the members of which shall be appointed by the King in conformity with the following article."

A Convention signed by the several sovereign countries of Central America in December, 1907, for the establishment of a Central American Court of Justice bound all those sovereign nations to submit to that court

> "all controversies or questions which may arise among them of whatsoever nature, no matter what their origin may be."

The proposed Constitution of the League of Nations in its present form repeats the historical error contained in the "Articles of Confederation" originally adopted by the United States of America in 1777. Those articles provided:

ARTICLE IX.

"The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any cause whatever."

That instrument lasted only twelve years during which time it was found to be quite impracticable as a working document, and it was necessary to supplant it in 1789 by the present Constitution of the United States which provides:

ARTICLE III. SECTION I.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Perhaps the reason for the failure of the Committee of the League of Nations to incorporate into its proposed Constitution direct provisions

for the erection of international courts, was the recollection of the difficulties which prior international conferences have experienced in deciding upon the method of selecting judges for such courts, and the fear that an attempt to incorporate such provisions might prevent the arrival at any agreement whatever upon the document.

But this difficulty the Committee has already successfully overcome. If the nations can agree upon a method of selecting the executive and legislative bodies of the League, it is a simple matter to confer upon one of them the duty of selecting the judges.

Furthermore, the difficulties of prior international conferences in agreeing upon a method of selecting judges have arisen from the fact that the plans proposed have impliedly assumed that the votes of the judges would be controlled by national bias instead of by ideals of justice and international right.

If the judicial power of the League of Nations is given a co-ordinate place with the legislative and executive powers and not the subordinate position to which it has been assigned by the draft submitted to the Conference, there need be little fear but that men of sufficient learning, talent, and devotion to justice will be attracted

to its bench. Mr. Choate spoke the confidence of the world when in discussing the possibilities of such a court, he said, "I should not care whether the United States happened to be one of the selected nations from whom a representative of the court appeared or not." There are great men in all countries who would be chosen for judicial positions, who would as fairly and impartially determine questions between the nations as the judges of the Supreme Courts of lesser federations determine questions arising among their component states or cantons.

It is possible that the form of the Judiciary articles proposed above may be open to minor objections. For instance, the same reasons which prompted the enactment of the eleventh amendment to the Constitution of the United States after the decision of the Supreme Court in *Chisolm vs. Georgia* (2 Dallas 419) may make it advisable not to confer on individuals the right to sue foreign governments. For my own part, I should prefer to see the clauses incorporated exactly as they are set forth.

But there can be no question as to the prime importance of an amendment of some kind which will provide for the erection by the Constitution itself, of international judicial bodies. The best thought of the world has long been fo-

cused on the hope of this accomplishment. The present war has placed its necessity beyond the realm of debate.

Judicial institutions represent the fountains from which justice can be demanded by the smallest petitioner as a matter of right, the protection of the weak against the strong, the guaranties of right and liberty and the preservation of democratic ideals.

The Peace Conference now so nobly engaged in its monumental and historical task, imperfectly judges the temper of the younger generations who are to live under the Constitution of the League of Nations if it underestimates their devotion to these ideals. If the conference is to create a federation which will really endure, it must erect as one of the foremost cornerstones of the federation a complete judicial system through which claims, irritations, and controversies which are the seeds of war, may be sifted, and by which the impartial administration of international justice may be assured.

AMOS J. PEASLEE

Paris
February 27, 1919

INDEX

INDEX

A

B

C

T

U

V

W