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By

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To the Inspiring Memory

of My Father

PREFACE

So many changes have occurred in the fifteen years since this book was originally published that revision is necessary; and the end of the League of Nations and the beginning of the United Nations furnish an historical point in the evolution of international government at which revision can properly be undertaken.

The reader will better understand the selection of the materials included in this book if he will bear in mind that I am not concerned with international relations in general, but with the slowly evolving constitutional law and organization of the community of nations, developing toward international, or world, government. Furthermore, I would not argue with anyone who disputes the title of the book; it would be a dispute as to the definition of government.

I have taught this course since I first proposed it at the Second Conference of Teachers of International Law and Related Subjects in 1925, and I am convinced that the purposes for which it was designed are still justifiable, and even more so today than then. These purposes I summarize, from the Preface to the original edition, in the paragraphs below.

For the large university, which can offer several courses in the international field, this book furnishes the preliminary training for advanced courses in International Law and International Organization, or serves as the single course in the field which many students desire to take for general information.

For the smaller college, which can offer but one course, it does not go too far toward technical international law, or wander too far into the very broad field of international relations—economic, political, psychological, diplomatic, et cetera. It may be used for a one term course or for a full year course.

For the general reader, increasingly concerned with the United Nations and the search for international peace and security, the book offers a rounded survey of the forces and developments in which he is interested. Though the book is well documented, in order to enable the student to pursue his investigation of particular points, I have tried to achieve a presentation not too technical for the interested reader to follow. I should be happy if it found readers outside the classrooms, and I think that it might be useful to speakers and discussion leaders.

In selecting bibliographical references, I have attempted to meet the needs of both elementary and advanced students and the resources of both large and small libraries. In this field it is necessary to draw upon writers from many lands and in many languages.

The manuscript has been read, to its great improvement, by my friend and colleague, Professor R. J. Swenson, and by Dr. Hans Aufricht, of the International Monetary Fund, whose broad and critical knowledge of the field has been generously loaned to me on more than one occasion.

CLYDE EAGLETON

July 1, 1947

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BIBLIOGRAPHICAL ABBREVIATIONS

There is here given a list of abbreviations of works to which reference is most commonly made in this text. Footnote bibliographies are also given for special topics. Where an abbreviation is used, then, the full citation may be found by reference to the Bibliographical Abbreviations. The list constitutes a useful, but not complete, bibliography for the field covered.

League of Nations documents are cited usually by the sales number in the lower right hand corner of the document. For guides to the League documents, see Marie J. Carroll, *Key to League of Nations Documents Placed on Public Sale,* 4 vols., covering 1920-1933, (World Peace Foundation, Boston); volume 5, 1934-1936 (Columbia University Press); and a book by Hans Aufricht, to be published shortly by the Columbia University Press.

There is no guide to the documents of the United Nations, and libraries have not yet attempted to catalog them. Short descriptive notes concerning them may be found in *A.J.*, 41 (1947), p. 140, and in *Int. Organ.* I (1947), pp. 44 and 316.

Cases referred to in the text are listed in the index.

A.J.	American Journal of International Law. Published by the American Society of International Law. 1907—.
Annuaire	Annuaire de l'Institut de Droit International. 1873—.
Annual Digest	Annual Digest of Public International Law Cases; being a selection from the decisions of international and national courts and tribunals. 8 Vols. London, 1919-1941.
Bib. Viss.	Biblioteca Visseriana. (Published at irregular dates). La Haye, 1923—.
Borchard	E. M. Borchard. The Diplomatic Protection of Citizens Abroad, or, The Law of International Claims. New York, 1915.
Brierly	J. L. Brierly. The Law of Nations. Oxford, 1928.
Briggs	H. W. Briggs. The Law of Nations. Cases, Documents, and Notes. New York, 1938.
B.Y.I.L.	The British Yearbook of International Law. London, 1920-1921 —1939, 1944—.
Com. Prog. Cod.	Documents of the Committee for the Gradual and Progressive Codification of International Law (League of Nations). Also found in *A.J.*, Vol. 20, Special Numbers for July and October, 1926.

Davis	Harriet Eager Davis. Pioneers in World Order. Columbia University Press, 1944.
Dept. of State Bull.	The Department of State Bulletin. United States Department of State. 1939—.
Dept. of State Pub.	The Department of State publications are numbered consecutively and also subdivided into numbered series. Washington, Government Printing Office.
Dickinson, *Cases*	E. D. Dickinson. A Selection of Cases and Other Readings in the Law of Nations. New York, 1929.
Dickinson, *Equality*	E. D. Dickinson. The Equality of States in International Law. Harvard University Press, 1920.
Documents Am. For. Rel.	Documents on American Foreign Relations. (Annual Volume.) Boston, World Peace Foundation, 1939—.
Eagleton	C. Eagleton. The Responsibility of States in International Law. New York University Press, 1928.
Evans	L. B. Evans. Leading Cases on International Law. Chicago, 1922.
Fauchille	P. Fauchille. Traité de Droit International Public. Tome I (in three Parts, or volumes); Tome II. Paris, 1923-1925.
Fenwick	C. G. Fenwick. International Law. 2nd Ed. New York and London, 1934.
Fenwick, *Cases*	C. G. Fenwick. Cases on International Law. Chicago, 1935.
Foreign Affairs	Foreign Affairs. Published quarterly by Council on Foreign Relations, Inc., New York, 1921—.
F.P.A.	Foreign Policy Association. Information Service. New York.
Goodrich and Hambro	L. M. Goodrich and E. Hambro. Charter of the United Nations. Commentary and Documents. Boston, World Peace Foundation, 1946.
Gonsiorowski	M. Gonsiorowski. Société des Nations et Problème de la Paix. 2 Vols. Paris, 1927.
Grotius Society	Transactions of the Grotius Society. (Annual volume.) 1916—.
Hackworth	G. H. Hackworth. Digest of International Law. 9 Vols. Washington, Government Printing Office, 1940-1944.

Hague Acad.	Academie de Droit International. Recueil des Cours. (One volume, 1923; five volumes per year thereafter. Numbered consecutively and by years.) Paris.
Hall	W. E. Hall. A Treatise on International Law. 8th Ed. by A. Pearce Higgins. Oxford, 1924.
Hearings	Hearings before the Committee on Foreign Relations, United States Senate, Seventy-ninth Congress, First Session, on the Charter of the United Nations for the Maintenance of International Peace and Security. Washington, Government Printing Office, 1945.
Howard-Ellis	C. Howard Ellis. The Origin, Structure and Working of the League of Nations. Boston and New York, 1928.
Hudson, *Cases*	M. O. Hudson. Cases and Other Materials on International Law. Second Edition. American Casebook Series. St. Paul, 1936.
Hudson, *International Legislation*	M. O. Hudson. International Legislation. A Collection of Multipartite International Instruments of General Interest, beginning with the Covenant of the League of Nations. 7 Vols. Washington, Carnegie Endowment for International Peace, 1931-41.
Hudson, *World Court Reports*	M. O. Hudson. World Court Reports. A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice. 4 Vols. Washington, Carnegie Endowment for International Peace, 1934-43.
Hyde	C. C. Hyde. International Law, Chiefly as Interpreted and Applied by the United States. 2nd Revised Ed. 3 Vols. Boston, 1945.
Int. Agencies	International Agencies in which the United States Participates. Department of State Publication 2699.
Int. Con.	International Conciliation Pamphlets. Carnegie Endowment for International Peace. New York.
Int. Organ.	International Organization. Quarterly. Boston, World Peace Foundation, 1947—.
Jessup	P. C. Jessup. Law of Territorial Waters and Maritime Jurisdiction. New York, 1927.

Knudson	J. I. Knudson. A History of the League of Nations. Atlanta, 1938.
Lawrence	T. J. Lawrence. The Principles of International Law. 7th Ed. by P. Winfield. Boston, 1923.
L of N	Documents issued by the League of Nations, followed usually by the catalog number, found in the lower right hand corner of the document.
League Year-Book	The League Year-Book. Edited by J. Jackson and S. King-Hall. New York and London, 1932-34.
Madariaga	A. de Madariaga. Disarmament. New York, 1929.
Malloy	W. M. Malloy. Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776-1909. Senate Document No. 357, Sixty-first Congress, Second Session. 2 Vols. Washington, 1910.
	Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers. Vol. III, compiled by G. Charles. Supplement, 1913, to Senate Document No. 357, Sixty-first Congress, Second Session, Washington, 1913.
	Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1910-1923. Vol. III, compiled by C. F. Redmond. Senate Document No. 348, Sixty-seventh Congress, Fourth Session, Washington, 1923.
	Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1923-1937. Vol. IV, compiled by E. J. Trenwith. Senate Document No. 134, Seventy-fifth Congress, Third Session. Washington, 1938.
McNair	A. D. McNair. The Law of Treaties. British Practice and Opinions. Columbia University Press, 1938.
Mexican Cl. Com.	Claims Commission, United States and Mexico. Opinions of Commissioners under the Convention Concluded September 8, 1923, between the United States and Mexico. February 4, 1926, to July 23, 1927. Washington, Government Printing Office, 1927.

Miller	D. H. Miller. The Drafting of the Covenant. 2 Vols. New York-London, 1928.
Moore, *Arbitrations*	J. B. Moore. History and Digest of the International Arbitrations to which the United States has been a Party. . . . 6 Vols. Washington, Government Printing Office, 1898.
Moore, *Digest*	J. B. Moore. A Digest of International Law. . . . 8 Vols. Washington, Government Printing Office, 1906.
Nys	E. Nys. Le Droit International. Les Principes, les Théories, les Faits. 3 Vols. Bruxelles, 1904.
O.J.	Official Journal. League of Nations.
Oppenheim	L. L. Oppenheim. International Law. A Treatise. 2 Vols. 4th Ed. by A. D. McNair. London, 1928.
Ottlik's *Annuaire*	Annuaire de la Société des Nations. Preparé sous la direction de G. Ottlik. Genève, 1920—.
P.C.I.J.	Permanent Court of International Justice. Series A, Judgments; Series B, Advisory Opinions; later, Series A/B.
Phillimore	Sir Robert Phillimore. Commentaries upon International Law. 3rd Ed. 4 Vols. London, 1878-1889.
Politis	N. Politis. The New Aspects of International Law. Carnegie Endowment for International Peace, Pamphlet No. 49. Washington, 1928.
Pol. Sci. Q.	Political Science Quarterly. New York, 1886—.
Pol. Sci. Rev.	The American Political Science Review. Published by the American Political Science Association. 1907—.
Potter	P. B. Potter. An Introduction to the Study of International Organization. 3rd Ed. New York, 1928.
Proc. Am. Soc.	Proceedings of the American Society of International Law. Washington, 1907—.
Ralston	J. H. Ralston. International Arbitration from Athens to Locarno. Stanford University Press, 1929.
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Report to the President	Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State. Department of State Publication No. 2349. Washington, Government Printing Office, June 26, 1945.
R.D.I.	Revue de Droit International. Paris, 1927—.
R.D.I. (Genève)	Revue de Droit International, des Sciences Diplomatiques et Politiques. Genève, 1923—.
R.D.I.L.C.	Revue de Droit International et de Législation Comparée. Bruxelles, 1874—.
R.D.I.P.	Revue Générale de Droit International Public. Paris, 1869—.
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Resolutions of the General Assembly	Resolutions adopted by the General Assembly during the First Part of its First Session from 10 January to 14 February 1946. United Nations, London, July 1, 1946. Document A/64. Resolutions adopted by the General Assembly during the Second Part of its First Session from 23 October to 15 December 1946. United Nations, New York, January 31, 1947. Document A/64/-Add.1. (These two documents are continuously paged and a continuous numeration for the resolutions is provided on pages 201-203 of Document A/-64/Add.1.)
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Schücking-Wehberg	W. Schücking und H. Wehberg. Die Satzung des Völkerbundes. Berlin, 1924.
Scott	J. B. Scott. Cases on International Law. St. Paul, 1922.
Stowell	E. C. Stowell. International Law. New York, 1931.
Survey	Survey of American Foreign Relations. Published for the Council of Foreign Relations. (Annual volume.) Yale University Press, 1928-1931. Continued under the title The U. S. and World Affairs. Annual Volume 1931—. New York.
Temperley	History of the Peace Conference of Paris. 6 vols. Institute of International Affairs, London, 1920-21.
Ten Years of World Cooperation	League of Nations. Ten Years of World Cooperation. Secretariat of the League of Nations. 1930.
UN Bulletin	United Nations Weekly Bulletin. Published by the Department of Public Information of the United Nations. 1946—.
UNCIO	Documents of the United Nations Conference on International Organization, San Francisco, California, April 25—June 26, 1945. Published in cooperation with the Library of Congress by the United Nations Information Organizations. 15 vols. and index. New York. (Documents will be cited by the document numbers.)

UN Doc.	Documents issued by the United Nations, cited by document number or other designation.
UN News	United Nations News. Monthly. Published by the Woodrow Wilson Foundation.
Wertheimer	E. F. Ranshofen-Wertheimer. The International Secretariat. A Great Experiment in International Administration. Washington, Carnegie Endowment for International Peace, 1945.
Wheaton	H. Wheaton. Elements of International Law. 8th ed. by R. H. Dana. London, 1866.
Williams	Sir John Fischer Williams. Chapters on Current International Law and the League of Nations. London, 1929.
W.P.F.	World Peace Foundation Publications. Boston.
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Wright, *Study of War*	Quincy Wright. A Study of War. 2 vols. University of Chicago Press, 1942.
Yepes and da Silva	J. M. Yepes and P. da Silva. Commentaire théorique et pratique du Pacte de la Société des Nations. 3 vols. Paris, 1934-1939.

PART I

THERE IS, and has been for many centuries, a community of nations. Its members have been steadily pushed into closer cooperation by certain forces, primarily of economic interdependence and, more recently, the fear of war. Though the states which are its members claim to be sovereign, they nevertheless submit to rules of law which have grown up through usage or which they have accepted in treaties. In the earlier stages of this community, relationships between states were usually bilateral, but many of these relationships were of interest to all states and rules and procedures were developed which applied equally to all. Institutions of the community as a whole were much later in appearing.

CHAPTER 1

THE COMMUNITY OF NATIONS

§ 1. Early Growth.—There is, in a broad sense, an international government today, though so weak and inadequate that the title of this book may reasonably be challenged. There is no "superstate," but in the community of nations there may be found law and organization, and this law is observed and enforced about as well as domestic law. No other term covers the content of the book so well.

In one sense, there has always been a community of nations. For nations are grouped human beings and the gregarious instinct, as well as the other forces which draw individuals together, also brings groups of individuals together. There has always been some meeting point of common interests: some trade, some emigration, some hospitality to or protection for aliens, some wars. And behind this, humanity has had certain instincts or feelings in common, and has been united in its struggle with the forces of nature. The same forces to which political scientists ascribe other forms of political organization have led to international organization. Man, said Aristotle, is a social animal; this instinct of sociability has led him through various forms of association, at first in tribes and clans, and later as peoples or nations.

GREEK. While rules of international law may be found as far back as 500 B.C., or before, the habit of the ancient world was for the most part isolation, and almost its only intercourse was war. "It is well known," says Oppenheim, "that the conception of a Family of Nations did not arise in the mental horizon of the ancient world." [1] In the Grecian peninsula the ancient rule of universal empire was disregarded, its group of homogeneous but separate peoples offering the nearest resemblance to the international family of today. Arbitration was known among them, and rules for the alleviation of warfare, as well as the ancient principles which upheld the sanctity of treaties and of ambassadors. The institution of the guest friend provided for the admission and protection of aliens. Toward international organization Greece contributed nothing more than the amphictyonies, or religious associations. But her history offers a compelling illustration, ex-

[1] Oppenheim, I, p. 55. (Refer to list of bibliographical abbreviations, p. xiii, above).

ceptional in those times, of the forces which draw together independent states which have interests in common.

ROMAN. It was long before a similar community of independent states again appeared, for the Roman state was a vast empire, allowing little room for international relationships.[2] A universal law, the *pax Romana* of which the Apostle Paul boasted, did prevail; but it was the law of one state reaching individuals within that state, not a law governing states themselves. Nevertheless, Rome made one contribution of great importance to international law, the *jus gentium,* in which there is a revived interest today. Aliens in Rome were tried before the *praetor peregrinus* according to their own laws. In the effort to ascertain these laws Rome accumulated the rules and customs of all nations: rules which, therefore, represented the fundamental legal principles accepted by all people. *Jus autem gentium omni humano generi commune est.* The *jus gentium* was a fertile source of international law in its formative period. Mention should be made also of the *jus fetiale,* which provided rules for the beginning and ending of wars, for heralds, treaties, and the like, and for the prosecution of claims against other states. Doubtless, too, the effects of a common law and à common culture, at any rate in their later study, were of some influence in building up international solidarity.

FEUDAL. The theory of a universal empire continued long after the fall of the Roman empire. It was maintained upon the one hand by the Church, on the other hand by the Holy Roman Empire. In the rivalry of this period, universalism could not survive, and a shocking epoch of decentralization followed. Feudalism and the Church stood in the way of the idea of the State, without which the modern community of nations would not be possible. But gradually nations began to shape themselves from the ruck of feudalism. As early as the Treaty of Verdun in 843 this process had started, and it continued until the abdication of Francis II in 1804 formally dissolved the Holy Roman Empire.

Centuries before this time facts had become too strong for theories. Important consolidating forces were at work. Christianity developed a community of thought in western Europe, where the origin of the community of nations is to be found. It had its own language; it taught a common morality; its international force was exhibited in the so-called "Truce of God" and in that widespread sportsmanship of arms which was called chivalry. The unifying effect of the Crusades was enormous. After them came a tremendous expansion of trade between different parts of the world, especially sea-borne trade, which called for codes of sea law and resulted

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[2] In her early history, however, Rome was one of a community of nations, C. Phillipson, *International Law and Custom of Ancient Greece and Rome,* 2 vols. (London, 1911), I, pp. 107-108; Fenwick, p. 11. And Cicero spoke of a *civitas gentium.*

in the formation of such an international organization as the Hanseatic League. Already attempts were being made to create a philosophy for the international order. The poet Dante concerned himself with the problem, and in 1305 Pierre Dubois, taking as his subject the recovery of the Holy Land, devised a scheme for an alliance of Christian powers to maintain peace.

Rise of Nation States. The rise of national consciousness meant first the support, and later the overthrow, of absolutism. As nation states grew stronger, the power of Empire and Papacy diminished. From feudalism was borrowed the idea of territorial control and personal allegiance. Machiavelli exalted the power of the state; Bodin contributed a doctrine of sovereignty. The Thirty Years' War was a period of transition from one system to another, a period of great confusion. The success of the Reformation put an end to the supremacy of both the Empire and the Papacy, and from this time forward, variety and individualism became possible, and separate nations became firmly established.

Peace of Westphalia. There were thus at work both separatist and consolidating forces; and recognition of both was shortly to be secured. So long as the theory of universal empire continued there could be nothing but internal law; there could be no law between states, for there could be only one state. Not until the legal right of independent coexistence of states was admitted could there be a community of nations, with laws and customs based upon common needs and interests. This recognition, political and legal, was given by the Peace of Westphalia, in 1648. Article V of the Treaty of Osnabrück, one of the treaties which constituted that famous Peace, reads:

> That there be an exact and reciprocal equality amongst all the Electors, Princes and States of both Religions, conformably to the State of the Commonweal, the Constitution of the Empire, and the present Convention: so that what is just of one side shall be so of the other, all violence and force between the two Parties being forever prohibited.[3]

And the signatories were bound to maintain all the provisions of the Peace. While the Treaty concerned members of the Empire primarily, there could be little question that if the Empire admitted the independence of its members, the independence of states outside the Empire, such as France and England, which had long ago asserted their freedom, would go unchallenged.

The Peace of Westphalia is therefore regarded as laying the foundations of the modern international society. "Implicitly, if not by its definite provisions, the Peace of Westphalia created what was in effect a new society

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[3] R. B. Mowat, *The European States System* (London, 1923), p. 16

of nations and gave to that society a fundamental law." [4] It was recognition of the pressure of circumstances, at that time only beginning to be felt, which was to lead these nations into closer and closer connection, and to compel them to accept rules and institutions for their common interest. Nationalism and personal sovereignty remained the dominant forces, distinctly particularistic in character. The principle of territorial jurisdiction was established, each state being supreme within its own boundaries. From this independence flowed equality, for all states were equally sovereign, and all were now recognized as such in a binding treaty.

Balance of Power. But no one of them was ever again to be permitted to prevail over the others. The only salvation of each lay in the admission of a legal right of independence on the part of others. It then became necessary, on the one hand, to lay down rules of common action so as to prevent interminable warfare, and, on the other hand, to initiate the principle of the balance of power, which was to dominate the politics of Europe during the seventeenth and eighteenth centuries. This principle was not a new one, for Polybius had said many centuries before, "Nor ought such a force ever to be thrown into one hand as to incapacitate the neighboring states from defending their rights against it." [5] Nor can it be recognized as a principle of international law, although the Peace of Utrecht spoke of "the establishment of a just peace for Christendom, by a just equilibrium of power." It was no more than an expression of the principle of self-preservation, a practical solution of a problem, a doctrine which, on the whole, was applied for the good of the world. It has doubtless safeguarded weak states, and has certainly prevented any one power from attaining permanent hegemony in Europe. The principle of community action was thus recognized, though in its most vague form and with the most rudimentary modes of expression. It was only when the whole community was threatened, by a Louis XIV or a Napoleon, that the disjointed machinery of the balance of power set to work. We shall see later how it developed into the Concert of Europe, and finally into the closer cooperation of the League of Nations.

Obstacles. Various obstacles hindered international development during this period. Peoples were still ruled by monarchs whose dynastic and personal ambitions shaped policy; Machiavellian diplomacy was the order of the day. Even later, when democracies replaced autocracies, the situation was little better, for democratic nationalism was as selfish and as whimsical in expression as had been the king. Furthermore, democracy carried over into its theory of the state the doctrine of sovereignty, of absolute

[4] Fenwick, p. 18.

[5] Quoted by J. B. Scott, in E. A. Walsh, *The History of International Relations* (New York, 1922), p. 100.

and illimitable authority, which made the state an end in itself, intractable and non-cooperative.

It was a period of low ebb for international law. Treaties were disregarded; Frederick the Great observed that he acted first and then found lawyers to justify his actions. This was the day of the Wars of Succession, of the violation of the Pragmatic Sanction, of the Partition of Poland. The heterogeneous character of the states which had sprung from the soil of feudalism added to the difficulty, for there were political organizations of every type and belief, aligning Protestant against Catholic, monarchy against democracy, eastern against western Europe. Colonial rivalries, in the day of the mercantile theory, produced bitter struggles. And as serious as any difficulty was the lack of communications, a lack which made acquaintanceship slow and bred fear and suspicion based upon ignorance.

Unifying Forces. On the other hand, these very elements of conflict, as we shall see, compelled closer agreement, and there were many other forces leading to understanding. The sequence of Renaissance and Reformation produced a European "republic of letters," which meant a certain community of thought and ideals, and which had one striking advantage over our own day—a common language, for all educated men spoke Latin. The itinerant student, even the itinerant professor, was unconcerned with national boundaries.

Coincidentally, there was an amazing expansion of commerce, and men were drawn together by a much more compelling interest than culture, that of self-interest. Individual commercial gain has proved a more potent force than culture, and trade has steadily surpassed national frontiers and rivalries. Colonial and trade rivalries have produced many conflicts, so many, indeed, that rules for commercial intercourse became essential. Thus appeared the early codes of maritime law, the consular service, and international rules for acquiring title to newly discovered lands, defining their boundaries, and similar matters.

The reduction of the number of states after the feudal period aided in the development of the community, as did their proximity and necessary contacts in the close quarters of Europe. This also helps to explain why the community of nations found its beginnings in Europe.

About the end of the eighteenth century, new forces made their impression, with incalculable results. The American and French Revolutions enhanced the importance of the individual and made democratic nationalism possible. The development of international relations and law, says Martens, is always in proportion to the respect paid to the individual within the state. It now became possible to pursue the interests of individuals rather than of monarchs. Some degree of popular control over foreign policy was practicable and the needs of individuals provided a more stable constant in

organizing the community, as the development of business interests subsequently shows. The way was prepared for a community of nations, of peoples rather than of states. With the liberation of the individual, with freedom of thought encouraged by education and developing intelligence, a philosophy of international relationships began to appear, a philosophy now within the grasp of the average individual.

§ 2. The Pressure of Interdependence.—During the nineteenth and twentieth centuries two great forces developed which were to change habits of life over the entire world.[6] These were interdependence, primarily economic and, consequent upon such interdependence, the changing character of war. Human beings were pushed together by these forces, and toward an international system which could help them to solve their new problems, and relieve them of the increasing danger of modern war.

Industrial Revolution. The Industrial Revolution, with its incredibly far-reaching effects in the integration of human interests, was of transcendent importance in the growth of the community of nations. It has made not only individuals but nations utterly dependent upon each other. First among its effects, doubtless, was the improvement of communications, without which other effects could scarcely have been felt. The many new inventions—railways and steamships, the telegraph and telephone, newspapers, and now aviation, moving pictures, and radio—have brought the different peoples of the world so much closer together that the world is now, in effect, only a small fraction of its former size. The radio disseminates information throughout the world with such instantaneous promptitude that peoples know each other far better, and the psychological effects of fear or hate founded upon ignorance are steadily being diminished.

But the effects of the Industrial Revolution go much deeper, reaching down to those motives of individual self-interest which dominate human action. It became possible for individuals to acquire large fortunes, and since money alone was able to earn profits, the capital reserves thus accumulated sought investment. Such investments might more easily or more profitably be sought in foreign lands, and this caused investigation of conditions in such lands, and, in general, a greatly increased interest in foreign countries. The interest was mutual, for while the more highly developed industrial country needed raw materials from abroad and foreign markets in which to sell, the less developed country needed to sell its raw materials, and was forced to rely on the industrial country not only for necessary machinery and manufactured articles, but also for the utilization of its natural resources. If the capitalist in the more advanced country desired to put his money to work abroad, the industrialist of the newer country

[6] Most of what is said in this and the following section is derived from the author's book, *The Forces That Shape Our Future* (New York, 1945).

needed financial aid, and was as eager to borrow as the capitalist to sell. To carry on this essential exchange, individuals must go from one state to another, and governments naturally took an interest in such movements. And so rules of international law for the protection of aliens and their property, as well as international institutions, were added to the machinery set up by private enterprise for economic exchange.

The importance of this spectacular development cannot be overemphasized. International industrial organization has proceeded with its division of labor until nations as well as individuals are dependent upon each other. From this interdependence international government, like other government, inevitably springs. The movement has progressed at such a rapid rate that even individuals, caught up as they are within the system, scarcely realize that the day of individual self-sufficiency is gone. It is not surprising that the realization comes the more slowly to nations.

It may be of some help, therefore, to reflect upon the changes which have occurred in American life since the making of the Constitution, and thus illustrate from our own national experience the consolidating effects of this interdependence. At the time of the birth of our nation, an individual was, or could be, almost entirely self-sufficing. He could produce upon his own land practically everything required to meet his needs—timber for his home, food for his family, and simple clothes. Today, even if he wanted to, the average individual in a city could scarcely produce unaided a single article for his ordinary requirements in life. In the old days, the parent who needed milk for his child could go out into his back yard and extract it for himself, or borrow a pailful from his neighbor. Today, if he tried such a course of action, he would in many places be arrested for maintaining a cow upon his premises, or his neighbor might be penalized for selling milk without a license, or uninspected.

> The farmer can still get a drink of milk for himself, but the city dweller—and by now a majority of us are city dwellers—depends upon the efforts of perhaps a million persons for the delivery of a bottle of milk to his door each morning.
>
> This is not exaggeration; it is an authentic illustration of the effects of interdependence. Suppose we take a dairy farmer in Connecticut or upstate New York, who contributes to the milk supply of New York City. To raise the food for his cows, agricultural implements, fertilizer, seed, and other things are needed, and to supply each of these needs we must go back to factories and business firms. The milk, when ready, is picked up by a truck, and the truck represents not only the trucking company that operates it, but a great automotive industry that makes the trucks, and a great oil industry that supplies the fuel. The milk is carried to a railway for transportation to New York City, and this involves the hundreds of thousands of employees of the railway; it is characteristic of the system that it is impossible to pick out

two or three of them and say that they were the ones who delivered the milk. When it reaches New York, it is put through various processes and bottled; this brings in not only the men at work at the dairy station, but thousands of others who make the machinery, the bottles, the paper caps for the bottles, or who see that the milk is in good sanitary condition. The milk is then delivered from door to door by small vehicles, horse or auto, and these require stables or garages, as well as more manufacturers. Finally, the bill collector comes around, and behind him are the manufacturers and printers and distributors of paper and ink and pencils and typewriters!

You may think that I am stretching things somewhat in order to find a million men behind the delivery of a bottle of milk, but I am not. If necessary, I can add even more, for railways depend upon the coal miners, and the trucks depend upon those who construct highways, and every industry depends upon some other industry. Whether you get your milk at the proper time and in the proper shape may easily depend upon the assembly line of a factory in Detroit, upon how much sleep a workman in the Baldwin Locomotive Company had, upon a strike in an oil refinery or a coal mine.[7]

The average individual believes that he gains by having the necessities of life supplied for him through specialized effort, which should more or less guarantee them as good. To this end he is willing to give up more and more of his personal self-sufficiency and to trust more and more of his affairs to the increasing machinery of law and governmental administration. But there is more than willingness involved: he could not do otherwise, granted the complicated economics of modern life. He could not in any large city have even that vital necessity, a drink of water, but for a governmental organization involving perhaps hundreds of millions of dollars and a great staff for maintenance. In this situation, the group finds it necessary to sacrifice individual liberty more and more, and through governmental action to set up restraints and safeguards about the individual, so that other individuals may be assured that they will not suffer from their dependence upon him. Not every man can carry his own weights and measures with him; not every man is enough of a chemist to know whether the food or drugs that he buys are adulterated or not. And if he did know, other individuals might not trust his measures, or his knowledge. Aside from retiring to a desert island and living in the fashion of a Robinson Crusoe, his only hope for maintaining life and happiness is through the constantly growing protection of government.

Interdependence of Nations. Similarly, if not yet to the same degree, peoples in various countries have come to depend upon each other to such an extent that the happiness, even the life, of individuals within

[7] *Ibid.*, pp. 10-12.

those countries is at stake. Foreign policy is shaped by such pressures. But for their overseas trade, the English people would starve in a few weeks; at the beginning of World War II, the British Food Minister noted with pride that the food reserve had been built up to such an extent that England could carry on for three or four months if cut off from the rest of the world. Because of this dependence, Britain has felt it necessary to maintain a powerful navy and an Empire and to base her policy upon control of the seas. The United States, on the other hand, being comparatively self-sufficing, could—until recently—adopt a policy of isolation. Foreign policy is, however, interested in such things as oil, and the present-day struggles for oil rivals in its intrigues and adventures the explorations and rivalries of three centuries ago. A new struggle is probably now in the making, for uranium.

The tariff has become an international issue. When the McKinley Tariff Act was put into effect by the United States, 1200 workers in the pearl button factories of the city of Vienna were laid off. The Hawley-Smoot Tariff evoked official protests from 33 foreign states, the French Government observing that it would do as much harm to Brittany as if that province had been devastated by war. The success of certain Paris *couturiers* and other exporters has been dependent to a certain extent upon their ability to evade American tariff laws.

The world is much smaller than it used to be. A war could be fought and won in Europe, a century or so ago, before news of it reached the United States. Indeed, the battle of New Orleans was fought a fortnight after the Treaty of Ghent was signed, and it was a month later when the news arrived that the war had been over before the battle was fought. Today, news is transmitted so rapidly that an American listening before his radio can hear what a foreign statesman has to say before the people in the rear of the hall where he speaks can hear him. Two centuries ago it required weeks of travel to cross the Atlantic Ocean or the American continent. Today, it is possible to reach any part of the world within forty hours, and it will not be long before it will be done on regularly scheduled flights.

In this smaller world, people are thrown together more closely than ever before. In a world so organized industrially, the prosperity of an individual within one state more and more depends upon what is happening in another state. The factories and the persons who depend upon them must draw their raw materials from all over the world; the more advanced industrially a state is, the more it depends upon other countries. The proportion of imports from abroad is, for the United States, small compared with its total trade, but these imports include things like vanadium, or manganese, without which our precision machinery could not operate; or tungsten, without which "the whole TVA development would be useless";

or rubber, without which we would be pushed back to "horse and buggy days"; and other things which would make us either do without or have inferior telephones and other such instruments. Nor is scientific invention a sufficient answer, for the substitute materials must also be found. If synthetic rubber exhausts our petroleum supply, we are forced to search the world over for oil. The other side of the matter is that other states depend upon us, or upon each other, and could not therefore permit any state to close its doors against trade.

The result of this interdependence is that each individual is affected, and notably in his pocketbook, by what happens in other states; indeed, life itself may depend upon reliable and regular international intercourse. Many illustrations could be offered. The price of automobile tires or silk stockings—or their availability at all—depends upon the import of rubber or silk; the use of nylon may wreck the livelihood of thousands of silk workers in various countries. When civil strife struck China, and roving soldiers ate up the hogs in Szechuan, Americans were unable to get toothbrushes with good hog bristles. When the dictates of style required that ladies be thin, the cereal producers and dairy people lost money. The wheat grower has long had the price of his wheat fixed at Liverpool, and the sisal from which is made the binder twine for his harvester is imported from Mexico. Fertilizer for the cotton crops of the South comes from abroad, and the jute bagging, in which the cotton is baled, must be imported from India. The canning industry, without tin from Bolivia and elsewhere, is turning to glass and bottlers must have corks from Spain. Practically all sports, besides being international in competition, are so in equipment: "the gut in the best tennis rackets, the bamboo in fishing rods and the silk or linen in fishing lines, the cork in baseballs, the celluloid in ping pong balls, all are imported." [8] In behalf of our cattlemen,

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[8] F. B. Boeckel, *The Turn toward Peace* (New York, 1930), p. 6. An advertisement of the international editions of *Time* and *Life* (May 18-24, 1947) carried a picture of an American living room with the following comment:

No matter where you live—East, South, West or North—it's a safe bet that something known as World Trade has stepped in and made itself at home right in your living room.

In fact, probably no part of your American-designed home could be as comfortable or as attractive as it is without the help of materials from dozens of different foreign countries. Your home, your business, your food, the very clothes you wear, all are intimately affected by America's two-way trade with the rest of the world.

For example, just look at this American living room and compare it with your own.

(1) No country in the world can produce sufficient wool to keep America supplied. Therefore, wool that goes into your wool carpets comes from many different countries —Scotland, China, Syria, Russia, India, Argentina, and 20 others.

(2) This young American mother is a veritable walking United Nations. The materials that go into her cosmetics come from all over the world—and her perfume may have in it ambergris from France, civet from Ethiopia, musk from China. The diamond in her ring comes from South Africa, and her alligator and crocodile skin shoes may come from Mexico or Calcutta.

(3) The mahogany in this desk comes from Honduras. It is crossbanded with satinwood from Ceylon. The inkwell stand is of English silver, and the writing ink

the Department of State conducted a long diplomatic controversy with the Argentine Republic, and there has been an international Conference on Hides and Bones. The ordinary investor may find the value of his stocks and bonds affected by a revolution in Brazil, by a coal miners' strike in England, or by events quite unknown to him in countries as equally unknown. The mere enforcement of a law or administrative regulation in a foreign country may decrease the value of the stock of an American corporation, and affect banks in which the ordinary citizen has his small funds deposited.

The modern age is essentially an age of business. Political imperialism, colonial expansion, military glory, and ambition recede into the background before this preoccupying interest. The modern business demands, above nationalistic ambitions or national frontiers, stable conditions and definite rules of intercourse. It cannot operate without them, and so business drags in the trail of its own enterprise reluctant political organization, which is always far behind economic advance.

But while economic forces are doubtless the most impressive and compelling factors in the life of prosperity-loving human beings, international interdependence is revealed elsewhere as well. Science and culture transcend all boundary lines, and are only slightly hampered by linguistic difficulties. The railway, the telephone, the radio, the airplane, atomic energy, or any one of a thousand other important discoveries are each the joint product of men of various nationalities who combined their knowledge for the benefit of mankind. Modern inventions and methods are almost at

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is durable only because of the gallic acid it contains—which comes from China, Syria, and Turkey.

(4) Draperies like these contain mohair—from Africa, Turkey, and Iran. The picture is an English mezzotint and the screen is Chinese.

(5) American-made radio-phonographs contain quartz crystals from Brazil and mica from India, Madagascar, Argentina, and Canada. The shellac in records comes from India and the resins from the Netherlands East Indies and the Belgian Congo.

(6) The paint on the walls may contain linseed oil from Argentina, castor oil from Brazil, tung oil from China, pigments from Belgium, Spain, France, Canada, and natural resins from all over the world.

(7) The telephone on the table contains 36 different materials—18 of which come from abroad. The lamp's shade and base are made of Chinese products.

(8) Father's suit is English flannel, and the brier for his pipe comes from Italy and Algiers. And the U. S. tobacco that goes into his pipe and cigarettes isn't only blended with tobacco from Turkey, Bulgaria, Greece, Cuba, Syria, and Sumatra, but also contains flavoring from 57 countries.

(9) Webbing for American-built sofas is made out of Indian jute. And sofas are often stuffed with kapok from the Philippines.

(10) Over a half-dozen nations meet on this coffee table. The coffee itself comes from Brazil, Colombia, and Central American countries. The sugar comes from Cuba, the coffee cups from England, the marble top from Italy.

(11) Oriental rugs, of course, are imported—and this one comes from Sarouk in Iran.

This is the story of how World Trade can affect you in just one room of your house. But it doesn't end there. The jobs of millions of Americans—perhaps yours—are dependent wholly or in part on our trade with the rest of the world.*

* Courtesy of TIME-LIFE International, Copyright Time Inc., 1947.

once known throughout the world, and the improvements effected are immediately available. The exchange of students and teachers and of scientific journals, as also the publication in newspapers of important scientific matters, keeps all peoples in touch with the latest improvements. Without such exchange of knowledge, the progress of civilization would be incalculably slower. Indeed, it is of such importance that governments as well as private enterprise have set up international bodies to facilitate it. Social intercourse has its effects upon community acquaintance and understanding. The multitudes of tourists who visit other countries each year; international marriages—to take the example of the GI in Germany; the connections made by those who for one reason or another must go abroad—all build up the feeling that human beings, wherever located, are part of one great family and that it would be a vital loss for them to be without the means of profitable intercourse.

It is necessary to emphasize this situation of mutual dependence, for it is the foundation upon which modern society, domestic or international, has been built. It is the appearance of this factor which marks off the modern epoch, and which gives hope that the community of nations, through sheer necessity, will establish the government which it so badly needs. No state is able to live alone, or even alone to fight a war today; no individual can longer feel confident that his state can protect him in his needs. The state has become inadequate for these needs; there must be law and organization outside of and above the state to make reliable and fair the international intercourse upon which he depends. Slowly, peoples are recognizing the consequences of the vast changes which are so relentlessly changing their patterns of life. As they realize this, they have demanded more international law and government for the community of nations.

§ 3. The Pressure of War.—The scientific development and interdependence above described have changed the character of war and made it so terrifying an instrument that fear of war has now become a compelling pressure leading toward government within the community of nations. Interdependence called for rules and institutions; war calls additionally for executive power and for the physical force necessary to contravene the use of physical force by a state. The consequences of modern war upon the life of the individual are not realized by the average citizen. It is necessary to pay some attention to these effects, not only because they stir people to action, but also because of their influence in shaping international government.

Compared with today, war a century ago was not very harmful. It was carried on by small numbers of professional soldiers and the bulk of the population hardly knew that their country was engaged in war, except for increased taxes, or unless the battle swept near them and foraging soldiers

took some of their possessions.[9] Other nations were unconcerned. Today, however, war reaches every person and every thing, not only in the countries at war, but in every other country. More than this, it can hardly be fought except upon a totalitarian basis, and it therefore endangers democracy and private enterprise, and, more broadly, undermines the bases of our civilization. It has become so enormous that preparation for it must be continuous. It has spread into other fields and become so varied an operation that, to use a *bon mot* attributed to Clemenceau, "war is too serious a matter to permit it to be directed by military men." Certainly, the professional knowledge of a military man a few decades ago is insufficient; scientists must work steadily to keep a nation's knowledge of warmaking devices ahead of that of its rivals. Industrialists, business managers, experts of all kinds must pool their knowledge, and keep steadily at work so as to be ahead, or merely up to date, when the next war comes. Thus, war tends to become universal, totalitarian, and permanent—a continuing process involving economic penetration, fifth columns, terrorism, and psychological warfare. We cannot stop for what we used to call peacetime; war and the preparation for war will occupy a large part of the energies and resources of a nation at all times.

Persons. A modern army is counted in millions instead of thousands. While it is no longer a small professional caste, its members must have had months of training before they can play their respective parts. Training on such a scale can not be given after a war starts; the United States was able to do so in the last two wars because the British Navy protected us during our months of preparation. That will not be possible again; indeed, the United States will probably be the object of first attack. Volunteering will not solve this problem; it can be met only by compulsory military training in time of peace, and conscription both for the army and for labor in time of war.

The numbers in uniform will presumably be greater than ever before (it is too early as yet to predict what numbers will be required for atomic warfare), but this will be only the beginning of the demands of the hungry god of war. For every man at the front, according to varying estimates, twenty-five to fifty persons are needed to supply him with his requirements. Factories of all sorts must be converted to war production, transportation provided, and communications developed. For this effort so many are needed that women and children, as well as men, and the blind and the lame will all be put to work. The girl who works in a factory producing aerial bombs or rockets, the scientists and their helpers at Oak

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[9] The total military force of United States, during the War of 1812, was 17,000 men; in the Mexican War, 4400; in the Spanish American War, 18,700. See Wright, *Study of War* (Chicago, 1942), I, p. 662.

Ridge, the coal miner or oil worker, the railway man or the merchant mariner—any one of them may in fact contribute as much toward winning the war as a soldier at the front.

Such persons must logically be subject to attack. International law has long made a differentiation between the combatant and the noncombatant and has tried to protect the latter, but this distinction is no longer valid since the man in uniform today is not the only person who contributes to the winning of the war. Modern war is, indeed, not won by a few thousand soldiers on a few acres of battlefield; it is won by breaking the morale of a people, by destroying their will to resistance. Aside from the fact that the former noncombatants may now be regarded as combatants, it is part of the strategy of modern war to injure and frighten as many of the population as possible. Fear and danger and thirst and starvation—these are the weapons of modern war, and they are directed against every individual. If it is difficult to realize the inhumanity of this kind of war, it is perhaps even more difficult for a democracy to realize that it must employ such measures against the persons of the enemy. At any rate, practically all persons will be called into service and all without exception will be subject to danger in the next war—if we permit it to come.

THINGS. Another rule of international law has been wrecked by the character of present-day war. The law of war was once able to maintain that private property was to be protected; that it was not subject to capture, but must be paid for; and that it was not subject to destruction, unless for military exigency—e.g., a house in the midst of a battlefield. But today, military exigency covers complete robbery and devastation. This, too, is logical, according to the peculiar logic of war, for modern war requires and uses all things. No state can supply itself with the vast and varied amounts of materials which it must have. The more materials a state can acquire by seizure from enemy people, the more it strengthens itself and weakens the enemy. A German plant producing ball bearings was one of the principal objectives of Allied air attack; oil refineries in Rumania were another, and it did not matter that they were owned by American companies.

It was once legitimate to fire only upon a "fortified town" or a "military objective"; anything else was protected by the law of war. Today, anything may be a military objective—a power plant, a railway junction, a bridge, a dam, a factory, even a school or a hospital if the objective is to weaken enemy morale. Such things may be more important than forts or ships, though destruction of private property is particularly important at sea. Here again, a rule of international law has been smashed by the methods of modern war. There was once a distinction between contraband and noncontraband goods, the former being those things used in

making war. But now, everything is used in making war. Blockade no longer covers merely a port; a whole continent is now blockaded, from a distance, and egress as well as ingress is prohibited. It was once forbidden to sink a ship without warning and without saving the lives of those on board. But the airplane or submarine cannot obey such a rule, and now the ship must be destroyed, not only to prevent its cargo reaching the enemy, but also to prevent its future use by the enemy. Even ships carrying food are destroyed, for the sooner the population can be starved, the sooner the war will end. During the World Wars, the shipbuilding industry was hard put to it to build ships faster than they were sunk. The destruction on land and sea was incredible. It will doubtless be surpassed in the next war.

NEUTRALS. The area of war was once confined to the belligerents, and indeed to small portions of their territory; other states could legally and actually remain neutral. But the law of neutrality, like practically all else of the law of war, was destroyed by the past few wars and one may confidently assert now that it is an obsolete status.

> In the long struggle to maintain a balance between the rights of the belligerent and the rights of the neutral, the former gained steadily, for he was armed, fighting desperately, and willing to take risks, whereas the defenseless neutral sought only to avoid fighting. If the neutral should fight for his rights—as the United States twice has done—he lost his neutrality and became involved in war; if he did not fight for his rights—which was our situation before Pearl Harbor—he lost steadily in economic strength, was rendered more vulnerable through loss of possible allies and by the increasing strength of the belligerent, and was finally brought into the war under the most disadvantageous conditions.[10]

A few states were able to remain neutral in the past war, but only because the belligerents found it an advantage to have them as neutrals. The state which remains neutral suffers about as much as the belligerents, except as to lives lost. Neutrals may trade only as the belligerents wish, may receive only what is permitted to come to them, may suffer from lack of food or other supplies as much as the belligerents. The belligerent nation needs supplies and a strategic area within which to operate. It is little concerned by the feelings of the neutrals. No state can fight a war solely upon the basis of its own resources; it must reach outside. Thus war is no longer restrained within the territory of the belligerents. It sweeps

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[10] C. Eagleton, *The Forces That Shape Our Future* (New York, 1945), pp. 39-40; see also C. G. Fenwick, *American Neutrality: Trial and Failure* (New York University Press, 1940).

over boundaries like a forest fire; World War II, although it originated in eastern Europe, pulled in the Spahis of Northern Africa and the Papuans of New Guinea. The situation of small neutral states is dangerous not only to themselves, but to other states and to the community of nations as a whole. Their efforts to remain neutral, and their weakness, leave exposed the flanks of their larger neighbors; twice the insistence upon their neutrality by Belgium and The Netherlands has led almost to the defeat of those attacked by Germany through these states. The question is thus raised whether such small states can be permitted to elect neutrality, when such a status aids an aggressor and endangers the order and safety of the entire community of nations.

Total War. Any war requires centralized direction, but in a modern war, which makes use of all persons and all things, the government must take control over all. Hitherto, rigorous military control has been needed only for the army itself, but the last two wars have taught us that all the resources of the nations, human or material, must be submitted to the same sort of rigorous control. It is not only for combatant work that persons must now be drafted, but also for labor and assistance with a thousand skills. The United States must be prepared for war before it comes; she can no longer wait until it is here. Government must prepare for war: train its soldiers, organize production, reserve ample resources, keep ahead of technological advance. It will have to do these things in time of peace, and this means that it must exercise powers which ordinarily it would exercise only in time of war. We can not trade so freely, for economic weapons are important; we can not afford to permit an enemy to build up his war potential from our resources, as we did with Germany and Japan. Such interference with private enterprise will not be liked in this country. Indeed, it may be resisted by the very people in whose interest it should be done.

This speculation may be carried a little further. Will a democracy be able to survive this sort of war? Our people do not want compulsory military training in time of peace, nor government controls in preparation for war, nor regimentation of their lives and thinking. The methods by which Germany and Japan taught their peoples to support war may have to be used to teach the American people to be ready for war; the methods which our enemies employed against us we may have to employ, dislike them as we may. If democracy adopts the totalitarian methods which war requires it can hardly remain democracy; if it fails to make the effort, its national existence may be ended by the next war adventurer. The danger is greatest to the United States, for it is clear to any aggressor by now that he must first get the United States out of the way, presumably by surprise and overwhelming attack.

This dilemma, scarcely recognized, and the shocking terror and waste of war, have led people in recent years to demand not only an organization to help solve the problems of interdependence, but one which also is strong enough to prevent war itself. It was the shock of war—though it took two of them—which turned the vote of the American people from isolationism to the United Nations. It remains to be seen whether another lesson of like nature will be needed.

§ 4. Development of Community Organization.—These pressures have been discussed at what may seem to be undue length in a text of this kind only because they must be understood and kept in mind all through the book. The law and the institutions of the community of nations have developed because of these pressures, and they have operated with cumulatively increasing force in recent years. They must, therefore, be studied to understand why and how the community of nations is to be further developed. Since the resources of nature have not been distributed equally among nations, there must be a constant exchange among them. The conflicts which arise in this process of necessary exchange lead necessarily to rules, since law is ever the product of the resurgent pressure of mutual and conflicting interests and desires. It is well to recognize that such concessions as states are willing to make are inspired always by self-interest. However altruistic individual members of a group may be, the national group as a whole will make concessions only when forced to, or only when shown an advantage therein for the group. This is the first law of nature, the law of self-preservation. Nations have been much slower in recognizing that self-preservation may as well be achieved through cooperation as through conflict. It is through the coercive experience of the wastefulness of continuous strife, through the final realization that there is gain for all in submission to the general rules of intercourse, that law and government appear. If the law and government of the community of nations has been slower in evolving than within the state, it is because the appearance of the international community was much longer delayed (until nation states had been consolidated), and because of the slower development, waiting upon the Industrial Revolution, of that interdependence which had earlier manifested itself among individuals. As the force of this interdependence was felt among states, rules for their governance began to receive acceptance, and a law of nations began to prevail, of which we shall speak in our next chapter. Diplomatic and consular institutions appeared and, more recently, an increasing number of organizations.

Unofficial Organization. Literally thousands of unofficial international organizations have come into being, covering every interest of human life. Business corporations frequently became extranational in organization. An International Chamber of Commerce functions. A World

Parliament of Religions meets occasionally. There is an Interparliamentary Union, composed of members of national legislatures, which attempts to secure uniform legislation. In the vast field of education, there is a World Conference of Educational Associations. Even in the realm of sport, the Olympic Games represent international competition and organization.

OFFICIAL. Unofficial organization was followed by official international organization. The Balance of Power became the Concert of Europe, the League of Nations, and now the United Nations. The rules of international law increased in number, and tribunals of arbitrations appeared in cumulative progression. Such problems as traffic on international rivers reached legal adjustment and even administrative organization after centuries of conflict. The many interests which required adjustment led to conferences whose numbers have increased until there is hardly a day on which no conference is in session. These conferences have, of course, served many purposes. In some cases they were called merely to settle political problems, but even such a conference rarely failed to consider other matters of common interest, as, for example, the rules laid down by the Congress of Vienna concerning diplomatic rank, or by the Congress of Paris with regard to sea warfare. Many conferences were purposively legislative, the Hague Conferences being among the earliest in this respect. Other conferences were of a technical character, often resulting in the creation of an international administrative body (usually called an International Public Union) to take care of such matters as postal or telegraph service or of sanitary problems. These efforts we shall in later chapters study in more detail. But we may note at this point that they covered practically the entire range of human activity: law and order, health, communication, labor, social and humanitarian, cultural, and others.

WAR ORGANIZATION. During the two World Wars the process of international control was carried to a point never before reached. The action taken by the Allies affected most neutrals, as well as their enemies. Shipping was unified and a single authority directed the movements of neutral as well as of other ships. There was an Allied Wheat Executive and an Allied Petroleum Control in the first World War; there were Combined Chiefs of Staff, a Combined Food Board, and scores of other such joint agencies in the Second World War. In general, food and raw materials were rationed, not only to the Allied states, but to neutrals as well. The success of this effort raises an interesting question as to why states find it possible to accomplish, in time of war, measures whose success justifies their employment, and yet are unable in time of peace to reach far less drastic agreements for international welfare. At any rate, the unified cooperation thus achieved was never entirely abandoned. The Allied Supreme Council of the first World War transferred its powers to the

Conference of Ambassadors, and this informal body gradually surrendered them to the Council of the League of Nations. The meetings of the Heads of States in the second World War have been followed by meetings of Foreign Ministers. If and when they will turn their control over to the United Nations are questions not yet answered.

§ 5. Characteristics of the Community.

UNIVERSALITY. The development of the community of nations has given to it certain distinctive characteristics. In the first place it is universal, for it embraces the entire world. Until rocket transportation to other planets is put upon a practicable basis, it will have no coordinate bodies with whom to deal, no rivals to serve as check or spur, no common enemy against whom the community of nations must unite in self-defense. The community of nations at first embraced only a few states in western Europe, and non-Christian states were excluded. Gradually other European states were admitted. The nations of the Western Hemisphere came in as heirs to this civilization, but other non-European states were admitted slowly and upon conditions, most of them subject to the limitation of extraterritoriality. Japan was first relieved of this condition, and the prestige of defeating Russia attained for her the rank of a Great Power. Others more slowly satisfied the standards of the community, Turkey not until the Treaty of Lausanne, China only in our own day.

From the viewpoint of the development of international organization, which we are now studying, the most striking feature is the development within the older community of the League of Nations, and now of the United Nations. There is thus a universal community of nations, bound by customary international law and treaties. Within this universal community is the smaller community of the United Nations, more closely bound by the terms of the Charter, the Statute, and the agreements constituting the specialized agencies. Both the League and the United Nations have attempted some control over non-members, but it remains generally true that no state can be bound by the obligations of the United Nations (or of the League of Nations) unless the state has voluntarily accepted membership therein. There are thus two communities, with two systems of law, and with possibilities of evasion or conflict.

COMPONENT ELEMENTS. The basic unit of the international society is the nation state, of which there are now around seventy. They differ in many ways. Some are large in area and population, while others are small. To some degree, a state's authority in the world is commensurate with its size. Every type of political system is represented, although most states now claim to be democratic, and there are few that are wholly autocratic. They differ also in economic strength, in geographic location, in race, religion,

language, and in social ideals—a heterogeneous group. Yet they all possess certain things in common: territory, a stable political organization of the people therein, and a certain amount of homogeneity of ideals. Each is equal to any other before the law of the community; and all have independence, whatever this may mean in a particular case.

Cooperative. The test of membership in either community is submission to its rules and the assumption and maintenance of rights and duties therein. To such submission, and to such duties and correlative rights, economic and other forces of interdependence lead as inevitably as they have done in the historic evolution of political organization among individuals. Little choice is found. The greater the self-sufficiency of a people, the more abounding its supply of natural resources and its ability to exploit them, the longer may be its resistance to these compelling forces; but ultimately it must succumb. No matter how heterogeneous the group may be, how different in race or language or traditions or ideals, there are certain common needs to which all must bow, needs whose satisfactions are to be obtained only through obedience to common rules. No matter how high national pride may soar, it must submit, for example, to the rules of the Universal Postal Union, or deprive itself, to its great loss, of a vital means of communication. This is the practical situation, but it leads to juridical results. The only alternative is interminable and wasteful conflict, too costly to endure in modern life.

Nevertheless, the state is not absorbed in this system. It does not lose its personality. There is as yet no probability of a world state, of a *civitas maxima,* in which peoples are entirely subordinated to a superior will. We are still far from the *civitas gentium* of which Cicero spoke, or from the universal state of which Wolff dreamed; the system is, rather, a free society of peoples united by the solidarity of their interests. Each people continues its separate existence, develops its own personality, shapes its own political physiognomy. Each is given exclusive jurisdiction within its own territories, and provides such internal machinery as pleases it, provided only that it performs the few international obligations demanded of it by the community. Independence and equality are not eliminated; on the contrary, following the well-known paradox of government, submission to the rules of the community secures for the state a greater degree of liberty and equality than would be possible by its unaided efforts. Many states, in fact, could not exist without such support.

The principle involved is that of voluntary cooperation among independent peoples who acknowledge no master above. The solidarity which produces cooperation—voluntary in so far as this solidarity pertains to a command from any other political organization—inevitably transforms the social order into a juridical order, issuing and respecting rules of law, and

working as each member chooses toward the attainment of the ends of a common civilization. Whether it be due to nationalistic feeling, to the effects of the doctrine of sovereignty, or whether it be a step in political evolution, a forward step based upon a greater experience and a greater sense of responsibility, the fact remains that the most impressive characteristic of the present community is its ability to undertake cooperative measures of control and administration without a unified authority above to give orders. This peculiarity will be encountered over and over again. It was doubtless best illustrated in the technique employed by the Council of the League of Nations, now being used again by the United Nations.

The term "international," it appears, was first used by Jeremy Bentham in 1780.[11] It is an expressive word, connoting clearly the most characteristic element of the modern international community. International law is a law *between* nations, rather than a law imposed upon them from above. The community of nations does not extirpate nationalism; on the contrary, it is founded upon nationalism. It must assume the existence of separate and independent states before it can begin to build, and its rules and machinery derive from their agreement. This agreement among nations may be compelled by social and economic pressure but, as in any democratic system, the members of the group have the right to express themselves upon any particular rule or institution proposed. In the legal theory of the past, no state is bound to observe a rule to which it has not given consent. There is no superior political power to demand the submission of any state. The nation state is the basic unit of the community, and the growth of the community depends upon the collective satisfaction by its members of their common needs. There is no conflict between nationalism or patriotism and internationalism; on the contrary, intelligent patriotism recognizes that national advancement is more securely to be obtained by cooperative community action than by depending upon its own might.

§ 6. Sovereignty and Power Politics.—Obviously, the preceding sentence leaves room for disagreement. Solidarity and common interest require concession, require admission that in some cases the interests of the nation must give way to the needs of the group. *Hodie mihi, cras tibi;* if a state refuses to make concession to the group, it need not expect other states to make concessions to it. At this point a discussion of the obsolescent doctrine of sovereignty seems to be necessary.[12] It is a discussion

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[11] It does not appear in dictionaries before 1876, and as late as 1909 the Century Dictionary defined it as "forcing a somewhat disorganized or weak country to submit to the combined control or protection of several stronger nations"! J. C. Faries, *Rise of Internationalism* (New York, 1915), p. 11, citing Fitzedward Hall, *Modern English* (1837), p. 317. However, Victoria had long before employed the word in its Latin form, preferring *jus inter gentes* to *jus gentium*.

[12] In view of the present rejection of the doctrine by writers and in current practice, this discussion may seem to be tilting against the windmill. But it is so deeply

which involves on the one hand legal theory and on the other hand, power politics.

Legal Theory. A survival of the era of personal monarchy, the doctrine of sovereignty was transferred, when democracy supplanted autocracy, from the personal monarch to the state. The authorship of the doctrine is generally credited to Jean Bodin (1576), who defined it as the *puissance absolue et perpétuelle d'une république.* But Bodin's purpose was to bring up the state from its position of legal subordination; he never subordinated international law to territorial sovereignty. Neither did Grotius nor Vattel, who, like Bodin, admitted sovereignty, but reconciled it with international law through principles of natural law. The doctrine of internal sovereignty was of great stabilizing value in the contest between kings and feudal princes.

In Germany, however, because of the opposition of the smaller states, the doctrine of internal sovereignty was neglected, while external sovereignty was built up until it wrecked the Hague Conferences and made contempt of international law. Hegel the philosopher, Treitschke the historian, and Jellinek the jurist, constituted a triumvirate which dealt blows to international law from which it has not yet recovered. To Hegel the state was supernatural and *sui generis,* and law could be nothing but the will of the state. Treitschke, accepting this much, admitted that the state could be bound by treaties, but since all treaties are subject to the rule *rebus sic stantibus,* a treaty becomes only a sort of a moral obligation, to be abandoned at any time by the state. Jellinek defined state sovereignty as the innate quality of a state, through which it can become legally bound only by its own volition, and promulgated his theory of auto-limitation, claiming that the state could be bound only by its own will. Pushing this line of thought to the extreme, Lasson was able to conclude that the relations between states are more a matter of mechanics than of law: "two states are related to each other like two physical forces." From this it follows necessarily and unavoidably that war is the ultimate judge between right and wrong, so far as two sovereign states are concerned.

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rooted in international law and especially in political practice that no understanding of that law or of the community of nations is possible without an understanding of this powerful force in their making. It has now been reaffirmed in the Charter of the United Nations.

On the doctrine of sovereignty, see E. M. Borchard, "Political Theory and International Law," in Merriam and Barnes, ed., *A History of Political Theories: Recent Times* (New York, 1924); J. W. Garner, "Limitations on National Sovereignty in International Relations," *Pol. Sci. Rev.,* XIX (1925), pp. 1-24; H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, 1920); R. Lansing, *Notes on Sovereignty,* Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 38 (Washington, 1921); H. J. Laski, *The Foundation of Sovereignty and Other Essays* (New York, 1921); W. W. Willoughby, *An Examination of the Nature of the State: A Study in Political Philosophy* (New York, 1911).

Granted its premise, that the state is an end in itself, absolute and irresponsible, the logic of the writers above mentioned is inexorable; and it is for that reason that their doctrine must be rejected *in toto*. The doctrine states an impossibility: the coexistence of more than one absolute and unlimited power within one juridical system is a contradiction in terms. "States are not sovereign in relation to one another unless one of them is to some extent subordinate." [13]

In their efforts to evade the anarchy to which this logic leads, the supporters of the doctrine of sovereignty have put forward various modifications. Aside from evasions such as that a fictitious, or theoretical, sovereignty may be admitted, though a real one does not exist, or that sovereignty is incompatible with submission to a concrete will, but not incompatible with submission to a legal order, there are two principal attempts to modify the harshness of the doctrine. One of these asserts that international law is true law, but only in so far as it is incorporated as part of some system of national law. The other modification is the well-known theory of autolimitation, credited to Jellinek, which asserts that a state can be bound only through its own will, but that, having given its consent, it remains permanently bound. It will be necessary to discuss both of these under the head of international law, but it may be observed at this point that (as to the first) if international law is only national law, then it can be changed at the wish of any state, which is untrue; and (as to the second) if a state is really sovereign and unlimited, and can be bound only by its own consent, then it can at any time, even after having given its consent, modify or reject the rule, which is equally untrue.

Contrary to Practice. In so far as concerns practice, it is to be doubted whether support could ever have been found for the Hegelian theory, since the Peace of Westphalia or before. No state since that time has ever been wholly independent. Sovereignty presumed omnipotence, but there can only be one highest, and such a situation has not been found since the fall of the ancient universal empires. We shall see later that states are only relatively independent, that domestic law is constantly subordinated to international law, that states regularly make reparation for violations of that law, and that they may be compelled to submit to the will of the community.[14] No state today would maintain that it can reject international law, or that it can do as it pleases within the community. Never, in diplomatic correspondence, is it asserted that a state is independent of the rules set up by the community. Sovereignty has now been replaced by responsibility, and the word now means, in its external sense, nothing more than the sphere of relative external independence and ex-

[13] Williams, pp. 13-22.
[14] See Chapter 2.

clusive jurisdiction reserved to it with the assent of the community, and limited by that community. Into the community states are born, willy-nilly, just as an individual is born into some state. Each state must submit, in actual fact, to the rules which govern that community. In connection with the state, sovereignty can mean only that sphere of jurisdiction and authority which it has been able to reserve—a constantly shrinking sphere. Or, to look at it from another viewpoint, sovereignty may be regarded as the voice which speaks externally for the state, but which is neither absolute, nor unlimited, nor indivisible, nor omnipotent, nor omniscient.

As a matter of fact, the conception of sovereignty involves, in the international community, exactly the same difficult problem which the idea of individual liberty has always presented within the state. It is a problem which has never been solved, for the reason that its factors are continually changing. No fixed and immutable boundary line can ever be drawn for government. The group must interfere with the freedom of action of the individual to the extent that group needs require, and this is a variable constant. In the community of nations, growing interdependence and the realization of the danger of war are leading to greater and greater diminution of national freedom, to more and more group control. The movement is striking since it has not before been necessary to any large degree to limit the state. But the degree of limitation varies from time to time and with each particular case. Sovereignty is not a unit, which a state either has or does not have; it is a relative term. One state may have more independence than another, and no state can, merely because it is sovereign, defy the wishes of the community. Whether or not it be true in legal theory, it is true in practice that a state must ultimately submit to the will of the majority of the community. In other words, in this democratic age states must accept the principle of democracy that, while each is allowed its voice, each must submit to the will of the majority. This will is at present inefficiently expressed, but it can no longer be maintained that any state may go its own way, simply because it is a sovereign state.

If the word "sovereignty" must be discarded, in the theoretical and absolute meaning given to it by legal philosophers in the past, the word itself continues to have practical meaning to statesmen and to peoples, and greatly affects the development of international organization. We shall see later that the Charter of the United Nations was founded upon "sovereign equality," and that the freedom of action of its Members was protected to a nullifying degree. International law does set restrictions upon states, but the range of those restrictions is inadequate for present needs, and behind the law of nations the community of nations has provided no regular procedures for enforcement of the law. Consequently, states have more "individual liberty" than do individuals and each must strive harder in its

own interests, since it is not possible to call upon a policeman for help against physical pressure or violation of law.

It does not follow from this situation—which is a transitional one—either that "sovereignty must be abolished," or that sovereignty is so fixed an institution that "power politics" must be the rule of life, and that international government is therefore impossible.

"Power politics" is a vague phrase which has come to have a menacing connotation, correlative with that of "sovereignty," as a result of which it is sometimes said that power politics must be completely eliminated before progress can be made. Actually, power politics is no more than an aspect of human relationships, whether between individuals or between states, and (a point often missed) it operates within a system of law and government as well as outside law. Continuous struggles go on between interest groups in all phases of life. They are present in a church group, in university student politics, in local, national, or international relations. It is precisely the function of law and government to hold these struggles for power within certain limitations regarded as fair by the community; they are not eliminated, but certain extreme manifestations, such as the use of violence, are prohibited. Within states, the strength of the community has been organized to maintain these limitations; there is an authority above, backed by overwhelming force.

Among nations, there is no such superior authority, and, while the law of nations is surprisingly well observed, there are large and dangerous fields of competition between states not covered by that law. Within these fields, a balance of power has been historically sought and often maintained after bloody conflicts. To many persons this is inevitable, and no improvement can be expected; solutions must be sought in terms of this balance of power. To a certain extent this is true, for power is always present with us and must always be reckoned with. It is possible, however, to control, to channel, the use of power, and today men are demanding that this be done.

For centuries, the state has been accepted as the highest form of human organization, *ne plus ultra*. Today, however, the forces of war and interdependence have made the state inadequate for the purposes for which it was created. The state is not an end in itself; it was created and maintained to serve man. If it is not sufficient to meet his needs, man will demand more, and is in fact doing so now. He demands that the irresponsible use of power by sovereign states be regulated, as the abuse of power by individuals has been regulated. His thinking does not go very far in this direction; he wants the sovereignty of other states limited, but he still wishes to keep his own sovereign powers, which is normal human nature. But there is little doubt, in the light of political experience of the past,

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that he will ultimately submit himself, or his state, more and more to law and government as the pressure upon him increases.

Thus, the alternatives are not absolute. One can not say "abolish sovereignty," even though it is possible to limit certain sovereign powers. On the other hand, one can not merely assert that power is reality, and that "to expect states at their present stage of development to accept any international code as binding upon them is wishful thinking." States do accept such codes almost every day. The answer must be sought somewhere in between the two extremes. Power and its use will always be a problem, and power politics as well: but both can and will ultimately be brought under law and government in the community of nations, as they have between individuals.[15]

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[15] Thorsten V. Kalijarvi and Associates, *Modern World Politics* (New York, 1946), p. 8. See also H. Briggs, "Power Politics and International Organization," *A.J.*, XXXIX (1945), p. 664.

CHAPTER 2

INTERNATIONAL LAW

§ 7. The Development of International Law.—The bond which holds together the loose structure of international society—in a sense, its constitution—is international law. *Ubi societas, ibi jus.* In a community there must be rules of conduct for the guidance of its members; the test of membership is that its members recognize mutual interests, and seek to promote them by fulfilling certain obligations, thereby avoiding the necessity of continuous conflict for the maintenance of individual rights. The inchoate organization of the community of nations makes a study of its law especially necessary. The principles laid down by this law, and the theories attaching to its formation and interpretation, furnish the constitutional foundations for the broader community of nations, and this is true even after the Covenant and the Charter. These principles, then, are of great importance in our effort to understand the unique development of the community of nations, and we shall study the law of nations in this sense, rather than for the purpose of learning in detail its rules of conduct.

ORIGINS. Many theories, some of them ingenious and complicated, may be found to account for international law. It would be beyond the range of such a survey as this to attempt to expound them. For our purposes, it is sufficient to say that law arises from the discovery that it is more profitable to solve the continual conflicts which arise from opposing desires by adherence to rules, than by constant dispute or fighting. Law is not so much an edict issued from above, the product of the rational processes of an authority, as it is an evolutionary process, whose statement by a proper authority, or merely by custom, is a recognition of this process.

> Law is neither an emanation from an order nor the manifestation of a will; it is simply a social product, a pure fact become conscious; the rulers of the society in which it arises merely formulate it in laws or treaties. In this conception, international law has but a single origin; the juridical consciousness of nations, which gives a binding character to the economic and moral rules born of their solidarity.[1]

Law being the product of the necessity of reconciling clashing forces and ambitions it was natural that, out of the welter of feudal conflict and

[1] Politis, p. 15. This definition, of course, is only one of many attempts to define law. No definition would be universally accepted today.

the terrible wars which marked the establishment of nation states, efforts should have been made to build a law between these states. They were manifested first in codes of sea law. The peculiar character of the unpossessable seas, and their function as highways of commerce for all nations, produced early efforts in this direction. The rivalry of commercial enterprise and later of colonial empire intensified the need. For unknown periods, rules had been in process of customary development, and in the fifteenth century they began to be collected and published. The most famous of these collections is the *Consolato del Mare,* which, published about the time of Columbus' discovery of America, stated the law of the Mediterranean Sea. There were other codes, which can not always be given precise dates. The Amalfitan Tables are said to go back to the eleventh century; the Laws of Oleron, for Western Europe, to the twelfth; the Laws of Wisby, for the Baltic states, to 1288; the Maritime Law of the Hanseatic League to 1614; the so-called Rhodian Sea Law, which may be apocryphal, was first published in 1561.

Explorations and colonial claims later gave rise to many new problems. The whole question of title by discovery had to be adjusted, and with it the question of proper boundary lines. To these problems the Roman Law principles relative to private property were applied with more or less success. Once colonies were established, and the possibilities of lucrative trade were realized, a great field of competitive effort appeared. Restrictions were placed by each nation upon trade with her colonies, and as a result of the conflicts thus engendered the development of the law of neutrality was begun. It is not surprising that there was great disregard for international law when it is recalled that the law was as yet hardly formed, much less established, and that the states of Europe were all engaged in a desperate and bloody struggle to maintain their new and hard-won independence. But while Frederick the Great called upon the jurists to justify his thefts, while Poland disappeared, and while Maria Theresa *pleurait et prenait toujours,* adjustments in international law were being made by conference and by treaty. Above all, writers were beginning to lay down the rules and establish standards to which states would be called upon to adhere.

Writers. Indeed, it is to writers, rather than to statesmen, that international law owes the formulation of its basic principles. It is true that they did not have the authority to edict the law, nor did any one else have such authority. Writers could and did suggest rules to meet the needs of the new situation; they could, by their teachings, impress upon states the need for law to govern their conduct; and they could, in the absence of legislative bodies and records, state what the law was as revealed in customary practice, and how it could be improved. To modern readers, their

works bear but little resemblance to law. They were forced to search for evidence and justification in Roman, canon, and civil law. They leaned heavily on natural law, and sought precedents in history, classics, and even in mythology. Much of their work has been abandoned, but it was of great importance in setting out guideposts and in arousing public interest, and especially in insisting that natural justice limits the state as well as individuals.

It has often been pointed out that the horrors of the Thirty Years' War stirred Grotius to write his famous treatise, and he has deservedly been given the title of the father of international law. But there were writers before his time who cannot be overlooked and to whom modern thought is nowadays returning. In the middle of the fourteenth century, Legnano, of Bologna, wrote (though it was not published until 1477) *De bello, de represaliis, et de duello.* It is not difficult to understand why these early writers paid so much attention to the law of war, and it is greatly to their credit that they should have attacked the problem of the existence or justification of war, as well as the methods of conducting war. In 1557, Vitoria, a Dominican monk of Salamanca, Spain, wrote thirteen *Relectiones theologicae,* of which the sixth was entitled *De jure belli.* Vitoria was the first to employ the phrase *jus inter gentes,* the Latin equivalent of international law, and was the first to think of a community of nations based upon reason and sociability.[2] *De jure et officiis belli,* by Ayala, provost of the Spanish armies in the Netherlands, is of less importance. The great Spanish Jesuit, Suarez, published in 1612 his *Tractatus de legibus ac Deo legislatore,* in which he first distinguished between reason and custom as sources of international law, a distinction followed ever since. Of him Westlake says:

> . . . But Suarez has put on record with a master's hand the existence of a necessary human society transcending the boundaries of states, the indispensableness of rules for that society, the insufficiency of reason to provide with demonstrative force all the rules required, and the right of human society to supply the deficiency by custom enforced as law, such custom being suitable to nature.[3]

Perhaps the greatest of the pre-Grotian writers was Albericus Gentilis, professor of Civil Law at Oxford University, who wrote in 1598 his *De jure belli,* a work which was the source of the first and third books of Grotius. He is regarded as one of the founders of the historical school of international jurists, but he did not discard the law of nature. He lacks

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[2] Dr. Scott suggests that Vitoria, rather than Grotius, should be regarded as the founder of international law. J. B. Scott, *Francisco de Vitoria and His Law of Nations* (Oxford University Press, 1934), p. 3.

[3] J. Westlake, *Chapters on The Principles of International Law* (Cambridge, 1894), pp. 27-28. On pp. 26-27 he translates a famous passage from Suarez.

the broad humanitarianism and the idealism of Grotius and consequently has not had such a widespread appeal as the latter.

GROTIUS. The unrestrained license of war and the anarchy of his day, so Grotius tells us, led him to write his famous *De jure belli et pacis*, which appeared in 1625, in the midst of the bloody Thirty Years' War.[4] It is a work of amazing erudition and broad knowledge, and because of its idealistic support of humanitarian principles it gained a tremendous following among those of his day who felt that some restraint must be put upon the barbarous practices of the time. Gustavus Adolphus is said to have slept with a copy beneath his pillow. Grotius admitted that he owed much to predecessors, particularly Gentilis, but his was by far the most scholarly and systematic presentation. He drew from many sources, but primarily from natural law—the dictate of right reason—which was virtually unchallenged in his day. But he also supported his views by precedent, and thus relied upon positive law or practice. Naturally, he did not cover all points, nor was he always correct; but the fundamental principles which he laid down are still the foundation of international law. That law is today undergoing vital changes, and in so doing, is returning to some of Grotius' principles, which were for a time disregarded.

Grotius accepted the dogma of sovereignty, but considered sovereignty restrained by natural law; in his mind a state was not above all law. His distinction between just and unjust wars is again becoming of importance. As a result, his disregard for the law of neutrality, a necessary consequence to one who believed that all states should support the just cause, is now justified. Recent tendencies support the importance which he gave to the individual. He has been criticized for identifying the law of nature with the *jus gentium*, but the recent "revival of natural law" [5] is proving that he was not far wrong. All in all, as one must say in the field of political science, "Back to Aristotle," so one must say in the field of international law, "Back to Grotius."

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[4] Grotius, or Hugo van Groot, was born in 1583, at Delft, Holland, where his tomb is now a shrine for those interested in international law. He wrote Latin verses at the age of nine, and took the degree of doctor of laws at the University of Leyden at the age of fifteen. Because of his religious views, he was imprisoned for life in 1619, but escaped in a trunk, through the devotion of his wife, in 1621. He was the Swedish minister to France from 1634 to 1645, and died there. He was a poet, philosopher, historian, and mathematician, as well as a jurist and diplomatist.

His book has had an amazing vogue. There were 45 Latin editions before 1748; and there have been innumerable translations. The literature concerning him is vast. We may cite Basdevant, "Hugo Grotius," in *Les Fondateurs du Droit International* (Paris, 1904), pp. 125-267; W. S. M. Knight, *The Life and Works of Hugo Grotius* (London, 1925); W. Van der Vlugt, "L'oeuvre de Grotius," *Hague Acad.*, 1925, II, pp. 399-506; H. Vreeland, *Hugo Grotius, the Father of the Modern Science of International Law* (New York, 1917); J. Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894), pp. 36-51. Many essays appeared upon the occasion of the celebration of his tercentenary in 1925.

[5] See pp. 43-44.

POST-GROTIAN WRITERS. The most popular of the followers of Grotius was Vattel, who is more often quoted than Grotius himself. He did not claim originality, for he admitted that he built upon the work of another disciple, Wolff. But Vattel popularized international law, and indeed developed some parts of it to an unfortunate degree. Where Grotius had used natural law as a bar to irresponsible sovereignty, Vattel let down that bar and emphasized the independence and equality of states and their fundamental rights and duties. He, too, divided his field into natural law and voluntary law but, having weakened the former by too great insistence upon the independent personality of the state, he offered no sufficient foundation for the latter. He cannot be called entirely a natural lawyer, since he supported his voluntary law by appeal to precedents; actually, his reasoning was *a priori*. What Vattel sought in practice was not a customary rule but evidence to support his own preconceived beliefs as to what the rule should be. His influence has been great, though somewhat misleading.

Other followers of Grotius include: Zouche, of Oxford, whose work Fauchille called the first treatise on international law, properly so named, and who is regarded also as one of the founders of the positivist school; Pufendorf, who is the leader of the natural law group; Bynkershoek, of Holland, whose *De dominio maris* gave us the rule of the three-mile limit of territorial waters; and Wolff, whose books, popularized by Vattel, taught the *civitas maxima;* and others of less importance.

In the nineteenth and twentieth centuries there are many writers. The student of international law should at least be acquainted with the names of the better known among them.[6]

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[6] They may be rapidly classified by countries. In Germany: Bluntschli (who was a codifier), Heffter, Liszt, Triepel, and Strupp. In France: Despagnet, Funck-Bretano et Sorel, Mérignhac, Piédelièvre, Pradier-Fodéré, and Bonfils, whose many editions have finally evolved into a four volume *Traité,* by Fauchille.

In England: Hall has written the most famous and most reliable text; Oppenheim in many editions is as well known; there is an elementary and well-written text by Lawrence; the inspiring writings of Westlake; the erudite work of Phillimore; the *Institutes* of Lorimer, exceptional in England because based on natural law; and more recently Professor Brierly of Oxford, H. Lauterpacht, H. A. Smith (*Great Britain and the Law of Nations*), and G. Schwarzenberger.

In the United States the name of John Bassett Moore is best known, though he has written no text. The classic American text is that by Charles Cheney Hyde, published in 1922, revised in 3 volumes in 1945. The most famous earlier writer of the United States was doubtless Wheaton. The proposed code of David Dudley Field is well known. Smaller texts have been issued by Hershey, Fenwick, Wilson, and the names of Kent and Story in earlier days should not be overlooked.

In Belgium, Nys, the historian of international law; in Italy, Fiore, one of the most famous of unofficial codifiers, Diena, and Anzilotti; in the Netherlands, De Louter; in Switzerland, Rivier; and in Russia, F. de Martens. South America has contributed Calvo of the Argentine, well known but not always reliable; Bevilaqua of Brazil; Alvarez and Cruchaga de Tocornal of Chile; and Bello and Seijas of Venezuela.

The collection of annual lectures (*Recueil des Cours*) given at the Academy of International Law at The Hague includes most of the famous international lawyers of the 20th century.

The development of international law has also been greatly aided by the work, during the past half century, of various organizations. Two of them appeared as a result of the interest inspired by the Alabama Award: the *Institut de Droit International,* a selective body which includes most of the great international lawyers of the world; and the International Law Association, as it is now called, with branches in various countries. In many nations there are societies for the study of international law, such as the American Society of International Law. There are also endowed institutions, such as the Carnegie Endowment for International Peace, or the World Peace Foundation, which strive to arouse interest in the subject and to encourage its advancement. Some of these bodies issue publications of various kinds, making available either gratuitously or at reasonable prices material for the study of international affairs.

During the nineteenth century there was a tremendous growth of the law through customary practice and treaty making. American precedents began an important development of the law of neutrality. While an attempt (at Brussels in 1874) to build a code for land warfare, based upon the model of the famous rules prepared by Lieber for the United States armies in the Civil War, was a failure, actually the rules were observed to a great extent in practice. Treaties against slave trading were executed until slave trading was put upon almost the same footing as piracy, as a rule of customary law. Increased trade and intercourse led to the building of a widespread law for the protection of aliens and of their property. Territorial jurisdiction was more closely defined, and arrangements developed through which states could help each other in the exercise of this jurisdiction, such as extradition, or the rules of private international law. Arbitral tribunals were called upon to an increasing degree, and their decisions established invaluable precedents. Furthermore, the need for rules to regulate the increasingly intricate intercourse of nations produced the beginnings of a method of international legislation by means of lawmaking conferences and treaties. At the Congresses of Vienna and Aix-la-Chapelle, for instance, the rank of diplomatic agents was established, and here, as well as later, arrangements were made for traffic on international rivers. Various rules were recognized for the conduct of war, such as the Geneva Convention of 1864 which established the Red Cross, the Declaration of St. Petersburg which regulated the use of explosive bullets, and the numerous conventions agreed upon at the Hague Conferences. Scientific study, for the most part unofficial, presented new problems and offered solutions, and an increasingly intelligent public opinion began to interest itself in a problem which it slowly recognized as having an important influence upon the fortunes of individuals. To such an extent has interest developed that in 1930 a Conference for the Codification of International Law met at The Hague—the first one ever held for the specific purpose of restating or codifying

certain subjects, rather than of solving an immediate and pressing problem.

Two wars of modern character in the twentieth century have practically wrecked what used to be a large half of any text of international law—the laws of war and neutrality. New methods of warfare rendered old rules out of date and they were deliberately disregarded. As a result, it has been freely asserted that international law is impotent and useless and has lost all claim to be regarded as true law. As to this, it must be observed that so long as war is permitted, law can not be expected to prevail. War is the antithesis of law.[7] The two can not live together. When two or more states are permitted to build up powerful military and naval forces and hurl them at each other in a life-and-death struggle, it is too much to expect that the nice etiquette of war laid down round a peaceful conference table should be observed. This is the more evident when new methods and instruments of warfare are suddenly thrown against the antiquated rules of a legal system which can only slowly be changed in peace times, and which could not possibly be changed during time of war. This, however, does not affect the international law of peace which, as we shall see, has been steadily growing.

§ 8. Terminology.—International law, as the term is generally used, means international public law. In the broad sense of interstate legal relations, it can be interpreted to mean much more than this. As a matter of fact, differentiations have not yet been properly worked out, and no final statement is attempted here; but it will be necessary to offer some definitions and subdivisions.

Comity. International law must be differentiated from comity, and from foreign policy or diplomacy. Comity is the etiquette rather than the law of international relationships. It consists of those rules which are observed between states for reasons of courtesy or convenience but which are not regarded as binding in character, or cognizable by a court. The courts have gone further than this. "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other"; and the court goes on to say that it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation.[8] The court doubtless did not mean to limit comity merely to this type of cases. It is, indeed, extremely difficult to say what belongs under the head of comity. Extradition in the absence of a treaty, or the admission of liquor for diplomats into the United States while the 18th Amendment was in force, would serve as illustrations.

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[7] "Talking about the laws of war is almost as sensible as preaching about the chastity of prostitution." Howard-Ellis, p. 321; and see *ibid.*, p. 352.

[8] *Hilton v. Guyot*, 159 U. S. 164 (1894).

A rule of comity may by long usage transform itself into a rule of law. It may be difficult to know when the transformation has been completed, as, for example, with regard to the immunity of diplomats in third countries. It is believed, however, that the term will ultimately be limited to acts of courtesy, and that international questions involving the legal rights of individuals will be recognized as a different branch of international law.

Policy. A continuing policy is sometimes confused with law. The fact that it is long maintained and well respected seems to give it the character of enforceable law. Doubtless the best illustration is the Monroe Doctrine, long maintained by the United States and observed by other states. However, it has been denied to be law by these same states, and Presidents of the United States have been careful to assert that it is a policy of the United States alone. Were it a rule of international law, it would be susceptible of interpretation and application by the community of nations, and, in consequence would doubtless have been abandoned long ago.

International Public Law. Using the term in, perhaps, an unjustifiably broad sense, it may be said that international law can be subdivided into various branches. Chief among these is international public law, which is the subject of our present discussion, and ordinarily the only subject of discussion in texts of international law. It is the law dealing with legal relations between states as such; it covers cases in which a state itself has violated the law or has been injured by a violation of that law.[9]

International Private Law. International private law, or conflicts of law, concerns those situations in which an individual has rights or obligations under the domestic laws of different states, resulting in a conflict between the two legal systems applied to the case. A set of customary principles has grown up by means of which domestic courts resolve such conflicts. It is ordinarily said that it is entirely a matter of domestic law, yet Justice Gray once said that "International law in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation,—is part of our law . . ." [10] At present, it is unfortunately true that a state cannot be held

[9] This is the usual statement, based upon the assumption that only states can be subjects of international law. But, as we shall see, individuals may also have rights and duties under that law.

[10] *Hilton v. Guyot*, 159 U. S. 163 (1894). And see Fauchille, I, pp. 5-6, who cites several authorities as classifying international private law as part of international *public* law.

responsible before an international tribunal for its failure to observe the principles of international private law. There seems to be no good reason, however, why it should not ultimately become a branch of international law, as binding upon states as any other rules of international law.

ADMIRALTY LAW. A similar situation exists for admiralty law, which takes care of conflicts arising on the high seas, and between ships of different nationalities. Its rules are probably as well observed as if they were binding international law. Since they do involve international legal relations, it would seem that admiralty law should also be accepted as binding upon domestic courts, with the state held responsible for failure to observe its rules. But again, as in the case of "conflicts of laws," it is discretionary with a state whether it will observe these rules or not.

INTERNATIONAL ADMINISTRATIVE LAW. Attention should also be called to a new development within the field of international law, to what might be called international administrative law. Such are the rules, usually conventional (by treaty), for postal service and other international communications, or for traffic on international rivers, or for international copyrights, or similar matters. They cannot be compared to municipal ordinances as to source, but they are comparable as to nature. This is a rapidly widening field and deserves classification as a part of international law.

OTHER TERMS. There are some other terms with which the student should be acquainted. The phrase "law of nations" may be used interchangeably with "international law." The French equivalent is *droit des gens,* or *droit international;* the German is *Völkerrecht.* It should be observed that although the English language differentiates between a law and a right, in French and in German the words *droit* and *Recht* combine the two meanings, with results which are sometimes confusing to the translator. And, of course, there is an international morality, but it is behind the law rather than part of it. "Municipal law" means domestic or national, rather than city, law.

§ 9. Sources of International Law.[11]

TREATIES. The foundation of international law, in the sense of the force which led to its statement, is the universal feeling of justice. But this justice must have human interpretation. The international lawyer has three sources upon which he can call to show that a principle of law has been established, and he must turn to various materials for evidence of his

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[11] Briggs, pp. 45-48; Brierly, pp. 39-47; Hyde, I, pp. 10-14. See Ch. de Visscher, "Contribution à l'étude des sources de droit international," *R.D.I.L.C.* (3rd Series), 1933, pp. 395-420.

claim. No rule may be regarded as a valid part of international law unless it can be shown to be derived from a treaty, a custom valid as law, or, in the absence of one of these, from "general principles of law." The most tangible of these, the most concrete before a court, is a treaty; but how far treaties establish rules of law it is difficult to say.[12] The ordinary bilateral treaty has been compared to a contract in domestic law. It is legally binding, but it does not lay down a general rule of conduct because it binds only the signatory parties. The question may be raised whether, if precisely the same rule should be found in bilateral treaties among all states, each with all others, it would not amount to a rule of international law. Technically, the answer would be no, for each state would be bound only to the other state party to the treaty, and it is quite conceivable that a state should be willing to continue its treaty with some states but not with others. Practically, the answer would be yes, because each state would be bound to every other state, and if a treaty should lapse a state would ask, and through comity would probably receive, the benefit of the rule, e.g., the extradition of a criminal.

But not every treaty purports to lay down a rule. A marriage treaty, or a defensive alliance, could scarcely be called a rule of law, though it might be possessed of legal force. A treaty may indeed set aside a rule of law—as the rum-running treaty with Great Britain purported to do—for there is no rule in international law to the effect that a treaty in contravention of accepted international law is invalid. Treaties cannot always be taken as evidence even of what their makers intended the law to be.

This is less true today, for hundreds of treaties are now being made with definite legislative intent.[13] Where a treaty purports to lay down a rule of law, and is signed by a majority of states, it may be regarded practically, if not theoretically, as a source of international law. Such a legislative treaty was the Treaty of Paris of 1856, which laid down rules with regard to contraband and blockade. This treaty suggests the reflection that rules may be laid down by treaty which, even though not signed by a majority of states, or though unratified, as in the case of the inoperative Declaration of London, may nevertheless provide effectual rules through customary observance. Other illustrations are the Hague Conventions of 1899 and 1907, or the Treaty for the Renunciation of War. Legislation, we shall see, is rapidly being made today through conferences whose labors eventuate in multilateral treaties. The difficulty still remains that states which refuse to sign such treaties are technically not bound by a rule upon which practically all the community

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[12] See Hyde, I, pp. 10-12; Brierly, p. 45; Hall, p. 5.

[13] Judge Hudson has collected such instruments appearing since 1920, and the collection now amounts to seven large volumes. M. O. Hudson, *International Legislation* (Washington, Carnegie Endowment for International Peace, 1931-1941).

has agreed. This situation is due to the lack of efficient legislative machinery in the community of nations, one of the worst defects of the community of nations.

CUSTOM. The chief source of international law is custom, the source of most law. As a community develops, rules gradually evolve through custom. They are tested by experience, applied and interpreted by courts, and may be edicted finally in statute form by legislative act. The last process is not essential. The Anglo-Saxon common law, with whose growth international law finds an analogy, is in large part still unwritten. Such a law has the advantage of flexibility, but the defect of vagueness, and it is difficult at times to say whether or not it has reached a point at which it may be relied upon as law. This is particularly true of international law, where not many precedents are available. A continuing practice does not alone make law. Customary law in a legal sense means something more than mere usage; it means a usage felt to be obligatory upon those under its incidence. It may be criticized because it is slow in its development, because it is difficult to fill its gaps, and because the line between custom and customary law is not clearly drawn. On the other hand, Anglo-Saxon lawyers claim for it that it is more responsive to current demands than is a fixed written law.

"GENERAL PRINCIPLES OF LAW." To use a discredited term, the law of nature is a third source of international law. It is not the natural law of two or three centuries ago, as taught by Hobbes and Pufendorf and others, an entirely subjective law discarded by political philosophers because of the lack of authoritative determination. It appears in much more ancient form. Again we must return to Aristotle, who said "Natural law is that which has authority among all men," and to Cicero and Gaius, who asserted that the *jus naturale* and the *jus gentium* were one and the same. Grotius has been much criticized for identifying the two, but recent thinkers are inclined to credit him more than his critics.[14]

There has always been something behind stated law—a reservoir upon which judges could call in emergency. Our own courts have been forced at times to admit that there were no precedents, and to fall back upon

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[14] "In effect, they were the same set of rules looked at from a different point of view; for rules which were everywhere observed, i.e., *jus gentium*, must surely be rules which the rational nature of man prescribes to him, i.e., *jus naturale*, and vice versa." Brierly, p. 11.

For recent studies in the law of nature, see Brierly, § 2; Lauterpacht, "La théorie du droit naturel," *Hague Acad.*, Vol. 18 (1927), p. 263; L. Le Für, "Le droit naturel et le droit rationnel ou scientifique," *R.D.I.*, I (1927), pp. 658-698; F. Pollock, "History of the Law of Nature: A Preliminary Study," *Columbia Law Review*, I (1901), pp. 11-32, II (1902), pp. 131-143; J. S. Reeves, "Influence of the Law of Nature on International Law in the United States," *A.J.*, III (1909), pp. 547-561; Williams, Ch. I.

common sense and justice.[15] This reservoir was known to the earlier philosophers as the *recta ratio,* right reason. But, since there was no accepted authority, modern thinkers have sought a more satisfactory foundation in objective principles which can be judicially ascertained, fundamental principles upon which a judge may rely when specific rules and precedents are lacking. There is nothing new in this. Lord Mansfield in the eighteenth century remarked that "The law of nations is founded on justice, equity, convenience, and the reason of the thing, and confirmed by long usage." [16] In many treaties of arbitration, the arbiter was instructed to seek his decision according to the principles of "justice, equity, and the law of nations," and now an authoritative statement is found in Article 38 of the Statute of the Permanent Court of International Justice:

> The Court shall apply:
> 1. International conventions . . .
> 2. International custom . . .
> 3. The general principles of law recognized by civilized nations . . .

What are these "general principles of law recognized by civilized nations" but the old *jus gentium?* The new law of nature has a more substantial foundation, in objective rather than in subjective principles. Like the old *jus gentium,* it embraces principles which are actually established by long usage or enactment, and which may be judicially proved by reference to the various legal systems of the world. It has not yet found a generally accepted name: it may be the "universal conceptions of law" of which Jellinek spoke; or "original law," as Sir John Fischer Williams prefers; or "general jurisprudence"; or, taking into account that even natural laws are not immutable (at any rate in the social sciences) "the law of nature with variable content." Whatever it be called, there can be no doubt that pure positivism, rejecting reason and accepting only practice, is no longer regarded as sufficient, and that it is respectable for a judge to fill in gaps in the stated law and to keep pace with changing social conditions, by appeal to fundamental principles judicially ascertainable. Such recourse will naturally be more often necessary in so incomplete a system as is international law.

§ 10. Evidences.—To find a rule of international law, then, one must go back to treaties, to custom, or to the general principles of law recognized by the leading civilized nations of the world. Of these, customary law is

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[15] "We think the case at hand is not so governed by authority but that it may be dealt with upon principle," Cardozo, J., in *Sokoloff v. The National City Bank of New York,* 239 N. Y. 165 (1924); "It remains for us to determine whether the result of the present judgment is contrary to common sense and justice," Lehman, J., in *Russian Reinsurance Company v. Stoddard,* 240 N. Y. Reports 163 (1925).

[16] Quoted in Brierly, p. 45.

most difficult to prove. A treaty is a tangible document, where the rule may be seen upon inspection, even though difficulties of interpretation may arise.[17] A "general principle of law," as, for example, that contracts must be observed and executed, may sometimes be sought out in the statutes or judicial decisions of the various states. But the task appears more difficult when one is asked to prove a rule of customary international law. How should one go about building up his brief?

To the Anglo-Saxon lawyer, accustomed to the customary rules of the common law, the task would not seem unusual. In international law the procedure is much the same, although more difficult perhaps, because fewer precedents are available and because they are not so easily accessible. In general, the object is to show that the rule offered has actually been accepted in practice as binding by the community of nations. To this end, evidences must be sought in various places.

Judicial Decisions. Doubtless most important as evidence, at any rate to the Anglo-Saxon lawyer, would come judicial decisions. It is necessary, however, to distinguish between decisions of an international court and those of domestic courts. The former are more acceptable as evidence upon the assumption that the judges are more independent and impartial, and better qualified to pass upon questions of international law. Actually, of course, such an assumption depends upon the standing of the court. Arbitral tribunals have not always succeeded in obtaining the best type of judges, for voluntary selection by states has been the rule, and states have tried to pick judges favorable to themselves. Furthermore, the tribunal has often been restricted by the *compromis d'arbitrage,* which states the procedure, and even the law to be followed (as in the famous Three Rules of the Treaty of Washington, according to which the Alabama Arbitration was decided), as well as the limits of the jurisdiction of the tribunal. It was an advance over this haphazard procedure when a panel of distinguished judges was provided in the old Hague Tribunal. The community of nations now has, in the International Court of Justice, a court of high standing, whose decisions may be regarded as of the greatest authority in proving such rules of law as have been covered by its judgments.

The decisions of national courts, while furnishing by far the greatest number of precedents, are necessarily controlled by the laws of the state and are apt to be vitiated by national bias, as well as being less authoritative because the judges are not usually so well-trained in international law. Decisions of national prize courts are looked upon with justifiable

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[17] It must be reiterated that ordinary bilateral treaties are of slight value as evidence. They may set aside a rule, or may embody a rule already accepted. Where, however, a legislative treaty states a rule, as sometimes a statute states a rule of common law, the treaty prevails. See D. V. Sandifer, *Evidence before International Tribunals* (Chicago, 1939).

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[17] It must be reiterated that ordinary bilateral treaties are of slight value as evidence. They may set aside a rule, or may embody a rule already accepted. Where, however, a legislative treaty states a rule, as sometimes a statute states a rule of common law, the treaty prevails. See D. V. Sandifer, *Evidence before International Tribunals* (Chicago, 1939).

suspicion, in spite of such conscientious judges as Lord Stowell.[18] Decisions in other fields may be affected by national policy, or by an attitude of opposition adopted by the particular state against a particular rule of international law, as, for example, the support given by South American states to the Calvo Doctrine. Nevertheless, while they must be critically studied, domestic court decisions still offer valuable evidence, and constitute the most voluminous and accessible material.

STATE PAPERS. The practice of states may be sought also in official acts and documents which reveal the views of individual states and which, taken together, may establish a common or community viewpoint. The legislation of a state may thus be taken to represent the views of a state. Like bilateral treaties, however, a statute may or may not state what is regarded as law by its authors. It may, like the Neutrality Act of 1794, lay down what the United States considers to be the proper rule of international law and may ultimately gain the approval of the community; or it may, like the Tariff Act of 1922, claim jurisdiction beyond the three-mile limit, in the face of other actions of the United States which would appear to support that boundary.

More valuable, doubtless, is the diplomatic correspondence of states, particularly that in which a point of international law is argued. It is to be presumed, although it is not always true, that the arguments which a state employs against another state are arguments whose validity the plaintiff state would admit, if employed against itself. Certainly it is fair to cite such arguments against the state which used them. On various occasions, the chief executive or other authorized spokesman of a state may issue a declaration or other official expression of the views of that state upon some point at issue. A remarkable collection of such views is to be found in the answers of governments to the questionnaire sent out by the Preparatory Committee for the First Codification Conference at The Hague of 1930.[19]

State papers, then, in which such expressions are to be found, are one of the most valuable sources in which evidences of international law are to be sought. For this reason, Moore's *Digest of International Law,* (supplemented now by Hackworth's *Digest,*) which is the most complete and

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[18] Who said: "I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me;—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent states, some happening to be neutral and some to be belligerent." *The Maria,* 1 C. Robinson 350 (1799).

[19] League of Nations, *Conference for the Codification of International Law, Bases of Discussion,* 1929. V. 1., *Nationality;* 1929. V. 2., *Territorial Waters;* 1929. V. 3., *Responsibility of States.*

convenient summary of such documents issued by any state, is widely quoted. Among other valuable sources are the annual volumes of *Foreign Relations* issued by the United States, which have unfortunately fallen some fifteen years behind, or the weekly *Bulletin* of the Department of State; the *British and Foreign State Papers,* a monumental and quite invaluable source of information; the *Documents Diplomatiques,* issued by the French government; the German *Staatsarchiv.* In the publications of the League of Nations and the United Nations new sources of material are found, destined to become the greatest reference sources of all.

Writers. Finally, the views of publicists, jurists, and text writers are frequently referred to by tribunals. Such men have presumably made a thorough investigation of precedents, and according to their respective authority the results of their studies will be referred to as evidence by courts of law. The Supreme Court of the United States has made a necessary distinction, however, in that "such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." [20]

It should not be overlooked, on the other hand, that such speculations may be of use in cases where the law is insufficient, or where much disagreement exists as to its precise bearing, and that they have been of the greatest value in setting guides for the development of international law. Writers are necessarily given importance in the practice of international law because of the paucity of precedent and the inaccessibility of evidence, which must be sought out in every state and in every language. It is the scientific function of the scholar to offer his interpretation of what he finds. Of even greater authority are the resolutions or other expressions, after debate, of scientific societies for the study of international law, such as the *Institut de Droit International* or the *Research in International Law.*

§ 11. Schools of Thought.—It has been customary, since the days of Grotius, to classify writers on international law into three schools: natural lawyers, positivists, and eclectics or Grotians, who drew from the former two. In the first class belong those writers, such as Pufendorf, who relied solely on natural law and denied validity to custom or even to treaty. But few in this school have gained repute—Burlamaqui, Barbeyrac, and the only one of recent times, the Scotsman, Lorimer. On the other hand, there were as few who went to the other extreme, to found their systems exclusively upon positive practice, the actual conduct of states, denying any authority to a law of nature. Perhaps Moser and Mably are alone in this group, though Zouche, Bynkershoek, and Martens lean very far in this direction. By far the great majority of writers fall into the group of eclec-

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[20] Justice Gray, in the *Paquete Habana,* 175 U. S. 700 (1899).

tics, and the real dividing line is as to whether a writer—while relying upon both natural law and practice—tends more toward one than toward the other.

Natural Lawyers. The difficulty with natural law was its subjective character. There was little practice or custom upon which the earlier writers could rely. They were forced, therefore, to build upon a theoretical foundation. International law owes to natural law its beginning, and owes to it, also, the conception—without which international law could never have been realized—that even sovereign states are subject to law. Thus states were subjected to a natural order, and a law was asserted which, if difficult to ascertain, was none the less binding upon them. To the medieval lawyer, the law of nature was to be ascertained by appeal to right reason, the reasoning of the best minds. He was aided in his search by Roman and canon law. But it was still rather a strain upon human credulity to permit even the best mind to extract from the labyrinth of its mental processes a rule of action which should control others—at any rate, until it should be determined who was the possessor of the best mind.

The fact that natural lawyers could not always agree among themselves easily gave rise to suspicion that there was no fixed law of nature. And indeed, since this law could consist only of general principles, the only means of obtaining rules was to see how the principles were actually worked out in reference to a particular set of circumstances—and this meant interpretation by means of actual practice. Not even the law of nature is fixed and immutable; it varies from age to age, and must be determined by reference to existing conditions. And to leave this determination to each individual, or to each state, simply means anarchy. The words of Maine are still true, that "the grandest function of the law of nature was discharged in giving birth to modern international law," but the offspring has denied its parent's teachings and has sought other support. The law of nature, as taught by Pufendorf, has for the most part been abandoned; but, as we have seen, it has been lately revived in more modern garb.

Positivism. As the natural law school became discredited, the pendulum swung in the other direction, and publicists asserted that only those rules could be regarded as law which could be shown in the practice of states. This group is known as the positivist, or historical, school, since its evidences and authority are sought in historical records. The positivists have been found mostly in Germany, England, and the United States. The earliest writer who deserves the title is probably Gentilis, who dissociated law from theology and ethics. But even Gentilis found the *nuda historiarum recitatio* fruitless. The daily doings of states, good or bad, juridical or political, consented to or imposed upon, furnish no satisfactory source of law, no matter how often repeated. Stagnation is the inevitable result

of a system in which there is no appeal to reason. "Custom," Westlake points out, "had introduced bad rules as well as good ones." [21] To avoid this difficulty, positivists attempted to base all rules upon the consent of states, a consent which must often be assumed, and which has no support in their logic.[22] Thus they fell into the very pit which they laid for the naturalists, for they built up a system *a priori*, upon the assumed doctrine of sovereignty, rather than building by induction from the actual practice of states, as they claimed to do. It was impossible for them to be consistent; indeed, there are very few of them who do not somewhere deny their fundamental premise, that the consent of the states, which they claim to be above any authority, is necessary to law. In one way or another they admit an authority outside of the state, for without this admission it would be impossible to establish the binding force of international law upon states. Positivism, by its own witness, cannot stand alone. The tendency during this period has been toward positivism; now it is swinging back toward natural law. But neither can do without the other. Naturalists must admit that practice affords the only human interpretation of their principles; positivists must admit that reason must be added to practice before it can be called law.

The positivist doctrine, insofar as it is based on the theory of consent, has been vigorously assailed by the "Vienna School" and others in recent years.[23] These writers in general assert a "monist" conception, to the effect that all law, national or international, constitutes one system, in which international law is supreme. The binding force of international law, therefore, is the same as that of any other law, and requires no separate defense. This school of thought is criticised as giving insufficient consideration to the actual practice of states.

§ 12. Theory of Consent.[24]—In proving a rule of international law it has usually been held necessary to show the consent of states to that law, and this leads us into a very difficult theoretical discussion. It has been seen that an unqualified doctrine of sovereignty is unacceptable. Nevertheless, it is still upheld even in the Charter of the United Nations, and its effects are far from being weeded out. One of these effects, vital in its results upon international law itself, we must now consider.

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[21] Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894), p. 27.

[22] See § 12, *infra*.

[23] See H. Kelsen (the founder of the Vienna School), *Das Problem der Souveränitat und die Theorie des Völkerrechts* (Tübingen, 1928); also his *General Theory of Law and State* (Harvard University Press, 1945); J. L. Kunz, "The Vienna School and International Law," *New York University Law Quarterly Review*, X (1933-4), p. 370; A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Wien und Berlin, 1926); J. C. Starke, "Monism and Dualism in the Theory of International Law," *B. Y. I. L.*, 1936, pp. 66-81.

[24] Briggs, pp. 24-25, with numerous references.

If a state is sovereign, then it cannot be bound without its own consent. The usual statement, even yet, is that no state is bound by a rule of international law to which it has not given its assent. This would mean that unanimous consent must be obtained before a rule of international law is established; that a right of *liberum veto* prevails in the community of nations as against any new law. Actually, however, no rule of international law could be proved to have received the formal assent of all nations, or of any large number of them; nor can this ever be done until machinery is set up for the purpose. International tribunals do not seek to ascertain whether the state before it has ever expressed its consent to the rule under discussion, but rather to ascertain what has been the practice of the community. A rule of general acceptance cannot be denied by a state on the plea that the record of history discloses no acceptance of the rule by that one state. Small states may be compelled to submit to a rule—witness the fate of South American states, which have consistently denied the rules upon which claims have been enforced against them. On the other hand, a large state may not escape the judgment of a court against it on the plea that it has never consented to the rule. Actually a vague—because of the lack of adequate machinery—majority rule prevails in the community of nations as well as within the state.

In the face of this situation, the bald statement of the corollary of sovereignty that a state could not be bound without its own consent was untenable, and positivists sought to evade the issue. It was not difficult to say that a state entering the community could be received upon the condition that it accepted all the laws in existence at that time. It is a fair rule and is maintained. But if a state were really sovereign and unlimited, it could disavow any rule at any time. It was necessary, therefore, to assume consent not only on the part of new members for old rules, but also on the part of all members for new rules. And so the theory of tacit consent appeared, by which it was assumed that after a rule had survived for a certain time it was agreed to by all members, unless formal objection had been entered. It was maintained by some that a state could retract its consent as freely as it had given it, but others asserted that consent once given could not be revoked, and that the state was ever afterwards bound by the rule.

This is unsatisfactory to the logical mind. States are bound because they have agreed to be bound, but why is this agreement binding? If a state is really sovereign, and dependent only upon its own will, why must it continue to be bound by a rule to which it has once given its consent but which at a later date runs contrary to its will? Triepel and others sought the answer in a fundamental norm, or in the maxim *pacta sunt servanda*. But if there be no power above the state, from what source does even this fundamental rule derive authority to bind the illimitable

state? If a state is to be bound, it must be by a compelling force from the outside; to say that it is obligated through its own consent means that no obligation exists. The doctrine of auto-limitation is, as Hobbes would put it, to make a thing depend upon itself. One can not lift oneself by one's own bootstraps.

"It is quite impossible," says Brierly, "to fit the facts into a consistently consensual theory." [25] Either there is no sovereignty or there is no international law; the two are irreconcilable. Actually, however, there are rules which do effectively limit the power of the state. No one would deny this today. But once it is admitted that there is a power outside the sovereign state and able to limit that state, then the doctrine of sovereignty is nullified, and with it the theory of individual consent.

CONSENT OF COMMUNITY. The sources and evidences which influence the international judge reveal the will of the community rather than of each individual state. This, it must be emphasized, is the actual situation, aside from any theoretical argument over sovereignty. "Nor is it to be admitted," said Justice Story in the case of *La Jeune Eugenie,* "that no principle belongs to the law of nations, which is not universally recognized, as such, by all civilized communities, or even by those constituting, what may be called, the Christian States of Europe." [26] It is the consent of the group which must be established, rather than the consent of each individual state. It is not permissible, nor is it done in practice, for a state to refuse to meet its obligations with the declaration that it had never given its consent to a rule well established, or that it had decided to change its mind and revoke its consent once given. "It is enough to show that the general *consensus* of opinion within the limits of European civilization is in favor of the rule." [27]

How the will of a political group is to be expressed is, in each case, a matter of the machinery and methods provided. It is usually, but not always, a matter of majority rule. In the United States, the Constitution may be amended by a minority of the people, through a very complicated machinery for expressing the group will. The *vox populi* is never a determinate mathematical calculation. The machinery of the community of

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[25] Brierly, p. 38; and see as to the theory of consent, J. L. Brierly, "Le fondement du caractère obligatoire du droit international," *Hague Acad.*, 1928, III, pp. 467-549; P. E. Corbett, "Consent of States and the Sources of the Law of Nations," *B. Y. I. L.*, 1925, pp. 20-30; M. O. Hudson, "The Prospect for International Law in the Twentieth Century," *Cornell Law Quarterly,* X (1925), p. 429; N. Politis, "Les transformations du droit international," *R. D. I.,* I (1927), pp. 57-75; R. Pound, "Philosophical Theory and International Law," *Bib. Viss.,* I (1923), pp. 71-90; J. B. Scott, "The Legal Nature of International Law," *A. J.,* I (1907), pp. 831-866; W. W. Willoughby, "The Legal Nature of International Law," *A. J.,* II (1908), pp. 357-365; W. W. Willoughby, *Fundamental Concepts of Public Law* (New York, 1924), p. 283.

[26] 2 Mason 448 (1822).

[27] Westlake, *op. cit.,* I, p. 16.

nations is not the best for the discovery of the wishes of the community, but the layman may console himself by reflecting upon the task of a judge called upon to interpret the unwritten common law in its earlier days. That judge was able to find his way, and international judges are blazing a trail equally as well. It may not be possible to say exactly how many years, or how many states, are required to establish the consent of the group to customary law, but international tribunals have succeeded in determining satisfactorily whether or not the rule has met with acceptance by the community of nations.

Relationship of Municipal Law to International Law. What, then, is the relationship between international and municipal law?[28] It has been maintained in the past that only those international rules may be called law which are accepted and applied within a state, and that since they are applied by domestic courts they are really domestic law, and that, consequently, there is no international law. Such a statement is obviously incorrect as regards cases which are tried by international tribunals and do not fall within the competence of domestic courts.

The statement is equally untrue within a state. It is an accepted principle that the rules of the international community are binding upon all states, and must therefore be enforced where necessary within a state. To admit that international law is ultimately dependent upon domestic law and courts, or that municipal law may override international law, would be to deny international law outright, and no state makes such a denial. As a matter of actual practice it may easily be shown that a state must have domestic laws which will enable it to enforce the rules of international law;[29] that it cannot have laws—not even its constitution—which conflict with international law;[30] that decisions of the courts putting its own law

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[28] Briggs, pp. 52-54; Hyde, I, § 5; H. Kelsen, "Les rapports de système entre le droit interne et le droit international public," *Hague Acad.*, 1926, IV, pp. 231-326; Ruth Masters, *International Law in National Courts* (New York, 1932); C. M. Picciotto, *The Relation of International Law to the Law of England and of the United States* (London, 1915); P. B. Potter, "International Law and National Law in the United States," *A.J.*, 19 (1925), pp. 315-326; H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), in French translation, Brunet, *Droit international et droit interne* (Paris, 1920); H. Triepel, "Les rapports entre le droit interne et le droit international," *Hague Acad.*, 1923, pp. 77-118; J. Westlake, "Is International Law a Part of the Law of England?" *Law Quarterly Review*, XXII (1906), pp. 14-26; Q. Wright, *The Enforcement of International Law Through Municipal Law in the United States*, University of Illinois Social Science Studies, V (1916); Q. Wright; "International Law in its Relation to Constitutional Law," *A. J.*, 17 (1923), pp. 234-244.

[29] See *U. S. v. Arjona*, 120 U. S. 487 (1886); Wright, *Enforcement*, p. 16. "And whereas the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of legal means of action which it possessed . . ." *Alabama Award*, F. Wharton, *A Digest of the International Law of the United States* (3 Vols., Washington, 1887), III, p. 633.

[30] "There could be no question that national laws must yield to the law of nations if there was a conflict." Umpire Plumley in the *Aroa Mines Case*, Ralston, *Venezue-*

above international law are not final, but may be reviewed and reparation may be demanded by an international tribunal;[31] and that international law reaches beyond the realm of the authority of the state.[32]

In the between-wars constitutions of Germany and Austria, international law was specifically made a part of municipal law. The same result is reached in repeated decisions by American courts: "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[33] While there has been some controversy in England, the courts there apparently apply the same rule. A domestic court is, however, instructed by its own legislation or constitution, and may therefore be required to put its own law first. What of such possible conflicts? The first duty of every state is to provide laws and machinery which will enable it to meet its international obligations. How a state does this is of no concern to international law; it is free to organize and rule itself as it pleases. But if a state fails to meet these international obligations because of a conflict between its own law and the law of nations, or if it does not have machinery or its courts are unable to give effect to the latter, that state becomes responsible to the state whose rights are violated. Internally, the court may proceed with the utmost correctness according to its own laws, and may even with perfect propriety under its laws violate international law. In so doing, however, it comes into conflict with a superior law, and must make reparation for the injury thereby occasioned. A court often says that it is unable, under domestic laws, to give relief, and that reparation must be sought through diplomatic channels. In result, this means an appeal from a lower to a higher authority. The fact that a domestic court is unable to give relief, far from ending the dispute, simply brings international procedure into play.

The situation is simple enough. The community of nations has little machinery for enforcing its own laws; it relies for that purpose upon its member states, just as the German Reich depended upon the Reich's members, in many cases, to carry on the work of the central government.

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lan Arbitrations, p. 344; and see the *Gentini Case, ibid.,* p. 725; *Cutting Case,* Moore, *Digest,* II, p. 235, and others quoted in Eagleton, p. 64. "In such a case a treaty is superior to the Constitution which latter must give way." *Montijo Case,* Moore, *Arbitrations,* p. 1440.

[31] "The defense of res adjudicata does not apply to cases where the judgment set up is in violation of international law." Moore, *Digest,* VI, p. 694. The Supreme Court of the United States has on several occasions been reversed by international tribunals. Root, in *A.J.,* III (1909), p. 535; J. H. Ralston, *Law and Procedure of International Tribunals* (Stanford University Press, 1926), § 179.

[32] A state could not by its own laws seize a pirate of another nationality upon the high seas, but it can do so under international law. See p. 112 below.

[33] From the *Paquete Habana,* 175 U.S. 700 (1899). See also the *Nereide,* 9 Cranch 423 (1815); the *Charming Betsy,* 2 Cranch 117-118 (1804).

The state thus becomes, within its own jurisdiction, the agent of the community; and its failure to perform the duties thus laid upon it—duties in return for which it is permitted exclusive jurisdiction—will make it liable at once. If it is true that a state may in practice refuse to execute international law internally, it is equally true practically that the state must make reparation for so doing. Just as the law of a member state in the United States must give way before a power delegated to the national government, so no domestic law can stand up against a law of the community of nations. It is only those who regard the state as sovereign, as above all law, who find difficulty with this proposition, and they are forced to bow to the facts of practice.

§ 13. Is International Law True Law?—There can be no doubt that international law was, and still is, shockingly defective. To admit that it is violated is not of great significance, for many legal systems suffer more frequent violation.[34] To admit its defects is not to deny its value, but merely to say that international law, like all other law, is the product of evolution. For reasons already explained, the law of nations has been slow in developing, but the pressure of interdependence is now reaching its high tide, and two World Wars have impressed their lessons indelibly upon the world. Development of law and government must necessarily proceed at a more rapid pace in the future.

International law has been defective in many ways. It has had neither judge, nor legislator, nor policeman. It covered only the more unimportant matters, and did not attempt to deal with questions of most vital importance to humanity. The greater portion of international relations did not come within its jurisdiction at all—such matters as the control of war, the pacific settlement of disputes, the vast problems of international economics, of imperialism, and the list of so-called domestic questions. It has been too much interested in the so-called fundamental rights of that artificial personification, the metaphysical state. Its rules have not always been precisely stated, nor have they been universally accepted.

It may be pertinent to observe, at this point, that if international law is defective and subject to criticism, this may fairly be charged to its critics, or to peoples in general. Law, as was said earlier, is a product of social consciousness. It does not just grow itself; it is not to be chided if it fails. Its failure is the failure of those who fail to give it the support which would make it strong and effective.[35]

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[34] "Indeed, in respect to actual observance, I venture to say that international law is on the whole as well obeyed as municipal law." John Bassett Moore, *International Law and Some Current Illusions* (New York, 1924), p. 300.

[35] "In a word, whether there was to be a law of nations . . . depended upon whether the possessors of the requisite power were on the side of the law." Hyde I, p. 19. Thus an especial responsibility would seem to rest upon the American people.

It may be said now, without undue optimism, that such defects are recognized, and that successful efforts are being made to remedy them. With the doctrine of sovereignty discredited, attention may be centered upon real human needs rather than upon the claims of the artificial state, and such of its corollaries as equality and independence, permitting a *liberum veto* upon legislation, are now being removed as obstructions. Machinery for legislation is being rapidly developed, through conference, multilateral treaties, and even official codification. Ordinary human beings are becoming interested, and are supporting international law with more vigor in order to solve problems which they now know require international solution. The hopeless effort to make war more polite has been abandoned, and efforts are now directed toward the control of war itself. Most of the states of the world have returned to the Grotian distinction between just and unjust wars. Efficient machinery is functioning for the settlement of international disputes, with each case adding to the storehouse of legal precedents. If one is not able to go so far as to say that there are now no gaps in international law, and that the judge has at his disposal enough law to enable him to render a decision, one may nevertheless feel that the judge has an invaluable source in the "general principles of law recognized by civilized nations."

The realization of these various objectives has been rendered much more probable through the establishment of the League of Nations, and now of the United Nations. Such organization is necessary if the community is to provide itself with an effective legislature, judge, or policeman, the absence of which now constitutes the great weakness of international law. The League of Nations collapsed, but the effort is again being carried on by the United Nations. The machinery of legislation has been somewhat improved, and much new conventional (or treaty) law has appeared. An efficient and highly respected Court is in operation, with a wide extent of compulsory jurisdiction, and strong pressures have been developed for pacific settlement of disputes and against the use of force. It remains true, however, that the League of Nations could not, nor can the United Nations, bind its members without their own consent to new rules of law, or impose upon them a settlement at a dispute.

Austinian Definition. The domestic lawyer is apt to deny to international law the character of true law, because of the influence of the Austinian definition of law. Austin held that law proper was a command from a determinate authority, that law was a rule of conduct laid down for an intelligent being by an intelligent being having authority over him. International law clearly cannot be fitted into this definition, but the definition no longer goes unchallenged. It is to be observed, in the first place, that the definition was made for individuals within a state, before it was

ever conceived that there could be a community of states with a government of its own. The definition considered the state only internally, not externally. Again, the definition was founded upon the prevailing doctrine of sovereignty, which is now, at any rate for external purposes, obsolete. But even as a description of municipal law, says John Bassett Moore, "it is not sufficiently comprehensive, since it would, for instance, exclude a large part of constitutional law, much of which, like a considerable part of international law, is not enforced by courts by means of specific penalties.[36] And Professor Brierly, of Oxford University, calls it "a misleading and inadequate description even of the law of a state; it does not, for instance, account for the existence of the English Common Law." [37] The School of Historical Jurisprudence of Savigny and Maine taught that custom precedes law and remains the essence of it, and that the true test of law is recognition of law as a binding rule and observance of law as such. Even among legal philosophers, no one seems today to know what law is, but, says Hershey, in summary indictment, "It is now generally agreed that the Austinian view of law is formal, narrow, arbitrary, unhistorical and unphilological." [38]

There is certainly a body of rules of conduct for states, rules generally accepted as binding. They are interpreted and applied by courts, both domestic and international, which call them law. They are argued by states in their correspondence and before tribunals as law, and the decisions of these tribunals are as faithfully observed as are the decisions of municipal courts. In only one respect does international law fail to measure up even to the Austinian definition: that is, the lack of a superior authority having power over states below it. The sanctions of the community of nations will be considered below, but, says Hyde, "It is no longer seriously or widely maintained that the existence of law is necessarily dependent upon the presence of a power to enforce it." [39]

Whether international law is true law or not depends upon one's definition of law, but the factual situation remains the same. Conduct within the society of nations is in fact controlled by rules which are determined and applied by courts, which may be enforced by external coercion, and which are accepted as law by those to whom they apply. "It may be fairly

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[36] J. B. Moore, *International Law and Some Current Illusions*, p. 292. On p. 294 he adds: "the world has come to regard the rules governing the intercourse of nations as constituting a system of law, for the maintenance of which even the use of coercion is justified."

[37] Brierly, p. 49.

[38] Hershey, p. 7.

[39] Hyde, I, p. 15. "In my opinion, a law may be established and become international, that is to say, binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement." *The Prometheus*, 2 Hong-Kong Law Reports 217 (1906).

doubted," says Hall, "whether a description of law is adequate which fails to admit a body of rules as being substantially legal, when they have received legal shape, and are regarded as having the force of law by the persons whom they are intended to guide." [40] Whether one wishes to call them law or not is merely a matter of nomenclature, depending upon a debated definition of law.

Doubtless, the proper solution is to differentiate, in the general field of jurisprudence, between international law and other kinds of law, such as constitutional law, admiralty law, civil law, conflicts of law, criminal law, and others, each of which has its own characteristics. But the theorist who wishes to deny to the law of nations the title of true law does not in the least affect the actual conduct of affairs in that society, nor the fact that those affairs are regulated by rules as well enforced and obeyed as those of domestic law.

§ 14. Sanctions.—"That society does not as yet, however," says Professor Hyde, "itself undertake to make hard the way of the transgressor by fixing penalties and enforcing them. Powerful forces, nevertheless, unceasingly operate to produce respect for international law." [41] What are these forces?

Moral Sanctions. In one group, we may put such forces as public opinion, the "moral conscience of mankind," etc. It is not to be denied that these are powerful forces, forces more effective than the policeman in securing observance of law, forces which nations fear.[42] But they are forces which apply as well to matters entirely outside of law, to rules of etiquette or sport or religion, as well as to rules of a political character. Powerful as they undoubtedly are, public opinion and other moral forces can scarcely be classified as juridical sanctions.

Self-Help. In the classic texts of international law it was customary to insert a few pages, as a sort of bridge between the law of peace and the law of war, descriptive of the methods by which coercion could be applied. These methods were treated not so much as sanctions as preliminaries of war, or as means of retaliation or of self-help. They were usually divided into amicable and non-amicable methods. Under the former were placed good offices, mediation, arbitration, and the like; under the latter, retaliation, reprisals, blockade, and others. These methods shaded off gradually into the final recourse, the *ultima ratio regis*, war itself. All of them, including war, could be used at any time, without illegality, and it was impossible to say, when one of these methods was employed by a state

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[40] Hall, pp. 14-15.
[41] Hyde, I, p. 15.
[42] See E. Root, "The Sanction of International Law," *Proc. Am. Soc.*, 1908, p. 14.

against another state, whether it was for the legitimate maintenance of a right or for a less worthy purpose. International consolidation has proceeded at such a rapid rate as to make this classification obsolete. Amicable methods, so-called, belong under (and will be discussed later as part of) the machinery for the pacific settlement of international disputes. Non-amicable measures are rapidly being taken over by the community, to be used only under its authority, for the enforcement of its rules, and so should be discussed under the new heading of sanctions.

Until international society was organized upon a basis of collective responsibility, a nation could protect its rights only through its own efforts. These efforts might or might not extend so far as that technical status known as war. Short of war, there were a number of possibilities. The first step would usually be the breaking off of diplomatic relations. This could be followed by various other pressures such as retaliation, reprisals, embargo, blockade, or even forcible intervention in, or invasion of, the offending state. Such measures of compulsion were not regarded as war, and could therefore be accepted as non-hostile, unless they were taken up as war by the state challenged. Resistance on this basis produced a complete change in the law of force, bringing into effect the laws of neutrality and of belligerent warfare, and producing great inconvenience through the burdens placed upon non-participants. These were inconveniences to be avoided if possible, and more so the direct consequences of war to the defeated party. Reprisals or intervention thus went often unchallenged, so as not to convert the situation into the legal status of war.

These measures of self-help, which include war itself, were and are unsatisfactory. They may be used in the cause of justice, to enforce a legal right, but they may equally well be used for selfish purposes.[43] States are unwilling to give them up until they are assured of better means of enforcing their rights, and it may be said in defence of these measures that they have often served as a protection for international law. They have, therefore, played a useful part, but it is doubtless correct to deny to them the quality of juridical sanctions. If it is possible at all to consider them as sanctions, they are untrustworthy ones, denying impartial adjudication and leaving the weak at the mercy of the strong. When employed by states as sanctions, it was rather against material injury than in defence of law. When all is said and done, self-help is merely the exercise of might, which may or may not be also right. It does not express the will or represent the authority of the community of nations. Can it be said, then, that there are international juridical sanctions? Before answering this question, it

[43] "Thus if war ensues because of the breach of international law, or because of fidelity to the principles of that law, the consequences may prove in fact to be identical," and for that reason "the fear of war is not to be deemed a sanction possessed of a legal character." Hyde, I, p. 15.

must be recalled that international society is now divided into an inner and an outer circle. The outer circle is the older community of nations, inchoate and unorganized, resting upon customary law and having no sanctions beyond morality and self-help. This is not to deny that the wider community has a true law and that the law is obeyed to a remarkable degree. But it lacks a sense of collective responsibility, and it does not have sufficient organization to protect itself against the exceptional lawbreaker.

Community Sanctions. Within the inner circle, represented first by the League of Nations, and now by the United Nations, true juridical sanctions are available. The essential point of difference is that machinery is here provided by which the community may determine illegality and may decide upon means of coercion to be employed in the name of the community against the offender. The action here taken is not unilateral, the irresponsible action of one state against another, but the action of an organized political group. It should be noted and emphasized, however, that these sanctions are not applied by any authority superior to nations. In the international community as now organized there is external coercion, but no coercion from a power above. Each member is independent, equal before the law to other members, and admitting no authority above it. There is no *civitas maxima,* no world state. There is simply a voluntary combination of independent states, cooperatively exercising through machinery provided by it the purpose of the community to maintain order. Its sanctions are applied as each case arises, through consultation and agreement, and not upon the command of any authority set above states.

PART II

WHO ARE THE members of this community of nations, and what is their legal status? Presumably, they are nations, or states; but it is not always easy to determine what political grouping deserves such an appellation. In practice, the answer is recognition, bestowed by other members. Questions arise as to title to territory and its boundaries, and as to its transfer. Many rules of international law—with many uncertainties also—have been developed as to the rights and duties of members, and especially as to the control which members can exercise (jurisdiction) over persons and things, in and out of their territories. Finally, what is the position under international law of the individual human being, who is after all the unit of any human society?

CHAPTER 3

MEMBERSHIP

Like a biological organism, a political organization is born, grows, reaches its majority, suffers from illness or external forces, and finally, perhaps, dies. It may grow or weaken, not only in area and population and financial and industrial strength, but also in its authority within the community. In terms of international law, these developments involve rules as to the acquisition of title to territory, boundaries, recognition, the continuing personality of the state and state succession, or inheritance upon demise.

§ 15. Modes of Acquiring Territory

DISCOVERY AND OCCUPATION.[1] There are several ways in which title to territory may be acquired. Title has often been taken through the discovery of hitherto unoccupied lands. Originally, during the unsettled period of exploration, discovery was regarded as sufficient, but it soon came to be considered as establishing merely an inchoate title, with occupation necessary to make it permanent.[2] What is meant by unoccupied land, *terra nullius,* has never been quite clear. Possession by uncivilized tribes was frequently disregarded, but even land claimed by a Great Power, when abandoned or not maintained by it, might be claimed by another state. The arbitration between the United States and the Netherlands over Las Palmas Island illustrates, to an attenuated degree, the difficulties of determining what is needed to establish legitimate occupation.[3] Conflicts in Africa led to an agreement, at the Conference of Berlin Concerning the Congo, that claims to territory should be notified to other powers, and that there should be established an "authority sufficient to cause acquired rights to be respected."

While various potential boundary disputes remain in South America and elsewhere, the limited extent of available unoccupied lands makes the

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[1] J. Goebel, Jr., *The Struggle for the Falkland Islands* (New Haven, 1927); M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London, 1926); N. L. Hill, *Claims to Territory* (Oxford University Press, 1945). For cases on the subject, see Dickinson, *Cases,* pp. 304-336; Evans, pp. 281-305; Hudson, *Cases,* pp. 370-401; Scott, pp. 172-200.

[2] *Johnson and Graham's Lessee v. M'Intosh,* 8 Wheaton 543 (1823); *The Fama,* 5 C. Robinson 106 (1804).

[3] The opinion of the arbitrator is found in *A.J.,* 22 (1928), p. 867; and see article by P. C. Jessup, *ibid.,* p. 735.

question of less importance today. However, the recent explorations of Admiral Byrd in the Antarctic area raise interesting questions as to the application of the rule. If occupation is regarded as the manifestation of the intention of the claimant state to maintain possession, perhaps the establishment of a temporary base, say for the aid of airplanes seeking short cuts in transoceanic flights or for whaling expeditions, should be regarded as sufficient evidence of such an intention where permanent occupation is impracticable.[4]

CESSION. Title to territory may, in the second place, be acquired through a number of forms of cession. States are rarely found in generous enough mood to make gifts of territory. Exchange is almost as rare, the most famous instances being the trading of Bessarabia for the Dobrudja, between Russia and Rumania; or the exchange of the island of Heligoland for African territory, between England and Germany. The usual methods are through purchase or conquest. Many instances of the former are to be found in the history of the United States, from the Louisiana Purchase to that of the Virgin Islands. Cession may also result from conquest or defeat in war, formally confirmed by treaty. Though money payments were made in Mexico in 1848 for areas now a part of our West, and to Spain for the Philippines, these transfers should be regarded as cession through conquest rather than as cession through purchase. That the treaty of cession is made under duress does not invalidate the title thus conferred, no matter how extortionate that treaty may be, so long as war is not illegal.

CONQUEST. Technically, title by conquest must be distinguished from title by cession following conquest, in that the former is not confirmed by treaty or other formal act. The inhabitants of the subjugated territory pass under the unconditional control of the conqueror without a treaty. Nevertheless, there are some who maintain that conquest does not give title in either case. The argument bears a close relationship to the principle of self-determination. These writers argue that conquest is merely a hard fact, that conquest is force, and force is antithetical to law. They hold, therefore, that conquest cannot give legal title.

However sympathetic one may be with this viewpoint, the logic of Fauchille is irresistible: to deny conquest is to deny war, and war has not

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[4] T. W. Balch, "The Arctic and Antarctic Regions and the Law of Nations," *A.J.*, 4 (1910), pp. 265-275; Hackworth, I, § 67; Hyde, I, §§ 104A to E; D. H. Miller, "Political Rights in the Arctic," *Foreign Affairs*, 4 (1925), pp. 47-60; E. Plischke, "Trans-Polar Aviation and Jurisdiction over Arctic Air Space," *Pol. Sci. Rev.*, XXXVII (1943), p. 999; G. Smedal, *Acquisition of Sovereignty over Polar Areas* (Oslo, 1931).

yet been made illegal.[5] "One must hope," says Oppenheim, "that the time will come when war will disappear entirely, but, as long as war exists, subjugation will also be recognised." [6] There can be no doubt that international jurisprudence has recognized title based upon conquest,[7] but there are now powerful trends against this principle of international law. As far back as 1890 a Pan American Congress passed a resolution that "conquest shall never hereafter be recognized as admissible under American public law," and Project No. 30 proposed by the American Institute of International Law laid down the rule, "In the future, territorial acquisitions obtained by means of war or in presence of an armed force, to the detriment of any American Republic, shall not be lawful." [8] Article X of the Covenant of the League of Nations, had it been positively interpreted and strictly enforced, would have made conquest impossible.

On January 7, 1932, Secretary Stimson announced that the United States "does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris . . . ." The "Stimson Doctrine" was adopted by the Assembly of the League of Nations and again reaffirmed in a note from nineteen American republics at the time of the conflict between Bolivia and Paraguay.[9] The Atlantic Charter rejected aggrandizement. It may be argued, upon the basis of acceptance by most of the members of the community of nations, that there is now a customary rule of international law against title by conquest.

Self-Determination. The doctrine of self-determination drives toward the same goal. The American Declaration of Independence speaks of the "consent of the governed," and Rousseau's theory of popular sovereignty led to the application of the principle during the French Revolution. Napoleon III and Italy employed the plebiscite on several occasions. It was, however, coldly received outside of France and Italy until revived by President Wilson at the Peace Conference of 1919. He asserted that "no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property," and included in the famous Fourteen Points the principle "that in determining all such questions of sovereignty

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[5] Fauchille, I, Pt. 2, p. 768. Not even by the Charter of the United Nations.

[6] Oppenheim, I, p. 463.

[7] *The Foltina,* 1 Dodson 450 (1814); *Fleming v. Page,* 9 Howard 603 (1850). See the well-supported book by Mathew M. McMahon, *Conquest and Modern International Law* (Washington, 1940), which, in general, agrees with the above paragraph.

[8] *A.J.,* 20 (1926), Special Supplement, p. 384. The Sixth Conference of American States, at Havana, 1928, adopted a Resolution that "All aggression is considered illicit and as such is declared prohibited." *A.J.,* 22 (1928), p. 357. See Chapter 18, *infra.*

[9] Department of State *Press Release,* January 7, 1932; see *Survey,* 1932, pp. 195, 217, 301; Hyde, I, §§ 109C, 109F.

the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined."

The practical application of such a principle is extremely difficult. Shall any discontented group be permitted to set itself up as a separate government? Would the United States, for example, permit Long Island to do so, or would the community of nations support its claim? Such a claim might upset vital economic dependences, nor would there be any guarantee of stability in the new system. Nevertheless, the historical lessons of Alsace-Lorraine, Poland, and other cases, were not disregarded by the Peace Conference of 1919, and several plebiscites [10] were allowed, as in Eupen and Malmédy, the Saar Basin, and Upper Silesia. The fact that a plebiscite was denied in other cases, or that it was granted as an act of conquerors, rather than as a matter of right, makes it impossible to regard the principle of plebiscites as one of international law.

While, then, it is still arguable whether title by conquest is illegal under international law, public opinion is undoubtedly moving in that direction. This trend must follow the path which leads to the illegality of war, for so long as war is legal conquest cannot be denied. The efforts being made in that direction give hope that title by conquest will ultimately become obsolete, if it is not already obsolete.

ACCRETION. New territory may also be added through the natural process of accretion. This term applies ordinarily to an extension of land due to alluvial deposits through the working of rivers or seas. Islands formed within territorial waters through other natural forces, such as volcanic activity, would seem to be included, and probably also artificial extension, through dikes or other such barriers. Where such land appears within the territorial limits of a state, it belongs to that state, and its territorial waters are measured anew from the island [11] or other extension.

PRESCRIPTION has been asserted as ground for title in international as well as in domestic law. It refers to long-continued possession, in the face of a title earlier held by another. It was stated as follows by the Supreme Court of the United States: "It is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." [12]

Leases do not give *de jure* title, but they are frequently nothing more than disguised cessions, practically conferring sovereignty upon the lessor. Similarly, spheres of influence and areas under administrative control,

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[10] See, as to plebiscites, Sarah Wambaugh, *Monograph on Plebiscites* (New York, 1920).

[11] *The Anna*, 5 C. Robinson 373 (1805).

[12] *Virginia v. Tennessee*, 148 U.S. 503 (1892).

such as Bosnia and Herzegovina under Austria until they were formally annexed in 1908, may mean effective control without acquisition of title.

§ 16. Boundaries.[13]

THE "HINTERLAND." There naturally arose, in connection with the vast areas of newly discovered territory, the question of the extent to which the claim could legitimately reach. Could a man who had just set foot upon a few inches of land thereby claim for his state the entire continent upon which he stood? Obviously not, if occupation and actual possession were necessary to render title by discovery valid. On the other hand, it was hardly reasonable to allow later arrivals to claim territory up to the back fences of settlers who had already arrived. There was long debate over the principles to be applied. According to one theory, the discoverer was entitled to all lands necessary for his security. This theory was disputed by those who argued that a claim should not be permitted to extend beyond the material limits within which the government could make its authority felt. And how much land was necessary for security until a reasonable time for achieving effective occupation had elapsed? The original charters granted by the British Crown to colonists in America granted the land from sea to sea, and this claim was vainly maintained later by the United States in the "54° 40′ or Fight" controversy over the Oregon country. There was also the theory of determination by natural boundaries, such as a mountain divide or watershed.

While the rule of effective occupation was ultimately admitted, there was not sufficient law to adjust such disputes, and settlement was usually made through treaty and compromise fixing artificial boundaries. During the nineteenth century the arena was transferred from America to Africa and competition became keen as the amount of unclaimed territory decreased. Various devices were employed, under such names as "hinterland," colonial protectorates, or spheres of influence, to extend sovereignty without assuming responsibility for sovereign control. Treaties were the usual solution until the Berlin Conference in 1885 laid down rules as to notification and effective occupation. The question is by no means dead, for boundary disputes may yet appear, whose solution will depend upon earlier claims.[14]

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[13] On boundaries, see Dickinson, *Cases*, pp. 336-368; Evans, pp. 140-157; Hudson, *Cases*, pp. 402-486; Scott, pp. 200-251; also S. W. Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (New York, 1940); Norman Hill, *Claims to Territory in International Law and Relations* (Oxford University Press, 1945), T. H. Holden, *Political Frontiers and Boundary Making* (London, 1916); Stephen B. Jones, *Boundary Making; A Handbook for Statesmen, Treaty Editors and Boundary Commissioners* (Carnegie Endowment, Washington, 1945); P. de Lapradelle, *La frontière. Etude de Droit International* (Paris, 1928).

[14] It may be noted that the application of the "Open Door" policy of Secretary Hay prevented such a scramble for territory in Asia as had occurred in Africa, and that the Monroe Doctrine has been a similar deterrent in South America.

While, actually, most boundary lines have been drawn by treaties of peace or cession, various rules have evolved from these controversies for the delimitation of boundaries.

MARITIME BOUNDARY. The maritime boundary is especially difficult to determine because of its configuration. The needs of self-defense, exercise of jurisdiction for certain purposes, fishing and other similar rights, combined in earlier days to produce extravagant claims. About the beginning of the eighteenth century Bynkershoek laid down the famous rule of the cannon-shot limit, *ubi finitur armorum vis*. It was measured at three miles, and this distance, rather than the range of a gun, has apparently been accepted in practice, although writers are not at all agreed that the three-mile limit is an established rule of law. The fact that the United States felt it necessary to negotiate a treaty in 1924 which would give her permission to search British rum-running vessels beyond that limit would seem to be a recognition of that rule, which is in fact explicitly asserted in Article 1 of that treaty.[15] Yet the United States for various purposes, and other states for even more varied purposes, have at times exercised jurisdiction beyond three miles. Modern circumstances of life, such as the greater speed of vessels, longer range of guns, radio communication, as well as such difficulties as the pursuit of smugglers and bootleggers, have led to much protest against the narrow range of the three-mile limit. Various proposals have been made for extending it out to a greater distance or for allowing jurisdiction beyond it for certain purposes. The Codification Conference of 1930 was unable to agree upon the extent of the territorial waters of a state.[16]

In the case of bays and gulfs, it is difficult to establish the coast line from which the three mile distance is to be measured. The logical effect of the application of this rule would be to include within the territorial limits of a state such indentations as are not more than six miles across; but if they are wider than this, a special agreement, or a prescriptive right, must be shown. From the viewpoint of national defense, or even of commercial traffic, it is hardly to be expected that the United States should deny herself control over, for example, Chesapeake Bay, and our courts have maintained such jurisdiction without challenge.[17]

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[15] For this treaty, see *A.J.*, 18 (1924), Supplement, p. 127.

[16] In the documents prepared for this conference invaluable information is to be found. The debates on this subject at the Conference itself are to be found in League of Nations, *Acts of the Conference for the Codification of International Law*, Vol. III, Minutes of the Second Committee, 1930. V. 16. See also *Com. Prog. Cod.*, Questionnaire No. 2, pp. 28-75; *Bases of Discussion*, Vol. II, 1929. V. 2; Research in International Law, *Territorial Waters*, pp. 241-380; P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York, 1927).

[17] *The Alleganean*, Moore, *Arbitrations*, p. 4332 (1885); *North Atlantic Coast Fisheries*, J. B. Scott, *The Hague Court Reports* (Oxford University Press, 1916), p. 146 (1910).

A strait separating two states is usually divided by a middle boundary line. If it is entirely within a state, but more than six miles wide, conventional arrangements will have to be made, as in the case of the Dardanelles.

RIVERS. When a river touches upon two or more states very difficult problems of control and of navigation may arise. A river wholly within a state, such as the Mississippi, is entirely subject to the control of that state. If it flows through two states a fertile source of dispute is found. The state at the mouth of the river has an enormous advantage, but its exclusive control in such a situation is so clearly inequitable that it has been restricted. Against such control Grotius and Vattel protested, supporting a right of innocent navigation. States have been compelled, in one way or another, to admit such navigation by conventional arrangement, until it may be said today to be recognized as a general principle of public international law.[18] Geographic and other influences, however, make it impossible to draft specific rules which can apply equally well to all situations, and so it has been necessary to provide by treaty for each river. In some cases, such as the Rhine and Danube, quite a jurisprudence has appeared, and administrative institutions have been created, charged with a considerable degree of authority in their supervision over these rivers. Part XII of the Treaty of Versailles greatly extended the application of the principle of freedom for fluvial navigation. It is probably true today that all important international rivers are open to general navigation.[19]

Where a river flows between two states the boundary set by jurisprudence is the *thalweg,* or center of the main channel. Each state has a general right of navigation and a particular right of control to the *thalweg.*[20] This rule permits the free movement of traffic in the best ship channel. If by a gradual process of erosion or accretion the channel is changed, the boundary line also moves. However, a sudden diversion of the river (known as avulsion) to other channels leaves the territorial boundary where it was.[21]

§ 17. Members.—The unit of membership in the community of nations is usually said to be the state or nation. A state is defined as a political unit, having fixed territory, people, an organized government, and, most

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[18] They are named international rivers, says Oppenheim, "because freedom of navigation in time of peace on such rivers in Europe and on many of them outside Europe for merchantmen of all nations is recognised by International Law." Oppenheim, I, p. 372. According to Hyde, "The true basis of any right possessed by a State to navigate the waters of a river traversing foreign territory is believed to be the general interest of the family of nations that such a privilege be not withheld. That interest must vary according to geographical considerations." Hyde, I, p. 562.

[19] See the cases before the Permanent Court of International Justice, in Series B, No. 14, and Series A, No. 23.

[20] *Louisiana v. Mississippi,* 202 U.S. 1 (1906).

[21] *Arkansas v. Tennessee,* 246 U.S. 158 (1918); see also the *Chamizal Boundary Dispute, A.J.,* 5 (1911), p. 785.

important, independence of external control. People would seem to be an obvious requisite, and a definite territorial area is important from the international viewpoint, since the jurisdiction allowed to a state, permitting it certain rights and holding it responsible for the performance of certain duties, is determined by its boundaries. Some states were denied admission to the League of Nations because of their small size. Likewise, a political organization is necessary, that there may be a voice to speak externally for the state, and an authority which can, on the one hand, administer justice internally and protect the rights of its members abroad, and, on the other hand, answer for damages done by the state. Thus far, various human organizations might measure up to the definition—some universities, for example, have large population and area and efficient organization. But they do not possess the chief requisite, independence of external control, which is said to distinguish the state from all other human associations.[22]

How far states actually have such independence is a moot question. Various collateral questions arise: Is independence an essential quality of the state, as an international unit? Are all states members of the community of nations? and, Can any body other than a state be a member? These questions will be discussed below, but in one sense the answer to them is affirmative, for the community of nations now reaches, either directly or through some other member, practically every inhabited portion of the terrestrial globe. This factual situation disposes of a problem formerly puzzling to writers, the extent to which international law applied to uncivilized communities. International intercourse must depend upon mutual understanding and reciprocity of interest, and there was not the same understanding on the part of a European state and an African tribe as to the meaning of a treaty. Naturally, then, the community of nations at first regarded itself as limited to Christian or European states. The American states were admitted as heirs to European civilization, and thus the community could no longer be called European. The admission of Turkey in 1856, and of Japan and other states in later years, deprived the community of nations of its exclusively Christian character, although reservations were still made as to barbarous communities. Today such limitations have about disappeared, for practically all communities are so far under the control or influence of admitted members that the latter can be regarded as responsible for them. For all practical purposes, then, it may be said that the community is universal, that all humanity comes under its wings.

The matter is further complicated by the question of membership in the inner community known as the League of Nations, now the United Nations. Does membership in one imply membership in the other? In neither

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[22] See, as to the definition of the state, J. W. Garner, *Political Science and Government* (New York, 1928), Chap. V.

the League nor the United Nations was membership made automatic, and some states recognized members of the older community of nations (e.g., the United States) were not members of the League of Nations or now (e.g., Switzerland) of the United Nations. In the debates which established the United Nations at San Francisco it was made clear, as a result of questions raised, that all Members were states, including such as the Philippines, the Byelorussian Soviet Republic, Egypt, or Lebanon. Presumably, then, each Member must recognize each other Member as a state, a legal person; but this principle would not affect non-Members. Relationships between all states under customary international law, whether Members of UN or not, would continue except insofar as they might be modified by the obligations of membership.

§ 18. Types of Members.[23]—One may measure independence as a test of membership in the community of nations by attempting to classify political entities upon this basis. If by independence sovereignty is meant, no political group could be a member of the community, for no state is unlimited in its power. When one surveys the actual situation of states today it becomes apparent that independence is a relative term. It might be possible—though we shall not attempt it here—to rank states according to the degree of their freedom from external limitation, and to show that no two states have the same quantity of it. Independence is not a unit which a state has or does not have; a state may have a certain amount of it, some more than others, and no state is absolutely free. Our question is not so much whether a political entity measures up to the definition of a state given by political science, but rather whether, according to the rules and practice of the community of nations, it is entitled to membership in that community. To employ more technical terminology, when is it a person or a subject of international law?

Writers who have attempted to classify members of the international community have found themselves embarrassed by the confusing wealth of plan and structure which the tide of political evolution has cast up. As Lawrence says, "the classificatory skill of jurists toils far behind the constructive ingenuity of statesmen." [24] Using one or another set of terms, however, they have usually arrived at a three-fold division into sovereign, part-sovereign, and dependent states.[25] It will be observed that, even

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[23] For cases relating to the status of members of the community, see Dickinson, *Cases*, pp. 1-63; Scott, pp. *Cases*, pp. 76-90, 104-137; Evans, pp. 33-66; Hudson, *Cases*, pp. 19-57. See also Dickinson, *Equality, passim;* Eagleton, Chap. II.

[24] Lawrence, p. 52. "For international purposes, however, this classification is immaterial." Hall, p. 23; and see Hyde, I, § 13; Dickinson, *Equality*, pp. 278-279; Fenwick, p. 353; Westlake, I, p. 21.

[25] "The community of nations is found to be composed of states which enjoy full membership and of other states which enjoy but partial membership. Of those which enjoy full membership some few are subject to restrictions which, while qualifying

among writers who support the doctrine of sovereignty, the classification of part-sovereign is admitted, thus destroying the claim that sovereignty is indivisible, and rendering it useless as a test of membership. Oppenheim faces this difficulty frankly and concludes: "That they can not be full, perfect, and normal subjects of international law there is no doubt. But it is wrong to maintain that they can have no international position whatever, and can never be Members of the Family of Nations at all." [26]

So-Called Sovereign States. Most of the states commonly recognized as members of the community are so free from external control that they may be called independent, but in no case is there complete freedom. "In a strict sense," says Hyde, "no member of the international society is or can be independent." [27] There are in fact numerous limitations upon them aside from the equal incidence of international law. Neutralized states are unable to make war, or cede territory, or enter into certain types of treaties. Belgium, for example, was unable to sign the treaty guaranteeing the neutrality of Luxembourg, or the Hague Convention Limiting the Employment of Force for the Recovery of Contract Debts. And it must be noted that if neutralization is a limitation upon the neutralized state, it is also a limitation upon those states, actually including the most powerful states of the world, who signed the treaty of collective guarantee. Again, certain states are limited in their treatment of minority groups within their control, or as to freedom of transit, and such conditions on membership had been earlier imposed by the Treaty of Berlin upon the Balkan states.

There are some so-called sovereign states whose independence is little more than fictitious. Cuba, until recently, was able to send and receive diplomatic agents, make treaties, and be a member of the League of Nations, though she was bound by a treaty with the United States which guaranteed her independence, forbade her to make treaties which might impair her independence, or to alienate any of her territory for colonization or for military or naval purposes, or to contract a debt beyond the ordinary revenues of the island. The United States was given "the right to intervene for the protection of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed

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the enjoyment of their rights, do not limit their status of full membership." Fenwick, pp. 85-86.

"A state in its normal appearance does possess independence all round, and therefore full sovereignty. Yet there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full sovereign States." Oppenheim, I, p. 135.

"Au point de vue de la souveraineté, on peut classer les différents Etats du globe en trois catégories: *souverains, protégés, vassaux.*" Fauchille, I, p. 257.

[26] Oppenheim, I, p. 136.

[27] Hyde, I, p. 43.

by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba." [28] Indeed, says Hershey, "In a very broad general sense, the Latin-American States might be said to be under the political protection of the United States." [29] A similar relationship existed between Egypt and Great Britain.[30] Most of such arrangements are today in process of change.

It is thus apparent that even received and accepted members of the community may have drastic limitations put upon their freedom, may submit to an amazing degree of control by other states, and may nevertheless retain their membership without question. The leading powers of the world are subject to similar, if lesser, restrictions. Germany, upon entering the League of Nations, objected to the performance of the military duties required by the Covenant, on the ground that her war-making power was limited by the Treaty of Versailles. The United States, because of her comparative isolation and ample resources, is probably more nearly a fully independent state than any other in the world; but she, like other great states, was restricted by naval disarmament treaties, and is not entirely free as to the use of the Panama Canal.

It is no answer to this situation to asseverate that these are conditions to which states have voluntarily consented. Even if the theory of auto-limitation be conceded, these restrictions on independence do actually exist, and are binding, and states can not of their own motion be rid of them. "In fact," says Hyde, "the whole body of treaties to which a State is a party betokens a check upon legislative freedom." [31]

So-Called Part-Sovereign States. Among states usually classified as part-sovereign can be found some which possess as much share in the rights of the community as some which are listed as full-sovereign. Bulgaria was, for example, by the Treaty of Berlin and until 1908, a tributary Principality under the suzerainty of the Sultan. Yet she had the right to make war and treaties, the right of diplomatic representation, and her delegates were seated at the Hague Conference of 1899. Again, English courts have recognized certain dependent Indian states as sovereign and have granted to their rulers diplomatic immunities, but no third state would

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[28] The treaty is found in Malloy, I, p. 362; and in Moore, *Digest*, VI, § 910. It was abrogated by a new treaty concluded in 1934 (48 Stat. at L. 1682).

[29] Hershey, p. 192, note 38. Fenwick, p. 284, discusses the Monroe Doctrine under the head of servitudes.

[30] A treaty of 1936 recognized Egypt as a sovereign independent state and formed an alliance between the United Kingdom and Egypt, leaving to the former some rights as to the protection of the Suez Canal. See *B.Y.I.L.*, XVIII, p. 79; *A.J.*, 31 (1937) Document Section, p. 77.

[31] Hyde, I, p. 209. "These limitations exist. There is abundant evidence that in one form or another they will become more important in the future. Little advantage can be derived from attempting to subordinate them to theories which tend to deny or distort their true significance." Dickinson, *Equality*, pp. 278-279; and see pp. 88-89, *infra*.

think of conceding to them even a qualified membership or voice in the community of nations.[32] Protectorates have the "one common element," "the prohibition of all foreign relations except those permitted by the protecting state." [33]

There are now no personal unions, (unless the British Commonwealth be so regarded) such as that existing between Hanover and England until 1737, or between Belgium and the Congo Free State until 1909; nor real unions, such as the union between Norway and Sweden until 1905, or that between Austria and Hungary until World War I disintegrated it. Likewise, the terms suzerain and vassal have become obsolete.

The federal state produces some questions. There is no doubt as to the capacity of a federal state for membership in the community of nations, but the rights of its member states are insignificant. Some members of the former German Empire had the right of legation and of treaty-making, and some of the cantons of Switzerland enjoy a very limited right to make treaties.[34] Whatever the legal status, there is little doubt that, should such a treaty be violated, protests and reclamations would be directed to the central government of the federal state. The member states of the United States have no international personality whatever.

The British Commonwealth of Nations. Finally, there are organizations which, exemplifying the prolific ingenuity of constructive statesmanship, cannot be classified at all. One of the most interesting of these developments, not only because of its novelty but because of the lessons to be drawn from it for international organization, is the British Commonwealth of Nations. The constitutional development within the Empire has proceeded at such a rapid rate of decentralization that each of the self-governing Dominions is now practically independent. Each Dominion is free to make its own treaties and to send and receive diplomatic agents, and does so. The development of Dominion independence has been constitutional, rather than international, and foreign states have accepted in practice this development, without formal recognition of independence. If Britain is willing for Canada to send a diplomatic agent, or to make a treaty, the United States will receive the agent and sign the treaty. For all practical purposes, the Dominions are independent; technically, in international law, their status may be debatable. They were admitted to the League of Nations, to international conferences and Public

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[32] *Mighell v. Sultan of Johore,* L.R. (1894) 1 Q.B. 149.

[33] *King v. Earl of Crewe,* L.R. (1910) 2 K.B. 576. As to protectorates, see T. Baty, "Protectorates and Mandates," *B.Y.I.L.,* 1921-1922, pp. 109-121; F. Despagnet, *Essai sur les protectorats* (Paris, 1896); G. W. Rutherford, "Spheres of Influence: An Aspect of Semi-Suzerainty"; *A.J.,* 20 (1926), pp. 300-325.

[34] The status of neither the Byelorussian Republic nor the Ukrainian Republic is clear, in relation to the Soviet Union. Under the Charter of the UN, they must be regarded as independent states, since they are Members.

Unions, and to the United Nations; they sign treaties, though under careful safeguards as to form and content. The Report of the Inter-Imperial Relations Committee of 1926 described the situation thus: "They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." [35]

THE PAPACY. The Pope was for centuries a temporal sovereign of great importance, until the Italian Law of Guarantees of 1871 reduced his temporal power to insignificance. However, his own protests against such a unilateral act, together with certain privileges left to him, such as inviolability of the few acres in which he resided and the right of legation and of treaty-making (concordats), made it possible to debate interminably his international position.[36] In February, 1929, the Lateran Accord was signed, including three documents: a political treaty, a concordat, and a financial agreement. According to Article 2 of the first document: "Italy recognizes the sovereignty of the Holy See in the field of international relations as an attribute that pertains to the very nature of the Holy See, in conformity with its traditions and with the demands of its mission in the world." In Article 24, however, "With regard to the sovereignty pertaining to it in the field of international relations, the Holy See declares that it wishes to remain and will remain extraneous to all temporal disputes between nations, and to international congresses convoked for the settlement of such disputes, unless the contending parties make a joint appeal to its mission of peace; nevertheless, it reserves the right in every case to exercise its moral and spiritual power. In consequence of this declaration, the State of the Vatican will always and in every case be considered neutral and inviolable territory." [37] "Vatican

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[35] "The committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire . . . considered as a whole, it defies classification and bears no real resemblance to any other political organization which now exists or has ever yet been tried." This report is the nearest approach to a constitution for the present system. It was made to the Imperial Conference of 1926, and is found in *British Parliamentary Papers*, 1926, Cmd. 2768, quoted in Hudson, *Cases*, pp. 26-27.

There is an extensive literature on this subject. Many citations are given in Hyde, I, p. 53; Oppenheim, I, pp. 193-200. Reference may be made particularly to P. J. N. Baker, *The Present Juridical Status of the British Dominions in International Law* (London, 1929); W. Y. Elliott, *The New British Empire*, (New York, 1932); H. D. Hall, *The British Commonwealth of Nations: a Study of Its Past and Future Development* (London, 1920); A. B. Keith, *Responsible Government in the Dominions*, 3 vols. (Oxford, 1912); R. B. Stewart, *Treaty-Making Procedure in the British Dominions*, *A.J.*, 32 (1938), p. 467.

See also § 113, *infra*.

[36] *Case of Gustav Gaultier*, 116 *Bulletin des Arrets de la Cour de Cassation Rendus en matière Criminelle*, 453 (1911), translated in Scott, p. 49, and Hudson, *Cases*, p. 24.

[37] The treaty may be found in *A.J.*, XXIII (1929), Supplement, p. 187.

City" is thus recognized—by Italy—as a sovereign state. The complicated provisions as to the relationship between Italy and the enclave of the Vatican, as to civil and church law, nationality, and other such matters, raise many questions. Again it can be said only that Vatican City possesses some degree of international personality, though not so much as other states—not enough, for example, to permit it to participate in a conference or join the United Nations. Its range of activity is obviously greatly limited.[38]

MANDATES. Another intriguing recent development is the system of mandates, which, at this writing, is being transformed into "trusteeship" under the United Nations. The idea originated in a reaction against the habit of seizing territories as a result of conquest in war, and substituted therefor the principle that "the well-being and development of such peoples form a sacred trust of civilization." The territory from which the mandates were created was taken from Germany and Turkey and was distributed as mandated territories on May 7, 1919, even before formal transfer had been made by the Treaty of Versailles. Mandatory states were to report annually to the Council of the League, and a Permanent Mandates Commission was set up in accordance with Article 22 of the Covenant to oversee the work. The Mandates were thus political communities, "renounced" according to the Treaty of Versailles in favor of the Allied Powers and by them distributed to mandatory states, each responsible in uncertain and varying degree for its conduct in the mandated territory to the Council of the League of Nations, which explicitly defined the "degree of authority, control or administration to be exercised by the Mandatory" in each case. They reappear today as trust areas. Much ingenuity has been expended in trying to locate sovereignty in these entities and to measure the amount of international personality possessed by each.[39]

There are many other anomalous situations. So intricate were the governmental arrangements for the Free City of Danzig that the Permanent Court of International Justice was called upon to determine who had the right to paint the mailboxes in that city. Behind this comic interlude lay a real problem, for by Article 102 of the Treaty of Versailles the City had its own government, but its foreign relations and customs were to be super-

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[38] As to the status of the Papacy, see R. Bompard, *Le pape et le droit des gens* (Paris, 1888); Yves de la Brière, "Le Traité du Latran et le nouvel état pontifical," *R.D.I.L.C.*, 3rd Series, X (1929), pp. 123-158; J. T. Delos, "Le Traité du Latran (11 Février 1929) et la situation juridique nouvelle de la Papauté," *R.D.I.P.*, XXVI (1929), pp. 452-478; C. G. Fenwick, "The New City of the Vatican," *A.J.*, XXIII (1929), pp. 371-374; A. P. Higgins, "The State of the City of the Vatican," *B.Y.I.L.*, 1929, pp. 214-217; L. LeFur, "Le Saint Siège et le droit international," *R.D.I.*, III (1929), pp. 25-69; "The Lateran Accord," *F.P.A.*, V, No. 9 (July 10, 1929).

[39] See Wright, *Mandates*, and the case of *Rex v. Christian*, S. African L.R. (1924) App. Div. 101, given in Hudson, p. 57. For further discussion of Mandates, and references, see *infra*, pp. 287-289; for trusteeship under UN, § 81, *infra*.

vised by Poland, and it was "placed under the protection of the League of Nations."[40] By an agreement of 1923, the city of Tangier became an international zone; its Statute was revised in 1945.[41] Whether the League of Nations possessed an international personality of its own was much disputed. The United Nations, under Article 104 of its Charter, clearly has legal personality, but it can hardly be regarded as a member of the community of nations. Some writers concede personality to International Public Unions, and a court in Washington granted the immunity of a sovereign state to the Pan American Union.[42] The status of the North American Indian tribes was defined by Marshall as "domestic dependent nations."[43] How far a *de facto* revolutionary government has an international status will be the subject of later discussion.

From the above rapid survey it is apparent that no state has unlimited freedom from external control and that no two states have the same amount of independence. Nor is there any standard amount, or measure, of independence required for membership in the community of nations. Obviously, the status of independence cannot be regarded as a sufficiently accurate test for such membership. "Independence," says Hyde, "is not essential," and he adds: "If independence be regarded as a necessary possession of a State of International law, the existing practice of treating as subjects or persons of that law various types of so-called dependent States is incapable of explanation."[44]

§ 19. Recognition.[45]—In practice, the test of membership appears to be recognition, and to this we must now turn. There is no automatic qualification for membership; indeed, it is unfortunately true that the society of nations has fixed no standards. The organized community does not in fact act; each state individually decides for itself whether to admit the neophyte to its fellowship. The result is a haphazard and unsatisfactory system in which a political entity may be regarded as a member of the society

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[40] The case referred to is that of the *Polish Postal Service in Dantzig, P.C.I.J.*, Series B, No. 11. See also Series B, No. 15, and Series B, No. 18.

[41] *A.J.*, 23 (1929) Document Section, p. 235; G. H. Stuart, *The International City of Tangier* (Stanford University Press, 1931).

[42] W. Penfield, "The Legal Status of the Pan American Union," *A.J.*, 20 (1926), pp. 257-262.

[43] *Cherokee Nation v. Georgia*, 5 Peters 1 (1831).

[44] Hyde, I, p. 22, and Note 6.

[45] As to recognition of independence, see C. A. Berdahl, "The Power of Recognition," *A.J.*, 14 (1920), pp. 519-539; Briggs, pp. 65-67; R. Erich, "La naissance et la reconnaissance des états," *Hague Acad.*, 1926, III, pp. 431-502; J. Goebel, Jr., *The Recognition Policy of the United States* (New York, 1915); Hackworth, I, Ch. III; J. G. Hervey, *The Legal Effects of Recognition in International Law* (University of Pennsylvania Press, 1928); H. Lauterpacht, "Recognition of States in International Law," *Yale Law Journal*, 53 (1944), p. 385, and in *Columbia Law Review*, 45 (1945), p. 815; A. D. McNair, "Judicial Recognition of States and Governments and the Immunity of Public Ships," *B.Y.I.L.*, 1921-1922, pp. 57-67; H. L. Stimson, *The United States and Other American Republics*, Publications of the Department of State, No. 156 (Washington, 1931).

of nations or as a subject of international law by some members and not by others. The looseness of the organization of the international community is nowhere more clearly shown than in the procedure of admittance to its membership.

Before taking up the process of recognition, we must pause to consider the origins of members, or the conditions under which they develop to the point of being considered for membership. The combination of members previously recognized, such as Texas and the United States, or the various units which made up Italy, may result in a new member whose status does not require recognition. On the other hand, a member may divide peaceably and by mutual agreement, as did Norway and Sweden, or as a result of war, as in the case of the Balkan states, and usually with no recognition necessary beyond the treaty made. When a new political entity is created from territory hitherto regarded as not measuring up to the standards of Western civilization upon which the community of nations was founded, as Liberia, or when an older state under the same disadvantage seeks admission, as Japan or Turkey, its recognition as a member has usually been conceded.

Revolution. Where the new state claims independence as the result of secession, or violent revolution, the process often involves some difficult readjustments. The frequency of this situation has resulted in the building of what are probably the most precise rules connected with the subject of recognition. There are two types of *de facto* governments, said Mr. Justice Field:

> "One of them is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. . . . The other kind of *de facto* governments, to which the doctrines cited relate, is such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success." [46]

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[46] *Williams v. Bruffy*, 96 U.S. 176 (1877). For other cases *re de facto* governments, see Dickinson, *Cases*, pp. 137-185; Evans, pp. 66-75, 83; Hudson, *Cases*, pp. 140-160; Scott, pp. 34-48; and citations in footnote 50, *infra*.

See also E. D. Dickinson, "The Unrecognized Government or State in English and American Law," *Michigan Law Review*, XXII (1923), pp. 29-45, 118-134; E. D. Dickinson, "Recent Recognition Cases," *A.J.*, 19 (1925), pp. 263-272; S. Gemma, "Les gouvernements de fait," *Hague Acad.*, 1924, III, pp. 297-414; A. S. Hershey, "Notes on the Recognition of *de facto* Governments by European States," *A.J.*, 14 (1920), pp. 499-518; C. C. Hyde, "Concerning the Recognition of New Governments by the United States," *A.J.*, 13 (1919), pp. 306-308; P. Noel-Henry, *Les gouvernements de fait devant le juge* (Paris, 1927); J. Spiropolous, *Die de facto-Regierung im Völkerrecht* (Universität Kiel, 1926).

The former process does not create a new state but merely replaces the former government within the state. The latter, however, creates an entirely new state, potentially a member of the community of nations. It thus becomes necessary to distinguish between recognition of a new government within a state and recognition of a new state. So far as the procedure and principles of recognition are concerned there seems to be little difference between the two. But in result, the former, much more frequent, merely raises the question whether the new agency, through which the state is to speak, shall be regarded by the community of nations as authoritatively representing that state, a permanent member of the community, and fit to carry on the obligations of such membership. The latter creates an entirely new member of the community, a new state, whose personality is to continue regardless of subsequent changes in government. Once a state's international personality is recognized it continues until its extinction, a matter of importance in the rules of state succession. The refusal to recognize a subsequent government in that state merely suspends intercourse, with certain legal and practical consequences, with the state which refuses recognition.

INSURGENCY. In the case of revolutionary change of government it appears that three possible stages of recognition have been admitted in practice: insurgency, belligerency, and independence. A group fighting for political rather than for selfish purposes may be recognized as insurgents, thus lifting them slightly above the status of criminals, or pirates, who would be punishable otherwise under ordinary criminal law.[47] The rights and duties of the status of insurgency have not yet, however, been worked out.

BELLIGERENCY. A stage higher than insurgency is recognition of belligerency, which produces important legal changes. When a revolutionary government has achieved control over a certain territory, and when the range of its military or naval operations is such as to affect third states, the latter—or the parent state—may concede to the insurgents the rights of a belligerent. This means that the law of war is to be applied as if between two independent states, and that the recognizing third state agrees to assume the duties of a neutral.[48] The new belligerent may now avail itself of the right of search and seizure for contraband, of blockade, of the ability to use, and to make purchases in, foreign ports, *et cetera;* and it also assumes responsibility for adherence to the rules of warfare. The question of recognition of belligerency is sometimes embarrassing to outside states, for their

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[47] *The Three Friends,* 166 U.S. 1 (1897).

[48] See Hackworth, *Digest,* I, § 52. A recent illustration was the Spanish Civil War, Hyde I, p. 199; N. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (New York, 1939), Ch. I.

citizens may suffer until this step is taken, while on the other hand they may antagonize the parent state by premature recognition. Where the parent state has recognized the belligerency of the rebels, as the United States tacitly did when President Lincoln declared the Confederate ports blockaded, other states need not hesitate to recognize. In general, the step should be considered as a recognition of a factual situation rather than as an expression of sympathy. It concedes a certain amount of international personality, for the revolutionary party thus becomes a subject of the laws of war and neutrality.

INDEPENDENCE. The third stage is the recognition of *de jure* independence, with full admission to membership in the community of nations. The justification for the use of recognition must be found in this admission. A state may exist and carry on a certain amount of intercourse with other states without having been recognized. There is no direct bar, in the absence of recognition, to ordinary commercial intercourse between individuals. But the damage to prestige, the lack of the ordinary diplomatic and consular channels, the absence of machinery and of the protection furnished by treaties, and the risk to individuals in a commerce not subject to the ordinary protection given to citizens abroad, may easily result in great detriment to the unrecognized state. On the other hand, the state which refuses recognition may suffer to such an extent that it may sacrifice its scruples and its desire to maintain legal principles for commercial gain, as did some states when they recognized the Union of Soviet Socialist Republics.

It is this difficulty, doubtless, which explains the attempted distinction between *de facto* and *de jure* recognition. The former seems to be a sort of a stop-gap arrangement, a *modus vivendi*, permitting commercial intercourse without necessarily restoring full diplomatic intercourse. *De facto* recognition is apparently revocable, but during its continuance there seems to be little difference in legal effect.[49] It apparently concedes international personality temporarily, but the only test of membership in the community of nations upon a permanent basis is *de jure* recognition.

LEGAL EFFECTS. The legal effects of recognition and non-recognition have produced a complicated jurisprudence. For the most part, the effects of failure to recognize are political or practical, but occasionally a legal problem arises which causes embarrassment or loss. As far back as 1804, Lord Eldon found it "extremely difficult to say, a judicial court

[49] Illustrations of *de facto* recognition are to be found in the attitude of the United States toward the Carranza regime in Mexico in 1915 (which became *de jure* recognition in 1917); or of England toward the new government of Russia in 1921 (which became *de jure* in 1924). See *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Luther v. Sagor*, L.R. (1921) 3 K.B. 532. For other cases, see Dickinson, *Cases*, pp. 137-185; Hudson, *Cases*, pp. 140-161.

can take notice of a Government, never authorized by the Government of the Country, in which that Court sits"; [50] and cases since that time seem to have made firm the rule that the unrecognized state cannot sue in the courts of the state which refuses recognition. Whether it is entitled to the immunities of a sovereign is debated, and how far the legal acts of such an entity must be accepted in other states are questions too complex to be discussed here. It is for the executive department to grant or to deny recognition and the courts are bound by its decision. Recent opinions of American courts seem to extend these principles to situations in which is involved recognition of the conquest of an area, rather than recognition of independence.[51] When recognition is given, its effects are retroactive, and it validates the acts of the recognized government from its beginning.

METHODS. Recognition may be either collective or individual. The former method is exceptional and usually due to political considerations, such as actuated the Congress of Paris in 1856 when Turkey was admitted, or the Peace Conference of 1919 when Poland and other states were recognized. Collective recognition is usually expressed in treaty form. Recognition is ordinarily an individual action on the part of each state, which confers the accolade when and as it pleases.

Recognition may be explicit and formal or it may be implicit and informal. It may be through proclamation or statement in a treaty or other such definite act; or it may be tacit,[52] through the performance of some procedure which can only be undertaken with another subject of international law, such as the making of a treaty with it or the sending or receiving of diplomatic agents. There seems to be a possibility, according to recent practice, of conditional recognition. An example is the action of the Congress of Berlin in recognizing certain Balkan states upon condition that they respect religious rights; other illustrations are to be found in the peace settlement after the first World War.[53] Recognition, once given, appears to be final, and cannot be withdrawn. Diplomatic relations, it is true, may be broken off, but this does not, it seems, affect the legal

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[50] *City of Bern v. Bank of England*, 9 Ves. Jr. 347 (1804). See also *R.S.F.S.R. v. Cibrario*, 235 N.Y. 255 (1923). For other cases dealing with the legal effects of recognition, see Dickinson, *Cases*, pp. 92-103, 151-185; Evans, pp. 57-58; Hudson, pp. 85-140; Scott, pp. 57-73. Especially Briggs, editorial notes.

In general on this topic, see note 46, *supra;* Hackworth, *Digest*, I, §§ 54-55; E. Lagarde, *La reconnaissance du gouvernement des Soviets* (Paris, 1924); A. Prudhomme, "La reconnaissance en France du gouvernement des Soviets et ses conséquences juridiques," *J.D.I.*, LII (1925), p. 318.

[51] *Eck v. N. V. Nederlansch Amerikaansche*, 52 N.Y.S. (2nd) 367 (1944); *The Maret*, 145 F (2nd) 431 (1944).

[52] The United States gave recognition to the USSR by exchange of notes stating certain agreements in connection therewith. See Dept. of State *Press Release*, October 20, 1933, and Dept. of State Pub., Eastern European Series No. 1; Hackworth, I, pp. 298-305; *Survey*, 1933, p. 290.

[53] *The Gagara*, L.R. (1919), Probate Div. 95; *The Annette; The Dora*, L.R. (1919), Probate Div. 105. See Hackworth, I, pp. 192-195.

situation as would failure to recognize. If conditions set for recognition are not met, recognition is not terminated, but a right of intervention exists.

STANDARDS. There is no right to demand, and no duty to grant, recognition.[54] Nor are there any criteria set by the community of nations for the guidance of members. Each state decides for itself, arbitrarily, whom it will recognize, though it may have evolved certain principles of its own, or a policy, in accordance with which it usually acts. In the development of the recognition policy of the United States, three principles have been followed. At first, the only requisite element was stability: "It is sufficient for us to know that a government exists capable of maintaining itself; and then its recognition on our part inevitably follows." [55] Later, however, emphasis was laid upon the ability and willingness of the new government to meet its international obligations, and this was the reason offered for the refusal of the United States to recognize the Soviet Government.[56] In 1913 President Wilson inaugurated a radical change in policy, which was continued by succeeding administrations. The application of this new policy appears now to be limited to the five Central American republics, and is expressed in their agreement not to "recognize any other Government which may come into power in any of the five Republics as a consequence of a *coup d'etat* or a revolution against a recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country." [57] In dealing with recent revolutions in South American states, however, recognition was extended by the United States upon the basis of her original policy, that is, stability and a willingness to meet international obligations. Secretary of State Stimson asserted, in an address of February 6, 1931, that the policy of the United States had been uniform from the days of Jefferson to those of Bryan:

> "This general policy, as thus observed, was to base the act of recognition not upon the question of the constitutional legitimacy of the new

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[54] Several writers, however, maintain the contrary. Thus Hall says: "Theoretically a politically organised community enters of right, as was before remarked, into the family of states and must be treated in accordance with law, so soon as it is able to show that it possesses the marks of a state." Hall, p. 103, and see also p. 20. *Contra*, Hyde, I, p. 55; Hershey, p. 199; Fauchille, I, No. 203; Oppenheim, I, § 71.

[55] Mr. Buchanan, Secretary of State, to Mr. Rush, March 31, 1848, Moore, *Digest*, I, p. 124. See also Hackworth, I, § 33.

[56] "Some speak as though stability was all that was necessary. What however would avail mere stability if it were stability in the prosecution of a policy of repudiation and confiscation? In the case of Russia we have a very easy test of a matter of fundamental importance, and that is of good faith in the discharge of international obligations." The international obligations in which Russia has failed, according to Secretary Hughes, in explanation of the above remarks, are repudiation of debts, confiscation of property, and the attempt to stir up revolution in other countries. *A.J.*, 17 (1923), p. 297; and see Hyde, I, § 45.

[57] *Conference on Central American Affairs* (1922-1923), Washington, Government Printing Office, 1923, p. 287; Hackworth, I, pp. 188-189.

government, but upon its *de facto* capacity to fulfil its obligations as a member of the family of nations. This country recognized the right of other nations to regulate their own internal affairs and disclaimed any attempt to base its recognition upon the correctness of their constitutional action." [58]

The Stimson Doctrine of non-recognition, above mentioned, may have the effect, as in the case of Manchukuo, of depriving a new state of recognition.

Significance of Recognition. Before World War II, it was estimated that there are in the world today some seventy states which might be described as members of the family of nations. This list would omit such tiny entities as Andorra, Liechtenstein, or Monaco; it would include states ranging from Luxembourg, with an area of 2,586 square kilometers and a population of 285,524, to China, with an area of 11,129,000 square kilometers and an estimated population of 485,508,838.[59] Neither size nor population is a controlling factor, for Belgium has played a more important part in the life of the community than China with her enormous population. Certain of these states may be regarded as charter members of the community, such as France, England, Germany (Prussia), or Spain, and these have admitted others, by tacit or express recognition. "A State is, and becomes, an International Person through recognition only and exclusively." [60] There are no set qualifications for recognition; a state is free to accept or reject, with no reasons given, the claim to recognition. Legal relationships may therefore be denied by a state for political reasons or because of prejudice. On the other hand, there is no rule of international law prohibiting the recognition of any kind of an organization. At any time, and regardless of existent practice, international personality may be conceded, fully or partially, to groups hitherto unrecognized, as has been done in the case of Public Unions, British Dominions, or the Papacy.

Recognition is at present an arbitrary and haphazard process which could be made much more useful. If it means anything at all it should mean that the state recognized is regarded by the recognizing state as qualified for legal membership in the community. It is a means of protecting the law of the community, and it should not be sacrificed for purposes of political

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[58] Secretary Stimson's address is printed as *The United States and the Other American Republics*, Publications of the Department of State, No. 156 (Washington, 1931). See also Taylor Cole, *The Recognition Policy of the United States Since 1901* (New Orleans, 1928); G. H. Hackworth, "The Policy of the United States in Recognizing New Governments During the Past Twenty-five Years," *Proc. Am. Soc.*, 1931, pp. 120-131.

[59] These figures are taken from Ottlik's *Annuaire*, 1929. He lists 54 members of the League, 13 Non-Members, and adds the Free City of Danzig, the Saar Basin, and mandated territory. The League of Nations document cited in footnote 20, p. 200, *infra*, lists 73 states capable of making treaties. It would be difficult to make an estimate today.

[60] Oppenheim, I, p. 143.

or commercial profit. From this viewpoint, the refusal of the United States for some 15 years to recognize Russia was not only justifiable but praiseworthy, if the justice of the American claims be conceded. But the uncertainty of the present process of recognition is well illustrated here, for the United States could exercise a unilateral right to pass judgment upon Russia. Recognition would be much more valuable as a collective procedure, by which the community as a whole, rather than individual members thereof, should admit new members into the rights and duties of membership in the community. Perhaps it would be better to say that if the community were properly organized, recognition would no longer be necessary.

§ 20. Continuing Personality and State Succession.[61]

Succession of Governments. When a member has been admitted to the community of nations, with determinate boundaries within which to exercise jurisdiction, its character as a member remains unchanged until the termination of its existence. This is true regardless of modification in its internal organization, and regardless also, in general, of increase or diminution in its territorial area.[62] A violent change of government therein may involve the need of recognition for the new government, but does not affect the rights or obligations of the state which it serves: it merely raises the question whether the community of nations regards the new government as properly qualified to act with authority and propriety for its state. Treaties continue to be binding, and financial obligations must still be met; property rights are unaffected, and claims for damages due to violations of international law continue. "A state neither loses any of its rights, nor is discharged from any of its duties, by a change of form in its civil government. The body politic is still the same, though it may have a different organ of communication." [63]

It sometimes happens that decrease in territorial area may make it physically impossible for a state to discharge its obligations. This is notably true of obligations of a local nature, connected with territory now

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[61] See on this topic, E. H. Feilchenfeld, *Public Debts and State Succession* (New York, 1931); G. Gidel, *Des effets de l'annexion sur les concessions* (Paris, 1904); M. Huber, *Die Staatensuccession* (Leipzig, 1898); A. B. Keith, *The Theory of State Succession, with special reference to English and Colonial Law* (London, 1907); H. Lewald, "Questions de droit international des successions," *Hague Acad.*, 1925, IV, pp. 5-126; A. N. Sack, *Effets des transformations des Etats sur leurs dettes publiques et autres obligations financières* (Paris, 1927).

[62] *The Sapphire*, II Wallace 164 (1871). For other cases on State Succession, see Dickinson, *Cases*, pp. 904-1015; Evans, pp. 76-107; Hackworth, I, p. 387; Hudson, *Cases*, pp. 779-827; Scott, pp. 74-115.

For example, the changes of government in France during the nineteenth century, or the present change of government in Russia, or the growth of Italy or of the United States.

[63] Chancellor Kent, as quoted in Scott, p. 80.

alienated. Sometimes the generally weakened resources of a state do not permit it to meet its financial obligations. In such a situation, special arrangements must be made by convention, as was done in Article 254 of the Treaty of Versailles. The Allies laid down the rule that "the partition of the pre-war debt of the German Empire and the German states will be made in proportion to the contributory power of the ceded territories," and the article above cited did in fact provide a complicated mathematical ratio for such payments.[64]

Succession of States. But there may be succession of states as well as of governments. A state's existence, as an independent member of the community, may be terminated in a number of ways. While it could possibly result from physical causes, it is usually a political process. Thus, an independent state may be absorbed by one or more states, voluntarily as in the case of Texas, or involuntarily through forcible annexation or incorporation, as in the case of the Transvaal or South African Republic or as in the notorious case of Poland. A state may disappear as the result of division into several states, as happened to the Holy Roman Empire and more recently to Austria-Hungary. When a state dies the problem of inheritance arises, and rules in connection with this problem are put under the title of "State Succession."

State succession may be either universal or partial: universal when a state is entirely absorbed by a state or states; partial, when only part of a state is affected, either by becoming incorporated into another state or by becoming independent. Universal succession is illustrated by the annexation of Texas to the United States, or by the division of Poland between three states. Partial succession is illustrated by the addition of California, a part of Mexico, to the United States, or by the successful revolt of a portion of a state which thereby becomes independent as, for example, the secession of the United States from the British Empire.

Such transfers of territories raise important and perplexing questions as to the succession of rights and duties. There is much dispute over the law of state succession: we can only suggest a few general principles, all of which are probably open to debate. That some rights and some obligations are passed on to the receiving state is not doubted, but just which ones they are, in a given set of circumstances, may be difficult to ascertain. When the British conquered the Boers, General Botha expressed an opinion well worthy of support, though not sustained in practice: "Our view is that having taken the assets of our government, you may fairly be expected to meet their liabilities, not in part, but in full."[65]

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[64] Hyde, I, §§ 124-5, 130.

[65] Quoted in Evans, p. 105. See also Adams to Everett, August 10, 1818, Moore, *Digest*, I, p. 334.

Not all treaties of the defunct state are binding upon its successor. It would be unfair to pass on treaties of alliance, or treaties dealing with dynastic or other personal affairs of a monarch. In general, treaties of a political character are excluded, and there is debate as to whether treaties of commerce and perhaps of extradition should be inherited. Sovereign control, together with all public property, credits, *et cetera,* pass to the receiving state, though subject to attached conditions or obligations.[66] On the other hand, it falls heir also, in principle, to the debts of the extinct international person. Contracts and concessions should in general be maintained, at any rate those of a nature beneficial to the locality transferred, such as for roads or bridges. The United States took over the debts of its members in 1790, but made special arrangements for the debt of Texas. A British court refused to return funds confiscated by the Transvaal (South African) Republic during its struggle with Great Britain. As to this much discussed case,[67] it need only be observed here that the plaintiff was a citizen of Great Britain, and that an alien might have been able to recover his property in an international court. That the debts were incurred by the conquered country in resistance to the conqueror should not invalidate the debt; if these are *"dettes odieuses,"* so is conquest odious. If a state sees enough profit in going to war to subjugate a territory, it should be charged with the debts incurred through legitimate resistance to its aggression.

Effects of Succession upon Private Rights. The conqueror undoubtedly has the right to establish such laws as he pleases over the new territory, but until he so acts the old laws remain in force and rights acquired under these laws should in general be respected by the new sovereign. Private rights remain undisturbed: "A cession of territory is never understood to be a cession of property belonging to inhabitants." [68] But it has been held in some cases that this rule does not apply to rights under the law of the former which are contrary to the constitution or public policy of the successor, as, for example, continuance in a purchased office, or a hereditary right to maintain a slaughterhouse.[69] Citizenship and civic rights must depend upon the law of the successor state.

The law of state succession needs revision and clearer statement. It is embarrassed not only by very great difficulties as to the principles of justice, but also by anachronistic conceptions as to sovereignty and war. It

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[66] *U.S. v. Prioleau,* 2 Hemming and Miller 559 (1865).

[67] *West Rand Central Gold Mining Co. v. King,* L.R. (1905) 2 K.B. 391. "As the distinction was not based on arguments, and was not approved by any other nation, it could not change the rules of law, which existed when the decision was rendered." Feilchenfeld, *op. cit., p.* 389, and see p. 385, *ibid.*

[68] *U. S. v. Percheman,* 7 Peters 51 (1833); Hackworth, I, p. 550.

[69] *Alvarez y Sanchez v. U. S.,* 216 U.S. 167 (1910); *O'Reilly de Camara v. Brooke,* 209 U.S. 45 (1908).

should be stated in terms of better guarantees of the rights of the people, individually or as a group, who are transferred.

§ 21. Fundamental Right of Existence.—The classic texts of international law, and particularly the earlier ones, devote much attention to the so-called fundamental rights of states.[70] Most of these have been severely questioned by more recent writers. Nevertheless, as Oppenheim says, "it must be taken into consideration that under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years, and that numerous real rights and duties are customarily recognised which are derived from the very membership of the Family of Nations." [71] The doctrinal development of international law has been in large part upon the basis of these rights, and they are therefore worthy of brief notice.

It may be suggested that existence is a fact rather than a right. The community of nations establishes no right to be born, nor has the principle of self-determination been so far established as to admit a right of existence to any group which claims it. At best, all that can be said is that a state may claim a right to continue to exist, once its international personality has been recognized. Normally, a recognized state may expect to continue its existence. But the society of nations offers no guarantee, for it does not declare war or conquest illegal, and it may even decide that the state should be deprived of its existence.[72] Article X of the Covenant of the League of Nations was intended to protect "existing political independence," but it was not enforced, and the United Nations offers little more assurance of continued existence to its Members. The society of nations has not yet assumed the collective duty of protecting the existence of its members to the same extent as has the state, but the realization that the community of nations is founded upon its separate member units has led writers to attempt to state fundamental rights, as principles of protection analogous to the "life, liberty, and pursuit of happiness" of the American constitutional system.

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[70] Brierly, p. 35; Dickinson, *Equality, passim;* Fauchille, I, Pt. 1, pp. 394-756; Fenwick, pp. 150-162; Hall, Chap. VIII; Hershey, Chaps. X, XI; Hyde, I, pp. 116-161; Lawrence, pp. 115-135, 245-270; Moore, *Digest,* I, pp. 60-66; Oppenheim, I, pp. 234-311; Phillimore, I, pp. 216-222; Stowell, pp. 69-207, 557-636; Westlake, *op. cit.,* pp. 293-303; Wheaton, §§ 60-105, 152-160, 206-289. See also A. P. Higgins, "The Duties of States," *Proc. Am. Soc.,* 1927, pp. 17-22; A. Pillet, "Recherches sur les droits fondamentaux des Etats," *R.D.I.P.,* V (1898), pp. 66-89, 236-264, VI (1899), pp. 503-532; E. Root, "The Declaration of the Rights and Duties of Nations Adopted by the American Institute of International Law," *A.J.,* 10 (1916), pp. 212-221; J. B. Scott, *The American Institute of International Law: Its Declaration of the Rights and Duties of Nations* (Washington, 1916).

[71] Oppenheim, I, p. 235.

[72] "The right of a State to continue its life as such may be said to depend in a strict sense upon the effect of its conduct upon the international society. The welfare of that society may not require the maintenance of a particular State; its very extinction may be deemed to be for the general good." Hyde, I, p. 204.

Self-Preservation. Attached to the right of existence, and sometimes identified with it, is the primordial right of self-preservation. It is a natural right, in the modern sense that it is so widely recognized as to be found in all legal systems. But the protection of a state's existence raises questions which international society has not answered so well as has the state in the case of attack upon an individual. What, in the first place, is this existence which must be defended? Today, at any rate, there is little chance of a state being entirely extinguished as the result of attack. Not even in the bitterest moments of the Peace Conference of 1919 was it proposed that the state of Germany should be eliminated, as a source of danger or for any other reason, nor were such proposals accepted after World War II. But there may be justifiable self-defense against lesser harm than death, and thus one arrives at the question: What interests of the state may properly be protected by force, in the name of defense? and What measures injurious to a state may be regarded as calling for self-defense? At this point, existence becomes confused with jurisdiction, with respect, and with other matters. Within the state there are laws and courts to determine what is legitimate self-defense; in the community of nations, each state determines for itself when it is fighting in self-defense.[73]

There can be no question of the right to take up arms against direct and illegal invasion. The defending state may even anticipate attack and invade the challenging state, provided the attack is imminent and certain; but of this each state is unfortunately its own judge. But the situation may be one in which the danger is less direct. Thus, in 1817, marauders used the Spanish territory of Amelia Island as a base of operations, and from it plundered commerce in American territory. There was no military action upon the part of Spain against the United States, no threat or even thought of attack; but in view of Spain's failure to restrain the marauders the United States attacked the island.[74] Likewise, when the United States failed to prevent Canadian insurgents from using her territory as a base of operations, British forces destroyed in American territory the ship *Caroline*, which had been used by the insurgents.[75] The principle is stretched further by the famous case of the seizure of the Danish fleet in 1807 by the British, to forestall its seizure by Napoleon. Writers have long been divided as to the legality of that act. But if it can be accepted as a proper act of self-defense, it is not a great step further to justify the

[73] "Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense." Secretary of State Kellogg, in note accompanying the Pact of Paris (1928). Secretary Stimson later sought to set limitations upon these words by denying to a state an unlimited discretion as to what constitutes self-defense; and Article 51 of the Charter of the United Nations does not leave to a state complete freedom in this respect.

[74] Moore, *Digest*, I, pp. 42, 173.

[75] *Ibid.*, II, § 217.

German claim of self-defense in invading innocent and neutral Belgium. At what point is a line to be drawn?

We may carry our question further. How far is a state justified in employing the best weapon of self-defense, the offense, against indirect threats such as mobilization, or against more remote threats, such as the steadily increasing army and navy of a neighbor, or the building of a great number of forts along the frontier? It is the uncertainty of answer to such questions that has produced the great competition in armaments, military alliances, the Balance of Power, and the Monroe and other such doctrines.[76] Or, even further, in this industrial age in which the very existence of a state may depend upon its ability to draw upon the resources of other states, would it be justifiable, as necessary self-defense, for one state to extort forcibly from another stated needed raw materials, or food supplies? or to defend itself by military action against a high tariff, or other economic measures deleterious to its industries or markets?

Aggression and Defense Are Both Legal. The difficulty of the situation lies in the fact that international society has never regarded attack upon one of its members as a crime against that society, as is true within a state. In other words, war has not been illegal. If a state is to be allowed, upon its own judgment and initiative, to undertake violent measures against another, the latter must equally be allowed to use its own judgment and initiative as to the danger it faces, and as to the measures necessary to defend itself against this danger. It is not surprising, then, since the state is the sole judge of the necessity of defensive action, that the doctrine of necessity has been pushed to indefensible lengths, and that self-defense has, through abuse, served as an excuse for aggrandizement.

Whatever right of existence or self-preservation a state may have rests upon the principle of responsibility. Each state owes to other states the duty, correlative to the right, of respecting their right of self-preservation. It has the duty of preventing conspiracies, and perhaps propaganda, within its territories against other states with which it is on friendly terms. It must not allow its territory to be used as a base for espionage, or for the preparation of military or naval expeditions against friendly states. The famous *Alabama Award* illustrates the legal force of this duty. The state which does not restrain such acts injurious to another state cannot so readily complain if the latter state invades its territory to put down the danger with which it is menaced.

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[76] "First. The Monroe Doctrine is not a policy of aggression; it is a policy of self-defence. . . . It still remains an assertion of the principle of national security. . . . The Monroe Doctrine rests 'upon the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself.'" C. E. Hughes, quoted in *A.J.*, 17 (1923), pp. 615, 619.

§ 22. **Independence.**—We have spoken of the importance of independence as a qualification for membership in the community of nations. Its importance to the community lies in the answer which it may give to another member asking the question: With whom shall I deal, in order to get an authoritative and final answer, binding in international law? For this purpose, the essential element of independence would seem to be the power of a state, recognized by the community of nations, to conduct international relations and in so doing to bind itself by its action.

For this purpose, internal sovereignty becomes of importance. The state is conceded by international law exclusive jurisdiction—though not entirely unlimited—over persons and things within its territory. It may set up any form of government which pleases it, make such laws and provide such machinery as it desires, and conduct such economic and social policies within the state as it considers best. Through its personal jurisdiction over its members it may to some extent control them within foreign states, as, for example, in demanding the performance of military service or the payment of taxes.

But with these rights of freedom of action there are correlative duties. The state has jurisdiction over aliens within its territories, but it must protect these aliens according to the requirements of international law. It may not permit its territory, much less its machinery of government, to be used against a foreign state. International law may even—as in the case of minorities—set certain standards for the treatment of a state's own citizens. From the viewpoint of international law, independence means little more than the quality of possessing machinery which, free from regular control or direction by another state, can represent a state authoritatively in its dealings with the community of nations, and which can enforce international law and maintain international justice on behalf of the community within its borders. In so far as independence relates to membership in the community of nations, an independent state would appear to be one which has been recognized.

Intervention. In connection with independence, writers usually discuss intervention,[77] and a doctrine of non-intervention has been built up which is regarded as the duty correlative to the right of independence. This duty is to refrain from the performance of any act which would violate the internal autonomy or the external independence of another state, such as the making of an arrest by one state within another, or interference in the conduct of the latter's foreign policy. Intervention has been described as "dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things."[78]

[77] It belongs rather under the head of Sanctions, but it will be discussed here in order to criticize it in its usual perspective.

[78] Oppenheim, I, p. 262.

According to Oppenheim, there is no doubt that intervention is forbidden by the law of nations; according to Hershey, non-intervention must be considered as a fundamental principle of international law.[79]

With these statements many points of dispute may be found. No two writers are agreed upon what, exactly, constitutes intervention, and there seems no good reason for attempting to circumscribe it in such fashion as to limit it to certain types of cases. Any interference of an imperative character from the outside with the ordinary and legitimate conduct of its own affairs by a state may be regarded as intervention. The problem is a political rather than a legal one. The argument in cases of intervention is not upon a legal basis, nor before an international court; it would be difficult to show that a state could defend itself against intervention by judicial appeal. On the contrary, treaties have sometimes provided for intervention, and tribunals have rewarded the industry shown in intervening to protect legal rights by conceding to the intervening state a preferential position in the payment of reparation.[80]

For the dearth of evidence as to the legal character of the rule of non-intervention there is excellent reason. Aside from the political considerations which have motivated states in their failure to accept a rule of non-intervention, there are powerful reasons of a more legal nature. One of these is the legality of war. So long as war is not illegal, it is difficult to see how lesser acts of violence can be declared illegal. It has been seen already that the international community is still in the stage of self-help and that there is no common authority to compel the observance of rights. If, then, there should be taken away from states the right of self-help short of war—of which intervention is the most important method—they would be forced to fall back upon the far worse evil of war in order to maintain their legal rights. The objections to intervention are not so much due to its principle as to its abuse. Intervention is simply a weapon, which may be the sword in the hand of justice, or a club in the hand of a thug. The society of nations cannot eliminate war or intervention until it provides some satisfactory substitute for the protection of rights.

Past abuse of intervention led writers to attempt to state a rule against it and led states to an effort to improve its use. Aside from the United States, usually independent in her action, important interventions during the nineteenth century have most often been collective. Although collec-

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[79] On the subject of intervention the following works, among many others, may be referred to: Hershey, pp. 236, 243; H. G. Hodges, *Doctrine of Intervention* (Princeton, 1915); E. C. Stowell, *Intervention in International Law* (Washington, 1921); P. Winfield, "The History of Intervention in International Law," *B.Y.I.L.*, 1922-1923, pp. 130-149; P. Winfield, "The Grounds of Intervention in International Law," *B.Y.I.L.*, 1924, pp. 149-162; C. G. Fenwick, "Intervention: Individual and Collective," *A.J.*, 39 (1945), p. 645.

[80] See the *Venezuelan Preferential Claims Case*, Scott, *Hague Court Reports*, p. 441.

tive intervention, if abused, can do more harm than intervention by one state (e.g., the Holy Alliance, against which the doctrine of non-intervention arose) it is in general more difficult to find a common purpose of exploitation among several states than on the part of one state. Thus, collective intervention can be regarded as an advance, though not a sufficient advance. Intervention, and war, should be sanctions of international law utilizable for no other purpose. This cannot be so long as a state is permitted to judge for itself what its rights are, and so long as it has the right to employ force in support of its unilateral judgment. A proper use of intervention will be possible only when the society of nations has organized machinery for ascertaining what should be done, principles upon which to decide, and a monopoly of the use of force.

The consistent maintenance of a right of intervention in the past, as well as the conclusions just reached, show that independence is not a fundamental legal right in the sense that a state has a right not to be interfered with no matter what it does. Certainly, a state is subject to the restrictions put upon it by international law, and until the community of nations itself takes over the task of protecting the rights of its members and forbids to states the use of force at will against other states, we cannot expect that states will give up intervention as a means of protecting their rights.

§ 23. Other So-Called Rights.

EQUALITY.[81] If there were such a thing as absolute sovereignty, then any sovereign state would be the equal of any other. Naturally, there have been many extravagant assertions of this parity. Russia and Geneva have equal rights, said Chief Justice Marshall in an often quoted statement.[82] How far such an assertion is correct depends entirely upon the viewpoint from which one looks at equality. There are great inequalities in size, in economic strength, in military power, in authority or influence within the community of nations; it is not difficult to find in such inequalities basis for an argument that there is also inequality in legal rights.

Nor do states have equal rights within the field of international organization. The Concert of Europe was able to exert its will without legal opposition, and the primacy of the Great Powers has long been recognized. This primacy received legal confirmation in the establishment of the Council of the League of Nations and again, in even more discriminatory fashion, in the Security Council of the UN, even though one of the fundamental

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[81] As to the doctrine of equality, see P. J. N. Baker, "The Doctrine of Legal Equality of States," *B.Y.I.L.*, 1923-24, p. 1; Dickinson, *Equality*, entire; J. Goebel, Jr., *The Equality of States* (Columbia University Press, 1923); F. J. Hicks, "The Equality of States and the Hague Conferences," *A.J.*, 2 (1908), p. 530; A. D. McNair, "Equality in International Law," *Michigan Law Review*, XXVI (1927), p. 131; Westlake, *op. cit.*, Ch. VII. Refer also to § (72), *infra*.

[82] *The Antelope*, 10 Wheaton 66, 122 (1825).

principles of the Charter is the "sovereign equality" of its Members. In international administrative bodies it is not unusual for voting strength to depend upon financial or colonial strength, in clear disregard of the principle of equality. It is in international conferences of a legislative character, perhaps, that the ancient principle of equality is best maintained, though, as we shall see, that principle is losing its strength as an obstructive force in international legislation.

On the other hand, all states are equally entitled to receive such protection as the law of nations offers for such rights as they may have. The rule that treaties are binding applies equally to all, and the rule that reparation must be made for an injury done in violation of international law affords, in principle, redress to the smallest as well as the largest of nations. If in practice this protection is not received it is not due to any lack of approval for the legal principle of equality before the law, but because of the ineffective machinery for judgment and for enforcement, a defect which will be found to some degree in any legal system.

It is impossible to state satisfactory conclusions as to the equality of states in international law. States do not in fact have equal rights, nor do they have equality in the administration of the affairs of the community. And while theoretically the law of nations affords equal protection to all, the protection becomes fictitious when made to depend upon self-help, which reduces it to subordination to superior might. In this situation, the only hope of securing real equality depends upon the developing sense of community responsibility.

Respect. Closely allied to sovereignty and equality is the so-called right to respect. This would seem to be rather a matter of etiquette or comity than of law; yet, peculiarly enough, an imposing jurisprudence has been built up about it. Originally, this right was the result of monarchical or nationalistic pride, but today certain parts of it may be explained by the need of protection to be given to those carrying on the intercourse of states. The right to respect manifests itself in the requirement that neither the heads of sovereign states nor their diplomatic representatives or emblems shall be injured or insulted. They are entitled to immunity and special protection in foreign states, and many famous cases uphold this principle as one of law. When Mattueof, the ambassador of Peter the Great in England, was arrested by force, his indignant master demanded the heads of those who had so mistreated him; and England was forced to send a special ambassador, bearing an engrossed copy of the Act of Anne which would make such injuries punishable in the future, to offer a formal speech of apology.[83]

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[83] This case is found in Ch. de Martens, *Causes Célèbres* (Leipzig-Paris, 1827), I, pp. 47-74, along with many other cases of this type.

A state must have criminal laws to punish those who commit such an injury, and it must make reparation, usually by formal apology, but even by pecuniary reparation, for the failure to protect the dignity of the foreign state. The line between a legal duty, entailing reparation, and mere ceremonial procedure is sometimes difficult to draw. The formalities of salutes to visiting men-of-war or dignitaries may or may not fall under the head of law. An apology is sometimes to be considered as a discharge of legal liability and sometimes as a response to the demands of etiquette. No agreement could be found as to the line between slander and legitimate criticism. Again, it has been asserted that, while the rules of private international law are not binding upon states, a failure to give full faith and credit to the public acts and proceedings of another state may be taken by the latter as lack of respect.[84]

The rules which courts are called upon to maintain are usually those which not only afford protection to the dignity of a foreign state but which have solid foundation in the needs of intercourse between states. In matters which are offenses against etiquette, matters merely offensive rather than damaging, the settlement will in all probability be made through diplomatic channels and without recourse to international law.

Intercourse. The assertion is frequently made, and even more often denied, that there is a right of intercourse between states. Rather than a right, it would seem to be a fundamental element in community life around which certain rules of law have grown up. It is not conceivable today that a community could exist without intercourse between its members. Certain methods of intercourse have come to be accepted in practice although not, perhaps, as a legal right; rules of positive law have grown up for the protection of these methods where they are in use. Thus it is to be doubted whether there is a legal right to send to or to demand from another state diplomatic representatives. But no state can afford to be without such agents of official international intercourse and, upon the assumption that diplomatic agents must be exchanged, a detailed set of rules has appeared for their protection. Again, a state may refuse to allow entrance to aliens, or may deport them, but such a policy would prove too injurious to a state to be continued permanently. Upon the fact that aliens do travel between and reside in different states, a far-reaching code for their protection has been developed, from which a large part of international litigation arises. Or again, a state is free to set up almost any sort of barrier to trade, against one or all states. She may prohibit trade entirely in certain articles, or at certain ports, or with certain nations; she may establish high customs tariffs against all or some states; she may put

[84] See the *Zappa Affair*, Stowell-Munro, *International Cases*, (Boston, 1916), I, p. 155.

restrictions upon certain articles entering her ports, or forbid certain articles to be exported. All this she may do without affording ground for legal action against her.

At this point, however, a significant development must be noted. Any one of these acts may bring protests or reprisals from other states, such as those which greeted the Smoot-Hawley tariff in 1930 in the United States. As this conflict of interests grows, the clamor for rules which may ameliorate the situation arises, and in such conflicts is found the source of all law. The factual situation is such that, even though one may not claim it as a legal right, it would be impossible for a state to forbid all intercourse with other states. One may say that there is no general right of intercourse but that where a state permits such intercourse international law will protect it. Or, one may say that there is a general right of intercourse but that states are still free to impose severe restrictions upon it, in the interest of national safety and prosperity. Whichever statement is accepted, there can be no doubt that the present tendency is to remove the obstacles which states may now impose upon international commerce and to bring it under the control of the community.[85]

Jurisdiction. Jurisdiction is probably the most important right—and duty—of a state, whether or not it be regarded as fundamental. From the viewpoint of sovereignty, jurisdiction means internal sovereignty, the exclusive control over all persons and things within the state. There are, of course, restrictions even upon the internal administration of a state, and they are constantly increasing in number as the needs of the community rise above the claims of the state. "The extent of both the right and the duty of a State to do justice within its own domain, as well as elsewhere, is also fixed by international law." [86] From the viewpoint of the community of nations, the jurisdiction of a state is simply the amount of control left by it to that state; or, if the statement be preferred, such jurisdiction represents the reserved powers left to the states after they have delegated to the community the exercise of certain powers. In practice, the community leaves vast powers to the states, and interferes with their administration as little as possible. But it should be noted that a state is not only exercising its own discretion over such matters as are reserved to it within its territorial domain. It is also acting as the agent of the community and is obligated to enforce the rules of the law of nations therein.[87]

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[85] A parallel may be found in the development of the interstate commerce power under the Constitution of the United States. While on the one hand no state can exclude commerce from another state, nor discriminate, nor cause loss to interstate commerce for the gain of one state, on the other hand the police power of the state is permitted to impose certain restrictions for the safety of the state, until they become incompatible with the national interest.

[86] Hyde, I, p. 440.

[87] The law of jurisdiction is important enough to require a separate chapter.

§ 24. Duties of States.—States have been concerned mostly with their rights, but there is an obverse side to every coin, and one side is as important as the other. For every right, there is a correlative duty, and for every wrong there should be a remedy. If a state has rights under international law, it must concede such rights equally to other states and must make reparation when it fails to do so. The rules of law are based upon reciprocity: *do ut des.*

Responsibility.[88] Responsibility is the principle which claims the performance of these obligations and demands reparation for their nonperformance. It must be set up against the rights enumerated.

The responsibility of a state may arise from its own act, through a governmental agent, causing injury to another state or to an alien; or it may, less directly, arise from the act of an individual within its control, causing injury to another state or to an alien.

Membership in the community of nations presupposes acceptance of the rules of the community. These rules permit to a state exclusive jurisdiction within its borders, with few limitations upon its exercise. But this very competence implies the acceptance by the state of responsibility for internationally illegal acts occurring within its control. If one nation concedes to another a monopoly of control within the boundaries of the latter, and so excludes itself from the possibility of protecting its own rights therein, it can only be upon the understanding that the latter state will protect those rights and will assume responsibility for injuries done to the other state or its citizens. Thus the territorial control exercised by one state, and the protection exercised by another state over its nationals and interests abroad, become mutually corrective forces, whose interplay is regulated by international law.

While the state may be regarded, from the external viewpoint, as a unity, it is an abstract entity which can deal with other states only through state agents, individuals acting under its authority—though it may *be* injured in its personality, or dignity, as a state. The organization of a state and the apportionment of its powers among its various agents is not ordinarily a matter of interest to the law of nations. Whether the agent acts within or without his competence, whether he be a superior or an inferior agent, does not matter if through his act international law is violated. A

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[88] On the subject of state responsibility, see Borchard, entire; E. M. Borchard, "Responsibility of States at the Hague Codification Conference," *A.J.*, 24 (1930), p. 517; *Com. Prog. Cod.*, Questionnaire No. 4, *A.J.*, 20 (1926), Special Number, p. 176; Ch. de Visscher, "La responsabilité des états," *Bib. Viss.*, II (1924), p. 87; Eagleton, entire; A. Freeman, *The International Responsibility of States for Denial of Justice* (London, 1938); G. H. Hackworth, "Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners," *A.J.*, 24 (1930), p. 500; *Research in International Law*, Draft Convention on Responsibility of States; M. W. Whiteman, "The Codification of the Responsibility of States," *New York University Law Quarterly Review*, VIII (1930), p. 185.

state may injure another through the violation of its territorial jurisdiction, as in the case of the capture of the *Florida* within the waters of Brazil,[89] or by breaking a treaty, as in the case of the *Wimbledon*.[90] It may injure an alien through discrimination against him, or by denial of justice, or by other violation of the law for the protection of aliens. The state is not made a guarantor of alien life and property within its limits. For acts of individuals within its jurisdiction injurious to foreign states or to aliens, and even to a large extent for acts of its own agents injurious to aliens, it can be held responsible only if it has failed to use due diligence in preventing the injury, or if it has not put into satisfactory operation the local machinery for the redress of the injury.[91]

PENALTIES. Though the community of nations lacks formal sanctions, severe penalties may be assessed against states which fail to measure up to the international standard of justice. If a state which ordinarily measures up to that standard fails for some reason in a particular case, it will have to make reparation.[92] Consistent failure of this sort will lead the community to disregard local justice as administered in the guilty state, on the ground that its agencies of redress are not worthy of confidence. Other states, a stage further along, have been subjected to exterritorial jurisdiction, which is removed as ability to give proper protection to aliens is demonstrated. A step further, and the state unable to assure proper protection may find itself reduced to a protectorate; finally, as has been asserted in at least one case, the annexation or absorption of such a state is justified.[93]

Against such measures it is no sufficient reply to assert that no sovereign state can be interfered with, or that the alien who goes to a state does so at his own risk. International interdependence calls for constant movement of persons from one state to another. Responsibility for such persons cannot be disclaimed on the charge that they seek personal gain. If a person

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[89] *The Florida,* 101 U.S. 37 (1879); and see Moore, *Digest,* II, p. 367, and §§ 209-220.

[90] *P.C.I.J.,* Series A, No. 1.

[91] See below, § 34.

[92] As to the measure of damages, see Borchard, pp. 413-430; Eagleton, Chap. VIII; C. Eagleton, "Measure of Damages in International Law," *Yale Law Journal,* XXXIX (1929), pp. 52-76; Hyde, I, §§ 298-299; H. E. Yntema, "Treaties with Germany and Compensation for War Damages," *Columbia Law Review,* XXIII (1923), pp. 511-527, and XXIV (1924), pp. 134-153.

[93] "And, in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the state itself. Annexation by Great Britain became an act of political necessity if those principles of justice and fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region." *R. E. Brown Claim,* American and British Claims Arbitration, *Report of Fred K. Nielsen* (Washington, Government Printing Office, 1926), pp. 198-199. See note 72, p. 83, *supra.*

who goes to a foreign state does so for the purpose of making money, this is no more than the baker or the tobacconist is doing at home. In either case, the operation is essential for the satisfaction of the needs of the community, and should be protected by the community. Both his own state and the state to which he goes profit by the activities of the alien; the community of nations could not today do without his services. Doubtless there are abuses in the efforts made to give him protection and the outcry against intervention and imperialism is often justifiable, but the remedy is not to be sought in surrendering the interests of the community, and their protection by international law, to the wishes of one state. The solution is rather to be found in an international organization which can offer this protection upon the basis of impartial judgment and collective action in the name of the community, instead of by the rule of the strong over the weak. Sovereignty must give way to responsibility, and independence to interdependence.

CHAPTER 4

JURISDICTION

§ 25. The Problem.—Whether from a practical or a theoretical viewpoint, the jurisdiction of a state—that is, the administration of justice in its broadest sense—is one of the most important fields of international law and one of the most important divisions of international organization. In the law of jurisdiction is to be found the distribution of powers between the community of nations and its members, and the basis of legal relationships between these members.

Jurisdiction is both a right and a duty. Each state is free to work out its own standards and ideals of justice for its members; and this freedom international law concedes, with certain restrictions. This is one of the chief functions of the state, the *raison d'être* for the foregathering of that particular group of individuals. From their viewpoint, the administration of justice is on the one hand, a duty internally, and on the other hand, a right as against other states. But their state is also a member of the community of nations. From the community viewpoint, the state has a right to administer justice to its own members according to its own ideals; but it has also a duty of maintaining the law and the standards of the community within its range of jurisdiction.

In general principle, then, a state is free to organize itself as it sees fit for the administration of justice within its range of control. For this purpose a judicial system would seem to be essential, and it must be one which is able to give the aliens the justice which is required by the law of nations. But a state may set up such courts or other official bodies as it wishes, and these bodies exclusively determine the lawfulness of acts within that jurisdiction. No other state may pass upon their lawfulness; only when they appear to be in conflict with international law may an appeal be taken from them, and then to an international tribunal and not to the courts of any other state.

The ordinary basis of the jurisdiction of a state is its own territory, within which it has more or less exclusive control; but the extension of international life and interdependence has led states to claim a legal control over persons or things outside their own territory, in various circumstances.[1] They found it necessary to extend their jurisdiction to cover

[1] "Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons,

their own nationals abroad, an extension justifiable by the bond of allegiance and by the duties owed by a citizen to his own state. A state could not require its citizens to observe its own laws in all cases while in a foreign country, for this might produce results disastrous to the individual; consequently, it is only in a few cases, such as military service or taxation, that a state imposes the obligations of its own law upon citizens abroad. Of course, and this is an important point, it cannot arrest or try one of its own citizens in the foreign state; it is only when the state has the individual or the thing within its own physical control that a penalty can be enforced.

The extension of a state's jurisdiction beyond this point has been rigidly resisted by Anglo-Saxon countries, but the intricacy of modern life is nevertheless pushing both practice and theory farther away from the territorial basis. It was not difficult to admit that a crime committed by a person abroad, which takes effect within a state, is punishable within that state, as, for example, shooting across a frontier. Nor was it difficult to assert that any person who commits acts abroad dangerous to the safety of a state should be liable to punishment if he should ever come within the grasp of the injured country. And from this it is not a far step to assess a penalty against any one abroad, whether national or alien, who injures a citizen of a state. By now, with crime organized upon an international scale, the question of an international criminal jurisdiction has arisen.

The Report of the Research in International Law dealing with "Jurisdiction with Respect to Crime" lists so concisely the different principles upon which penal jurisdiction is claimed by states that it is quoted here in full:

> These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as

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property, and acts outside their territory, it (international law) leaves them in this respect a wide measure of discretion which is limited only in certain cases by prohibitive rules; as regards other cases every State remains free to adopt the principles which it regards as best and most suitable." The Permanent Court of International Justice in the *Lotus Case*, Series A, No. 10, p. 19.

> of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely, though by no means universally, accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.[2]

Obviously, some overlapping and many conflicts are possible, with such varying theories and systems. A person may be subject to two jurisdictions, as for taxation, or nationality. It is usually true that the man who has been tried in a foreign state will not be tried again for that offence in his home state; but the individual may well be caught between the horns of a dilemma, while the two states vainly argue the question of jurisdiction. There is much confusion on the border lines, and serious studies are now being made to secure greater uniformity. The rules of jurisdiction, of long standing, cover most cases. These we must now study; they will be taken up to show the development above outlined, and the development will be summed up as a whole at the end of the chapter.

In a famous statement, John Marshall laid down the rule which has for many years been the foundation of the jurisdiction of states, that is, a territorial foundation:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[3]

Within its limits of territory, a state may exercise jurisdiction over all things and persons within it; and this, as has been seen, includes aliens. This does not mean that a state has a property title over all land within it, but merely sovereign control over it. As property it belongs for the most part to individuals; for purposes of jurisdiction it is under the control of the state. This control is not without exception, for the community of nations may at times enforce its law within a state; but it is rare that one state may exercise jurisdiction within another state. Stated in another

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[2] *Research in International Law*, Jurisdiction with regard to Crime, p. 445.
[3] *Schooner Exchange v. M'Faddon*, 7 Cranch 116, 135 (1812).

way, this means that the laws of one state cannot take effect in another state.

§ 26. The Extent of Territorial Jurisdiction.—Over all persons and all things within its territorial limits—with the few exceptions made by international law, shortly to be noted—a state has exclusive jurisdiction.[4] Its right to make and enforce laws within those limits is practically unlimited, and this right will be conceded by the courts of other states, which will usually refuse to sit in judgment over such acts.[5] It does not follow from this that an individual acting under rights given him by the laws of one state will have those rights respected in another state.[6] If injustice is done by the refusal of the courts to act in such cases, relief must be sought in diplomatic action.

In ordinary circumstances, no state may exercise jurisdiction within another state. It is not free to make an arrest or seizure. When a detachment from a German warship attempted to arrest deserters within a Brazilian port, and when the United States captured a Confederate vessel, the *Florida,* in Bahia, proper reparation was made.[7] Nor can one state set up a court within a foreign state, nor recruit soldiers therein, as Citizen Genêt discovered in the early days of the American republic.[8] Foreign military forces may not pass through a state without its permission. On the whole, the exercise of territorial jurisdiction is the highest manifestation of sovereignty, and to interfere with it is not only illegal but insulting.

Territorial jurisdiction includes aliens. The alien owes temporary allegiance to the state of his residence, and may be punished for departures therefrom.[9] Whether he is exempt when he violates local law under instructions from his state is perhaps debatable, but may be maintained as a general rule. On the other hand, his own state cannot arrest him in another state for charges which it may have against him (except through extradition); and thus criminals are enabled, through the exclusivity of territorial jurisdiction, to find asylum in foreign lands.[10]

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[4] For cases on this point, see Dickinson, *Cases,* pp. 399-413; Hackworth II, pp. 1-165; Hyde, I, § 220; Hudson, *Cases,* pp. 573-593; Scott, pp. 265-277. See also W. Schoenborn, "La nature juridique du territoire," *Hague Acad.,* 1929, V., pp. 85-189.

[5] "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its territory." *Underhill v. Hernandez,* 168 U.S. 250 (1897). The intricacy of modern business, however, sometimes demands such an inquiry. See *Russian State v. Compagnie Ropit,* 53 *Journal de Droit International,* p. 667, translated in Hudson, *Cases,* p. 137.

[6] For examples of such difficulties, see the contrary opinions of the English cases of *Caldwell v. Van Vlissingen,* 9 Hare 415 (1851), and the American case of *Brown v. Duchesne,* 19 Howard 183 (1856), involving patent rights; or *Strathern S.S.Co. v. Dillon,* 252 U.S. 348 (1920); or the Creole, Moore, *Arbitrations,* 4375 (1853).

[7] *R.D.I.P.,* XIII (1906), p. 200; Moore, *Digest,* II, pp. 367, 587, and IV, § 623.

[8] Moore, *Digest,* II, § 224.

[9] *De Jager v. Natal,* L.R. (1907) A.C. 326. See Hyde, I, § 219; and refer to § 33, *infra.*

[10] In practice, extradition cares for most such cases. See below, § 30.

Territorial Waters. The jurisdiction of a state extends out to the limits of its territorial waters, though within these waters it is slightly limited by international law.[11] It is difficult at times to discern whether these limitations, ordinary in practice, are set by comity or by international law. There is no doubt of the rule permitting innocent passage to foreign merchantmen through these waters. These ships must, however, and especially within a port, conform to local regulations as to pilotage, navigation, sanitation, *et cetera.* In matters involving internal order and discipline on board the vessel, even minor violations at local law, the local authorities do not usually interfere, leaving adjustment to the master of the vessel or to his state; but if the events on board are such as to disturb public order, the local state may assume jurisdiction. To what extent it will do so is apparently a matter for its own determination, and it is difficult to predetermine just how serious a breach of public order is necessary to inspire it to action. The practice of the United States is shown in the case of Wildenhus, who had committed murder on board a Belgian vessel in a New Jersey port. Over the protest of the Belgian consul, who sought a writ of habeas corpus, the New Jersey court tried the case, and its right to do so was upheld by the Supreme Court. French policy is more generous, leaving to the state of the ship a large degree of control. This was illustrated in the peculiar case of *Regina v. Anderson,* in which an American citizen committed murder upon a British vessel within French waters. The French courts did not try the case, and the American was convicted in a British court.[12]

In this case, the British court observed that either the United States or France could as well have taken jurisdiction. Thus concurrent jurisdiction is possible; and on the other hand, it is possible that the murderer could go untried, for lack of laws within one state authorizing his trial. In the famous case of *Queen v. Keyn,* the captain of a German vessel had been convicted by a British court of manslaughter because of a collision within the British three-mile limit. A higher court reversed the verdict for lack of jurisdiction, since no British statute had been provided author-

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[11] Concerning jurisdiction in territorial waters, see *Com. Prog. Cod.,* "Questionnaire No. 2, Territorial Waters," *A.J.,* 20 (1926), Special Number, pp. 62-147; C. J. B. Hurst, "The Territoriality of Bays," *B.Y.I.L.,* 1922-1923, pp. 42-55; Hyde, I, §§ 221-226; Hackworth, II, pp. 208-282; P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York, 1927); W. E. Masterson, *Jurisdiction in Marginal Seas* (New York, 1929); *L. of N. Doc.* C.351.M.145, 1930.V.14; J. S. Reeves, "The Codification of the Law of Territorial Waters," *A.J.,* XXIV (1930), pp. 486-499; *Research in International Law,* "The Law of Territorial Waters"; G. G. Wilson, "Les eaux adjacentes au territoire des états," *Hague Acad.,* 1923, pp. 127-176.

[12] *Wildenhus v. U.S.,* 120 U.S. 1 (1887); *Regina v. Anderson,* 11 Cox, Criminal Cases, 198 (1868); *Chung Chi Cheung v. The King,* Judicial Committee of the Privy Council (1939) A.C. 60. As to French policy, see *The Sally and the Newton,* translated in Dickinson, *Cases,* p. 434, and comments in Jessup, p. 145. For other cases in this field, see Dickinson, *Cases,* pp. 433-512; Evans, pp. 148-157, 172-186; Hackworth, II, §§ 139-140; Hudson, *Cases,* pp. 630-658; Scott, pp. 349-354.

izing the court to try such a case. The British Parliament at once remedied this defect by passing the Territorial Waters Jurisdiction Act of 1878.[13]

The concurrence or conflict of two jurisdictions often puts a ship master into embarrassing situations. A British court convicted a British master for false imprisonment because he had transported a banished person from Chile, an act authorized by the Chilean government, but illegal under British law as soon as the vessel had entered upon the high seas.[14] A similar difficulty was presented by the Eighteenth Amendment to the Constitution of the United States which raised, among many others, problems as to its enforcement within territorial waters. In the leading case of *Cunard v. Mellon,* the right of the United States was upheld to prevent foreign vessels bringing in liquor solely for the use of passengers and crew and even under seal. As a result, a foreign vessel might be deprived of such beverages for the entire voyage, and in some cases it might be forced to violate the laws of its own state, where such laws required liquor to be carried for the crew.[15]

Air. Is the atmosphere above a state to be included in its territorial jurisdiction? Little help in answering this question is to be found in national jurisprudence. The injury done by a signboard jutting out over a neighbor's land, or by a balloon falling into a field, is not to be compared with the great problems of military and commercial aviation, and their effects upon the subjacent territory.[16]

Two principal theories appeared. One claimed that the sovereignty of the state over its own territory extended *usque ad coelum;* the other asserted that the air, like the high seas, was free to all. Various modifications to each theory were admitted. Obviously, the air is not like the high seas. Gravity, for one thing, introduces a vital differentiation; the op-

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[13] *Queen v. Keyn,* L.R. (1876) 2 Ex. Div. 63; and see Scott, p. 247, and Jessup, p. 124.

[14] *Regina v. Lesley,* 8 Cox, Criminal Cases, 269 (1860).

[15] *Cunard v. Mellon,* 262 U.S. 100 (1923). This situation was adjusted, to some degree, by the treaty with England of January 23, 1924, which allowed liquor to be brought in under seal in return for the right to pursue suspected British vessels for a certain distance beyond the three-mile limit. Treaty Series (U.S.), No. 685, *A.J.,* 18 (1924), Supp., p. 127.

[16] As to the problem of aerial jurisdiction, consult C. L. Bouvé, "The Development of International Rules of Conduct in Air Navigation," *Air Law Review,* I (1930), pp. 1-38; K. Colegrove, *International Control of Aviation* (W.P.F., Boston, 1930); F. de Visscher, "Le droit international de la navigation aérienne en temps de paix," *R.D.I.L.C.,* 3rd Series, VIII (1927), pp. 182-214; Dickinson, *Cases,* pp. 368-381; J. W. Garner, "La réglementation internationale de la navigation aérienne," *R.D.I.L.C.,* 3rd Series, IV (1923), pp. 356-394, 628-652; Hackworth, IV, pp. 357-391; M. O. Hudson, "Aviation and International Law," *Air Law Review,* I (1930), pp. 183-210 (reprinted in *A.J.,* 24 (1930), pp. 228-240); A. K. Kuhn, "International Aerial Navigation and the Peace Conference," *A.J.,* 14 (1920), pp. 369-381; B. Lee, "Sovereignty of the Air," *A.J.,* 7 (1913), pp. 470-496.

portunities for harm from the air are much greater than those for harm from the seas. Moreover, tragic recollections from the War left each state uncompromising in its desire for complete control over the air above it. Article I of the Convention of 1919 therefore read: "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory." Article II, however, allowed "freedom of innocent passage above its territory to the aircraft of the other contracting states, provided that the conditions laid down in the present Convention are observed." Some of these conditions are international in character, such as the requirements for airworthiness, pilotage, or the prohibition of the carriage of munitions; others are set by the state subjacent, which may require aircraft to follow certain routes, to avoid passing over forts, to take no photographic pictures, etc. In time of war, the state is left entirely free to control air navigation above its territory.[17]

Radio. The same principles of national sovereignty apparently apply to radio communication. It seems to be admitted that a state is legally, if not actually, free to prevent the passage of Hertzian waves across its territory. Conferences were held at Berlin in 1903 and 1906, and at the International Radiotelegraphic Conference at London in 1912 rules were laid down for communication from ship to ship and from ship to shore, absolute priority being given to SOS calls. The Washington Conference of 1927 extended the application of previous rules to all radio stations, and the law of radio was further developed in conferences at Madrid (1932) and Cairo (1938).[18] There would seem to be less objection to the passage of radio communication waves than to the passage of airships.[19]

§ 27. Limitations upon Territorial Jurisdiction.—There are, as has been above noted, some limitations upon the absolute right of jurisdiction which a state enjoys within its own territories; and these limitations are

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[17] This Convention is to be found in Hudson, *International Legislation*, I, p. 359. It contains the rules and symbols for international air navigation. See also Colegrove, *op. cit.*, and *infra*, pp. 165-166.

An International Commission for Air Navigation was set up by this treaty. Two other conventions of a similar nature were signed, an Ibero-American treaty, at Madrid, November 1, 1926; and a Convention of Commercial Aviation, at the Sixth Conference of American States at Havana in February, 1928.

For the Convention on International Civil Aviation of 1944, see below, § 87.

[18] The Convention of 1912 is found in *A.J.*, 7 (1913), Supplement, p. 229; the work of the Washington Conference of 1927 is discussed in detail by Irvin Stewart, "The International Radiotelegraph Conference of Washington," *A.J.*, 22 (1928), pp. 28-49. See also M. Davis, "International Radiotelegraphic Conventions and Traffic Arrangements," *Air Law Review*, I (1930), pp. 349-364; Fauchille, I, Pt. II, pp. 633-651; Hackworth, pp. 277-287; Hyde, I, § 192; J. D. Tomlinson, *International Control of Radiocommunications* (Geneva, 1928).

[19] Ill feeling due to radio propaganda, however, led to adoption by a League of Nations Conference in 1936 of a convention prohibiting broadcasts which might incite to war. League of Nations *Treaty Series*, Vol. 186, p. 301.

important as revealing the extent to which international law has found it necessary to interfere with the control which a state has in its own territorial area. Some of these limitations are set by customary international law, such, for example, as the use of territorial waters or the protection of aliens; others, a rapidly increasing field, are set by treaty and include such things as the protection of minorities, the use of straits and canals, the navigation of rivers, or land and air transit. The latter are too variegated to study at this point and will be discussed in other connections; but it is necessary now to consider some of the more usual limitations, especially those set by customary international law.

SERVITUDES. Writers disagree widely as to what constitutes an international servitude and its significance.[20] It may, perhaps, be compared in some respects to an easement in domestic law. By most writers it is attached to territory, and there is much disagreement as to whether a servitude is a limitation upon sovereignty. Some writers, and an international tribunal in one important case, have even denied the existence of servitudes.[21] The examples of servitudes offered by Oppenheim include the perpetual duty of permitting the passage of troops of another state; the duty of allowing subjects of another state the use of coastal waters for fishing; the maintenance of a customs house by another state; or the use of an island as a coaling station. According to Fenwick, the Monroe Doctrine establishes a "negative servitude." [22]

IMMUNITIES. Doubtless the best established of these restrictions upon territorial control are the so-called diplomatic immunities, and other such immunities attached to the sovereign state. These were formerly based upon the character of personal sovereignty, or upon the equal character of sovereign states, and the fiction of the exterritorial quality of the diplomat and his belongings was developed. Today they are justified by the needs of international intercourse and are measured by these needs.[23] The head of a state cannot be arrested or tried or otherwise subjected to jurisdiction within a foreign state; nor can his ambassadors, ministers, or other

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[20] As to servitudes, see G. Crusen, "Les servitudes internationales," *Hague Acad.*, 1928, II, pp. 5-74; Dickinson, *Equality*, pp. 382-399; Fenwick, Chap. XVI; A. D. McNair, "So-called State Servitudes," *B.Y.I.L.*, 1925, pp. 111-127; P. B. Potter, "The Doctrine of Servitudes in International Law," *A.J.*, 9 (1915), pp. 627-641

[21] It was denied by the Hague Tribunal in the *North Atlantic Coast Fisheries Case*, Scott, *Hague Court Reports*, pp. 159-160. For other cases, see Dickinson, *Cases*, pp. 382-399; Hudson, *Cases*, pp. 486-502; Scott, pp. 255-264.

[22] Oppenheim, I, pp. 433-434; Fenwick, p. 285.

[23] "It is perfectly clear that ex-territoriality is a fiction which has no foundation either in law or in fact . . . there are sound practical as well as theoretical reasons for abandoning the term 'ex-territoriality,' for the mere employment of this unfortunate expression is liable to lead to errors and to legal consequences which are absolutely inadmissible." *Com. Prog. Cod.*, "Diplomatic Privileges and Immunities," *A.J.*, 20 (1926), Special Number, p. 153.

members of his diplomatic representation.[24] Consuls, however, are not entitled to immunity except for their official archives, but in practice they are given many privileges, often affirmed by treaties.[25] The increasing number of diplomatic agents, and such problems as their concentration at Geneva, under the League of Nations, and now in the United States with the United Nations, has led to careful study of the need of these privileges. The present tendency is to limit them to those which are really essential to the performance of their high duties, and to reduce the number of those who enjoy all of these privileges.

ARMY. A foreign military force may not enter a friendly state without permission, and when such permission is given no jurisdiction will be taken over members of the force so long as they remain attached to it and under the control of their officers.[26] It has been maintained that members of a military force entering a state without its permission should be given no exemption, but should be subjected to the ordinary laws of the land for offenses committed therein. While this results logically from the exclusive jurisdiction of the state, it is harsh logic, for it puts the individual member of the expedition between the millstones. He has no opportunity for judging whether or not the expedition is justified by international law; he must obey and not reason why. When McLeod was arrested and tried in New York state for murder resulting from his participation in the *Caroline* episode, England emphatically demanded his release and Secretary of State Webster admitted the justice of the demand.[27] Detached members of an expedition have, however, no such immunities.

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[24] From the large literature concerning diplomatic immunities, reference may be made to the following: *Com. Prog. Cod.*, "Questionnaire No. 3, Diplomatic Privileges and Immunities," *A.J.*, 20 (1926), Special Number, pp. 148-175; Research in International Law, "Diplomatic Privileges and Immunities"; F. Deak, "Classification, Immunities and Privileges of Diplomatic Agents," *Southern California Law Review*, I (1928), pp. 209-252, 332-354; C. Eagleton, "The Responsibility of the State for the Protection of Foreign Officials," *A.J.*, 19 (1925), pp. 293-314; Hackworth, II, pp. 404, 623, IV, p. 513; "La condition juridique des agents diplomatiques, selon la legislation soviétique et les traités conclus par l'U.R.S.S.," *R.D.I.*, (Genève), VI (1928), pp. 346-368; C. J. B. Hurst, "Les immunités diplomatiques," *Hague Acad.*, 1926, II, pp. 119-241; Hyde, II, §§ 433-442; Ch. Morton, *Les privilèges et immunités diplomatiques* (Lausanne, 1927).

For cases on this subject, see Dickinson, *Cases*, pp. 562-593; Evans, pp. 205-231; Hudson, *Cases*, pp. 834-874; Briggs, Ch. IX; Scott, pp. 278-300.

Refer also to § 38, *infra*.

[25] I. Stewart, *Consular Privileges and Immunities* (New York, 1926); E. C. Stowell, *Le Consul* (Paris, 1909). For cases, see Dickinson, *Cases*, pp. 587-593; Hudson, *Cases*, pp. 874-906; Scott, pp. 311-322; E. C. Stowell, *Consular Cases and Opinions* (Washington, 1909). Refer also to § 37, *infra*.

[26] *Schooner Exchange v. M'Faddon*, 7 Cranch 116, 139 (1812). The large number of American soldiers stationed in England during World War II led to agreements being made between the United States and England to deal with the situation, but the principle stated above was maintained.

[27] Moore, *Digest*, II, pp. 25-26. See Hyde, I, §§ 201-202; Eagleton, *op. cit.*, in *A.J.*, XIX (1925), pp. 301-302; *Arce v. State of Texas*, 202 S.W. 951 (1918); Oppenheim, I, § 443; *Horn v. Mitchell*, 223 Fed. 549 (1915).

PUBLIC VESSELS. Unlike an army, a foreign warship is assumed to have a right of entry into the territorial waters of any state, unless expressly prohibited. Within the territory of a foreign state it is exempt from jurisdiction, though it is expected to observe navigation, sanitary, and other such regulations. The vessel itself is inviolable and no one on board may be arrested. It is thus possible for a warship to give asylum to local offenders, a practice which is to be reprobated, although it has sometimes been justified as a humanitarian measure. Members of the crew ashore have been held liable to local jurisdiction, though in ordinary practice those guilty of petty infractions of the law, such as drunkenness, are returned to their ship.

Other public vessels have consistently been granted the same immunity.[28] The principle involved is, according to Hyde, "not the ownership or exclusive possession of a ship by a foreign sovereign, . . . but rather the appropriation and devotion of the vessel to the public service under governmental authority." [29] The use of such a vessel for commercial purposes does not necessarily deprive it of its public character.[30] Recently, however, the number of cases in which governments have undertaken enterprises distinctly business or commercial in character has brought this principle under heavy criticism. In such cases, to claim immunity would seem unfair in competition with private enterprises. The question was especially raised in the operation, by the United States Shipping Board, of one of the greatest fleets of passenger liners upon the seas. But while courts have at times recognized the changed situation, they have consistently and legitimately denied that it was within their power to change the law, and the rule seems still to be one of immunity.[31] To change it requires inter-

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[28] *The Sapphire,* 11 Wall. 164 (1871); *The Parlement Belge,* L.R. (1880) 5 Prob. Div. 197. There are numerous recent cases, for which see Dickinson, *Cases,* pp. 594-621; Evans, pp. 232-261; Hudson, *Cases,* pp. 546-564; Scott, pp. 300-310. In general as to the immunities of public vessels, see *Com. Prog. Cod.,* "Legal Status of Government Ships Employed in Commerce," *A.J.,* 20 (1926), Special Number, pp. 260-278; J. W. Garner, "Immunity of State-Owned Ships Employed in Commerce," *B.Y.I.L.,* 1925, pp. 128-143; N. Matsunami, *Immunity of State Ships* (London, 1924); A. D. McNair, "Judicial Recognition of States and Governments and the Immunity of Public Ships," *B.Y.I.L.,* 1921-1922, pp. 57-74.

[29] Hyde, II, p. 837.

[30] *The Parlement Belge,* L.R. 4 P.D. 129; *Berizzi Bros. v. Pesaro,* 271 U.S. 562 (1926); *Compania Española v. Navemar,* 303 U.S. 68 (1938); see also *Annual Digest* (1919-1922), Case No. 105, where a South African court said "any use of a vessel for the purpose of obtaining revenue for the State is a public purpose, just as its use for the protection of the State is public."

[31] In a case involving one of the United States Shipping Board vessels, a German court said: "Admittedly proposals tending toward the abolition of the immunity allowed to state property serving private purposes, or tending towards, at least, a restriction of such immunity in the international law of the sea, have been finding increasing favor among competent authorities. But this development has not become so generally pronounced in the practice of international intercourse that one should deduce from it a legally valid change of the principles of international law cited above." *The Ice King,* translated in Hudson, pp. 557-558. The court points out that

national legislation, a slow and difficult process, though some advance was recorded by the Brussels Conference of 1926. Seventeen states there agreed that vessels owned and operated by states, with their cargoes and passengers, should be subject to local jurisdiction, though non-trading public vessels and ships of war must be sued in their own countries.[32]

The status of state aircraft is not yet clear, but their immunities are apparently more restricted.[33]

OTHER STATE PROPERTY. An analogous situation is to be found with regard to other property of a state. A sovereign cannot be sued in foreign courts, and it thus becomes impossible to sue and attach his property.[34] The foreign sovereign may sue in local courts; and if he thus submits himself to jurisdiction, he must accept judgments with the conditions attached and be prepared to allow suits for counter-claims.[35] In effect, the other property of a state is as immune from jurisdiction as are vessels. In both cases, individual rights may at times be sacrificed to the formal claims of states.

EXTERRITORIAL JURISDICTION. Another, but rapidly disappearing, exemption from local jurisdiction is what is known as exterritorial or consular jurisdiction.[36] In various historical developments, and usually based upon treaty, a state has been permitted, or rather has taken the right, to administer justice to its own subjects in a foreign state. The practice was early abolished in Europe, but it was long maintained in countries whose administration of justice was regarded as so different or so deficient as to

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measures may be taken by the political department of the government, or by business, and concludes that "this will probably also further the tendencies towards adaptation of international law to the requirements of international business intercourse through the abolition of the immunity of state vessels engaged in commerce exclusively."

[32] The Convention is quoted in Dickinson, *Cases,* p. 619, and in Hudson, *Cases,* p. 561. See, on this point, Hyde, II, § 257 and citations.

[33] Hyde, II, § 257A.

[34] *De Haber v. the Queen of Portugal,* L.R. (1851) 17 Q.B. 196; *Vavasseur v. Krupp,* L.R. (1878) 9 Ch. Div. 351; *French Republic v. Jefferson County,* 200 Kentucky 18 (1923). See Dickinson, *Cases,* pp. 526-562; Hudson, *Cases,* pp. 515-546; *Research in International Law,* "Competence of Courts in Regard to Foreign States."

[35] *U.S. v. Prioleau,* 2 Hemming and Miller 559 (1865). See also Eleanor Allen, *The Position of Foreign States Before German Courts* (New York, 1928); E. Angell, "Sovereign Immunity—The Modern Trend," *Yale Law Journal,* XXXV (1925-1926), pp. 150-168; *Com. Prog. Cod.,* "Report on Competence of States in regard to Foreign States," *A.J.,* 22 (1928), Special Supplement, p. 117.

[36] The term "exterritorial" is used with several meanings. It has been applied to the vessels of a state, to its diplomatic agents and property abroad, to criminal jurisdiction over aliens abroad, or to the special situation above described. In general it refers to control exercised by a state outside its own boundaries.

For cases on this topic, see Hudson, *Cases,* pp. 752-778. See also J. Escarra, "Le régime des concessions étrangères en Chine," *Hague Acad.,* 1929, II, pp. 5-140; A. Heyking, *L'exterritorialité* (Paris, 1926); F. E. Hinckley, *American Consular Jurisdiction in the Orient* (Washington, 1906); L. Strisower, "L'exterritorialité et ses principales applications," *Hague Acad.,* 1923, pp. 233-287; W. W. Willoughby, *Foreign Rights and Interests in China* (Baltimore, 1927); *Report of the Commission on Exterritoriality in China* (Washington, Government Printing Office, 1926).

justify it. As these states secured stability, or measured up to the international standard of justice, the restrictions were removed. Japan freed herself in 1899; the capitulations were abolished for Turkey by the Treaty of Lausanne in 1923; the United States and Great Britain were negotiating for the termination of their extraterritorial rights in China when World War II intervened.[37]

To sum up, the exceptions to territorial jurisdiction are not widespread or of very great importance. On the understanding that it carries with it responsibility, the jurisdiction of states is being extended; but where it conflicts with the needs of the community it remains limited, or added limitations are imposed. Jurisdiction is more and more measured by the needs of the community of nations rather than by national claims to sovereignty, and its extension is in accordance with the use made by the community of the machinery of the state. How far this development will continue is now uncertain, but there are tendencies toward extending it beyond territorial limits and making jurisdiction concurrent or universal. To these developments we must now turn.

§ 28. Jurisdiction over Nationals Abroad.

THE HIGH SEAS.[38] A second stage of jurisdiction is that exercised by a state over its own nationals abroad. International law interposes no objection to this extension of jurisdiction beyond the territorial limits of a state, though this sometimes produces complications which must be adjusted. Naturally, the first field of such jurisdiction is over nationals upon the high seas, but it has been widely employed to control them in foreign lands as well.

"THE FREEDOM OF THE SEAS." In ancient days the seas were free. With the appearance of the idea of sovereignty states attempted to extend their sovereign control over parts of the sea. Venice claimed the Adriatic as her own, and England demanded recognition of her sovereignty over the English Channel and the North Sea. This control might exclude fishermen or even commerce, but usually it called merely for salute to the flag. But when Spain and Portugal, under authority of the Papal Bull of Demarcation, attempted to exclude all ships from large parts of the ocean, Queen Elizabeth, disregarding consistency, asserted that the sea was by natural rights and by the needs of intercourse open equally to all. A famous

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[37] See *Documents Am. For. Rel.*, I (1938-9), p. 246; II (1940-1), p. 240.

[38] As to jurisdiction on the high seas, consult F. W. Fulton, *The Sovereignty of the Sea* (Edinburgh, 1911); J. W. Garner, "The Freedom of the Seas," *A.J.*, 23 (1929), pp. 363-370; G. Gidel, *Le Droit International Public de la Mer*, 3 Vols. (Paris, 1931-34); A. Pearce Higgins, "Le régime juridique des navires de commerce dans la haute mer," *Hague Acad.*, 1929, V, pp. 5-79; Jessup, Chap. II; Piggott, *The Freedom of the Seas* (Oxford, 1919); P. B. Potter, *The Freedom of the Seas* (New York, 1924).

controversy between writers followed. Grotius, in his *Mare Liberum,* fought for freedom of the seas, and he was answered by the Englishman, Selden, with the *Mare Clausum.* It was not until the next century, with Bynkershoek and others to aid, that the views of Grotius prevailed. By the nineteenth century the extravagant claims of earlier centuries had disappeared, and the great body of salt water outside the territorial limits of states was free to all.

Freedom of the seas means that no state has sovereignty over any portion of the seas beyond its territorial waters, and therefore, though with increasing exceptions, that no state can take jurisdiction over any other than its own ships upon the high seas.

> Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, non alienum laedas.*[39]

A State may not acquire territory in the open sea, though it may apparently acquire sub-soil rights, as, for example, a mine or a tunnel extending out underseas. It may not (except in war) stop the vessel of another state upon the high seas even for the purpose of taking off its own nationals, as was maintained by the United States before the War of 1812 and by England in the *Trent Case.*[40]

But freedom cannot be interpreted to mean lawlessness. In order to have some degree of control over ships on the seas, and also because of the personal bond between the state and its subjects, states are allowed jurisdiction over their own ships upon the seas. This was at first justified by the fiction of exterritoriality, but recent cases deny that a ship is "a floating bit of the territory of its state."[41] The basis of jurisdiction seems now to be national character. As Fenwick puts it: "Since it is necessary that some one state should exercise jurisdiction over the vessel, let the state which chooses to assume a degree of responsibility for the vessel by per-

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[39] Justice Story, in the *Marianna Flora,* 11 Wheaton 1 (1826). For other cases as to authority on the high seas, see Dickinson, *Cases,* pp. 414-512, esp. 512-525; Hudson, *Cases,* pp. 658-729; Scott, pp. 337-371.

[40] Great Britain claimed the right to impress into her navy British seamen found on board foreign vessels in the course of belligerent visit and search. This was denied by the United States. Moore, *Digest,* II, p. 987. The *Trent,* a British mail steamer, carrying Mason and Slidell, Confederate agents, was stopped by a United States warship, which removed the two. Secretary Seward admitted the justice of the English protest and released them. See *British and Foreign State Papers,* LV, p. 602; Moore, *Digest,* VII, p. 768.

[41] *Lam Mow,* 19 Fed (2nd) 951 (1927); *Cunard v. Mellon,* 262 U.S. 100 (1923).

mitting it to fly its flag be the state whose law must be held to control acts done on board the vessel."[42] Each state, to this end, must have its own rules—which it has entire freedom to make—with regard to the registry of vessels in its name, and a flag which indicates the national character of the vessel. The law of the flag state, then, applies on board the vessel, covering crimes there committed, and also such questions as marriage and nationality.[43]

Maritime Law. While the control of a state over its own vessels provided some degree of order, the interests of the community of nations demand far more. The principle of the freedom of the seas is founded upon the need of free intercourse between states, rather than upon the rights of any one state upon those seas; and in order to protect this intercourse, and thus increase the freedom of movement upon the seas, rules have been laid down which do not leave ships entirely free from interference. There is, for example, the question of salvage, or of collision between vessels of different states. To care for such problems as these there has grown up a body of maritime law, the principles of which will be applied by the courts of any state in the same manner, thus constituting a sort of international law.[44] On May 31, 1929, a Convention for the Safety of Life at Sea was signed at London, which gave conventional authority to rules concerning collisions, seaworthiness of vessels, radio equipment, iceberg patrol, meteorological data, and other matters.[45]

Visit and search of foreign vessels, in time of peace, has long been regarded as illegal. "No nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim," said Lord Stowell in 1817; and his judgment has been followed by American courts, and strongly upheld by the political department of the United States.[46] Nevertheless, there have always been exceptions to the rule; and it is not believed that it can be maintained in such absolute form today. Piracy, of course, has always been an exception; and if it be conceded that a suspected ship can be searched in order to deter-

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[42] Fenwick, pp. 191-192. As to the fiction of exterritoriality applied to vessels, see *Cunard v. Mellon*, 262 U.S. 100 (1923); *Lam Mow*, 19 Fed. (2nd) 951 (1927). Brierly, p. 152, points out that it "would lead to the absurd result that the waters surrounding a ship from time to time would be territorial waters."

[43] As to the nationality of a child born on shipboard, see *Marshall v. Murgatroyd*, L.R. (1870) 6 Q.B. 30; *Lam Mow* 19 Fed. (2nd) 951 (1927). As to marriage, see *Fisher v. Fisher*, 250 N.Y. 313 (1929).

[44] "When, therefore, we find such rules of navigation . . . accepted as obligatory rules by more than thirty of the principal commercial states of the world, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea. . . ." *Scotia*, 14 Wallace 170 (1872).

[45] A. K. Kuhn, "The International Convention for Safety of Life at Sea," *A.J.*, 24 (1930), pp. 133-135. See also § 57, *infra*.

[46] *Le Louis*, 2 Dodson 210, 245 (1817). See also *The Antelope*, 10 Wheaton 66 (1825); *The Marianna Flora*, 11 Wheaton 1 (1826); Moore, *Digest*, II, § 309; *La Jeune Eugenie*, 2 Mason 409 (1822).

mine whether it is a pirate, it must be admitted that any ship can be stopped and searched. Doubtless reparation would have to be made if such action were shown to have been unjustifiable. Technically, perhaps, there is no right to investigate a ship to ascertain whether it is engaged in the slave trade; actually, so many conventional arrangements for this purpose have been made that it may be practically conceded. The right of search and arrest has been conceded in many treaties for different purposes, such as for protecting fishing and sealing, submarine cables, or the liquor or arms traffic. There is disagreement among writers as to a right of search for the purpose of proving the right of a ship to carry a national flag, but in any case in which such a question assumed practical importance it is not believed that a state would hesitate for a moment to investigate, nor will a state hesitate to exercise the right when it believes it necessary for its self-defense, as did Spain in the case of the *Virginius*.[47] In time of war, of course, there are complicated rules for visit and search.

Control beyond Territorial Waters. Closely connected with the law of the high seas is the difficult problem of the border line between territorial waters and the high seas.[48] Can a state for any purpose extend its jurisdiction beyond the three mile limit? In practice most states have done so. England at one time arrested smugglers as far out as a hundred leagues, and the United States from the very beginning of her existence has taken jurisdiction for certain purposes to a distance of four leagues. Indeed, at the very time that the United States felt it necessary to secure by treaty the permission of other states to pursue beyond the three-mile limit their ships violating the Volstead Act, she had just renewed her Tariff Act which permitted the pursuit of smugglers for four marine leagues.[49]

Cases in the United States are confusing but, according to Hyde, it is not to be concluded that the Supreme Court of the United States has denounced such conduct as at variance with the requirements of international law.[50] The situation was presented in intensified form by the efforts to enforce the Eighteenth Amendment. It is impossible to discuss them here, but the case of the *I'm Alone* illustrates the doctrine of hot pursuit in modern form. This doctrine, which would allow a chase initiated within territorial waters to be continued outside those waters, seems to be admitted in international practice. In the case of the *I'm Alone*, questions arose as to whether the treaty of Great Britain, in extending the limit

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[47] Moore, *Digest*, II, pp. 895-903.

[48] For cases see Dickinson, *Cases*, pp. 433-512; Briggs, pp. 336-361; Hudson, *Cases*, pp. 658-691; Scott, pp. 361-371.

[49] 49 U.S. Stat. 517, C.438.

[50] Hyde, I, p. 778, and in general on this point, pp. 777-794. See *Church v. Hubbart*, 2 Cranch 187 (1804), in which Marshall said: "its power to secure itself from injury may certainly be exercised beyond the limits of its territory."

within which search is permitted, extended also the limit within which chase may be initiated; as to the distance to which pursuit is allowable; and as to whether a pursuit begun by one vessel could be continued by another. It would seem permissible to answer all affirmatively, though the decision required the United States to pay damages.[51]

A Modern Problem. Here, as elsewhere, the inviolability and sanctity of the high seas is at issue. Such is the usual statement; but the query may be put whether it is not really national pride which is at issue. The high seas are not inherently sacred, and there is no reason why they should be the sanctuary of criminals. The right of visit and search was denied by Lord Stowell, in *Le Louis,* on the ground that there was no such justification, in time of peace, as self-defense offers in time of war. But the intricate relationships of states today would seem to afford equally as good justification in time of peace. To permit the arrest of violators of municipal law upon the high seas would be to the mutual advantage of states and would eliminate mutual criticism. Recent trends of opinion are decidedly in favor of permitting a state to protect itself in this manner. The arbitrary three-mile limit meets with opposition, and various changes have been suggested: to extend it to a zone of from six to fifty miles; to create two zones; to maintain a three-mile limit for purposes of general jurisdiction; and to allow arrest for certain purposes regardless of the limit of territorial waters. The last proposal, if the chase were halted at the maritime frontier of other states and checked by liability for unwarranted search or interference, would not be unreasonable. The First Codification Conference at The Hague was unable to reach any agreement concerning jurisdiction in territorial waters,[52] and the issue remains confused.

Other Cases. From the viewpoint of jurisdiction over citizens abroad, cases involving ships in foreign waters may be mentioned again; and another category of such cases includes those arising within the exterritorial or consular jurisdiction of a state, which has also been discussed.

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[51] Department of State, Arbitration Series, No. 2; Hackworth, II, pp. 703-708. See W. C. Dennis, "The Sinking of the *I'm Alone*," *A.J.*, 23 (1929), pp. 351-362; G. G. Fitzmaurice, "The Case of the *I'm Alone*," *B.Y.I.L.*, 1936, p. 82. The doctrine of hot pursuit was admitted as a principle of international law by the Canadian Government in the above cited correspondence; it has been upheld in various cases, such as *The Itata,* Moore, *Arbitrations,* p. 3067, and *The Ship North, A.J.*, 2 (1908), p. 688; it was denied in the cases of *James Hamilton Lewis* and *C. H. White, Foreign Relations,* 1902, App., p. 454.

[52] The preparatory materials gathered for this Conference offer the most valuable material obtainable, including the answers of states to specific questions. See *Com. Prog. Cod.,* Questionnaire No. 2, "Territorial Waters," *A.J.*, 20 Special Supplement, July, 1926, pp. 62-147; League of Nations, *Conference for the Codification of International Law, Bases of Discussion,* II, "Territorial Waters" 1929.V.2; *Acts of Conference for the Codification of International Law,* III, Minutes of the Second Committee 1930.V.16. See also *Research in International Law,* "Territorial Waters," pp. 243-380.

CONTROL OVER NATIONALS IN FOREIGN LANDS. The extent to which control is claimed over nationals in foreign lands differs widely. Continental states do not hesitate to claim such control. Thus, the French Code of Criminal Procedure provides that "Every Frenchman who, outside of the territory of France, is guilty of a crime punishable by French law, may be prosecuted and judged in France." [53] The insistence of states having such laws upon the performance of military service by their nationals who have become naturalized in the United States has led to many conflicts over the right of expatriation. Anglo-Saxon states are more hesitant in claiming such jurisdiction, since it involves an extension of the theory of the territoriality of law. But, says Hyde, "It is generally agreed that a State may punish its own nationals for disobeying its commands while within a foreign country, notwithstanding the legal quality which the territorial sovereign may have annexed to the acts of disobedience." [54]

Legislation is in general presumed to be territorial,[55] but it may be specifically directed to acts committed outside the state. Earl Russell was, in a famous case, convicted in the British House of Lords, after a divorce granted in Nevada, for a bigamous marriage contracted in Nevada.[56] Both England and the United States have statutes dealing with treason committed abroad, and other acts of this type are included in the statutes of both.[57] The right of the United States to levy an income tax upon its nationals abroad, even for income derived abroad, has been sustained by the Supreme Court of the United States; and that court has held it legal to apply a statute against conspiracy to defraud to an act done in Brazil.[58] Such interpretations are necessary consequences of the intricacy of modern life, which make it possible for a person in one state to injure a person in another state, without physical presence or contact.

§ 29. Jurisdiction over Aliens Abroad.—A third field of jurisdiction, much more unsettled and debated, is its extension to cover an offense committed, not by a citizen, and not within the territory of his state, but by

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[53] Translated in Dickinson, *Cases,* p. 683; see also *ibid.,* pp. 671, 685, 691, and note 30.

[54] Hyde, I, pp. 802-803.

[55] *The Apollon,* 9 Wheaton 362, 370 (1824); *MacLeod v. Attorney-General for New South Wales,* L.R. (1891) A.C. 455; *American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (1909).

An excellent short statement of this theory is quoted from Lewis, *Foreign Jurisdiction and the Extradition of Criminals* (p. 30) in Dickinson, *Cases,* p. 684, note 2.

[56] L.R. (1901) A.C. 446.

[57] Dickinson gives citations to many such acts of various states, including, among the statutes of the United States, treason, correspondence with foreign governments, slave trade, hostilities against the United States, its citizens, or their property, and supplying arms, liquor, or opium to Pacific Island natives. Dickinson, *Cases,* p. 691, and notes.

Cf. *Rev. Stat.* § 5335 (Logan Act); 27 *Stat.,* 445 (Harter Act); *22 U.S. C.A.,* § 256 (punishment of American consuls for criminal acts committed abroad).

[58] *Blackmer v. U.S.,* 284 U.S. 421 (1932). *Cook v. Tait,* 265 U.S. 47 (1924); *U.S. v. Bowman,* 260 U.S. 94 (1922).

an alien abroad. Pushed to its extreme, this theory would lead to the universality of criminal jurisdiction.

The right is clearly admitted in some cases upon the high seas. The doctrine of hot pursuit at times permits it. The best illustration, however, is piracy. International law confers upon any state the right to arrest and punish any person guilty of piratical acts; and while each state may have its own statutes for this purpose, the right to take jurisdiction over a person of another nationality upon the high seas is exceptionally derived from the rule of international law. Piracy differs from the exercise of jurisdiction over aliens in foreign lands in that in the latter case, no arrest can be made abroad, and punishment may be administered to the alien only if he, or his property, comes within the territorial control of the state.[59]

Aside from such exceptional situations, there is much disagreement. That the exercise of jurisdiction over aliens abroad is illegal has been strongly maintained by the United States and by England. A well-known example is the *Cutting Case*. Cutting, an American citizen, had published in the United States what was regarded as a libel upon a Mexican citizen, and for this he was tried by Mexican courts. Emphatic representations were made by the United States against this action, upon the grounds that it was contrary to international law, that it was unsupported by existing legislation, and that the penal laws of a state can have no extra-territorial application, except to nationals. To this Mexico replied that her action was justified by international law, and she was able to cite the legislation of a number of states in her support. Since neither side surrendered its position and no international court passed upon it, the case is inconclusive.[60]

There are exceptions, however, in the practice of the United States, and in that of England, which has as strongly supported the theory of territorial jurisdiction. An alien who commits perjury before an American consular official abroad is punishable.[61] The decision in the case of *Ford v. United States* would seem to extend the statute against conspiracy and

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[59] The international crime of piracy is much more difficult to define than it appears to be. It must apparently be committed upon the high seas: if a pirate comes within the territorial waters of a state, he is subject to the domestic laws as is an ordinary criminal. It is not the absence of authorization which renders them pirates, for a state may engage in piracy. *The Helena*, 4 C. Robinson 3 (1801). Piracy is not merely robbery; but the purpose must apparently be private rather than political. See Hall, § 81; Oppenheim, I, p. 499; Research in International Law, "Piracy"; *In re Piracy Jure Gentium*, Judicial Committee of the Privy Council 1934; *A.J.*, Vol. 29 (1935), p. 140; *Com. Prog. Cod.*, "Questionnaire No. 6, Piracy" 1927. V. 1., pp. 115-119, and answer of Rumania, pp. 201-222.

For cases, see Briggs, pp. 361-369; Dickinson, *Cases*, pp. 518-525; Hudson, *Cases*, pp. 692-705; Scott, pp. 337-349.

[60] Moore, *Digest*, II, pp. 228-242; and Briggs, pp. 302-305; Hyde, I, §§ 241-243.

[61] *U.S. Rev. Stat.*, § 1750.

fraud to aliens.[62] In England, the case of the *King v. Godfrey* concedes the right to extradite a person who was not present in Switzerland at the time that he obtained goods by false pretenses therein.[63]

The practice of Continental states reveals a wide and varying range of statutes applying to aliens abroad. Among such crimes are those against the safety of the state and against counterfeiting, and, with many varying conditions attached, offenses committed against subjects by foreigners abroad.[64] Continental writers defend this practice as strongly as Anglo-Saxon writers condemn it.

The case of the *Lotus,* before the Permanent Court of International Justice, brought the issue before an international tribunal; and while the Court has been criticized for failure to seize an excellent opportunity for laying down an authoritative rule, attention was focused upon the problem, and its various angles were authoritatively presented. A collision occurred upon the high seas between a French ship, the *Lotus,* and a Turkish ship, the *Boz-Kourt,* and the latter was sunk with some loss of life. The officers of both ships were tried and convicted for manslaughter, under the Turkish Penal Code, and France objected that such jurisdiction was illegal under international law. The Court refrained from saying that it was legal; but it denied that "international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely upon some permissive rule of international law." The court remarked that while the territorial character of criminal law is fundamental, "it is also true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them." The judgment did not satisfy partisans on either side. Anglo-Saxon writers maintain that it was decided on the theory, admitted by them, that a crime may take effect in another jurisdiction—e.g., a shot fired across a frontier, or, in this case, death produced on the Turkish vessel through negligence on the French vessel. Writers of the other school equally maintain that the judgment has cleared the way for the development of an international penal law.[65]

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[62] *Ford v. U.S.,* 273 U.S. 593 (1927). Expressions in *U.S. v. Bowman,* 260 U.S. 94 (1922), clearly leave the way open to apply the statutes therein cited to aliens, though the court does not speak to that point.

[63] *King v. Godfrey,* L.R. (1923) 1 K.B. 24.

[64] They are summarized in Moore, *Digest,* II, pp. 258-259, though much development has taken place since that time. See the French, Austrian, and Mexican codes quoted in Dickinson, *Cases,* pp. 671, 675, 691. The Turkish Penal Code, which in this connection is taken directly from the Italian, is found in the *Lotus Case, P.C.I.J.,* Series A, No. 10, pp. 9, 14-15. See, in general, *Research in International Law,* "Jurisdiction with respect to Crime."

[65] The *Lotus Case* stirred up a vast amount of discussion. It is found in the *P.C.I.J.,* Series A, No. 10. For discussions, see A. de Lapradelle, *Causes célèbres du droit des gens, L'affaire du Lotus* (Paris, 1928); H. Walther, *L'affaire du Lotus*

§ 30. Extradition.[66]—In the absence of a universal criminal law, it is obvious that a criminal may take advantage of the numerous exclusive national systems, and, merely by stepping across a frontier, find asylum in another state. Since justice is universal in nature and calls for the punishment of crime, the practice of extradition has grown up as a matter of practical expediency and reciprocal interest to remedy, to a certain degree, this defect. Extradition refers to the delivery, by the state in which the accused person happens to be, and upon demand of the accusing state, of a person suspected of having committed a crime in the latter state.[67]

There is a divergence of opinion as to whether extradition is required by customary international law or depends wholly upon treaty. Fauchille categorically asserts that it has its base in international law and exists aside from any treaty; Oppenheim and others are as emphatic that it depends solely upon treaty.[68] International law, assuredly, puts no obstacle in the way of a state which wishes to extradite in the absence of a treaty. In view of the fact, however, that each state may determine for itself whether it is willing to trust the judicial system of the asking state, and whether it considers the crime for which extradition is asked to be as serious as it is adjudged to be by the other state, it does not seem possible to assert a customary rule requiring extradition. In the United States it has been held that the President is not legally empowered to extradite in the absence of a treaty.[69]

Treaties of extradition are so numerous as practically to make up for the lack of a customary rule. Certain general principles may be found in them. A person may not be tried for any crime other than that for which he was extradited: he has been released upon that specific condition.[70]

(Paris, 1928); J. H. Brierly, "The Lotus Case," *Law Quarterly Review*, XLIV, p. 156; H. Donnedieu de Vabres, "L'affaire du Lotus et le droit penal," *R.D.I.*, II (1929), pp. 135-165.

[66] As to extradition, see Briggs, pp. 305-317; *Com. Prog. Cod.*, "Report on Extradition," *A.J.*, 20 (1926), Spec. Supp., p. 243; Hackworth, IV, Ch. XII; Hyde, II, pp. 1012-1064; H. Kraus, "Observations concernant les tendances de l'evolution du droit international de l'extradition," *R.D.I.L.C.*, 3rd Series, VIII (1927), pp. 161-181; J. B. Moore, *Extradition and Interstate Rendition*, 2 vols. (Boston, 1891); Research in International Law, "Extradition"; A. Rolin, "Quelques questions relatives à l'extradition," *Hague Acad.*, 1923, pp. 181-227.

[67] *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

[68] Fauchille, I, p. 994, who says that this opinion is usually admitted in doctrine, and that jurisconsults who subordinate it to a convention are rare. He asserts also that only the United States, Great Britain, and Belgium maintain a contrary policy in practice. The opposite view is taken by Hershey, p. 377, note, who says that the great majority of modern authorities clearly regard extradition in the absence of a treaty as a mere matter of comity, interest, or moral obligation. He is supported in his view by *Com. Prog. Cod.*, *A.J.*, 20 (1926), Special Supplement, p. 243; Hyde, I, § 310; Oppenheim, I, p. 565.

[69] Hyde, II, p. 1015.

[70] *U.S. v. Rauscher*, 119 U.S. 407 (1886). For other cases of extradition, see Dickinson, *Cases*, pp. 692-762; Evans, pp. 346-358; Hudson, *Cases*, pp. 1020-1052; Scott, pp. 404-428; M. O. Hudson, "The Factor Case and Double Criminality in Extradition," *A.J.*, Vol. 28 (1934), p. 274.

A certain amount of evidence must be shown. Crimes are interpreted in accordance with the law of the state asking extradition; sometimes it must be a crime according to the law of both states. Political crimes are not ordinarily extraditable, though the difficulty of defining exactly what constitutes a political offense raises a number of problems.[71] There is disagreement also as to whether a state should surrender by extradition one of its own citizens. States which provide for the punishment of their own citizens for certain crimes committed abroad may logically refuse to surrender them for trial for such crimes. The United States, however, which does not make this provision, stands ready in the interests of justice to surrender her own citizens. In the case of *Charlton v. Kelly,* the Court rejected a plea that the extradition treaty with Italy rested upon a reciprocal basis, and that since Italy refused to surrender her citizens for trial in the United States, the United States should consequently refuse to extradite Charlton to Italy. Without such an interpretation, Charlton would have escaped punishment.[72]

The divergences of national views as to the fundamental principles underlying extradition leave one with the feeling that it does not offer a satisfactory solution of the problem. According to Rolin, the solidarity of states is nowhere better shown than in extradition; and he asserts that the ubiquity of crime should not result in a ubiquity of repression. Fauchille, on the other hand, says that the controversy sets up the principle of the sovereignty of states against the idea of the community and of international solidarity.[73] Codification is desirable and is being studied. It should be provided, at any rate, that the state should not refuse extradition unless it is itself able to punish: in the words of Grotius, *aut dedere aut punire.* The criminal should not escape.

§ 31. The Question of International Jurisdiction.—In the preceding survey of national jurisdictions, it has been seen that there has been a constant effort to expand the jurisdiction of the state in order to give itself proper protection and to secure the proper repression of crime. Criminal methods and organization have steadily improved, and have become international in scope and operation, in such matters, for example, as counterfeiting or smuggling. To meet this development states have used the principles of nationality and of diplomatic protection to extend their control beyond territorial limits, first to their own citizens, and at length to aliens, for crimes committed abroad. Such extensions produced conflicts between various legal and jurisdictional theories, and the question arose as to

[71] In the English case, *In re Meunier,* L.R. (1894), 2 Q.B. 415, it was held that crimes of anarchists, being directed against society as a whole, were not political crimes and were extraditable. See also *In re Castioni,* L.R. (1891) 1 Q.B. 149.

[72] *Charlton v. Kelly,* 229 U.S. 447 (1913).

[73] A. Rolin, "Quelques questions relatives à l'extradition," *Hague Acad.,* 1923, p. 183; Fauchille, I, p. 993.

whether further advance was possible without international agreement. There has, in fact, been in process an interesting movement, attracting little attention until the *Lotus Case,* which seeks to create a universal criminal law and an international criminal jurisdiction. Organizations have been formed, journals published, and conferences held for this purpose.[74] The Committee of Experts for the Codification of International Law included in its program three subjects of interest to this movement: extradition, the criminal competence of states for crimes committed outside their territory, and piracy; but it reported "international regulation, though desirable, would encounter grave political and other obstacles."

The confusion of thought among the various advocates of an international criminal law and the variety of proposals characteristic of any constructive movement, make it difficult to present their suggestions in systematic form. They may be considered from the viewpoint of (1) individuals and (2) states.

The situation of individuals and the possibility of violations of international law by individuals will shortly be discussed. Those who advocate an international criminal jurisdiction point to piracy and to violations of the laws of war and neutrality as well-established instances of the capacity of individuals to violate international law; they suggest also counterfeiting, slave trading, the sale of alcoholic beverages in certain parts, and breaking of cables, the traffic in arms, in women and children, or in obscene publications, and abuse of the Red Cross flag, as matters proper to be included. These, in other words, should become internationally illegal and subject to punishment by any state (uniformity of law and penalty having been established) or by an international court.

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[74] There is an *Association International de Droit Pénal,* which publishes the *Revue International de Droit Pénal,* in which will be found most of the information concerning the movement. It has been studied with more or less approval, in part or as a complete problem, by the *Institut de Droit International,* by the Interparliamentary Union (Washington, 1925), and by the International Law Association, which has devoted much attention to it. See *I.L.A.* 31st Report, 1922, p. 76; 33rd Report, 1924, p. 81; 34th Report, 1926, p. 118.

As to the movement for an international criminal jurisdiction consult W. E. Beckett, "Do We Need an International Criminal Court?" *B.Y.I.L.,* 1926, pp. 73-96; W. E. Beckett, "Exercise of Criminal Jurisdiction over Foreigners," *B.Y.I.L.,* 1925, pp. 44-61; H. H. L. Bellot, "Statute for the Permanent International Criminal Court," *I.L.A.,* 33rd Report (1924), pp. 75-113; M. A. Caloyanni, "La Cour Permanente de Justice Criminelle Internationale," *Revue Internationale de Droit Pénal,* II (1925), pp. 298-354; F. Cybichowski, "La compétence des tribunaux à raison des infractions commis hors du territorie," *Hague Acad.,* 1926, II, pp. 251-384; B. de Francqueville, *L'oeuvre de la Cour Permanente de la Justice Internationale* (Paris, 1929), I, pp. 50-63; H. D. de Vabres, *Les principes modernes du droit international pénal* (Paris, 1928); J. Dumas, *Responsabilité internationale des Etats* (Paris, 1930); V. V. Pella, *La criminalité collective des états et le droit pénal de l'avenir* (Bucarest, 1926); Politis, Chap. III; Q. Saldana, "La justice pénale internationale," *Hague Acad.,* 1925, V, pp. 227-425; M. Travers, *Le droit pénal international,* 5 vols. (Paris, 1920-1922); M. Travers, "Les effets internationaux des jugements répressifs," *Hague Acad.,* 1924, III, pp. 419-468; Williams, *Chapters,* Chap. X.

Certain crimes of war have always been regarded as illegal, and an unsuccessful effort was made by the Treaty of Versailles to try the German Kaiser and other German officials for "a supreme offense against international morality and the sanctity of treaties," and for violations of the law of war. Trials of individuals for such offenses were successfully carried through at the end of World War II, the death penalty being exacted in a number of cases.

The principal crime which could be committed by a state would be aggressive warmaking, which the Pact of Paris attempted to declare illegal, and which now seems more fully established as an international crime. Certainly, for such acts as these, an international criminal law and jurisdiction would be essential. Such efforts collide violently with the long accepted theory that the state can commit no crime, but if the proposals really mean advance, no such anachronistic theory should be permitted to stand in the way. The idea of a penalty against a state, while usually denied, is not entirely alien to present practice, and finds some support.[75]

Naturally, the idea of an international criminal court has appeared in such a movement. The Treaty of Versailles provided for such a body to try the Kaiser though, of course, it was never constituted. Before the Committee of Jurists which elaborated the Statute of the Permanent Court of International Justice, Baron Descamps proposed a High Court of International Justice which should try crimes against international public order and the universal law of nations.[76] It found some favor in the Committee; but the Assembly of the League of Nations, to whom it was referred, replied that the problem was prematurely presented, that ordinary criminal courts are able to take care of such cases at present, and that if an international court should be needed, a criminal division of the Permanent Court could be set up.

Discussion of the subject continued, however. At the 1922 meeting of the International Law Association, Professor Bellot proposed a scheme which was adopted at the meeting of 1924 and amended in 1926. It planned a court which should have jurisdiction over violations of international obligations of criminal character by citizens of one state, or by *heimatlosen,* against another state or its citizens, and over violations by states of treaties concerning the conduct of war, or of rules of war generally accepted as binding.[77] A report was submitted to the League of Nations Assembly in 1931, and the Fourteenth Assembly adopted a resolution en-

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[75] See material gathered in C. Eagleton, "Measure of Damages in International Law," *Yale Law Journal,* XXXIX (1929-1930), pp. 61-66; S. Glueck, *War Criminals —Their Prosecution and Punishment* (New York, 1944).

[76] *P.C.I.J.,* Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (The Hague, 1920), pp. 49, 129, 498-515. See also B. de Francqueville, *L'oeuvre de la Cour Permanente de Justice Internationale* (Paris, 1928), I, p. 50.

[77] Report of the 34th meeting, *I.L.A.,* 1926, p. 118, also 31st Report, 1922, p. 76; 33rd Report, 1924, p. 81.

couraging certain private organizations to continue their studies and submit them later for consideration.[78]

Additional impetus was given to the idea of an international criminal law and court by the assassination of King Alexander of Yugoslavia in France in 1934, and by the more recent trials of war criminals following World War II. The former led to adoption by the League of Nations Assembly of a Convention for the Prevention and Suppression of Terrorism and of a Convention for the Creation of an International Criminal Court.[79] This Court was never established, but the International Military Tribunals established at Nuremburg and Yokohama may be regarded as international criminal courts, and around them rages a great debate among international lawyers.[80] A Charter for the International Military Tribunal was agreed upon by the Four Powers, and within it was stated the law to be followed by the Court:

> A. Crimes against peace. Namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
>
> B. War crimes. Namely, violations of the laws or customs of war . . . .
>
> C. Crimes against humanity. Namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial, or religious grounds in execution of, or in conjunction with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic laws of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Various questions were raised by this procedure: could these four victor nations declare international law on behalf of the community of nations,

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[78] *Resolutions of the Assembly*, 1933, p. 380; and see Minutes of the First Committée, Special Supplement No. 116; J. Jackson and S. King-Hall, *League Year-Book 1934*, pp. 274, 280; A. K. Kuhn, "International Cooperation in the Suppression of Crime," *A.J.*, 28 (1934), p. 541.

[79] *Conference for the Repression of Terrorism*, C.94.M. 47. 1938.V. The former convention was ratified by only one state, the latter by none, though 23 states had signed the former, and 13 the latter. *O.J.*, 1938, Sp. Supp. No. 193, p. 54. See A. Sottile, "Le Terrorisme International," *Hague Acad.*, 65 (1938), pp. 91-184 and bibliography.

[80] From the large literature dealing with this subject, reference may be made to Department of State Publication No. 2420, entitled "Trial of War Criminals"; S. Glueck, *War Criminals—Their Prosecution and Punishment* (New York, 1944); Q. Wright, "War Criminals," *A.J.*, Vol. 39 (1945), p. 357.

It should be noted that these tribunals differ in character from the usual national military tribunals which try persons for violations of the laws of war.

and would it be *ex post facto* law? Is aggressive war a crime? Are individuals subjects of international law, and can they appear before an international court? Do orders from a superior officer afford immunity? What effect would such precedents have upon the conduct of statesmen and military officials hereafter? The answers to such questions remain to be seen, and their effect upon the movement toward an international criminal law and court. The decisions at the Nuremburg Tribunal were approved by 55 states at the General Assembly of the United Nations in 1946, and a committee was instructed to put them into rules of law. Thus the precedent at Nuremburg seems well on its way to acceptance as a rule of law.[81] The effort of the United Nations to state and establish "human rights" will also contribute to the development of international criminal law. There seems to be little doubt that the movement will continue, because of current needs in a very interdependent world; and outworn ideas of sovereignty, of the immunity of the state, and perhaps of territorial jurisdiction should not be permitted to stand in the way of a solution of this problem of jurisdiction.

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[81] *Resolutions of the General Assembly,* No. 95 (I), p. 188.

CHAPTER 5

INDIVIDUALS

§ 32. Personality in International Law.

Doctrine Denies Personality. In accordance with a generally, though not universally, accepted interpretation of the concept of sovereignty, it has usually been said that states only can be subjects of international law, and that individuals can be no more than objects of that law, in the same category with ships, or horses or pigs, or other chattels.[1] Says Oppenheim: "Subjects of the rights and duties arising from the Law of Nations are states solely and exclusively. An individual human being, such as a king or an ambassador, for example, is never directly a subject of International Law." Elsewhere he classifies individuals—as do also Hershey and many others—in the words: "Persons and things are *objects,* not *subjects,* of the Law of Nations." [2] According to Article 34 of the Statute of the International Court of Justice: "Only States may be parties in cases before the Court."

International Law Reaches Individuals. It may of course be said that international law in a broad and indirect sense has always sought to protect the individual. In its earlier natural law connections, the state was not regarded as irresponsible, and writers thought in terms of a law superior to the state and able to protect individuals against the state. Humanitarian intervention has been approved by writers and practiced by states. Treaties have contained provisions for the protection of minority groups within a state, and for peoples in mandated areas.

Further than this, however, individuals have long had relationships with international law which positivists have been embarrassed to explain. The positions of pirates, blockade runners, and contraband carriers have often been brought up for explanation. Piracy is unquestionably a violation of international law, but it is one for which no state is responsible, and for

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[1] "It is owing to the development of the idea of absolute and uncontrolled sovereignty that the doctrine now recognizes only the states in international relations. Subject to their omnipotence, individuals were totally eclipsed. This conception was, however, too inconsistent with the real state of affairs to remain uncontested for long." Politis, p. 19.

[2] Oppenheim, I, pp. 21, 521; Hershey, p. 157, note 2.

which the pirate himself must suffer the penalty.[3] Article III of the Treaty of Washington (unratified) in 1922 made members of submarine crews liable as pirates for violations of the law of war as therein laid down. The person who runs a blockade or carries contraband has violated international law and no state is responsible for his act: the duty set by international law is upon the individual rather than upon his state. The Supreme Court of the United States has held that counterfeiting is an offense against the law of nations; and it has found in that law rules which reach down to protect innocent fishermen.[4]

In such cases as these, it is argued, the individual does not come into contact with international law but with domestic law. It is a state, it is pointed out, which punishes the pirate, or which confiscates the blockade-running ship. This is the same argument which we have already condemned: that international law is law only when enforced by state action, and then it is state law. It evades the situation. The authority of the law against piracy derives not from a state but from the community of nations. The law which the state executes is not its own law but international law. The pirate or the blockade runner, in fact, has rights as well as duties; he has a right not to be punished for what international law has not declared to be illegal.

The Procedural Problem. It must be repeated that international law has not in the past developed its own agencies of execution. It has relied, for the most part, upon states and their machinery. It merely defines piracy and authorizes states to seize pirates, leaving the penalty to be set by the state. Not even this much liberty is allowed to states in the case of those who run blockades or carry contraband, for the penalty in these cases is closely guarded by the law of nations. If international law is part of the law of the land and must be applied by the courts of the land, it is difficult to understand how international law could fail to be applied to individuals during the process.

The community has the power, if it wishes, to deal directly with the individual, and in occasional instances it does so. The Danube and Rhine Commissions, for example, are bodies which make regulations affecting individuals, and which can, through their own courts, enforce them directly upon individuals belonging to riparian states. "In the cases of some ten or more international administrative bodies the bureau is given power to fix rules binding upon member states or their nationals, and even to carry

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[3] "Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common; they are done under conditions which render it impossible or unfair to hold any state responsible for their commission." Hall, p. 310. For discussion of piracy, and citations, see p. 112, *supra*.

[4] *U.S. v. Arjona*, 120 U.S. 479 (1887); and, for England, *Emperor of Austria v. Day and Kossuth*, 2 Giffard 628 (1861); *Paquete Habana*, 175 U.S. 677 (1900).

out these rules in application to the daily business of the world through its own staff of employes... the bureau, by prior international agreement, is given authority which at the moment supersedes that of the state, either to act itself or to act through or upon its citizens." [5]

Individuals before International Tribunals. In a number of cases, the individual has been permitted to appear before an international court. A Central American Court functioned for a number of years, having authority to hear complaints of individuals against states, and heard several such cases. The Twelfth Convention of the Second Hague Conference proposed a Prize Court which, had it been established, would have allowed jurisdiction over individuals.[6] The question produced long discussion in the Committee of Jurists which drafted the Statute of the Permanent Court, but the Assembly of the League of Nations believed that the time was not yet ripe for such jurisdiction.[7] A series of international courts, the *Tribunaux Arbitraux Mixtes,* were created to try claims of individuals arising under Article 297 of the Treaty of Versailles. These included claims of individuals against states, and the rights claimed were asserted by the courts themselves to belong to individuals and not to their states.[8] This somewhat exceptional case of a right given to an individual to make a claim under international law even without the support of his own state was a remarkable advance over the traditional claims commission.

The practice of the claims commission, the usual method of arbitrating international claims of individuals, reveals shocking inconsistencies. The theory of the exclusive personality of the state is so artificial in character

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[5] Potter, pp. 176-177. He offers as examples the sanitary councils, the commissions dealing with river navigation, and the International Sugar Union.

[6] See A. de Bustamante, *The World Court* (New York, 1925), § 77, p. 74; for reports of cases, *Anales de la Corte de Justicia Centroamericano,* Vols. III and IV. As to the proposed Prize Court, J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (New York, 1918), p. 189. See also E. M. Borchard, "The Access of Individuals to International Courts," *A.J.,* 24 (1930), pp. 359-365; S. F. Séfériadès, "Le probléme de l'accès des particuliers a des jurisdictions internationales," *Annuaire,* 1929, II, pp. 257-271.

[7] *P.C.I.J.,* Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (The Hague, 1920), pp. 204-217.

While the Court in earlier cases demanded an international interest between states, in the case of the Serbian and Brazilian Loans the Court found it necessary to justify its assumption of jurisdiction, admitting that the case was "exclusively concerned with relations between the borrowing State and private persons, that is to say, relations which are, in themselves, within the domain of private law." *P.C.I.J.,* Series A, Nos. 20, 21, p. 18. See also Series B, No. 15, pp. 17-18; C. G. Tenékidès, "Les litiges entre Etats et particuliers devant la Cour Internationale de la Haye. Les arrêts 14 et 15," *R.D.I.L.C.,* 3rd Series, XI (1930), pp. 473-493.

[8] "It is the national who may express a desire for restitution, not the Government. Again, possession is to be restored to the evicted owner, not the Government." *Case of Ex'ors of F. Lederer,* Anglo-German Tribunal, December 13, 1923, *Recueil des decisions des tribunaux arbitraux mixtes institués par les traités de paix,* III (Paris, 1923-1924), p. 768.

that states have found it difficult to maintain consistency.[9] According to present practice, an individual may present a claim only with the consent of his own state, which may sacrifice that claim to political or other exigencies. If supported, it is then regarded as the claim of the state, for only states can have rights under international law. Nevertheless, the tribunal must be satisfied that the individual is a national of the claimant state, and if the individual thereafter loses that nationality, the entire claim is lost—though in legal theory it is the claim of the state and should not be affected by anything that the individual may do.[10] Frequently the money is awarded to the individual, but it is always paid to the state, and whether or not the individual will ever receive it depends upon the generosity of his state. Again, the claim is argued upon the ground of the damage done to the individual, not to his state; and damages are measured by his loss, not by that of his state.[11] Such situations are not only ridiculous inconsistencies in legal theory, but show also shocking disregard for human justice. The case of stateless persons who, since they have no state to represent them, have no possible access to an international court, is particularly shocking.

THE INDIVIDUAL AS A SUBJECT OF LAW. It is for the individual human being that law and government exist, and it is absurd to deny him access to the protection of international law. A large number of international lawyers have claimed for the individual a position in international law,[12]

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[9] Thus a Claims Convention with Spain in 1802 speaks of "excesses . . . by . . . individuals . . . contrary to the law of nations or to the treaty." Malloy, II, p. 1650.

[10] "A claimant, having a perfectly legal claim, is now dependent for relief primarily upon the political strength or influence of his nation, on its political relations with the country complained against and on the disposition and willingness of the Foreign Office to exert diplomatic efforts in his behalf. His claim becomes the plaything of politics and of their accidents. The government of the injured citizen is subjected to political pressure to espouse what may be a poor claim, and in prosecuting a claim is led to invoke the support of a whole people on behalf of a single citizen or corporation, a primitive and mediaeval form of collective revenge which survives in practically no other branch of public law." E. M. Borchard, "Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners," *A.J.*, 20 (1926), p. 747; and see Williams, pp. 258-259, note 3.

"There must, then, be an individual who has a claim, and a British or American nationality; else we cannot take jurisdiction." *Case of McHugh, Sherman and Brain,* Moore, *Arbitrations*, p. 3279; see also *ibid.*, pp. 1465, 3063; J. Hanna, "Nationality and War Claims," *Columbia Law Review*, 45 (1945), p. 301.

[11] See as to this point, C. Eagleton, "The Measure of Damages in International Law," *Yale Law Journal*, XXXIX (1929), pp. 54-61.

[12] "Looking upon the individual as the real object of all law, it proclaims the necessity of rendering international law democratic by placing individuals in the first rank of its subjects. It is gradually gaining force and ground in all countries. It is followed by an ever-increasing number of jurists, of which the most prominent are: Schücking and Wehberg, in Germany; Kelsen and Verdross, in Austria; Saldana, in Spain; Basdevant, Duguit, de Lapradelle and Scelle, in France; Krabbe, in Holland; Mandelstam, in Russia; and Alvarez, Garner and Ralston, in America." Politis, p. 23, quoted by Q. Wright, *Research in International Law since the War* (Carnegie Endowment, Division of International Law, Pamphlet No. 51), p. 32. Wright adds to this list the names of Westlake, W. Kaufmann, Diena, Cavaglieri, Osawa, and

and an increasing number of organizations demand that the individual receive such protection. Thus, the *Institut de Droit International* at its 1929 session in New York adopted a Declaration of the International Rights of Man, and the American Law Institute, after thorough study, issued a Statement of Essential Human Rights.[13]

The decision of the Nuremburg Tribunal accepted the individual as a subject of international law. The Court said:

> That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[14]

The General Assembly of the United Nations unanimously approved this opinion and recommended that it be stated and adopted as law.[15] If the emphasis in this trial was upon the duties of individuals, rather than upon their rights, the judgment nevertheless asserts that the individual is a subject of international law.

Further evidence of the modern recognition of the individual is to be found in the Charter of the United Nations, which states as one of its Purposes "to achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms." This phrase is found at various places in the Charter, which also calls for the establishment of a Commission on Human Rights. The task of this Commission is a most difficult one and its work will be long and slow; some of the speeches made concerning it must be regarded as premature in their assertion that international legal rights were created for human beings by

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Eagleton, and could have included himself. See also E. M. Borchard, as cited in footnote 10, above, and in *Annals of the American Academy of Political and Social Science*, 243 (1946), p. 112 (This issue of the Annals contains numerous contributions on the subject of human rights); H. Aufricht, "Personality in International Law," *Pol. Sci. Rev.*, 37 (1943), p. 217; P. C. Jessup, "The Subjects of a Modern Law of Nations," *Michigan Law Review*, 45 (1947), p. 383, and "Responsibility of States for Injuries to Individuals," *Columbia Law Review*, XLVI (1946), p. 903; C. Eagleton, "The Individual and International Law," *Proc. Am. Soc.*, 1946, p. 22; C. G. Tenékidès, "L'Individu dans l'ordre juridique international" (Paris, 1933); F. G. Dunn, "The International Rights of Individuals," *Proc. Am. Soc.*, 1941, p. 14; J. B. Scott, *ibid.*, 1930, p. 15; E. Benes, "The Rights of Man and International Law," *Czechoslovak Yearbook of International Law* (London, 1942), p. 1; V. R. Idelson, "The Law of Nations and the Individual," and H. McKinnon Wood, "Legal Relations between Individuals and a World Organization of State," in *Transactions of the Grotius Society*, 30 (1944), pp. 50, 141.

[13] *Annuaire*, 1929, II, pp. 298-300; Annals of the American Academy, as cited in the previous footnote, p. 18. See also *Declaration of the International Rights and Duties of Man*, Inter-American Juridical Committee (Pan American Union, 1946); Commission to Study the Organization of Peace, *Fourth Report*, Part III (1944), and *Draft International Bill of Human Rights* in *Int. Con.*, No. 426, December, 1946.

[14] From the Judgment of the Tribunal as reprinted in *A.J.*, 41 (1947), Document Section, pp. 220-221, citing *Ex Parte Quirin*, 317 U.S. 1 (1942).

[15] *Resolutions of the General Assembly*, No. 95 (I), p. 188.

the Charter itself. It may be said, however, that the principle of protection for human rights was accepted and responsibility for their statement was laid upon various organs of the United Nations.[16] As the discussion of noble principles narrowed down to specific means of promoting and protecting individual rights, the phrase "national sovereignty" was more and more emphasized. The Economic and Social Council, in June, 1946, "considering that the purpose of the United Nations with regard to the promotion and observance of human rights, as defined in the Charter of the United Nations, can only be fulfilled if provisions are made for the implementation of human rights and of an international bill of rights," asked the Commission on Human Rights to submit suggestions as to how this implementation might be achieved. The Commission has begun its work, slowly but sensibly, by collecting for study the various declarations and bills of rights now in force in various countries, and other materials on the subject. It has also suggested that treaties containing provisions involving human rights should conform to the standards set forth in the Charter.[17]

Thus, while much progress has been made toward international protection of the individual, the community of nations has yet to prepare a clear statement of the rights and duties of individuals. This effort will raise such fundamental questions as the exclusive jurisdiction of the state, the right of an international order to protect an individual even against his own state, and the division of the loyalty of the individual between his state and the international system. When rights and duties have been stated, questions will appear as to the tribunals which are to interpret and apply the law, and the methods by which it is to be enforced. The effort is manifestly one in which progress will be slow. It is probable that the first steps will be in the direction of inducing states to include in their national codes certain protections for the individual; it will be a more difficult task to induce states to accept rules embodied in treaties and enforceable from the outside. It is suggested, however, that acceptance of an International Bill of Human Rights would promulgate universally accepted principles for the guidance of states and of courts, and that the new law would grow gradually from these beginnings.[18]

The relationship of the individual to international law is a factor of some importance in the future development of international government. The Nuremburg trials have shown the need of an international jurisdiction

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[16] See the commentary by J. Robinson, *Human Rights and Fundamental Freedoms in the Charter of the United Nations* (Institute of Jewish Affairs, New York, 1946). It contains citations to many efforts and writings in this field.

[17] *Journal of the Economic and Social Council*, First Year, Second Session, No. 29, 13 July 1946.

[18] See H. Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945).

to control those who incite to aggressive war or commit inhumane crimes. The studies so far made with regard to control of atomic weapons likewise indicate the need for jurisdiction over individuals, and such jurisdiction is a key feature in the various plans offered in connection with the current movement for world government.[19] It is not difficult for a student of the American federal system to conceive of the citizen as the subject of more than one law, having different and sometimes conflicting rights and duties as a citizen of the United States and coincidently as a citizen of a member state. It is much more difficult to transmute this understanding into the acceptance by national groups of an international central government, able to reach into a state and punish an individual therein, or to protect an individual against his own government.

§ 33. Legal Status of Aliens.—It is the individual abroad who comes most often into contact with international law. An extensive system of rules has been developed for the protection of the alien and, as intercourse between states grows, the importance of these rules increases steadily. Most international litigation arises today, not from injuries done by one state to another, but from injuries suffered by aliens.

Right of Entry. We have noted above the claim of some writers that a right of commerce, or intercourse, exists as between states. This is interpreted by some as giving to an alien the right to enter any state; others reach the same conclusion by deduction from the natural law principle of individual liberty. These writers do not, however, deny the power of a state to exclude certain types, or certain groups of aliens; at the most, the claim is that no state is free to exclude all aliens. This would seem to be a statement of fact rather than of law. No state could, under existing circumstances, isolate itself from other states.

It cannot be doubted that a state is free to exclude aliens, individually or by groups, and to admit only those whom it pleases to admit. This right has been emphatically affirmed by the Supreme Court of the United States,[20] and it has been put into effect in her increasingly stringent immigration laws. These laws not only prohibit the entrance of diseased, immoral, or other such persons; they exclude also racial or national groups, either entirely or beyond a certain limit. While such discriminatory measures produce protest and even reprisal, there is no ground for legal complaint. Immigration has not yet been taken over by international law, and remains a "domestic question."

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[19] See Chapter 18, below.

[20] *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889); *Nishimura Ekiu*, 142 U.S. 651 (1891). For cases as to admission and expulsion, see Dickinson, *Cases*, pp. 828-842; Evans, pp. 134-135; Hudson, *Cases*, pp. 1121-1149; Moore, *Digest*, IV, §§ 550-559. See also C. L. Bouvé, *Exclusion and Expulsion of Aliens in the United States* (Washington, 1912).

Similarly, aliens, if admitted, may be expelled, though practice affords illustrations of some limitations upon the use of this right.[21] It is a right founded primarily upon the public interest of the state, but, while undeniable, it may not be used arbitrarily. If an alien is suddenly deported, to his material loss, and without apparent reason, his state would be justified in making diplomatic inquiry as to the cause of the action; and damages have been collected where such dismissal was shown to be arbitrary and unreasonable.

ALLEGIANCE. The alien, when admitted to a state, is subject to the jurisdiction of that state, and owes a temporary allegiance to it.[22] He must obey its laws and submit to penalties for breaking them. He must pay taxes and may be called upon to perform duties of police, but he is exempt from military service, and it is even forbidden to him in some states. Aside from the deprivation of political rights, such as voting or holding office, his situation is usually little different from that of a national. He will probably find it desirable to have his passport at hand, and he may, particularly in time of war, be required to report to the police and keep a card of identity at all times. His civil rights will be much the same as those of his neighbors who are nationals, though he may be forbidden to own land, and other special restrictions may be placed upon him.[23] For such rights as he has, international law requires that he be guaranteed the same protection under domestic law as the national receives. In this respect he has an advantage over the national, who must submit to his own state; the alien may appeal to international law. It is a closely restricted right, but it may be none the less effective. It is dependent, as has been seen, upon his own state and its willingness to make his claim a diplomatic claim, but it enables him to avail himself of a remedy against the state of his residence which nationals of that state do not have.

§ 34. Diplomatic Protection of Citizens Abroad.[24]—The exclusive jurisdiction of a state within its own borders is checked, as we have seen, by certain rights of protection accorded to an alien's state by international law. The bond of nationality, which unites a person to his own state, is the basis for an extension by his state of both control and protection over him in foreign lands. His status is evidenced by his passport. From the viewpoint of domestic law, the citizen may not ordinarily demand protec-

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[21] *Turner v. Williams*, 194 U.S. 279 (1904); *Musgrove v. Cheung Teeong Toy*, L.R. (1891) A.C. 272.

[22] *De Jager v. Natal*, L.R. (1907) A.C. 326.

[23] A number of States of the United States forbid Orientals to own land; and local prejudices have produced some peculiar restrictions. Thus an alien, in different localities, may not own a dog, or a gun, or receive a license as a junk dealer, or run a pool hall. See cases in Dickinson, *Cases*, pp. 850-861; Hudson, *Cases*, pp. 1151-1164.

[24] For background citations on this subject, refer to § 24, *supra*.

tion from his home state, as of legal right;[25] but from the viewpoint of international law, his state may afford protection to him if it so pleases. The extent of this protection and the procedure to be followed are regulated by international law.

Local Remedies. The general principles of the responsibility of states have been outlined above, and we may now consider them more closely insofar as they relate to the protection of aliens. In general, the duties of a state in this respect may be described as prevention and punishment, as restraint and redress.

No state can guarantee the life or property of an alien. The American tourist who is robbed in Paris must appeal to French police and courts as would any Parisian, and he need not hope for an American warship to appear in response to his frantic appeals for justice. The duty which international law requires of France is that it should give to the American as good an administration of justice as she would give to a Frenchman. This administration of justice should measure up to "a certain reasonable standard of civilized justice," but usually the alien is entitled to the same protection as the national—no more, and no less.[26]

"Due Diligence." The state must have proper machinery for the protection of individuals within its borders, and the government must exercise "due diligence" in preventing injury to aliens. This does not mean that special protection must be given to them, unless special circumstances demand it, such as an anti-racial riot. There have been an undue number of such cases in the United States, in which insufficient protection was given to Chinese or Italians, as a result of which the United States was obliged to pay damages. Thus, at Rock Springs, Wyoming, a mob drove out all Chinese residents, killing twenty-eight, wounding eighteen, and destroying valuable property. The coroner returned a verdict of death from causes unknown! Such a burlesque on justice could not be maintained. There was neither protection nor punishment; and the United States paid at one time over $276,000 in behalf of Chinese citizens injured in this and other riots.[27] Damages were paid also in consequence of the well-known

[25] But, according to *Rev. Stat.*, § 2001, "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen. . . ."

[26] In reaction against claims regarded by them as unduly pressed, the Latin American states support the Calvo Doctrine, which asserts that in no case can an alien ask for better treatment than a national would receive. See Borchard, *loc. cit.*, p. 845; Eagleton, § 33; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, 1938), pp. 469-489; Hyde, II, pp. 994-998; *North American Dredging Co. Case*, Claims Commission, U.S. and Mexico, *Opinions of the Commission* (Washington, 1927), p. 21.

[27] Moore, *Digest*, VI, pp. 822-836.

New Orleans riot of 1891, and for others. The principle involved was stated by Lord Palmerston in the case of *Don Pacifico:* "The Greek Government having neglected to give the protection they were bound to extend, and having abstained from taking means to afford redress . . . ," England was justified in demanding reparation.[28]

Mob cases usually involve the payment of damages, since there is usually sufficient warning to allow the government to take unusual precautionary measures. If, however, the situation is beyond the control of the usually adequate forces of government, the state can not be held liable. Nor can it be expected to anticipate the secret or sudden outbursts of individual passion. In such cases, though the government may have been diligent enough in its precautionary measures, it may yet render itself liable through failure to take prompt and efficient action to apprehend and punish the offender. To allow his escape when he could have been captured, or to be dilatory or inefficient in prosecution, has often been considered by an international tribunal to be sufficient justification for an award. In the *Janes Case,* before the Mexican Claims Commission, an award of $12,000 was made because "the Mexican authorities did not take proper steps to apprehend and punish the slayer of Janes"; and in another case the United States was directed to pay to a Mexican widow $10,000 because Texas courts had postponed the trial of the murder of her husband, for one reason or another, from 1922 to 1927.[29]

"Denial of Justice." While lack of due diligence may bring liability, the ordinary basis of a claim is a "denial of justice." The duty of the alien, as has already been observed, is to seek redress in the local courts; and it is ordinarily true that he has no right to call upon his own state for aid or to expect pecuniary damages until these remedies have failed.[30] There are innumerable ways in which such a failure may occur. It may result from the absence of machinery or laws through which redress is obtainable; from refusal of access to the courts; from delay, collusion, venality, anti-national bias, or other fault in judicial procedure (but not from mere error on the part of the court); from arbitrary interference by the executive or other authorities; from failure to execute the decree of the court. In the case of the *Salvador Commercial Company,* an American firm was fraudulently deprived of a concession, and when it attempted to appeal to

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[28] *Ibid.,* p. 853.

[29] *Janes Case, Mexican Cl. Commission,* p. 108; *Galvan Case, ibid.,* p. 408.

[30] This is believed to be the correct meaning of "denial of justice" as a technical term of international law. See C. Eagleton, "Denial of Justice in International Law," *A.J.,* 22 (1928), pp. 538-559. The term has, however, been employed in a wider meaning, so as to cover every internationally illegal act injurious to aliens. Hyde, II, pp. 909-917; Borchard, p. 330. See also A. V. Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, 1938); O. Lissistzyn, "The Meaning of the Term Denial of Justice in International Law," *A.J.,* 30 (1936), p. 632.

local courts an executive decree arbitrarily blocked this means of redress. Local remedies being thus closed, it was held that Salvador was guilty of a denial of justice.[31] And in the *R. E. Brown Claim,* it was said:

> All three branches of the government conspired to ruin his enterprise. The Executive department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions.[32]

Awards have been given for such injuries as false arrest or inhumane treatment during imprisonment; but for the most part, all claims are subordinated to the rule that local remedies must have been exhausted before diplomatic interposition is permissible. The advantages of this rule have been stated; the result is a desirable tendency to consider denial of justice, in the technical definition just given, as the only foundation for an international claim.[33] As judicial systems in the various states become more and more trustworthy, there will be less and less opportunity for the alien to appeal to his home state for aid. However, in those cases in which he has a justifiable claim, he remains at the mercy of his home government, and only through its support is he able to advance a claim at all.

§ 35. Nationality.

SIGNIFICANCE OF NATIONALITY.[34] Procedurally, the national character of the individual is of vital importance to him. Whether he has rights under international law as a member of a state, or as an individual human

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[31] Dept. of State Pub., *Foreign Relations,* 1902, p. 838.

[32] American and British Claims Arbitration Tribunal, *Report of Fred K. Nielsen* (Washington, 1926), p. 198.

[33] It may be observed that the proper application of the rule of local redress produces different results in different states. Thus an award against a policeman in the United States, under American law, may be illusory, since the policeman may be unable to pay; whereas under administrative law systems, such as in France, the state may accept liability for its agent's act. American law and judicial procedure are now beginning to take note of this situation.

[34] The literature on nationality is extensive. See *Com. Prog. Cod.,* Questionnaire No. 1, *A.J.,* 20, Special Number, July, 1926, pp. 21-61; *Bases of Discussion,* I, Nationality, 1929.V.1.; *Acts of the Conference for the Codification of International Law,* I, Plenary Meetings, 1930.V.14, and II, Minutes of the First Committee, Nationality, 1930.V.15.

See also G. Cogordan, *La nationalité* (Paris, 1890); R. W. Flournoy, "Nationality, Conventions, Protocols, and Recommendations," *A.J.,* 24 (1930), pp. 466-485; R. W. Flournoy and M. O. Hudson, *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties* (New York, 1929); Hackworth, III, Ch. IX; F. Van Dyne, *Citizenship of the United States* (Rochester, 1904); W. W. Willoughby, "Citizenship and Allegiance in Constitutional and International Law," *A.J.,* 1 (1907), pp. 914-929; *Research in International Law,* "Nationality."

being, in present-day practice he has small chance of enforcing them except as a national of some state. This character is a necessary qualification for admission to an international tribunal and its absence would deprive him of the usual method of redress, diplomatic interposition. International law doubtless requires protection for an alien, but procedurally he can invoke that protection only by appealing to his own state. Thus a person without national character is left entirely without protection.

Nationality is the bond which unites a person to a particular state. It is, so to speak, his card of membership, entitling him to the rights and duties of membership. Naturally, it is the state which decides who are to be its members, but if the state reaches too far in its claims it may collide with similar claims by other states, and thus arouse international problems. "In a broad sense," says Hyde, "international law limits the right of a State to impress its national character upon an individual, or to prevent that character from being lost or transferred. The freedom of action of each member of the family of nations is, however, wide." [35] It would be almost correct to say that international law makes no provisions as to nationality, leaving each state free to do what it wishes. It is, however, true that certain principles have been established in practice, and if a state should step beyond these its action would doubtless result in vigorous protest from other states. If for example the United States should by law declare all Canadians to be American nationals,[36] it is hardly to be expected that Canada would placidly accept the ruling, or that an international court would respect the claim of the United States to appear in behalf of Canadian subjects.

Acquisition of Nationality by Birth. In the usual practice of states, nationality may be acquired either through birth or through naturalization. Citizenship through birth may result from being born within the territorial jurisdiction of a state, the *ius soli;* or from being born of the nationals of a certain state, no matter where, the *ius sanguinis*. The one depends upon the place of birth, regardless of parentage; the other depends upon parentage, regardless of the place of birth. A state may employ either or, in varying degrees, both of these principles. In the United States the Fourteenth Amendment makes all persons, born in the United States and subject to the jurisdiction thereof, citizens of the United States

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[35] Hyde, II, p. 1066.

[36] The word "national" is usually employed, today, in the external sense, and thus as a term of international law; whereas the word "citizen" or "subject" now refers to internal character and rights. It is to be observed that a state may confer nationality without conferring the rights of citizenship internally. While a citizen is always a national, a national is not always a citizen. Persons in the territorial possessions of the United States are nationals, but they have or may become citizens only through act of Congress.

and of the state wherein they reside. According to the Nationality Act of 1940, the United States regards as citizens at birth:

> (a) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided,* that the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property . . .
>
> (e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;
>
> (f) A child of unknown parentage found in the United States, until shown not to have been born in the United States.

The Act of 1940 provides also that persons are nationals and citizens born outside the United States of parents both of whom are citizens and one of whom has resided in the United States or an outlying possession.[37]

Acquisition of Nationality by Naturalization. Naturalization, the acquisition of nationality by adoption, may be either collective or individual. In the former case, it may result from conquest or cession of territory, though in such cases the inhabitants are usually given by treaty the right to choose the nationality they prefer. In the latter case, the individual voluntarily renounces his former allegiance. By successfully meeting the qualifications and tests set for admission, and by swearing allegiance to the state whose nationality he seeks, he secures a new nationality. His former state may not, however, concede to him the right to abandon its nationality; since each state may make its own laws in this respect he may as a result have two nationalities.

Dual Nationality. The possibility of a conflict of nationality in such variegated situations will doubtless have been noted. It may arise from the fact that the parents were within foreign territory when the child was born; or it may arise from naturalization, in those situations where the naturalized person is not permitted by the state of his former allegiance to renounce his nationality, or where such state claims the children of its own citizens. In what is probably its best advertised form today, it arises from international marriages. Before 1922, the rule had been consistently followed that a woman automatically assumes the nationality of her husband, thereby automatically losing her former nationality.[38] The increasing independence of women revolted against such sex discrimination, and

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[37] 54 Stat. 1138, Sec. 201. Very complicated provisions follow as to the nationality of persons one of whose parents is a citizen and the other a non-citizen national or alien.

[38] See *Mackenzie v. Hare,* 165 Cal. 776 (1913); 239 U.S. 299 (1915).

against the involuntary changes of citizenship forced upon them. As a result of powerful agitation by women's organizations the United States passed the Cable Act in 1922, under which marriage alone would not confer or terminate citizenship, though naturalization was made easier for the alien woman who married an American citizen.[39]

EXPATRIATION. Fundamentally, the principle at issue in cases of dual allegiance is the right of expatriation, that is, the right of an individual to break off at will the bond of allegiance to a state. Originally, it was generally maintained that allegiance was indissoluble, and this seems to have been admitted by the United States. But the pressure of immigration soon persuaded her to the other view, and Congress in 1868 asserted it in these words: "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness . . . ," therefore any official declaration denying the right of expatriation "is declared inconsistent with the fundamental principles of the Republic"; and all naturalized citizens of the United States, while in foreign countries, "are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."[40] Unfortunately, the naturalized person's state had as much right to maintain its claim to him as had the United States to deny it: the Act of 1868 was a unilateral declaration having no force abroad. In this situation, that state would take jurisdiction which actually had the disputed national within its control. However, the principle of expatriation was vigorously asserted by the United States through diplomatic negotiation. A number of treaties were signed, embodying the compromise that a naturalized American who went back to his former state would be treated as an American citizen by that state for a term of two years, while the United States would not attempt to protect him beyond that period. Most modern writers uphold a theoretical right of expatriation, and it seemed well on its way to recognition as a principle of international law before 1914. Military exigencies during and following the first World War have produced a decided setback among states which are unwilling to lose needed human resources. The practices of totalitarian governments have on the one hand made it difficult for their nationals to emigrate, much less to be naturalized abroad, and on the other hand, such governments have deprived some of their nationals of citizenship for political reasons. Many other nationals do not dare to claim the protection of, or passports from, their own nations. There is, consequently, a

[39] Subsequent amendments have modified the procedure and put the alien man or woman who marries an American spouse upon a more equal footing. See the Nationality Act of 1940, above cited; also, Hackworth, III, § 247; Hyde, II, pp. 1114-1121.

[40] *Rev. Stat.*, §§ 1999, 2000.

large number of "refugees," "displaced persons," in the world, whose fate and disposition were a subject of study by the League of Nations and now by the United Nations.

ATTEMPT AT CODIFICATION. An attempt was made, at the First Codification Conference at The Hague in 1930, to secure some uniformity and to remedy injustices caused by conflict between nationality laws. In spite of long and careful preparation, and in spite of the very conservative proposals made, little agreement could be reached. A Convention on Certain Questions Relating to the Conflict of Nationality Laws was signed, which recognized that "it is for each state to determine under its own law who are its nationals"; and the wishes of those who desired some international regulation found expression only in the statement that "this law shall be recognized by other States, in so far as it is consistent with international conventions, international customs, and the principles generally recognized with regard to nationality." It was admitted that any question of nationality must be determined in accordance with the law of each state. Thus the problem of dual nationality remained unsolved: the conflicting interests of immigration and emigration are still too powerful to make acceptable any single rule. On the contrary, it was affirmed that "a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses," and an individual can not renounce one of his nationalities without the consent of the state whose nationality he renounces.

The right of expatriation, which has a close connection with dual nationality, was emphatically and, it is believed, justifiably, maintained by the United States at the Conference. When the Convention conceded the right of a state to refuse to surrender its claim to a citizen who becomes naturalized in another country, the United States refused to sign the Convention.

The question of dual nationality involves also the status of married women. A strongly organized movement pressed the cause of women at the Conference, urging the adoption of the simple rule that the status of man and woman should be precisely the same with regard to nationality, regardless of marriage. Aside from conservative objections, it was found that such a rule would produce many practical inconveniences—e.g., the status of children—and so many conflicts with existing national laws, that it was found impossible to adopt it. Article 8 of the above Convention, however, provides that the wife shall lose her nationality only if she acquires that of her husband by the laws of his state, thus giving assurance that she will not be left without nationality; and by Article 10, the naturalization of the husband works no change in the nationality of his wife except with her consent.

Two Protocols were also adopted by the Conference. One provides that a person of dual nationality habitually resident in one of the two countries shall not be subject to military obligations in the other country. The other eliminates a certain limited type of statelessness. Finally, a recommendation was adopted urging that stateless persons be admitted by the state whose nationality he last possessed. Obviously, much remains to be done with the problem of nationality.

CHAPTER 6

OFFICIAL INTERCOURSE BETWEEN STATES

§ 36. Growth of Intercourse between States.—There has always been a certain amount of intercourse between members of the community of nations and, from the earliest days, there have been instrumentalities for this intercourse, such as the herald or special envoy, whose person was inviolable, or the treaty, which established a sacred obligation. The growth of trade and the pressure of interdependence, which has been described above, produced an enormous development of these agencies; and today the community is steadily building new rules and new institutions to take care of the steadily growing, and now vitally important, intercourse between its members.

NEGOTIATION. This intercourse has for the most part been carried on by private individuals, their interests being protected by their respective states in accordance with rules of law developed for this purpose. As economic interests have become more and more political interests, states themselves have become involved, either through regulation of trade or by actually engaging in trade themselves. The services which a state now provides for its citizens are far more numerous than they once were, and each of these produces relationships with other states—for example, health or education. Consequently, states have had to increase their agencies for communication with other states, and by now, they are in almost continuous communication with each other. It may also be noted that these relationships have become increasingly multilateral, rather than bilateral, which means that there is comparatively more community, and less bilateral, action.

The communications and discussions between states represent their endeavor to reach amicable agreement upon matters of common interest. It is a process which never ceases, and which calls for the building of machinery and rules by which states can understandingly, and at times bindingly, reach agreement. Negotiations may be carried on directly by the heads of states, though this is rare.[1] From the earliest times, agents have been employed for this purpose. Ultimately, it became necessary to establish permanent agents, and thus the diplomatic and consular systems have

[1] President Wilson attended the Peace Conference of 1919; and the meetings of Roosevelt, Churchill and Stalin are well-known. Such direct negotiations seem to take place only for matters of exceptional importance.

appeared: the former to take care of the interests of states, the latter to take care of citizens or their interests abroad. The conference also appeared, as a convenient means of handling matters of interest to a number of states; nowadays, conferences are a daily matter, and many are regular ones, held under the auspices of an established institution. The astonishing increase in the number of international conferences measures the growth of international intercourse.

Negotiations may eventuate in a treaty, or other form of agreement between states. The number of multilateral treaties, which for the most part attempt to state new rules of international law, increases steadily. There have appeared also a number of institutions of administrative nature to deal with matters of continuing common interest, usually of a technical character, such as the Universal Postal Union, or newer bodies such as the Food and Agriculture Organization. There has also been much improvement in the means of settling differences between nations. Finally, the community has established over-all bodies, the League of Nations and the United Nations, for continuous attention to common needs.

In this chapter, the older means and methods of international intercourse will be briefly described, means which are of course still in use, and on a far greater scale than ever before. The following chapters will take up in more detail the procedures for international legislation and administration, and for the pacific settlement of disputes.

§ 37. The Consular System.—"Consular representation," says Potter, "is the original and most fundamental form of official international intercourse." [2] In view of the earlier theory that aliens were subject to the law of their own state, rather than to that of the state of their residence, the first need of agents between states—aside, perhaps, from heralds in war time—was to take care of citizens engaged in commerce abroad. Such agents were to be found in ancient Greece and Rome. With the reinvigoration of trade about the thirteenth century, the office became important. Each state found it necessary to send out judges to administer the commercial affairs of its citizens abroad. The judge might be elected by the alien members of the local community; or he might be sent out by the home state—at first to travel with the ship, later to reside in one place. However

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[2] Potter (1st ed.), p. 64. In general, as to the position of consuls, see *Com. Prog. Cod.*, "Legal Position and Functions of Consuls," *A.J.*, 22 (1928), Special Number, pp. 105-110; A. de Clercq and C. de Vallat, *Guide pratique des consulats* (5th ed., Paris, 1898); A. H. Feller and M. O. Hudson, *Diplomatic and Consular Laws and Regulations*, 2 Vols. (Washington, 1933); C. L. Jones, *The Consular Service of the United States* (Philadelphia, 1906); T. H. Lay, *The Foreign Service of the United States* (New York, 1925), Chap. V and *passim;* J. I. Puente, *The Foreign Consul: His Juridical Status in the United States* (Chicago, 1926); I. Stewart, *Consular Privileges and Immunities* (New York, 1926) *Research in International Law, Legal Position and Functions of Consuls;* E. C. Stowell, *Le Consul* (Paris, 1909); E. C. Stowell, *Consular Cases and Opinions* (Washington, 1909).

chosen, his function was to apply the law of his state, usually to commercial problems; and the result was the building of commercial law, codified, as we have noted, in the *Consolato del Mare*. The system was carried by the Crusades to the Orient, where the "capitulations," or consular jurisdiction, continued long after it had been dropped, as to its judicial functions, in Europe.

Several important changes have developed to distinguish the older system from consular practice of our own day. In the first place, the doctrine that the alien carries with him his own law was dropped, and was supplanted by the rule of subjection to the jurisdiction of the state of residence. Naturally, the judicial functions of the consul disappeared in this process, except in countries of exterritorial jurisdiction. Again, it became the practice for a state to appoint its own consuls, and thus the *consules electi* disappeared. The development of the diplomatic service deprived the consul of some functions, and certainly diminished his prestige, but his essential task, the promotion of commerce, still remains.

Organization of the Consular Service. Whereas the diplomatic service maintains only one office in a state, the consular service usually has offices at every important commercial centre. The United States has, for example, over one hundred consular representatives in Canada alone. Each state has its own organization and regulations. The typical official is the Consul, but there are supervisory officials, such as the Consul-General, and various grades of subordinate officers, as Vice-Consul, Deputy-Consul, or Consular Agent. Usually, nowadays, they are consuls *de carrière:* they are appointed by a state, from its own citizens usually, exclusively for the consular function, and not permitted to engage in a business of their own. In less important places, a state may choose from the inhabitants individuals who are authorized to exercise certain consular functions. Each state is divided geographically into consular districts by the sending state, and the area of consular jurisdiction for each office is thus established.

Sources of a Consul's Authority. Consuls derive their authority from both the sending and the receiving state: they "are regarded as the officers both of the state which appoints and the state which receives them." [3] As regards the latter state, its authority is conferred upon the consul through the issuance to him of an *exequatur,* a document which recognizes his commission from his own state and permits him to exercise his consular functions within the state which grants the *exequatur.* The *exequatur* may be refused, or revoked, without explanation.

The consul's authority from his own state is derived from his commission, issued in the United States by the President, with the consent of the

[3] U.S. Consular Regulations (1896), p. 27, quoted in Moore, *Digest,* V, p. 32, and in Lay, *The Foreign Service of the United States,* p. 126.

Senate. The Department of State exercises supervision over his activities. He may or may not be put under the direction of his diplomatic representative in the state to which he is accredited. A proper classification for the consul presents some difficulties. He is a representative of the state abroad, and should therefore come under the control of the foreign office; at the same time he works in behalf of commercial and other interests, and should and often does receive instructions from other departments of the government.

Functions of the Consul. The work of a consul is varied and trying. He must promote the interests of American citizens within his jurisdiction, protect them in all acquired privileges, and facilitate trade relations. For his fellow-citizens abroad he must keep a record of permanent residents, certify to births, marriages, and deaths, attest wills, perform notarial functions, protect them against injustice in local courts, or from unjust detention (especially in practice for military service), and take charge of estates of deceased Americans. He has onerous duties with regard to shipping: he must receive the papers of American vessels arriving at his port, and deliver them to the master after the obligations to the crew have been discharged; issue bills of health to vessels clearing for his country; ship or discharge American seamen; adjust quarrels between master and crew; certify invoices and enforce customs regulations; and assist stranded vessels or stranded seamen. He provides visas for alien immigrants (as well as for other travelers), and watches over their numbers and qualifications; he arranges for the extradition of criminals; he observes the execution of commercial treaties. In behalf of citizens back at home he maintains all possible contacts and acquires all possible information concerning local markets or materials, or other matters which might afford an opportunity for American business interests, which information he dispatches home in regular reports; he answers specific inquiries concerning addresses and business standing and other matters. In general, he attempts to promote American trade in his locality.[4] He is usually able to keep busy, and even to stir up trade without resorting, as did O. Henry's consul, to scattering cockle-burrs among a barefooted population in order to create a demand for shoes. The range of his duty and of his service is amazing; it is the foundation of international commerce.

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[4] "When written to directly by any firm and given a clear indication of the information wanted, consular officers will incorporate in their replies, addressed to the inquirer, data in regard to prevailing conditions in trade and industry, rates of applicable customs duties, imports and exports of various commodities prominently associated with the trade of their districts, the extent to which various goods are manufactured locally, the foreign competition to be met, prevailing prices, peculiarities of local trade practices, lists of firms engaged in the importation and sale of similar articles, suggested local agencies for the distribution of American goods, principal publications available for advertising, advertising rates, and local advertising agencies, etc." From the prefatory words to Publication No. 3 of the Department of State, *Consular Officers of the United States,* October 1, 1929.

A consul has no diplomatic character, and his privileges and rights under international law are debatable.[5] Usually, however, many such rights are given to him by treaty. While he himself is not inviolable, nor immune from local jurisdiction, his office and archives probably are; and he may demand free access to his fellow-citizens, and undisturbed communication with his own state. In practice, he is treated with respect and given every facility for the performance of his duties. He is a public official, but not a diplomat.

§ 38. Diplomatic Intercourse.[6]

Growth of Diplomacy. Historically, the diplomatic system appears much later than the consular system. It is true that from the dawn of history there have been heralds, and special envoys, all of whom aided in building up those rules of respect for diplomatic representatives which are found today in customary international law. But these were transient agents: diplomacy in the modern use of the word began to take form in the intercourse between the politically active Italian city states about the fifteenth century.[7] They discovered so many dealings with each other that it was convenient to have permanent representatives always on watch. Other states found the practice worthy of imitation, particularly after 1648 when coexistent membership in the community of nations was recognized, and dynastic and colonial and commercial and other rivalries called for the constant employment of diplomatic agencies.

The early methods of diplomacy as an instrument of national policy were developed in Italy under the theories of Machiavelli, and were characterized by the "fine Italian hand." An ambassador, according to the famous *bon mot* of Wotton, was "a man sent to lie abroad for the benefit of his country"; and Bynkershoek asserted that ambassadors were nearly always spies. In the days when political ambitions and dynastic intrigues represented the highest interests of states, the ambassador must be a trusted servant of the monarch. He was not permitted to take a wife with him, for fear that she might gossip; but it was advisable to take his own cook, to avert the danger of being poisoned. Nor was he allowed to remain long in one place, for fear that he might become too much attached to it. His methods were devious and subterranean, but in this they matched the mo-

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[5] See cases in Dickinson, *Cases*, pp. 587-593; Hackworth, IV, pp. 699-806; Hudson, *Cases*, pp. 874-906; Scott, pp. 311-323.

[6] A few references are here given from the vast literature in this field; J. W. Foster, *The Practice of Diplomacy* (Boston, 1906); R. Genet, *Traité de Diplomatie et de Droit Diplomatique* (Paris, 1931); Sir Cecil Hurst, *Les Immunités Diplomatiques, Hague Acad.*, 1926, Vol. II; Sir E. Satow, *Guide to Diplomatic Practice* (London, 1932); Com. Prog. Cod., *Report of Subcommittee on Diplomatic Privileges and Immunities, A.J.*, 20 (1926), Supplement, p. 151; *Research in International Law, Draft Convention on Diplomatic Privileges and Immunities.*

[7] A. Sereni, *The Italian Conception of International Law* (Columbia University Press, 1943), p. 15 and elsewhere.

tives and ambitions of his sovereign. Etiquette and precedence, in those days of bitter rivalry between growing new states, were of primary importance; and many *causes célèbres* mark the historical struggle.[8] Diplomacy today has outgrown such early conceptions. It is less ceremonious, more open and more businesslike; it serves the group interests of private citizens, and its political aims are now of minor importance.[9] But its old reputation unfortunately clings to it, in the minds of many, and recent activities of Nazi and other agents show that there is still some ground for accusation.

Right of Legation. Since the act of sending or receiving a diplomatic agent by one state is regarded as recognition by it of the other state, it is usually true that only recognized members of the community of nations may exchange diplomatic agents. According to some writers, there is a *ius legationum,* a right to send and receive diplomatic agents. Thus Hershey says, "It is in fact a fundamental right of States." [10] While the necessities of community life require this exchange, the undoubted legal rights of a state to refuse to receive an official sent for that purpose, or to break off diplomatic relations entirely at any time, seem to indicate that diplomatic representation is a practice rather than a right. A state in its own discretion may send diplomatic agents to, or receive them from, any political entity. Representation may be terminated through the breaking off of diplomatic relations by one state, or by war, or by revolutionary change of government, or the extinction of a state.

Organization of the Diplomatic Service. The organization of a state's diplomatic service begins with the head of the state who, in international law, speaks authoritatively for the state in its foreign relations. Such was, at any rate, the old rule: Jefferson, as Secretary of State, informed Citizen Genêt that the President, "being the only channel of com-

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[8] During the days of Louis XIV, for example, the rivalry between France and Spain led the Spanish ambassador in England to hire a number of persons to hamstring the horses and attack the servants of the French ambassador, after which the Spanish representative was able to take the leading place in the parade undisturbed. Louis XIV, however, by dire threats, forced the King of Spain to apologize and to concede precedence to France thereafter; and in celebration of this notable victory had a medal struck. Martens, *Causes Célèbres,* I, pp. 353-356. See also F. de Callieres, *De la Manière de négocier avec les souverains* (Amsterdam, 1716); Comte de Garden, *Traité complet de diplomatie* (Paris, 1833); J. W. Foster, *The Practice of Diplomacy* (Boston, 1906).

[9] As the political interests of the state diminish, and its interest in the business activities of its citizens increases, it becomes difficult to distinguish between consular and diplomatic functions. Perhaps it could be said that when a business interest of a citizen becomes of interest to the whole national group, it is taken up by the diplomatic rather than the consular service, and regarded as a political rather than as a commercial matter.

[10] Hershey, p. 392, note 6. But he comments that the exercise of the right is discretionary, and refers to his discussion of the Right of Commerce or Intercourse. See also Oppenheim, I, p. 608, who calls it a right, but bases it upon the necessity of negotiation between members of the Family of Nations.

munication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation; and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation, and no foreign agent can be allowed to question it. . . ." [11] In these days of democratic control of foreign policy, and of constitutional limitations upon the treaty-making power, it is incumbent upon the state seeking to make a treaty to investigate the constitutional authority of the state with which it is dealing, and to make sure that it is dealing with agents authorized to bind that state. However, if the word of the chief of state, giving assurance that constitutional requirements have been met, must be accepted by other states, it would be possible for a state to be bound internationally, though by an internally unconstitutional procedure. This problem, arising from the transition from the days of absolute monarchy to the days of democratic control, has received little attention, and no definite answer is at present available. On the one hand, it is highly important that there should be one voice capable of speaking authoritatively for the state; on the other hand, a people in these days would not be willing to be bound by the word of their chief of state, if his word misrepresented their will. In practice, the head of the state so rarely abuses his power that the question almost never arises. It is nevertheless of vital importance in treaty-making, and therefore in international legislation.

The chief of the state formally accredits and receives ambassadors, and otherwise acts as ceremonious head of the state. He may participate directly in negotiations, as did President Wilson "in his own name and by his own proper authority" in the Peace Conference of 1919, or as did President F. D. Roosevelt at Yalta and elsewhere, but ordinarily he deals through his agents. In any case, the direction of foreign policy, and certainly of negotiations, is almost always left exclusively in his hands.

THE FOREIGN OFFICE. For the direction of these numerous agents, each state maintains a department, usually called the Ministry of Foreign Affairs, but in the United States called the Department of State.[12] This department has general supervision over all the external relationships of

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[11] Hyde, II, p. 1215, note 5; see also E. S. Corwin, *The President's Control of Foreign Relations* (Princeton, 1917); Moore, *Digest*, IV, p. 670; *U.S. v. Curtiss Wright*, 299 U.S. 319; Hackworth, IV, § 421. Concerning democratic control of foreign policy, see D. P. Heatley, *Diplomacy and the Study of International Relations* (Oxford, 1919); D. C. Poole, *Conduct of Foreign Relations under Modern Democratic Conditions* (Yale University Press, 1924).

[12] On the American Department of State, see C. E. Hughes, "Some Aspects of the Work of the Department of State," *A.J.*, 16 (1922), pp. 355-364; T. H. Lay, *The Foreign Service of the United States* (New York, 1925), Chap. III and *passim*; I. Stewart, "Congress, the Foreign Service, and the Department of State," *Pol. Sci. Rev.*, XXIV (1930), pp. 354-366; F. Van Dyne, *Our Foreign Service* (Rochester, 1909).

the state, and, in general, such relationships must pass through its hands. It selects and distributes its representatives abroad, and instructs them in their duties. Such instructions may be independently formulated by the Department or issued in accordance with directives which it receives itself from the chief of state or from the legislative body. The organization of such a department presents many difficulties. In a democratic age its dependence upon the legislature and upon popular control in general produces complications. It is hard to correlate the activities of various independent departments and direct them all through the channel of the foreign office; difficult even to correlate the activities of the diplomatic and consular services, with their different functions. Some of the work is mere administrative routine, while some of it is public policy in its most rarefied form; some of the work calls for technical knowledge, and some of it for social poise. Upon the organization and support of the foreign office depends to a high degree the reputation of a state abroad.

Foreign Service. The organization of the service abroad is based in the first place upon the classifications laid down at the Congresses of Vienna and Aix-la-Chapelle. According to this classification, "diplomatic agents are divided into three classes: that of ambassadors, legates or nuncios; that of envoys, ministers, or other persons accredited to sovereigns; that of chargés d'affaires accredited to ministers for foreign affairs." There is little of practical value in these distinctions today, beyond establishing an order of precedence. Each state is free to send a representative of whatever rank it prefers, though rank actually depends upon reciprocity. Usually, ambassadors are sent only to the more important posts, although the United States sends an "ambassador extraordinary and plenipotentiary" to many small nations. Ambassadors and Ministers receive from the head of their state letters of credence, which they present to the head of the state to which they are accredited; the charge d'affaires is commissioned to the Foreign Minister only. Since a state is free to reject at will the person sent to it, the practice of *agréation* is observed; that is, inquiry is first made as to whether the person whose appointment is proposed will be acceptable.[13] A state is free also to ask for the recall of a diplomatic agent who has become *persona non grata,* or even to dismiss him by handing to him his passports.[14]

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[13] A well-known instance of refusal to accept is that of Keiley, who was rejected by Italy in 1885 because of a speech in which he had criticized the King of Italy for the invasion of the rights of the Pope. He was likewise rejected by Austria because "the position of a foreign envoy wedded to a Jewess by civil marriage would be untenable and even impossible in Vienna." The United States recognized the right of Austria to refuse to accept Keiley, but for several years appointed no minister to Austria. Moore, *Digest,* IV, § 638.

[14] During the First World War the United States requested the recall of the Austro-Hungarian Ambassador, Dumba, and of the German military and naval at-

The internal organization of the embassy or legation is determined by each state for itself. There is usually, below the chief of the mission, a number of Secretaries; a legal advisor, called Counselor or Solicitor; various attachés, or persons attached to the mission with diplomatic rank, for the purpose of studying particular problems, *e.g.*, military, financial, or commercial attachés; and such clerks, interpreters, and others as are needed.[15]

Functions and Privileges of Diplomats. The ambassador, or other diplomatic agent, is the spokesman for his country in the state to which he is accredited. He transmits communications from his own government, and he may be able at times, through a personal touch, to render some of them less obnoxious. Through him, a constant interchange of views is carried on, as well as more formal negotiations leading, perhaps, to the conclusion of a treaty. He and his staff gather information as to policies, military strength, economic situation, public opinion, or any other matter which might be of service to his own government. He has the task of protecting the interests of his own state and the interests of his fellow-nationals, in the country where he is at work. He has many miscellaneous functions to perform, such as the registration of births, deaths, and marriages of nationals of his own state, or the issuance of passports and visas; and he may be called upon for aid by a stranded student, or by an heiress seeking presentation at Court. In general, his job is to promote pleasant relations between the two states, and the exercise of this function calls in the highest degree for those intangible characteristics which have given to the word "diplomatic" its connotation.

Chiefly in order to give him freedom and leave him entirely unembarrassed in the performance of his important functions of preserving harmony between nations, but partly also out of respect to his own state and to the

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tachés. For the famous case of Lord Sackville, British Ambassador to the United States, to whom President Cleveland sent his passports, and for other such cases, see Moore, *Digest*, IV, § 640.

[15] In the United States it is only recently that proper attention has been given to the Foreign Service. Not until 1893 was the grade of ambassador established. For a century the service was the prey of the Spoils System; salaries were so low that only men of independent means who found the social aspects of diplomatic life attractive could be chosen; and the result was too many "boys with the white spats, the tea drinkers, the cookie pushers" (as they were once called in official testimony) in the service. A vast improvement was made by the Rogers Act of 1924 and subsequent legislation. This act amalgamated the diplomatic and consular services, and now a member may be transferred from one to the other. A fairly stiff examination must be passed by applicants for the service, the standard of competition is high, and they are then trained in a school within the Department of State. A careful record is kept of each member, and advancement is based upon merit. Salaries were improved, and an allowance is made for travel and for post expenses. Recent appropriations have made it possible for the United States to build or acquire excellent embassy buildings in important capitals. The Foreign Service of the United States is now being reorganized and strengthened. See W. P. Maddox, "The Foreign Service in Transition," *Foreign Affairs*, 25 (1947), p. 303.

principle *par in parem non habet imperium,* a diplomatic official is accorded certain privileges. The most important of these is inviolability and special protection. "The person of a public minister is sacred and inviolable. Whoever offers any violence to him not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world." [16] A similar protection must be given to his residence and property, and his correspondence with his own government must not be disturbed. He may display his flag or emblem, and worship as he pleases. He is allowed freedom of transit to or from his post, even though dismissed; and this freedom applies also to third states through which he must pass. Whether by law or by comity, he is accorded such privileges as bringing his baggage uninspected through the customs.

Immunities. For the same reasons, a diplomatic official is immune from practically all jurisdiction on the part of the state to which he is accredited. The embassy itself may not be entered by local police without permission, though it is doubtful whether the rule would be respected in extreme cases, such as the use of the embassy as an asylum for a criminal. The envoy himself may not be arrested or subjected to jurisdiction for any reason whatever, unless, as would probably happen in any serious matter, his state should waive immunity for him. In the case of Carlos Waddington, who had committed a murder, the Belgian government surrounded the embassy in order to prevent his escape, but did not arrest him until the Chilean government had waived immunity for him. The diplomat cannot be compelled to give evidence, though he may be authorized to do so by his own state. How far he is free from taxation is at present uncertain. These immunities extend to the diplomat's official staff, to his own family, and to his servants. In practice, such persons are registered with the foreign office of the place of residence, and their status may be easily ascertained by reference to the diplomatic list.

Penalties. Exemption from local process does not leave the local state entirely unprotected, nor the diplomat himself entirely irresponsible. The purpose of immunities is not to advertise the dignity of a monarch or of a state, but to maintain free from interruption the highly important business between states. The diplomat is expected to use his privileges for this purpose, and not for his own glorification. He must observe local

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[16] *Respublica v. de Longchamps,* 1 Dallas 116; Moore, *Digest,* IV, p. 622. Each state has laws providing special penalties for attacks of this sort. See *U.S. Rev. Stat.,* §§ 4062-4065. The famous case of *Mattueof* in England, which necessitated passing the Act of Anne (7 Anne, c. 12) illustrates the duty of a state, C. de Martens, *Causes Célèbres* (Leipzig, 1858-1861), II, pp. 47-74. For other citations, refer to pp. 102-103, *supra.*

regulations: his position would not, for example, entitle him to pass through police lines, and he could be restrained from so doing. He could not be subjected to arrest or penalty for having violated such a regulation. In any serious case, however, his own state would usually waive jurisdiction and leave him to be tried under the laws which he had violated. Other penalties are available to the injured states. An offending diplomat may be reported to his superiors who may impose a more severe penalty than the local law provides.[17] His recall may be demanded, and in extreme cases he can be given his passports and escorted from the country. While abuse of diplomatic immunities sometimes occurs, the deterrents against abuse are powerful.

It should be observed that the diplomat is not free to violate the laws of the state to which he is accredited; it is simply that he can not be punished by the law of that state for such violations. As Hyde says, "the functions of a minister are not deemed to be curtailed by his respect for the local law; and his usefulness to his own country is increasingly regarded as dependent upon his possession of a reputation unblemished by any imputation of hostility or unfriendliness toward the state to which he is accredited." [18] As the sacrosanct character of the state has diminished, so have the immunities of its diplomatic representatives. The quality which the ambassador possesses today is not so much inviolability as freedom from interference in the performance of his duties. Modern conditions have altered his situation. It is no longer necessary to maintain an entire quarter of a city exempt from national jurisdiction for the benefit of resident diplomats; and immunities for many servants can not be demanded so justifiably when a taxicab can be summoned at a moment's notice or a bath obtained by merely turning a faucet. The intricacy of the modern business world has created problems which the old mantle of the diplomat can hardly cover, as, for example, the control and taxation of shares of stock owned by him. The increase in the number and type of national agents abroad produces a disinclination on the part of states to extend further the peculiar privileges of a diplomat.[19] On the whole, the tendency seems to be to decrease the privileges as well as the number of those to whom they apply. Dignity is of less importance than business.

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[17] Too many cases of speeding, for example, will bring a protest from the state of residence; and such a protest indicates that his usefulness is seriously impaired. The result will be the transfer of the offender, or his dismissal from service—a penalty far more severe than the local traffic court could impose. See C. Hill, "Sanctions Constraining Diplomatic Representatives to Abide by the Local Law," *A.J.*, 25 (1931), pp. 252-269.

[18] Hyde, II, p. 1266.

[19] Diplomatic immunities for the staff of an international organization, such as UN, are not stated in customary international law, and must be arranged for by treaty. See p. 316, *infra*.

Diplomatic Etiquette. Nevertheless, it remains true that diplomatic society is ruled by ceremony, and complicated by etiquette and precedence; and the practical importance of observing these conventions should not be underestimated. Democratic America scorns ceremony, and so laughed at Ambassador Harvey, when he appeared at the Court of St. James in knee-breeches. The official costume of the American envoy abroad is plain evening dress. While this suits American ideals of democratic simplicity, it does not add to the prestige of the United States when her ambassador is mistaken for a waiter at a reception, nor when citizens of the state where he is located contrast disparagingly the plain garb of the American with the magnificent raiment, the epaulettes and gold braid, of another diplomat. It is not what Americans think of their ambassadors abroad that matters, but rather what the people of the country to which he is sent think of him. The ambassador's purpose is to promote good relations; to do this he must win the confidence of those with whom he must deal. He should not only speak the language of the country to which he is accredited, but he should understand and respect its customs. Unless he does so, he can not serve his country to the best advantage. If he laughs at the idea of afternoon tea, he may offend; if he refuses to serve wine, he may be regarded as trying to preach. He can not gain goodwill by attempting to impose his own country's customs upon the country to which he is sent.

For many of the diplomatic conventions which arouse mirth there is reasonable explanation. The problem which a Washington hostess has upon her hands in seating her diplomatic guests results from the effort to eliminate the old quarrels over precedence. Precedence is no longer based upon the power of a state, for all are regarded as equals; and to avoid any appearance of superiority, it is mathematically worked out. The diplomatic corps in a capital has a loose organization, the ambassador oldest in residence at that capital being the *doyen;* and precedence is based upon seniority of residence within each rank. When the rules of procedure resulted in the wife of the Belgian ambassador being assigned to sit at dinner with the German ambassador, shortly after World War I, her refusal was taken as an insult. Similarly, precedence in the signing of documents is carefully regulated: states may, for example, sit at the conference table, or sign, in alphabetical order, and each state retains the copy in which its name appears at the head of the list. By such conventions the problem of precedence has been adjusted; to deny them would be to reopen the old struggle. To receive an envoy from, or to make a treaty with a government, is to recognize that government. The apparent verbosity and circumlocution often found in diplomatic writings may be ascribed to the need for precision; a shade of meaning may later become the subject of an international arbitration. When dealing with great national interests, and with

proud national feelings, the greatest care must be exercised. Observance of formalities means playing the game according to accepted rules.

§ 39. Conferences.[20]—A conversation between two diplomats in an embassy office, or even over a *Cointreau* at a sidewalk cafe, could be regarded as a conference, but the term has, usually, a more formal and impressive connotation. A conference, or Congress, is ordinarily a specially assembled meeting of the representatives of a number of states for the purpose of reaching agreement, through this more formal and more collective method of negotiation, upon matters of interest to that group; and matters of such importance are today usually of interest to most members of the community of nations.

Conferences were, before the creation of the League of Nations, impromptu and haphazard; they depended upon whether or not some state felt sufficient interest in a subject to assume responsibility for summoning and maintaining a conference to discuss it. While one could be summoned at any time, by any state, for any purpose, it was costly and risky to hold a conference. Except for a few Public Unions, there was no automatic or regular means of summoning or managing a conference. With the establishment of the League of Nations, conferences have become more regular, more numerous, and more efficient. A central secretariat makes possible the automatic calling of a conference to deal with a particular problem; it enables thorough preparation in advance, better management of procedure, and continuation of the effort after the conference has adjourned. A vast amount of business is thus conducted on behalf of the community of nations, which can not act through a legislature but must seek agreement among the sovereign states, its members.

Since the chief function of conferences today is the preparation of international legislation, discussion of the procedure of conferences is reserved for consideration in a later chapter.

§ 40. Treaties.[21]—The work of the diplomat may issue in conversations, without record, or perhaps with an *aide-memoire* to help recall what was said; it may be conducted through correspondence, and thus have a written

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[20] See on this topic, *Com. Prog. Cod.*, "Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties," *A.J.*, 20 (1926), Special Number, pp. 747-750; F. S. Dunn, *The Practice and Procedure at International Conferences* (John Hopkins Studies, 1929); R. G. Gruber, *Internationale Kongresse und Konferenzen* (Berlin, 1919); N. W. Hill, *The Public International Conference* (Stanford University Press, 1929); F. W. Holls, *The Peace Conference at the Hague* (New York, 1900); J. I. Knudson, *Methods of International Legislation, with special reference to the League of Nations* (Geneva, 1928); A. Merignhac, *La conférence internationale de la paix* (Paris, 1900); D. P. Myers, "Representation in Public International Organs," *A.J.*, 8 (1914), pp. 81-108; V. D. Pastuhov, *A Guide to the Practice of International Conferences* (Washington, 1945); E. Satow, *International Congresses*, Foreign Office Peace Handbooks, Hist. Sect., No. 151 (London, 1920).

[21] As to treaties in general, see J. Basdevant, "La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités," *Hague Acad.*, 1926, V,

record; or it may eventuate in a signed agreement, in legally binding form, generally called a treaty. The modern community of nations is built upon treaties. From an agreement between two states for their own purposes, a mere contract, the treaty has developed until today it is often signed by most of the states of the world, embodying rules or institutions of fundamental importance to the community. This development represents the conviction of the community, slowly accepted, that it is through agreement rather than through weapons that progress is made. "In scope and design such compacts have recorded with precision the changing needs of the international society, reflecting the extent of the progress of individual States on the pathway from isolation to intimacy of association with other nations." [22]

Treaties Are Sacred. Granted the fundamental importance of treaties, it is not surprising that the rule *pacta sunt servanda* should be one of the oldest and most respected of international society. This rule is axiomatic: it can be explained only as one of those fundamental principles accepted by all legal systems. It is a rule established by centuries of observance; its acceptance must be presumed. To express skepticism as to the obligatory force of treaties is to deny the testimony of the ages, and to forbid all possibility of international progress. With the development of the multilateral treaty, the rule becomes of greater significance, for through treaties international legislation is now being made.

Power to Contract—International Law. The validity of a treaty depends upon capacity to contract (which is a question both of international and of domestic law), and upon execution of the document in the proper form. It is usually said that since states only are subjects of international law, only states can conclude treaties. In practice, states do make agreements which they call treaties with political bodies which are not members of the community of nations. Whether an international court would interpret such treaties according to the rules of international law may be open to question, and certainly treaties must be distinguished from ordinary con-

pp. 539-643; L. Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunde* (Stuttgart, 1924); *Com. Prog. Cod.*, Report to the Council, June, 1927, 1927.V.16; S. B. Crandall, *Treaties: Their Making and Enforcement* (Washington, 1916); A. F. Frangulis, *Théorie et Pratique des Traités internationaux* (Paris, Academie Diplomatique International, 8é Année); O. Hoijer, *Les traités internationaux*, 2 vols. (Paris, 1928); G. Jellinek, *Die rechtliche Natur der Staatenverträge* (Wien, 1880); W. McClure, *International Executive Agreements* (New York, 1941); A. McNair, *The Law of Treaties* (New York, 1938); "Memorandum approved by the Council," League of Nations, *Treaty Series*, I (1920), pp. 8-13; R. B. Mowat, *The Great European Treaties of the Nineteenth Century* (Oxford, 1918); C. Phillipson, *Termination of War and Treaties of Peace* (London, 1916); *Research in International Law, Draft Convention on the Law of Treaties;* R. E. L. Vaughn Williams, "Les méthodes de travail de diplomatie," *Hague Acad.*, 1924, III, pp. 247-254; Q. Wright, "Conflicts between International Law and Treaties," *A.J.*, 11 (1917), pp. 566-579; Q. Wright, "The Legal Nature of Treaties," *A.J.*, 10 (1916), pp. 706-736.

[22] Hyde, II, p. 1370. As to terminology, see McNair, Chap. I.

tracts between states and individuals. But not every state has an unlimited capacity to make treaties. As Hall says, "All states which are subject to international law are capable of contracting, but they are not all capable of contracting for whatever object they wish." [23]

Power to Contract—Constitutional Law. This capacity is measured also by internal constitutional law. The head of the state is recognized by international law as the authority through whom such obligations are assumed by the state, but he may be restricted by his own constitution. While on the one hand a state would not care to be bound by a treaty exceeding the constitutional limits of its treaty-making power, on the other hand it would not permit another state to pass judgment upon its constitution, nor would another state be so presumptuous. It would appear, then, that a state has only the duty of assuring itself that it is dealing with the authorities empowered by the constitution of the other state with the authority to make treaties; it has not the right to determine whether these authorities have exceeded their constitutional powers, internally. The responsibility for seeing to it that these officials do not exceed their authority must rest upon the state which authorizes them to act for it.

This problem presents itself in particularly difficult form in the United States, whose Constitution says: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land." This phrase "authority of the United States" may be interpreted as meaning, within the limits of the Constitution, or as meaning, made by the authority designated in the Constitution. The former construction, if strictly adhered to, could render impossible a treaty which dealt with any matters reserved to the member states. In the case of *Missouri v. Holland,* however, the Supreme Court held valid, under a treaty with Canada, a statute formerly declared by it to be an unconstitutional assumption by Congress of power belonging to a state.[24] In the era of legislative treaties upon which the United States is now entering, capacity to make such treaties will be of vital importance, for such treaties deal with almost any imaginable subject. Both the United States and other states would suffer if the Constitution were interpreted to forbid making treaties in the field of labor, or health, or control of arms, trade, et cetera.

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[23] Hall. p. 380.

[24] *Missouri v. Holland,* 252 U.S. 416 (1920); see also *Santovincenzo v. Egan,* 284 U.S. 30. Numerous citations are given to literature dealing with this question in Hyde, II, p. 1392.

While the United States has at times been unwilling to negotiate treaties which might seem to invade the reserved rights of States, Secretary Stimson said in 1932 that "the position that we did not have the constitutional powers to enter into a treaty providing for such control was not well taken." Hackworth, V, p. 21.

For British practice, see McNair, Chap. II.

It is not clear whether a treaty in direct violation of a specific prohibition of the Constitution would be upheld. It would not be unreasonable to interpret the Constitution as purposely leaving the treaty-making power without stated limits, since it is impossible to foretell under what circumstances a treaty might have to be made—*e.g.*, a treaty of peace after defeat in war. Doubtless the Supreme Court will expand the treaty-making power to meet the needs of the nation, just as it has done with the commerce power.[25] But it should always be remembered that a treaty properly made by the designated constitutional authorities of a state binds that state in international law, and that the state will be held responsible for violations of it.

Duress and Illegal Nature. There appears to be no rule in international law, as there is in domestic law, which would make invalid a treaty signed under duress.[26] If there were such a rule, a treaty of peace signed after defeat would not be valid. In the anarchy which war produces, such a rule could not stand; but the defeated state has the same opportunity to upset the treaty by war as the conqueror had to impose it by war—however satisfactory that may be. It is often asserted that a treaty established for purposes contrary to international law is illegal and not binding. Desirable as this may be, there seems little support for it in practice. Hall's statement that "a treaty is not binding which has for its object the subjugation or partition of a country" finds no substantiation in history.[27] Poland was partitioned. The United States has negotiated with Great Britain a treaty which sets aside a rule of law admitted in the same treaty—the three mile limit. On the other hand, the Covenant of the League of Nations (Article XX) and the Charter of the United Nations (Article 103) both assert that the constitutional document prevails over any treaty inconsistent therewith.

Termination. A treaty may expire because the time limit set within it has been reached; and such provision is usually made in modern treaties, either for automatic expiration, or denunciation, or renewal. Or it may be dissolved through the mutual agreement of its makers, either expressly or by the conclusion of another treaty replacing it. Many treaties become of mere historical interest when the stipulations therein have been fulfilled, as, for example, the payment of a sum of money, or the cession of territory. As to what treaties survive a war between the signatories there is

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[25] See the remarks of former Chief Justice C. E. Hughes, in *Proc. Am. Soc.*, 1929, pp. 194-195.

[26] If the persons who negotiate the treaty are subjected to duress or fraud, it is said that there is no obligation. This situation is, however, usually cared for by the requirement of ratification.

[27] Hall, p. 383. "It is a customarily recognized rule of the Law of Nations that immoral obligations cannot be the object of an international treaty." Oppenheim, I, p. 713; and see Hyde, II, § 490; Fenwick, p. 330; McNair, Chaps. X and XI.

much uncertainty.[28] If a treaty is violated by one party it may be declared void by the other party, as Secretary Kellogg emphasized in his explanations of the Pact of Paris. In general, however, insufficient provision is found in the law of nations for the revision of a treaty which does not include in itself a method of termination. To supply this need, the rule that circumstances alter cases has been invoked: *omnis conventio intelligitur rebus sic stantibus;* and states have at times attempted to free themselves from the burden of an antiquated or unfair treaty with this as justification.[29] This would seem to be rather a necessity than a rule; for progress can not be stayed, or an intolerable situation prolonged, by an unbending rule of *pacta sunt servanda.* On the other hand, a state cannot be permitted to violate its obligations and to justify such violation by the unilateral assertion that circumstances are no longer the same. No solution would appear possible until the community of nations becomes sufficiently organized to decide such questions through appropriate organs, and in accordance with accepted principles of law. The Covenant of the League of Nations attempted to remedy the situation by providing (Article 19) that the Assembly may advise the reconsideration of treaties which have become inapplicable; but the provision was never put to use. The Charter of the United Nations has no such provision, except as found by implication in Article 14.

Interpretation. In interpreting a treaty, the purpose is to seek out the agreed intention of its makers. To this end the signatory parties may agree on an interpretation, or may submit the question to an international tribunal. In the latter case, what rules would the tribunal apply? Various suggestions have been made by publicists and by tribunals.[30] In general,

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[28] For cases on this point, see Dickinson, pp. 1112-1122; Evans, pp. 398-410; Hudson, *Cases,* pp. 964-981.

[29] This rule was asserted by Russia in 1870, to escape certain clauses of the Treaty of Paris of 1856. As a result, the Powers agreed that "it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement." See Hall, pp. 409-412. A more recent, and better, example is the effort made by China to rid herself of her treaties allowing exterritorial and other privileges in her territory.

On the *clausula rebus sic stantibus,* see Brierly, in *Grotius Society,* XI (1926), p. 11; Garner, in *A.J.,* 21 (1927), p. 509; E. Kaufman, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Stantibus* (Tübingen, 1911); Lauterpacht, § 75; A. D. McNair, "La terminaison et la dissolution des traités," *Hague Acad.,* 1928, II, pp. 463-537; McNair, Chap. XXIV-XXVI; B. Schmidt, *Über die völkerrechtlichte Clausula rebus sic stantibus* (Leipzig, 1907); H. Tobin, *The Termination of Multipartite Treaties* (Columbia University Press, 1933).

Refer also to pp. 287, 324-325.

[30] As to the interpretation of treaties, see C. C. Hyde, "The Interpretation of Treaties by the Permanent Court of International Justice," *A.J.,* 24 (1930), pp. 1-19; McNair, pp. 163-306; R. Pic, "De l'interprétation des traités internationaux," *R.D.I.P.,* XVIII (1910), pp. 5-35; R. R. Wilson, "Interpretation of Treaties," *Proc. Am. Soc.,* 1930, pp. 39-45; J. C. Yü, *The Interpretation of Treaties* (New York, 1927).

the rules would be those of common sense, such as that treaties are to be interpreted according to their reasonable rather than their literal sense; words should be understood in their usual rather than technical meaning; the whole must be considered rather than any part; and where the text is ambiguous, the intention of the framers may be sought in the records of the negotiations.

NEGOTIATION. Treaties are usually negotiated by persons commissioned by the chief of state for that purpose. In the days of Grotius, the plenipotentiary was given "full powers" through which he could, by his own signature, bind his state. The modern constitutional requirement that the legislative body must approve the treaty has made such authority rare. The "full power" today refers to discretion in negotiation rather than power to bind. Signature by the plenipotentiaries signifies agreement to the terms and text of the treaty, which can not thereafter be altered without the consent of all; and the treaty is usually dated from its signature. But the approval of the states themselves, evidenced through exchange of ratifications, is necessary in order to make the treaty a legally binding instrument.

RATIFICATION. If the requirement of ratification was justified at one time through fear that the sovereign might be betrayed by his agent, today its justification is found in the necessity of securing the approval of the people, in the democratic systems of this age. It has the virtue of preventing the conclusion of secret treaties binding the state to objectionable measures, but it also brings with it very great inconveniences, and the question is often raised as to whether there is a duty of ratification. Clearly there is no legal duty; otherwise, ratification would be useless. But there is certainly an obligation, founded in the convenience of the community of nations, to refuse ratification only for excellent reasons. When an envoy may be in direct communication with his chief executive upon all questions which may arise during negotiations, it is fair to assume that the treaty will be concluded in accordance with the wishes of that authority. However, ratification depends in many states upon another agency of the government. Where this situation exists, it is distinctly to the discredit of a state if its agencies are unable to agree; and its credit abroad is sure to suffer.[31]

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[31] The policy of the Senate of the United States, which must approve treaties before the President may proceed to ratification, has aroused much criticism. It has acted upon motives of Senatorial prerogative and with the view of having its way with the President, rather than with proper respect for the good name of the United States abroad. It may be suggested that the House of Representatives has never failed in its moral obligation of providing the money and legislation necessary to make a treaty effective, though it could easily, if it followed the example of the Senate, demand an improper share in the treaty-making process. See Fleming, *The Treaty Veto of the Senate;* J. E. Harley, "The Obligation to Ratify Treaties," *A.J.*, 13 (1919), pp. 389-405; K. Colegrove, *The American Senate and World Peace* (New

Aside from this failure of internal organization, states are often dilatory in approving treaties; and this, in an age of legislation through multilateral treaties, has proved of much embarrassment.[32]

RESERVATIONS. While the requirement of ratification is often inconvenient, it is made doubly so by the practice of affixing reservations, a practice rendered notorious by the United States Senate.[33] A treaty, once signed, cannot be modified without the consent of other signatories, so that the addition of a reservation amounts to renewal of negotiations. The efforts of the Signatories of the Protocol of Adherence to the Statute of the Permanent Court of International Justice—which included two international conferences—to meet the reservations set by the Senate of the United States doubtless required more time and effort than would have been necessary for the negotiation of a new treaty. The society of nations often suffers from faulty organization within a state, through which two different and independent parts of the government attempt at different times to make a treaty satisfactory to each.

York, 1944); Q. Wright, "The United States and International Agreements," *Int. Con.*, No. 411 (1945), p. 379.

[32] This problem, and efforts to solve it, will be considered in more detail in a subsequent chapter.

[33] Notorious is hardly too strong a word to use when one considers the reservations made to the Treaty of Versailles; the quite useless reservations made in connection with adherence to the Permanent Court; and especially the consistent reservations to arbitration treaties which have put the United States at the foot as regards the pacific settlement of international disputes. For example *ad absurdum* of reservations, see those proposed by Senators McKellar and Borah to the London Naval Treaty, *Congressional Record*, 71st Congress, Special Session. A recent example was the reservation unnecessarily added by Senator Connally to our adherence to the "Optional Clause" of the Statute of the International Court of Justice, with regard to "domestic questions."

As to reservations, see § 54, *infra;* also F. B. Kellogg, "Effects of Reservations and Amendments to Treaties," *A.J.*, 13 (1919), pp. 767-773; H. W. Malkin, "Reservations to Multilateral Conventions," *B.Y.I.L.*, 1926, pp. 141-162; McNair, Chap. IX; H. D. Miller, *Reservations to Treaties* (Washington, 1919); M. Owen, "Reservations to Multilateral Treaties," *Yale Law Journal*, XXXVIII (1928-1929), pp. 1086-1114.

PART III

THE NEXT STEP toward international government was the appearance of institutions established by and acting in the name of the community of nations. These institutions were specialized, each dealing with a particular technical function; it was not until the League of Nations that an attempt was made to set up an overall institution.

It is doubtless somewhat misleading to classify these developments under the usual categories of executive, legislative, and judicial, but for purposes of convenience the following three chapters are so arranged. Actually, the development was haphazard, and institutions and procedures were squeezed out into whatever form the pressure of conflicting forces made possible. There was little advance toward executive organization, but definite progress in the administrative field. The greatest advance was probably that made in the means of settling disputes between nations; the least was in the field of making new law.

CHAPTER 7

INTERNATIONAL ADMINISTRATION

§ 41. New Needs.—Up to this point, our discussion of international intercourse has been concerned with the individual and independent action of states. There has been, thus far, no institutional character to this development, no integrated machinery representing the collective action of the entire community. Each state made its own arrangements with each other state separately, and dealt only with those with whom it was pleased to deal. To secure universal or even uniform action under such conditions was practically impossible. Any machinery set up for such a purpose was *ad hoc*.

Further development was essential, and under the pressure of common need new methods and institutions began to appear. These did not represent the particularistic aims and methods of separate states, but were rules and institutions characteristic of an integrated society. States pooled their efforts and worked through central organizations speaking the joint voice of all, rather than speaking in many discordant voices. Judicial machinery, at first irregularly constituted and rudimentary in character, slowly evolved into the highly respected Permanent Court of International Justice. International unions and other administrative bodies began to act in the name of the collective society. Instead of bilateral agreements multifarious in character and innumerable in number, between pairs of states, conferences undertook to handle matters of interest to all in one meeting of all, and multilateral treaties were employed as the instrument of international legislation.

During the latter half of the 19th century and the early part of the 20th, much progress was made. At the least, the fundamental problems and difficulties were uncovered, and in some cases significant advance was made toward solutions. The gains made were, however, quite incommensurate with the needs to be met. Individuals have not yet learned to think and plan intelligently upon a national basis, but the pressure of international interdependence, now at its height, is steadily forcing them out of exclusive faith in national sovereignty and into acceptance of rules and procedures set up by the community of nations. Economic losses are better teachers than textbooks, and the 20th century, not yet half gone, has been ruthlessly teaching the need for more efficient international government.

It should be noted that the problem calls for more than international agreement upon rules and institutions; it calls also for internal reorganization. International organization can not be effective until national systems can be geared into it. The machinery of national governments was originally built with only the domestic needs of the state in view, and with no realization of the fact, now pressing heavily upon states, that domestic efforts of all sorts depend, to an increasing degree, upon situations external to the state. The national state has become, willy-nilly, part of a wider system. The cogs of national governmental machinery do not fit into the wheels of the international system, and both suffer from the resulting friction and inefficiency. Today, it is the community of nations which suffers most; but already it is apparent that a state stands to lose greatly if it is unable to participate rapidly and smoothly in international action. Conflict with national constitutions appears in many forms. It may be that a proposed course of procedure is in conflict with constitutional provisions and cannot be adopted until the difficult process of constitutional amendment has been carried through. The method of making treaties in a particular state may be inefficient, and international legislation may be delayed because of such incapacity, with resultant loss to that particular state. The federal state, with its inability to bind its members, presents a peculiarly difficult problem. It is uncertain how far a chief of state may bind his own state, nor is it clear what a treaty is in the law of each state. In the ensuing pages, the effects of this situation will often be seen, whether as to administrative, legislative, or judicial action. No answer is available at present; but the student of international government will have to devote much thought in the future to the reorganization of his own domestic government, so that it may fit in with and profit from the developing international government.[1]

§ 42. Development of Administrative Functions.—In other fields, less political in character, there has been much more concrete development, much more efficient machinery. Here the insufficiency of a particularistic national viewpoint was more manifest.

As law develops, it acquires a positive as well as a negative character. It not only prohibits certain acts, but it performs certain acts. It says not only "this must (or must not) be done by the citizen," but also, "this must be done *for* the citizen." The function of government is not merely to

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[1] In the United States, the procedure of treaty-making has been under heavy attack, and efforts have been made to develop a bipartisan foreign policy. In order for the nation to speak with one voice, it would be necessary to coordinate the shares of the various Departments in the statement of foreign policy, and to coordinate the representatives of the United States in the various international organizations to which she now belongs. See, as to the general problem, the symposium in the *Pol. Sci. Rev.*, XXXVIII (1944), p. 913.

give commands to its citizens, but to perform services for them. In consequence, the machinery of government has been steadily increasing as its range of action necessarily widens. These newer services, contributing to health, prosperity, and so on, are largely technical and administrative in character. The increase of administration is the most marked characteristic of modern governments. New departments have been, and are being, steadily added, and each of them expands its activities continuously. These departments, with but few exceptions, found that they were incapable of coping with the problems which faced them within the confines of their territorial jurisdiction. The health of the nation, for example, could not be properly protected until international arrangements could be made to prevent the transfer of disease from other states. The departments of Commerce and Agriculture, and others, find it necessary to maintain many agents abroad, and encourage international agreements for the solution of their problems. Internal and external activities are inextricably mixed.

Private International Associations. And it was found that rules alone were insufficient. As Potter says, "rules of law are of scant effect if unsupported by organs of governments." Within the state, much machinery had been created to perform the increasing functions of government; it appeared equally necessary to set up machinery to take care of the international phases of these functions. The first response to this pressure was in the form of private international associations. They range from the Olympic Games to the World Parliament of Religions; from the Red Cross to the International Railway Union. There is an International Wine Office to encourage the use of wine, and an International Bureau against Alcoholism to discourage it. Legislators meet in the Inter-Parliamentary Union; business men in the International Chamber of Commerce; laborers in the International Association for the Legal Protection of Labor; students in the Students' International Union. There are associations for hotelkeepers, and associations for the deaf and dumb. Great business corporations, such as the Standard Oil Company, are international in their organization. A complete list of such bodies would mount up into the thousands; indeed, granted their independent action and often ephemeral character, it would be practically impossible to compile a complete list.[2] They do, however, cover almost every field of human activity, and illustrate in remarkable fashion the extent to which such human activities depend upon factors beyond national frontiers and call for international organizations.

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[2] See Potter (1st ed.), p. 291, and Chap. XVIII in general; the various issues of *La Vie Internationale*, published at Brussels from 1908-1909; the League of Nations, *Handbook of International Organizations* (Geneva, 1938); *International Agencies in Which the United States Participates*, Dept. of State Pub. No. 2699 (1946). A great deal of current information is provided in the Department of State *Bulletin*.

PUBLIC INTERNATIONAL UNIONS. Private associations lead to official ones. To such private bodies states might send delegates, or offer subventions. In many of them now in existence, governments are members alongside of private individuals and corporations; in others, administrative departments of governments, such as railway administrations, may be members. The transition from purely private to purely official organizations is very gradual, and it is often difficult to draw a boundary line. Such bodies as the European Conference on Time Tables, with delegates from states, from railway and steamship administrations, and from Pullman and air companies, defy classification. The International Agricultural Coordination Commission included in its membership the official Institute of Agriculture, various sections of the Secretariat of the League of Nations, the International Chamber of Commerce, the Institute of Intellectual Cooperation, and many private agricultural societies. We shall soon encounter the difficulty of defining an International Public Union; but the attempt to define even a private international association has produced several learned dissertations, and no agreement.[3]

The development of such private organizations led to the formation of official bodies. The nineteenth century was characterized by much activity on the part of states in their effort to secure international cooperation. Treaties calling for uniform action were frequent; but more was needed, and so international organs were established, based upon treaty and composed of states. These organs were created by differing groups and to meet differing needs, and they followed no model. Like states themselves, they were created to meet pressing emergencies, and were adapted to special circumstances, and little attention was paid to the classification, or the juridical bases, laid down by political scientists.[4] As "experiments

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[3] See Guillois, "Les Associations Internationales," *R.D.I.P.*, XXII (1915), pp. 1-127; A. Normandin, *Du Statut Juridique des Associations Internationales* (Paris, 1926); Union des Associations Internationales, Publication No. 98, August, 1921 (Bruxelles).

[4] For classifications, see Burns, in *B.Y.I.L.*, 1926, p. 57; Hicks, *The New World Order*, p. 262; Kazansky, in *R.D.I.P.*, IX (1902), p. 359; Neumeyer, in *R.D.I. (Genève)*, II (1924), p. 349; Rapisardi-Mirabelli, in *Hague Acad.*, 1925, II, p. 367 *et seq.*, Woolf, *International Government*, pp. 169, 183.

On International Public Unions in general, see *Annuaire de la Vie Internationale*, 1905-1907, Office Central des Institutions Internationales (Bruxelles), 1910-1911; F. de Ruffini, "La protection internationale des droits sur les oeuvres litteraires et artistiques," *Hague Acad.*, 1926, II, p. 391; Descamps, *Les offices internationaux et leur avenir* (Bruxelles, 1894); Chaps. VIII, XII; W. Kaufmann, "Les Unions internationales de nature économique," *Hague Acad.*, 1924, II, p. 181; F. Meili, *Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums* (Leipzig, 1899); G. Moynier, *Les bureaux internationaux des Unions universelles* (Genève, 1892); K. Neumeyer, "Les Unions internationales," *R.D.I. (Genève)*, II, 1924, pp. 16-40, 138-144, III (1925), pp. 20-25, 102-108; M. Pilotti, "Les Unions d'Etats," *Hague Acad.*, 1928, IV, pp. 445-546; Poinsard, *Les Unions et ententes internationales* (Berne, 1901); A. Rapisardi-Mirabelli, "Théorie générale des Unions internationales," *Hague Acad.*, 1925, II, pp. 345-390; P. S. Reinsch, *Public International Unions* (Boston and London, 1911); P. S. Reinsch, "International

in international administration" they vary widely as to function, institutions, authority, methods or scope; and there are insufficient precedents to guide the student. To classify them is almost impossible; as Potter says, it would be as difficult as to classify the pebbles on a beach. Students have, indeed, paid but little attention to this important new development, and it is not surprising to find that no two writers agree on such questions as the definition of an International Public Union, or its international personality. The remark is apt that they have been baptized rather than defined.

For our purposes, the easiest approach is through function, and we shall survey the various administrative agencies under the headings: Transport; Communications; Economic; Cultural and Scientific; and Social. The large number of such bodies, even of those having an institutional character, renders impossible more than a summary survey.

§ 43. Transport.

WATERWAYS. Recalling the fact that in the channels of intercourse between states has been found the natural field for collisions and rivalry, and recalling also that it was here that the need for agreement was most effective in building up international solidarity, it is not surprising to find that in this field permanent organs of administrative character first begin to appear.

THE RHINE. We have already referred to the problem of the international river, the river which flows through more than one state. The admission of the general principle of territorial sovereignty in such a case as this may mean the exclusion from the sea of all commerce except that of the state which controls the river mouth. The two great river highways of Europe, the Danube and the Rhine, along which had marched the armies of barbarians, the Roman legions, and the Christian crusaders, had been disputed for centuries; and with the growth of trade, the adjustment of the many problems connected with their use became of pressing necessity. As far back as 1506 there was a treaty agreement providing for organized control of the Rhine; and many arrangements were made as to both rivers until more permanent principles were laid down by the Congress of Vienna. "The Congress of Vienna established the rule that international rivers—that is, rivers crossing or forming the boundary of more than one state—were to be administered for the benefit of the world commerce, but their administration and navigation were to be left in the hands of the riparian States." [5] Revisions were made of these provisions of the treaty

Unions and Their Administration," *A.J.*, I (1907), pp. 579-623; L. Renault, "Les Unions internationales," *R.D.I.P.*, III (1896), pp. 14-26; B. Von Toll, *Die internationale Bureaux der allgemeinen völkerrechtliche Verwaltungsvereine* (Tübingen, 1910).

[5] J. P. Chamberlain, *The Regime of the International Rivers: Danube and Rhine*, Studies in History, Economics and Public Law, Columbia University (New York, 1923), CV, p. 29.

which applied at first only to the Rhine; but the machinery remained fundamentally the same. A Rhine Commission was set up to administer the principles of the treaty. It was composed of one member from each state bordering the Rhine, and each state had one vote, except for certain administrative matters, as to which voting power was distributed according to the length of the river bank of each state. Its function was, in general, to prevent interference with navigability and to keep navigation moving according to its regulations. The necessity of uniform interpretation of these regulations called for judicial bodies, and so the "Rhine Courts" were established at convenient points on the river. These were local courts, with an appeal to a special court of appeal in each Rhine state, and their decisions were executory in the other states. Either party, however, might appeal to the Commission instead of the national appeal court, and thus the application of the international agreement could come finally before an international tribunal.

In theory, changes in legislation were made by states; but a practice was accepted which deserves especial attention as the beginning of a flexible system which has since been put into almost universal use by public unions. In practice, regulations concerning navigation, licenses, and such matters, were adopted by the Commission and accepted by states. To change the treaty itself, however, an international conference was necessary. Thus it is possible, in a Union, to adjust regulations as rapidly as changing conditions demand, and not necessarily by unanimity, while the treaty remains the fundamental law, to be revised only by formal action.

THE DANUBE. The principles accepted at the Congress of Vienna were applied to the Treaty of Paris in 1856. Two commissions were set up by this treaty, the temporary European Danube Commission, to which the Great Powers and Turkey belonged, and whose function was to improve the navigation of the mouths of the river; and the Riparian Commission, composed of riparian states only, which was supposed to administer traffic on the river and to succeed to the European Commission's authority. How-

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On international rivers, see also J. Blociszewski, "Le régime international du Danube," *Hague Acad.*, 1926, I, pp. 257-337; F. Corthèsy, *Etude de la Convention de Barcelone sur le régime des voies navigables d'intérêt international* (Paris, 1927); Ch. de Visscher, "Le nouveau régime international du Rhin," *R.D.I.L.C.*, 3rd Series, I (1920), pp. 80-85; J. Hostie, "Les actes du Danube et de l'Elbe," *R.D.I.L.C.*, 3rd Series, IV (1923), pp. 247-271; A. Kasama, *La navigation fluviale en droit international* (Paris, 1928); G. Kaeckenbeeck, *International Rivers*, Grotius Society Publications, No. 1 (London, 1918); J. P. Niboyet, "Les tribunaux pour la navigation du Rhin et le pouvoir judiciaire de la Commission Centrale du Rhin," *R.D.I.P.*, XXX (1923), pp. 5-33; G. Sherman, "International Organization of the Danube under the Peace Treaties," *A.J.*, 17 (1923), pp. 438-459; D. Sturdza, *Recueil de documents rélatifs à la liberté de Danube* (Berlin, 1904); G. Tarrius, *Les eaux industrielles internationales et leur réglementation internationale* (Perpignan, 1935); W. J. M. Van Eysinga, "Les fleuves et canaux internationaux," *Bib. Viss.*, II (1924), pp. 121-157.

ever, the Riparian Commission was never put into operation, and the European Danube Commission gradually assumed complete control. "Thus there has grown up," says Sayre, "an international commission, composed of representatives of the great Powers of Europe, which is independent of local sovereignty, and which has a jurisdiction of its own over the most important part of one of the large rivers of the world." [6] The Commission, to which Rumania, as a riparian state, was added when she became independent, is self-supporting through tolls, and has an annual budget of about $400,000.[7] It is well-organized and its work has been highly efficient. It undertakes engineering works, fixes and collects tolls, issues licenses, and imposes fines. It has built and maintains the port of Soulina, and has a large body of employes. Its judicial power is exercised in the first instance by its officials at Soulina and Galatz, with appeal to the Commission itself, and is limited to enforcement of the treaty and its own navigation rules, and the collection of tolls. The Commission meets twice a year, but an executive committee, composed of whatever members happen to be at its seat, is able to meet any emergency. Unanimity is required for questions of principle, but majority rule is frequently invoked. The Commission has its own flag, enjoys diplomatic immunities for its members and its property, and is neutralized.

The development of an international fluvial administration was much advanced by the Treaty of Versailles and subsequent agreements. Articles 354-362 of that treaty continued the previous organization and rules for the Rhine and arranged to extend them to the Moselle and to canals which may be built. By Article 331, the Elbe, the Oder, the Niemen, and the Danube were declared international rivers, and subsequent articles provided commissions and rules for each. In the case of the Danube, in addition to continuing the European Danube Commission, Article 347 created a new International Commission, which has been called "the most important practical result of the river clauses in the treaties of peace." [8] The seat of the European Danube Commission is at Galatz; that of the International Commission at Bratislava; and the latter, like the former, has its own flag and privileges. The International Commission has charge of that section of the river not under the administration of the European Commission. The long sequence of agreements as to the Danube, each referring back to others, produced a complicated situation which was finally presented for solution to the Permanent Court of International Justice, which affirmed the jurisdiction of the European Commission, in the widest fashion, as against the claims of Rumania.

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[6] Sayre, *op. cit.*, p. 43.
[7] As of 1939. There is current uncertainty as to the future status of the Danube.
[8] G. Sherman, "The International Organization of the Danube under the Peace Treaties," *A.J.*, 17 (1923), p. 451.

Barcelona Conference. The principle of freedom of communications and transit was affirmed in Article 23*e* of the Covenant of the League of Nations; and Article 338 of the Treaty of Versailles provided that the previous articles concerning international rivers were to be replaced by a later convention. Consequently, a committee of the Peace Conference was continued under the name of the *Commission pour l'étude de la liberté des communications et du transit*. This was taken over by the League of Nations, and was finally to be converted into the Advisory Commission of that body. The problem had now become one of providing a uniform international regime for such rivers; and many new elements have now appeared, such, for instance, as hydraulic or electric power. Such a regime was established by the Conference of Barcelona of 1921, in the "Convention on the Regime of Navigable Waterways of International Concern."[9] It is practically, if not technically, correct then to say that the principle of free navigation upon international rivers is a principle of international law. A centralized machinery existed in the Organization for Communications and Transit of the League of Nations to maintain the principle; and the United Nations will apparently continue the activity through the Transport and Communications Commission of the Economic and Social Council.

Railways. Another group of means of communication obviously calling for international agreement is railways.[10] It is too much for impatient commerce calmly to endure, to require that passengers, and much more goods, shall be unloaded and reloaded at every frontier. But to permit direct passage through several states involved many problems, such, for example, as the division of labor and expenses involved in a single through ticket, or the more vital matter of a uniform gauge track upon which all trains could run. It was impossible for states individually to handle such matters and, after several attempts, a convention was signed at Berne in 1890 (revised in 1924) which created the International Union of Railway Freight Transportation. This office, according to Woolf, has more extended powers than any other international institution. The fundamental principle of the Convention was the obligation of the contracting states to transport through merchandise and to enforce this obligation upon their railways. To this end, the central office must necessarily be given a large degree of supervision. It arranges the settlement of accounts between the

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[9] Found in L. of N. *Treaty Series*, VII, pp. 36-63. See also F. Corthèsy, *Etude de la Convention de Barcelone sur le régime des voies navigables d'intérêt international* (Paris, 1927); Oppenheim, I, pp. 378-381.

[10] On railways, see P. Chavan, *Les communications internationales par voies ferrées et le problème de la souveraineté de l'état* (Lausanne, 1927); N. Droz, "L'Union internationale des chemins de fers," *R.D.I.P.*, II (1895), pp. 169-184; S. Raikowitch, *Le régime international des voies ferrées et la Société des Nations* (Paris, 1925); K. Stieler, *Die internationale Eisenbahnverband*, Völkerrechtsfragen, Pohl und Wenzel, Heft XI (Berlin, 1926); Sir Ralph Wedgwood and J. E. Wheeler, *International Rail Transport* (Oxford University Press, 1947).

various railway administrations, and has adequate power for the collection of debts. It does not merely advise, but gives decisions, upon the request of the disputants.

There are various other railway bodies more or less official in character —it must be remembered that railways in Europe are usually governmental enterprises. An International Conference for Promoting Technical Uniformity on Railways dates back to 1882. It has held a number of conferences, maintains a permanent bureau, and divides expenses among its eighteen member states according to the length of their railways. An International Railway Congress Association founded at Brussels in 1919 replaced a similar body created in 1885 and dissolved in 1918. There is a Central Office for International Railway Transport; an International Railway Wagon Union (1921); an International Railway Union (1922) composed of railway administrations; a Union for the Use of Carriages and Vans in International Traffic (1923). In these organizations, sovereign states become associated with more humble bodies. In the European Conference on Time Tables (1923), for example, there assemble delegates of states and of the League of Nations, of railway and steamship administrations, and of Pullman and air companies. Mention may be made also of the Central Council for International Touring and the World Motor Transport Congress. The Permanent Association of Road Congresses (1908), which has in its membership fifty states and colonies, is subsidized by states, corporations, and individuals.[11]

Aerial Transportation. Finally, there remains to be considered the new field of aerial transportation, so new that it became a subject of international agreement as recently as the Peace Conference in 1919. The Convention Relating to the Regulation of Aerial Navigation, signed at Paris in 1919, recognized "that every Power has complete and exclusive sovereignty over the air space above its territory," but each Power agreed to allow "freedom of innocent passage" to the aircraft of other contracting states which observe the conditions set down. Detailed regulations were provided as to marking and signals, traffic, licenses and medical certificates for pilots, meteorological information, customs, and similar matters. Clearly an administrative body was needed, and the convention provided for an International Commission for Air Navigation, located at Paris, and charged with many duties. It had a striking range of legislation in its power to change the regulations for aerial navigation by majority vote. In 1925 an International Conference on Private Law Affecting Air Questions created

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[11] How much of this will survive the readjustments following World War II remains to be seen. The Economic and Social Council of the United Nations lists as one of its problems "reestablishment and re-organization of inter-governmental and other international machinery for the coordination of railway problems in Europe." *Report of the Secretary-General*, UN Doc. A/65 (1946), p. 17.

the Technical Committee of Legal Experts on Air Questions (CITEJA), in which forty-three states participated.[12] A convention signed at Warsaw in 1929 provided for the liability of the international air-carrier. A Third Conference on Private Air Law was held at Rome in 1933, and a Fourth at Brussels in 1938. Much of the activity above described will now doubtless be absorbed in the International Civil Aviation Organization which will be discussed in a later chapter.

Mention has already been made of the Organization of Communications and Transit of the League of Nations and of its work in coordinating the machinery and principles of river navigation. A similar task was undertaken by that body in other fields. The Conference at Barcelona had adopted a general convention upon freedom of transit, which asserted, on the part of signatories, the principle of freedom of transit (i.e., the right to utilize means of communications within all states) and the principle of equality of treatment. The Conference had applied this to the regime of rivers. At the second general conference of communications and transit, at Geneva in 1923, a similar task was accomplished for the regime of railways and for maritime ports, and other conventions were adopted as to electric and hydraulic power. As a result of the work of the Organization of Communications and Transit, national control of the various means of communication for national purposes has given way rapidly to the needs of international commerce.[13]

§ 44. Communications.

Telegraphy. Telegraphy was introduced about 1840, and immediately became an international problem. In Europe several regional combinations were formed which, upon the initiative of France, were united, along with others, by the Convention of 1865, revised in 1875. It took the name of the Telegraphic Union in 1908. The first conference laid down the principles that wires should be open to the use of all, of cooperation between states, and of a base rate. In the battle between national sover-

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[12] On aerial navigation, see C. L. Bouvé, "The Development of International Rules of Conduct in Air Navigation," *Air Law Review*, I (1930), p. 1; K. Colegrove, *International Control of Aviation* (W.P.F., Boston, 1930); M. O. Hudson, "Aviation and International Law," *Air Law Review*, I (1930), p. 183, also found in *A.J.*, 24 (1930), p. 228; O. J. Lissitzyn, *International Transport and National Policy* (Council on Foreign Relations, New York, 1942); L. Tombs, *International Organization in European Air Transport* (Columbia University Press, 1936); J. B. Van Zandt, *Civil Aviation and Peace* (Brookings Institution, Washington, 1944).

For current developments, see § 87, *infra*.

[13] On communications and transit in general, see M. Bourquin, "L'organisation internationale des voies de communications," *Hague Acad.*, 1924, IV, p. 163; Ch. de Visscher, *Le droit international des communications* (Paris, 1923); Ch. Dupuis, "Liberté des voies de communications. Relations internationales," *Hague Acad.*, 1924, I, p. 127; G. Hanotaux, *L'oeuvre de Barcelone* (Paris, 1922).

eignty and common needs, the latter won, and an international bureau, the first of its kind, was set up at Berne to collect and distribute information and to prepare for conferences.

Three conferences have been held thus far dealing with radio-telegraphy. Reinsch tells us that it was at first a matter of exclusive private contracts, with the result that stations could not communicate with each other, no matter what distress there might be, unless the message was transmitted by the Marconi system. It was regarded as of nationalistic advantage for a state to have a monopoly on radio communication in this manner.[14] However, this position was partly surrendered at the Berlin Conference of 1906, and more fully at the London Conference of 1912. Provisions were made, applying to all wireless stations, requiring ship to ship or ship to coast communication and connection between local telegraph and coastal radio stations. In 1925 the International Broadcasting Union was set up by nine European countries, including both state and private broadcasting systems.

At the International Radiotelegraphic Conference of Washington, in 1927, the range of activity was defined as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds by means of Hertzian waves," and it was extended to cover all stations, not merely maritime stations. This convention set up also an International Technical Consulting Committee. One of the difficulties of the conference, illustrating the problems of international organization, was the fact that in most cases the government operated the radiotelegraphic system, while in others, such as the United States, it was in private hands.[15] The Telegraphic Union became the Telecommunications Union in 1934. Its functions are to prepare for conferences, and to issue publications and service documents (such as call letters or frequency lists). There is a Consulting Committee for each of the three fields, Telegraph, Telephone, and Radio. Members choose one of six classes, and pay dues ranging from 3 units in Class VI to 25 units in Class I. Arrangements are now being made for this Union to become one of the specialized agencies of United Nations.

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[14] Reinsch, *Public International Unions,* p. 128; see also Woolf, *International Government,* pp. 212-216.

On radiotelegraphy, see L. G. Caldwell, "The International Committee on Wireless Telegraphy," *Air Law Review,* I (1930), pp. 211-231; M. Davis, "International Radiotelegraph Conventions and Traffic Agreements," *ibid.,* pp. 349-375; A. Huth, *Radio Today,* Geneva Studies, Vol. XII, No. 6 (1942); I. Stewart, "The International Radiotelegraphic Conference of Washington," *A.J.,* XXII (1928), pp. 28-49; J. D. Tomlinson, *The International Control of Communications* (Genève, 1938).

[15] Irvin Stewart, "The International Radiotelegraphic Conference of Washington," *A.J.,* XXII (1928), p. 28. Sovereign states were unwilling to admit private companies upon equal terms with themselves. A compromise was reached by which experts of private companies could attend, and could cast one vote for their respective countries, if their governments were not represented.

Postal Union. The best known of the Public Unions is the Universal Postal Union, which, partly as an example and partly because of its importance, deserves fuller treatment, as illustrating the methods of such bodies. During the Middle Ages, messages were carried by merchants, or by the messengers of monasteries, or others. As printing and commerce increased communications, governments took an interest in and protected such messengers. The Hapsburg Emperors turned over to the Taxis family the right to carry mails, and their system continued until 1867, when it was taken over by the Prussian Government, a natural step, since the postal service had become a public utility of the first order. Meanwhile, the reform of Sir Rowland Hill in England had introduced penny postage, by the simple process of pasting on a stamp. But there was as yet no uniformity as between states. Each state had its own rates and its own weights; and the mathematical computations forced upon post-offices were perplexing. The price depended upon the route taken, so that, to use Reinsch's well-known illustration, the cost of a letter sent from the United States to Australia would be 5 cents, 33 cents, 45 cents, 60 cents, or $1.02 per half ounce, according to the route by which it was sent. The situation was further complicated by the fact that a state might use its postal system as an income producer, and attempt to make a profit from other states. This was a game at which more than one could play.

A conference was held in Paris in 1863, upon the proposal of Postmaster General Blair of the United States. Its purpose was simply to study the situation, and while it laid down no rules, it reached agreement as to principles. Meanwhile, Stephan in Germany had worked out a project by 1868, based upon the system among the German states; but the Franco-Prussian War delayed a conference until 1874. The Berne Conference simply brought to a head a great many proposals made by different persons. Agreement was reached upon a single postage rate (though some leeway was allowed each state), and upon a unit of weight. The principle that each administration should keep what it collected was adopted, though it has been the object of frequent attack since. An international bureau was created, and disputes were to be arbitrated. The Postal Union today embraces almost every area in the world, and includes a population of around two billions. The unity of world interest is shown in Article 1 which describes this area as "one postal territory."

The organization of the Universal Postal Union includes congresses, conferences (now unused) and the bureau at Berne. The congress meets about every five years. Delegates assemble with power to bind their governments to an unusual degree, for states must begin to apply the convention signed upon the date set for it to become operative. In practice, ratifications are not awaited. Voting is unequal, depending upon colonies—Great Britain thus has six votes, France has four, the United States has

two. The congress acts by majority vote, and if ratifications are obtained to the signatures which make up this majority, others must accept the convention or withdraw. The economic situation gives ample assurance that no state will withdraw under such circumstances.[16] Proposals may also be made between congresses, through the bureau, which submits them to governments for consideration. If a sufficient number of affirmative replies is received, it is prepared by the Swiss Government as a diplomatic document, ready for signature. In such a case, unanimity is required for changes affecting organization or fundamental rules; a two-thirds majority for other provisions; and a majority if it is only a matter of interpreting the regulations.

The International Bureau of the Universal Postal Union is established at Berne, under the supervision of the Swiss Postoffice. For the purpose of sharing expenses, members are divided into seven classes, of which the first class pays twenty-five units, and the seventh class one unit. The bureau has little authority, but its work is of much importance. It collects and distributes information which is essential; and for this purpose publishes a monthly magazine in four languages, a dictionary of postoffices, a list of routes, and other such material. It makes investigations, handles interim proposals, and takes care of such matters as the loss of registered mail, or the division of sea transit charges. One of its most important functions is to interpret the convention at the request of a member. Disputes are submitted to the arbitration of two other postal administrations, one chosen by each disputant, a third being chosen if necessary by these two.

In the sense of authority to compel obedience on the part of states, the Postal Union can not be called government; but in the sense of performing an essential administrative function for members, its work must be classified as one of the most characteristic of governmental activities today.[17]

§ 45. Scientific and Cultural.—Science, literature, and art are international in character. Discoveries, inventions, and scientific thought in general pass rapidly from one nation to another, and become part of advancing civilization. National laws for their protection, such as for patents and copyrights, are ineffective beyond national frontiers. Indeed, nations seemed

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[16] "In one instance the French Government was strongly opposed to any change in a foreign postage rate, and its delegate announced that he would refuse to accept it. The proposed change, however, was adopted by a majority of votes; and the French Government, sooner than give up the incalculable advantages of membership in the Postal Union, promptly ratified the change." Sayre, *op. cit.*, p. 25.

[17] See R. L. Bridgman, *The First Book of World Law* (Boston, 1911), Chap. IV (for early documents); Reinsch, *Public International Unions*, pp. 21-28; Sayre, pp. 19-25; J. F. Sly, "The Genesis of the Universal Postal Union," No. 233, October, 1927; Woolf, *International Government*, pp. 186-205; and the publications of the Union itself. Arrangements are now being made by which the Postal Union will become one of the "specialized agencies."

to encourage, by tacit condonation, the violation of foreign patents or the pirating of literary works, while at the same time giving protection to their own scientists or writers within their jurisdiction.

Industrial Property. The first efforts at international protection were initiated by private international association, and led to the creation of the International Union for the Protection of Industrial Property, concluded at Paris in 1883, and revised frequently thereafter.[18] A prerequisite for membership is that the state shall have a special administrative service for patents. Periodic conferences are held, and an international bureau is established at Berne, under the supervision of the Swiss Government, which performs the usual functions of liaison, information, and preparation for conferences. A peculiarity of this Union is that it contains within itself limited unions for special purposes. The original Union established the principle that a state should give to foreign inventors the same rights as it gives to its own, as to trademarks, patents, industrial designs or models, or against unfair competition. In addition, the arrangement of Madrid of 1891 provided, for such as signed, the registration of trademarks; and a similar arrangement of the same place and date was made for the repression of false indications of origin. There is no international registration of patents.

The position of writers and artists was equally precarious, and for many years efforts were made through bilateral treaties to protect their rights. After various preliminary conferences, a Convention for the Protection of Works of Art and Literature was signed at Berne in 1886 (revised at Rome in 1928). This convention, with subsequent revisions, gives to the author or artist not merely national protection, but a minimum international protection, and engages states to unify the formalities by which literary rights are established and to pursue and seize imitations, whatever the form of reproduction. The Union has periodic conferences and a bureau at Berne, which is united with the Bureau for the Protection of Industrial Property. Since the war, a great deal of effort has been devoted to the puzzling problem of the legal statement of such rights, and there appears to be a tendency toward grouping them all together under the heading of "scientific property." [19]

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[18] On industrial property, see S. P. Ladas, *The International Protection of Industrial Property* (Harvard University Press, 1930); M. Ostertag, "International Unions for the Protection of Industrial, Literary and Artistic Property," *Michigan Law Review*, XXV (1926), pp. 1-17; S. Rathenau, "Die internationale Union zum Schütz des gewerblichen Eigentums nach deutschen Recht während des Krieges," *Z.V.*, IX (1915), p. 63.

[19] On intellectual property, see E. Clunet, *Etude sur la convention d'Union internationale pour la protection des oeuvres litteraires et artistiques* (Paris, 1887); F. de Ruffini, "La protection internationale des droits sur les oeuvres littéraires et artistiques," *Hague Acad.*, 1926, II, pp. 391-569; S. P. Ladas, *The International Protection of Literary and Artistic Property* (New York, 1938).

Weights and Measures. In certain fields of scientific and cultural effort, international agreement and organization have been found necessary. Indeed, it was in this field, apparently, that the first International Public Union, if it may be so identified, was organized. This was the Geodetic Union, created in 1864, and now defunct. Triangulation for mapping purposes calls for the establishment of points of measurement in other countries, and also demands uniform terms. A Prussian official induced his government to call a conference for this purpose in 1864, and an association was established, located at Potsdam, and maintained for some time by the Prussian Government. In 1886, it was internationalized, with an independent budget. It had a triennial conference, an annual commission, and a central bureau.

After various conferences had studied the problem of uniform scale maps for the world, there was set up in 1913 the Central Bureau of the International Map of the World on a Millionth Scale. It is located at Southampton, England, operates on a budget of £500 per year, and has now mapped about a fourth of the land area of the world.

In a building at St. Cloud, near Paris, specially constructed for quiet and stability, and under triplicate lock, are kept the standard metric measures by which a large part of the world weighs and measures the articles of daily use. It houses the International Bureau of Weights and Measures, established by a convention of 1875 at the request of the Geodetic Union for uniform measures. A convention of 1921 added to its duties that of finding uniform electrical measurements. A conference of delegates meets every six years, and the International Committee of Weights and Measures supervises the bureau.[20]

Council of Scientific Unions. Among the numerous conferences held at the end of World War I was one on International Scientific Organizations, held in London in 1918, which set up the International Research Council. This was reconstituted in 1931 under the name of the International Council of Scientific Unions. 29 states hold membership in it through national research councils, and 13 others participate directly as governments. It includes seven scientific unions: International Astronomical Union, International Union of Geodesy and Geophysics, International Union of Chemistry, International Scientific Radio Union, International Union of Physics, International Union of Geography, and the International Union of Biological Sciences. The purpose of the Council is to provide cooperation between scientific bodies. It was located at Brussels, but has operated from Cambridge, England, since 1934.

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[20] C. E. Guillaume, *La Création du Bureau International des Poids et Mesures et son Oeuvre* (Paris, 1927).

International Hydrographic Bureau. Another postwar conference set up in 1921 a bureau whose purpose is to coordinate the hydrographic work of the various member states, for the purpose of making navigation safer, and to attain more uniformity in documents. It operates through a General Conference, a Bureau, and a Secretary-General, and has a budget of 160,000 gold francs. The contributions of members are determined by the ship tonnage of each. It is located at Monaco. There is also an International Council for the Exploration of the Sea, and a similar body for the Mediterranean. Fishing constitutes an important food supply; as the need for fish increased and the supply diminished, states took up the study of the peripatetic fish quite seriously. Conferences were held at the beginning of the present century, and a Convention in 1902 provided for conferences, a central committee, and a permanent bureau and laboratory at Copenhagen. The bureau studies biology, hydrography, and the plankton, the floating food supply of the fish.[21]

Education. There have been various attempts to build international bodies for the advancement of education. Thus there is an International Bureau of Education, and another for Technical Education. Under the League of Nations, there was an Institute of Intellectual Cooperation, an Institute of Educational Cinematography, and an International Museums Office. It is probable that most of these organizations will be absorbed in the United Nations Educational, Scientific, and Cultural Organization, which is described in a later chapter.

§ 46. Economic.—In view of the economic interdependence of nations, the need for cooperation in this field is manifest; it is unfortunately true, however, that nations find great difficulty in their efforts toward economic cooperation. Among the earliest of such efforts were the International Bureau for the Publication of Customs Statistics, set up in 1890 at Brussels, and the International Institute of Commercial Statistics. The latter body goes back to 1853 for its beginnings, though it was not until 1913 that a Permanent Office was established at the Hague. It seeks to provide uniformity in the reporting of administrative and scientific statistics.

Agriculture. In the field of agriculture we encounter the most vital of all economic interests—the food supply. The farmer has always held an isolated position, and agriculture has lagged far behind other economic development. It was this which attracted the attention of a Californian, David Lubin, who, believing that farmers in all lands have a common interest, conceived the idea that international organization would give to them more collective force and a better opportunity for ameliorating their

[21] See P. C. Jessup, "L'exploitation des richesses de la mer," *Hague Acad.*, 1929, IV, pp. 405-514.

condition. He peddled his idea industriously and finally gained the sympathetic attention of the King of Italy. The Italian Government invited a conference which met at Rome in 1905 and established the International Institute of Agriculture. It has now been absorbed in the Food and Agriculture Organization. This Institute had an elaborate organization, and almost all states belonged to it. Its members could choose to belong to one of five groups, in which the units ranged from sixteen, with five votes, down to one unit with one vote. Its functions were to collect and distribute, as rapidly as possible, information as to agricultural methods, markets, prices and wages, plant diseases, and such matters of cooperation as insurance, credit, and common legislation.

Various other bodies could be mentioned in the agricultural field, such as the International Seed-Testing Association, the International Society for the Study of the Chemistry of the Soil, the International Union of Forest Research Organizations, the *Comité International du Bois,* the International Bureau of Intelligence on Locusts, the International Commission on Agricultural Engineering, the International Commission on Agricultural Industries, and others. It seems probable that many of these activities will now be taken over by the Food and Agriculture Organization.

Commodities. A more recent development has been the creation of agencies to deal with one particular commodity.[22] The surplus of coffee, and consequent competitive efforts to dispose of it, led to negotiation among coffee producing states and to the establishment in 1940 of the Inter-American Coffee Board. The purpose of this Board is to promote orderly marketing of coffee, and it has authority to increase or decrease the export quotas, so as to adjust supply to demand. Voting strength is based on export and import figures, the United States having 12 of the 36 votes, Brazil 9, Colombia 3, and the other members one apiece.[23]

Probably the most powerful of all the Public Unions, although it is now defunct, was the Sugar Union. The increased production of sugar after the discovery of the sugar beet, and the use of duties and bounties in the combat for markets, led to a desperate situation. Great Britain especially was affected and after a vain effort with a few states forced an agreement at Brussels in 1902, establishing a sort of customs union to equalize competition and aid consumption through the reduction of taxes. A bureau to collect information was established at Brussels, but there was also a commission to exercise constant supervision. This commission, composed of one delegate from each member state, could by majority vote order a change in the internal legislation of any signatory state, such as

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[22] See International Labour Office, *Intergovernmental Commodity Control Agreements* (Montreal, 1943).

[23] *International Agencies,* p. 78; Inter-American Coffee Board, *Annual Report,* Washington, 1942-43, etc.

suppressing bounties, raising or lowering the tariff on sugar in that state, or preventing import from specified states. As the situation began to improve, however, states reverted to the old order and lost interest. England withdrew in 1913 and all others had formally withdrawn by September 1, 1920.[24]

After the first World War, the sugar crisis reappeared, and led first to unofficial efforts (such as the Chadbourne Agreement of 1931) to improve the situation. In 1937, representatives of 22 sugar importing and exporting governments signed an International Sugar Agreement, under which a General Council and an Executive Committee were set up. Only the Council can change the quotas agreed upon. Voting is proportioned according to the amount of sugar exported or imported. As a result of World War II, six states no longer participate. A small secretariat is maintained at London.[25]

Efforts to adjust the trade in tin began in 1931, and an International Tin Committee was set up in 1933. Various renewals were made, the latest (1942), being signed by Belgium, Bolivia, the Netherlands and the United Kingdom. Its purpose is to limit the production and export of tin. An Advisory Committee concerning wheat, set up in 1933, has now become the International Wheat Council, with headquarters at Washington, where the secretariat is located in the Department of Agriculture. Its purpose was to determine quotas and fix prices, but rapidly changing circumstances have forced it to reconsider the agreement made. A Rubber Study Group was established in 1944, which has thus far no permanent organization or regular meetings. Many other efforts are being made in the commodity field, such as the European Coal Organization, or the International Cotton Advisory Committee.

The first meeting of the United Maritime Consultative Council was held at Amsterdam in June, 1946, and appointed a committee to plan an international governing body. There have been numerous conferences concerning whaling, since the first one, called by the League of Nations in 1931; at the latest one, the regulations were revised, but there was no indication of plans for organization. The 18th International Congress for Housing and Town Planning (founded 1913) met in England in October, 1946; and an International Tourist Organization Conference assembled in London in the same month. An Inter-Global Joint Wool Organization was set up by Britain and some of her Dominions, and conversations were held at London in November, 1946, to discuss problems raised by it.

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[24] On the Sugar Union, see D'Aulnis de Bourouill, *La Convention rélative au régime des sucres* (La Haye, 1902); N. Politis, *L'Organization de l'Union Internationale des Sucres* (Paris, 1904).

[25] *Int. Organ.*, I, p. 384; *Int. Agencies*, p. 84.

President Truman has asked the Economic and Social Council of the United Nations to call a conference on Resource Conservation and Utilization.

Much organizational development may be anticipated in the economic field, but whether as independent units, or under the specialized agencies of the United Nations, it is now impossible to predict. The International Trade Organization, if and when it is created, would doubtless assume or coordinate many of these functions.

§ 47. Health and Social.

HEALTH. If science is not stayed by national frontiers, much less is disease. Six times during the nineteenth century cholera and plague followed trade and pilgrimage routes into Europe, with terrible devastation. National administrations were impotent against it; a quarantine can not be effective without notification that disease is on the way. In no situation is international cooperation so imperiously demanded, and many treaties mark the vain effort of national sovereignty to avoid international supervision.[26]

As far back as 1838, a Health Council was imposed upon Turkey, to establish a quarantine service at that crossroads. Various conferences and Sanitary Councils marked the effort to combat the continuing epidemics in Europe. In 1892, at Venice, an International Sanitary Convention was agreed upon, to be followed by many others. These require notification of the menace of disease, and prescribe measures for precaution and quarantine to be taken in ports, with regard to shipping, and in other ways. In more dangerous localities, sanitary councils were established with much authority. Turkey objected to the one at Constantinople as an interference with her national sovereignty, and it was ended in 1923. The Council at Alexandria was much more successful, and was credited with producing a fifty per cent improvement within one decade. There were others at Tangier, at Teheran, and for the Danube River. These bodies provided an international health administration which regulated shipping, disinfection, quarantine, hospitals, and which could, by majority vote and without appeal, penalize ship captains for failure to observe regulations.

In 1907 the International Health Office was set up at Paris. It was given no power; its purpose was not to take the aggressive against disease. It was not placed under the League of Nations, but acted as an advisory body to the Health Organization of the League.[27] There are, however, a

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[26] See Linden A. Mander, *Foundations of Modern World Society* (Stanford University Press, 1941), Ch. I.

[27] The difficulties of international cooperation are illustrated by the refusal of Austria and Germany to support the Health Office because it was located at Paris rather than at Berlin; and by the refusal of the United States to cooperate if it should be united with the League of Nations.

number of more or less official bodies dealing with other phases of health. An International Commission for the Decennial Revision of Nosological Nomenclature was created in 1900, whose purpose was to secure uniform terms and statistics concerning the causes of disease and death. It received a new lease on life when, in 1920, some forty governments adhered to it. Its funds were supplied for a time by the City of Paris; later by the League of Red Cross Societies. There was organized in 1927 an International Office for Epizootics, whose function is to coordinate research as to the contagious diseases of animals. It is supported by the governments of forty-six states and colonies. Various other health bodies exist, such as the International Bureau against Alcoholism, the International Center for Research on Leprosy, the International Union for Combatting Venereal Diseases, the International Union Against Tuberculosis, or the Permanent International Commission of Studies on Sanitary Equipment. Again, it seems probable that many of these functions will be transferred to a United Nations specialized agency, in this case the World Health Organization.

Slavery. In various other social and humanitarian activities international administrative cooperation has been possible, more particularly since the organization of the League of Nations. The anti-slavery movement dates back to the Congress of Vienna, resulting in many treaties prohibiting the slave trade at sea, and finally in the Act of 1890, at the Brussels Conference, which organized two bureaus, one at Brussels and a Maritime Bureau at Zanzibar. In 1926 the League of Nations offered for signature a treaty whose purpose was to complete and develop the Brussels program. By this treaty states agreed to prohibit slavery in any form within their territories. The chief obstacle to its success has been the unwillingness of states to submit to international supervision.

There is an International Penal and Penitentiary Commission, founded at Paris in 1880, with its seat in Berne. Its purpose is to collect information concerning prison systems and the repression of crime, for the guidance of governments. Several conferences to secure cooperation in dealing with international criminals were held from 1905 on, and in 1924, at Vienna, the International Criminal Police Department was organized. It was moved to Berlin in 1941, and nothing has been heard of it since.

An International Bureau for Enquiries regarding Relief to Foreigners may be traced back to 1907; and a proposal made by Senator Ciralao in 1921 led to the establishment of the International Relief Union at Geneva in 1927 to which thirty states were parties. The League of Nations and the International Labor Organization assisted in this work, and in 1930 the Intergovernmental Committee on Refugees was organized. These activities will now be taken over by the International Refugee Organization.

Narcotics Control. In 1912, a convention was signed at The Hague by which a few states agreed to take steps for controlling narcotic drugs in their territories. Others adhered through ratification of the peace treaties of 1919. In 1925 the Permanent Central Opium Board was set up under the League of Nations, and in 1931 and 1936 further agreements providing penalties restricted production to the world's needs.[28] Thus a system was established, largely under the League of Nations, but cooperating with states and with the Health office, which has worked with much efficiency to control the use of opium and other dangerous drugs. The United Nations has now established a Commission on Narcotic Drugs and has taken over the League functions in this field.

Many other organizations could be listed which perform social functions. There is—or was—an International Central Office for the Control of Liquor Traffic in Africa, an International Office for the Protection of Aborigines, an International Union for Suppression of White Slavery, an International Association of Judges of Juvenile Courts, an International Federation of Housing and Town Planning, an International Office for the Protection of Nature, and others. The United Nations Relief and Rehabilitation Administration served in the wake of World War II. Future activities will doubtless be coordinated by the Economic and Social Council of the United Nations.

Inter-American Bodies. Brief reference may be made to the fact that numerous administrative agencies have been set up by the American Republics, a few of which have functioned usefully, others of which appear to be in unnecessary duplication of existing universal agencies, and many of which have never functioned at all.[29]

§ 48. Definition of International Public Unions.—The bodies which we have been describing have simply grown up. Not all of them are called "Unions," but the word has come to be applied to the class of international organizations within which they are included. Partly because they are so variegated; partly because they fall without the range of interesting political problems, and outside the field of judicial disputes and precedents; and partly because scholars have made no study of them as a group—there is no acceptable definition yet extant. The brief analysis which follows furnishes some elements of a definition, and helps to explain existing phenomena.[30]

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[28] *Int. Organ.*, 1 (1947), p. 149; *Int. Agencies*, p. 202; B. A. Renborg, "Principles of International Control of Narcotic Drugs," *A.J.*, 37 (1943), pp. 34-36; *U.N. Bulletin*, 1 (1946), p. 10, 2 (1947), p. 605.

[29] For these, see Ruth Masters, *Handbook of International Organization in the Americas* (Washington, Carnegie Endowment, 1945).

[30] One of the first authorities upon Public Unions was the Russian, Kazansky, who demanded that Unions have universality, organization, administration, contract, and states as members. See F. de Ruffini, *op. cit., Hague Acad.*, 1926, II, pp. 479-80.

International Public Unions are distinguished from international private associations. Even the word "international" has difficulties of interpretation: Does it refer to purpose or to membership? Is the Carnegie Endowment for International Peace, or is the Standard Oil Company, international in character? How many states members are required to give it international character? It must be international in purpose also, but what does this mean? Must it be a purpose which directly interests the entire world, omninational, as Otlet suggested? Could it apply to an agreement concerning a locality, *e.g.*, the Danube River? At any rate, the association should not be an "instrument of national policy"—to detach that phrase from its usual connotation. It is also demanded that it be non-commercial, and therefore not a profit-making institution.

DEFINITION. A public union, it seems clear, is based upon a treaty, and today one could say, upon a law-making multilateral treaty, rather than upon the bilateral or contractual type. A treaty can be made only by states, who are therefore necessarily included; but it does not follow that states cannot admit others than states into membership. As we have seen, modern treaties have admitted to a common organization individuals, corporations, international associations of various kinds, and branches of the League of Nations. In the face of such a development it does not seem possible to demand that states only shall be members of Public Unions; but one can insist that, in order to deserve the title of an International Public Union, the agreement shall be an official treaty between states.

In the second place, an essential element, distinguishing the Union from mere treaties for a common purpose, is permanent organization. The word "Union" is sometimes applied to treaties which provide no organs, such as the Union to Combat Phylloxera, or the Iceberg Patrol in the Atlantic, or the Latin Monetary Union. The duties called for in these treaties are carried out by state agencies or even by a department of some one nation. It does not seem logical to call such a system a Union; if so, the term might have to include such treaties as those dealing with white slavery, or the Automobile Convention of 1909. Perhaps such bodies could be classed as the most rudimentary form of the Union. Ultimately, inter-

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According to Neumeyer (*R.D.I.*, Genève, III, 1925, pp. 20-24) the essential elements of a Public Union are: (1) they are concerned with matter of internal law, but of general interest (2) composed of states (3) have a common organ or organs (4) universality of purpose and of membership (5) autonomy.

Fauchille offers the following definition: "Les Unions internationales sont des conventions qui, au lieu d'intervenir entre deux ou trois Etats dont les intérêts spéciaux sont exclusivement pris en considération, sont conclues entre un assez grand nombre d'Etats qui se placent a un point de vue plus général, de telle sort que le reglement adopté par eux peut convenir aussi à d' autres Etats et être accepté par ceux-ci, et qui ont en outre entre eux des liens particulièrement étroits, se manifestant par des organes communs." *Traité*, I, Pt. 3, p. 453. If mere treaties are Unions, it would be necessary to include in the list hundreds more than are usually named.

national bodies will stand upon an international footing, with their own organs, independent of any one nation.

In the third place, a union should be universal, in the sense that it should be open to the membership of all qualified states. Prerequisites may sometimes be demanded: for instance, a railway union could not well admit to membership a state whose railways were of a different width.

Finally, some criterion of purpose should be established, although it is difficult to state one. Clearly, a Union is not legislative or judicial in purpose, though it may include either or both functions. It should be primarily for the *administration* of interests common to all states. This, however, contrary to the views of some, would not exclude an association whose interest is in a locality, such as the Danube River. Other states than those on the banks of the Danube may have an interest in it. Boats from the United States may desire to use it; and even if none do, the United States may have a great interest in seeing that goods going from or to her own ports have fair treatment en route through the Danube, or more broadly, in seeing that the Danube does not become a source of friction leading to war. Perhaps, also, in deference to the wider international organizations of our day, it should be said that each international union is restricted to one specific purpose.

§ 49. Organization and Competence of Unions.

ORGANIZATION. Even within the limits of the above criteria, there is the greatest variety of structure and organization among the Unions. Some of them have few members, though the minimum number would be four or five; some of them run up to fifty or more members. Most of them are composed of states only; but there is an increasing number with hybrid membership. They may include departments of government, such as a postal or railway administration, rather than the state itself; or groups of states united in other organizations, such as the International Agricultural Coordination Commission; or private individuals or associations of individuals, as in the case of the European Conference on Time-Tables.[31] Several types of organs are in use. In practically all cases there is a periodic conference, essential for making the treaty originally and for revising it later; there may be an intermediate body, a council or commission or board, to make or revise the administrative regulations; there should be a bureau, or secretariat, to carry on routine work. The fundamental principles of the union are, however, usually subject to change only by a diplomatic conference, which is thus the legislative source for the Union. The conference meets more or less regularly, sometimes annually, sometimes,

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[31] This is of some importance since certain enterprises, such as railways or telegraph, may be government-owned in one country and in private hands in another.

as in the Union for Weights and Measures, every six years. The interval is not always a fixed time.

Expenses and Voting. Except in the rare cases of organizations such as the Danube Commission or the Sanitary Councils, which are self-supporting, expenses are met by contributions from members. The most frequent method of allocating such contributions is to divide the members into a number of classes, to which states are sometimes assigned, but from which they usually choose for themselves. States in each class then pay according to class, one paying perhaps six or seven times as much as another; but in such cases, voting power is correlatively increased. In other cases, payment is made according to population, as in the case of the Bureau of Weights and Measures, or according to the amount of commerce, as in the Bureau for Commercial Statistics; or according to the length of railways, or of coast line. Rarely do states make equal payments. Indeed, the theory of the equality of states is disregarded in so far as financial payments are concerned, and this has had its effect on the voting power of states. Where inequality of voting is not secured through classes for payments, it may be provided in another way, such as allowing extra votes for colonies. In most cases for administrative regulations, and in a number of cases for fundamental provisions, majority rule prevails in one way or another.

The Bureau. The most characteristic and essential organ of the Union is the permanent central office, usually a commission or bureau, but sometimes called the central office. The commission, less frequent, is composed of delegates of states and is thus, to a degree, a diplomatic body, representative of sovereignty. It is therefore a more authoritative organ, and is found in those unions which possess the greatest power of action, such as the Danube Commission, or the Commission of the Sugar Union, which also possessed a bureau. The commission is sometimes given diplomatic privileges. The bureau is the more usual body, and more characteristically an administrative organ. It is independent of any state, but for purposes of convenience it may be put under the supervision of the state within which it is located, as is true of various Unions located in Berne, and a number of others. While some problems may arise in these cases as to the recruitment or management of the personnel, there can be no interference by the local state with the international functions of the Union.

Where officials are representatives of states, they are of course chosen by their own states and are responsible to them. States cannot choose their own representatives in those cases in which the members of a commission are in number less than the total number of member states; nor do they do so, in a few cases such as the sanitary councils, where it is essential to appoint technically qualified persons for the office. The personnel

of a bureau is usually limited to a small number, perhaps not more than five or six, with typists or other such employees added as are needed. The Union may provide its own rules for recruitment and advancement, or it may turn this task over to the state in which the bureau is located. The problem of recruitment, or of distributing the personnel among various nationalities, is not of such importance here as in the League of Nations or the United Nations.

COMPETENCE. From the viewpoint of competence, or authority, there is not much to be said. The Unions, it should be remembered, are administrative rather than executive in character. The treaty perhaps establishes certain duties for member states, but no authority for enforcement, no sanctions, are in most cases given to the bureau. It seems hardly worth while, then, to follow the division of Sayre, who spoke of organs with little or no power (in which class practically all would fall), organs with power of control over local situations, and organs with power of control over member states. A more useful classification would be: (1) those which, through research, statistics, or in other ways, supply information or machinery to meet a common need; (2) those whose task is also to gather information as to the measures taken in execution of obligations under the treaty; (3) those which have some administrative control over individuals, or over localities; (4) those which have control over states. To the first group would belong such bodies as the Metric Union, the Union for the Publication of Customs Tariffs, the International Hydrographic Bureau, the Institute of Agriculture, and many others. As to the second group, it is to be observed that the power to make a report upon the execution of a treaty, or to make recommendations for changes in it, involves no authority, but does submit the situation to criticism and public notice. This process is useful, and even serves as a sanction to a certain degree, as witness the work of the Mandates Commission of the League of Nations. Such would be the situation of the Radiotelegraphic Bureau, the Commission for Air Navigation, or the Bureau for the Protection of Industrial Property. In the third group would fall the River Commissions, the Sanitary Councils, or the Maritime Bureau at Zanzibar for the control of the arms and liquor traffic in Africa. Only the Sugar Union can clearly be put into the last group, and perhaps the Union of Railway Freight Transportation.

In addition to administrative powers, some of the Unions have more or less extensive judicial and legislative powers. The Postal Union Bureau may offer advisory opinions; some of the river commissions have their own courts. As to legislation, which will be discussed elsewhere, it has been possible in a few cases to bind states by majority decision in the Conference. The power of the bureau to make administrative regulations

without consulting the member states is a legislative power worthy of emphasis, comparable to the issuance of orders by the Federal Trade Commission, or other domestic administrative body.

JURIDICAL SITUATION. As to the juridical status of Unions, there is little agreement. Is a Union a mere society, or is it endowed with legal personality? If the latter is it under international law or domestic law, and which domestic law? And does the same solution hold true of the bureau of the Union, which is permanently located within some state? It is beyond the range of this work to enter into the complicated legal problems involved, but it may be recalled that there can be other persons at international law than states. If one looks at the Union from the viewpoint of the law which created it and gave to it its power of action, it is a subject of international law. If one asks whether it can sue or be sued, whether it can hold property and by what title, the answers would be sought in the field of private international law. This, however, is merely existing practice; there is no reason why a treaty should not endow a Union with the right to share in an international conference or appear before an international tribunal. Indeed the Danube Commissions are given diplomatic immunity, and the same privilege was accorded the Pan American Union by an American court.[32]

MERITS AND DEMERITS. There is general agreement as to the importance and value of these administrative bodies, whether as to their significance in international government, or as to their methods and accomplishments. They are, of course, inevitable, in one form or another. States often find themselves impotent to protect their own members without such cooperation, as is the case in matters of health, or of air navigation. Or they find it more economical to take joint action, as for the publication of customs tariffs, or the establishment of postal and telegraphic communications. In some cases, the problem is one of *terrae nullius*, and can be handled in no other way, as, for example, the slave trade at sea, or fisheries. The Unions have the advantage of permanence, of continuous activity, of technical study, and accumulating experience. They remove problems from the arena of political or diplomatic controversy, without too much sacrifice to national sovereignty and other prejudices. As a result, they have developed some popular confidence in international administration. They have accustomed people to the idea of cooperation rather than of war for the solution of problems, and the lesson is already being applied in broader fields. The increase of such bodies has been at an ever ac-

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[32] See W. G. Penfield, "The Legal Status of the Pan American Union," *A.J.*, 20 (1927), p. 257. Hershey, p. 207, concedes international personality to unions. As to this problem, see de Ruffini, *loc. cit.*, pp. 484-495; Fauchille, I, Pt. 3, p. 454; Rapisardi-Mirabelli, *loc. cit.*, p. 364; and citations given in these articles.

celerated rate. They are little known, for their non-political character leaves them without sensational news value; but the very placidity with which they pursue their appointed tasks—in contrast with friction in other international fields—is reassuring. It would be impossible to do without them today.

They have had, however, a haphazard organization, and there is much room for improvement. It is difficult to explain why some have been accepted while other needed ones have not appeared. Apparently, states have held the balance between the important, which could not be denied, and the unimportant, which did not matter. The bogey of national sovereignty still frightens statesmen: in some cases the need was so great that sovereignty had to be sacrificed, over the unwilling protest of this or that state—for example, Rumania, on the Danube; in other cases, the proposed Union seemed so unimportant, from the viewpoint of sovereignty, that there could be no objection. Undoubtedly the process will continue, as nationalism finds that it means gain instead of loss.

The haphazard creation of these bodies has meant a haphazard protection of community rights. There has been no central direction, no bureau of research or recommendation, no central agency to secure coordination, or to propose new functions, much less sufficient power. Authority is reserved to the diplomatic conference, with its inefficient procedure based upon the equality of states, and embarrassed by the necessity of political bargaining or by such exhibitions of national pride as caused Germany and Austria to reject the Public Health Office because it was not located at Berlin.

Some progress toward coordination was attempted under the League of Nations, and a sweeping reorganization is now being carried on by the United Nations. The various administrative agencies of the United Nations system will be separately discussed in Chapter 14, below; some of the characteristic features of the new international administration will be surveyed in the following paragraphs.

§ 50. Current International Administration.—During the last quarter of a century a science of public administration has been rapidly developing within governments, with a large literature, and calling for special courses of training within universities. This science has, within recent years, turned its attention also to the administrative problems and institutions of the community of nations, reaching far beyond the earlier institutions which we have been discussing.[33] The League of Nations, with its com-

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[33] H. Butler, "Some Problems of an International Civil Service," *Public Administration Review*, 10 (1932), p. 376; N. Hill, "The Personnel of International Administration," *Pol. Sci. Rev.*, XXIII (1929), pp. 972-988; C. W. Jenks, "Some Legal Aspects of the Financing of International Institutions," *Grotius Society*, 28 (1942), pp. 87-132; C. W. Jenks, "Some Problems of an International Civil Service," *Public*

paratively large staff, evolved certain practices and provided experience for the United Nations. We have now not only the United Nations to study in this respect, but a growing number of "specialized agencies," each with its own staff and problems.

Looking back over former international bodies, and surveying those now being built, it would appear that all are being cast in a mold which provides three essential parts for each: a conference, which makes the law or lays down the policy; a permanent secretariat, which is the continuing backbone of the organization and which serves all parts of the system, both in preparatory work and in execution of decisions; and intermediate bodies which assist the policy-determining organ by advice and technical knowledge. Titles may vary, but these three structural parts seem to be usual in the international institutions of today.

Compared with National Government. It is manifest that such a system varies from, and must operate differently from, a national government. The fundamental difference, of course, lies in the fact that the international institution has little and usually no authority to act on its own; it depends upon the agreement of sovereign states, and its effort is practically exhausted in securing this agreement. There is no legislature in the United Nations, or in any of the specialized agencies, which can by majority vote impose a decision, or rule of law, upon a state which has not itself consented thereto; there is no executive branch which has authority to carry out a policy or rule once agreed upon, in the sense of requiring action, as, for example, the Treasury Department may do in regard to a citizen. The international body can only work carefully and patiently to persuade states to agree, or to carry out the agreements they have made; it has usually no authority to act independently, or to require action from its members. It must act by agreement and not by authority of law. Consequently, the larger part of its work consists in study and research, preparation for conferences, negotiation, and drafting. Negotiation on a formal scale will be carried on by the General Assembly, a Council, or conference in which diplomatic representatives of states work; but members of an international staff must also think in terms of negotiation, of working out a satisfactory agreement between states, rather than of implementing with sufficient authority the rules or policies decided upon.

Administration Review, III (1943), p. 93; E. J. Phelan, "The New International Civil Service," *Foreign Affairs*, January 1933, p. 312; C. Purves, *The Internal Administration of an International Secretariat* (Royal Institute of International Affairs, 1945); Royal Institute of International Affairs, *The International Secretariat of the Future* (London, 1944); E. F. Ranshofen-Wertheimer, *The International Secretariat* (Carnegie Endowment, Washington, 1945); same author, "International Civil Service of the Future," *Int. Con.*, No. 418, February, 1946; T. A. Sumberg, *Financing International Institutions.*

See also Chapter 14, *infra*, on Specialized Agencies, especially the last paragraph.

Whereas a national administration is part of the executive branch of the government, there is no executive branch in international government. International administration stands alone, with no cabinet minister at its head; it receives its instructions directly from the diplomatic (rather than legislative) action of the organs which direct policy. It is the only permanent part of the system, and its staff members are the only persons who represent the community of nations and who are exclusively devoted to upholding the international viewpoint. The Staff Regulations of the League of Nations Secretariat said:

> The officials of the Secretariat of the League of Nations are exclusively international officials and their duties are not national, but international . . . They may not seek or receive instructions from any Government or other authority external to the Secretariat of the League of Nations.

Similar words were put into the Charter (Article 100) of the United Nations. This does not mean that an employe of the United Nations is deprived of his national citizenship, or even of his national loyalties; on the contrary, the organization will profit the more if he maintains his national connections and loyalties and can interpret them in regard to particular problems. Nor does employment in such an international staff mean lack of patriotism; it can and should indicate a belief that the interest of his own nation will be promoted through this international action.

It is easier for a citizen of Iowa, holding a federal job, to think in terms of national rather than of state loyalty, than for a citizen of the United States, holding a United Nations job, to think in terms of international rather than of national loyalty. The selection of a staff and the education of that staff in its different type of duties and loyalties is thus one of the primary functions of an international administrative body.[34] The characteristics required vary somewhat from those needed in a national administrator; indeed, the type of work, the uncertainty and delay in the making of policy, the patience required, may prove so trying that a staff member must have a strong conviction as to the importance of the work he is doing.

Recruitment. The national recruiting officer can draw upon a reservoir of persons who speak the same language and have a homogeneous background of political tradition and training. He can offer positions with assurance that they are permanent, perhaps life appointments. The personnel officer of United Nations or of other international institutions must struggle with polyglot tongues, diverse political and social backgrounds,

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[34] See *The International Secretariat of the Future* (Royal Institute of International Affairs, 1944), pp. 17-23.

and varying degrees of education and training. He can not offer such assurance of a continuing post; that will remain speculative for some years to come. He must deal with varying standards of living which make a reasonable salary schedule difficult to achieve; and he must worry about the expense and time to be allowed for long vacation trips, to make up to some extent for the sacrifices of expatriation. He must arrange for an unusual amount of overtime, for when conferences or organs meet, the important officials who come will rush through their work, crowding the staff severely. Transfers, offering opportunity for advancement, have not been so easy between international bodies as between departments of a national government. As in the American federal system, the matter of geographical, or national, distribution must be taken into account. This is necessary because of national pride, far more important in a system in which all depends upon agreement between nations; but it is desirable also to enable the international body to maintain contacts with and understanding of its variegated and distant members. National pride produces a particular difficulty with regard to the higher posts; the League of Nations was unable to eliminate certain such posts because the larger Powers insisted upon holding high offices.[35] National representation is desirable, but it is uncertain where to draw the line between it and efficiency. It is especially important, in an organization which must depend for all its activities upon satisfying its members, that there be liaison with the various nations and an effective public relations service. The former is to some extent handled by the practice, developed under the League of Nations and continued under United Nations, of permanent national delegations established at headquarters.

Budgeting. An international institution has no power of taxation and usually no source of income except from contributions voluntarily made by members; if these contributions do not arrive, there is no means of collection, no penalty available. The Assembly which appropriates money is not long in session and, if money runs short, it is not there to provide a deficiency appropriation. As a result, the institution must overbudget in order to be able to meet emergencies. Where the unanimity rule applied, one vote was enough to wreck the legal financial basis of contribution, and international institutions operated under a sort of gentlemen's agreement that they would pay even in the face of such an adverse vote. No such problem faces a national financial administration.[36]

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[35] Report of the Committee of Thirteen, *11th Assembly, Minutes of the Fourth Committee*, p. 299.

[36] Sir H. Ames, *Financial Administration and Apportionment of Expenses*, L. of N. Doc., Information Section, 1923; C. W. Jenks, "Some Legal Aspects of the Financing of International Institutions," *Grotius Society*, 28 (1942), p. 87.

OTHER PROBLEMS. Another problem of some difficulty is that of languages. Aside from the necessity of maintaining a large corps of interpreters and translators, the members of the staff must be able to communicate with each other, and with others with whom they work. The drafting of documents is of a different order from drafting orders in a national administration. In many respects (such as planning, accounting, budgeting, purchasing), the work is very much the same as that of a national administrator; but a good national administrative servant is not necessarily a good international one.

UNIFIED CIVIL SERVICE. The existence of the various specialized agencies, with staffs of similar type, raised questions as to common standards for personnel and their treatment. The Secretary-General of the United Nations has been authorized by the General Assembly to establish, after consultation with the heads of the specialized agencies which had been brought into relationship with the United Nations, an International Civil Service Commission to advise on recruitment and common standards.[37] A new field of professional opportunity is thus being opened to students of international affairs.

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[37] *Resolutions of the General Assembly,* No. 13 (I), p. 15. See also the *First Report of the Advisory Group of Experts on Administrative, Personnel and Budgetary Questions,* to the Secretary-General of the United Nations (March 8, 1946), and *Report of the Secretary-General,* U.N. Doc. No. A/65 (30 June 1946), p. 55.

CHAPTER 8

INTERNATIONAL LEGISLATION

§ 51. The Modern Problem.—The sources of international law, as we have seen, are custom and treaty and, behind these, the "general principles of law recognized by civilized nations." Custom, in spite of its enormous importance, is not easily ascertainable as new law. At what point it crystallizes into law is hard to determine; as to this, and also as to the general principles of law, judges must decide. In the *Paquete Habana,* Justice Gray spoke of a custom going back for centuries; in the *Scotia,* the consent of thirty states was mentioned. But not all customs require centuries for their establishment;[1] and it is doubtful whether the specific consent of thirty states to any customary rule of law could ever be shown. The judge must decide according to his idea of the consensus of opinion, rather than by the number of years or the number of states. Custom is not a satisfactory process for making new law.

As the need for new international law increased in many fields, means were sought by which this law could be more readily made. There could be little advance, however, for states still clung to the theory of consent, and subordinated any formal method of legislation to the rules of equality and unanimity. No legislative process can be effective when subjected to a *liberum veto;* and nations were slow to arrive at the stage of being willing to submit to a decision reached by majority vote. The Assembly of the League of Nations showed some trends toward legislative procedure, but it could not be called a legislature, nor can the General Assembly of the United Nations.

The treaty remained the only alternative, and upon it has fallen almost entirely the burden of making new international law. It is a vehicle which was never intended to carry such a load, and it has had to be stretched mightily to cover the legislative needs of the community of nations. A treaty which is intended to make law necessarily differs from the contractual, bilateral treaty. It calls for many signatures, and this requires, to secure necessary agreement, conferences and efficient conference methods. The

[1] It could be maintained that the doctrine of non-recognition of changes brought about by the use of force contrary to treaty (the Hoover-Stimson doctrine) became customary law within a few weeks, since it was approved by a great majority of states in the General Assembly of the League of Nations and by a conference of American republics.

drafting of such treaties is of a different type, and the securing of numerous ratifications—the evidence of the consent of the sovereign states—becomes another burden. The reservations which could be attached to a bilateral contract are annoying and destructive in a legislative act. Old rules as to interpretation or termination of treaties are inadequate for the necessary revision of legislative instruments. Questions arise as to supervision over the execution of legislative treaties, and as to their application to states which have not signed them. There has been a strong movement for the codification of international law; progress has been sought also through unification of national laws on particular subjects.

To such problems of international legislation this chapter is devoted. It will be seen that some improvement has been made, especially through the experience of organizations such as the International Labour Organization and the League of Nations. It nevertheless remains true that, in the development of international government, the legislative function has been the most backward and is now the most inadequate for the needs of the community; and this will doubtless remain true so long as states put the right of individual national decision above the right of community decision. It should be noted at this point that no people have clung more closely to this right than the American people.

It is desirable to reiterate here what has been said previously, that it has become a matter of vital importance to fit the cogwheels of the national machinery of government into the cogwheels of the international machinery. The need is particularly great in the field of international legislation, and deficiencies of this sort go far to explain the difficulties of making new international law. It is unfortunately true, at times, that national constitutions, made primarily for domestic purposes, do not provide sufficient methods by which the state can legally be bound to international agreements.[2] It is uncertain what agents are authorized to speak for the state, or how far their authority to bind the state extends. Where such authority exists, and the state accepts an obligation, machinery may be lacking by which the obligation can be put into internal effect. Even more embarrassing is the fact that the provisions of a constitution may be in direct opposition to the terms of the international agreement. In result, desirable legislation may be blocked because of the unwillingness of the negotiators to act in contravention of their own constitutions; or the agreement may be accepted and thus precipitate a conflict between domestic and inter-

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[2] The United States has found it necessary to pass several statutes in order to be able to participate properly in the United Nations. *United Nations Participation Act of 1945,* Public Law 264, 79th Congress, 1st Session; the *International Organization Immunities Act,* Public Law 291, 79th Congress, 1st Session; *Act for the Development and Control of Atomic Energy,* Public Law 589, 79th Congress, 2nd Session. See also L. Preuss, "The International Organization Immunities Act," *A.J.,* 40 (1946), p. 332.

national law; or the constitution must be amended, which is frequently a very difficult task, necessarily delaying the process of international legislation. Apart from this problem of governmental mechanics, the reluctance of states to surrender positions or principles embodied in their law must be taken into account in the negotiation of international agreements.

THE MULTILATERAL TREATY. While a bilateral agreement may sometimes contain a rule of law (e.g., for extradition), the modern development of legislative treaties has been in the direction of treaties signed by as many states as can be induced to sign. The treaties of Vienna (1815) and Paris (1856) are earlier instances of instruments including rules of law and accepted by a number of states. With the establishment of the League of Nations, the volume of such legislation increased steadily requiring seven thick volumes of compact printing. The importance of the multilateral treaty as an instrument for international legislation could not be better demonstrated than by reference to these volumes.[3]

This developing practice brings to our notice certain differences between the bilateral treaty of past use and the multilateral legislative treaty of today. The mere increase in the number of such treaties, and in the number of signatories to each, has led to improved means for making treaties. Multilateral treaties can hardly be made except in conferences and the conferences tend to adopt legislative procedure and to become periodic. The large number of signatories produces complications in the legal effect of the treaty as between the signatories and as concerns pre-existent treaties. Such a treaty is opened to acceptance by all states and signatories cannot, as in the case of bilateral treaties, choose their partners; consequently, some of the older implications of treaty-making become untenable. For example, it can hardly be maintained that signature by one party imports recognition of the sovereign independence of a state which later becomes a party.[4] Again, it may be asked whether the old rule that the violation of a treaty in one part or by one signatory invalidates the whole treaty should be applied to legislative treaties? A legislative treaty would seem, on the contrary, to imply the use of sanctions against the offender, as is done when an individual violates a domestic law. It would be absurd to abrogate a law merely because it has been broken by one of the subjects to which it applies.

While the term "international legislation" may be used in a general sense, the process is of course far from being really legislative, since a

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[3] M. O. Hudson, *International Legislation*, 7 Vols. covering 1919-1937 (Washington, Carnegie Endowment, 1931-1941). Insufficient attention has been paid by scholars to this function of multilateral treaties, and the best discussion of it is still that provided by Judge Hudson in the Introduction to the first of these volumes.

[4] The United States has, on various occasions, specified that its signature to a multilateral convention did not imply recognition of other signatories. See, for examples, Hyde, I, pp. 190-193.

treaty can bind only the parties which accept it. Some of the difficulties in this connection have been summarized by C. W. Jenks as follows:

> The requirement of ratification results in many laboriously negotiated instruments never coming into force or only coming into force after such delay and between a group of parties so arbitrary in composition that their value is greatly limited. It often happens that an instrument is brought into force only by allowing the parties to make reservations of so far-reaching a character that the instrument loses most of its value. The fact that instruments are binding only upon the parties . . . is doubly disastrous in its consequences in that it both accentuates the difficulty of bringing instruments into force and places quickly reached limits of effectiveness once they are in force for certain parties. The traditional conception of international instruments as creating relations between States alone is a fertile source of difficulties; it . . . limits the extent to which the provisions of instruments enure directly to the benefits of the individuals in the interest of whom they are frequently intended. There is often no provision for any organized international supervision over the application of the instrument . . . the position as regards the termination and modification of instruments is in very many cases quite unsatisfactory.

Mr. Jenks goes on to say that many of these weaknesses could be eliminated by the inclusion of appropriate provisions when the treaty is drafted, and therefore urges strongly an international legislative drafting bureau such as is nowadays provided for various parliamentary bodies.[5]

The purpose of the legislative treaty is not to make a bargain, as has usually been true of treaties in the past, but to state a rule. Its terms are general rather than specific. In its making, in its range of incidence, and in the general interest in its enforcement, it approaches statute law in character.[6] On the other hand, in order to deserve this character, the legislative treaty should not be subject to abrogation by individual states; it should be applicable to those states which are in a minority of opposition or of inertia; and it should provide means of change, or revision.

§ 52. Conference Methods.—For purposes of treaty-making by a group of states, the conference (or congress) has long been employed by the community of nations, although the purposes of the average conference of

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[5] C. W. Jenks, "The Need for an International Legislative Drafting Bureau," *A.J.*, 39 (1945), pp. 165-166. Some writers would question the application of the term "international legislation" to such treaties. See E. D. Dickinson, "International Law: An Inventory," *California Law Review*, 33 (1945), pp. 528-532.

[6] Wright points out that "law-making treaties frequently govern the day-to-day conduct of individuals and a wide range of administrative officials. Thus their proper execution requires the continuous operation of internal law, and states have tended to follow the example of the United States in giving them automatic effect as internal law within the territory." *A.J.*, 23 (1929), pp. 98-101.

today are quite different from those of the conferences of a century ago. "On the one hand," says Dunn, "there is the traditional conception of the diplomatic congress of representatives of independent states, surviving from the time when international intercourse was chiefly confined to the relations of states as political units; on the other hand, there is the rapidly growing tendency to look upon international conferences as parliamentary assemblies, organized along the general lines of legislative bodies." [7] The conference resembles a legislative body in its purpose and output, in its composition, including technical experts and even unofficial representatives, in its increasing tendency toward periodicity or continuity, in its scientific preparation, and in its rules of procedure and voting. The vastly increased number of such conferences reveals the importance of this new legislative process.[8]

Conference procedure, however, had many defects and needed improvement. The defects were summed up by Hudson as follows:

> In the first place, it was difficult to get any conference assembled to consider possible legislation. No central authority existed to convoke it, no machinery existed to be availed of, no personnel trained in the work of such conferences was at hand. The initiative usually fell to some single state, requiring careful preliminary negotiations and involving onerous responsibilities. A restrictive agenda had to be agreed upon and seldom was the necessary preparatory work done to assure successful collaboration. When once it was assembled, the issue of a single spasmodic conference was often in doubt. Not until various unions were established, did periodicity begin to appear. Even after the inauguration of the Hague Conferences, their continuance remained very precarious; the second Hague Conference was possible only after delicate negotiations, and in spite of its *voeu* it was still uncertain whether a third conference would be held when the clouds of 1914 enveloped all international cooperation in a haze of bewildering doubt.[9]

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[7] Dunn, p. 188. He calls attention to the increasingly frequent substitution for the old diplomatic plenipotentiary of the technical expert, and even of unofficial agents. *Ibid.*, pp. 42-46.

[8] See S. E. Baldwin, "The International Congresses and Conferences of the Last Century as Forces Working toward the Solidarity of the World," *A.J.*, 1 (1907), pp. 565-578; M. Burton, *The Assembly of the League of Nations* (Chicago, 1941); R. G. Gruber, *Internationale Staatenkongresse und Konferenzen, ihre Vorbereitung und Organisation* (Berlin, 1917); N. W. Hill, *The Public International Conference* (Stanford University Press, 1929); O. Hoijer, *Les traités internationaux*, 2 vols. (Paris, 1928); M. O. Hudson, "The Prospect for International Law in the Twentieth Century," *Cornell Law Quarterly*, X (1925), pp. 436-459; J. I. Knudson, *Methods of International Legislation, with special reference to the League of Nations* (Geneva, 1928); E. Mahaim, "Les conventions internationales du travail," *R.D.I.L.C.*, 3rd Series, X (1929), pp. 697-734, XI (1930), pp. 123-146; V. D. Pastuhov, *A Guide to the Practice of International Conferences* (Carnegie Endowment, Washington, 1944); E. Satow, *International Congresses* (Foreign Office Handbooks, London, 1920).

[9] M. O. Hudson, "The Prospect for International Law in the Twentieth Century," *Cornell Law Quarterly*, X (1925), pp. 439-40.

Under the theory of consent which called for unanimity in making new law, it was impossible even with the conference to make much progress. The conference was called by an individual state, which could invite such other states as it wished, and which could set for discussion such items only as it chose to include. Other states were under no penalty or disadvantage in refusing the invitation, and they could also refuse to attend unless the agenda were adjusted to their pleasure. Diplomatic rather than technical delegates attended, under ironclad instructions framed according to national ambitions, which might easily, as in the case of the Opium Conference of 1924-1925, render the conference abortive. Small states, now for the first time admitted to the society of larger states, valiantly maintained the sovereign right of equality and the principle of unanimity. Thus the old methods were maintained in the new machinery. The conference was, as Buell puts it, regarded as "a major operation,—something to be submitted to as a last resort."

League Conference. The existence of the central machinery furnished by the League of Nations and the International Labour Organization, and the efforts which they have made, have produced many improvements. In the first place, meetings of the Council and Assembly and other organs, which must be regarded as conferences, were automatic and regular; no one state was required to take the risk of inviting a conference to assemble. If a state objected to one item on the agenda, there were many other items which it could not afford to miss. There was no problem as to what states should be invited; all Members were expected to attend, and a state could not afford to be absent. The process was impersonal and automatic, and sought the widest possible participation; thus conferences became larger and tended toward universality. Much more adequate preparation can be made through the permanent secretariats of such intergovernmental organizations, and the important prerequisite of obtaining opinions and perhaps consent of governments—a sort of preliminary negotiation—can be better handled.[10]

The permanence and continuity of the Assembly of the League, and likewise of the Labour Conference and of some Unions, made them far superior to an *ad hoc* conference, whose work is necessarily hasty and is for the most part wasted if it adjourns without having agreed upon a draft. The Assembly (and now the General Assembly of the UN) offers a test of public opinion as to whether a question is ripe for discussion. If sufficient agreement is revealed, it may refer the matter for study to a commission, or to a special committee of experts. The effort is not necessarily

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[10] As illustrating the care with which a conference was prepared by the League of Nations, see the resolution adopted by the Assembly in 1931, quoted in Pastuhov, *op. cit.*, pp. 22-23, and in *UN Doc.*, A/AC 10/5, 29 April, 1947.

ended with adjournment, as in the case of an *ad hoc* conference; it may, if necessary, be carried on from year to year until it reaches fruition. The continuity provided by permanent machinery is of the greatest importance. If the Assembly fails to reach agreement, its work is not wasted, for it will meet again and build upon what it has already accomplished. There is no problem as to whether states which have sent delegates to one conference will do so for the next one, for Member states send delegates regularly. The membership is a fixed one, which can grow in experience, and which does in fact act under rules of procedure which more nearly resemble a parliamentary body than the old diplomatic conference. Nor does it have to await the pressure of a crisis to be summoned; it is regularly in session and can take up difficulties before they reach the critical state. And finally, such central machinery makes possible execution of, or supervision over the observance of, the agreements reached by the conference—something which could not well be done by the older type of conference.

International Labour Conference. The procedure for making international legislation through conferences was carefully studied by the International Labour Office. Under its procedure, a report is prepared on the subject under discussion, showing the law and practice existing. This is sent, together with a questionnaire, to the governments concerned; replies are expected six months before the opening of the conference. On the basis of these replies draft conventions may be drawn up, and submitted to governments four months in advance. Sometimes the first report is discussed in one Conference and acted upon at the next Conference. The Conference decides whether to issue a treaty (convention) for ratification, or merely to make a recommendation to be adopted by states in their national legislations. Members are obligated by the Charter to submit such conventions to the authorities in their own states which are competent to deal with them. Provision is also made for watching over the observance of accepted Labour Conventions, and economic sanctions may be taken (Articles 411-420) against a state which fails to measure up to its obligations. It is probably correct to credit the International Labour Organization with the most effective methods thus far devised for the preparation and promotion of international legislation.

Ad Hoc Conferences. Numerous conferences are, of course, still held which are not the periodic meetings of the organs of an international organization. Some of these are convened by such an organ, and if so, may be prepared by it and operate under its procedures, such as the World Economic Conference of 1927. Others are called upon the initiative of a state or group of states. In the latter case, it will probably meet in the territory of the inviting state. Examples are the Washington Conference

on Limitation of Armaments in 1921-22, or the various conferences summoned after the Second World War to establish the specialized agencies. In these cases, a heavy load of responsibility rests upon the host state.

EQUALITY. The work of the international conference, and especially its legislative output, which necessarily eventuates in treaties, has long been embarrassed by the doctrine of sovereign equality.[11] It appears in various phases of the legislative process. Each state, no matter how small or how large, has claimed the same representation, the same voting power, the same right to obstruct through failure to ratify, as any other state, and this in committees as well as in plenary sessions. The principle was again sanctified in the Charter of the United Nations which (Article 2, § 1) bases the whole Organization upon the "sovereign equality" of Members. The result was insistence by the Great Powers upon a right of veto, and students are now beginning to devote attention to schemes of differential voting power as a means of circumventing unanimity, or the veto.

UNANIMITY. The rule of equality was extended into the requirement of unanimity, which means that the *liberum veto* of any one state can defeat the measure under consideration. The most famous illustration of this was the refusal of Persia to accept a resolution interpretative of the Covenant of the League for which all other Members had voted.[12] But while the rule of equality has been sacredly maintained by the small states and given lip-service at least by the larger states, in practice it has long been overridden or evaded; from the viewpoint of convenience, of common needs, of community pressure toward progress, the rule is intolerable. "Insistence upon complete equality in the constitution and functioning of an international union, tribunal or concert is simply another way of denying the possibility of effective international organization." [13] Even at the Hague Conference,

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[11] See P. J. N. Baker, "The Doctrine of the Legal Equality of States," *B.Y.I.L.*, 1923-1924, pp. 1-20; Margaret Burton, *The Assembly of the League of Nations* (University of Chicago Press, 1941); E. D. Dickinson, *The Equality of States in International Law* (Harvard University Press, 1920); J. Goebel, Jr., *The Equality of States* (New York, 1923); F. C. Hicks, "The Equality of States and the Hague Conferences," *A.J.*, 2 (1908), pp. 530-561; N. L. Hill, "Unanimous Consent in International Organization," *A.J.*, 22 (1928), pp. 319-329; D. P. Myers, "Representation in Public International Organs," *A.J.*, 8 (1914), pp. 81-108; C. A. Riches, *The Unanimity Rule and the League of Nations* (The Johns Hopkins Press, 1933); C. A. Riches, *Majority Rule in International Organization* (The Johns Hopkins Press, 1940); Sir J. F. Williams, "The League of Nations and Unanimity," *A.J.*, 19 (1925), pp. 475-488.

[12] It should be noted, however, that in accordance with the practice of the Assembly the President declared that the resolution was not rejected, since the Assembly had not voted for the contrary interpretation—a procedure which illustrates the means found to evade the destructive effects of the doctrine of equality. *Records of the Fourth Assembly* (1923), Plenary, p. 86.

[13] Dickinson, *Equality*, p. 336. "If, then, the world is ever to reorganize itself for the peaceful regulation of international affairs, that organization must provide for the essential inequality of states." L. S. Woolf, *International Government* (New York, 1916), p. 120.

of which it was boasted that the doctrine of equality had achieved a great triumph, the Powers had their way. "It is abundantly clear," says Scott, "that the delegations at the Hague did not and could not possess equal influence in framing the conventions, and that, notwithstanding the principle of legal equality, the larger States either forced their views upon the Conference or by their opposition prevented an unacceptable proposition from being accepted." [14] The fiction of "quasi-unanimity" was developed, by which a majority of votes was treated as unanimity. In the minutes of the Second Conference there is recorded: "adopted unanimously with the exception of two votes (United States and Great Britain) and one abstention (Portugal)." A majority vote allowed a proposal to be recorded, even if not passed, and thus brought it to the attention of the world.

In Public Unions. In many other ingenious ways the effort to avoid the obstructive effect of the doctrine of equality may be seen. It appears, in the first place, as to representation. In the Public Unions, regarded usually as politically unimportant, concession has been made to the greater importance of some states. Thus, in the Postal Union, the participation of colonies gives six votes to Great Britain, four to France, three to Germany, and two to the United States. Or, as in the case of the Institute of Agriculture, membership was classified, with a different number of votes assigned to each class. States may be assigned to a class, or may choose it, paying a proportionate share of the expenses; or the class may be determined by railway mileage, population, commercial importance, or other measure. In many of the Unions or commissions a majority vote prevails on procedural matters, and in some cases for fundamental changes. The Sugar Commission, as has been seen, could by majority vote compel a state to change its tariff laws. The governing body of the Postal Union acts upon majority vote, and such a decision of its Congress must be put into effect at once by Postal Administrations without awaiting ratification. In the Institute of Agriculture, two-thirds of the membership constituted a quorum, and its decisions bound absent members. By the Convention of Air Navigation in 1919, five votes were assigned to each of the five Great Powers and one each to other states, with the specific intention of giving control to the Powers, a majority being sufficient for action. The Committee of Jurists, for the codification of international law, which met at Rio de Janeiro, acted upon a two-thirds vote.

In the League of Nations. At the Peace Conference at Paris in 1919, the Powers who had won the War took complete charge. A distinction was made from the beginning between the Principal Allied and

[14] Quoted in Dickinson, *Equality*, p. 290, note 2. He calls attention in the pages following to the reaction against the principle of equality as employed at the Conference.

Associated Powers and other states. The five Great Powers controlled everything; others were permitted to participate only in so far as their interests were involved. To each of the five Great Powers were apportioned five delegates; to Belgium, Brazil and Serbia, three each; one or two each to others. These arrangements, as well as the rules of procedure, were established by the five Great Powers in advance of the meeting. All chief officials came from these five states and they held a majority in each committee. The usual rights of equal states were completely disregarded. The treaty of Versailles was put into effect, for example, in the face of China's refusal to sign. To criticisms of such methods the reply is that so vast a task could never have been accomplished if homage had been paid to antiquated methods based upon sovereign rights.

While Article 5 of the Covenant of the League of Nations provided for unanimity except where otherwise expressly stated, in practice there were many exceptions to the rules of equality and unanimity. Aside from such extrinsic forces as the disinclination to be found in a small minority and the desire to cooperate, there was a sort of gentlemen's agreement not to count abstentions as negative votes, thus making it possible to secure unanimity without consent having been given. Some highly important exceptions were made by the Covenant itself, which could be amended by a majority of states in the Assembly including the states represented on the Council.[15] Thus the rule of unanimity itself could be changed by a majority vote. In the International Labour Organization, by Articles 402 and 405, of the Treaty of Versailles, items may be added to the agenda and draft conventions or recommendations may be made by a two-thirds vote of the Conference. The Treaty of Versailles itself, as regards its labor clauses, may be amended by a two-thirds vote of the Conference, including the unanimous vote of the members of the Council of the League of Nations (Article 422).

United Nations. The United Nations Conference on International Organization at San Francisco was summoned by the Four Powers, who admitted equality of voting in principle but nevertheless accomplished their desires by sheer force of power, to which other states submitted. The rules of procedure of the Conference provided for decisions by a two-thirds majority; and the rule of unanimity was abandoned for all organs of the new United Nations. It should not be forgotten, however, that such decisions (except in the Security Council) do not bind members, and that ratification is still required for this purpose. In the meetings for making

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[15] Howard-Ellis lists 10 such exceptions, p. 124; Buell gives 7 for the Assembly and 13 for the Council, p. 668; Hill, p. 192, and in *A.J.*, 22 (1928), p. 327, note 33, gives the same list; Sir John Fischer Williams lists 12, and suggests a number of others, *A.J.*, 19 (1925), pp. 485-487.

the peace settlement, the participation of smaller states has been much more limited by the Big Five.

§ 53. The Problem of Ratification.

SIGNATURE. Thus the rule of unanimity, one of the chief embarrassments in international legislation, is being steadily hewed down, in so far as representation and voting in conferences is concerned. But the work of the conference is, after all, only tentative. If agreement is reached, a treaty is signed; but it must still be ratified. The modern significance of signature is somewhat uncertain. Apparently, it means nothing more than agreement upon a definite text, together with a willingness to submit this text to the government for consideration as to ratification. It certainly implies no obligation to ratify, but it perhaps means that ratification can be given later only to the text signed. It is a preliminary, and far from final, expression of the willingness of the state to be bound.

FAILURE TO RATIFY. But it is in the process of ratification, where the will of the sovereign state is finally expressed, that the chief difficulty is found. It has often been true that multilateral treaties, duly signed by delegates having plenipotentiary powers, have failed to secure enough ratifications to go into effect.[16] By 1930, there were still sixteen states which had signed conventions at the Second Hague Conference but had failed to ratify a single one of the treaties they had signed; indeed, none of the fourteen conventions there signed was ratified by all of the states which had signed them.[17] The most remarkable example, perhaps, is that of the famous Geneva Protocol, which was unanimously adopted by the Assembly, actually signed by nineteen states, and ratified by none.[18] Many treaties have had to wait for years before securing enough ratifications to

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[16] The number of ratifications required to put a treaty into effect varies, and is usually stated in the treaty. A disarmament treaty, for example, would probably require the consent of all states at the conference. In other cases, the treaty may go into effect as soon as any two states have signed, others having the right to add their ratifications later. The irregular process of ratification accounts for the custom of giving to a treaty its date of signature rather than of ratification. See McNair, Chaps. VII and VIII.

[17] M. O. Hudson, "Present Status of the Hague Conventions of 1899 and 1907," *A.J.*, 25 (1931), pp. 114-117. See also Dickinson, *Equality*, p. 284; Hill, p. 215.

[18] According to a Chart prepared by the Secretariat of the League of Nations, *Table Showing the State of Signatures, Ratifications and Accessions in Agreements and Conventions Concluded under the Auspices of the League of Nations up to September 1, 1930* (1930. V. 18. Table 1). Over half of those who could have ratified the treaties before them had not acted at all with regard to them. For the Twenty-first List of this kind, see *Official Journal*, Special Supplement No. 193 (July 10, 1944). A supplement dated July 31, 1946 brings the record up to the end of the League. *Ibid.*, Special Supplement, No. 195.

The International Labour Conference had adopted, up to 1939, sixty-seven conventions. About a dozen members had failed to ratify all of them, and another dozen had ratified less than ten. *Constitutional Questions* (ILO, Montreal, 1946), p. 195.

For Latin American treaties, see the Chart issued by the Pan American Union, *Status of the Pan American Treaties and Conventions* (Washington, 1947).

ensure validity. Latin-American states have been amazingly negligent. What makes such procedure the more exasperating is that it may not be known whether the failure to act is due to rejection of the treaty, or to mere indolence, or to parliamentary or other complications.

Accession. Modern practice provides for accession, or adhesion, by states, that is, for deposit of an instrument of acceptance which may be equivalent to both signature and ratification. Thus a treaty which has been ratified and is in effect may be opened to adhesion by other states; or a treaty which has been adopted in a conference (such as the Assembly of the League) could be opened to adhesion by any state, and go into effect as soon as it has received a stated number of accessions. The machinery of the League of Nations made this procedure especially convenient; and it was followed in the making of many modern treaties, such as the Pact of Paris. Accession may be accomplished through another treaty; by declaration followed by acceptance, both ratified, as in the case of the Acts of the Congress of Vienna in 1815, or the Telegraphic Union in 1865; or by unilateral notification to a Power designated for the purpose, as was done in Article 3 of the Pact of Paris. For League of Nations treaties, accessions were deposited with the Secretariat. This procedure has the advantage of making it possible for states not represented at the conference to accept the treaty, and thus widen the range of the application of the treaty. Accession under such conditions should be equivalent to ratification, but some states have, in recent years, made a practice of acceding *ad referendum*. The utility of ratification after accession is not apparent.[19]

League Proposals. The delays and deadlocks in putting a treaty into effect led the League to make a special study of the problem. The Committee appointed for this study accepted the principles that "the signature of an international convention on behalf of a country indicates an intention on the part of the Government of that country to make a fresh examination of the question with a view of putting the Convention into force as far as it is concerned"; and that, on the other hand, the interests of other contracting parties require that they know what is to be the fate and the territorial scope of the agreement. From a survey of the efforts made by the League, it concluded that League treaties were better ratified than treaties made outside the League. As means of improving the situation for the future it suggested that states be requested annually to give reasons for

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[19] A Resolution of the 8th Assembly said:

"The procedure of accession to international agreements given subject to ratification is an admissible one which the League should neither discourage nor encourage.

"Nevertheless, if a state gives its accession, it should know that, if it does not expressly mention that this accession is subject to ratification, it shall be deemed to have undertaken a final obligation. If it desires to prevent this consequence, it must expressly declare at the time of accession that the accession is given subject to ratification." L. of N., *Records of the Eighth Assembly*, Plenary, p. 141.

failure to ratify; that more preparatory work is needed, and that states should be educated to their responsibilities in the matter; that there should be a pledge, in accordance with the practice of the International Labour Office, to submit the treaty for approval by the proper authority within eighteen months; that another conference be called to consider the problem and make changes where a treaty is inoperative through lack of ratifications; that the time limit for signature be reduced; and that in some technical agreements ratification is not necessary at all.[20]

I.L.O. Procedure. Such conservative suggestions were characteristic of the cautious steps necessary in dealing with sovereign states. The International Labour Organization, more concerned with humanity than with sovereign states, has gone further. The International Labour Office does the preparatory work and presents a draft treaty for consideration by the Conference. When the Conference adopts a draft convention or a recommendation by a two-thirds vote, all member states are obligated, by Article 405 of the Treaty of Versailles, to submit it to "the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action." Thus, in the procedure of the Labour Organization, signature becomes a mere formality, or rather a collective act. A member state may be required to submit to its constitutional body a treaty which it has not been willing to sign, thus giving to the legislature (which is usually the competent authority) a chance at a treaty which the executive may never have been willing to negotiate. The rule of the majority here binds even those who do not sign.[21]

A Proposal to Assume Ratification. Mr. Philip Noel Baker has suggested the adoption of a rule that ratification be assumed on the part of a state which has signed, or in the case of a treaty which has been adopted by majority vote in the Assembly, unless the treaty is specifically rejected within a fixed period of time.[22] The effect of such a procedure

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[20] The Committee gives as reasons for the delay: (1) the complicated machinery of modern government; (2) shortage of parliamentary time; (3) necessity of new domestic legislation to put treaty into effect; (4) difficulties discovered after signature; (5) interdependence with other international instruments.

This Committee reported that out of 39 League treaties, 26 were in force; and that 552 ratifications had been received while 553 signatures remained unratified. This was characterized as "not discouraging." The Committee's report is found in L. of N. Doc., 1930.V.11.

A number of steps to encourage ratification were taken by the League, such as publishing an annual statement of the extent to which various Conventions had been accepted, instructing the various committees to keep track of treaties within their fields, and provisions in individual conferences for action to be taken.

[21] See Mahaim, *op. cit.*, *R.D.I.L.C.*, 3rd Series, X (1929), pp. 697-734, XI (1930), pp. 123-146; I. Morellet, "At Which Moment Do the International Labour Conventions Become Applicable?" *International Labour Review*, XVI (1927), pp. 755-772; R. Telsik, "Ratification of International Labour Conventions," *International Labour Review*, XVIII (1928), pp. 714-730; F. O. Wilcox, *The Ratification of International Conventions* (London, 1935).

[22] P. J. N. Baker, *op. cit.*, *B.Y.I.L.*, 1924, pp. 62-64.

would be to put the burden of action upon the signatory states and to compel them to accept the responsibilities and duties of joint action within the community of nations. The sovereign right to refuse ratification would not be denied; a state would be compelled only to express an opinion. This does not seem unreasonable. Indeed, in such a society of voluntary cooperation as we now have, the most effective means of securing the attention to community business necessary for its advance is to provide an automatic penalty for failure to attend to that business. But nationalistic particularism is as yet too strong to hope that this proposal may be adopted at any time soon; and there is also an undoubted difficulty to be found in the variegated constitutional provisions within different states for the making of treaties. The most significant statement made by the Special Committee which investigated the problem was this: "The existence of a considerable number of international conventions constitutes today a permanent and regular feature of international life, and it is to be hoped that States will gradually adapt their administrative machinery and parliamentary procedure to the requirements of this situation which is still comparatively new." [23] Each constitutional system has grown up in its own way, but, as has been observed above, the integration of international society now demands a reshaping of that part of the internal machinery which must fit into the cogwheels of international government.

Ratification Not Required. Finally, it is to be noted that, in the case of some agreements, it is possible to dispense with ratification entirely. This has been done in the case of some bilateral treaties, and much of the progress accomplished in the administrative Unions has been in this fashion. Dunn observes that of the nine instruments adopted by the Barcelona Conference only three required ratification, and that the rules of organization of the General Conference and of the Permanent Advisory and Technical Committee, "which in reality form the constitution of the Communications and Transit Organization," were among those adopted without ratification.[24] It is often possible for governments to conclude agreements of technical or other character for which there is no constitutional requirement of ratification. An example was the Agreement concerning Transit Cards for Emigrants, of June 14, 1929. The League Committee above quoted recommends that "whenever the character of the contemplated agreement permits of the adoption of this procedure, it should be adopted, since, *ab initio*, it avoids the difficulty created by delays in ratification." [25]

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[23] *Report of the Committee, Appointed to Consider the Question of the Ratification and Signature of Conventions Concluded under the Auspices of the League of Nations,* 1930.V.11., p. 4.

[24] Dunn, pp. 184-185. See also Wilcox, *op. cit.*, note 21, *supra.*

[25] See the document cited in note 20, *supra,* at p. 6.

§ 54. Reservations to Multilateral Treaties.[26]—If the necessity of ratification involves embarrassments, it must be said that international legislation is even more complicated by the possibility of reservations. Individuals are not permitted to say, concerning a domestic statute, that they individually refuse to accept it or that they accept it with reservations; but a state may insist, with regard to a legislative treaty, that it shall not be bound by such legislation except under reservations imposed by it. It may be argued that since a state is free to reject the treaty entirely, it may accept the treaty under such conditions as pleases it; but this, in the case of the modern legislative treaty, does not take into sufficient account the position of the other signatories. The reservation may, if accepted, deprive other signatories of the particular advantages which induced them to accept the treaty. Marjorie Owen remarks (perhaps with some exaggeration), "Signatories may claim the moral advantage of a treaty while obviating all burdensome obligations by a timely reservation." [27] A treaty presumably states a common purpose, but reservations may completely destroy this unity of view. Legislation is far from real when its subjects are free to accept only such parts of it as they care to.

Confusing Effects of Reservations. A reservation is a complication at any time; it appears at its worst in a treaty which has already come into effect upon a certain number of signatures, but remains open to the adhesion of other states. The time elements thus introduced produce many interesting questions as to the legal relationships between the various signatories. If state A and state B have signed and ratified a treaty and thus put it into effect, and then state C ratifies with a reservation, are A and B obligated to submit to this reservation? If so, can A and B withdraw from the treaty if they object to the reservation? Conversely, if state A, one of the original signatories, makes a reservation accepted by state B, is state C, who signs it later, bound by this reservation, or can C sign the treaty later and hold A to the original meaning of the treaty exclusive of A's reservation? or is C simply excluded from participation in the treaty so long as C objects to A's reservation? More generally, if state A signs with a reservation, how does this affect state B who has already signed, or state C who signs later? And does a reservation accepted by some states and rejected by others destroy the whole treaty, or merely affect relations between

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[26] As to this problem, see G. G. Fitzmaurice, "Do Treaties Need Ratification?" *B.Y.I.L.*, 1935, p. 28; D. F. Fleming, *The Treaty Veto of the American Senate* (New York and London, 1930); Hyde, II, § 519A; H. W. Malkin, "Reservations to Multilateral Conventions," *B.Y.I.L.*, 1926, pp. 141-162; McNair, Chap. IX; D. H. Miller, *Reservations to Treaties, Their Effect, and the Procedure in Regard Thereto* (Washington, 1919); M. Owen, "Reservations to Multilateral Treaties," *Yale Law Journal*, XXXVIII (1928-1929), pp. 1086-1114; William Sanders, "Reservations to Multilateral Treaties at Ratification or Adherence," *A.J.*, 33 (1939), p. 488.

[27] Marjorie Owen, *op. cit.*, *Yale Law Journal*, XXXVIII, p. 1087.

certain pairs of states, and if so, which pairs? Could the original signatories, whose ratification put the treaty into effect, state a rule, reserve themselves out of certain applications of it, and by denying later reservations make the whole rule effective upon states ratifying later?

These are not merely academic questions—they appear in practice. Thus, in order to settle the problem of the adherence of the United States to the Permanent Court of International Justice in accordance with the reservations which she attached to her adherence, the original signatories were forced to hold two international conferences, and no final decision was ever reached. Perhaps the best illustration is to be found in the Pact of Paris of 1928. This treaty came into effect upon ratification by the fifteen original signatories, several of whom accompanied signature with various restrictive statements. Other states accompanied their accessions with similar restrictive statements, and Russia declared that she refused to accept certain of the original restrictions. What, then, is the technical legal status of the Pact? Is it valid between any states, without agreement among all parties? If so, between which states and to what extent? It is doubtless more desirable to have a state agree to a treaty under conditions than to have it entirely dissociated from the common effort. However, the general rule appears to be established that reservations depend upon the consent—or, at any rate, the failure to protest—of the other signatories. Reservations may be made at any point in the proceedings: at the time of signature; at the time of ratification; even at the time of accession. In the first situation there is excellent opportunity for the consideration and acceptance of reservations by other signatories; and it may be assumed at this point that if no objection is raised, there is no objection.

Since, in principle, the consent of all signatories must be obtained to any reservation, a reservation offered after signature should be submitted to all signatory states for approval. If reservations are attached at the time of ratification, entirely new points of view may be introduced. The Senate of the United States has shown much resourcefulness in this respect.[28] Since ratifications come in at different times, there is no opportunity to compare their effects except by the government whose duty it is to receive them; and that authority should not accept the deposit of a reservation unless the consent of the other signatories has been obtained. A reservation offered with an accession to a multipartite treaty should have received the consent

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[28] Various estimates have been offered as to the number of reservations made by the Senate. See *Cornell Law Quarterly*, V (1920), p. 247; *F.P.A.*, 1928, No. 16; *Yale Law Journal*, XXXVIII (1928-1929), pp. 1091, 1096-1097. Reference has been made (note 33, p. 154, *supra*) to the fantastic proposals for reservations which have appeared in the Senate. None, however, can equal the effective reservation offered by Salvador to the Convention on Treaties signed at Havana, February 20, 1928: "The delegation of Salvador not only casts its negative vote to Article 13, but it also votes against the convention and does not sign it." This is headed "Reservation of the Delegation of Salvador." *A.J.*, 22 (1928), Supplement, p. 142.

of all those who have previously ratified or adhered; apparently it should have the approval also of those who subsequently adhere.

Attempts to Control Reservations. The importance of this problem has led to its study by the International Labour Office, which proposed to prohibit all reservations to Labour Conventions; and also by the League of Nations, whose Council referred it for study to the Committee for Progressive Codification. The Committee reported that a signature after the treaty had gone into effect was only an accession, and could modify nothing in the treaty. The Council approved this view, but recommended also the procedure adopted by the Conference on Customs Formalities at Geneva in 1923. This Conference considered the reservations offered, accepted them conditionally, and provided that future reservations might also be accepted if approved by the Council after consultation with the technical body mentioned in Article 22 of the convention.[29] The Conference for the Abolition of Import and Export Prohibitions and Restrictions at Geneva in 1927 provided for what was in effect a reassembling of the Conference at a later date to determine when the Convention should come into effect and what reservations could be accepted. In other cases, permissible or prohibited reservations have been stated in the instrument itself.

Thus, as slowly as nations can be induced to move toward cooperation, the problem is being worked out. A treaty is supposed to express a common purpose, expressive, in the case of legislative treaties, of a rule for the community; consequently, the effect of a reservation is to start the treaty-making process over again, for it is a fundamental principle that the treaty must have the consent of all parties. It is conceivable that, because of constitutional or other exigency on the part of a state, it may feel obligated to make a reservation as to some particular provision of a treaty, one which is acceptable to other states, but there should be a limit upon reservations which affect the nature of the treaty. In any case, reservations are an evil which must be put under control; otherwise, international legislation, in the sense of rules applying equally to all, will be impossible until this evil is regulated.

§ 55. Revision of Treaties.—One further point remains to be discussed in connection with the making of legislation through treaties. The revision of treaties has long been one of the most difficult problems of international society, and it becomes pressing with the making of legislative treaties. The rule *rebus sic stantibus* has been mentioned earlier. Even if it is conceded, it offers but little in the way of a solution, for there is no method of reaching authoritative decision as to when circumstances have changed. The accepted method, if one may judge by the Russian revision of the

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[29] *O.J.*, VIII, pp. 770-772.

Treaty of Paris in 1870, is to wait until no one is in a position to oppose and then force a change. More recently China sought vainly, through legal methods, to throw off the "unequal treaties," and the revision of the treaties which make up the peace settlement of 1919 became a vital international issue.

Granted the lack of an international legislature, the problem is obviously very difficult. On the one hand, there must be a proper respect for international law and for the validity of international instruments; on the other hand, no treaty is inherently sacred, nor can it be allowed to block the evolutionary march of progress. If change is not allowed in some circumstances, it will be made by force, and public opinion will applaud. All the efforts of the Holy Alliance were unable to maintain the provisions of the Treaty of Vienna, and its efforts to maintain them filled the nineteenth century with bloodshed and controversy. But conceding that change must be permitted, what regular methods of making the change can be substituted for the old irregular ones?

Many treaties provide no means of revision; some even set no date of expiration. In either case, so long as the treaty is operative, it may be changed only by agreement of all signatories; and peculiar combinations may result when a treaty is revised by agreement of all but a few of the original signatories. Thus the Convention for the Pacific Settlement of International Disputes of 1899 was revised in 1907; the United States and France are bound to each other by the latter Convention, and are separately bound to Great Britain and Italy by the former convention, since the latter states have not ratified the Convention of 1907.

Modern treaties tend to provide themselves with means of revision. The Treaty of Versailles allowed the International Labour Organization to change Part XIII; gave the Reparations Commission wide powers; reserved authority in a number of cases, such as frontiers, to the Principal Allied and Associated Powers; and provided for the amendment of the Covenant of the League of Nations. It may be noted incidentally that the Peace Conference by the Treaty of Versailles revised a number of previous treaties, without securing the consent of all the signatories thereto.

Article 19 of the Covenant. An especial effort was made to meet the need for treaty revision by Article 19 of the Covenant of the League of Nations. This article was originally intended to be a corrective to Article 10, which was criticized as perpetuating a status quo, but became separated from it. When, in 1921, the request of Bolivia was presented that the Assembly consider her treaty with Chile, a Committee of Jurists reported upon the meaning of Article 19. They asserted that the modification of treaties was solely within the competence of the contracting parties, that the Assembly was unable to modify any treaty, and that it could advise

reconsideration of a treaty only when the conditions existing at the time of its conclusion had undergone so radical a change that it was beyond reasonable possibility to enforce it. In subsequent debates it was held that an agreement for obligatory arbitration could not be employed to compel revision of a treaty which included no means of revision; that only under Article 19 could a claim for revision be presented. At the Tenth Assembly, the Chinese delegation proposed a committee to examine the means of rendering the article more effective; but the only result was, after some opposition, a resolution conceding to each Member the right to raise the question of whether the Assembly should proceed in accordance with Article 19—a decision which may have had political, but certainly had no legal, significance.[30]

The Charter of the United Nations makes no effort to solve this problem, and revision of treaties is found only by implication in Article 14.

I.L.O. In the International Labour Organization much more study has been given to the problem. It was originally said that the Governing Body should report as to the need of revision every ten years. Did this mean to wait ten years, or to report within ten years? The procedure seems to be that the Governing Body will decide whether or not to put revision of a convention upon the agenda of the Conference; and the Conference can add others only by two-thirds vote and by postponing discussion until the following year. There are other difficult questions, such as whether revision may be partial or total, and whether revision abrogates previous conventions, or leaves both new and old in existence and perhaps in conflict. The Labour Organization has made advance in securing discussion and even revision, but it has also realized that there is as much danger in instability due to periodic revision as in the lack of opportunity for revision.

In the past it has been true that the use of force—war—was not illegal. It was, therefore, proper to change by force a treaty extorted by force—or any other treaty. Today, as the gaps in the barriers against war are being closed, even this unsatisfactory means of treaty revision is being eliminated. Unless some other and better means can be supplied, unjust treaties must continue to be unjust. In such a situation respect for law is difficult to maintain. Provision for the revision of unjust laws or conditions is a vital part of any governmental system.

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[30] The bitter struggle over revision of the Peace Treaties was mostly responsible for the inability to make use of Article 19. As to Article 19, see Goellner, *La révision des traités sous le régime de la Société des Nations* (Paris, 1925); Ray, *Commentaire*, pp. 559-567; *Records of the Second Assembly* (1921), Plenary, p. 466; *ibid.*, Fifth Assembly (1924), Third Committee, p. 202; *ibid.*, Tenth Assembly (1929), Plenary, pp. 177-178.

§ 56. Codification of International Law.[31]—The word codification usually implies a legislative act, systematizing existing law, correcting defects and inconsistencies, and filling in gaps in order to secure a complete and correlated code of law upon the subject. Internal codification, difficult as it is, is probably simpler than the codification of the law of nations. The state has a legislature with power to act, known rules of law, courts to interpret them and, behind all, the pressure of the needs of national unity. In international law, the first problem is to ascertain and secure an agreed statement of existing rules. International law does not have unified action behind it, nor a central legislative authority to edict the new code; on the contrary, each state must be induced to give its consent, and reasons of national pride or political exigency may cause refusal. International law does not have behind it so much of precedent and experience as does domestic law. Indeed, its codification calls for formal agreement upon fundamental principles, never yet given by the entire community of nations, and the grouping of rules under these principles. The codification of international law, if it means anything at all, means systematic legislation.

As to the value of codification, a controversy of long standing is still being waged, though the needs of international society have pushed aside objections to the only process through which, it would seem, its law can be brought up to date. The historical school argues that to write out the law in statute form arrests the natural growth of the law and petrifies it—an argument which unnecessarily assumes that the written law is immutable. The argument that exact statement of the law leads to interpretation by the letter rather than by the spirit of the law would attach to any written law. Even under the rigid written Constitution of the United States there has developed a far-reaching unwritten constitution, which at times nullifies the written instrument. As de Visscher observes, men will never be content to be carried along in such an unknown current as the evolution of customary law. And aside from the customary development which affects written law, there is always the possibility of revision.

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[31] As to codification in general, see P. J. N. Baker, "The Codification of International Law," *B.Y.I.L.*, 1924, pp. 38-65; J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtbuch dargestellt* (Nordlingen, 1868); J. Constantinoff, *La codification du droit international et l'unification législative* (Paris, 1929); Ch. de Visscher, "La codification du droit international," *Hague Acad.*, 1925, I, pp. 329-455; D. D. Field, *Outlines of an International Code* (2nd ed., New York, 1876); P. Fiore, *International Law Codified and Its Legal Sanction* (English translation by E. M. Borchard, New York, 1918); M. O. Hudson, "The Progressive Codification of International Law," *A.J.*, 20 (1926), pp. 655-699; E. Root, "The Codification of International Law," *A.J.*, 19 (1925), pp. 675-684; J. B. Scott, "The Codification of International Law," *A.J.*, 18 (1924), pp. 260-280; J. B. Scott, "The Gradual and Progressive Codification of International Law," *A.J.*, 21 (1927), pp. 417-450; *Historical Survey of Development of International Law and Its Codification by International Conferences*, UN Doc., A/AC. 10/5, 29 April, 1947.

It is argued further that codification must be by treaty, and that a treaty is a unit, so that if one part of it is violated no one is bound by any other part of it. However much this may be true of the bilateral contractual treaty, it need not be true of the multilateral legislative treaty. Provision may be made in this type of treaty for denunciation or revision of parts of it, as the Covenant of the League could be changed without affecting other parts of the Treaty of Versailles; and it should be understood that violation of the treaty, as in the case of legislative statute, brings responsibility rather than abrogation of the treaty.

It would seem a little premature to undertake codification, in the global sense of the word, and some evidence was provided for this viewpoint in the experience of the League of Nations with regard to codification. There is insufficient agreement among nations as to rules and even principles. The trend today seems to be toward the "progressive development" of international law by treaty legislation dealing with specific problems.

Unofficial Codification. The first efforts at codification were made by private individuals. It was proposed by Jeremy Bentham as part of his scheme for perpetual peace, but his own contribution was in the form of principles moral rather than legal in character. The movement really began from the impetus furnished by the code of the laws of war, drafted by Francis Lieber in 1863, for the use of the armies of the United States in the Civil War. It was remarkably successful and was widely followed, and Lieber's own interest in the development of international law led to other attempts, such as Bluntschli's famous code, which appeared in 1868. The efforts of Bluntschli, with the aid of the interest inspired by the successful arbitration of the *Alabama* Claims, led to the formation of the *Institut de Droit International* and of the Association for the Reform and Codification of the Law of Nations, now called the International Law Association. In 1872 and 1876 David Dudley Field, a lawyer with experience in codifying the law of the state of New York, published his "Draft Outlines of an International Code." Other well-known private codes are those of the Italian, Fiore, which appeared in 1889 and later in an English translation, by Borchard; of Jerome Internoscia; and of E. Pessoa.

When the *Institut de Droit International* was founded in 1873, opposition developed against any attempt at global codification. The *Institut* has among its purposes, according to its Statutes, to "give support to every serious attempt for the gradual and progressive codification of international law," and it devotes its efforts to the scientific study and statement of the law upon particular topics, which it publishes in its *Annuaire* in the form of *Règlements*. The International Law Association works in somewhat similar fashion. The American Society of International Law does not take action upon rules of law; but the American Institute of International Law

has devoted itself almost entirely to codification. A number of other organizations, such as the *Institut für Internationales Recht* at Kiel, gave especial attention to codification. In the United States, the Harvard Law School organized the Research in International Law in 1926, for the specific purpose of aiding in the work of codification undertaken by the League of Nations, and it has issued a number of Draft Conventions which are widely used.

Such work as this is of the utmost importance in the building of international law. Individual efforts such as those of Bluntschli and Fiore may be criticized as idealistic, but they must nevertheless be credited with having fixed guideposts. But where scientific study is undertaken in conference by groups of experts, not affected by political exigencies but taking into account practical needs, the work is invaluable as paving the way for official action. The vast amount of investigation necessary, and the short time which a conference has to devote to a problem, render such preliminary studies indispensable. This work can not be successfully done by the political representative sent by states to conferences; as Dr. Scott says, experience has demonstrated "that the intervention of governments through their political powers is most effective and beneficial in matters of this kind at the end, instead of at the beginning of the process." [32]

Official Codification. Until the creation of the League of Nations, attempts at codification were haphazard and infrequent. Such an effort usually resulted, at first, from an acute problem which was adjusted as opportunity appeared, at a conference probably called for another purpose. Thus the rules for fluvial navigation and diplomatic rank were adjusted at the Congress of Vienna, and rules for contraband and blockade were laid down at the Congress of Paris in 1856. In the latter part of the nineteenth century, a few conferences were called for the specific purpose of legislating on certain topics, such as those which produced the Geneva Convention of 1864, to provide better care for wounded, or the Declaration of St. Petersburg, in 1868, forbidding the use of explosive bullets. The Hague Conferences of 1899 and 1907 enlisted public interest, and were more successful. In addition to a number of Declarations, the First Hague Conference issued three conventions, one dealing with the Pacific Settlement of International Disputes, one with respect to the Laws and Customs of War on Land, and one concerning the adaptation of the Geneva Convention to naval warfare. The Second Hague Conference produced thirteen conventions, mostly dealing with the laws of war and neutrality. Such instances should probably be spoken of as legislation, rather than as codification.

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[32] Scott, *op. cit.*, *A.J.*, 21 (1927), p. 418.

Codification in the Western Hemisphere. In the Western Hemisphere a great theoretical interest had long been in evidence.[33] As far back as 1826 a congress had met at Panama, upon the suggestion of Colombia. At this congress codification was proposed, though without result. Another met at Lima in 1875, upon the invitation of Peru; and in 1888-1889 certain conventions of private international law were signed at Montevideo. In the latter year the United States, which had hitherto refrained from participation, initiated the series of Pan American Conferences. At the first, it was agreed that the time for codification was not yet ripe. It was not until the Third Conference, at Rio de Janeiro in 1906, that a Committee of Jurists was actually appointed, composed of one delegate from each member state. It approved a gradual rather than global codification. The Committee held its first meeting in 1912, dividing its work among six commissions which actually held their meetings without connection with each other, in various capitals.

The World War having interfered, the Committee was reconstituted at the Fifth Conference, which affirmed the principle that progress could be better made through the work of scientists than through diplomatic conferences and approved global codification for private international law, with separate conventions for public international law. Meanwhile, the American Institute of International Law had been created for the specific purpose of aiding in this work, and in 1924, at the request of Secretary of State Hughes, the Governing Board of the Pan American Union asked the Institute to submit projects of international law to the Committee of Jurists. Thirty projects of public international law and an entire code of private international law were ready in 1925. They were studied by the Committee of Jurists and reduced to twelve, of which, when they were considered by the Sixth Conference of American States at Havana in 1928, seven were adopted by the Conference as Conventions: The Status of Aliens; Duties of Neutral States in the Event of Civil Strife; Treaties; Diplomatic Functionaries; Consular Agents; Maritime Neutrality; and Asylum. Subsequent conferences multiplied agencies and committees, and the Mexico City Conference in 1945 reorganized them under the direction of the Inter-American Judicial Committee, which is an active working body.[34]

[33] As to codification in the Western Hemisphere, see A. Alvarez, *La codificacion del derecho internacional en America* (Santiago, 1923); A. S. de Bustamante, *The Progress of Codification under the Pan American Union* (Habana, 1926); Pan American Union, "The Codification of International Law in the Americas," Law and Treaty Series, No. 20 (1946); J. B. Scott, "The Codification of International Law in America," *A.J.*, 19 (1925), pp. 333-337; "Conventions on Public International Law Adopted by the Sixth International American Conference," *A.J.*, 22 (1928), Supplement, pp. 124-166.

[34] *Inter-American Conference on Problems of War and Peace*, Pan American Union, Congress and Conference Series No. 47 (Washington, 1945). See also Inter-American Juridical Committee, *Recommendations and Reports: Official Documents*, 1942-1944 (Rio de Janeiro, 1945).

CODIFICATION BY THE LEAGUE OF NATIONS. At the time of the creation of the League of Nations, and again during the making of the Permanent Court of International Justice, the need of codification was suggested. Even during the War there had been demands from all corners of the earth for a third Hague Conference. After the War, however, there was a reaction against the Hague system which had failed to stop the War, and the Covenant as finally adopted contained not a word as to codification. In the First Assembly a proposal to proceed to codification was halted by Lord Robert Cecil, who disliked any reference to the Hague system and who did not think that public opinion was sufficiently calm to undertake such a task. In view of the turbulent spirit in the wake of the war, it was doubtless wise to wait, as the League did, for some years.

By 1924, however, when the Swedish delegate renewed the proposal, the Fifth Assembly was ready to accept it. The Council was asked to set up a Committee of Experts for the Gradual and Progressive Codification of International Law, which was to prepare a provisional list of subjects, communicate them to members, study their responses, report to the Council upon the topics which seemed sufficiently ripe, and upon the preparation for conferences to consider them. This Committee assembled first in 1925 and selected several topics for the study of states. In 1926 it sent out seven questionnaires and three reports, and in 1927 it issued others.[35] Thirty-nine states replied, with more or less promptitude, and their responses were examined by the Council. Upon its recommendation, the Eighth Assembly approved the appointment of a Preparatory Committee for the Conference, which had meanwhile been invited by Holland to meet at The Hague. Three subjects were selected for the consideration of this Conference: Nationality; Territorial Waters; and the Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners. The Preparatory Committee sent out a questionnaire to the governments, and upon their replies constructed Bases of Discussion rather than a draft treaty.[36]

FIRST CODIFICATION CONFERENCE. On March 13, 1930, the Codification Conference assembled at The Hague. Forty-eight states were represented and the delegates included some of the ablest international lawyers in the world. Nevertheless, it accomplished practically nothing.[37] One

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[35] These were really more than questionnaires. They were valuable scientific studies of the topic, though of varying quality, each presented by a subcommittee in which divergent views were often revealed. They are printed in L. of N. Doc., 1927.V.1. and 1928.V.4.; and are also printed in *A.J.*, 20 (1926), Special Supplement, and 22 (1928), Special Supplement.

[36] See L. of N. Doc., 1928.V.1.; 1929.V.1.; 1929.V.2.; 1929.V.3.

[37] As to this Conference, see E. M. Borchard, "'Responsibility of States' at the Hague Codification Conference," *A.J.*, 24 (1930), pp. 517-541; R. W. Flournoy, "Nationality Conventions, Protocols and Recommendations by the First Conference on the

convention covering certain questions as to conflict of nationality laws, and three protocols dealing with statelessness and military obligations in cases of double nationality, were adopted. The Committees on Nationality and Territorial Waters presented reports; the Committee on Responsibility was unable to agree even upon a report.

For this failure various reasons have been offered. It is pointed out that experience was lacking for this particular type of conference, and that too much was attempted in too short a period of time. It is apparently true that states attempted to carry on the same political maneuvers as they were accustomed to employ in other types of conference. Nationality, certainly, included many problems of a political nature, and to a lesser degree this was true also of the other subjects. There is evidence also of a lack of willingness on the part of states to make necessary concessions. A mile more or less of territorial waters does not involve the security or national honor of states; yet each state clung to the limits set by its own laws. This was true in other situations; indeed, the criterion of acceptability was often whether the proposal conflicted or not with existing domestic laws. States were apparently not ready to subordinate national laws and feelings to international solidarity as they have been forced to do in more active and pressing matters, such as health, or communications.[38]

The issue disclosed by the above experience, as to whether there should be an agreed statement of existing law or the making of new rules of law, appears again in Article 13 of the Charter of the United Nations, in accordance with which the General Assembly is to encourage "the progressive development of international law and its codification." This order of words seems to put first the making of new law, and this conclusion is reinforced by the Assembly resolution of December 13, 1946, which speaks of the

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Codification of International Law," *ibid.*, pp. 467-486; G. H. Hackworth, "Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners," *ibid.*, pp. 500-517; M. O. Hudson, "The First Conference for the Codification of International Law," *ibid.*, pp. 447-467; D. H. Miller, "The Hague Codification Conference," *ibid.*, pp. 674-694; J. S. Reeves, "The Codification of the Law of Territorial Waters," *ibid.*, pp. 486-500; J. S. Reeves, "The Hague Conference on the Codification of International Law," *ibid.*, pp. 52-57; H. A. Rolin, "Quelques observations sur la Conference de Codification," *R.D.I.L.C.*, XI (1930), pp. 581-599; M. W. Whiteman, "The Codification of the Responsibility of States," N.Y.U.L.Q.R., VIII (1930), pp. 185-237.

The reports of the Conference are found in L. of N. Doc. 1930.V.14.; 1930.V.15.; 1930.V.16.; 1930.V.17.

[38] The Conference itself recommended more preparation, and suggested: (1) that the Committee state the reasons why it considers a topic suitable for codification, and secure the views of states upon this point before a conference is called; (2) that a draft convention be drawn up beforehand by an appropriate body upon the bases of legal science and actual practice; (3) that governments should be asked for their observations upon this draft; (4) that their replies should be communicated to other governments together with a question as to the desirability of putting this draft convention upon the agenda; (5) that only such subjects should be taken up as are approved by a large majority of Powers. L. of N. Doc. Final Act, 1930.V.7., p. 18. See also the discussion in *Records of the Eleventh Assembly* (1930), pp. 211-213, 565-567; and "Observations by Governments," 1931.V.4.

"eventual codification" of international law. Sir Cecil Hurst has suggested that this type of work can not be done on an official basis, since national political motivations would influence voting; that consequently, an international group of experts should make the study and recommendations as private individuals; and that the rules or codes proposed should not be adopted in treaty form, but left to grow into customary law through acceptance by tribunals.[39] The United States proposed, in a United Nations committee, the creation of a Commission of Experts in International Law, to work for at least three years on the subject.[40]

§ 57. Unification of Private Law.[41]—Another process, connected with if not really part of international legislation, is the far-reaching movement toward securing uniformity in national legislation. The effort here is not to provide rules binding upon states, as does international public law, but to attain agreement among states so that each will enact laws within its own jurisdiction, applicable to individuals therein, in harmony with similar legislation within other states. The effort may be compared with that of the Conference of Governors who attempt to obtain uniform laws in the various states of the United States. The result is to put persons in different countries upon practically the same legal footing. When one considers the highly difficult field of Conflicts of Law—*e.g.*, the possibility of being held to be married in one state and not in another, or the validity of a contract or bill of exchange in another state—the importance of this approach is not to be minimized.

The effort to unify private law may be carried on by associations of individuals, by diplomatic conferences, or by organizations within which governments, governmental administrations, great corporations, and private individuals are all members together. The purpose and function of many International Public Unions, as we have seen, is no more than the encouragement of such uniform laws. The unification of law may result from a treaty between states; from the pressure of individual citizens or organizations within their own states, working in conjunction with similar bodies in other states; or from meetings of members of parliaments who have agreed to converge their efforts in such a semi-official body as the

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[39] Sir Cecil Hurst, "A Plea for the Codification of International Law on New Lines," *Grotius Society*, October 16, 1946. See also the paper by Yuen-li Liang, in *Proc. Am. Soc.*, 1947.

[40] U.N. Doc. A/AC.10/14, 12 May 1947.

[41] See J. Constantinoff, *La Codification du droit international et l'unification législative* (Paris, 1927); M. O. Hudson, "The Prospect for International Law in the Twentieth Century," *Cornell Law Quarterly*, X (1925), pp. 436-459; M. O. Hudson and A. H. Feller, "The International Unification of Laws concerning Bills of Exchange," *Harvard Law Review*, XLIV (1931), pp. 333-377; F. A. Mann, "The Interpretation of Uniform Statutes," *Law Quarterly Review*, 62 (1946), p. 278; J. B. Moore, *International Law and Some Current Illusions* (New York, 1924), Chap. VII, "The Passion for Uniformity"; J. B. Scott, "The Sixth Pan American Conference," *A.J.*, 22 (1928), pp. 351-362.

Inter-Parliamentary Union. In this uncharted field, the ancient distinctions between public and private law become badly tangled, but international cooperation proceeds nevertheless.[42]

ILLUSTRATIONS. One of the most important fields in which this work has been carried on is that dealing with instruments of commerce. As far back as 1874, Holland invited a conference (which never met) to establish rules as to the competence of tribunals and the execution of foreign judgments. In 1910, thirty-five states met at The Hague to study such questions as bills of exchange, and continued the work at the Second Conference in 1912, which agreed upon regulations, a treaty, and a bureau. The war broke up this program, and it was renewed in 1923 under the aegis of the League of Nations, becoming part of the vast economic activity of the League. In May, 1930, a Convention was signed at Geneva providing for uniform laws among thirty-three states as to bills of exchange. Another field favorable to the unification of law is that of maritime law, in which much successful work has been accomplished. In 1897, the *Comité Maritime International,* an association of private individuals, met at Antwerp. It has held many meetings of its own and has led to several diplomatic conferences. In 1913 the Secretary claimed that "more than three-quarters of the tonnage of the world is now regulated by uniform maritime law elaborated by the International Maritime Commission." Its work includes such matters as responsibility for collisions at sea, salvage, maritime mortgages, loans, safety of navigation, and similar matters.

In many other fields the pressure for unification is felt. In the Western Hemisphere, the Inter-American High Commission, created by the First Pan American Financial Conference of 1915, attempts to secure changes in laws, or regulations of an administrative character, which will tend to facilitate inter-American economic cooperation. In 1926-1927, upon the invitation of the Italian Government, an Institute for the Unification of Private Law was set up at Rome under the auspices of the League of Nations. Doubtless the most successful work which has been done in this field, however, is that of the International Labour Organization, which has put into effect various conventions calling for national legislation relating to conditions of labor.

CODIFICATION AND UNIFICATION. The relationship between the movement for codification of international law and the unification of national laws is uncertain. The latter will doubtless make more headway, because

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[42] In the process of codification it has sometimes been found difficult to determine whether a topic should be considered under public or private law—e.g., nationality or extradition. The movement seems to indicate that international public law and international private law are not so far apart, and that the latter as well as the former is coming to be ruled by the community of nations instead of being left to the will of states.

of the desire of states to retain control within their own hands, and also because of its especial appeal to legislative bodies, who can claim more participation and importance in such work than in that of codification. It thus represents a compromise, for, while the treaty-making authority must make the convention providing for unification, the laws must be put into effect by national legislatures. It has the further advantage that, even when efforts fail to eventuate in binding treaties, states may nevertheless adopt in their legislation the principles more or less agreed upon; and agreements may be made among a few states for this purpose if the effort fails among many. On the other hand, the method of unification does not measure up to treaty legislation for many purposes. Even under a convention, there may be room for divergences between systems of national legislation which would leave the individual under dual control. And since such laws are domestic laws, they are subject to change and to interpretation by domestic courts, which may enunciate differing views in different states. Finally, unification, like private international law in general, is defective in that there is no responsibility upon the state for its observance.

Conclusions. A great deal of international legislation has been achieved, in spite of the many anachronistic methods which still embarrass its progress.[43] While sovereignty and national pride still embarrass treaty-making, the necessities of international intercourse are slowly breaking down such obstructions. The ancient "fundamental rights" are being weakened, and new concepts based upon human needs and human rights are being substituted. The diplomatic conference is being replaced by meetings of experts. Public Unions, the International Labour Office, and the technical bodies of the League of Nations learned to work upon a scientific basis, more and more free from political prejudices. As to representation, as to efficient methods of work, as to the procedure of the community through conference, significant improvements have been noted. Majority rule has become the usual practice in conferences and international organs. In the development of international legislation, fundamental changes in the relation of the state to the community and in political theory in general can be observed. It is more and more true that the state is regarded by the individual as an agency to secure the international cooperation which he needs, rather than as a sacrosanct institution to be worshipped in itself. The Bureau for the Protection of Industrial Property, the International Labour Office, the Postal Union, become institutions of personal interest to him, and thus he is brought closer to the organization of the international community.

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[43] The seven volumes of Hudson's *International Legislation*, and the numerous volumes of the League of Nations *Treaty Series* bear witness to this statement.

Nevertheless, it remains true that in the field of international legislation the growing organization of the community of nations is at its weakest. Great improvements have been made in the procedure of conferences, but real legislation is impossible so long as each state may refuse to be found except by its own individual ratification. The warm controversy over the Nuremburg trials illustrates both the legal problem and the drastic steps to which states are forced, in the absence of an efficient system of legislation.[44] The pressure of need increases steadily, and answers will be found in one way or another; but no sufficient answer can be found until peoples become cognizant enough of this need to be willing to submit their nations to the rule of law and, where needed, to reorganize their constitutional systems accordingly.

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[44] See Sheldon Glueck, *The Nuremburg Trial and Aggressive War* (New York, 1946), and p. 118, *supra*.

CHAPTER 9

PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

If it were possible in the study of international government to follow the usual separation into legislative, executive, and judicial functions, it would be proper to devote this chapter to the international judiciary. The community of nations has developed various methods for the peaceable adjustment of differences, but not all of these can be spoken of as judicial methods. Only recently has a Court (the Permanent Court of International Justice) been established deserving of this characterization, and the phrase "judicial settlement" has been reserved to its work and that of its successor. Except for these courts, neither the League of Nations nor the United Nations has advanced much beyond the traditional principles and methods earlier developed by the community of nations for the pacific settlement of disputes. These principles and methods remain fundamental, and understanding of them, their defects and difficulties, is essential today.

§ 58. Diplomatic Procedures.—The term "pacific settlement of international disputes" was made famous by the Convention of that name adopted at the First Hague Conference and revised at the Second Hague Conference. To the problem involved, however, earlier writers on international law gave but scant attention. It was usual to include a short chapter or so in the text, by way of transition from the law of peace to the law of war, in which were discussed amicable and non-amicable modes of settlement. The non-amicable methods belong rather under the heading of sanctions and have been so treated above. They are not instruments for the determination of justice or for pacific settlement, but rather instruments for coercive action, whether just or unjust. Amicable methods, on the other hand, deserve consideration here as the current means of settling conflicts, and also, it is to be hoped, as the beginning of a much more effective system for settling disputes between nations.

Diplomacy. Always the first, and by far the most important, method of adjusting international differences is diplomacy. Foreign offices are constantly at work for this purpose, and in most cases agreement is reached if it is sincerely desired. For every case which breaks into public notice, or which calls for other than diplomatic correspondence, there are hundreds

which are settled in the ordinary daily routine of chancelleries. Such negotiations may be carried on through oral or written communications between ambassadors and foreign ministers, or they may perhaps call for an international conference, and they may eventuate in a formal treaty or in a mere exchange of notes. It has been so established a practice that the diplomatic agents of the state should first take up consideration of the problem, that it has been asserted as a rule to be obeyed. According to Hershey, "In case of a serious difference, States are bound to try this mode of settlement before resorting to forcible methods of coercion or redress." [1] Such a requirement is found in the Covenant of the League of Nations, and in many treaties calling for arbitration or conciliation, in which other methods of settlement must await the failure of diplomatic negotiations; it is restated in Article 33 of the Charter of the United Nations. The force of the rule is shown by the condemnation visited upon Austria because of her ultimatum to Serbia in 1914, which forestalled the usual methods of diplomacy for the maintenance of peace.[2]

Good Offices. "Good offices" is a term applied to the attempt of a third state to bring together two disputants in an effort to secure peaceable settlement. It is the least possible interference in a disagreement, and involves on the part of the state offering its good offices no suggestion of a solution and no participation in the negotiations through which a solution is reached. It may, however, lead to an invitation to offer a solution or to participate in negotiations, in which case the procedure is converted into one of mediation. The term is sometimes confused with the off-the-record discussion (French, *officieux*) of a matter which a state does not care to consider on a full diplomatic footing.

Mediation. Mediation goes a step further than good offices. The mediator proposes a solution, offers his advice, and in general attempts to conciliate differences. He has no right to impose his views, and the offer of mediation could therefore be regarded with suspicion before the Hague Convention for the Pacific Settlement of International Disputes elevated it to a formal and accepted method of procedure. This Convention gave to third states the right (but not a duty) to offer good offices or mediation, and the exercise of this right was not to be regarded as an unfriendly act.

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[1] Hershey, p. 458, and see Fenwick, p. 399.

[2] It may be difficult to say when diplomatic negotiations have failed. In the first *Mavromattis Case*, the Permanent Court of International Justice said that states are in the best position to judge the political reasons which may prevent diplomatic settlement. But "when negotiations between the private person and the authorities have—as in the present case—defined all the points at issue between the two Governments, it would be incompatible with the flexibility which should characterise international relations to require the two Governments to reopen a discussion which has in fact already taken place and on which they rely." *P.C.I.J.*, Series A, No. 2, p. 15; and see the dissenting opinions of Moore (p. 62) and of Finlay (p. 41).

According to Article 4, "the part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance." It was further provided that such measures "have exclusively the character of advice, and never have binding force," and that they can not interrupt any warlike measures being taken. The effort of the mediator is to reach a settlement, and it tends toward compromise rather than toward legal solution. His role is clearly not that of a judge. Neither the offer of mediation nor the proposal for solution need be accepted by either disputant. Among the numerous cases of mediation may be mentioned that of the United States and Mexico between Salvador and Honduras and Guatemala in 1906; the A.B.C. mediation between the United States and the Huerta regime in Mexico in 1914; or President Wilson's offer to the belligerents in the World War, in December, 1916.[3]

Commission of Inquiry. Another method of pacific settlement was provided by the First Hague Conference. It rests upon the theory that many disputes could be settled if the facts of the case could be established. The Hague Conference therefore recommended that, in differences of opinion as to the facts, a Commission of Inquiry should be employed to elucidate the facts—provided it involved neither honor nor vital interests. The Commission was to be set up by special agreement between the parties to the controversy, that is, after the quarrel had begun, and the report of the Commission was to be limited to a statement of the facts, and in no way have the character of an arbitral award. It leaves the Powers in controversy freedom as to the effect to be given to such statement. The method was successfully used a few years later when the Russian fleet, on its way to Japan, fired upon some English fishing vessels off Dogger Bank in the North Sea. A commission was instituted, which reported that there were no Japanese vessels among the fishing boats. Russia paid reparation to England for this unjustifiable action when the facts had thus been ascertained.[4]

Knox and Bryan Treaties. The success of the Commission of Inquiry in the above instance greatly increased interest in this method. At the second Hague Conference the six articles of the Convention dealing with this subject were elaborated into twenty-eight, but without extending its range of operation at all. The United States and Great Britain set up

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[3] As to good offices and mediation, see Fauchille, I, Pt. 3, pp. 518-531, with numerous examples; Hershey, pp. 459-461; Hyde, II, p. 1561; Moore, *Digest*, §§ 1065-1068. The Convention for the Pacific Settlement of International Disputes is found in Scott, *Hague Conventions and Declarations* (New York, 1918).

[4] On Commissions of Inquiry, see Bokanowski, *Les commissions internationales d'enquête* (Paris, 1908); A. Mandelstam, "La commission internationale d'enquête sur l'incident de la mer du Nord," *R.D.I.P.*, XII (1915), pp. 161, 531; Ralston, Chap. XXVII.

in 1909 a Joint Commission for frontiers and waterways along the Canadian boundary. In 1911, Secretary Knox negotiated treaties which provided for submission to a Mixed High Commission of Inquiry which was to make recommendations for settlement in advance of arbitration. They were a step toward changing the Commission of Inquiry into a commission of conciliation, but they were rejected by the Senate. The so-called Bryan Treaties in 1913 made much broader use of the Commission of Inquiry than had originally been proposed. They provided for permanent commissions, established in advance, to which must be submitted all disputes of any nature whatever, if diplomacy had failed, except where there was an obligation to arbitrate. A report was called for within one year, and until it was announced, there could be no war or hostilities. According to Bryan, the advantages of these treaties were that they allowed time for passions to cool and an opportunity to separate questions of fact from questions of national honor, and that they allowed time for world forces of peace to operate. The fundamental principles of the treaties were that the Commission should be a permanent one; that inquiry should be applied to all quarrels; that hostilities are prohibited for a time; and that the recommendation has only its own intrinsic merit to commend it to acceptance. The right of the commission to suggest bases of settlement is implicit in the treaties. Twenty-eight such treaties, negotiated in 1913-1914, were ratified by the United States, and although forgotten for a time, were revived through the appointment of new commissioners by President Coolidge.

The principles of the Bryan Treaties were of some importance in the development of pacific settlement. The Central American Treaty of 1923 recognizes them, and they were applied also, with some limitations, in the Gondra Convention made at Santiago in 1923 between certain Latin-American states. The theory was recognized in Article 15 of the Covenant of the League of Nations, and in general is an important step in the tremendous growth of the method of conciliation.[5]

§ 59. Arbitration.[6]

MEANING. Among pacific methods for the settlement of international disputes, arbitration has been by far the most useful. While there is still disagreement as to its precise definition, it seems safe to define it as the

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[5] As to the Bryan Treaties, see J. Efremoff, "La conciliation internationale," *Hague Acad.*, 1927, III, pp. 24-29; J. B. Scott, *Treaties for the Advancement of Peace between the United States and Other Powers* (Oxford, 1920).

[6] As to arbitration in general, see E. Descamps, *Essai sur l'organisation de l'arbitrage* (Bruxelles, 1899); L. A. Kamarowsky, *Le tribunal international* (Paris, 1887); H. Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit*, Stier-Somlo Handbuch des Völkerrechts (Berlin, 1914); A. Merignhac, *Traité théorique et pratique de l'arbitrage international* (Paris, 1895); A. Raeder, *L'arbitrage international chez les Hellènes* (Nobel Institute, Christiania, 1912); J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford University Press, 1926); D. Schindler, "Le progrès de

settlement of international disputes, according to legal rules and methods, by arbiters chosen by the disputant parties themselves.[7] The word has sometimes been used in the broader sense of almost any kind of pacific adjustment. Indeed it is sometimes said that arbitration is nothing more than compromise, and that it has nothing to do with justice. This charge may perhaps have been true in its earlier stages. During the Middle Ages a prince, called upon to act as an arbiter, might perhaps prefer for safety's sake to favor in his decision the more powerful party, and there was little law to guide him even if he wished to use it. Even after the revival of arbitration in the nineteenth century there was hesitancy in regarding it as a judicial process. Ralston mentions the Mexican Commissioners of 1840 who asseverated that they were present, not to judge, but to resolve difficulties. And as late as 1907, Secretary Root asserted in his instructions to the American delegates to the Second Hague Conference that it had been a very general practice for arbitrators to act as negotiators rather than as judges. This, however, is the exception rather than the rule. When the King of the Netherlands, in the Northwestern Boundary dispute between the United States and Great Britain, acted without authority as *amiable compositeur,* the award was rejected by both parties. In most cases where compromise has appeared in the award, it may be traced either to the authority for such procedure conferred in the *compromis,* or to the fact that the matter referred to arbitration was not suitable for judicial decision. The former situation may be illustrated by the *Delagoa Bay Case,* in which the arbitrators were instructed to do substantial justice, and not to concern themselves with technicalities; the latter by the *Casablanca Case,* in which political rather than judicial interests were at stake.

Today, there can be no doubt that arbitration is a legal procedure. A study of decided arbitrations will show a vast majority decided according to legal rules. Most writers regard this as the proper aspect of arbitration. "Mediation," says Moore, "is an advisory, arbitration a judicial function. Mediation recommends, arbitration decides." [8] According to

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l'arbitrage obligatoire depuis la création de la Société des Nations," *Hague Acad.,* 1928, V. pp. 237-360. For reports of arbitrated cases, see A. de Lapradelle et N. Politis, *Recueil des arbitrages internationaux* (Vol. I, Paris, 1905; Vol. II, Paris, 1924); H. La Fontaine, *Pasicrisie Internationale; Histoire documentaire des arbitrages internationaux* (Berne, 1902); J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party,* 6 vols. (Washington, 1898); J. B. Moore, *International Adjudications,* 6 vols. to date (New York, 1929); J. B. Scott, *The Hague Court Reports* (New York, 1916); and reports of various Claims Commissions.

[7] The Covenant of the League of Nations, as amended after the establishment of the Permanent Court of International Justice, distinguished between arbitration (through a tribunal established by the parties) and judicial settlement (by the Court), both being differentiated, as a legal procedure, from inquiry by the Council, or conciliation.

[8] Moore, *Digest,* VII, p. 25. See also the illuminating discussion by Judge Moore, in *International Adjudications,* Modern Series, I, "Historical and Legal Notes," pp. xv-xci. It contains an exhaustive survey of all authorities.

Hyde, arbitration means "an impartial adjudication according to law, and that before a tribunal of which at least a single member who is commonly a national of a state neutral to the contest acts as umpire." [9] The Hague Convention for the Pacific Settlement of International Disputes states that "international arbitration has for its object the determination of controversies between states by judges of their own choice, upon the basis of respect for law."

On the other hand, a distinction is now made between arbitration and judicial settlement. This distinction is found in Article 12 of the Covenant of the League, which was amended to require submission of any dispute likely to lead to a rupture to "arbitration or *judicial settlement* or to inquiry by the Council." The fact that this amendment was introduced as a result of the creation of the Permanent Court of International Justice suggests that the distinction is one of machinery rather than of principle; that is, the Court is another—and undoubtedly much better—method of judicial determination of disputes. Even so, there are difficulties in making the distinction. It has been suggested that arbitration is instituted by voluntary agreement, whereas judicial procedure is instituted upon demand of one of the disputants; or, more simply, it is arbitration if the agreement to arbitrate follows the dispute, judicial if the agreement precedes the dispute. This, however, would result in making the procedure of the Permanent Court arbitral except under the optional clause or other compulsory jurisdiction, and in making the arbitral tribunal judicial in character whenever it is given obligatory jurisdiction. The essential difference would seem rather to be that the Court, with its fixed personnel, seat, and procedure, is not so malleable in the hands of disputants as is the arbitral tribunal whose members, organization, procedure, and even rules of law to be used may be fixed by the *compromis d'arbitrage*. As helpful a statement as is available is that given by the Legal Section of the Secretariat of the League in a memorandum with regard to the creation of the Court: "Arbitration is one judicial method of settling disputes. Now, arbitration is distinguished from judicial procedure in the strict sense of the word by three features: the nomination of the arbitrators by the parties concerned, the selection by these parties of the principles upon which the tribunal should base its findings, and finally its character of voluntary jurisdiction. The boundary line between the two kinds of judicial procedure can not be definitely fixed." [10]

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[9] Hyde, II, p. 1581. He quotes Westlake, I, p. 354: "The essential point is that the arbitrators are required to decide the difference—that is, to pronounce sentence on the question of right. To propose a compromise, or to recommend what they think best to be done in the sense in which the best is distinguished from the most just, is not within their province, but is the province of the mediator."

[10] *P.C.I.J.*, Advisory Commission of Jurists, *Documents Presented to the Commission relating to Existing Plans for the Establishment of a Permanent Court of Inter-*

PROCEDURE. Arbitrations, in past practice, have been instituted by a bilateral treaty, called the *compromis d'arbitrage,* signed by the parties to the dispute. The *compromis* states the question to be answered, names the arbitrators or the method by which they are to be selected, provides for a place of meeting, expenses, rules of procedure, and even the rules of law to be used. It may require decision according to strict rules of international law; it may, as in the case of the Three Rules of the Treaty of Washington by which the *Alabama Claims* were decided, state the rules themselves; or it may allow the use of equity, or of natural justice, or authorize the judge to act as *amiable compositeur,* or mediator. In the last case, as Politis comments, it may be practical, but it is not arbitration. The parties before the tribunal are technically states only, but in fact they often include individuals whose claims are being presented by their states, and whose nationality must be established before the state is permitted to plead for them. Each state is represented by an agent and by counsel, and argument is usually written, in the form of memorials, case, countercase, etc. The *compromis* is the charter of the tribunal, although the tribunal may determine its own competence under the terms of the *compromis.*

JUDGES. The selection of judges is one of the most important and also one of the most criticized elements of arbitral procedure. Formerly, appeal was made most often to sovereigns, a procedure which had the advantage of choosing a judge not representative of either party. But the sovereign was incompetent himself to determine legal questions, and was forced to call upon his legal advisers, persons who would never, perhaps, have been selected as arbitrators. Furthermore, the sovereign was inclined to decide upon a political basis, calculated according to his own interests. The tendency has therefore been to choose experts—but preferably an expert who would decide in favor of the country making the choice.

There are innumerable methods of setting up the Court. Usually each state appoints one member, and these two, or the states themselves, agree upon a neutral third member. Or again, each state chooses one of its own nationals and one neutral, and these agree upon a fifth neutral judge. The joint commission, in which there is no neutral to serve as umpire, does not deserve to be called an arbitral tribunal, although it has its uses. So long as these methods are continued, judges will vote as national representatives rather than as judges, and states will seek to choose judges known to be friendly to their views, thus eliminating many competent persons. Considered from this angle, the criticism that it is difficult to find satisfactory judges is quite true; but what is really sought is a representative

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national Justice, p. 113. For a discussion of the distinction between arbitration and judicial settlement, see J. Garnier-Coignet, "Procédure judiciaire et procédure arbitrale," *R.D.I.,* VI (1930), pp. 123-147.

rather than a judge. It is for this reason that a permanent court, with a fixed personnel, is so much superior to the ordinary arbitral tribunal. A national judge is not really free, even when he desires to be; and the decision is thus left to one man, whose idiosyncrasies are not balanced by the votes of other judges.

The tribunal usually offers a reasoned opinion in support of its decision, a practice demanded by custom and of great aid in the building of international law. It usually decides by a majority vote, and its decisions are *res judicata,* although the case may be reopened by the consent of both parties. The decision of the arbitral tribunal is binding, for the parties have so agreed—it is for this reason that states hesitate to accept obligatory arbitration, binding them to accept the decision in whatever case may arise in the future.

History. Although its effective use is quite recent, arbitration has always been known as a means of settling disputes between states. Said Thucydides: "It is wicked to proceed against him as a wrongdoer who is ready to refer the question to an arbitrator." Greece used it often, Rome but little. During the Middle Ages the Pope was called upon frequently to serve as arbitrator, and occasionally, cardinals or sovereigns. It is hard to distinguish, during this period, between amiable composition and true arbitration. The modern era of arbitration begins with the Jay Treaty between the United States and England in 1794, which set up three boards of arbitration. The *Alabama Award* greatly increased interest and encouraged systematic study and popular support of arbitration. According to Politis, there were 70 arbitrations up to the year 1872; 87 in the following twenty-seven years; and 51 from 1899 to 1914. Of these, Great Britain participated in 71, the United States in 69, France in 33, Italy in 19, Germany in 15 (though some half of these were between German states), Russia in 3, Austria in 2, Japan in 2. It should be noted that, under many such agreements for arbitrations, there may be hundreds of cases tried by the tribunal. Thus, in the first report of the American Agent before the German-American Mixed Claims Commission, established in 1922, 12,416 claims were listed. Thousands of similar cases were handled by the Mixed Arbitration Tribunals, under bilateral agreements between the various belligerents in the first World War; and many other tribunals are now at work.[11]

The somewhat scattered efforts of the previous century were brought together and progress was consolidated in the work of the First Hague

[11] Thus the Report of Fred K. Nielsen, American Agent before the American and British Claims Arbitration Tribunal set up in 1910, discusses 100 cases tried by the Tribunal. Hundreds of cases have been decided by the Mexican-United States Claims Commission, established in 1923, and there are many other such tribunals. An interesting trend toward better tribunals is revealed in other statistics offered by Politis. See Politis, pp. 34-35, 78.

Conference, and from that time on the development of pacific means for settling disputes has been rapid. The Convention for the Pacific Settlement of International Disputes was "animated by a strong desire to concert for the maintenance of the general peace," and to that end "desirous of extending the empire of law, and of strengthening the appreciation of international justice." The signatories pledged themselves in Article 1 to use their best efforts to insure the pacific settlement of disputes. They agreed to have recourse "as far as circumstances allow" to the good offices and mediation of friendly Powers; recommended the employment of the International Commission of Inquiry on questions of fact "involving neither honor nor vital interests"; and recognized arbitration as the most efficacious and equitable method of settling questions of a judicial character, and established a code of arbitral procedure. The Convention also set up the Permanent Court of Arbitration at The Hague, and it will be convenient to pause here for a moment, to consider it and other institutions of a judicial character.[12]

Permanent Court of Arbitration at The Hague. So far as it is permanent the old Hague Tribunal consists merely of a Registrar and Bureau, housed in the sumptuous Peace Palace at the Hague built through the generosity of Andrew Carnegie, and furnished by the gifts of states. The diplomatic corps at the Dutch capital serves as an administrative council. No provision was made for a permanent bench. Each state is entitled to name four persons whose names are included upon the panel of judges of the Court. The *compromis* must be made as usual, and judges selected, though from the panel of the Court. Of the arbitrations pursued since the creation of the Court, a steadily decreasing fraction has been given to the Court. It has not been kept very busy, having had less than one trial a year, but its work has been helpful in showing the possibilities of arbitration, and the need of improving it and of widening its range of usefulness. It has been called "neither Permanent nor a Court," "only a phantom, an impalpable ghost." Certainly it has had many deficiencies. It has not had great influence in the development of law; it has not built up much confidence in itself; it has the same faults in the selection of judges as the individual arbitral tribunals; it has not been easily accessible. But for such faults as these its adherents have only themselves to blame. It could not

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[12] See as to these institutions, J. Eyma, *La cour de justice centro-américaine* (Paris, 1928); T. Heyligers, "L'organisation des Tribunaux Mixtes d'Egypte," *Hague Acad.*, 1927, II, pp. 5-107; C. J. B. Hurst, "Wanted! An International Court of Piepowder," *B.Y.I.L.*, 1925, pp. 61-67; D. P. Myers, "The Origins of the Hague Arbitral Courts," *A.J.*, 8 (1914), pp. 768-801, 10 (1916), pp. 270-311; J. B. Scott, "The Evolution of a Permanent International Judiciary," *A.J.*, 6 (1912), pp. 316-358; J. B. Scott, "The Closing of the Central American Court of Justice," *A.J.*, 12 (1918), pp. 458-475; H. Wehberg, *The Problem of an International Court of Justice*, translation by C. G. Fenwick (Oxford, 1918).

do more than it was given authority to do.[13] A valiant effort was made at the Second Hague Conference to confer upon it a degree of compulsory jurisdiction, but such efforts were blocked by Germany and, in any case, would have been severely limited. From its faults, however, states have learned, and from its successes they have taken encouragement, with excellent results in 1920.[14] It was continued primarily for those states not connected with the Permanent Court of International Justice, and its future seems uncertain after the establishment of the International Court of Justice as the principal judicial organ of the UN.

Prize Court. The effort of the Second Hague Conference to create an International Prize Court was intended to meet a practical need, and has furnished valuable lessons. By a vote of thirty-six to one with six abstentions, agreement was reached upon a court, to be composed of fifteen members, which should always include judges chosen by the eight Great Powers. It was to have obligatory jurisdiction and to sit permanently at The Hague, and it was to be accessible to individuals as well as to states. Unfortunately, agreement could not be reached upon the law which it was to apply; and it failed to be set up after the vain effort of the London Conference of 1908 to state the law in the Declaration of London.

A Court of Arbitral Justice. At the Second Hague Conference another effort was made, upon the demand of the United States, to set up a "real" court. Agreement was reached upon a court with a regular bench, sitting permanently, composed of professional judges chosen from the panel of the older Court, with renewable terms of twelve years. The Bureau and Administrative Council of the older Court were to serve the Court of Arbitral Justice as well. But the project was wrecked upon the opposition of the smaller states, who insisted upon sovereignty. Brazil observed that arbitration means confidence, whereas judicial institutions mean obedience; and each state demanded a judge upon the bench—forty-four in all! Aside from the fact that a judge should not be conceived of as a national agent, the position of the smaller states would seem contrary to their best interests, for of all members of the community, they need to rely upon judicial determination rather than upon sovereign power. The United States con-

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[13] In the course of a lecture given in 1926, the Registrar of the older Court pointed out the following advantages justifying its continued existence: (1) Members of the Court are chosen *ad hoc* thus making it possible to secure the type of judge needed for the particular case; (2) states parties to the case choose the judges, thus satisfying public opinion; (3) a state may have its own nationals as judges; (4) statesmen rather than jurists may be chosen for political questions; (5) many disputes involve both political and legal questions and can therefore be better handled by the old Court. These points, it is suggested, are for the most part derogatory of arbitration.

[14] For reports of the cases tried by the Court, see J. B. Scott, *Hague Court Reports* (New York, 1916); for a summary, see Ralston, p. 259 *et seq.*

tinued her efforts to secure a judicial tribunal and a Third Hague Conference was proposed for 1914, which, however, never met.

CENTRAL AMERICAN COURT. Meanwhile, a Central American Court of Justice, which may be called the first real international court ever to be established, was created in 1907. Since there were only five states concerned, the problem of selecting judges was obviated by permitting each state to name one. Disputes of whatever nature were to be submitted to this Court, after diplomacy had failed; and in addition suits by an individual against a foreign state were permitted. In practice, however, it was inclined to proceed too fast, interfering without authority in revolutionary disturbances, and in general displaying zeal rather than discretion. Its last case involved the Bryan-Chamorro Treaty between the United States and Nicaragua, and when the United States showed no inclination to accept the ruling of the Court that the Treaty was illegal, the effect was to discourage renewal of the ten-year period for which the Court had been created. Upon the invitation of the United States, a conference was held in December, 1922, which recreated the Court but with greatly limited authority. From a panel of thirty names, three judges are to be chosen by a minutely regulated process for each case. Its jurisdiction is still obligatory, but all questions which affect sovereign and independent existence are excepted. No cases have been brought before it.[15]

P.C.I.J. The last judicial institution to be established was the Permanent Court of International Justice, established under Article 14 of the Covenant of the League of Nations, and now revised as the International Court of Justice. It will be separately considered in a later chapter.

§ 60. Obligatory Arbitration.

VOLUNTARY ARBITRATION. Arbitration was at first arranged for by special treaty, negotiated for each occasion after the dispute had arisen—if the parties felt so disposed. Obviously, passions might have been inflamed to such a degree that there would be no willingness to effectuate a settlement in this manner. It is clearly better to have a standing agreement beforehand, binding states to submit to peaceful settlement quarrels which might arise in the future, whether or not passions were running high. At this point the legal character of arbitration becomes most evident, for usually states have not been willing to submit to an obligation to arbitrate where they were not sure that there were definite rules of law which the arbiter must follow. States naturally feared that in such circumstances many cases would be left to the discretion or to the idiosyncrasies of an arbiter not himself bound by definite legal procedure. An obligation to

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[15] A survey of the Central American Court of Justice may be found in M. O. Hudson, *The Permanent Court of International Justice* (New York, 1943), Chap. III.

arbitrate taken in advance would greatly widen the field of arbitration, but to undertake it required much more confidence upon the part of states than existed.

Compromisory Clause. The first step in this direction was taken by the insertion into various types of treaties of a clause (*clause compromissoire*) providing that disputes arising under the treaty in which the clause was included should be arbitrated. The first modern instance of such a clause, according to Hershey, is found in the treaty between the United States and Tripoli in 1796; today it is found in many treaties, such for example as that of the Postal Union, or the Brussels Slave Trade Convention. Of the first 1,000 treaties registered with the League of Nations, 187 had compromisory clauses.[16] It was an easy first step to take toward obligatory arbitration, for a state bound itself to submit only the type of cases which might arise under the treaty.

Obligatory Arbitration. The next step was the making of bilateral treaties of general arbitration. Some such treaties were made during the nineteenth century, and in 1897 the United States attempted to negotiate some of this type, but they were wrecked by the Senate. The first important treaty, the model for many subsequent ones, was that between Great Britain and France in 1903. It provided that "differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July 1899, provided nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties." Encouraged by the work of the Hague Conferences, and with this treaty as a model, many others were negotiated.

Range of Jurisdiction. The attempt to secure collective engagements for obligatory arbitration, which represent an advance beyond bilateral engagements, revealed the difficulty of determining which matters states are willing to submit to arbitration. Efforts have been made to solve this problem either by listing the subjects regarded as arbitrable, or by listing exceptions to a general rule of arbitration.[17] At the First Hague Conference an attempt was made to render arbitration obligatory in certain fields, such as pecuniary damages, or the interpretation of treaties concerning submarine cables, money, telegraph and postal communications,

[16] "Arbitration and the United States," *W.P.F.*, IX, Nos. 6-7.

[17] See A. Cavalcanti, "Restrictive Clauses in International Arbitration Treaties," *A.J.*, 8 (1914), pp. 723-737; H. Wehberg, "Restrictive Clauses in International Arbitration Treaties," *ibid.*, 7 (1913), pp. 301-314; R. R. Wilson, "Reservation Clauses in Agreements for Obligatory Arbitration," *ibid.*, 23 (1929), pp. 68-93.

railways, rivers and canals, measures, industrial and artistic and intellectual property, sanitary or other matters. The obligations thus assumed were to be subject to the exception of national honor and vital interest; and even so, fear was expressed concerning matters of private international law, submarine cables, rivers and canals. The opposition of Germany made agreement impossible. At the conference of 1907, twenty-six subjects were proposed, and of these only eight obtained general acceptance: pecuniary damages, reciprocal free assistance to indigent sick, protection of laborers, prevention of collisions at sea, weights and measures, wages of deceased seamen, protection of literary and artistic property, and tonnage of ships. But even this much agreement was vitiated by Germany, who announced that she accepted the principle for bilateral but not for multilateral treaties. The Conference therefore had to content itself with a *voeu* in its Final Act, unanimously approving compulsory arbitration in principle.

This list of subjects of dispute, for the most part innocuous, as well as the clause reserving national honor and vital interest in such cases, is amusing, but nevertheless represents a real difficulty which has not even yet been satisfactorily solved. The reservation of national honor and vital interests was especially unsatisfactory, for it was possible through it to reserve any dispute from the obligation to arbitrate, and emphatically those very subjects which most needed pacific means of settlement and which were most apt to lead to war. It represented in fact a setback, for such matters had previously been arbitrated. Senator Sumner, for example, excited over the depredations of the *Alabama,* demanded reparation to the extent of two and a half billions of dollars and the surrender of Canada, besides indirect damages; while England, on the other hand, asserted that "the construction of British statutes could never be submitted to arbitration, that the question involved the honor of the country and so was not appropriate for arbitration." Nevertheless, the matter was arbitrated and the United States was satisfied with a payment of fifteen and a half millions, while English honor was so little hurt that she was able to express her regret at what had happened. Reservations as to sovereignty, political questions, constitutional questions, and the like, were of little assistance in determining which questions should properly be submitted to arbitration.

"Domestic Questions." An effort more nearly in the right direction was that of reserving "domestic questions" from arbitration. The danger in this direction lies in the assumption that a state, being supreme and irresponsible, can by its own edict designate a matter as within its domestic jurisdiction and therefore not subject to arbitration—which is contrary both to practice and to law. On the other hand, it is undoubtedly true that international law makes no effort to control all the activities of a state, very few of them, in fact. There is a large field reserved to the exclusive juris-

diction of the state, and within that field it may legitimately object to interference from the outside, just as member states of the United States resist encroachment by the federal government. But the exercise of a domestic power may produce effects abroad; a state can not be permitted to decide for itself whether a matter is or is not solely within its domestic jurisdiction. Judicial consideration has been given to the question in cases involving Article 15, Para. 8 of the Covenant of the League of Nations.[18] The French Government claimed that nationality lies within the exclusive domain of sovereignty. The Permanent Court of International Justice replied:

> The words 'solely within the domestic jurisdiction' seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not in principle, regulated by international law. As regards such matters, each State is sole judge. The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.[19]

With the principle of this opinion there can be little dissent. It is impossible to make a fixed and permanent list of matters belonging exclusively to states. Such matters as immigration or tariff or Monroe Doctrine may or may not be domestic questions at the present moment; at any time in the future, international law may take control over them. Domestic questions are simply those which, at a given moment, have not been brought within the domain of international law, but this should not be a matter for the state at the bar to decide. It must not be lost from consideration that even matters of solely domestic jurisdiction may produce international repercussions, and that for such disagreements some means of pacific settlement should be provided. The problem is thus reduced to ascertaining what is within the domain of international law and referring such disputes to

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[18] "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

[19] *P.C.I.J.*, Series B, No. 4, pp. 23-24. For discussions as to "domestic questions," see T. Baty, "Domestic Jurisdiction," *R.D.I.L.C.*, 3rd Series, X (1929), pp. 44-51; J. L. Brierly, "Matters of Domestic Jurisdiction," *B.Y.I.L.*, 1925, pp. 8-19; C. G. Fenwick, "The Scope of Domestic Questions in International Law," *A.J.*, 19 (1925), pp. 143-147; C. J. B. Hurst, "Interpretation of Art. 15, par. 8, of the League of Nations," *B.Y.I.L.*, 1923-1924, pp. 175-179; P. Mariotte, *Les limites actuelles de la compétence de la Société des Nations, Article 15, §§ 7 et 8 du Pacte* (Paris, 1926); Ray, pp. 490-498; W. Suckiennicki, *La souveraineté des états en droit international moderne* (Paris, 1926); A. Van Deth, *Etude sur l'interprétation du paragraphe 8 de l'article 15 du Pacte de la Société des Nations* (Amsterdam, 1928). It is to be regretted that the reservation as to domestic questions has been repeated, in even more obnoxious form, in Article 2, § 7, of the Charter of the United Nations, and again by a reservation attached to the acceptance by the United States of the "optional clause." See pp. 346-347, *infra*.

the judicial procedure of arbitration, and of providing other means of peaceable adjustment for matters not within the purview of international law but producing international disputes.

"JUSTICIABLE QUESTIONS." A vast amount of discussion has been aroused in the effort to determine what are justiciable and what are non-justiciable questions.[20] Some prefer the terms political and legal disputes. If the agreement is to submit to arbitration, which is a judicial process, then national honor or interests or policy should be submitted if questions of law are involved. We have noted the treaty of 1903 between France and Great Britain, in which it was agreed to submit differences "of a legal nature, or relating to the interpretation of treaties." Closer definition was obtained in the treaties negotiated by President Taft in 1911: "international matters in which the high contracting powers are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law and equity." Such matters were to be referred to arbitration; all others to a commission of inquiry. This principle has been followed in numerous treaties, and in the so-called "optional clause" (Article 36) of the Statute of the International Court of Justice, the compulsory jurisdiction of the Court is specified as covering all or any of the classes of legal dispute concerning:

(a) The interpretation of a Treaty.
(b) Any question of International Law.
(c) The existence of any fact which, if established, would constitute a breach of an international obligation.
(d) The nature or extent of the reparation to be made for the breach of an international obligation.

With this solution most writers appear to be in agreement. Thus Hyde said: "The true test of a justiciable controversy is believed to be whether the principles of international law are sufficiently broad and flexible in their scope and application, and sufficiently well understood, to mark clearly the lawfulness or unlawfulness of the conduct or contentions giving rise to complaint." [21] Some writers go to the extent of asserting that in-

[20] As to justiciable questions, see T. W. Balch, *Legal and Political Questions between Nations* (Philadelphia, 1924); P. M. Brown, "The Classification of Justiciable Disputes," *A.J.*, 16 (1922), pp. 254-259; F. Castberg, "La compétence des tribunaux internationaux," *R.D.I.L.C.*, 3rd Series, VI (1925), pp. 155-172; R. Y. Hedges, "The Juridical Basis of Arbitration," *B.Y.I.L.*, 1926, pp. 110-120; E. A. Jelf, "Justiciable Disputes," *Grotius Society*, VII (1921), pp. 59-72; H. Lauterpacht, "The Doctrine of Non-Justiciable Disputes in International Law," *Economica*, 1928, pp. 277-317; P. S. Reinsch, "The Concept of Legality and International Arbitration," *A.J.*, 5 (1911), pp. 604-614; D. Schindler, "Les progrès de l'arbitrage obligatoire depuis la création de la Société des Nations," *Hague Acad.*, 1928, V, pp. 237-361.

[21] Hyde, First Edition, II, p. 113. On the previous page, he spoke of "justiciable, that is, one capable of reasonable adjustment by reference to accepted principles of

ternational law can be extended to cover any possible case which might arise. Sir John Fischer Williams believes "that on a question of rights there is no international conflict possible which, were it referred for decision, the Permanent Court of International Justice would be compelled to declare itself incompetent to decide." [22] It is argued therefore that if any disputes fall outside of arbitration, it is simply because states are unwilling to submit them, and not because international law is unable to handle them. In general, states justify themselves in their attitude by saying that it would be difficult to foretell what decision international law would give in such matters as conflicts arising out of immigration, or tariffs; and that so long as war is not illegal the decision as to the illegality or justice of any forcible act of interference would be uncertain.

§ 61. Conciliation.[23]

Two Channels. As it became more and more evident that pacific settlement could not be entirely obtained through the use of arbitration, states began to pay more attention to conciliation as an alternate method. The tendency now is to say that all quarrels must be submitted to one or the other form of pacific settlement: either to arbitration (or judicial settlement) or to conciliation, and the problem to be solved is the relationship between the two methods. This, it may be suggested, is simply another way of asking which are justiciable and which are non-justiciable questions; but it is important to note that between the two of them pacific settlement is provided for all types of disputes. These channels of development were revealed at the First Hague Conference; they were shaped and deepened through treaties and through use by the League of Nations; they have been made more uncertain now under the Charter of the United Nations, which makes no such clear differentiation as was found in the Covenant of the League of Nations.

For Conciliation. A proper equilibration between the two methods is hard to find. There are some who maintain that conciliation should come first, whether logically or chronologically. This position is based upon the

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international law." In his Second Edition, Dr. Hyde has substituted for "justiciable," the word "arbitrable," II, pp. 1580-1582.

[22] Williams, *Chapters*, p. 50; and see Van Deth, *loc. cit.*, p. 27.

[23] As to conciliation, see P. M. Brown, *La conciliation internationale* (Paris, 1925); F. de la Barra, "La médiation et la conciliation internationale," *Hague Acad.*, 1923, pp. 557-567; Ch. de Visscher, "La procédure de conciliation devant la Société des Nations," *R.D.I.L.C.*, 3rd Series, IV (1923), pp. 21-36; J. Efremoff, "La conciliation internationale," *Hague Acad.*, 1927, III, pp. 5-146; C. Gorge, "L'évolution de la conciliation internationale," *R.D.I.L.C.*, 3rd Series, VII (1926), pp. 633-676, VIII (1927), pp. 58-106; C. C. Hyde, "The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes," *B.Y.I.L.*, 1929, pp. 96-110; A. N. Mandelstam, "La conciliation internationale d'après le Pacte et la jurisprudence du Conseil de la Société des Nations," *Hague Acad.*, 1926, IV, pp. 337-642; P. Ruegger, "Le fonctionnement pratique des commissions de conciliation," *R.D.I.L.C.*, 3rd Series, X (1929), pp. 91-108.

argument that in the present stage of international society, we cannot safely say *fiat justitia pereat mundus*. What that society most needs now, it is said, is peace and stability; it is more important to obtain a friendly settlement than a just settlement which might leave hard feelings. Conciliation, it is said, on the one hand, gives a safeguard for national sovereignty, and on the other hand, builds up the desire for pacific settlement; when this desire is sufficiently established, it will be time enough to impose justice upon unwilling states. Conciliation represents a great advance over mediation, from which it evolved, in that the inquiry is taken out of the hands of sovereigns who might be suspected of a desire for selfish intervention and turned over to scientific experts from whom sovereignty has nothing to fear. It is to be recalled, too, that arbitration results in a decree and that the decree is binding judicially, while conciliation merely recommends, leaving the state free to accept or reject the recommendation as it pleases, or as it feels the pressure of public opinion. Conciliation therefore harmonizes better, it is said, with a society based upon voluntary cooperation. It permits a state to concede its whole position, for the sake of peace, but without surrendering its principle. Since the conciliation commission is not limited to law, it has a wider range within which to find a solution. Arbitration implies the humiliation of being sentenced at law, whereas conciliation implies friendly adjustment. On the whole, the argument of those who prefer conciliation asserts that an amiable solution is to be preferred to litigation, and that peace weighs more than justice.

For Arbitration. This argument is undoubtedly valid to a certain extent, or as applied to certain controversies, but it is also true that states should admit the reign of law wherever it can be shown to be effective. International law does apply properly and adequately to some controversies, and in these justice should prevail over conciliation. There is agreement in the community upon some matters as arbitrable, and this agreement needs to be extended as rapidly as possible to other matters. Arbitration, it is maintained, should be regarded as the rule, conciliation as the exception; only so can a society founded upon law and justice be achieved. Conciliation, it is said, offers too wide a margin for abuse by sovereign states, and it should be used only where arbitration cannot be used. Legal questions should always be settled by law and, consequently, conciliation should not necessarily precede arbitration. To submit the question at once to law is to leave sentiment out of it. If, on the other hand, the subject is not one suitable for arbitration, or the Court is unable to take jurisdiction, then conciliation should be resorted to. Neither is excluded; on the contrary, both are needed to make up the sum total of pacific settlement which can handle all disputes. The problem is to find a proper relationship between them.

ORIGINS. The origins of conciliation are to be found in the commissions of inquiry provided for in the Convention for the Pacific Settlement of International Disputes at the First Hague Conference. The new method did not get off to a flying start. All questions involving national honor or interests were excepted, even though the report of the commission left the parties entirely free. Inquiry as to facts does not go so far toward proposing a settlement as does mediation. Mediation either secures a settlement or leaves things as they were; inquiry upsets the situation in favor of one party or the other without, nevertheless, providing an answer. It was natural that the power to make recommendations should be added to the power to ascertain the facts; even at the First Hague Conference, it had been vainly proposed that arbitration be made the necessary sequence to the report of a commission of inquiry.

The needed advance was made in the treaties negotiated under President Taft in 1911, which, however, were not approved by the Senate. These treaties made arbitration compulsory, but provided that, upon the demand of either party, the question should first be submitted to a joint high commission of inquiry. The commissioners thus acted as fact-finders, lawyers, or *amiables compositeurs*. Arbitration was employed either if there were no demand for inquiry, or if the commission of inquiry failed to achieve a settlement. These treaties did not go into effect but they furnished an excellent lesson. They were followed by the famous Treaties for the Advancement of Peace, the Bryan Treaties, which have been discussed above. Under these treaties a permanent commission was instituted, and signatories were obligated to submit to it all questions to which the terms of previous arbitration treaties did not apply or were not applied. Thus conciliation was in principle subordinated to arbitration. No decision was authorized: the commission could make recommendations, but the parties reserved their freedom of action. But every question was to be submitted to a process of peaceable adjustment, and war was at least postponed for a considerable time.

AS USED BY THE LEAGUE. The Covenant of the League of Nations incorporated these principles, clearly outlining the alternative channels to be followed. Members were, by Article 12, to submit disputes either to arbitration or judicial settlement, or to inquiry by the Council, and not to resort to war until three months after the award or recommendation. They might choose between arbitration and conciliation (Article 13), though the matters regarded as justiciable were stated, in terms of Article 36 of the Statute of the Court. While the choice is facultative, and no preference is given to one or the other method, there is no doubt that the makers of the Covenant preferred arbitration, and subsequent efforts were made to amend this article in the direction of making obligatory the arbitration of

the matters listed in Article 13, Para. 2, as, for example, in the Geneva Protocol.[24] It was provided in this agreement (unratified), that if a quarrel were submitted to the Council it should propose arbitration. If one party accepted, arbitration was obligatory and the decree binding. If both parties refused, the recommendation of the Council was to be binding if unanimous; if not, the question would as a final measure (though there were some exceptions) be submitted to arbitration.

The great advance of the Geneva Protocol lay in finding a solution, by one method or another, which was to be binding upon disputants. Thus the most important defect of conciliation, its impotence to secure obedience, was remedied. The Locarno Pact provided that "any question with regard to which the parties are in conflict as to their respective rights shall be submitted to judicial decision," and all other questions were to be submitted to a conciliation commission. In 1928, the Assembly offered a number of model treaties, and collected them into a General Act which was opened for signature. Signatories were bound by it to submit disputes of every nature to conciliation. However, questions in which a right is contested, as described in Article 36 of the Statute of the Court, must be submitted to the Court, unless the parties agree to submit them to arbitral procedure. Disputes not otherwise settled must be arbitrated. When one considers that states may sign the Optional Clause, or the General Act, or a variety of bilateral treaties, the resulting hodge-podge of obligations seems an unnecessary sacrifice to the whims of nations.

§ 62. Treaties for Pacific Settlement.—Aside from the work of the League of Nations, a large number of bilateral treaties of arbitration or of conciliation or of both have been signed by various states. Among arbitration treaties there is a group of those negotiated before the War and still in force, in which disputes to be submitted are limited to those of a legal character, excluding such matters as national honor and vital interests; these were made mostly by the United States. In another category, mostly of later origination, are those not restricted to legal questions, but providing some exceptions, such as for cases originating before the treaty, or for constitutional questions. A small group of treaties, such as that between Austria and Hungary in 1923, submit all questions without exception to arbitration. And there are of course many compromisory clauses, for the arbitration of one specific type of question, in treaties of other types.

The modern type of conciliation treaty is comparatively recent, the first apparently being those between Brazil and Great Britain in 1919, and between Sweden and Chile in 1920. A resolution of the Assembly in 1922 gave a great impetus to the movement. The first treaty to provide both arbitration and conciliation was that between Germany and Switzerland in

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[24] See § 105, *infra*.

1921. In this, and a number of such treaties, all questions must be submitted to one or the other process. Those regarded as arbitrable are specified, and questions not falling under this head must be conciliated, although by agreement the parties may also conciliate questions even though they are listed as arbitrable. The treaty of 1924 between Germany and Sweden is like these but stipulates that, in the interpretation of the treaty, preference is to be given to arbitration. Other treaties provide conciliation for all questions, to be followed, if the award is not accepted, by arbitration for legal questions; still others require arbitration, in such a case, for all questions.

There were, according to a count made by the League of Nations[25] in 1927, 85 treaties providing for arbitration or conciliation, 33 for arbitration alone, 18 for conciliation alone, 34 for both. Of the arbitration treaties, 14 provided for the arbitration of all disputes of any kind without any exceptions; 16 others were the same except that some exceptions were allowed; 3 provided for disputes of a specific kind (juridical); and 34 provided for disputes of a juridical nature, with exceptions. Eighteen of the arbitration treaties defined juridical character as "of a legal nature or relating to the interpretation of treaties"; 5 as "in conflict as to their respective rights"; 3 merely as of "a legal nature"; and 13 defined it in terms of Article 36 of the Statute of the Court. Fifty of the 67 treaties which deal with arbitration contain reservations.[26] Forty of the 67 refer cases to the Permanent Court of International Justice, and of these, 26 gave to the Court exclusive and compulsory jurisdiction for all or certain types of disputes. Forty-five treaties allow the constitution of a tribunal according to the rule laid down at The Hague; and 15 others allow the creation of special tribunals. Sixty-five of the treaties call for the making of a *compromis,* and of these, 42 provide a solution in case agreement can not be reached upon the terms of this instrument.

Of the 52 conciliation treaties, 15 made conciliation preliminary to arbitration; 25 allowed either, though usually submitting legal disputes to arbitration; and 12 others required arbitration for legal questions and conciliation for others with arbitration to follow if the recommendation of the conciliation commission was not accepted. Of the 52 treaties, 35 con-

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[25] League of Nations, *Arbitration and Security: Systematic Survey of the Arbitral Conventions and Treaties of Mutual Security Deposited with the League of Nations,* 2nd ed. to December 15, 1927, 1927.V.29; M. Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (Cambridge, 1931).

[26] These reservations can be put under nine headings: (1) vital interests and independence in 24 treaties, of which only 8 have appeared since 1914; (2) honor in 20, of which only 4 have appeared since 1914; (3) interests of third states in 20, though 9 recent treaties expressly reject this exception; (4) previous disputes in 13, but 11 recent treaties expressly include such disputes; (5) territorial status and frontiers in 8; (6) questions arising from the World War in 7; (7) internal legislation; (8) decisions of national courts except where denial of justice is found—a favorite with South American states; (9) constitutional questions in 2.

tained no reservations to the conciliatory process; in the others, the reservations found were for previous disputes, territorial status and frontiers, questions arising from World War I, domestic legislation, and constitutional questions. Forty-nine treaties established permanent conciliation commissions and practically all of these commissions were of five members each. In some of these, the signatory states appoint all but one member of the commission; in 27 others, states appoint only one national representative each. The odd member, always a neutral, is to be jointly agreed upon under 50 of the treaties; and if agreement is not reached upon him, 26 of the treaties would call upon the head of a state (19 of them name the President of the Swiss Confederation) and 18 upon the Permanent Court. In all treaties, either party may set the machinery into motion.

SUMMARY. The advance made in these treaties is manifest. In the first place, a very large number make resort to pacific settlement mandatory for all disputes, and a large proportion of these require submission in one form or another to the decision or recommendation without resort to war. Arbitration is apparently more favored than conciliation, which is as it should be. The number of reservations is diminished, and the type of reservation now made is not so inclusive as before. The machinery is greatly improved. Permanent instead of temporary commissions of conciliation are provided, though they are so numerous that it will be difficult to build up uniform principles for future guidance—a matter of some importance in the new field of conciliation. The conciliation treaties have rarely, if ever, been used; as to this, it may be remarked that the mere existence of such treaty obligations encourages diplomatic settlement, avoiding expense, publicity, and embarrassment. The commissions are weak in that national members are too numerous, often throwing the burden of decision upon the neutral member. National representatives are not needed on the commissions, since a state may send its best advocates to present its case. It is very difficult for the national commissioner to preserve a proper impartiality. Even if not acting under governmental instructions, he may well be affected by national prejudices or by an excess of patriotism. The various treaties represent all sorts of experiments, from which it may be hoped that the best methods will ultimately be selected and adopted. While they are merely separate treaties, taken together they represent a sentiment toward pacific settlement which fairly well establishes a rule for all nations to the effect that pacific settlement must always be attempted before forcible measures are undertaken.

How far these treaties will continue in effect remains to be seen. The Charter of the United Nations (Article 95) leaves a place for them. The Charter itself presents no advance in the field of pacific settlement of disputes. It emphasizes the right of parties to settle disputes in their own

way; it does not provide clear alternatives, but rather lumps procedures together indiscriminately (Article 33); it does not favor legal procedures; and it does not advance compulsory jurisdiction for legal questions.[27]

§ 63. Arbitration in the Western Hemisphere.[28]—In this rapid development of the methods and use of pacific settlement, the Western Hemisphere, and particularly the United States, has not kept pace. The boast of the Western Hemisphere is that it has always been devoted to the cause of arbitration; indeed, this devotion has been offered as one of the characteristics which distinguish it from the less advanced European states. Arbitration has undoubtedly been much talked about on the American continents. In 1826, Bolivar, a statesman of far vision, succeeded in having signed at the Panama Conference a Treaty of Union and Perpetual Confederation which would have established a real government among the American nations, with pacific settlement for all disputes and a guarantee against aggression. It was ratified only by Bolivar's own state, Colombia. A similar scheme, with more detail, was worked out at a Congress at Santiago in 1848; it secured no ratifications whatever. The regular series of Pan American Conferences beginning in 1889 have been little more successful.

However, sporadic instances of devotion to arbitration deserve approving attention. Brazil, as far back as 1891, included in her constitution a provision requiring arbitration precedent to war, and Venezuela and the Dominican Republic have similar provisions. Argentine and Chile signed in 1902 what is said to be the first compulsory arbitration agreement covering everything, although it excluded constitutional questions. The Central American Court of Justice has been mentioned above. According to Manning, 228 arbitration treaties were made among South American nations to 1910; and according to Carbonell, these nations entered into 120 such treaties between 1909 and 1919.[29] This, however, owing to the South American habit of signing much and ratifying little, gives no fair picture of the actual situation. An authoritative statement sums it up as follows:

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[27] See § 108, *infra*.

[28] As to this topic, see M. Ball, *The Problem of Inter-American Organization* (Stanford University Press, 1944); N. Carbonell, *Las conferencias internacionales americanas* (Habana, 1928); J. Efremoff, "La conciliation internationale à la Conférence de Washington," *R.D.I.*, III (1929), pp. 490-498; "Arbitration on the American Continent," *F.P.A.*, IV, No. 17 (October 28, 1928); W. R. Manning, *Arbitration Treaties Among the American Nations to the Close of the Year 1910* (New York, 1924); J. O. Murdock, "Arbitration and Conciliation in Pan America," *A.J.*, 23 (1929), pp. 273-291; J. B. Scott, "The Pan American Conference on Conciliation and Arbitration," *A.J.*, 23 (1929), pp. 143-152; F. J. Urrutia, *La evolucion del principio de arbitraje en America* (Madrid, 1920); J. F. Williams, "The Pan American and League of Nations Treaties of Arbitration and Conciliation," *B.Y.I.L.*, 1929, pp. 14-32; *The International Conference of American States on Conciliation and Arbitration 1928-1929* (Washington, Government Printing Office, 1929).

[29] See citations in preceding note.

"Unratified multilateral arbitration treaties and resolutions have been the rule. The first real advance was made through adherence to the Hague Conventions for the Pacific Settlement of International Disputes. Today 19 of the American Republics have ratified or adhered to the Hague Convention of 1907. The Pecuniary Claims Convention and the Gondra Convention of 1923 were the only general multilateral Pan-American treaties providing machinery for arbitration and inquiry up to the time the Conference of 1928 met in Washington. Of course, there are numerous bilateral arbitration treaties between the American Republics. Thirty-six arbitration treaties are in effect between Latin American Republics. Five of the Root arbitration treaties are in force between the United States and American Republics. Eight of the Bryan treaties for the advancement of peace are in effect. A treaty, similar to the Bryan treaties, is in force between the United States and four of the Central American Republics." [30]

Havana and Washington Conferences. While the apparent accomplishments in the field of arbitration are thus much reduced, the resultant figures are well worthy of praise. The Fifth Conference of American States at Santiago in 1923 viewed them with complacence, and upon its suggestion the Commission of Jurists of Rio de Janeiro prepared a project for pacific settlement which was presented to the Sixth Conference at Havana in 1928. This project said nothing of arbitration; but as it was reported out of the Second Commission it included the principle of obligatory arbitration, with free choice of the tribunal desired.[31] Debate arising over this, the Conference adopted a resolution which declared "that the American Republics adopt obligatory arbitration as the means which they will employ for the pacific settlement of conflicts between states"—with certain minimum exceptions as to independence and sovereignty—and which provided for a Conference to meet at Washington. This Conference met from December 10, 1928 to January 5, 1929, with twenty states represented. It agreed upon a General Convention of Inter-American Conciliation, a General Treaty of Inter-American Arbitration, and a Protocol of Progressive Arbitration.

The Conciliation Convention amplifies the Gondra Convention, which must be ratified with it. The permanent commissions of diplomats at Washington and Montevideo are given the power to intervene when a

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[30] J. O. Murdock, "Arbitration and Conciliation in Pan America," *A.J.*, 23 (1929), pp. 277-278; see also *Latin American Treaty Developments*, Pan American Union, Law and Treaty Series No. 21 (1947); and a chart, *Status of the Pan American Treaties and Conventions* revised to 1947 issued by the Pan American Union.

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rupture of peaceful relations appears imminent, or upon demand of one party. Other commissions may be appointed under the terms of the earlier Convention, which may proceed to inquiry or conciliation as they see fit, but must make a recommendation within a year's time. The recommendations are not binding. By the Arbitration Treaty, there must be submitted to arbitration "all differences of an international character which have arisen or may arise between them by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law"; and such justiciable questions are stated in the words of Article 36 of the Statute of the Permanent Court of International Justice. Article 2 excepts from this obligation questions "which are within the domestic jurisdiction of any of the parties to the dispute and are not controlled by international law," and questions affecting third states. The addition of the phrase "and are not controlled by international law" makes it impossible for the mere *ipse dixit* of a state to reserve a question as domestic. It is a distinct gain that such "catch-all" phrases as national honor, or vital interests, are omitted, and that a definite statement of obligations is made. Finally, it is provided that parties may, if they wish, choose conciliation in preference to arbitration. If a settlement is not secured, they must ultimately resort to arbitration. The Protocol of Progressive Arbitration permits the withdrawal of reservations, thus allowing for broadening the treaty.[32]

The Seventh Conference of American States (Montevideo, 1933) adopted a "Peace Code," including an American Court of Justice, which was passed on to the Buenos Aires Conference of 1936, and thence to the Eighth Conference (Lima, 1938), and there referred to the Pan American Union for study.[33] The Mexico City Conference (1945) continued the effort to coordinate the various peace instruments, and referred the problem to the Inter-American Juridical Committee, which had already prepared alternative drafts of a treaty for the purpose. Action upon this proposal waits upon a conference called to meet at Rio de Janeiro, but several times postponed.[34] The creation of the United Nations has left some uncertainties as to the relation between it and regional systems.

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[32] The treaties may be found in *A.J.*, 23 (1929), Supp., pp. 76-89. See also J. B. Whitton and J. W. Brewer, "Problems Raised by the General Treaty of Inter-American Arbitration," *A.J.*, 25 (1931), pp. 447-468. The United States signed without reservations both treaties, but the Senate added the compromisory clause to the Arbitration treaty.

[33] *The International Conferences of American States: First Supplement 1933-40* (Washington, 1940), pp. 50, 161, 244.

[34] *Inter-American Conference on Problems of War and Peace* (Pan American Union, 1945), p. 68; Inter-American Juridical Committee, *Recommendations and Reports* (Rio de Janeiro, 1945).

UNITED STATES AND PACIFIC SETTLEMENT. It was the United States, as has been observed, which revived the use of arbitration, and during the nineteenth century she could well claim the leadership of the movement for arbitration.[35] But it was the Executive which led; the Senate has never been disposed to push arbitration. By the middle of the century it had turned down a number of petitions urging the use of arbitration and declared that it was impracticable and that the sword was the best guarantee of peace. The remarkable success of the Geneva Arbitration aroused widespread interest, and led to the introduction of various resolutions in Congress and finally, in 1874, to the passage of a joint resolution vaguely commending this method of settling disputes. In 1883, Switzerland proposed a general treaty of compulsory arbitration and it was discussed in draft form, but nothing came of it. Agitation in the British House of Commons and in the French Chamber of Deputies led, after some years, to a concurrent resolution calling upon the President to start negotiations for an international tribunal, and finally to work upon an actual treaty.

The treaty as discussed, and as finally signed in 1897, would have arbitrated claims of citizens, but was somewhat uncertain as to disputes involving the state itself. When it was submitted to the Senate what took place was "less a debate than a parliamentary exercise." Every time-killing device was employed, with the result that the treaty was carried over into McKinley's term. Here it was amended to except from the obligation to arbitrate differences "which, in the judgment of either party, materially affect its honor, the integrity of its territory, or its foreign or domestic policy," as well as claims against member states, or the validity of existent treaties; and to provide that when the dispute arose, the agreement to submit (*compromis*) must be approved by a two-thirds vote of the Senate. The Senate then voted to reject the treaty.

HAY TREATIES. During Theodore Roosevelt's term, the approval of the Senate Committee on Foreign Relations having been obtained in advance, Secretary Hay negotiated a number of treaties of arbitration upon the model of the one between England and France in 1903. This time the Senate approved the treaties, with the exception of one word: for "agreement" was substituted "treaty." The result was (bearing in mind the provisions of the Constitution), to use the forceful words of Roosevelt, "to make any one of these so-called arbitration treaties solemnly enact that there shall

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[35] As to the attitude of the United States, see K. Colegrove, *The American Senate and World Peace* (New York, 1944); D. F. Fleming, *The Treaty Veto of the Senate* (New York and London, 1930); J. W. Garner, "The New Arbitration Treaties of the United States," *A.J.*, 23 (1929), pp. 595-602; P. C. Jessup, "The United States and Treaties for the Avoidance of War," *Int. Con.*, No. 239, 1928; R. Olney, "General Arbitration Treaties," *A.J.*, 6 (1912), pp. 595-600; J. B. Scott, *Treaties for the Advancement of Peace between the United States and Other Powers* (New York, 1920); "Arbitration and the United States," *W.P.F.*, IX, Nos. 6-7 (1926).

be another arbitration treaty whenever the two Governments decide that there shall be one," and he refused to proceed with such "shams." Apparently, the determining argument, then as now, was the desire not to decrease, but rather to increase, the prerogatives of the Senate. So said certain members: "The firm grasp upon our relations with foreign governments, placed in the hands of a minority of one-third of the Senate by the Constitution . . . is silently passing . . . into the sole and exclusive power of the President." [36]

However, in 1908, President Roosevelt again negotiated the treaties, retaining the exceptions as to vital interests, independence, and national honor, and allowing the Senate to approve the *compromis*.[37] Some twenty-two of these came into force, though eleven of them were allowed to lapse. They constituted, until around 1928, the only type of arbitration treaties binding the United States. President Taft, who exhibited much interest, attempted in 1911 to make more inclusive treaties, defining justiciable questions and providing conciliation for other questions. Senator Lodge presented the report of the Committee on Foreign Relations, punctuated by objections that "the constitutional powers of the Senate are taken away *pro tanto* and are transferred to a commission upon the composition of which the Senate has no control whatever," and "the Senate could be debarred from passing upon that question." [38] Again the treaties were emasculated by amendments, and Taft let them drop. The Bryan Treaties represented a great contribution to the methods of pacific settlement, and could be accepted by the Senate because they meant no loss of power upon its part, and no binding obligation upon the United States. In 1916, the Naval Appropriations bill carried the statement that "it is hereby declared to be the policy of the United States to adjudicate and settle its international disputes through mediation or arbitration to the end that war may be honorably avoided." Article 2 of the Pact of Paris is stated in negative rather than in positive form, and therefore establishes no obligation to settle a dispute.

Until about 1928, no further treaties of arbitration were negotiated by the United States except two of the old type, one with Sweden in 1924

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[36] Quoted from the report of the minority of the Foreign Relations Committee, in "Arbitration and the United States," *W.P.F.*, IX, Nos. 6-7 (1926), p. 519.

[37] According to Fleming, *The Treaty Veto of the American Senate*, p. 90, President Roosevelt was induced to agree to these treaties through an expedient devised by Root. This was to submit the *compromis* for the approval of the Senate before it was signed. It was thus not treated as a treaty, nor did it force other nations to make a treaty; but it gave to the Senate the control which it sought.

[38] Of course, the primary purpose of such a treaty is to bind a nation in advance, and to take out of the hands of a legislative body, in which a fire-eating patriotic speech is often regarded as a means of vote-getting, the right to block the peaceful settlement of a dispute. The juridical position of the *compromis* is discussed by Murdock, *op. cit.*, *A.J.*, 23 (1929), pp. 285-286, and by R. R. Wilson, "Clauses relating to Reference of Disputes in Obligatory Arbitration Treaties," *A.J.*, 25 (1931), pp. 469-489.

and one with Liberia in 1926. At about the time that the Pact of Paris was being negotiated, a large number of treaties of arbitration and conciliation were negotiated. They were a distinct improvement over the earlier treaties, but are still far behind those of other states. They provide a clearer definition of justiciable questions, in the same terms as the Inter-American Treaty of Arbitration, and they omit the old reservations as to national honor and vital interests. But they introduce other reservations equally as effective. "Domestic questions" are excepted. The reservation as to the interests of third parties is unnecessary and allows for evasion. The Monroe Doctrine is also excepted. The requirement of Senatorial approval for the *compromis* is retained, thus potentially vitiating the pledge. It was therefore correct to say, until the United States accepted the Optional Clause to the Statute of the Court, that the United States was not bound by any treaty for compulsory arbitration, and the responsibility for this position belonged entirely to the Senate.

Acceptance of the Charter of the United Nations represented no obligation of this sort, but the Senate in 1946 approved, and the United States has accepted, compulsory jurisdiction of the Court for legal disputes. This was, however, made subject to reservations regarding domestic questions and cases arising under multilateral treaties.[39] It should now be possible to improve the policy which for years has kept the United States at the foot of the procession.

Conclusions. To sum up, it may be said that it is in the field of peaceful settlement of disputes that international government has made its most far-reaching advances. What is needed now is consolidation. The development has naturally been scattered rather than unified, but the tendency today appears to be away from centralization and system and toward decentralization. Each state goes its own way, and experiments with this state or that as to means of settlement. Such experimentation has been necessary, but it would seem to be time now to gather up and systematize the results. Aside from the possible inconsistencies of decisions and the lack of authoritative precedents, the various methods in use may produce conflicting obligations. Between the Optional Clause of the Court, the General Act of the League of Nations, the collective treaties among American states, and bilateral treaties of arbitration and conciliation, it may be difficult to determine, among pairs or groups of states, which obligation

[39] It would be out of place in such a work as this to discuss the position of the Senate. From the viewpoint of international government, however, an arrangement by which one-third of the Senate may, for reasons of prerogative or party, reject a treaty or attach weakening reservations to it, makes it difficult for the United States to show good faith or efficiency in her dealings with other states. The Senate has abused its treaty power in other fields also, to such an extent that strong efforts have been made to alter its constitutional powers in this field. See K. Colegrove, *The American Senate and World Peace* (New York, 1944).

is to prevail. The unwillingness of states—representing an unfortunate revival of national sovereignty and particularism—to assume such obligations as the Optional Clause, or the Geneva Protocol, has prevented systematic and concerted development of the means of pacific settlement. It is undoubtedly praiseworthy, when such development is impeded, to seek to satisfy the idiosyncrasies of reluctant states in whatever way is necessary to secure peaceful adjustment, but it is to be wished that states could agree upon a more harmonious system. The recent wide acceptance of the Optional Clause gives hope that progress may now be made.

The most noteworthy feature of this development has been the rapid increase in the use of the machinery of conciliation. This has been due partly to the difficulty of obtaining a satisfactory classification of disputes to be regarded as justiciable or arbitrable, partly to the situation described in the preceding paragraph, and partly to the intrinsic virtues of conciliation as a means of settlement in certain types of cases. But to put conciliation above arbitration is to put compromise above law and justice. If it is necessary to employ conciliation, upon the ground that peace and stability must be established before justice can gain sway, it should be regarded as a temporary expedient. Arbitration should always be used in cases where it is clear that international law covers the issue, and there should be continuous effort to increase the number of such cases. It is going too far to assert that judicial settlement is impossible, until international law is built up into a complete and well-rounded code; for law is never complete. The problem at present is to find a proper balance between the two methods, and the balance should always weigh upon the side of arbitration. Conciliation represents national sovereignty, unwilling to bow to a decision, and it must doubtless be satisfied for a time; but it should gradually give way, as international law and organization develop, to judicial settlement.

PART IV

WE HAVE SEEN how the growing pressure of interdependence led to the establishment of international technical organizations to deal with particular functions. The next logical step toward international government would be the establishment of one overall system for the community of nations, and this came as a result of World War I.

The pressure of war, as discussed in Chapter I above, had been increasingly felt, but the terrible potentialities of modern scientific warfare, as revealed in World War I (and immeasurably more so by World War II), frightened peoples into creation of the League of Nations. The driving force behind this effort was the desire to bring war under control, and this clearly called for more than technical institutions; it demanded an overall organization, of political character and with coercive authority. The League of Nations was intended to be such a body (as is now the United Nations); and it served both "to provide international cooperation" and "to achieve international peace and security." These two functions we shall consider separately, devoting Part IV to organization and cooperation, and Part V to the control of war.

CHAPTER 10

THE LEAGUE OF NATIONS

BACKGROUND AND GENERAL SURVEY

§ 64. Earlier Ideas Concerning a League of Nations.[1]—The idea of a league of nations had long been in gestation; its roots reached far back into the past. Isidore of Seville (560-636) thought of a society of nations, of a world which is the "domicile of all mankind"; and Dante (1265-1321) had in mind a world government which was not to be a unitary monarchy but a community of nations, governed by law.

The campaign against the infidel was the motive force which actuated many of the early writers. Pierre Dubois, for example, was inspired by the reasonable belief that Europe must herself be pacified before any effort against the heathen could hope for success, and in his work, *De Recuperatione Sanctae Terrae,* written in 1305, he proposed that, since the Pope is a ruler over souls only and the Emperor merely a national ruler, there should be an *entente* of European princes. Dubois was a politician and a jurist, rather than the usual philosopher of his age, and he had an eye for reality. Feeling the need for institutions, he urged a union of states, with a council and a court, and his practical political sense added control by France to this plan. Such a plan was fantastic for his day, but it needs to be recalled as the first systematic scheme of this sort ever presented.

The imagination of King Podiebrad of Bohemia (or of his advisor, a Frenchman named Marini) went still further. As a Hussite, he had even less use for a Pope or for an Emperor than did Dubois. He sought a combination of France, Bohemia, and Venice against the Turk, and planned

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[1] A. C. F. Beales, *The History of Peace: A Short Account of the Organized Movements for International Peace* (New York, 1931); M. E. Curti, *Peace or War: The American Struggle, 1636-1936* (New York, 1936); W. E. Darby, *International Tribunals: A Collection of the Various Schemes Which Have Been Propounded; and of Instances in the Nineteenth Century* (London, 1904); R. Y. Hedges, *International Organization* (London, 1935); S. Hemelben, *Plans for World Peace Through Six Centuries* (University of Chicago Press, 1943); C. L. Lange, *Histoire de l'Internationalisme,* Vol. 1 (New York, 1919); J. A. R. Marriott, *Commonwealth or Anarchy? A Survey of Projects of Peace from the 16th to the 20th Century* (Columbia University Press, 1939); J. T. Meulen, *Der Gedanke der Internationalen Organisation in seiner Entwicklung,* 2 vols. (The Hague, 1917-1940); J. B. Scott, *Law, the State, and the International Community,* 2 vols. (Columbia University Press, 1939); V. Valentin, *Geschichte des Völkerbundgedankens in Deutschland* (Berlin, 1920).

to set up a real world state. Members were to be obliged to submit to arbitration and to render to each other mutual assistance, even to the point of military execution of orders. There was to be an Assembly at Basle, and apparently the three states were to divide the world between them and rule it.

The "Grand Dessein" of Henry IV, really the work of his Minister, Sully, was likewise motivated by the crusading spirit, and doubtless also by opposition to the Empire. Sully proposed to redistribute the territory of Europe in order to secure some degree of equality between states, and then reconstitute the Continent into a *république universelle très chrétienne,* composed of fifteen equal units. There was to be a Senate of sixty, four from each state, and six local councils. These states were combined in order to maintain the *status quo,* and the maintenance was to be secured through arbitration and a joint army ready to enforce obedience.

Later and gradually it came to be denied that even infidels should be excluded from the community of nations. The influence of religion was strong, and writers such as Vitoria, Suarez, Gentilis, and others, gave expression to the idea of the unity of the human race and the solidarity of the community.[2] The reformers such as Sir Thomas Moore planned a Utopian community; or like Erasmus, taught the ideal of peace. Theologians, and Grotius as well, taught that it was not proper to fight the Turk simply because of religion; and Francis I not only allied with them, but defended his alliance. The discovery of the New World further widened the horizon and the idea of the community of nations gradually spread beyond Europe to the entire world.

Later writers, then, were less concerned with combinations for religious purposes and more interested in the ideal of a universal human society. An unknown monk, Emeric Cruce, in 1623, wrote *Le Nouveau Cynée,* which is a remarkable forerunner of the League of Nations. His plan called for a mutual guarantee of possessions and provided a council of ambassadors for administrative purposes. William Penn, surprisingly in view of his Quaker beliefs, desired an organization sufficiently strong to arbitrate disputes, and with a military force to back up such decisions. He rejected the principle of conquest and asked for representation based upon population and wealth rather than upon equality.

The famous "Plan for a Perpetual Peace" of the Abbé de St. Pierre probably had more influence than any of these early schemes. By his time, many philosophers were supporting pacifism, were teaching the equality of states, and were seeking in international organization the only legal protection for these equal nations. The Abbé proposed an alliance based upon

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[2] See A. Sereni, *The Italian Conception of International Law* (Columbia University Press, 1943).

the Peace of Utrecht, and was therefore subject to the criticism that he merely maintained the *status quo*. This was emphasized by his plan. There was to be a Congress of Ambassadors, endowed with legislative and judicial power, which could make fundamental changes only by unanimous vote. Pacific procedure was provided for, and disarmament—the latter appearing in but few such plans. The alliance was to back up arbitral decrees, and, like Penn, he proposed to collect the expenses of such an execution from the offending state. The writer detailed an abundance of advantages for his plan; but, as in the case of the Holy Alliance later, its chief result would have been to maintain in power the *beati possidentes*.

There followed a plethora of writers, most of them deriving their ideas from the *Grand Dessein* or from the Abbé de St. Pierre, and concerned more with propagandizing for the cause of peace—a necessary educational process—than with international organization. Rousseau demanded a European Republic, Wolff a *civitas maxima*. Bentham studied the causes of war and proposed disarmament, the liberation of colonies, and an international tribunal; but he would have no more than moral sanctions. Emmanuel Kant preached eternal peace, *Der Ewige Friede*, republican government, and disarmament, and would have builded public law upon a federation of free states. So the thread of thought, through changing and expanding patterns, was woven into the fabric of international development.

§ 65. **Development of Executive Leadership.**—Meanwhile, a pattern had been likewise developing in the field of practical politics. The society of nations grew from a Christian community united against the infidel into a universal community based upon common human interests. Nor is it any longer merely a European community. The Turk has ceased to be ostracized, and was formally admitted to membership in the community in 1856. In the Western Hemisphere two continents of peoples were added as heirs to European civilization; and the Far East has acquired seats among the Great Powers.

Balance of Power. When the Peace of Westphalia proclaimed the legality of the separate and independent existence of states, the factual situation remained little changed. It was still true that one state might easily become the prey of another, and that all might be ultimately swallowed up into a universal empire. To meet this possibility, the earliest means of defence offered was the principle of the Balance of Power. In its application, this principle meant a combination of states against the threat of the strongest aggressive power. Haphazard combinations of this nature doubtless preserved the community of nations against such menaces to its existence as those of Phillip of Spain, or Louis XIV, or even Napoleon. In the nineteenth century, a need for more efficient combination was felt, for Napoleon had come perilously near to a complete upset of the

equilibrium, and it seemed necessary to have some common leadership against any repetition of the danger.

Concert of Europe. The first proposal was made by the fanatic Tsar of Russia, who offered to his fellow sovereigns, at the moment reviewing the victorious allied troops upon the plains of Vertus, the Act of the Holy Alliance. It bound them in Article I:

> Conformably to the words of the Holy Scriptures which command all men to consider each other as brethren, the Three contracting Monarchs will remain united by the bonds of a true and indissoluble fraternity, and, considering each other as fellow-countrymen, they will, on all occasions, and in all places, lend each other aid and assistance; and regarding themselves towards their subjects and armies as fathers of families, they will lead them, in the same spirit of fraternity with which they are animated, to protect Religion, Peace and Justice.

This proposal was accepted by all, "so to speak, with a shrug of the shoulders," but Castlereagh of England, to whom it was all "verbiage," wished for something more concrete. His purpose, as expressed in the Preamble to the Quadruple Alliance, was "to fix in advance by a solemn treaty the line of conduct which they propose to follow in order to guarantee Europe against the dangers that might yet threaten her." The engagements of the Treaty of Chaumont were renewed, and the actual forces to be provided by each state in case of intervention were specified. The Quadruple Alliance also agreed to "renew at fixed intervals" their previous conferences—"meetings consecrated to great common objects and the examination of such measures as at each one of these epochs shall be judged most salutary for the peace and prosperity of nations and for the maintenance of the peace of Europe." [3]

Thus the Concert of Europe began, purposefully enough. It was based upon the primacy of the Great Powers, upon whom responsibility fell since they alone were strong enough to maintain order.[4] Its principle of action was the maintenance of the Balance, the preservation of the *status quo;* it asserted that the public order of Europe was based upon the principle of legitimacy. It worked through the same old alliances; but also through the new method of periodic conferences, concerning which Castlereagh was enthusiastic. It had no secretariat, no formal organization to prepare its meetings. Conferences were held at Vienna in 1815; at Aix-la-Chapelle in 1818; at Troppau and Laibach in 1820 and 1821; and at Verona in

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[3] On this period, see W. A. Phillips, *The Confederation of Europe* (New York, 1914).

[4] A phrase recurrently familiar in the discussions concerning the making of the United Nations.

1822. These meetings produced some legislation, such as rules concerning the rank of diplomatic agents, and resulted in positive action for the maintenance of rights and order in Europe. The weapon of intervention was actively employed in the name of the Concert, although, from a present-day viewpoint, it was misused. Disagreement as to its function led to the withdrawal of England at Verona, leaving the hybrid combination which came to be known as the Holy Alliance, and against which the United States, in Monroe's message of 1823, ranged herself alongside of England. The Holy Alliance hung on, a disembodied spirit, until the Hungarian Revolution of 1849.

Nevertheless, the Concert of Europe, in much broader and more vague grouping, continued its work. Conferences were summoned as crises arose, and by the state most affected or sufficiently interested to take the initiative in calling a meeting. Such action represented the growing feeling of responsibility for maintaining peace in Europe, and it furnished, in most rudimentary form, a sort of an executive direction for Europe.

Nineteenth Century. Many examples of the control thus exercised can be found in the nineteenth century. The struggle for Grecian independence opened a new phase of the Eastern Question; and that hotbed of war became more than ever a matter of concern to Europe, calling for common action to adjust its affairs. A contest, said Canning, "so ferocious, leading to excesses of piracy and plunder, so intolerable to civilized Europe, justifies extraordinary intervention, and renders lawful any expedient short of positive hostility." [5] As a matter of fact, it produced open hostilities, and after the annihilation of the Turkish fleet at Navarino, the Powers granted independence to Greece and promised her a monarch.[6] From that time on, a close watch was kept over the Balkan peninsula, and no state was permitted to have its own way unsupervised. Regularly the Concert intervened when troubles arose and called conferences to readjust the situation, as at the Congress of Paris in 1856,[7] or as when it compelled the revision of the Treaty of San Stefano at the Congress of Berlin in 1878. The neutralization of Belgium, "the cockpit of Europe," and of Luxembourg and the Netherlands, are other illustrations of its work. Smaller states were invited to participate on various occasions; and the two Hague Peace Conferences at the beginning of the twentieth century represented a new phase, both as to universal membership and in the attempt at a legis-

[5] Marriott, *The Eastern Question*, p. 195.

[6] And in addition opened the Black Sea and the Danube River to neutral vessels, and gave autonomy to the principalities of Moldavia and Wallachia.

[7] At this Congress, Turkey was admitted "to participate in the public law and concert of Europe," and various territorial rearrangements were made. In addition, the famous Declaration of Paris concerning maritime warfare represented the legislative activity of the Concert.

lative solution of the problem of maintaining peace and reducing armaments.

In the present century, four episodes reveal strikingly the growing coherence of the Concert, and its tendency to intervene in matters which would earlier have been maintained to be matters of purely national concern. In 1905, Germany demanded that Morocco, over which France had been gradually extending her control, should be placed under international supervision. A conference was assembled at Algeciras in the following year, which resulted in "theoretical acceptance of the German doctrine of internationalization, but a practical disavowal of it by the grant of a privileged position to France and Spain." [8] The dispute was not settled; and when it flared up again with the visit of the German gunboat *Panther* to Agadir in 1911, Lloyd George made a famous speech in which he asserted —as Germany had done herself in 1905—that England could not be omitted from any settlement of the Moroccan question, even though she had no direct political stake in it.[9]

The claim of an international control over troublesome questions was even more strikingly demonstrated in two episodes in the Near East. When Austria, in 1908, annexed Bosnia-Herzegovina, a protest was at once made at such a violation of the public law of Europe, recorded in the Treaty of Berlin, and an international conference was demanded. It was a serious crisis, for Germany "in shining armor" backed up Austria; and the Concert was not operating with sufficient harmony to be able to prevent the violation. The annexation was legalized, but even in this solution the character of international control was recognized in that the note through which Serbia unwillingly submitted was addressed to, and in submission to demands from, the Great Powers.[10] When the Balkan War broke out in 1912, the Powers again intervened, even to the extent of a display of naval force; and the Conference at London, in July, 1913, created the independent state of Albania, put Prince William of Wied upon its throne, and established a Commission of Control, which was responsible for the

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[8] Schmitt, *England and Germany*, p. 237. The Conference provided an international police in Morocco, and a self-supporting financial system.

[9] "But if a situation were to be forced upon us by which peace could only be preserved by the surrender of the great and beneficent position Britain has won by centuries of heroism and achievement—by allowing Britain to be treated, where her interests are vitally affected, as if she were of no account in the cabinet of nations—then I say emphatically that peace at that price would be a humiliation intolerable for a great country like ours to endure." Quoted by Schmitt, *loc. cit.*, p. 330.

[10] The note is worth quoting: "Serbia recognizes that the *fait accompli* regarding Bosnia has not affected her rights, and consequently she will conform to the decisions that the Powers may take in conformity with the Treaty of Berlin. In deference to the advice of the Great Powers Serbia undertakes to renounce from now onward the attitude of protest and opposition which she has adopted with regard to the annexation since last autumn. She undertakes, moreover, to modify the direction of her policy and to live in the future on good, neighborly terms with the latter." It may be noted that the Austrian ultimatum to Serbia in 1914 claimed a violation of this promise.

organization of the new government and for civil and financial administration in Albania.[11]

The concerted action of states is illustrated in less distinctly political action. Thus there has been, in a number of cases, cooperative action to secure financial control, as in Egypt, or Turkey, or China. There have been collective actions for territorial administration, or condominiums, in such cases as Samoa, the New Hebrides, or the puzzling case of Spitzbergen. The joint action taken against Venezuela in 1903 was rewarded by the Hague Tribunal, which gave to the intervening powers a priority in payment, thus giving judicial support to such action.[12] One of the most interesting of these experiments is the international city of Tangier, whose history illustrates how agreement is forced out of conflict. It has been constantly a subject of negotiation, until a revised statute was finally agreed upon in July, 1928. It has an international commission of control, an international legislative assembly, a mixed court, and international administration over such matters as health, navigation, and postal communication. Alongside of this system, and apparently still independent of it, is the Commission for the Cape Spartel Lighthouse, which has functioned successfully for many years.[13]

Whatever one may think of the policies involved or of the decisions taken in these situations, there can be no doubt that the community of nations was taking an increasing interest in all problems that might disturb the peace of nations; that states were demanding participation in community action for this purpose; that the authority of the Concert was admitted; and that it was building precedents and even, at the last, organs for joint action. Its machinery, however, proved totally insufficient when confronted with the ultimatum presented by Austria to Serbia in 1914. It has often been said that had there been any effective international organization whatever, even a means of summoning an international conference, World War I could have been averted; and in view of later developments the assertion does not sound unreasonable. At any rate, the Concert of Europe, with all its precedents of authoritative intervention, lacked the cohesiveness and the organization through which it could respond rapidly and effectively in the emergency which precipitated the war in 1914.

World War Machinery. The desperate emergencies of the First World War produced a degree of international cooperation which leads one to wonder why such cooperation cannot be attained for the purpose of

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[11] F. Sayre, *Experiments in International Administration* (New York, 1919), pp. 56-62.

[12] J. B. Scott, *Hague Court Reports* (Oxford University Press, 1916), p. 58.

[13] As to Tangier, see D. P. Myers, "Tangier, An International City," *National Municipal Review*, IV (1915), pp. 60-65; G. H. Stuart, *The International City of Tangier* (Stanford University Press, 1931).

avoiding war. In 1916, an Allied Supreme War Council was set up to assume general direction over the far-reaching activities of the Allies. An Allied Naval Council, a Maritime Transport Council, and a Blockade Council soon appeared, and also various executives, such as the Wheat Executive, or the Petroleum Conference. Sub-committees arranged programmes of shipments for many commodities, such as wool or cotton, hides, cereals, nitrates, and coal or steel. While the functions of these bodies were for the most part fact-finding, their recommendations were almost necessarily accepted by the nations involved. Their activities extended to neutrals, and the cargo and destination of practically every commercial vessel was directed by the Allied Maritime Transport Council. It is hardly going too far to say that in the use of certain articles the nations of the world were put upon a ration basis. The success of these organs furnished examples and precedents used in the creation of the League of Nations.[14]

§ 66. The Making of the Covenant.[15]—The efforts looking toward peace and international organization during the war were necessarily scattered and disorganized, but their surprising persistence revealed their hold upon the public imagination. In Switzerland, a committee was formed by Professor Nippold in August 1914; a Dutch organization began work in October 1914 and summoned a conference at The Hague which became known as the *Organization Centrale pour une Paix Durable;* in France *La Paix pour la Droit* worked for a league endowed with strong sanctions; in Germany such organizations were strictly repressed, but some valuable studies were nevertheless made. Several groups were at work in England: The Union for Democratic Control, the Fabian Society, the Bryce Group, the Phillimore Group, and the League of Nations Society, which was founded in 1915.

Meanwhile, in the United States, and under the leadership of William H. Taft, the League to Enforce Peace had been organized at Independence Hall in January, 1915. It had a program of four points: (1) justiciable questions to be submitted to a tribunal; (2) other questions to a Council for inquiry and recommendation; (3) economic and military force to be combined against a state which goes to war before submitting its dispute to settlement; (4) periodical conferences to codify international law. It

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[14] S. P. Duggan, *The League of Nations* (Boston, 1919), Chap. III; Sir Arthur Salter, *Allied Shipping Control, An Experiment in International Administration* (New York, 1921).

[15] On the making of the League of Nations, see R. S. Baker, *Woodrow Wilson and the World Settlement,* 3 vols. (Garden City, 1922); Gonsiorowski, I, pp. 121-216, and 317-326; Howard-Ellis, Chaps. I-V; C. A. Kluyver, *Documents on the League of Nations* (Leiden, 1920); Knudson, Chap. I; Miller, entire; T. Marburg, *Development of the League of Nations Idea: Documents and Correspondence of Theodore Marburg,* edited by J. H. Latané, 2 vols. (New York, 1932); Morley, Part I; Münch, entire; Ray, Introduction; Temperley, *passim;* F. Wilson, *The Origins of the League Covenant* (London, 1928).

was a simple and appealing program, although it would delay rather than eliminate war. It met with much support, and also encountered opposition which became organized as the World Court League. The latter body represented the view which finally prevailed in the United States—opposition to sanctions and support for Court, conciliation, and codification. In May, 1916, President Wilson spoke to the League to Enforce Peace, supporting the idea of an association of nations to keep the seas free and to prevent war, and favoring a guarantee of territorial integrity and political independence. In his speech to the Senate on January 22, 1917, he added the idea of disarmament. The last of his famous Fourteen Points stated the ideal of a League of Nations: "A general association of nations must be formed under specific convenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small States alike."

Consolidation of Ideas. Thus, by the end of the War, the idea of some sort of an association of nations was strong in many countries. The Allied statesmen—Grey in England, Briand in France, Wilson in the United States, as well as Bethmann-Hollweg in Germany—were all committed to it, and the neutral states were seriously studying it. Certain common principles appeared. There was content no longer with extemporaneous cooperation; permanent organization was desired. The principle of universality was accepted—all states should be members; and opinion tended toward some mild form of federation rather than toward a superstate. Most plans called for some sort of a representative assembly, for a court, a council, and for a secretariat. Some envisaged military sanctions; the French hoped for an international army and general staff. There was general agreement that it is the duty of every state to accept its share of the collective responsibility for the maintenance of order and systematic cooperation within the association, and to join in against the state which was a menace to peace. The purpose of the organization, in the minds of most, was the diminution of war, though the Anglo-Saxons were not optimistic enough to conceive of more than delaying war, in the sense of the Bryan Treaties. There was a great incidental interest in the limitation and reduction of armaments, and a surprising amount of attention was given to such humanitarian matters as colonies, minorities, and self-determination in general, and to economic problems, all of which were regarded as causes of war and in need of adjustment.

Peace Conference. At the plenary meeting of the Paris Peace Conference on January 25, 1919, a resolution was passed, asserting it to be essential "that a League of Nations be created to promote international cooperation, to ensure the fulfillment of accepted international obligations, and to provide safeguards against war"; that it should be created "as an

integral part of the general treaty of peace"; and that it should have periodic conferences, a permanent organization, and a secretariat. A Commission was appointed, with President Wilson as chairman, to work out the Covenant of the League of Nations. It was composed of two members from each of the five Great Powers and—after a protest by the small states—of nine others representing the smaller states. The First Commission of the Peace Conference, dealing with the League of Nations, held ten meetings from February 3 to February 13, and on the 14th President Wilson sailed for America to be gone for one month.

The report of the Commission had been taken for consideration by the Plenary Conference, but meanwhile, suggestions and criticisms were pouring in from every quarter. Those which came from the United States were of the most importance, not because of their intrinsic merit, but because they revealed an increasing opposition in the Senate, which it would be necessary to placate. The most important of these suggestions concerned "domestic questions," the Monroe Doctrine, the right of withdrawal, unanimity in Council and Assembly, and the non-obligatory character of the mandates system. These President Wilson supported and they were incorporated into the Covenant. On May 20-21, the neutral states were invited to express their views, and this led to further changes. The Commission resumed its deliberations upon Wilson's return, and after a total of fifteen meetings adopted a text which was approved by the Plenary Conference on April 28. Sir Eric Drummond was named as the first Secretary-General, and a committee was appointed to inaugurate the new machinery. While it began work at once, and the League of Nations had its first headquarters in London, the Treaty of Versailles and therefore the Covenant (which was the first 26 articles of the Treaty) did not go into effect until January 10, 1920, when the exchange of ratifications was made.

THE DEFECTION OF THE UNITED STATES. But for the powerful leadership of President Wilson, the Covenant would not have been included in the Peace Treaties, and quite probably there would have been no League of Nations at all. Thus the League was largely of American origin, yet it was rejected by the United States. This famous episode deserves the attention of the American people from several viewpoints, not all of which can be considered here: as an instructive, though not very cheerful, lesson concerning the process of democracy in the United States; as illustrating the need for more efficient constitutional methods and governmental machinery for cooperation in international affairs; and as one of the chief reasons for the difficulties and failures of the League of Nations.

Many studies have been made of this situation and it is now possible to speak with confidence as to the facts. "It is as certain as anything in the realm of public opinion can be," says a recent authority, "that in May,

1919, the majority of the American people favored the ratification by the Senate of the Treaty with the Covenant as it was." [16] A Literary Digest Poll showed newspapers in favor of it, and 32 State Legislatures and 33 Governors had endorsed it. Senator Lodge himself, the Chairman of the Senate Foreign Relations Committee, who led the successful fight against the League, explained that since 80% of the American people were for the League, he could not undertake a direct frontal attack but must chip away at it by pointing out dangers and adding "safeguarding" reservations.[17] The attack, though perhaps intensified by Lodge's personal animosity to Wilson, was primarily a matter of political party strategy. The Covenant was seized upon as the best point of attack against the administration in power, and such considerations as the good reputation of the United States or the peace of the world were disregarded in view of the superior needs of the party.

The campaign was waged with shrewdness and success. On the one hand, doubts were stirred up on the basis of historic American policy, concerning the Monroe Doctrine, "entangling alliances," and the dangers of military action by the League against the United States; and mothers were frightened by the spectre of their sons being called upon to "shed their blood in faraway lands and for causes in which we have no concern," to quote from Senatorial oratory. The antipathies of the Irish against England were appealed to, and the prejudices of other racial groups were stirred up in various ways. On the other hand, through astute parliamentary strategy, Lodge put himself into the position of being the defender of the Treaty of Versailles (with fifteen reservations attached to it which President Wilson could not accept and which left little of the League of Nations) and which put Wilson into the position of voting against his own treaty. Public opinion was apparently changed, though the election of 1920 cannot be regarded as a referendum on this issue,[18] and remained opposed for two decades or more. The Treaty was not ratified; the United States made a separate treaty of peace with Germany and remained outside the League.

So complete was the reversal of attitude that the Department of State did not dare even to acknowledge communications from the League of Na-

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[16] R. J. Bartlett, *The League to Enforce Peace* (University of North Carolina Press, 1944), p. 130; and see C. A. Berdahl, *The Policy of the United States with regard to the League of Nations* (Oxford University Press, 1932); K. Colegrove, *The Senate and World Peace* (New York, 1944), Ch. IV; D. F. Fleming, *The United States and the League of Nations 1918-1920* (New York, 1932).

[17] H. C. Lodge, *The Senate and the League of Nations* (New York and London, 1925); *As I Knew Them: Memoirs of* (Senator) *James E. Watson* (Indianapolis, 1936).

[18] See Berdahl, *loc. cit.*, pp. 47-66; Colegrove, *loc. cit.*, Ch. IV; Fleming, *loc. cit.*, Ch. XVIII-XIX. Harding, in his campaign for the Presidency asserted that he, too, was for an "association of nations," but this platform promise was forgotten after election.

tions for some years. By 1923, American representatives could attend conferences held under the auspices of the League "in an unofficial and consultative capacity"; and by 1930, Secretary Kellogg could assert that the United States had sent official delegations to 22 League conferences and unofficial observers to 20 others. Such participation was inevitable and could not for long be childishly refused; it developed until the United States, toward the end of the League, was taking a larger share in the activities of the League than did ninety per cent of its Members—though without sharing in the overhead cost of the League! A delegate of the United States even sat, though timidly and mutely, with the Council of the League during its discussion of the Manchurian situation.

In spite of the increasing sympathy of the United States for the League, its method of unilateral cooperation was so ineffective that the League was unable to do many things which could have been done with the assistance of the United States. Public Unions could not be put under the League, as anticipated in Article 24 of the Covenant, because the United States would not belong to them if they belonged to the League. The disarmament effort eagerly supported by the United States depended upon security, but the United States would not contribute to collective security. The Manchurian situation was particularly difficult for the League, since it was of primary interest to the United States and the Soviet Union and a third one of the Great Powers (Japan) was defying the League. In the Ethiopian crisis, economic sanctions could not be effectively applied since the United States was not bound to apply them; and when Japan again attacked China in 1937, coordination of efforts failed though the United States was working in the utmost sympathy with the League. The failure of the League lay in its failure to provide security, and for this failure the absence of the United States was largely responsible.

§ 67. The Nature of the League of Nations.

A Victor's Peace? The League was severely criticized by its opponents in the United States on the ground that it was an organization of victors for the purpose of maintaining the "iniquitous" Treaty of Versailles. The Covenant was, of course, made at the same peace conference which imposed upon Germany the terms of peace, and it was itself a part of the various treaties of peace. The Covenant was, however, a separate instrument; it could be accepted by non-signatories or rejected by signatories of the peace treaty, and a process of amendment was provided independent of the usual procedure for revising a treaty. The League had, of course, a duty to uphold this Treaty as all other treaties; but it, like the United Nations later, was excluded from administration or enforcement of political settlements, such as reparations or frontiers, and the specific tasks given

to it by the peace treaties were humanitarian or administrative, such as minorities, or Danzig and the Saar territories.

It was President Wilson's belief that no peace treaty could be made which would satisfy everyone and that it was much more important to have an organization for the continuing adjustment and settlement of difficulties which would inevitably arise under the peace settlement. As events proved, the League was not used as a guarantee of victory or as a means of enforcement except in the general sense of its duty to uphold existing treaties; it was used to aid rather than to harass the vanquished.

Not a Superstate. It has been observed that the League was evolutionary in origin, being little more than a gathering together, on a broader scale of participation, of the various methods and agencies already long in use. It is not surprising that this first effort at general organization of the community should have restricted but little the freedom of action of its member states. It was a voluntary association of sovereign states, accepting certain common obligations and employing a common machinery of action for certain purposes; it was incapable of creating new law, or imposing new obligations, upon a Member without the consent of that Member. It created a joint responsibility but it respected sovereignty. While it had some personality of its own, it was for the most part merely machinery through which states could cooperate if they so desired—and from this it follows that the failure of the League was the fault of its Members rather than of itself.

Coercive Power. The primary reason for which the League was established was the desire to be secure from war. Such security could be provided only by use of the superior force of the whole community, and the duty of community action against an aggressor was recognized, though not sufficiently implemented. A new theory in relations between states was thus adumbrated, to be compared with the domestic theory of police action. It was not the same, however, for there was no superior authority above states, no independent police force and no automatic action against a law-breaker. If coercive action was to be taken, it must be upon decision by the states themselves, in each separate instance, and through armed forces contributed by Members as they might wish. There was no coercion from an authority above, but there might be joint coercion from outside a state. It was maintained that neutrality was inconsistent with the obligations of the Covenant. Where joint action against an aggressor had been a right in the past, it was now stated as a duty, though, unfortunately, not with sufficient implementation to be effective.

Universality. The admission of former enemy states into the League of Nations destroyed the charge of exclusivity, and its total membership embraced most of the states of the world. There was never any one time,

however, at which all these states were members, nor a time at which all the Great Powers were members; and the absence of the United States wrecked any statistical claim of universality. The increasing cooperativeness of the United States made more plausible the claim of the League to speak for the whole community of nations, but the absence from membership of the United States, the withdrawal of Germany, Italy, Japan, and others, and the unwise expulsion of the Soviet Union, left it shockingly weak.

A proposal was made by Argentine at the first Assembly for automatic membership of all states. This might be a desirable objective, but it would require sufficient authority and strength on the part of the League to compel a recalcitrant state to accept and observe the obligations of membership, and states were not willing to give to it this authority. On the other hand, unless sovereignty was subordinated to superior authority in this fashion, it seemed desirable to set standards for membership; even the older practice of recognition required that a state should be able and willing to meet the obligations of membership in the unorganized community of nations before it could claim the benefits and legal rights of such membership. In practice, the League strove toward universality, and no candidate for membership was ever rejected except entities too small and dependent to assume the responsibilities of membership. Though it never embraced all the states of the world, the League made an important step toward international government when it accepted the principle, *omnium contra unum.* It thereby became the duty of all states to combine, not in particular alliances directed against particular states, but against whatever state happened to be the law-breaker.

A Service Institution. The indispensable and undebated value of the League of Nations lay in its character as a service organ for the community of nations. For the first time, there existed a central agency and machinery to which could be referred practically any question of interest to members. Either the Assembly or the Council could deal "with any matter within the sphere of action of the League or affecting the peace of the world," and while this gave it no authority to make binding decisions, it enabled the League to be of service in many useful ways. This was recognized to such an extent that upon the eve of its downfall it was commonly said that the League must be maintained for this purpose, even if it had failed in its more important political purposes.

Legal Personality. The attempt to define the League of Nations in terms of political science has brought forth many answers. It was clearly not a state; it seems insufficient to call it an association of nations; and its principle, *omnium contra unum,* made it more than an alliance. It has been called a glorified public union but, while it did perform similar ad-

ministrative functions, it was not limited to one function and it was more than administrative in character. As we have seen, it was not a superstate, nor could it be called a federal system, since the balance of authority did not reside in the central government, nor could that authority reach down to individuals within the member states. Perhaps it most nearly resembled a confederation in which each member retained its sovereignty and most of its autonomy. While there has been some debate in the literature on the subject, most writers seem to admit some degree of legal personality to the League.[19]

§ 68. **General Survey.**[20]—The League of Nations system, in its broadest sense, included three bodies, each founded on a separate instrument and more or less autonomous, but all related to each other in various connections. These were the League itself, the International Labour Organization, and the Permanent Court of International Justice. The International Labour Organization has now become one of the specialized agencies, and will be taken up under that heading; the Permanent Court of International Justice will be discussed at the end of this Chapter, and later as revised into the International Court of Justice.

THE COVENANT. The Covenant was a self-contained unit, but also the first twenty-six articles of the peace treaties. It represented in every paragraph a hard-won compromise between conflicting views. It also represented the Anglo-Saxon predilection for general principles and broad statements to be worked out in gradual evolution.[21] No organ was given authority to interpret the Covenant. A proposal to give this authority to

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[19] On this problem, see Gonsiorowski, I, p. 283; Howard-Ellis, pp. 343, 483; Oppenheim, I, pp. 319-322; Ray, pp. 63-64; Verdross, *Verfassung*, p. 111; Williams, *Chapters*, Chap. 15; Wright, *Mandates*, pp. 364-368, 302-303, 425-426; P. E. Corbett, "What is the League of Nations?" *B.Y.I.L.*, 1924, pp. 119-148; Hoijer, *Le Pacte de la Société des Nations* (Paris, 1926), p. 12; T. Komarnicki, *La question de l'intégrité territoriale* (Paris, 1923), pp. 135-148; Wm. Martin, "La nature juridique de la Société des Nations," *R.D.I.*, III (1929), pp. 403-431; J. Nisot, "La structure juridique de la Société des Nations," *J.D.I.*, 55 (1928), pp. 328-339; R. Redslob, *Théorie de la Société des Nations* (Paris, 1927), pp. 44-48 and *passim*.

[20] The following works are suggested as a short bibliography on the League of Nations: Viscount Cecil, *A Great Experiment* (Oxford University Press, 1941); Gonsiorowski, entire; Howard-Ellis, entire; Knudson, entire; Miller, *passim;* P. Munch, ed., *Les origines et l'oeuvre de la Société des Nations* (Rask-Orstedfonden, Copenhagen); Morley, entire; D. P. Myers, *Handbook of the League of Nations* (W.P.F., Boston, 1935); W. E. Rappard, *Uniting Europe: The Trend of World Cooperation since the War* (New Haven, 1930); R. Redslob, *Théorie de la Société des Nations* (Paris, 1927); W. Schiffer, *Repertoire of Questions of General International Law before the League of Nations* (Geneva, 1940); G. Schwarzenberger, *The League of Nations and World Order* (London, 1936); A. Zimmern, *The League of Nations and the Rule of Law* (London, 1936).

Commentaries upon the Covenant: Ray, Schucking-Wehberg; Yepes and da Silva. Yearbooks by Ottlik (Annuaire), and by Judith Jackson and Stephen King Hall. Complete and

[21] "Probably it was wise to leave the matter vague and uncertain. final precision in any international document, particularly regarding such a momentous issue, is not always desirable." Miller, I, p. 181.

the Court was rejected on the ground that it would put the Court above the League; and Article 59 of the Statute, which holds a decision of the Court binding only on the parties before it, made judicial interpretation of no final effect. The Council and Assembly were regarded as too much political in character to be allowed to interpret the Covenant. Each Member was thus left free to put his own interpretation upon its words. In practice, debates and resolutions in the Assembly and procedures worked out into accepted interpretations—and these usually constituted limitations upon the authority of the League.

The plan of the Covenant is simple. After a brief Preamble, the first seven articles provide for membership and organization; Articles 8-17 deal with the maintenance of peace; Articles 18-21 are concerned with treaties and regional arrangements; and the remainder, except for Article 26, the amending clause, take care of international cooperation and administration. Before taking up the study of the various parts of the organization, with their functions and interrelations, there are certain matters relating to the League as a whole to be considered.

MEMBERSHIP. Two classes of membership were established by the Covenant. Original Members were those who had signed the Treaty of Peace and were also named in the Annex to the Covenant (thus excluding enemy states), and the thirteen invited neutrals also named in the Annex, all of whom accepted membership within the time limit set. The other class was composed of admitted Members.

ADMISSION. "Any fully-self-governing State, Dominion, or Colony" could become a Member if approved by a two-thirds vote of the Assembly (Article 1, Para. 2). The phrase "fully-self-governing" was never defined, but is doubtless to be explained by the inclusion in the Annex of the British Dominions and India. Each applicant for membership was required to give "effective guarantees of its intention to observe its international obligations." The actual test of whether qualifications had been met or not was, of course, the vote of the Assembly.[22] The only groups actually denied admission were those considered to be too small for the responsibilities

[22] The First Assembly set the following questions to be asked of applicants for admission: (a) Was its application for admission to the League in order? (b) Was the Government applying for admission recognized *de jure* or *de facto*, and by which states? (c) Was the applicant a nation with a stable government and settled frontiers? What were its size and its population? (d) Was it fully self-governing? (e) What had been its conduct, including both acts and assurances, with regard to (i) its international obligations; (ii) the prescriptions of the League as to armaments? *Records of the First Assembly*, Second Committee, p. 159.

As to admission in general, see J. Coucke, "Admission dans la Société des Nations et reconnaissance de jure," *R.D.I.L.C.*, 3rd Series, II (1921), pp. 320-329; M. O. Hudson, "Membership in the League of Nations," *A.J.*, 18 (1924), pp. 436-458; G. Scelle, "L'admission des nouveaux Membres de la Société des Nations par l'Assemblée de Genève," *R.D.I.P.*, XXVIII, pp. 122-138.

of membership, such as San Marino, Monaco, and some of uncertain political status, such as Georgia and Azerbaijan. The only important state which failed to join the League at all was the United States.

TERMINATION OF MEMBERSHIP. Membership in the League could be terminated in one of three ways: by formal withdrawal upon two years' notice (Article 1, Para. 3); by refusal to accept an amendment (Article 26, Para. 2); or by expulsion (Article 16, Para. 4). It was also required that all international and Covenant obligations should have been fulfilled at the time of withdrawal, a provision intended to make it impossible to withdraw for the specific purpose of avoiding an obligation. However, no one called attention to this obligation when Germany, Italy, and Japan withdrew so as to be free to continue to violate the Covenant. A Member which expressed its dissent from an amendment properly adopted automatically ceased to be a Member, though it was not made clear how long a period might elapse before such dissent was expressed. A Member might be expelled for violations of the covenants of the League by a vote of the Council concurred in by all other Members of the League represented thereon. The only case of expulsion was that of the Union of Soviet Socialist Republics, in December, 1939, as a result of its attack on Finland.[23]

AMENDMENT. Article 26 provided that "amendment to this Covenant shall take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly." While this statement apparently favored the Council, in effect both Council and Assembly were eliminated, since states might ratify the amendment or not, regardless of how their representatives voted in either body. Various uncertainties developed. Should the Council and Assembly act separately or jointly? Was unanimity required for their action (Article 5) though a majority only was required for ratification? Should an amendment not ratified remain open indefinitely? As a result of such problems, the Second Assembly offered an amendment to Article 26 but it was not ratified by a sufficient number of states to put it into effect. A few minor amendments were made but on the whole the Covenant remained practically unchanged.

FINANCES. Like many other new bodies, the early financial situation of the League was precarious.[24] The original provision in Article 6, that expenses should be borne "in accordance with the apportionment of the

[23] This, in view of earlier failure to expel Germany, Italy, or Japan, and in view of the wartime Soviet position, now seems a strange procedure. See, as to the procedural question, Leo Gross, "Was the Soviet Union Expelled from the League of Nations?" *A.J.*, 39 (1945), p. 35.

[24] "At one time things reached such a pitch that the Secretary-General and one or two other high officials secretly pooled their month's salary to pay the salaries of the

expenses of the International Bureau of the Universal Postal Union," had not been fully considered, and proved inappropriate. For one thing, it provided only for the expenses of the Secretariat. For another, the Postal Union scale did not fit a body whose expenses were far greater, and whose members were not so numerous. An amendment was made (which entered into effect in 1924) authorizing the Assembly to decide upon the proportion in which Members should bear the expenses of the League. In 1925, the Assembly set up a scale ranging from one to 105 units. These units were proportioned among Members upon the basis of revenue, population, and other factors, and the system was flexible enough to limit India and China, with their enormous populations, to the amount paid by the most populous European country.

The budget was in three parts: for the Secretariat, for the International Labour Office, and for the Permanent Court of International Justice. Each of these bodies prepared its own budget which was subjected to detailed examination by the Supervisory Commission. The consolidated budget was referred to Members before the meeting of the Assembly, and at the Assembly was handled by the Fourth, or Finance, Committee, whose report was customarily accepted by the Assembly. The first budget called for ten million Swiss francs; in 1939, this had risen to 32,234,012 francs, and the budget of 1943 was for 11,388,376 francs. The attitude of the League toward expenditures was one of severe economy, with the result that the world expended upon its organization for the maintenance of peace and progress among nations, during its entire existence, less than the cost of one modern battleship. The legal obligation to pay dues seems clear, but it was not so clear that Members were bound to accept a budget as voted, and there was no means of compelling payment. While some states were in arrears, dues were on the whole regularly paid, even during World War II.

Headquarters and Immunities. The seat of the League was fixed at Geneva by the Peace Conference, and while there were occasions on which there seemed to be a possibility of removal, the building of the International Labour Office home and the magnificent League of Nations palace seemed to indicate the intention of remaining at Geneva. Organs of the League could meet elsewhere, but they came to depend so completely upon the Secretariat and equipment at Geneva that they rarely met elsewhere than at headquarters.

Complicated negotiations were required with Switzerland with regard to the inviolability of League property and with regard to immunities to be

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exiguous lower staff." Howard-Ellis, p. 432. The discussion of League finances by Howard-Ellis, in Chap. XI, is particularly interesting. See also H. Ames, *Administration financière et répartition des dépenses de la Société des Nations* (Genève, 1923); H. F. A. Vollmar, *Les Finances de la Société des Nations* (La Haye, 1924); Wertheimer, Chap. XIV.

granted to its officials and to the representatives of states. The granting of immunities to delegates to the Council and Assembly and to the numerous conferences held in Geneva, as well as to the permanent officials of the Secretariat and the Bureau of the International Labour Office, constituted a unique and heavy responsibility for the state in which headquarters were located.[25]

§ 69. **The Permanent Court of International Justice.**[26]—The League of Nations system, it was said above, included the Permanent Court of International Justice. The Court was not quite an organ of the League, but it was a product of the League, and should be discussed in relation to it. It is therefore, and perhaps somewhat inappropriately, taken up at this point. It became theoretically a new Court under the United Nations, but actually few changes were made. These will be mentioned when we come to discuss the Court as the "principal judicial organ" of the United Nations.

The older Court had been created, in accordance with Article 14 of the League of Nations, as an independent organ, founded upon its own treaty, but related to the League in various ways. Its judges were elected by the Council and Assembly of the League; the number of judges could be increased, and their salaries fixed, by the Assembly; its budget was a part of the League of Nations budget, though an independent unit thereof. Various duties—such as advisory opinions—were laid upon the Court by the Covenant, and also by other treaties.

Selection of Judges. The Court consisted originally of eleven judges and four deputy judges, but the Statute was amended in 1929 to provide fifteen judges. They were to be chosen regardless of nationality "from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law" (Article 2 of the Statute), and were to represent "the main forms of civilization and the principal legal systems of the world" (Article 9). The qualifications set are high, demanding the type of man capable of holding the highest judicial position in his own country. Each national group of members of the Permanent Court of Arbitration at The Hague (consisting

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[25] S. Basdevant, *Les fonctionnaires internationaux* (Paris, 1934); M. Hill, *Immunities and Privileges of International Officials* (Washington, Carnegie Endowment, 1946); J. Secretan, "The Independence Granted to Agents of the International Community in their Relations with National Public Authorities," *B.Y.I.L.*, 1935, p. 56. See L of N Doc. C.66.1926.V.

[26] See A. P. Fachiri, *The Permanent Court of International Justice: Its Constitution, Procedure and Work* (Oxford University Press, 1932); B. de Francqueville, *L'Oeuvre de la Cour Permanente de Justice Internationale*, 2 Vols. (Paris, 1928); M. O. Hudson, *The Permanent Court of International Justice, 1920-1942: A Treatise* (New York, 1943).

of four persons) is entitled to nominate not more than four judges, not more than two of these of their own nationality. The list of nominees is submitted by the Secretary-General, in their alphabetical order, to the Council and Assembly, which vote upon them independently of each other and by secret ballot. In each body, each candidate must receive an absolute majority; and if two men are elected from the same state, only the elder is declared elected. Other provisions guard against any possibility of deadlock.

Under certain circumstances, there may be additional judges upon the bench. Each nation party to the case before the Court is entitled to have upon the bench a judge of its own nationality, a provision which has caused criticism. A judge is not supposed to be a representative of his own state, but the result of this situation is to make him an advocate for his state. It might have been desirable, from the viewpoint of an ideal tribunal, to have required the removal from the bench of all nationals of parties to the case, rather than to have added to their number. This concession to national sovereignty apparently has to be made and various justifications have been offered for it. The judge is able to explain to his colleagues the situation and the law of his own state; and, if his state is defeated, to help frame the opinion of the Court in such fashion as not to wound its susceptibilities.[27]

The judges regularly elected hold office for nine years and are then eligible for re-election. Thus independence is secured, while at the same time account is taken of the need for change and of the danger that a judge may stay on after he is too old to perform his functions. The Court, however, is always prepared to act, since the judge remains in office in any case until his successor is chosen. Vacancies are filled by the same process of election as otherwise, but the judge thus elected serves only for the unexpired remainder of the term. A member of the Court can not be dismissed unless, in the unanimous judgment of the other members, he has ceased to measure up to the required conditions. He may resign by notification to the Secretary-General. Members are entitled to diplomatic privileges and immunities (Article 19). The Court is located at The Hague, and meets in a dignified room in the Peace Palace given by Andrew Carnegie. The President of the Court is elected by the judges themselves for a three-year term; and he and the Registrar of the Court are required to live at the seat of the Court. Under the original Statute, an annual meeting was required, and the President could summon an extraordinary session whenever desired; but by the revised Article 23, "the Court shall remain permanently in session except during the judicial vacation," and

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[27] See M. O. Hudson, *The Permanent Court of International Justice* (New York, 1943), pp. 360-369.

members, unless on regular leave (six months every three years) or ill, are required to hold themselves permanently at the disposition of the Court. The full Court is ordinarily to sit, but one or more judges may be excused from sitting, provided the number of judges is not thereby reduced below eleven. Nine judges constitute a quorum. Their salaries are fixed by the Assembly upon proposal of the Council, and can not be changed during the period of office. Provision is made also for travel allowances and for pensions.

JURISDICTION OF THE COURT.[28] The jurisdiction, or "competence," of the Court is stated in Chapter II of the Statute: "Only States or Members of the League of Nations can be parties in cases before the Court" (Article 34). An individual can not appear before the Court, although there was a strong feeling in the Committee of Jurists that this should be permitted. International tribunals have, as has been seen, been forced a long way in the direction of recognizing the rights of individuals, but the individual still remains almost entirely at the mercy of the delinquent state, or of his own state. Undoubtedly, the admission of individuals before the Court would produce many inconveniences, but it would seem possible to advance by degrees toward jurisdiction over claims of individuals. Such special cases, for example, as those of stateless persons or persons owing double allegiance, or of minority rights, might be first turned over to international courts, and upon the experience thus gained further advance could be predicated.

COMPULSORY JURISDICTION. The most important question which the Committee of Jurists of 1920 had to decide was whether states could be summoned, against their will, before the proposed Court, and they decided unanimously that this was the correct principle. The Council and the Assembly of the League, however, reversed this recommendation—an unfortunate backward step. Consequently Article 36 now reads: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." In so far as the Statute goes, then, no state can be compelled to appear before the Court except of its own volition.

In fact, however, the Court had a wide compulsory jurisdiction, derived chiefly from authority outside the Statute. In the first place, the Peace Treaties and others resulting from the war, such as those for mandates,

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[28] As to the jurisdiction of the Court, see P. J. N. Baker, "The Obligatory Jurisdiction of the Permanent Court of International Justice," *B.Y.I.L.*, 1925, pp. 68-102; M. O. Hudson, as cited in the previous footnote; A. Peaslee, "Obligatory Jurisdiction of the Permanent Court of International Justice," *Proc. Am. Soc.*, 1931, pp. 48-57; H. E. Richards, "The Jurisdiction of the Permanent Court of International Justice," *B.Y.I.L.*, 1921-1922, pp. 1-6; *Case of the Free Zones of Upper Savoy and the District of Gex*, *P.C.I.J.*, Series A, No. 24, dissenting opinion of F. B. Kellogg, reprinted in *A.J.*, 25 (1931), pp. 203-213.

minorities, labor, communications, and transit, made provision for the reference of disputes to the Court. There are numerous treaties of various types which confer jurisdiction upon the Court—such, *e.g.*, as the Convention on Air Navigation of 1919, or, more pertinently, treaties of pacific settlement of the type which has been discussed earlier, some of which specifically designate the Court as the tribunal to be sought. In most such cases Article 37 authorizes the Court to serve.

The Statute also makes possible a further degree of obligatory jurisdiction. Article 36 offers a compromise, in the famous "Optional Clause," through which states may agree to submit to a reciprocal compulsory jurisdiction. The Optional Clause was attached to the Protocol for separate signature, and the states which sign it "declare that they recognize 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 any of the classes of legal disputes . . ." A continually varying but large total number of states had adhered to the Optional Clause before the second World War came, some of them, unfortunately, with harmful reservations.

Justiciable Questions. One reason for the hesitation in accepting compulsory jurisdiction had been the uncertainty as to what type of dispute is suitable for arbitration. Article 36 answers this question definitely: "(a) The interpretation of a Treaty. (b) Any question of international law. (c) The existence of any fact which, if established, would constitute a breach of an international obligation. (d) The nature and extent of the reparation to be made for the breach of an international obligation." These terms are broad, if accepted without reservation. They may be taken as describing the type of case proper to submit to the Court, whether or not the Optional Clause is in question. The final clause of Article 36, which allows the Court to determine whether or not it has jurisdiction, is the usual rule, and may permit of precedents establishing the boundary line between domestic and international law.

Law Applicable. The Court is authorized to apply international conventions "establishing rules expressly recognized by the contesting States"; custom, "as evidence of a general practice accepted as law"; the "general principles of law recognized by civilized nations"; and, as subsidiary means for determining the law, judicial decisions and the teachings of publicists. Judicial decisions, however, are subjected to Article 59, and the Anglo-American rule of *stare decisis* is not effective.[29] Thus the Court may call upon the sources which have been described in an earlier chapter—treaty,

[29] "Article 59. The decision of the Court has no binding effect except between the parties and in respect of that particular case."

custom, and the general principles of law. It has been asserted that under these clauses any international dispute is capable of being settled by the Court. This is doubtless more than states are as yet willing to accept, but certainly the competence of the Court is wide, and there is room for growth through judicial interpretation. The Court is also given power, if the parties so agree, to judge *ex aequo et bono, i.e.*, as seems just to the Court. This provision was necessary since the Court is given jurisdiction over "all cases which the parties refer to it," and this might include some cases for which no law seemed fixed. The power has been criticized, however, as making the Court an arbitral rather than a judicial tribunal, a conclusion which does not necessarily follow.

Procedure of the Court. If the Court has compulsory jurisdiction, it may take hold of the case upon the demand of either party; if the case is submitted by voluntary agreement, notification to the Registrar of the Court is sufficient. If any Member considers that it has a right to intervene, it may request permission to do so, and the Court will determine whether or not the request shall be granted. Every state participating in the case is bound by the decision, and the Court may also indicate measures of a provisional nature to protect the rights of the parties (Article 41). Each party is represented by an Agent, who is the official representative of his state and who may have the benefit of counsel to aid him before the Court. The presentation of the argument is both written and oral. The written argument consists of "cases, counter-cases, and, if necessary, replies"; and its orderly presentation is arranged for in the Rules of Procedure of the Court. Time limits are fixed for the presentation of each document, and when all have been submitted a date for oral presentation is set. Proceedings are in public, although they may in exceptional cases be private. Witnesses may be heard; the argument of counsel is unfolded; the judges shuffle their papers and ask questions. Experts may also be called upon. If one party fails to appear, the Court may decide against it by default. When the presentation of the case is ended the judges retire for private consultation. A majority of those present is sufficient for a decision, with the President to decide in case of a tie. The judgment of the Court must state the reasons upon which it is based (Article 56), and dissenting judges may utter and have printed their separate opinions. These documents are of the greatest authority in the building up of international jurisprudence. There is no appeal from the judgment, but the Court may construe it upon the request of either party (Article 60), or may proceed to a revision if any new facts are discovered. The decision is binding only upon the parties to the case, thus disregarding the binding force which English and Americans are accustomed to give to judicial precedents, but such opinions have great persuasive force in later cases.

Each party bears its own costs; the expenses of the Court are borne by itself.

ADVISORY OPINIONS. Article 14 of the Covenant, it will be recalled, states that the Court "may give" an advisory opinion upon matters referred to it by the Assembly or Council.[30] No provision whatever was made in the Statute for such opinions, but Articles 71-74 of the Rules of the Court establish a procedure which makes advisory opinions, so far as judicial procedure goes, practically equivalent to regular judgments of the Court. In practice, the advisory opinions of the Court have been extremely helpful, and have been called for frequently. The Court delivers its advisory opinions in open court, notice having been given; and it is guided in its consideration of the case by the rules for contentious procedure so far as they are considered to be applicable.

THE UNITED STATES AND THE COURT. Though the traditions of the United States were in favor of judicial settlement of disputes,[31] a small minority of Senators was able, under the rules of the Senate, to block acceptance of the Court.

On February 24, 1923, President Harding asked the Senate to advise and consent to the acceptance by the United States of the Protocol of Accession to the Court, and enclosed a letter from Secretary of State Hughes suggesting four reservations to cover the peculiar situation of the United States. President Coolidge subsequently urged action, in each annual message, but it was not until January 27, 1926 that the Senate finally passed a resolution giving its advice and consent to the Protocol, with five instead of four reservations. This action of the Senate was communicated by Secretary Kellogg to the Secretary-General of the League, with the notice that the signature of the United States would not be affixed until the signatory governments should "have specified in their writing to the Government of the United States" their acceptance of the reservations, and that toward this end he had addressed each government separately. The Council of the League pointed out the difficulty of separate consideration by states and summoned the Conference of States Signatories to the Protocol of Signature at Geneva in September, 1926, which the United States re-

[30] As to advisory opinions, see M. O. Hudson, "The Advisory Opinions of the Permanent Court of International Justice," *Int. Con.*, No. 214, 1925; M. O. Hudson, "Les avis consultatifs de la Cour Permanente de Justice Internationale," *Hague Acad.*, 1925, III, pp. 345-411; A. D. McNair, "The Council's Request for an Advisory Opinion," *B.Y.I.L.*, 1926, pp. 1-13; A. H. Philipse, *Les fonctions consultatives de la Cour Permanente de Justice Internationale* (Lausanne, 1928); C. G. Tenekides, "La compétence de la Cour Permanente de Justice Internationale en matière de procédure consultative," *R.D.I.P.*, XXXIII (1926), pp. 120-129.

[31] Elihu Root in 1907 instructed the United States delegation to the second Hague Conference to work for a real court with obligatory jurisdiction. Both political parties, as did every President and the House of Representatives, favored United States participation in the Permanent Court of International Justice.

fused to attend. The Conference found no difficulty with any of the five reservations, except the last half of the fifth one: "nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." This extravagant demand, aside from any desire to concede it, raised legal difficulties. To say that no advisory opinion could be given in a case in which the United States "claims an interest" would be to give it an exceptional position, above that of other signatories. The Conference therefore prepared a Protocol conceding the demands of the United States upon all except the last point, and guaranteeing her equality on this point, under conditions to be worked out later.

The views of the Conference were communicated to the United States. President Coolidge failed to present them to the Senate, and it was not until two years later, at a time when the Senate Committee on Foreign Relations seemed disposed to renew negotiations, that he again took up the matter of the Court. It was doubtless of some relevancy that a Committee, of which Elihu Root was a member, was to meet shortly in Geneva to prepare a revision of the Statute. On February 19, 1929, Secretary Kellogg addressed to the Signatories and to the Secretary-General a note far more conciliatory in tone than previous utterances, approving the exchange of views suggested by the Conference three years before. Mr. Kellogg's note was welcomed, and the Committee for Revision of the Statute was instructed to study also the question of the accession of the United States.

Revision of the Statute.[32] At the meeting of the Assembly of the League in 1928, a resolution had been adopted to the effect that, in view of the experience of the Court and in view of the coming election of a new bench, it was desirable to study the Statute for the purpose of revision. In connection with the work of the Committee appointed for this purpose, Mr. Root presented a formula under which the United States might be able to participate. This plan was approved by both Council and Assembly and opened for signature. On December 9, 1929, the three protocols were signed for the United States.[33] No action was taken, however, until 1935,

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[32] As to the revision of the Statute, see A. Hammarskjold, "Le Règlement revisé de la Cour Permanente de Justice Internationale," *R.D.I.L.C.*, VIII (1927), pp. 322-359; M. O. Hudson, "The Amended Rules of the Permanent Court of International Justice," *A.J.*, 25 (1931), pp. 427-435; *Minutes of the Conference regarding the Revision of the Statute . . . and the Accession of the United States*, League of Nations, 1929.V.18; *Minutes of the Session held at Geneva, March 11th-19th, 1929*, Committee of Jurists on the Statute of the Permanent Court of International Justice, League of Nations, 1929.V.5; A. Raestad, "La révision du Statut de la Cour Permanente de Justice Internationale," *R.D.I.*, III (1929), pp. 340-379.

[33] The three protocols are: (1) the original protocol of adherence to the Statute; (2) the protocol for the adherence of the United States; (3) the protocol covering the revision of the Statute.

and then the Senate rejected them. It is an amazing story of puerile national behavior, which helps explain why other nations regard with distrust the international policies of the United States.

As to the "Root Formula," see *World Court: Hearing before the Committee on Foreign Relations*, U.S. Senate, 71st Cong., 3rd Sess.; P. C. Jessup, "The Protocol for American Adherence to the Permanent Court," *A.J.*, XXV (1931), pp. 308-312; P. C. Jessup, "The Root Formula for the Accession of the United States to the Permanent Court of International Justice," *Proc. Am. Soc.*, 1931, pp. 61-67.

CHAPTER 11

THE LEAGUE OF NATIONS

ORGANS AND FUNCTIONS

§ 70. **Assembly and Council.**—"The action of the League" says Article 2 of the Covenant, "shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat." The Secretariat was thus a subordinated body, though more or less the backbone of the entire system. In addition to these three organs, there developed a number of technical organizations, permanent and temporary commissions, administrative bodies, and institutes, making up a complicated system which was in practice tied together through the Secretariat and was actually flexible and adjustable. The table (page 274) presents the system in summary outline.[1]

The Assembly. The Assembly of the League was in the nature of a diplomatic conference and, though it developed procedures which gave to it some of the aspects of a parliamentary body, it was not possessed of legislative power.[2] The First Assembly held that the Assembly could not be regarded as possessed of legislative power; on the contrary, delegates to the Assembly "render their decisions as the representatives of their respective states, and in rendering such decisions they have no standing except as such representatives."[3] Delegates were chosen and instructed by their governments and this, though it means political rather than expert consideration, has the advantage that their governments are able to support and put into effect the votes of their delegates. The practice of sending the same delegates from year to year developed personal understanding and produced cooperation rather than diplomatic fencing. The delegates found that they must, if they wished to acquire authority within the organization, take an active part in all of the work of the League, rather

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[1] The table is taken from Ottlik, *Annuaire*, 1938, p. 82, and would not necessarily be accurate for every year.

[2] See, with regard to the Assembly, Margaret E. Burton, *The Assembly of the League of Nations* (University of Chicago Press, 1941); H. R. G. Greaves, *The League Committees and World Order* (Oxford University Press, 1931); Morley, Ch. XIII-XV; C. Riches, *The Unanimity Rule and the League of Nations* (Johns Hopkins University, 1933).

[3] *Records of the First Assembly* (1920), Plenary, p. 318.

Organization of the League of Nations

I. THE ORGANS

Assembly *Council* *Secretariat*

II. AUXILIARY ORGANS

A. Technical Organizations

- Economic and Financial Organization
- Organization of Communications and Transit
- Health Organization

B. Permanent Advisory Commissions

- Military, Naval, and Aerial Questions
- Intellectual Cooperation
- Supervisory Commission
- Mandates
- Control Organ for the Manufacture and Distribution of Drugs
- Advisory Commission for Social Questions
- Opium Commission
- Permanent Central Opium Committee
- Advisory Committee of Experts for Slavery

C. Temporary Advisory Commissions

- Commission for the Study of European Union
- Special Committee on Contributions in Arrears

D. Administrative or Executive Organizations

- Advisory Commission for Refugees
- Commissioner for Bulgarian Refugees (Sofia)

III. AUTONOMOUS ORGANIZATIONS

- Permanent Court of International Justice
- International Labour Office

IV. SPECIAL ORGANIZATIONS

- International Institute of Intellectual Cooperation (Paris)
- High Commissioner for Refugees (Jewish and others) from Germany
- Institute for the Unification of Private Law (Rome)
- International Nansen Office for Refugees
- International Center for Study of Leprosy

than sit back and work only where the interests of their states were involved.

Each Member was entitled to one vote, though it might have three delegates.[4] The Assembly met regularly once a year and in occasional special sessions, at the seat of the League. The continuity thus established allowed a subject to be carried over from year to year rather than dying at the end of an *ad hoc* conference; on the other hand, it perhaps encouraged procrastination. The agenda was prepared by the Secretary-General and distributed months in advance; the Assembly itself could decide whether other items could be added. This agenda always included reports on the work of the Council and the Secretariat, and debates on these afforded an opportunity, for a number of days while the Assembly was being organized, for speeches to be made upon almost any subject. The Assembly was thus a regular forum for a discussion of world affairs and particularly useful for the smaller states. The opportunity to present complaints or proposals constituted one of its most valuable functions.

The Assembly elected its own President, usually from a smaller state not represented on the Council. The six Permanent Committees were then constituted, and six Vice Presidents were elected.[5] The six Chairmen and the six Vice Presidents, with the Chairman of the Agenda Committee, composed the General Committee, a sort of steering committee. No decision could be taken by the Assembly until a committee had acted, though this rule might be dispensed with by a two-thirds vote. Each Member had a representative on each committee. As in all parliamentary bodies, the real work was done in the committees. It was usually around a fortnight after the opening of an Assembly session before the committees were ready to report. For each committee, a rapporteur, who had guided the topic through the day, presented the matter to the plenary Assembly. Since each Member State was represented on each committee, the committee vote was usually conclusive and there was little debate on the floor of the Assembly.

The work of the Assembly usually issued in the form of a resolution, though it might be as a draft treaty for ratification by Members. The

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[4] It was hoped that provision for three delegates would allow representation of different shades of opinion in each Member State, but this did not develop in practice. A much larger delegation was actually required. At least six persons were required for the six Permanent Committees, and experts were brought along to deal with the many different subjects under discussion. Four were allowed upon the floor at the same time and it was possible to feed through these four the various experts needed for the different items on the agenda.

[5] The six Permanent Committees were: Legal and Constitutional Questions; Technical Organizations; Reduction of Armaments; Budget and Financial Questions; Social and General Questions; Political Questions. See M. E. Burton, *The Assembly of the League of Nations* (University of Chicago Press, 1941); H. R. G. Greaves, *The League Committees and World Order: A Study of the Permanent Expert Committees of the League of Nations as an Instrument of International Government* (Oxford University Press, 1931).

official languages of the League were French and English. A third language could be used but the speaker must furnish his own interpreter. Much time was thus consumed in interpretations. The rule of unanimity prevailed in voting, though various ways were found for evading the rule. The Assembly had certain exclusive functions which will be listed below.

THE COUNCIL. The Council was originally to "consist of representatives of the principal Allied and Associated Powers,[6] together with four other Members of the League"; the latter or non-permanent Members being "selected by the Assembly from time to time in its discretion." Thus, while the equality of States was recognized in the Assembly, the actual preponderance and responsibility of the Great Powers was recognized in the Council. The First Assembly recommended that delegates should, in choosing Council members, give consideration to geography, ethnical groups, religious traditions, the various types of civilizations, and the chief sources of wealth. The choice of the non-permanent members of the Council led to jealousies and intrigues for years. In 1922, at the request of the Council, the Assembly increased the number of non-permanent seats to six. This did not satisfy the hunger for prestige, and matters came to a head in 1926 upon the occasion of the admission of Germany, which was to be made a permanent member of the Council. After an amazing display of petty national selfishness, the following procedure was finally accepted: Germany alone of those who demanded permanent seats was made a permanent member; the number of non-permanent members was increased to nine; of these nine, three were to be elected each year by the Assembly for a term of three years each and were not eligible for immediate re-election. By resolution of the Assembly in 1936, the number of non-permanent members was increased to eleven. A practice developed of assigning seats to regional areas, e.g., three seats to Latin America, one to the Little Entente, one to the Scandinavian states. The number in the Council therefore varied from time to time.[7]

PROCEDURE. The Council was required by the Covenant to meet at least once a year though it actually met much more often. The anticipated opportunity of such regular meetings was of great psychological importance. States came to send regularly their Foreign Ministers or Prime Ministers, who fell into the habit of acting as colleagues in a common cause rather than as rivals. These meetings afforded an opportunity for making many adjustments aside from carrying on the work of the League. The Presi-

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[6] The United States of America, the British Empire, France, Italy, and Japan.

[7] Another group of possible members of the Council was found in Article 4, § 5. A Member not represented on the Council must be invited to sit as a Member at any meeting of the Council in which "matters specially affecting the interests of that Member" were being discussed.

dent of the Council was chosen in alphabetical rotation, a practice not always conducive to the best results. It was fortunate, for example, that so competent a person as Briand was President when the Greco-Bulgarian crisis arose in 1924.

The Council was not a legislative body, nor an executive Council, though it tended to assume executive functions. Its procedure was very elastic; it might use committees *ad referendum* or with full powers to act, as, for example, in the financial reconstruction of Austria; it might act upon the recommendation of a rapporteur or of the Secretariat; it might (as in the case of disputes) do everything itself. It was a political body, and in the settlement of disputes (which function will be discussed later) it sought to achieve agreement rather than to deal out justice. Where legal questions were concerned it could call upon the Permanent Court for an advisory opinion. The rule of unanimity applied in the Council as in all League organs, so that any members, and not only permanent members, could veto. A disputant, under Article 15, however, could not vote in his own case, though he could do so if the dispute were raised under Article 11.

Relation of Council and Assembly. No clear differentiation of functions between the Council and the Assembly was written into the Covenant. They could hardly be said to represent the two chambers of a legislative body nor would it be accurate to describe their relation as that of a cabinet to a parliament.[8] They were simply two cogs designed to work closely together in the same machinery. They represented a compromise between the equality of states and the predominance of the Great Powers.

Concurrent Powers. Both the Assembly and the Council were given the right to "deal at their meetings with any matter within the sphere of action of the League or affecting the peace of the world." Article 2 put the two bodies on the same plane and a number of concurrent powers were stated. They shared in the right to increase the number either of permanent or of elective members of the Council (Article 4, § 2); together they chose a Secretary-General (Article 6, § 2); "any circumstances whatever" which threatened to disturb the peace could be presented to either body (Article 11, § 2); either might ask an advisory opinion of the Court (Article 14); both participated in the process of amendment (Article 26, § 1). In addition, certain powers were conferred upon the League as a whole without saying whether they belonged to the Council or the Assembly;

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[8] *Records of the First Assembly* (1920), p. 320.
"It is impossible to consider the Assembly as a Chamber of Deputies and the Council as an Upper Chamber . . .
"It is equally impossible to consider the Council as invested with the executive and the Assembly with the legislative powers . . .
"The truth is that the League of Nations has no analogy in ordinary constitutional law." *Ibid.*, pp. 318-320.

and various treaties conferred powers upon both. Thus, by the Statute of the Court, both shared in the election of judges.

Powers of the Assembly. To the Assembly alone were confided the powers to admit new Members (Article 1, § 2); to elect non-permanent members of the Council (Article 4, § 1); to fix rules concerning the election, terms of office, and conditions of re-eligibility of these members (Article 4, § 2 *bis*); to fix its own rules of procedure and appoint its committees (Article 5, § 2); to control the finances of the League (Article 6, § 5); to handle disputes referred to it from the Council (Article 15, §§ 9-10); to advise the reconsideration of treaties (Article 19).

Powers of the Council. The powers given exclusively to the Council were far more numerous. By Article 5 it regulated its own procedure and committees. It approved staff appointments in the Secretariat (Article 6, § 3); it could move the seat of the League (Article 7, § 2); it had to formulate plans for the reduction of armaments, and had to give its consent before the limits, when agreed upon, could be exceeded (Article 8, §§ 4, 5); the Permanent Advisory Commission on armaments was its subsidiary agency (Article 9). It advised upon the means by which the obligations of Article 10 were to be carried out; it was summoned in case of any war or threat of war (Article 11, § 1); it acted as conciliator under Articles 12 and 15; it proposed the steps to be taken when an award was not carried out (Article 13, § 4). It could recommend the military action to be taken under Article 16, and could, under paragraph 4 of the same article, expel from membership in the League; it could set the conditions upon which a non-Member might appear before the League in a dispute, and recommend action to be taken in such a case (Article 17); it exercised such control as the League had over Mandates (Article 22, §§ 7-9); it decided whether the expenses of a bureau or commission might be included in the League budget (Article 24, § 3). Various powers were conferred upon the Council by treaties.

Relative Positions. It is doubtless true that the makers of the Covenant favored the Council more than the Assembly, but from this fact, and from the fact that the Council was mentioned some sixty times in the Covenant and the Assembly only twenty-four times, it would be easy to draw wrong conclusions. The Assembly from the beginning represented an international outlook and stood for the idealism and cooperation in which public opinion was interested; it therefore had increasingly the support of the public. Moreover, the Assembly took aggressive action from the start, as, for example, in taking to itself practically entire control over the reduction of armaments. There was ample room for discord, but the use of tact

and good sense resulted in a surprising lack of friction between the two bodies.

It is believed, however, that the Assembly gained as compared with the Council. After the First Assembly, the Council regularly made a report to the Assembly on the measures taken by it to execute decisions of the Assembly. This report was critically discussed by the Assembly which thus acquired a sort of supervisory character. This was strengthened by the practice of the Assembly in agreeing upon a line of action and calling upon the Council to carry it into effect. The Assembly had also a certain degree of control over the size and composition of the Council and it controlled the finances of the League. Thus the Council did in practice tend to become a sort of executive body for the League.

On the other hand, if the Council made many concessions to the Assembly, it could afford to do so. In the Council the Great Powers were dominant, regardless of the majority of the small states. Any one of the Great Powers, assured of permanency, had always a veto against anything that it disliked. It was in the Council that the ranking statesmen of the world actually worked. The Council had at least a primary administration of important functions, such as the settlement of disputes, which gave to it great prestige. Behind the scenes it was the Great Powers who directed the affairs of the world. The League could never forget that it was impotent without the Great Powers. The Council could afford to be tolerant with the Assembly.

§ 71. The Secretariat and Other Organs.

Secretary-General. A detailed study of the organization and work of the Secretariat would reveal the extent to which it constituted the backbone of the League. The first Secretary-General was Sir Eric Drummond, who was named by the Peace Conference in Annex 2 of the Covenant. Other appointments were to be made by the Council with the approval of the majority of the Assembly (Article 6, § 2). No term of office was fixed by the Covenant, but the first incumbent resigned in 1933, and the Assembly fixed a ten-year term thereafter.

It was not intended, and some regard this as a mistake, that the Secretary-General should be an aggressive character, a statesman or leader.[9] His post was the highest of the League, but it was exclusively an administrative one. Sir Eric Drummond emphasized its administrative character and did not seek to build up the prestige of the post. Only the Secretary-General and his staff represented the organized community of

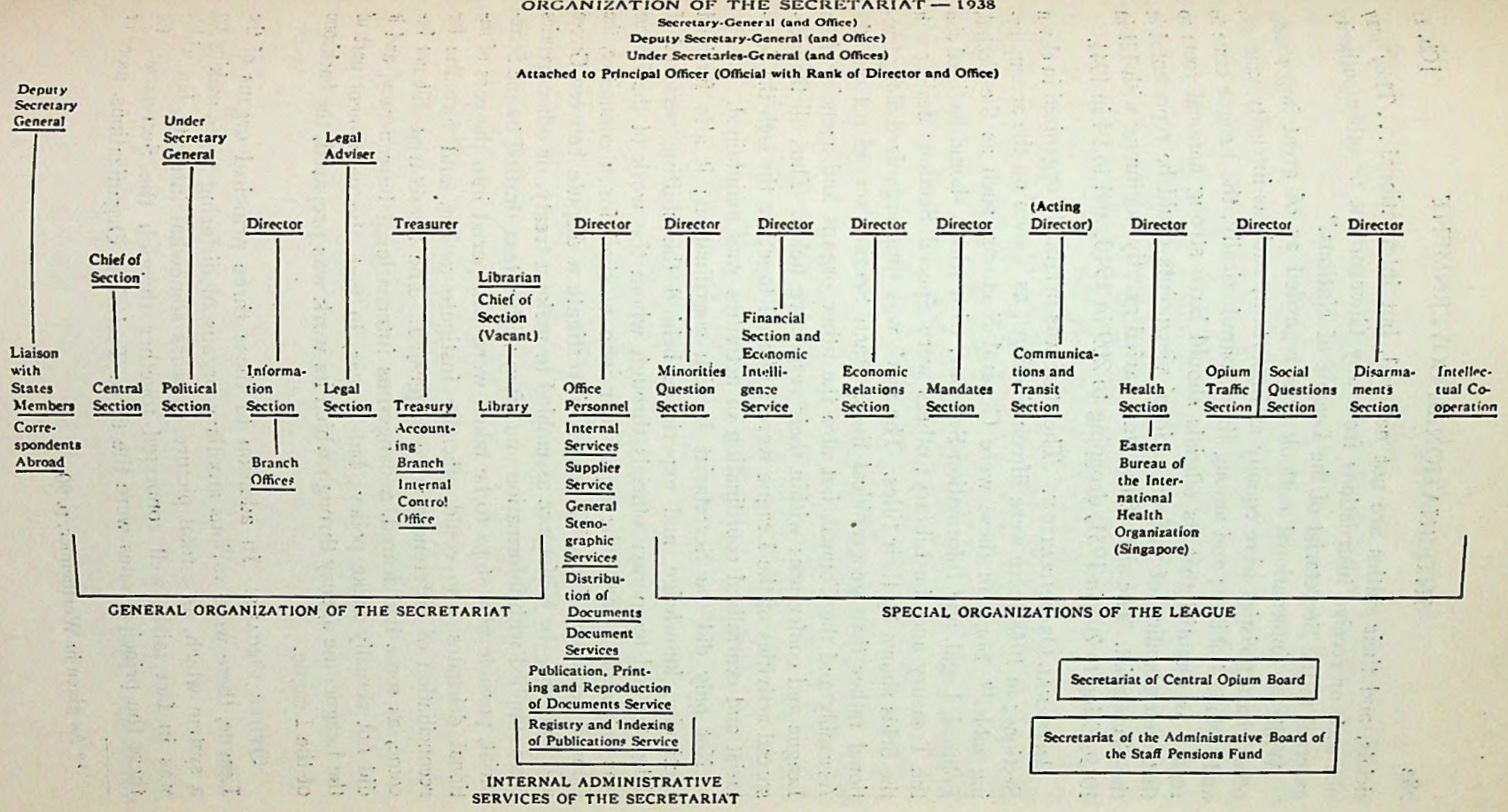
[9] F. G. Boudreau, "International Civil Service," in Davis, p. 79; C. W. Jenks, "Some Problems of an International Civil Service," *Public Administration Review*, IV (1943), p. 94; Wertheimer, pp. 48-49.

nations, and his authority was not sufficient to shape or define a continuing policy for the League of Nations.

Originally there were four Under-Secretaries-General, but in 1922 the post of Deputy-Secretary-General was established, and in 1932 a second Deputy was added. The Under-Secretaries (four in 1919, 3 in 1920, then 2, again 3 after the entry of Germany) were in practice reserved to the Great Powers and appointed by them; they were, in fact, national representatives though not so in legal function. At the least, they explained to their own governments what was going on in the League; at the most, the German and Italian incumbents sought to direct and control all their own nationals in the Secretariat. They had some administrative functions to perform, but were in this respect only slightly differentiated from the directors of sections the rank below them. Continuous struggle and intrigue revolved around these offices, and rivalries concerning them were intense. The problem of the "High Directorate" was never solved by the League.

International Civil Service. While there was no debate at the Peace Conference as to the need for a permanent Secretariat—on which, indeed, the life of the League depended—there was a divergence of opinion as to whether it should be composed of national delegations, paid by their respective governments and responsible to them as had been the case in previous conferences; or whether it should be constituted as an international civil service, to furnish expert and impartial information in the interests of the community, rather than in the interests of the separate states. Through the insistence of Secretary-General Drummond, the latter view prevailed, and the Council report of 1920 laid down the principle that persons once chosen to posts in the Secretariat were no longer in the service of their nations, but exclusively in the service of the League of Nations. Since both Council and Assembly were composed of instructed delegates, the Secretariat was thus the only true international organ of the League.

Nationalistic claims, however, did not die easily. The Italian Government supported the rejected principle even to the extent of passing a law requiring its citizens holding any posts abroad to report to the Italian Government and to surrender their posts when required to do so. The "primordial necessity" was asserted in the Assembly of selecting the members of the Secretariat from those states not well "represented" therein. In 1929 a crisis was imminent because members of the Secretariat felt that their tenure of office was too precarious, and were accepting other positions. The Assembly appointed a Committee of Thirteen which reported that the Secretariat should remain strictly international in character, and should be provided with a staff capable of doing its work with the proper efficiency. It proposed, as the first article of the Staff Regulations: "The officials of the Secretariat of the League of Nations are exclusively international of-



From E. Ranshofen Wertheimer, *The International Secretariat*, by kind permission of the Carnegie Endowment for International Peace.

ficials, and their duties are not national, but international . . . They may not seek or receive instructions from any Government or other authority external to the Secretariat of the League of Nations."

While an international outlook was regarded as of great importance, other characteristics were equally as important, such as integrity, courage, and technical ability; and among these, paradoxically, the League came to regard as essential that its officials should have strong national roots so that understanding of various national viewpoints could be represented in the Secretariat. The size of the staff varied greatly beginning with 121 in 1919, rising to 707 in 1931, dropping to 209 in 1940, and to 94 in 1944.

Internal Organization. The staff was originally organized in eleven Sections; in 1938 there were fifteen Sections, as shown on the accompanying table.[10] Some of these were General Sections, such as the Central, Political, Legal, and Information Sections, with which should be listed also the Treasury and the Library; others were Special Sections dealing with the fields shown by their titles. The work was thus organized along functional rather than geographical lines. Each Section served not only the Assembly and the Council, but also the other organs and agencies of the League and conferences within their respective fields. Thus all the widespread activities of the League were gathered together through the Secretariat and centralized coordination of activities was maintained.

Not only did the Secretariat furnish coordination; it also furnished continuity, knowledge, and experience behind the shifting personnel of delegates and temporary officials through whom the work of the League was ostensibly done. The rapporteur who worked for a committee, the Council representative who went to investigate a dispute between Greece and Bulgaria, the conference assembled to make a treaty, or other agencies were supplied with information and often with a text drafted by the Secretariat, possible new steps to be taken were whispered into the ears of national delegates who could officially instigate action, and formulae for reconciliation of differences were suggested. The Secretariat did not become, as some had feared, a dangerous international bureaucracy, and it did not actually make policy; but it was, in fact, the permanent part of the League, the agency through which its work was prepared, the backbone of the League.

Other Organs. In addition to these three principal organs of the League, there were various auxiliary organs of differing types making up a system which, as a total picture, appears somewhat intricate, but which was in fact fairly well connected together through the Secretariat. Of these the principal ones were the three Technical Organizations, more or

[10] As given in Wertheimer, p. 90.

less autonomous bodies insofar as their own work was concerned, expert in composition and advisory in function, but subject to direction insofar as their activities might engage Members of the League.

The Economic and Financial Organization was set up as the result of a recommendation by the Brussels Financial Conference in 1920. It consisted of an Economic Committee and a Financial Committee, and its function was to advise and to make proposals for submission to the Council or Assembly. It made a number of studies of much value, and issued publications both serial and monograph. Under its auspices were held a number of conferences, among which were the World Economic Conference of 1927, whose recommendations were applauded by everyone but put into effect by no government; the Monetary and Economic Conference of 1933, which the United States helped greatly to wreck; and others dealing with such matters as Simplification of Customs Formalities, Treatment of Aliens, Abolition of Import and Export Restrictions, and so forth. The Financial Committee made possible the financial reconstruction of Austria, Hungary, and other states; and advice as to economic and financial problems was provided at the request of a number of states. The decade following 1930 was not a period of eager economic cooperation, and various changes were made in the effort to achieve more. The Bruce Report of 1939 recommended that the economic and social work of the League should be brought under the supervision of a central committee. Such planning was interrupted by the war, but work in this field was to some extent continued during the war through the transfer of the Economic, Financial, and Transit Department to Princeton.[11] The Economic and Financial Committees held joint meetings, and decided to continue such pivotal publications as the Statistical Year-Book, the Monthly Bulletin of Statistics, and the World Economic Survey. A Delegation on Economic Depressions had been created in 1938, and published "The Transition from War to Peace Economy in 1943." [12]

The Organization for Communications and Transit originated in Part XII of the Treaty of Versailles and was founded upon a Statute provided for it by the Barcelona Conference on Communications and Transit. It was an autonomous body of experts chosen by their own governments which worked upon a technical rather than a diplomatic basis. It had a general conference which met every four years and which drafted treaties; an Advisory and Technical Committee which met twice a year; and it worked through six permanent committees whose titles indicate the field

[11] See *Report on the Work of the League, 1942-1943*, L of N Doc., General. 1943. I; Henry F. Grady, "World Economics," in Harriet Davis, *Pioneers in World Order* (New York, 1944), p. 156; Martin Hill, *The Economic and Financial Organization of the League of Nations* (Washington, 1946); Knudson, Chap. VIII.

[12] L of N Doc., C.6.M.6.1943. II.A.

of activity covered: Ports and Maritime Navigation; Inland Navigation; Transport by Rail; Electric Questions; Legal; and Road Traffic. It arranged conferences to deal with such matters as transit cards for emigrants, regime of rivers, road traffic, transmission of electric power, and so forth.[13]

The Health Organization was planned by a conference which met at London in 1920 in accordance with a resolution of the Council of the League. Some delay was encountered because of the unwillingness of the United States to permit the older Health Office at Paris to be included, and a provisional Health Committee at Geneva, in consultation with the Health Office, worked out the plans by which the Health Organization was ultimately set up. The latter body was composed of the Health Committee and the Health Section of the Secretariat, and was assisted by an Advisory Council chosen by the Health Office of Paris. The Health Organization had a wide and useful field of activity. It drafted a few treaties such as the Sanitary Convention of 1926; most of its work consisted of study of such subjects as cancer, health education, infant mortality, sleeping sickness, the standardization of sera and of medical terms. It maintained an efficient epidemiological service, with staffs in various parts of the world and with printed and radio announcements of the spread of plague; and it assisted various states such as Brazil and China in their public health services.[14]

Permanent Commissions. In addition to the technical organizations, there were a number of permanent commissions, expert and advisory in character. In accordance with Article 9 of the Covenant, a Permanent Advisory Committee on Military, Aerial, and Naval Questions was constituted, though its activities were largely absorbed by other bodies. The Covenant also called for (Article 22, §9) a Permanent Mandates Commission. It was composed of eleven persons who could have no connection with their own government, but were selected upon their own merit. A Committee of Intellectual Cooperation was established by the Council in 1922 and was part of a rather too widely extended system in this field. Members of the Committee were very distinguished persons, each of eminence in some intellectual field as, for example, Dr. Einstein or Mme. Curie. In general, its function was to facilitate intellectual exchange between nations and to encourage collaboration in intellectual activity, and it has been criticized as operating at too high an intellectual level. There was also an Advisory

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[13] Jan Hostie, "Communications and Transit," in Institute on World Organization, *World Organization: A Balance Sheet of the First Great Experiment* (Washington, 1942), p. 158; Knudson, Chap. IX.

[14] H. Van Blankenstein, *L'Organisation de L'Hygiène de la Société des Nations* (Purmermend, Holland, 1934); F. G. Boudreau, "International Health Work" in H. E. Davis, *Pioneers of World Order* (New York, 1944), p. 193; Mander, Chap. I; C. Vitta, "Le Droit Sanitaire Internationale," *Hague Acad.*, 1930, Vol. III.

Commission on Opium and Other Dangerous Drugs, a Permanent Central Opium Board, an Advisory Commission for the Protection and Welfare of Children and Young People (later known as the Advisory Commission on Social Questions), and an Advisory Committee of Experts on Slavery.

Temporary Commissions. Other commissions were set up at different times to meet particular needs, and ended when their task was accomplished. Such, for example, were the Committee for the Progressive Codification of International Law which ended with a conference in 1930, or the Preparatory Commission for the Disarmament Conference, the Commission on Arbitration and Security, and the Temporary Mixed Commission, whose work ended with the Disarmament Conference. Other such bodies were the Inter-Governmental Advisory Commission for Refugees (1928), the Commission of Inquiry for European Union (1930), the Committee on Amendment of the Covenant in order to bring it into harmony with the Pact of Paris (1931), the Wheat Advisory Commission (1933). The Council at times set up special committees such as that on the dispute between Bolivia and Paraguay, or the one on technical cooperation between the League and China.

Administrative Bodies. The Treaty of Versailles (Article 103) provided for a High Commissioner for the Free City of Danzig to be appointed by the Council of the League, and also for a commission of five members for the government of the Saar Territory. Various agencies were created to take care of refugees, to serve as trustees for international loans, to conduct military investigations in accordance with the terms of the peace treaties, and other such tasks.

Special Institutions. Three Institutes were set up under the supervision of the Council of the League, but located in and supported by individual Members. The Institute of Intellectual Cooperation was located at Paris upon the invitation of the French Government after some uncertainty as to whether the League would retain sufficient control over its work. It was a corporation under French law, supported by the French Government and nineteen other states, but its governing body was the League Committee of Intellectual Cooperation, and it was served by a section of the League Secretariat. These activities, or part of them, will now be carried on by UNESCO. Upon the invitation of the Italian Government, an International Institute for the Unification of Private Law was established in Italy, which contributed one million lire annually for the support of the Institute. Its purpose was to secure uniform national laws on various subjects. The Italian Government also provided for the International Institute of Educational Cinematography with an annual subvention of 600,000 lire. Its purpose was to study moving pictures with

reference to their educational possibilities. Its work, too, will to some extent be absorbed by UNESCO.

It should be noted in final comment upon the organization of the League that all of these variegated organs were tied together through the appropriate sections of the Secretariat which made possible more coordination than the mere listing of these organs would indicate as possible.

§ 72. Other Activities of the League.—The functions of the League may be classified generally under the two headings of the maintenance of peace and international cooperation. Discussion of the maintenance of peace will be reserved for a subsequent chapter. While it attracted more attention, the task of cooperative effort in many fields engaged far more of the activity of the League, and did much more to justify the existence of such an international organization. Several volumes would be required for study of its activities, and no more can be covered here than a survey of its constitutional functions and something of the work accomplished in the non-political field.

TREATIES.[15] In an effort to avoid secret treaties, a new condition for their validity was established by Article 18—publicity. "Every treaty or international engagement," entered into by any Member after the League had begun its career was to be registered with the Secretariat and published. Just what was meant by "engagements" is not clear, but a memorandum of the Secretary-General, approved by the Council, required registration for "...any other international engagement or act by which nations or their governments intend to establish legal obligations between themselves and another state, nation, or government."[16] Registration was a purely formal act, which the Secretary-General performed in a ministerial capacity, and which did not imply approval or support for the document. A treaty could be registered by any or all signatories, and while non-Members could not be required to register treaties, any such treaty made with a Member would naturally be registered by that Member, and arrangements were made by which treaties of non-Members would voluntarily be entered for publication. All are published in a systematic order in the *Treaty Series*, now the most important treaty collection in existence, and a convenience which perhaps justifies Article 18 more than its original purpose.

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[15] See A. Goellner, *La révision des traités sous le régime de la Société des Nations* (Paris, 1925); M. O. Hudson, "The Registration and Publication of Treaties," *A.J.*, 19 (1925), pp. 273-292; J. Lambiris, "L'enrégistrement des traités d'après l'Article 18 du Pacte de la Société des Nations," *R.D.I.L.C.*, 3rd Series, VII (1926), pp. 697-709; R. Schwab, *Die Registrierung der internationalen Verträge beim Völkerbund* (Berne, 1929).

[16] League of Nations, *Treaty Series*, I, pp. 9-13.

Article 20 calls for the abrogation of old treaties inconsistent with the terms of the Covenant, and pledges Members not to enter into other inconsistent treaties. Article 21 also deals with inconsistent obligations, for the purpose, however, of excepting some. This article was inserted to cover the Monroe Doctrine, and was stated in general terms because of the general dislike for it—a dislike so great that President Wilson was literally forced to beg for it. The solid reason for accepting it was the fear that without such acceptance the Senate would reject the Covenant. The effort to secure a general wording and at the same time to satisfy the Senate produced the absurdity of calling it a "regional understanding," which it clearly was not. When, in 1927, Costa Rica requested a definition of the Monroe Doctrine as a condition of her re-entry into the League, the Council replied that Article 21 envisages such agreements as they existed, without attempting to define them; that task, it said, belongs to the states which have accepted among themselves such understandings. In the dispute with Paraguay and Bolivia, the Council legitimately asserted its right to intervene and thereby established a valuable precedent; but it as properly accepted the good offices of the Inter-American Conference then in session at Washington.

Article 19 was originally intended to be a corrective to Article 10, which was criticized as perpetuating the *status quo*. It was at first a part of Article 10, but was later detached in order to give to it the separate importance which the French wished it to have. It seemed more useful to discuss the value of this article under the head of international legislation, and it is unnecessary to repeat what has been said there. It did not solve the difficult problem of revising treaties in the absence of consent by all signatories; at most it afforded an opportunity for revealing to public attention the possibility of disputes which might arise from them.

MANDATES.[17] Those territories taken from their former sovereigns and not yet able to stand alone were by Article 22 made "a sacred trust of civilization." The distribution of the territory was not, however, provided in the Covenant. By the various Treaties of Peace it was surrendered to the Principal Allied and Associated Powers; these, acting through the Supreme Council, parceled out the territory to various states as mandatories and notified the Council of the League of this action; the Council of the

[17] Complete information as to mandates is to be found in the exhaustive work of Q. Wright, *Mandates under the League of Nations* (University of Chicago Press, 1930). See also, from the vast literature on the subject, N. Bentwich, "Le système des mandats," *Hague Acad.*, 1929; Davis, p. 121; N. Feinberg, *La juridiction de la Cour Permanente de Justice Internationale dans le système des mandats* (Paris, 1930); B. Gerig, *The Open Door and the Mandates System* (London, 1930); H. Rolin, "La pratique des mandats internationaux," *Hague Acad.*, 1927, IV, pp. 497-628; F. White, *Mandates* (London, 1926); *The Mandate System: Origin—Principles—Application*, L of N Doc., 1945.VI.A.1.

League then took over the task of administrative supervision under Article 22. No provision was made for a future transfer or redistribution of territories, and this led into puzzling legal questions when transfer to the United Nations was planned. According to Wright, "The only probable manner of changing the status of mandated territory is through action of the League by amending Article 22, by admitting a mandated community to its membership, or by otherwise recognizing the latter's independence. Thus the League of Nations seems competent and alone competent to change the status of territory now under Article 22." [18]

The mandated territory was to be intrusted to "advanced nations," able to assume the responsibility and willing to accept it. The mandate was exercised "on behalf of the League," and the mandatory was required to (Article 22, § 7) render to the Council an annual report as to the territory in its charge. The authority to be exercised by the mandatory state was found in the terms of the mandate.[19] As to the much-disputed problem of sovereignty, Wright's thoroughly considered conclusion is "that sovereignty of the areas is vested in the League acting through the Covenant amending process, and is exercised by the mandatory with consent of the Council for eventual transfer to the mandated communities themselves.[20]

There were three classes of mandates, differing "according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances." Certain communities which belonged to the Turkish Empire were regarded as having reached such a stage of development that "their existence as independent nations can be provisionally recognized," but subject to administrative advice and assistance until they should be able to stand alone. These were the Class A mandates, and included Palestine, Iraq, Syria and the Lebanon, and Transjordan. For other peoples, especially those of Central Africa, the mandatory was given a larger degree of control, but was required to guarantee freedom of conscience and religion, prohibit such abuses as the liquor or arms or slave traffic, prevent fortifications or military training of the natives, and secure equal opportunities for the trade and commerce of other Members. These were the Class B mandates, under which were administered the Cameroons, Togoland, Tanganyika, and Ruanda-Urundi. Finally, certain territories "such as Southwest Africa and certain of the South Pacific Islands" could for various reasons "be best

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[18] Wright, *Mandates*, pp. 506-507.

[19] By Article 22, § 8, the authority to be exercised was to "be explicitly defined in each case by the Council." In practice, however, the terms of the mandates were laid down by the Principal Allied and Associated Powers. See Wright, *op. cit.*, p. 109 *et seq.*

[20] Wright, *Mandates*, p. 530. Without denying the validity of the two statements above quoted, it will be seen later that practice did not develop in conformity with them.

administered under the laws of the mandatory as integral portions of its territory" subject to safeguards above mentioned. These were the C mandates. It would appear, from this distribution, that the A mandates might hope for independence; and in fact Iraq, Syria, and Lebanon have gained their independence and are now members of the United Nations; that the B mandates must remain long in suspense; and that there is little hope of independence for the C mandates.[21]

The authority of the League in this field was exercised by the Council, through the Mandates Commission called for by the Covenant (Article 22, §§7, 9). Disputes, under the terms of the mandates, were to be referred to the Permanent Court of International Justice. Mandatories were required to make annual reports concerning the territories under their administration, and the Council provided questionnaires upon which to base these reports. The procedure of the Council allowed also for petitions from inhabitants, which were transmitted through the Mandatory Power. The Commission held hearings at which representatives of a mandatory were present to answer questions, but was not given authority to conduct investigations on the spot. Indeed, the Commission had no authority to do more than offer observations upon the reports concerning conditions within a mandated area, and no sanction except the force of public opinion which it could bring to bear; but it exercised its functions with remarkable success, resulting usually in acquiescence on the part of the Mandatory Power with suggestions offered. The efforts of the Council and Commission were directed principally to three aims: (1) the political and moral education, the improvement of the living conditions and, in general, the protection of the interests of the native population; (2) the application of the principles of non-discrimination in economic matters; (3) the preservation of the legal status, integrity, and individuality of the territory as a distinct international entity.[22] There can be no doubt that the mandates system was a successful experiment in humanitarian advance, and the experiment is now to be continued in the "trusteeship" system of the United Nations.

Other Territories. Article 103 of the Treaty of Versailles provided for a High Commissioner for the Free City of Danzig, to be appointed by and responsible to the Council of the League of Nations. His chief function was to adjust disputes which might arise from the bizarre relationships created between Poland and Danzig by the terms of the peace settlement. Appeals might be taken from his decisions to the Council, which might

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[21] *The Mandates System*, League of Nations Publication, XI.A. Mandates. 1945. VI.A.1, pp. 19-20, 24. This document gives an authoritative and summary account of the administration of the mandates system under the League.

[22] The Mandates System, *loc. cit.*, pp. 50-51.

refer them to the Court.[23] With the rise of Hitler, Nazis seized political control in Danzig, and a humiliating period followed for the League, ending in the unopposed absorption of Danzig into Hitler's Reich.[24]

The administration of the Saar Territory was more successful. The Treaty of Versailles had provided (Article 50, Annex, Chap. II) for government of this territory by a Commission of five, chosen by the Council, and representing the League of Nations. At the end of fifteen years, a plebiscite was to be taken to determine whether the population preferred to live under France or Germany. This plebiscite was duly taken in 1935, and the territory was transferred to Germany. This was the only case in which the League acted as a governing body over a territory, and it seems generally agreed that it governed with efficiency, and conducted the plebiscite fairly.

Refugees.[25] The problem of refugees after the War had led to the establishment of three administrative institutions. The work was due, in the first place, to the generous sympathy of Dr. Nansen, to whom the League originally turned over the problem. Some two million Russians, over a million Greeks, and hundreds of thousands of Armenians, Turks, and others had been dislodged in the maelstrom of the War, and the economic situation of Europe was such that it was impossible to find employment for them. Dr. Nansen was appointed High Commissioner, and with the aid of relief organizations and after innumerable struggles for funds, he managed to tide over the worst part of the situation. From 1924-1928 the work was put under the direction of the International Labour Office as a problem of employment, but the Ninth Assembly returned it to the League itself. The death of Dr. Nansen in 1930 left a period of uncertainty, until the International Relief Office began in 1931, with instructions to complete its work by 1938. This, however, did not take into account the new flood of refugees seeking to escape Hitler, and in 1933 a High Commissioner for Refugees coming from Germany was created but—because of German opposition—to operate independently of the League. In 1938, President Roosevelt summoned a conference at Evian, as a result

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[23] As was done in the cases of the *Polish Postal Service in Danzig, P.C.I.J.*, Series B, No. 11; *Jurisdiction of the Courts of Danzig*, Series B, No. 15; *Access to or Anchorage in the Port of Danzig of Polish War Vessels*, Series A/B, No. 43; *Treatment of Polish Nationals*, Series A/B, No. 44; and others.

[24] As to the government of Danzig, see O. Loening, *Die Rechtsstellung der freien Stadt Danzig* (Berlin, 1928); J. Makowski, *La situation juridique du territoire de la Ville Libre de Dantzig* (Paris, 1925); C. Piccioni, "Le Statut International de Danzig," *R.D.I.P.*, XXVIII (1921), pp. 84-106.

[25] J. G. McDonald, "Refugees," in H. E. Davis, *Pioneers in World Order*, p. 208; Sir John Hope Simpson, *The Refugee Problem; Report of a Survey* (London, 1939); Sir Herbert Emerson, "Postwar Problems of Refugees," *Foreign Affairs*, January, 1943, p. 211; *International Assistance to Refugees*, Report submitted by Sir Herbert Emerson, High Commissioner of Refugees, L of N Doc., 1946.XII.B.1.

of which the Intergovernmental Committee was established, outside the League. When UNRRA came into being, one of its tasks was the care of refugees. It was estimated that there were in Europe, after World War II, some 20 million displaced persons and, in the Far East, 30 million more. The efforts of the League in this field were marked by uncertainty and tergiversation, which is not surprising in view of the great difficulties involved. A solution may ultimately be found in the legal establishment of human rights so that no country can so mistreat its citizens as to produce a mass refugee problem; but the road to this goal will be long and uphill. The UN has now created an International Refugee Organization to deal with the continuing problem.

INTERNATIONAL BUREAUX. The desire to secure a more centralized cooperation among states led to the provision, in Article 24, for the inclusion of Public Unions, or their bureaux, under the auspices of the League. No effort was made to compel the older Unions to enter, or to lose their autonomy through entrance but, in the interests of centralized administration, new bodies later created were to be placed under the direction of the League. In some cases the absence of the United States has made both provisions difficult. Few of the older Unions availed themselves of the opportunity afforded them; nor did the League assert its authority over the newer ones. Whether included or not, the Secretariat of the League was instructed to collaborate and assist such bodies so far as is desirable. Paragraph 3 of Article 24 gave to the Council the authority to include the expenses of any bureau put under the League in the expenses of the League, but the power was actually exercised by the Assembly, which controls the budget.[26]

MINORITIES.[27] One other field of administrative activity remains to be noted, although it is not specifically provided for in the Covenant. The task of protecting minority groups was laid upon the Council of the League by "Minority Treaties" between the Principal Allied and Associated

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[26] H. von Spreckelsen, *Die rechtliche Beziehungen des Völkerbundes zu internationalen Unionen* (Münster, 1929); League of Nations, *Handbook of International Organizations* XII.B. International Bureaux.1937.XII.B.4.

[27] As to minorities, see A. Balogh, *Der internationale Schütz der Minderheiten* (München, 1928); P. de Azcarate, *League of Nations and National Minorities, An Experiment* (Washington, Carnegie Endowment, 1945); I. Evans, "The Protection of Minorities," *B.Y.I.L.*, 1923-1924, pp. 95-123; K. Kraus, *Das Recht der Minderheiten* (Berlin, 1927); J. Lucien-Brun, *Le problème des minorités devant le droit international* (Lyon, 1923); L. P. Mair, *The Protection of Minorities* (London, 1928); A. Mandelstam, *La protection des Minorités* (Paris, 1925); H. Rosting, "Protection of Minorities by the League of Nations," *A.J.*, 17 (1923), pp. 641-660; J. S. Roucek, *The Working of the Minorities System under the League of Nations* (Prague, 1929); J. Stone, *International Guarantees of Minority Rights: Procedure of the Council of the League of Nations in Theory and Practice* (Oxford University Press, 1932); *Ten Years of World Cooperation*, Chap. XI; H. Wintgens, *Der völkerrechtliche Schütz der nationalen, sprachlichen und religiosen Minderheiten* (Stuttgart, 1930).

Powers, and Czechoslovakia, Greece, Poland, Rumania, and Yugoslavia. In addition, provisions were inserted into some of the Peace Treaties, and various declarations and special agreements were made. By these agreements, the states concerned gave certain pledges in behalf of their minorities, such as the right to life, liberty, freedom of worship, civil and political equality, use of language, or equality of opportunity in public employment. The agreements could not be modified except by a majority of the Council, and each state agreed that any members of the Council might bring to the attention of the Council any infraction of an obligation thus contracted. In such a case, the Council could take such action as it might deem proper and effective in the circumstances. Any dispute as to law or fact must be referred to the Permanent Court. Petitions could be submitted by any person or association to the Council and, after observations made by the governments concerned, the Council might make recommendations. Naturally, states thus conditioned in their sovereignty have felt some dissatisfaction, and there has been an effort to generalize the regime of minorities so as to apply to all states. In 1933 a resolution was adopted, and noted by the Council, expressing "the hope that the States which are not bound by legal obligations to the League with respect to Minorities will nevertheless observe in the treatment of their own racial, religious, or linguistic Minorities at least as high a standard of justice and toleration as is required by any of the treaties and by the regular action of the Council." [28]

The problem of minorities is a very difficult one. Aside from the claim of national sovereignty, the practical difficulties of ascertaining, within a given state, how it treats its minority peoples, are enormous. Complaints are envenomed by prejudice, and may be used by discontented peoples, or by their states of origin, as an excuse for furthering political ambitions. Granted the explosive force of nationalistic ambitions, it is plain that the utmost discretion must be exercised by the Council. On the other hand, the publication of established facts, whether injurious or not to the accused state, has had its value proven in the Mandates system. A minority group is inspired by the same nationalistic feelings as is the state which oppresses it, and both must give way to internationalism. No solution is to be found in shuffling frontiers around until every person is contentedly located in the political system which pleases him most. To take territory away from Czechoslovakia, for example, and give it to Hungary, would mean merely to shift the incidence of the discontent, to present the same problem from another angle. Nationalism has ever been autophagous, like animals which devour their own young. No sooner has a downtrodden group come to power than it proceeds to oppress other groups.

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[28] J. Jackson and S. King-Hall, *The League Year-Book*, 1934, p. 227.

With minorities as with refugees, a solution is now being sought on a broader scale, through the statement and protection of certain basic rights for the human being as an individual, wherever he may be found, and regardless of the claims to arbitrary control made by his own state. Progress in this direction will be slow and difficult.

§ 73. **Transfer of League Activities to the United Nations.**[29]—The decision to create a new international organization instead of continuing the League of Nations produced a surprising number of questions as to legal succession. There was to be considered not only the obligations of the Covenant and the activities undertaken by the League, but hundreds of treaties which had conferred responsibilities upon the League, and also the relationships between it and the Permanent Court of International Organization and the International Labour Organization.

The problem was studied by the Executive Committee of the Preparatory Commission of the United Nations which agreed at the outset that only the League of Nations could arrange for its own dissolution, though the United Nations would assist in every possible way. Most of the Members of the UN had been Members of the League of Nations, so that organizational opposition was largely eliminated. It was early agreed, also, that only non-political and technical functions and the material assets of the League should be considered for transfer. After some debate as to whether certain activities should be selected and transferred by designation, it was decided that certain League activities should be excluded and all others transferred *en bloc*. A footnote to the Report stated the general limitations:[30]

> The Committee recommends that no political questions should be included in the transfer. It makes no recommendation to transfer the activities concerning refugees, mandates, or international bureaux. The contemplated transfer will not include transfer of personnel. Transfer of assets and liabilities should imply neither profit nor loss for the United Nations. The problem of separating the finances of the International Labour Organization from those of the League is left for later consideration.
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> The transfer of economic activities is limited to such work in this field as the United Nations might wish to continue; that of the health activities will be subject to any decisions made in the future regarding a new health organisation; and that of the social activities would take

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[29] See *The League Hands Over*, L of N Doc., General. 1946.1; H. Reiff, "Transition from League of Nations to United Nations," *Dept. of State Bull.*, XIV (1946), pp. 691, 739, reprinted as Dept. of State Pub., No. 2542; A Sweetser, "From the League to the United Nations," *Annals Am. Acad.*, 246 (1946), p. 1.

[30] Report of the Executive Committee, PC/EX/113/Rev. 1, 12 November 1945, p. 108.

place with the understanding that the question as a whole will have to be referred to the competent organ of the United Nations. The transfer of functions arising from treaties is contemplated only as far as is possible and desirable.

The Preparatory Commission refined the report of the Executive Committee somewhat and appointed a Negotiating Committee to work out with the League a "Common Plan" for transfer of the assets of the League, and this was done.[31] The General Assembly, at its first session, set up an *ad hoc* committee to consider the transfer and, on the basis of its report,[32] adopted certain resolutions. On February 12, 1946, it reserved the right not to assume any particular function or power; declared its willingness in principle to assume certain others, such as custody of treaties for which the League had been custodian, and others of a non-political character; and asked the Economic and Social Council to survey the activities of the League and to make recommendations as to those which it might be desirable for the UN to assume. It also approved the "Common Plan." On December 14, it authorized the Secretary-General to assume the activities previously performed by the League Secretariat, and the Economic and Social Council to assume and continue the activities previously performed by League committees and commissions, with the exception in each case of those activities exercised pursuant to international agreements and those entrusted to specialized agencies. Other resolutions dealt with opium, health, and the transfer of material assets.[33] The property transfers involved many details, ranging from the proportionate share to which were entitled Members of the UN who were or were not Members of the League of Nations, down to the disposition of gifts to the League or the protection of underground mains. No decision was taken as to loans previously made by the League of Nations. The assets of the League as of December 31, 1944 were estimated at about 110 million Swiss francs. It would have been much simpler to continue the old League than to arrange this transfer, but political feelings must be paid for.

Meanwhile, the Assembly of the League of Nations had had a meeting (April 8-18, 1946) to confirm the arrangements for the transfer. Resolutions were adopted terminating the Permanent Court of International Justice on the day after the Assembly ended, which day was April 19; transferring to the Secretary-General of the United Nations the original texts of treaties deposited with the League; recommending that the Members of the League should facilitate the assumption by the UN or specialized

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[31] UN Doc. A/18, 28 January 1946. It is summarized by Reiff, *loc. cit.*, p. 9, and printed by him as Appendix II.
[32] UN Doc., A/28, 4 February 1946.
[33] *Resolutions of the General Assembly*, p. 79; see also pp. 35, 78, 81, 96, 139-144.

agencies of functions which they were willing to perform; and instructing the Secretary-General of the League to assist in such transfers. A Liquidation Committee was created to transfer material assets at a cost price, the income to be distributed to the Members in proportion to their total contribution to the League. Finally, a resolution was adopted declaring the League of Nations dissolved as of April 19, 1946.[34]

The King is Dead; Long Live the King!

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[34] *Int. Organ.*, I (1947), p. 141, with citations to L of N documents.

CHAPTER 12

THE UNITED NATIONS

CREATION AND GENERAL SURVEY

§ 74. The Procedure of Making the Peace.—The history of the joint effort of the Allies in World War II has yet to be written. As in the case of World War I, many lessons of international cooperation were learned. The Allies worked with more coordination, and supplied themselves with more common agencies of action; they exerted perhaps even more control over the activities of the other nations of the world. Combined Boards engaged in functional activities which were more unified than cooperative; equipment was adjusted to the same standards and measurements; troops were mixed under one command; Lend-Lease, substituted for the older inter-allied loans, made the whole effort seem more of a common enterprise. Much of this experience was available and some of the agencies might usefully have been continued, for peacetime purposes; but it is a fact to be noted with regret that human beings do not seem able to cooperate so well for purposes of peace as they can for purposes of war.

The terms for the settlement of the war in 1919 and the establishment of the League of Nations were both done at the same Conference, and that procedure has since been subjected to criticism. The Covenant of the League thus became part of the "iniquitous" treaties of peace and the beneficiary of attacks made from various particularistic viewpoints upon those treaties. A distinction was made in principle at the Paris Conference of 1919 between the ending of the past war and the purposes of the new organization which was to provide for peace in the future; control over the defeated enemy was in principle taken from the League of Nations, and it has been debated since that time whether the League would have been strengthened or weakened by that responsibility.[1] At any rate, a bifurcated international system resulted. The Supreme War Council continued to function for a short time, and then transferred its functions to the Conference of Ambassadors.[2] At the same time, of course, the Council of the League of

[1] See W. E. Rappard, *International Relations Viewed from Geneva* (New Haven, 1925), p. 14; L. Goodrich, "From League of Nations to United Nations," *Int. Organ.*, I (1947), p. 6.

[2] The Conference of Ambassadors was (or is, for it could apparently be called together at any time) a loose organization of the ambassadors living in a given capital.

Nations was beginning to function, and questions arose as to the respective jurisdictions of the two bodies. The Conference of Ambassadors was in general regarded as the agency through which the Allies were to supervise the execution of the terms of the peace, but it was inclined to assume control of other international matters as well. The issue appeared with explosive force at the time of the Corfu episode, in which Italy denied the jurisdiction of the League of Nations and asserted that the Conference of Ambassadors alone had jurisdiction. A Committee of Jurists held that, under Article 15, § 1 of the Covenant, the Council could not take jurisdiction where the dispute was already being handled by another jurisdiction.[3] The result was that Greece was not fairly treated and that the prestige of the League of Nations was badly damaged.

At the end of World War II, a somewhat similar situation appeared, though perhaps more clearly delineated. The making of the Charter and the making of the peace settlements were two quite different processes, but the Charter of the United Nations (Article 107) left to the Big Five complete control over the peace settlements with the defeated states and complete control over the enemy states themselves; and to a large degree (Article 106) it left to the Big Five responsibility for the maintenance of peace and security in the world. The Meetings of Foreign Ministers correspond today to the Conference of Ambassadors, and it may again be debated whether the United Nations would be strengthened or weakened by having the responsibility for the peace settlement. On the one hand, it is perhaps better that the issues of war, with their aftermath of passions and bitterness, should be handled by the victors, and neutral members might not wish to shoulder responsibility for the results of a war in which they had no part; on the other hand, the organization of the community of nations might be expected to provide a more fair and just settlement of the issues, and it might benefit and be strengthened by the experience of handling important community problems. It had been shown that settlement on the basis of nationalistic revenge and reparation was insufficient for the reconstruction needed by the entire community of nations, after World War I; but the hopes of those who sought a more sensible plan of community reconstruction after World War II were not realized.

At this time it had a secretariat at the *Quai d'Orsay* and its own letterhead. Premier MacDonald said that it was to wind up some matters connected with the Treaty of Versailles "and it will be strictly confined to that." See G. P. Pink, *The Conference of Ambassadors* (Geneva Studies, Vol. XII, 1942).

[3] See *O.J.*, 1923, pp. 1278, 1287, 1294, 1305, and for 1924, p. 525. That the Conference of Ambassadors was an authoritative body was recognized by the Permanent Court of International Justice in its Advisory Opinion concerning the Monastery of St. Naoum, *P.C.I.J.*, Series B, No. 9.

The process of putting the pieces together this time has of course been a larger and more difficult one. In 1945 as in 1919, the Great Powers exercised control in fact and made the decisions; at both times, the fundamental problem was the same, that of securing agreement among the Great Powers. The general principles upon which the Allies intended to make the peace were stated by President Roosevelt on January 7, 1941, when he said that "we look forward to a world founded upon four essential human freedoms . . . freedom of speech and expression . . . freedom of every person to worship God in his own way . . . freedom from want . . . freedom from fear . . ." These ideas were given fuller statement in the Atlantic Charter of August 14, 1941, which eschewed gains or territorial aggrandizement, asserted the right of peoples to have their own form of government, planned a system of security in which people would be free from fear and want and under which there would be economic collaboration and free access to trade and materials among the nations of the world. The Declaration by United Nations of January 1, 1942, demanded complete victory so as to preserve human rights and justice; and at Casablanca there were added unconditional surrender, denazification, and punishment of war criminals, but also the promise that the peace would not be a punitive one.

The Foreign Secretaries of the Soviet Union and the United Kingdom and the Secretary of State of the United States met at Moscow in October, 1943, and issued several statements with respect both to the making of peace and the making of the "general international organization." The Heads of States met at Tehran (their second meeting) in November 1943, confirmed the Moscow agreements, and asserted the chief responsibility of the Great Powers for the making of peace. Unconditional surrenders were made by Italy (September 3, 1943), Rumania (August 23, 1944), Bulgaria (September 9, 1944), Finland (September 19, 1944) and Hungary (January 20, 1945); and the Dumbarton Oaks conversations in the fall of 1944 laid the bases of an international organization for security. Another conference of Heads of States was held at Yalta, in the Crimea, in February, 1945, at which important decisions were reached, some of which became known only later. Some territorial rearrangements were stated, which would affect Poland, Germany, and China.

After the surrender of Germany in May, 1945, the three Heads of States met at Potsdam in July and reached many agreements as to the peace settlement, among them that the procedure should be that a Council of Foreign Ministers should outline the settlement, leaving details to be worked out by their deputies in other meetings. At the first meeting of the Council of Foreign Ministers (London, September, 1945) the United States insisted that the proposed peace settlement should be considered by a conference of the United Nations. No agreement could be reached on

this point until the next meeting (Moscow, December, 1945). It was here decided that preliminary terms of peace would be drawn up by Members of the Council, representing the principal powers which had signed the respective armistices; that these terms would be submitted to a Conference of those states which had waged war against the Axis with substantial forces; that a hearing would be given to representatives of the defeated states (Italy, Rumania, Bulgaria, Hungary, and Finland); that the Conference would make recommendations and that on the basis of these recommendations the Council would reconsider and prepare final texts; and that the final texts would be signed by all those states which had actively waged war with those nations.

The Council of Foreign Ministers met in Paris (April, 1946) to prepare the treaties of peace and at once found themselves in stubborn disagreement. After days of vain discussion, they recessed, met again in June and July, and finally agreed on the five drafts. These were presented to the Conference meeting in Paris, July 29-October 15, 1946, which spent about a month trying to agree upon rules of procedure. Agreement could be reached upon hardly any point except by compromises pregnant with trouble for the future—such, for example, as the regime established for Trieste, as lacking in common sense as the earlier regime for Danzig. The Council met again (New York, November, 1946) and prepared the final drafts of the five treaties; they have now been ratified by some states. Work has been begun on the far more difficult task of preparing the German settlement; the Japanese settlement is not yet in view.[4]

The procedures of both the peace settlement and the "general international organization" were founded upon the unanimous agreement of the Great Powers, and this, as was prophesied, has proved a very narrow foundation upon which to build. In addition to the usual rivalries, a fundamental ideological cleavage exists between the Soviet bloc and the Western bloc; the issues are real and vital, and jockeying for advantageous position in the post-war settlement is inevitable. We must leave it to the historians to decide whether the current methods of reconstructing the world after such a war represent any advance over the methods of the past.[5] It was wise, at any rate, that a decision was taken to proceed to the making of the new international organization without waiting for the conclusion of the peace treaties. To this development, which is a more necessary part of the purposes of this book, we now turn.

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[4] It is not within the purview of this book to consider the terms of the peace treaties. The above short sketch of procedure has been taken largely from *Making the Peace Treaties*, Dept. of State Pub. No. 2774 (February, 1947). It contains references to source and other materials.

[5] See P. E. Moseley, "Peace-Making, 1946," *Int. Organ.*, I (1947), p. 22; H. Nicholson, *Peacemaking 1919* (Boston, 1933); same writer, "Peace Making at Paris: Success, Failure, or Farce?" *Foreign Affairs*, 25 (1947), p. 190.

§ 75. The Making of the Charter.—The failure of the League of Nations had been discouraging, the more so that this failure had been due to lack of support on the part of the nations of the world. Nevertheless, there seems to have been little doubt at any time that some sort of an international organization would emerge from the clouds of World War II. The need for such an organization was apparent to all, and it was especially important that the American people had now swung round to support of the idea. A large degree of unity had been achieved through signature of the Declaration by United Nations; the Atlantic Charter foreshadowed an international organization; the signature of the USSR to the Declaration of Moscow assured it.[6] A great deal of study had been given to the planning of such an organization, both unofficially and officially, and particularly by the Department of State.[7]

The Four Powers who had promised it at Moscow met at Dumbarton Oaks [8] from August 21 to October 7, 1944. The Conversations were in two parts, in the first of which the Soviet Union talked with the United Kingdom and the United States, and in the second China talked with them. Each of the Four Powers brought with it a plan. These were discussed and agreement was reached upon an outline of general principles, called the Dumbarton Oaks Proposals. These were widely distributed and criticism was invited. Probably no similar document was ever so thoroughly studied, or subjected to so democratic a procedure of consideration and adoption, as was the Charter of the United Nations which evolved from these Proposals.[9]

UNCIO. The United Nations Conference on International Organization assembled at San Francisco on April 25, 1945, with fifty states in attendance, and continued its labors until the signing of the Charter on June 26.[10] It was organized in four Commissions and twelve Committees,

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[6] The documents may be found in *Dept. of State Bull.*, VI (1942), p. 3, and IX (1943), p. 307; in *Documents Am. For. Rel.*, IV, p. 203, and VI, p. 229.

[7] See the Bibliography prepared by Hans Aufricht for the Commission to Study the Organization of Peace (New York, 1943); *Report to the President*, pp. 20-21; C. Eagleton, "The Charter Adopted at San Francisco," *Pol. Sci. Rev.*, XXXIX (1945), p. 934.

[8] Dumbarton Oaks is an estate in Washington, D.C., now owned by Harvard University.

[9] See Appendix for this document. Only a few of the many comments upon it can be cited here: American Bar Association, *Recommendations*, etc. (Chicago, April 4-5, 1945); H. Kelsen, "The Covenant and the Dumbarton Oaks Proposals," *A.J.*, 39 (1945), p. 45; Inter-American Juridical Committee, "The Dumbarton Oaks Proposals" (Pan American Union, Washington); UNCIO, Doc. 2 (collection of amendments officially proposed); *Int. Con.*, No. 405 (1944), and No. 409 (1945).

[10] "It was a large conference, stretching the facilities of that hospitable and interesting city. In all, 282 delegates, representing fifty states, attended, and with their staffs they amounted to 1,726 persons officially working for their states. The International Secretariat, mostly recruited from the United States, numbered 1,058 persons. A total of 2,636 newspaper, radio, etc., representatives were present, and it required

most of the actual work being done in the Committees. A Coordination Committee and a Committee of Jurists put the pieces together into a final document; there was a Steering Committee to guide the work and resolve problems; and above all were the Big Five meetings in the penthouse on top the Hotel Fairmont. The work was arduous and often delayed by the necessity of waiting until the Big Four or Five could reach agreement, but there was little doubt in the mind of anyone that the Conference would succeed in its purpose. The rule of unanimity was abandoned and action was taken by a two-thirds majority; debate was free and unrestricted. The Big Five had their way on the points where they took a firm stand, but this was because of the realization which all had that the system could not work unless the Great Powers were willing to make it work.

The drafting of the Charter was poor, partly because of the desire of various nations to have some of their words recorded in the Charter, partly because the Soviet delegates were unwilling to depart very far from the words of the Dumbarton Oaks Proposals, and partly because those who dominated the Conference were inexperienced in such work and impatient with legal terminology. There are many uncertainties of meaning and of textual authority, some of which have already caused debate and deadlock. The bare bones of the Dumbarton Oaks Proposals were at San Francisco given flesh, somewhat adipose at spots, but the essential principles of the Proposals were little modified.

Another document on Interim Arrangements was signed at the same time, and in accordance with this, the Executive Committee [11] met at London on August 16, 1945, to make proposals for setting up the new organization. The Preparatory Commission itself assembled in London on November 24, 1945, and, with encouraging unanimity and lack of reservations, agreed upon numerous recommendations of measures for establishing the various organs and procedures of the United Nations.[12] These were for the most part adopted by the General Assembly, at the First Part of its First Session, at London January 10 to February 14, 1945. Other steps

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the aid of 2,262 Army and Navy boys and girls, 800 AWVS, 400 Red Cross, and 800 Boy Scouts—not to mention 188 telephone and telegraph operators—to service the Conference. The average daily output of documents was about half a million sheets of paper, and on one day 1,700,000 sheets were issued and distributed; seventy-eight tons of papers were used. The total cost of the Conference, aside from expenses of delegations, was some two million dollars, paid by the United States as host," Clyde Eagleton, "The Charter Adopted at San Francisco," *Pol. Sci. Rev.* XXXIX (1945), p. 935.

See also *Report to the President, passim;* "The United Nations Charter," *Int. Con.* No. 413 (1945), p. 441; W. T. R. Fox, "The Super-Powers at San Francisco," *The Review of Politics,* 8 (1946), p. 115; G. Kirk and L. H. Chamberlain, "The Organization of the San Francisco Conference," *Pol. Sci. Q.,* LX (1945), p. 321.

[11] *Report of the Executive Committee to the Preparatory Commission of the United Nations.* UN Doc., PC/EX/113/Rev.1. 12 November 1945.

[12] *Report of the Preparatory Commission of the United Nations,* PC/20.23. December, 1945.

were taken at the Second Part, and with these decisions the successor to the League of Nations was launched upon its career.[13]

WHY? The question may be asked at this point: Why was it necessary to build a new organization? Why could not the League of Nations have been rebuilt in such fashion as might have been thought necessary? This would have avoided various problems of legal succession and might have saved a great deal of uncertainty and labor. The answer is to be sought in human nature, and even such statesmen as were not themselves afflicted by this disease were nevertheless driven by its effect upon their peoples. It was essential to draw into the international organization the two greatest and most reluctant states of the world and these two were the ones who had been most captious about the Geneva League. American statesmen were afraid that they could not persuade the Senate to accept the League of Nations which it had for so long rejected, and felt that they must present to it a new scheme more American in origin and thinking. The Russians had been expelled from the League of Nations and had a long-standing feud with Switzerland. There were also perhaps some who hoped that a fresh start would bring something stronger than the League had been and less affected by the stigma of failure which, more or less unjustly, rested upon the League.

§ 76. Characteristic Features.

A LEAGUE OF VICTORS. Like the League of Nations, the United Nations was conceived in the midst of war and in the fear of war. It was the product of the victors of World War II, and their trade name was carried over to become the name of the universal organization for peace.[14] No States were invited to participate in the San Francisco Conference except those who had signed the Declaration by United Nations;[15] both enemies and neutrals were excluded from original membership. It would seem that the only aggressors whom the makers of the Charter had clearly in mind were the Axis Powers, since the Security Council cannot act against a Big Power aggressor, and its potentially vast strength would not be needed against smaller states. Nevertheless, the United Nations was itself deprived of control over the enemy states, and Article 107 leaves these states at the disposition of the Five Powers.[16] It was their share in winning the

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[13] See *Resolutions Adopted by the General Assembly.*

[14] The name "United Nations" met with some objection for this reason, and also because of its inconvenience as a name, but it was adopted as a memorial to President Roosevelt. Goodrich and Hambro, p. 58; UNCIO, Document 944, I/1/34 (1).

[15] The Declaration by United Nations pledged joint efforts for the defeat of the Axis. An undignified scramble to sign before the Conference met followed this announcement.

[16] The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. See Article 23 of the Charter.

war upon which was based the claim of the Five Powers to predominance in the United Nations, and no new state can be admitted without the consent of all five. The term "peace-loving state" was interpreted to mean those states which had been willing to war against the Axis aggressors, and this interpretation may for some time to come affect the admission of "other peace-loving states" into membership.

THE FIVE POWERS. While the Great Powers had a position of special importance in the League of Nations, their predominancy in the United Nations is more marked. They have permanent seats on the Security Council, and only they have a right of veto, a discrimination in their favor as compared with the League Council in which all members had a veto. It is a right which includes not only matters of security but extends to such other matters as admission of new Members, selection of a Secretary-General, or amendment of the Charter. This special position does not depend upon their ability to meet stated criteria; they are arbitrarily named and there is no way to unseat them, even by amendment, without their own consent. They can block almost any action in the Security Council (though not in other organs); on the other hand, when they are in agreement, they should easily be able to influence the two other votes needed to take affirmative action.

Power is further channeled into their hands by Chapter 17 of the Charter. Article 106 authorizes them to take such action "on behalf of the Organization" as they may consider to be necessary for the maintenance of international peace and security; and while the Security Council itself decides when this period of delegation of authority is to be ended, each of the Five has a veto on that decision. By Article 107, entire control over enemy states is given to the Five Powers ("the Governments having responsibility") with no provision as to when or how this control is to be terminated. For an indefinite time, then, the Big Five, rather than the United Nations, have legal authority to maintain peace and security throughout the world as they wish, and entire control over the peace settlements and future disposition of the enemy peoples.

REALISM. The position thus given the Five Powers, and particularly the veto, represented what was called a "realistic" viewpoint. This viewpoint maintained that, in the existing exceptional balance, or imbalance, of power among nations, the only hope for the new Organization lay in unanimous agreement among these states. If they could agree, their strength would make the United Nations irresistible; if one or more should not agree, it would be hopeless to try to coerce it or them. Such an effort could only mean war upon a vast scale. The United Nations, therefore, should not, except as a stated legal principle, include among its ambitions that of preventing the use of force by a Great Power; it should be planned

so that its strength would be used only against resurgence of the former enemy states or against small aggressors. While it is true that this would deprive each of the Five of the aid of the United Nations against the only aggressors whom each of them need fear, this could not be helped. It would be better to enable it to do what it could do within the range of practical possibility than to wreck the United Nations by putting upon it a load greater than it could carry.

This view prevailed, but there are strong arguments against it. It could be anticipated, and has since been shown, that agreement among the Five Powers is difficult to achieve. If a crisis originating in a Great Power aggression should develop to the point of calling for enforcement of action against that Great Power, it would be a crisis dangerous enough to mean war in any case, within or without the United Nations.[17] In such a situation, it would surely be advantageous for the state which must face the aggressor to have upon its side such resources as the obligations put upon Members by the United Nations Charter could provide. These might be sufficient to deter aggression; they might be sufficient to turn the balance against the aggressor; in any case, the United Nations could organize moral support for those who face the aggressor, and the development of such moral support would assist in the long range task of building a community based upon law and justice. In other words, the use of the veto would not prevent the use of force, if a sufficiently critical dispute should arise; and if force is to be used, it would be better to have it known that the victim of aggression would have the organized community of nations upon its side from the beginning. If it were said that this would disrupt the United Nations, it must also be said that failure on the part of the United Nations even to try to prevent aggression would as effectively disrupt it. This, indeed, is what actually happened to the League of Nations.

Certainly, the result is that no security is provided for the United States or for any other Great Power. The only aggressor whom the American nation has to fear is a Great Power aggressor. Against such a danger the Charter offers protection in principle, but the veto denies it as a practical possibility; and since there is little present likelihood of the United States becoming an aggressor, the veto works to our disadvantage. From the viewpoint of the smaller states, they may be compelled to submit to Security Council decisions (Article 25), while the Great Powers may escape by use of the veto. A small state can be denounced and action can be taken against it as an aggressor, while the Great Power cannot be so handled. As a practical consequence, each of the smaller states will be compelled to align itself with a Great Power and the rival blocs thus formed

[17] Enforcement action by the United Nations should not be regarded as war, but as police action. A very important principle is involved in this use of terms.

will mean power blocs on a larger scale than ever before. In general, Five Power control furnishes too narrow a base upon which to build a world organization for peace and security.

Sovereignty. We have spoken earlier of the enormous importance of national sovereignty, even in the limited meaning of a relative freedom from external control, and of the difficulty of building a system of international law upon such a foundation. The Charter bases the United Nations upon the principle of the "sovereign equality of all its Members" and it carefully protects each Member against interference. No organ of the United Nations has legislative authority, and no new rule of law can be issued which is binding upon a Member without its own consent.[18] Only under Chapter 7, in the field of enforcement against an aggressor, may a Member be bound to action without its own consent; and the Security Council can give no final decision, but can only make recommendations, in disputes between Members. Even though no authority is given to legislate, assurance is made doubly sure by Article 2, § 7, which forbids the United Nations to intervene in any matter which is "essentially" a matter of domestic jurisdiction.[19] Finally, a right of withdrawal is apparently understood to exist, though not stated in the Charter.

Potentially, control by the Security Council in cases of breach of the peace is wide-reaching and powerful; the United Nations is here armed—even if inadequately—with the first of the powers of government, the power to repress the illegal use of force. Aside, however, from this limited interference, which is only in case of the use of force and not for general enforcement of law, national sovereignty remains untouched and is indeed carefully protected. The United Nations is far from being a superstate; it is an association of states, with each Member free to do as it wishes except for certain limitations upon its right to use force in its international relations.

Political Character. It follows from the above that the United Nations is not so much a legal order as a political system. Indeed, the phrase "international law" was not found in the Dumbarton Oaks Proposals (except in the domestic questions clause, from which it was later removed), and as a result of the insistence of many states it was inserted at San Francisco in Article 1, § 1.[20] Here it is limited to the settlement of disputes "in conformity with the principles of justice and international law." The only

[18] Nevertheless, the force of Assembly resolutions should not be discounted. Even though they do not legally bind Members, they have great influence upon their actions.

[19] See page 310 below for discussion of this clause.

[20] See C. Eagleton, "International Law and the Charter of the United Nations," *A.J.*, 39 (1945), pp. 751-4; P. C. Jessup, "Development of International Law of the United Nations," *ibid.*, p. 754; G. A. Finch, "International Law in the United Nations Organization," *Proc. Am. Soc.*, 1945, pp. 28-40.

other reference to international law in the Charter is found in Article 13 which mildly authorizes the General Assembly to "initiate studies and make recommendations for the purpose of: . . . encouraging the progressive development of international law and its codification."

Compulsory jurisdiction was denied to the International Court of Justice and consequently the nearest approach to a requirement that legal disputes be settled in accordance with law is found in Article 36, under which the Security Council may recommend to the parties in a dispute that they should "take into consideration that" legal disputes should, "if the parties so desire," be submitted to the Court. No requirement, beyond the vague reference in Article 1, § 1, is placed upon the Security Council with the regard to use of international law; it was given almost complete freedom in handling disputes or threats to the peace upon a political basis. The Security Council, in the disputes which have thus far been before it, has not felt it necessary to be guided in its decisions by international law, or to refer legal questions to a court.[21]

Cooperation. The hope of the United Nations, therefore, as was true also for the League of Nations, lies in the willingness and the ability of its Members to cooperate. This is true even in the one field where authority and governmental power exists, the field of security, for even here the Five Powers must agree before action can be taken. Since no authority whatever is given to any other organ, a majority vote is sufficient for decisions, and no veto is provided in these organs. It may therefore be expected that progress will more easily be made in economic and social affairs than in the political or security field, but it must be remembered that this progress depends upon ratification by states of recommendations made to them by the various organs of the United Nations. Granted cooperation, a wide field of human improvement is opened; but it is in the sense of objectives to be sought through cooperation and not in the sense of authority to act. Adequate facilities for study, planning, and negotiation are provided; whether they will provide progress in the sense of legislative development will depend entirely upon the willingness of sovereign states to accept the recommendations made.

Decentralization. We have observed that the League of Nations under Article 24 of the Covenant sought to bring all international activities under one umbrella, though for various reasons it did not succeed in this effort. The United Nations, on the contrary, encourages the building of separate international organizations, each with its own special function, its own staff, and its own treaty base. These were designated in the Charter

[21] The Albanian dispute was referred to the Court after the Security Council was blocked by a veto. The General Assembly has shown a similar disregard for law. See pp. 323, 439, *infra*.

as the "specialized agencies"; and it was further provided (Articles 57 and 63) that agreements should be made between each of these and the Economic and Social Council which would bring the specialized agencies into some sort of relationship with the United Nations itself. This development and the reasons therefor will be stated in Chapter 14, but it may be noted at this point that the United Nations tends in the direction of decentralization rather than toward the centralization which the League of Nations attempted. It would be more accurate to say, perhaps, that the United Nations has as many or more fields of activity as did the League, and that, in addition, a number of independent institutions would carry on specialized, but coordinated, work in cooperation with it.

CONCLUSIONS. To many persons, the Charter of the United Nations was a disappointment. They had hoped for advance beyond the League of Nations, for a system which could provide some degree of security against war; and they had hoped that it might be given sufficient authority to deal more effectively with the more important economic and social causes of war. These hopes were not realized.

It is probably true, however, that the Charter reflects with some accuracy prevailing popular opinion in the world, and particularly in its two most important Members. Certainly, the American people cannot consistently criticize the United Nations, for it was they who made it what it is. The American people have swung from isolation to international organization, but they have not made it clear how far they are willing to go in submitting national sovereignty to the new international order. They were theoretically in favor of an international government strong enough to stop a Hitler, but specific inquiry reveals unwillingness to submit to a majority vote imposing a law or decision upon the United States, to have their boys drafted for an international police force, or even to have their tariffs modified from the outside. They could have had as strong a United Nations as they wished, but they did not indicate to their government willingness to pay the price for so strong a system.[22]

In certain respects, the United Nations represents potential gain over the League of Nations; in other respects, it is weaker. In both systems, objectives were stated and machinery was provided, but in both cases progress had to depend upon the voluntary cooperation of its Members rather than on its own authority. It was doubtless a great gain, taking everything

[22] American students should keep this in mind as they study the United Nations. It is possible that the President, or the Department of State, underestimated the extent of authority which the American people were willing to give to the United Nations, but they had ample reason for moving cautiously. President Roosevelt kept continuously in mind that one third of the Senate could defeat acceptance of the Charter—which would have been disastrous—and that it had previously done so on other important matters, such as the League of Nations in 1919-20, or the Permanent Court of International Justice in 1935.

into consideration, that the two most powerful and most reluctant states were persuaded to enter the new Organization, for without their participation there could be little hope of progress. Though the sharp ideological differences between them present very difficult problems for the United Nations, it is better to have these problems worked out under the jurisdiction of a universal system than for them to be fought out individually. It is a gain, too, that the unanimity rule, so long prevailing in international conferences, is abandoned and that a veto can nowhere be used except in the security field, and that instead of a veto belonging to every Member and to be used in all voting, a veto can now be used only by five states and only in the security field. The authority to require Members to use armed forces against an aggressor is a decided gain over the League of Nations as a legal matter, however weak it may be in its actual operation. There is more provision for action, limited as that action is, in the economic and social field, and the activity in this field is to be continuous rather than occasional. Though the average individual thinks of the United Nations as a security organization, it is weak in this respect, and its greatest achievement will probably be found to lie in other fields.

§ 77. **General Survey.**—With this survey of characteristic features in mind, we may now proceed to examine the system set up by the Charter, taking first those provisions which relate to the Organization as a whole, and in later chapters the various organs and their functions.

Preamble, Purposes, and Principles. The Preamble and Articles 1 and 2 which purport to state the purposes and principles of the United Nations provide an unnecessarily repetitious statement of the aims of the United Nations. It is a somewhat novel idea to include such materials in the text of a constitutional document, and while the idea has merit, it was both overdone and underdone in the Charter.

Preamble. Here is found the name of the new organization which, as already noted, continues the appellation given to the wartime alliance. The Preamble itself is a conglomeration, the last resting place for various proposals which could not be included in the text, and this raises a question as to the legal force of preambular provisions. International law texts tell us that the preamble to a treaty has no legal validity, but it was asserted at the Conference that matters put into the Preamble were as effective as if they had been put into the text.[23] It may be noted also that while the Preamble starts with the words, "We, the peoples," it ends with "our respective Governments . . . have agreed." "Peoples" are not known as sub-

[23] Gooodrich and Hambro, pp. 54-55, UNCIO, Doc 944, I/1/34 (1). The question of *travaux preparatoires* appears in many other places in the Charter, notably in regard to a right of withdrawal.

jects of international law, and in some countries only the monarch has the constitutional power to conclude a treaty.

PURPOSES. Four paragraphs in Article 1 summarize the purposes of the United Nations, and each was long discussed. The chief additions to the earlier draft at Dumbarton Oaks were: the important phrase in Paragraph 1 (applicable only to the settlement of disputes) "and in conformity with the principles of justice and international law"; in Paragraph 2, "based on respect for the principle of equal rights and self determination of peoples"; and in Paragraph 3, the addition of "cultural" problems, and "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Briefly, the four purposes are to maintain international peace and security; to develop friendly relations among nations; to achieve international cooperation in broad fields and to develop the rights of individual human beings; and finally, to provide a common machinery for carrying out these various purposes.

PRINCIPLES. Article 2, which requires the Organization and its Members to act in accordance with stated Principles, is not so well balanced. Actually, certain paragraphs deal with the Organization as a whole, while others deal only with the application of principles; one relates to non-Members; the final paragraph is a blanket exception to almost everything in the Charter; and the Article as a whole deals only with security and makes no mention of any other purposes.

Paragraph 1 states the principle of "sovereign equality." Sovereignty is, of course, carefully protected throughout the Charter, and equality of legal rights and voting is fairly well assured outside the Security Council. Members agree, by Paragraph 2, to fulfill their obligations under the Charter. This, of course, they are already bound by ratification to do, but the paragraph is of importance as stating clearly the important principle that the enjoyment of benefits by some depends upon the performance of duties by all—a lesson which was impressed upon observers by the experience of the League of Nations. The third paragraph requires that international disputes be settled, not only peacefully, but in such a manner as to create no disturbance of the peace, e.g., by injuring third parties. The next paragraph reinforces the requirement of peaceful adjustment by forbidding the use of force inconsistent with the purposes of the United Nations. This marks a definite improvement over earlier prohibitions against "war." The obligation of Members to give each other mutual assistance in enforcement action taken under the Charter is recognized in Paragraph 5, which may be regarded as eliminating neutrality as a legal possibility.[24]

[24] In view of Article 51, and of the possible inability of the Security Council to agree upon the aggressor, the above statement might be disputed.

Paragraph 6 introduces an important element in the maintenance of peace by subjecting non-Members to the power of the United Nations whenever this is necessary for the maintenance of peace and security. No legal obligation was put upon non-Members since this could not be done without their consent; they are simply told that they must maintain peace, though they are later provided with opportunity to avail themselves of the procedures of the United Nations for the settlement of their disputes. The effect of this paragraph is to take a long step toward universal jurisdiction, since it leaves little reason for remaining a non-Member; it may be regarded as indispensable for the maintenance of peace throughout the world.

Paragraph 7 is a sad retrogression, due almost entirely to the United States. It is one of the worst examples of several in which the Charter takes away with one hand what was given with the other. In the Dumbarton Oaks Proposals this clause was located in the section on pacific settlement of disputes and applied only to such disputes. At San Francisco it was moved back to become one of the Principles applicable to the whole Charter. The restriction had been included in Article 15, § 8, of the Covenant of the League of Nations where, however, decision was to be made by the Council, in accordance with international law, as to whether or not a matter was legally a domestic question. Both these requirements were dropped at San Francisco with the apparent result that each state could, upon its own assertion of domestic jurisdiction, exclude the United Nations from consideration of the matter.[25] The removal of the phrase to Article 2 made it apply, apparently, even to resolutions or recommendations by any United Nations organ, in any field, with the exception of Chapter 7.[26] Both the Security Council in the case of Spain, and the General Assembly in regard to Spain and to Indians in South Africa, failed to turn to the Court for interpretation, and adopted resolutions which seem to disregard Article 2, § 7, in spirit as well as in word. It is open to debate whether such action should be criticized as disregard for constitutional law in an emotional determination to achieve ends regarded at the moment as desirable, or praised as a proper assumption by the General Assembly of a right to interpret the Charter so as to permit progress.

These Purposes and Principles are to some extent elaborated in other parts of the Charter, but they will doubtless be called upon frequently as

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[25] Some reinforcement for this interpretation was added by Senator Connally's amendment to the Senate's consent to United States adherence to the optional clause of the Statute of the Court, "as determined by the United States." See p. 347 below.

[26] An amendment at San Francisco changed this exception so that it would not apply to all of what is now Chapter VII, but only to the "application of enforcement measures under Chapter 7," thus apparently eliminating the right of the Security Council under Article 39 to determine that a threat to the peace exists! The devastating effects of this absurd clause are stated in detail by H. Kelsen, "Limitations on the Functions of the United Nations," *Yale Law Journal*, Vol. 55 (1946), pp. 997-1007.

controlling directives in future decisions. For example, it is nowhere else stated in the Charter that disputes should be settled in accordance with international law and justice. Many of the criticisms of the Dumbarton Oaks Proposals, as represented by proposed amendments, are to be found hidden away in these two articles, and they will probably be recalled by their authors. The only Principles enunciated relate to peace and security, and the United Nations was furnished with no Principles to guide it in other fields.

MEMBERSHIP. Two classes of membership are provided for in Chapter 2 of the Charter. Article 3 says that "those states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations," and which have ratified the Charter, shall be original Members. Fifty states participated in the Conference and subsequently ratified the Charter; one other signed later.[27] Thus there are fifty-one original Members. Of these, the Byelorussian Republic, the Philippines, Syria, and the Ukrainian Republic, and others, might have had difficulty in qualifying under a political science definition of the word "state." It is sufficient to say that they were invited to attend by the Four Powers who summoned the Conference, and that, for the purposes of the Charter, any Member would seem to be a state.[28]

ADMISSION. Any other "peace-loving" state may be admitted to membership if, in the judgment of the Organization, it is able and willing to carry out the obligations which it would accept on becoming a member. The word "peace-loving" met with some criticism and has no clear meaning;[29] and no explanation was given to the word "able and willing." New Members may be admitted by vote of the General Assembly on recommendation of the Security Council. In this vote a veto may be used in the Security Council, and a two-thirds majority of the General Assembly is required. The first applications for membership were debated upon so strictly a political basis and with so little regard to the criteria stated that the General Assembly passed a resolution calling upon the Security Council to re-examine these applications for membership on the basis of their respective merits "as measured by the yardstick of the Charter in accord-

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[27] Poland did not have a recognized government at the time and signed on October 15, 1945. A list of signatories of the Declaration by United Nations may be found in Goodrich and Hambro, pp. 78-79.

[28] This is borne out by the removal from Article 34 of the Statute of the Court of the word "Members."

[29] Original Members are apparently *ipso facto* peace-loving, from which it might be concluded that states which were at war with the Axis were peace-loving. By the Potsdam Declaration of August 2, 1945, the Four Powers announced that they would support applications for membership from neutral states with the exception of Spain.

ance with Article 4."[30] Four new Members have been admitted, and the membership of the United Nations is (1947) as follows:

ORIGINAL MEMBERS

Argentine	El Salvador	Panama
Australia	Ethiopia	Paraguay
Belgium	France	Peru
Bolivia	Greece	Philippine Commonwealth
Brazil	Guatemala	Poland
Byelorussian Soviet Socialist Republic	Haiti	Saudi Arabia
	Honduras	Syria
Canada	India	Turkey
Chile	Iran	Ukrainian Soviet Socialist Republic
China	Iraq	
Colombia	Lebanon	Union of South Africa
Costa Rica	Liberia	Union of Soviet Socialist Republics
Cuba	Luxembourg	
Czechoslovakia	Mexico	United Kingdom
Denmark	Netherlands	United States of America
Dominican Republic	New Zealand	Uruguay
Ecuador	Nicaragua	Venezuela
Egypt	Norway	Yugoslavia

ADMITTED DECEMBER, 1946

Afghanistan	Siam
Iceland	Sweden

SUSPENSION AND EXPULSION. The use of suspension (Article 5) as a penalty is a new idea, not found in the League of Nations. Both its extent and its use are limited: the suspension is not from membership, but from the "exercise of the rights and privileges of membership"; and it can be employed only against a state "against which preventive or enforcement action has been taken by the Security Council." The initial action must be taken upon recommendation by the Security Council and subject to the use of the veto; the General Assembly, by a two-thirds vote, then approves or disapproves the recommendation. Restoration of rights to a suspended Member is, however, given by the Security Council alone. The rights which might be lost by a suspended state would presumably be such as participation or voting or holding office in organs of the United Nations. This would not exclude the nationals of such a state serving on the Secretariat or in the Court, since these persons do not represent states.

EXPULSION. A Member may also be expelled, but this penalty is limited to states which have "persistently violated the Principles contained in the

[30] *Resolutions of the General Assembly*, No. 35 (I).

present Charter." Since this provision would operate in opposition to the concept of universality held by many, and since the expelled state would no longer be subject to the jurisdiction of the United Nations, there was much opposition to it, but the determination of the U.S.S.R. that it be included prevailed.

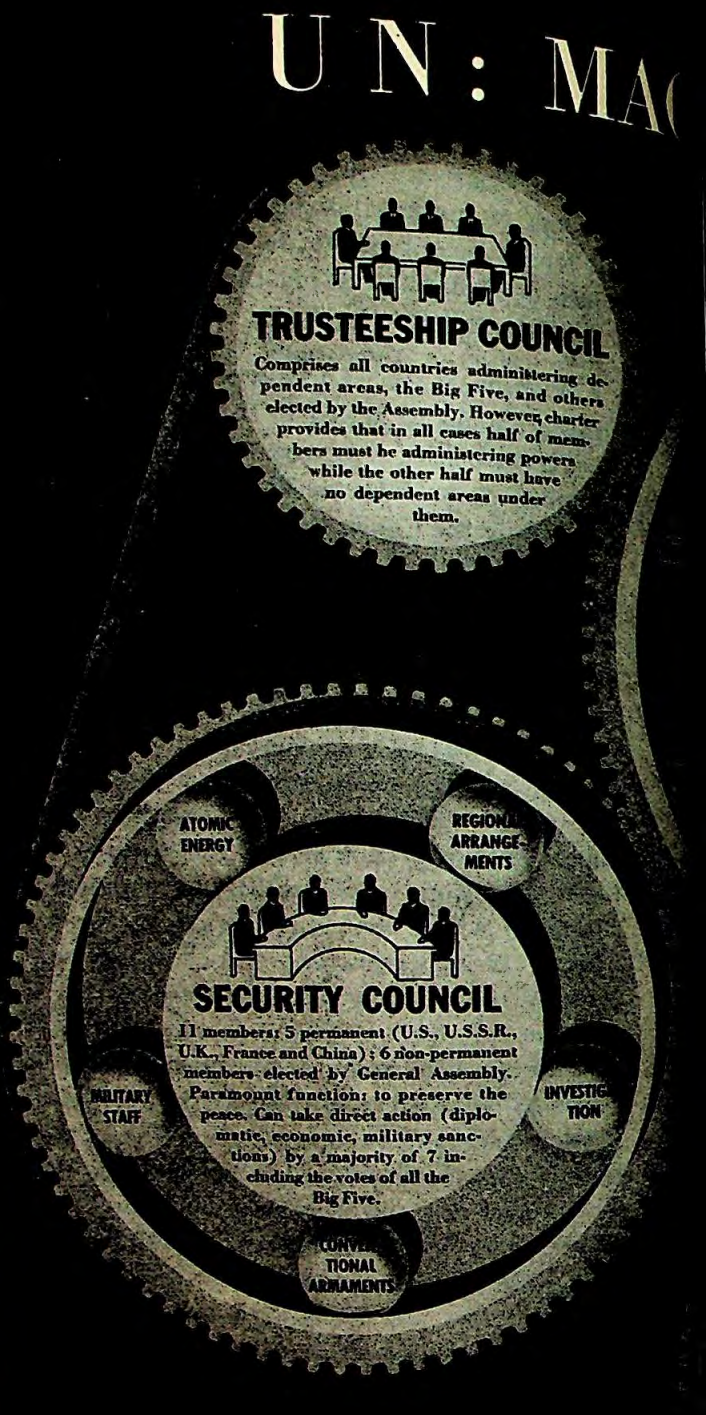
WITHDRAWAL. There was much debate as to whether a right of withdrawal should be stated in the Charter, and the Charter does not mention it. Nevertheless, it is maintained that there is a right on the part of each Member to withdraw. This is based upon an interpretative resolution adopted by the Conference which emphasized heavily the duties of membership, but admitted that the Organization would not seek to compel a Member if, because of exceptional circumstances or because of an amendment, that Member should feel constrained to withdraw.[31] This method of statement represented a compromise, since it is probable that neither those who wished to include in the Charter a statement of a right of withdrawal, nor those who wished to exclude it, could have commanded the necessary two-thirds majority. The result is a problem for the international lawyer, who would usually hold that a signatory state could not be relieved of its obligations under a treaty in the absence of provisions therein by which these obligations could be changed, and who must ask also concerning the extent to which conference proceedings, not included in the text of the Charter (*travaux preparatoires*) and not ratified, can be regarded as expressing the meaning of the Charter.[32]

Some interesting conclusions may be drawn from these varied provisions concerning membership. The chief current qualification for membership seems to be hostility to the Axis Powers, as differently interpreted by the Russian bloc and by other states. The Charter is not conceived in terms of universal membership, but in fact it moves a long way in that direction. This is because membership itself means little loss of sovereignty, while on the other hand a non-Member may be compelled just as effectively as can a Member to observe the obligations of the Charter with regard to security. The provisions for suspension and expulsion also point in this direction. A suspended Member is in much the same position as an expelled Member, which is to say, as a non-Member, since in any of these three cases the United Nations may exercise its security powers over a state, whether or not it is a Member or able to exercise the rights of membership. Very little is to be gained, then, through a refusal of member-

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[31] UNCIO, Doc. 1178 I/2/76 (2), quoted in Goodrich and Hambro, pp. 87-88; see also the *Report to the President*, pp. 48-49; *Hearings*, pp. 232-240, 324-327, 346-348.

[32] H. W. Briggs, "Power Politics and International Organization," *A.J.*, 39 (1945), pp. 673-674.



This chart shows how the principal organs of the UN are geared into each other, the General Assembly being the central organ to which all others are connected. The subordinate organs, which bear the brunt of the work of the principal organs, are shown as of October, 1947. The Court, it will be noted, is more independent of control than are the other organs. This chart has the advantage over earlier ones that it reduces the Security Council into its proper perspective as one of the three functional Councils.

The chart appeared in the October, 1947 issue of the *United Nations World* and is reproduced here by courtesy of that journal.

NERY FOR PEACE



UNITED NATIONS WORLD Chart by James Cutler

ship; on the contrary, the non-Member may wish to participate in the disposition of his own case, and is therefore encouraged to join.

LEGAL CHARACTER. There has been much debate as to whether the League of Nations possessed legal personality, but such doubt is cleared up with respect to the United Nations by Article 104, which explicitly states that "the Organization shall enjoy within the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes." Legal capacity may refer to the power to make contracts, dispose of property, and do other such things under domestic law, a capacity which would certainly be needed; it may refer also to ability to operate as a subject of international law. As to the latter, a general authority is given, such as may be necessary for its purposes. It should be noted in this connection that in two cases and to some extent in the third case, authority is given to make treaties or agreements: the Security Council is to make agreements with Members or with "groups of Members" (Article 43); the Economic and Security Council is to make agreements with each of the specialized agencies, which must be approved by the General Assembly (Article 63); and the Trusteeship agreements, or any alteration thereof, must be approved by the General Assembly (Articles 79, 85).

PRIVILEGES AND IMMUNITIES. Furthermore, the Organization is to "enjoy in the territory of its Members such privileges and immunities as are necessary for the fulfillment of its purposes" (Article 105). Thus the United Nations, working through any of its organs, in any Member state, is entitled to the usual privileges or immunities accorded to a legal person in international law. The committee which prepared this article took as a basic principle that "no Member state may hinder in any way the working of the Organization or take any measures the effect of which may be to increase its burdens, financial or otherwise." [33]

It is provided also that representatives of Members, and officials of the Organization itself (for the most part, the staff of the Secretariat), shall have such privileges and immunities as may be necessary for the exercise of their functions in connection with the United Nations. The General Assembly is made responsible for negotiations determining details, and has prepared a treaty on the Privileges and Immunities of the United Nations.[34]

HEADQUARTERS. The location of the headquarters of an international organization raises many questions of importance both to the organization and to the state in which it is located.[35] Political considerations, such as

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[32] UNCIO, Doc. 993, IV/2/42 (2), p. 3.
[34] *Resolutions of the General Assembly*, p. 25.
[35] C. W. Jenks, *The Headquarters of International Institutions* (London, 1945); *Report of the Headquarters Commission*, UN Doc. A/69, October, 1946.

Soviet and United States dislike for Geneva, or desire to maintain the interest of the American people, led to the decision to locate United Nations headquarters in the United States; its location on the Eastern seaboard was a compromise between those who wanted it in Europe and the many who preferred San Francisco; and it could not be located in the South because of the prevalent prejudice there from which persons of color might suffer. Theoretically, such a headquarters should be a separate unit, entirely independent of any state, such as an island or a detachable peninsula; actually this would involve providing, at enormous cost, such needs as public utilities, civil and criminal law facilities, communications, and perhaps munitions factories. Furthermore, the United Nations is not a super state, calling for a District of Columbia under its own governance; it is an association of sovereign states, with a common machinery which could be located in any one of them. Assuming willing cooperation—which was slow in developing on the part of either federal or local authorities—the location of United Nations headquarters within the United States was politically wise and physically convenient. After much tergiversation, it was decided at the 1946 meeting of the General Assembly to build permanent headquarters in the heart of New York City, where land had been offered through the gift of John D. Rockefeller, Jr. It will be several years before buildings can be constructed to house the United Nations at that location and meanwhile, the Secretariat is temporarily located at the large Sperry manufacturing plant near Lake Success on Long Island.

FINANCES. The control of the budget and of finance in general is wholly in the hands of the General Assembly, thus giving it a large degree of control over the whole system and perhaps over the specialized agencies as well. The expenses of the United Nations are to be borne by the Members, who are to contribute according to an apportionment made by the General Assembly; and the Assembly is to approve the budget of the Organization and also any budgetary arrangements entered into with the specialized agencies (Article 17).[36] An automatic penalty for falling into arrears is provided in Article 19, which penalty may be modified by the General Assembly if it is satisfied that failure to pay was due to conditions beyond the control of the Member.

The Assembly has provided a Committee on Contributions to apportion expenses among Members, and it distributes costs in general according to capacity to pay. The scale of apportionment is to be revised every three years unless changes in ability to pay necessitate earlier revision. A Working Capital Fund of 25 millions was established by contributions from Members, to carry over until regular budgets could be established. The

[36] In the agreements so far made there is a provision for consultation with regard to inclusion of the budget of the agency in the budget of the United Nations.

share paid by the United States was over 6 millions; that of the United Kingdom was some 3½ millions; the U.S.S.R. contributed $1,723,000, France $1,400,000, and so on down the scale to the lowest unit of $12,500.[37]

The budget for the first year, which included various conferences and moves to different headquarters, was $21,500 thousand—less than one-tenth of the cost to the United States alone of one day of war; the City of New York spends to keep its streets clean more than nations provide for the world organization for the maintenance of peace and security!

AMENDMENT. The provisions for amending the Charter were much argued and, as adopted, have been much criticized. It is one of the chief lessons of history that change cannot be stayed; a constitution which cannot be changed by regular methods will be changed, or evaded, by irregular methods.

Amendments are negotiated within the General Assembly, where they are adopted by a two-thirds vote of *all* Members, but they enter into force only when they have been ratified "in accordance with their respective constitutional processes," by two-thirds of all the Members, including the five permanent members of the Security Council. It was this extension of the veto to the process of amendment which aroused opposition at the Conference. It was observed that these five states were arbitrarily named and that if one ceased to be a Great Power it could not be unseated, nor could another state which had become a Great Power gain a permanent seat, so long as one of the original five might object. Worse than this, no part of the special powers given to them, especially the voting procedure, could be changed without the consent of all. It was largely because of this situation that the clamor for a right of withdrawal arose; various states felt that they might wish to leave the United Nations if the provisions of the Charter should be abused, and yet be unchangeable; others feared that they might be bound by an amendment adopted without their consent.

In an effort to allay the discontent aroused by this provision, Article 109 was added. This makes it possible to call a conference for general revision of the Charter, whenever two thirds of all Members of the General Assembly and any seven Members of the Security Council approve. In case a conference should not be called before the tenth annual session of the General Assembly, the question is automatically put upon the agenda of that Assembly and the vote as to whether such a revision conference shall be called is in this case by a bare majority of all Members of the General

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[37] See the *Report of the Secretary-General*, U.N. Doc., No. A/65, pp. 59-60; *First Report of the Advisory Group of Experts on Administrative Personnel and Budgetary Questions, March 1946; Second Report of the Same Group, October 19, 1946.* The budgets approved for the financial years 1946 and 1947 may be found in *Resolutions of the General Assembly*, No. 68 (I), and the scale of contributions by Member states in No. 69 (I).

Assembly and any seven Members of the Security Council. The conference method offers little improvement in the situation for, though a conference for proposing amendments can be called without a veto, the veto applies to the ratification necessary to put the amendment into effect. The Great Powers felt that they could not risk a change in the large responsibilities which they carry through any sort of a majority of those whose responsibilities are not so great. For this feeling on their part, there is some justification, and the conflict between theory and practicality remains a difficult one.

CHAPTER 13

THE UNITED NATIONS

ORGANS AND FUNCTIONS

According to Article 7 of the Charter there are established as the principal organs of the United Nations: A General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. The General Assembly and the Secretariat correspond to the two similar organs of the League of Nations; there are, however, three Councils instead of one. The International Court of Justice is now listed as an organ of the United Nations, while the Permanent Court of International Justice was a body separate from the League of Nations. The International Labour Organization, the other autonomous body of the League, has become one of the specialized agencies of the United Nations. Within the United Nations as now planned, the organization seems more symmetrical, though there may yet develop more or less detached or autonomous bodies such as the Atomic Energy Committee, and the situation of the specialized agencies is not yet clear.

§ 78. The General Assembly.—While most emphasis in the making of the Charter was laid upon security and the Security Council, the General Assembly is actually the center, the nexus of the entire system. It is the only organ in which all Members participate. The three Councils, the Court, and various other organs, are all related to the General Assembly and this can be said of no other organ (except, in another sense, of the Secretariat). It is the only organ which has all fields of activity within its jurisdiction. Exclusive and powerful as is the Security Council, the Assembly includes in its wide functions some share in the security function. It exercises supervisory control of other organs including, to a lesser extent, the Security Council. It distributes work to all organs and all must report to it and are subject at the least to its criticisms. Through financial and budgetary powers, it may exercise control over all of them.

ORGANIZATION. Every Member of the United Nations is represented in the General Assembly. Each has one vote, proper respect being paid here to the principle of "sovereign equality." Each is permitted to have five representatives sitting at meetings. A larger number would mean an

unwieldy Assembly and would put some Members, with small delegations, at a disadvantage. This number makes it possible to have such experts and advisors as may be needed for a particular discussion; in practice they are changed on the floor as needed. It seems clear that Members of the General Assembly are not persons but states; and the persons who participate in its work do so as instructed diplomatic representatives of their respective states.

PROCEDURE. Provision is made for an annual meeting of the Assembly (Article 20), and by Resolution 77 (I) this meeting is to begin on the third Tuesday of September. Special sessions may be convoked by the Secretary-General at the request either of the Security Council or of a majority of Members.[1] Longer sessions will doubtless be required than were held by the Assembly of the League of Nations since the General Assembly has a broader field of operations and more organs to oversee. The Assembly is authorized to make its own rules of procedure [2] and elects its own President and seven Vice-Presidents for each session.

The Rules of Procedure provide for a General Committee whose task is to coordinate the work of the various Committees, and to assist the President in conducting the work of the Assembly. There are six Main Committees: (1) Political and Security; (2) Economic and Financial; (3) Social, Humanitarian, and Cultural; (4) Trusteeship; (5) Administrative and Budgetary; (6) Legal. In addition, there are a Credentials Committee, an Advisory Committee on Administrative and Budgetary Questions, a Committee on Contributions (apportionment of expenses among Members) and several *ad hoc* committees. Each Member may have a representative on each of the Main Committees. Items of the agenda are referred to appropriate Committees where they are thrashed out into recommendations for submission to the plenary Assembly. Since all Members are represented on these Committees, the chances are that the action taken in Committee will be confirmed by the Assembly.

There are five official languages for the United Nations, in which all documents must be published: Chinese, English, French, Russian, and Spanish. The two working languages for debate purposes are English and French, and speeches made in any of the five languages are interpreted into one or both of the working languages. A speech may be made in any other language, but the speaker must in this case furnish his own interpreter. The language problem is a difficult one, doubling or tripling the time required, and various experiments are now being tried to overcome it.

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[1] The first such special session, called at the request of the United Kingdom to consider the Palestine problem, met in New York in April, 1947.

[2] See the *Provisional Rules of Procedure for the General Assembly*, UN Doc., A/71/Rev. 1, 28 April 1947.

Where sufficient understanding exists, translation may be dispensed with by agreement. Some of the rooms at Lake Success are equipped with headphones, through which by pressing a switch a speech may be heard in any of the five languages, as it is being delivered. As each speech is given, the interpreters in four of the glass-enclosed, soundproof chambers may be seen hard at work at the difficult task of running interpretation.

Voting. An important advance over the procedure of international conferences of the past, including the League of Nations, is found in Article 18, which abandons the rule of unanimity in voting and requires only a majority of those present and voting. Certain designated matters call for a two-thirds majority and we may refer to those according to their place in the Charter: Articles 11, § 2; 23; 61; 86, 1c; 4, § 2; 5; 6; Chapters XII and XIII; 17. In the procedure of amendment, however, the majority required is a majority of all Members. All other questions are determined by a bare majority and a bare majority is sufficient to include any other matter under the two thirds rule.

Each Member has one vote, and thus "sovereign equality" is maintained; the vote of Liberia weighs as much as that of the Soviet Union and the population below the Rio Grande has twenty times the vote of nearly the same number in the United States. Equality of voting in the General Assembly is largely responsible for maintenance of the veto in the Security Council, where important decisions are to be taken; it is permitted in the General Assembly since no decisions taken by it are binding upon a Member without ratification by that Member.[3] The work of the Assembly issues in the form of Resolutions which, while not legally enforceable, are of great weight, and desperate parliamentary battles may be fought to avoid unfavorable conclusions. Nothing is said in the Charter as to a right of the General Assembly to draft treaties to be submitted for ratification by Members, but there would seem to be nothing to forbid this procedure, which is highly important as a method of international legislation.[4]

Functions. The General Assembly was much strengthened at San Francisco, as compared with the Dumbarton Oaks Proposals, and its field of function now includes anything which may arise under the Charter,[5] though in the one aspect of security limitations are set upon it. The action which it may take goes no further than recommendation, and it cannot pass

[3] It does not seem possible to make much progress toward a better procedure of international legislation so long as equality of voting is maintained. This situation has led to some studies of "graded representation," though no indication of official movement in this direction has been given. See L. B. Sohn, "Multiple Representation in International Assemblies," *A.J.*, 40 (1946), p. 71; F. Rider, *The Great Dilemma of World Organization* (New York, 1946).

[4] It is specifically authorized for the Economic and Social Council (Article 62, § 3), which is itself responsible to the General Assembly.

[5] Article 10; and see Goodrich and Hambro, pp. 94-96.

legislation binding upon Members. It is free, however, to discuss or consider any subject, and to make recommendations upon any subject except those on the agenda of the Security Council. It is primarily a forum, the "town meeting of the world," and this is a function of enormous importance, as was shown by the Assembly of the League of Nations. Any point of trouble in the international scene may here be brought into the open, and when the limelight of public opinion has been focused upon such a matter, even the greatest states will pay attention to conclusions reached in the discussion.

Maintenance of Peace and Security. In the League of Nations, Council and Assembly were coordinate bodies, each able to do most of what the other could do, as, for example, handling disputes and maintaining peace. In the United Nations system, a clear division of functions between the Security Council and the General Assembly was planned and, though somewhat dimmed, actually exists. The Security Council, as we shall see, is given "primary responsibility for the maintenance of peace and security," but the General Assembly is not excluded from this field, and may conceivably play an important part in it.

Article 11 gives authority in this field to the General Assembly, and Article 12 sets a limitation upon it. By paragraph 1 of Article 11, the General Assembly may "consider the general principles of cooperation in the maintenance of international peace and security"; by paragraph 2 it may "discuss" specific questions, i.e., disputes. The "general principles" include those for disarmament and the regulation of armaments, but the Security Council has the responsibility for formulating plans in this field (Article 26).[6] A dispute ("any questions") may be put before the General Assembly by any state, Member or not, or by the Security Council; and the Assembly may, in such a case, do all that the Security Council can do, which is to make recommendations as to what should be done. It may do this, however, only when the Security Council is not dealing with the matter; and over the meaning of the words in the text there was, and doubtless will continue to be, much debate. Two provisions cover this situation.

In a case which originates in the Assembly itself, "any such question on which action is necessary" must be referred to the Security Council. This would seem to exclude Chapter VII, for the General Assembly is not authorized to do anything in the way of enforcement action;[7] it is not so

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[6] The General Assembly has nevertheless taken the lead, as did the Assembly of the League of Nations. See § 112, below, and Resolution No. 41 (I).

[7] However, the General Assembly recommended that its Members break off diplomatic relations with Spain, though this is one of the measures of enforcement listed in Article 41. *Resolutions of the General Assembly*, No. 39 (I).

clear that it excludes Chapter VI, for it would not be worth while to authorize the Assembly to recommend, and at the same time to require the Assembly to refer the matter to the Security Council on the ground that "recommendation" is "action." It may be prophesied that in a case referred to it, rather than to the Security Council, the General Assembly will claim the right to make recommendations.[8]

On the other hand, the situation is much clearer when the case originated in the Security Council. Article 12 states positively enough that "when the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter," the General Assembly shall make no recommendations unless requested to do so by the Security Council. At San Francisco, the fear was expressed that the Security Council might keep a matter indefinitely on its agenda, and thereby exclude the General Assembly even though the Security Council was doing nothing itself to settle the dispute. This led to the inclusion of paragraph 2 of Article 12, according to which the Secretary-General must notify the General Assembly of the matters being dealt with by the Security Council, and of the matters with which it has ceased to deal.[9] He must be authorized by the Security Council to convey this message and of course any one of five states may block such a message by a veto, and thus keep the matter from the General Assembly. In such a case, the discussion in the Assembly might be severe enough to amount to a recommendation in itself. The Assembly has as much authority to deal with a dispute properly before it as does the Security Council, i.e., the right to make recommendations. In making such recommendations, it is limited neither by the restrictions of Chapter VI, nor by the veto. If the veto continues to be used arbitrarily by the Security Council, or the procedure of that body is unsatisfactory, the result may be that disputes will be submitted to the Assembly rather than to the Security Council.

Peaceful Change and Treaty Revision. Articles 11 to 14 may all be regarded as elaboration of the general authority granted to the General Assembly under Article 10. Article 14 stands somewhere in between the maintenance of peace and cooperation for other purposes. It deals with something broader than disputes, that is, with situations calling for what has come to be known as "peaceful change." It corresponds somewhat to Article 19 of the Covenant of the League. The General Assembly has no power to order or enforce any change whatever; it can only "recommend measures for the peaceful adjustment of any situation, regardless of origin,

[8] In fact, it may be said to have done so with regard to the complaint by India against South Africa. *Ibid.*, No. 44 (I).

[9] An example of this was the transfer by the Security Council to the General Assembly of the Spanish question in November, 1946. Security Council, *Official Records*, 79th meeting.

which it deems likely to impair the general welfare or friendly relations among nations."

The phrase "treaty revision" is nowhere to be found in the Charter, and the Charter reveals no advance over the Covenant of the League with respect to the important problem of revision of treaties. Indeed, it pays less attention to it, though doubtless as much can be accomplished under this Article as was possible under Article 19 of the Covenant. The words "regardless of origin" were intended to cover treaty situations.[10] Since the Security Council may deal with "any situation which might lead to international friction or give rise to a dispute," (Article 34) the effect would seem to be to give a coordinate jurisdiction in this field to the Security Council and to the General Assembly.

Other Functions. Certain obligatory functions are laid directly upon the General Assembly by Article 13, which says that it "shall initiate studies and make recommendations" concerning cooperation in the political field, in the development of international law, and in the economic, social, cultural, educational and health fields, and also for "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." While the wording of this Article is as weak as it is possible to make it, a broad field of endeavor, though not of authority, is opened to the General Assembly by it, and it is to be anticipated that it will continue the important work of the League of Nations in this field, with more adequate machinery. Most of this work is to be carried on through the Economic and Social Council and will be discussed under that heading. Even the slight authority of the General Assembly in these fields is subject to the indeterminate limitation of Article 2, § 7; and it remains uncertain whether that prohibition on "intervention" by the General Assembly applies even to the study and recommendations to which the Assembly is limited by Article 13.

In addition to the deliberative functions above described, the General Assembly has other functions of elective, administrative, or supervisory character. It may, after recommendation by the Security Council, admit new Members, suspend or expel Members (Chapter II), or choose the Secretary-General (Article 97). It elects the elective members of the Security Council (Article 23), the Economic and Social Council (Article 61), and the Trusteeship Council (Article 86), and it shares with the Security Council in the choice of judges of the International Court of Justice (Article 4 of the Statute of the Court). It receives and considers reports from, and thus through the right of criticism exercises varying degrees of

[10] Senator Vandenberg, who as a delegate of the United States was chiefly responsible for this Article, explained that he had originally intended to refer specifically to revision of treaties, but he had forgone this. UNCIO, Doc. 748, II/2/39, p. 2; Hearings, p. 251; Goodrich and Hambro, p. 105.

supervision over, the Security Council, the Economic and Social Council, and the Trusteeship Council (Article 15) and presumably from the International Court of Justice. Its control is complete over the Economic and Social Council (Article 66) and over the Trusteeship Council (Article 85) except for strategic areas. It must approve trust agreements (except for strategic areas, Article 85), agreements with the specialized agencies (Article 63), and agreements as to immunities and headquarters (Article 105). A large field of supervision over United Nations activities is opened to it through complete control over the finances of the United Nations (Article 17), including the Court (Article 33 of the Statute), and perhaps the specialized agencies (Articles 17, 63). The Assembly may request advisory opinions from the Court and may authorize other United Nations organs, or specialized agencies, to request such opinions. It may initiate amendments (Article 108), and may establish such subsidiary organs as it thinks necessary (Article 22).

THE FIRST ASSEMBLY. The first session of the General Assembly was in two parts, the first meeting in London, January 10-February 14, 1946; the second in New York, October 23-December 15. The first part of the session was devoted almost entirely to problems of organization; during the second part, the Assembly began to plan and undertake its proper functions. We cannot here survey its numerous activities, most of which will be mentioned at one place or another in the text which follows. They range from sensational political discussions to translations of the classics. In general, the discussions were upon a high level, though at times they were charged with emotion. One hundred and three Resolutions were adopted. Important precedents were established, such as the assumption of functions in the field of peace and security, or as to interpretation in practice of the "domestic questions" clause. Responsibility was accepted, insofar as its authority to act would allow, for the reconstruction and relief problems of the world. New international law was vigorously pushed, especially as regards protection of human rights.

The sum total of the functions assigned to the General Assembly under the Charter is imposing and establishes it as the central and most important organ of the United Nations. This position it may be said to have consolidated by its achievements during its First Session.[11] There were political influences and fumbling, but they were not so great as in the Security Council, and the Assembly asserted a right to take the Security Council

[11] See "Achievements of the General Assembly," *U.N. Bull.*, I, December 31, 1946; *U.N. News*, I, December 1946; John Foster Dulles, "The General Assembly," *Foreign Affairs*, Vol. 24 (1945), p. 1; Alger Hiss, "The General Assembly of the United Nations," *Illinois Law Review*, 41 (1947), p. 591; *Report by the President of the United States on the Activities of the United Nations and the Participation of the United States Therein for the Calendar Year 1946*... Dept. of State Pub., No. 2735, Chap. I.

to task with regard to such matters as the veto and the admission of new Members. Though the Security Council was doubtless intended to be the most important organ, there seems little doubt, in the present record, that this distinction belongs to the General Assembly.

§ 79. **The Security Council.**[12]—Doubtless the most famous of the United Nations organs is the Security Council. The primary interest of most persons in the new organization was from the viewpoint of security, and the original emphasis in the drafting of the Charter at Dumbarton Oaks was upon the Security Council. It should not, however, be regarded as an independent unit; it is one of the three Councils exercising separate and limited functions.

ORGANIZATION. The Security Council is composed of the representatives of eleven states, five of which are designated by name in Article 23 to be permanent Members.[13] The other six, non-permanent Members, are elected by the General Assembly by two-thirds vote, three each year, for a two year term.[14] Thus the differentiation between Great Powers and other states, recognized in the Council of the League, was continued in the United Nations and somewhat strengthened in that only these five, rather than all Members, were entitled to a veto. There was little opposition to recognition of this factual situation, but much opposition to the extent to which it was carried in the Charter. It was pointed out that these five states were arbitrarily named; that no criteria are established for selection or for change as Great Powers appear or diminish or withdraw; and that the veto in the amending process makes almost impossible any change as to permanent Members.

While the idea of graded representation in United Nations organs received little consideration, an effort was made by Canada to give to states of medium strength a semi-permanent basis, or a longer term. The effort failed, and membership is either permanent or for two years. As a result of this struggle, however, the Charter provides (Article 23, § 1) that the General Assembly shall, in the selection of non-permanent Members, give "due regard," in the first instance, "to the contribution of Members of the United Nations to the maintenance of international peace and security and

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[12] As to the Security Council, see *Report to the President*, p. 66; E. Buehrig, "The Security Council," *Dept. of State Bull.*, XIII (1945), p. 825; H. Kelsen, "Organization and Procedure of the Security Council of the United Nations," *Harvard Law Review*, 59 (1946), p. 1087; R. K. Kane, "The Security Council," *Foreign Affairs*, 24 (1945), p. 12.

[13] The Charter says: "shall consist of eleven Members of the United Nations." The persons who sit in the Security Council are thus representatives of states, instructed and removable by them. The permanent members are the four signers of the Declaration of Moscow, China, the Union of Soviet Socialist Republics, the United Kingdom, and the United States, with France added.

[14] In order to establish a rotation, lots were drawn for the first selection of one and two year terms.

to the other purposes of the Organization," and also to equitable geographical distribution.[15] The provision that a retiring Member shall not be eligible for immediate re-election further limits the possibility of an intermediate status of longer term.

PROCEDURE. The anticipated importance of the Security Council is revealed in the provision that it "shall be so organized as to be able to function continuously" (Article 28). Consequently, it is necessary for each Member of the Security Council to maintain a delegate always in residence at the seat of the United Nations. While the Council might not have as much business to transact as does the General Assembly, it was regarded as of great importance that it should be able to meet and to act quickly. Provision has been made for regular meetings, and the suggestion is offered (Article 28, § 2) that more important representatives (such as Foreign Ministers) should attend these meetings. The Council may meet where it wishes, but one may derive from the experience of the League of Nations the conclusion that it would prove costly and inconvenient to meet elsewhere than at the headquarters. It may establish subsidiary organs: one such organ, the Military Staff Committee, is provided for by the Charter (Article 47); the Council itself set up a Committee of Experts to work on Rules of Procedure; and the Atomic Energy Commission was set up by resolution of the General Assembly, January 24, 1946, and instructed to report to the Security Council.[16] The Council makes its own rules of procedure, which it has been unable so far to do; its President is automatically chosen by rotation in accordance with these rules.

Articles 31 and 32 deal with matters in which states not Members of the Security Council are involved. If a Member's interests are affected in a question brought before the Council, it may participate without vote in the discussions, and the Council decides whether it has such an interest. If a Member or non-Member of the United Nations is a party to a dispute before the Security Council, it is entitled to participate, without vote. A distinction is thus made between "disputes" and other questions,[17] and here, as in other cases to be mentioned, the definition of "dispute" is important.

VOTING. It has been noted that the rule of unanimity was abandoned at San Francisco and that decisions of United Nations organs may be taken by majority vote. In the Security Council, each Member has one vote. Decisions on procedural matters are made by vote of any seven Members; decisions on other matters require a "qualified majority," that is, seven votes including the concurring votes of all the permanent Mem-

[15] See Goodrich and Hambro, p. 119.
[16] *Resolutions of the General Assembly*, No. 1 (I).
[17] Goodrich and Hambro, pp. 138-9.

bers. Thus, each of the five permanent Members has a "veto" (though the word is not found in the Charter); and this provision, while clearly an advance over the Council of the League in which every Member had a veto,[18] produced the greatest controversy at San Francisco and since.

Many questions were asked at San Francisco, and an elaborate answer was given by the Sponsoring Powers, from which the following quotation is given. The statement by the Sponsoring Powers distinguished between "procedural" and "other matters," as does Article 27. It then elaborates as follows:

> 2. For example, under the Yalta formula a procedural vote will govern the decisions made under the entire Section D of Chapter VI. This means that the Council will, by a vote of any seven of its members, adopt or alter its rules of procedure; determine the method of selecting its President; organize itself in such a way as to be able to function continuously; select the times and places of its regular and special meetings; establish such bodies or agencies as it may deem necessary for the performance of its functions; invite a Member of the Organization not represented on the Council to participate in its discussions when that Member's interests are specially affected; and invite any state when it is a party to a dispute being considered by the Council to participate in the discussion relating to that dispute.
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> 3. Further, no individual member of the Council can alone prevent consideration and discussion by the Council of a dispute or situation brought to its attention under paragraph 2, Section A, Chapter VIII. Nor can parties to such dispute be prevented by these means from being heard by the Council. Likewise, the requirement for unanimity of the permanent members cannot prevent any member of the Council from reminding the Members of the Organization of their general obligations assumed under the Charter as regards peaceful settlement of international disputes.
>
> 4. Beyond this point, decisions and actions by the Security Council may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement under Section B, Chapter VIII. This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon states to settle their differences, or makes recommendations to the parties. It is to such decisions and actions that unanimity of the permanent members applies, with the important proviso, referred to above, for abstention from voting by parties to a dispute.[19]

[18] Though, as will be seen, this gain is offset by uncertainty as to the use of the veto in disputes.

[19] See UNCIO, Doc. 855, III/1/B/2 (a), and Doc. 852, III/1/37 (1). These are quoted in Goodrich and Hambro, pp. 126-130. The latter authority asserts that the joint statement "was not accepted by the San Francisco Conference as an official interpretation of the provisions regarding Council voting procedures," but regards it nevertheless as effective.

This, however, did not answer all uncertainties. No definition of "procedure" was given. The statement of the Sponsoring Powers, however, ends with the assertion that the decision as to whether a matter is procedural or not is to be taken by a vote of seven including the permanent members. After long debate at San Francisco, it was agreed that in decisions under Chapter VI, that is, in the settlement of disputes before the Security Council, the votes of parties to the dispute should not be counted. In early cases before the Security Council, however, the difficulty arose over determining what, under the Charter, constitutes a dispute; who, therefore, would be parties to the dispute; and whether the vote on this question should be regarded as procedural or not.[20] There is uncertainty also as to abstentions. The rule is stated positively, requiring the agreement of the Five Powers in each case. It appears, nevertheless, that precedents are being established under which abstentions will not be counted.

The voting procedure was devised by President Roosevelt, in order to reassure the Senate that the sovereignty of the United States was safely protected. It was agreed upon at the Crimean conference ("Yalta Formula") and has in practice been used and upheld chiefly by the Soviet Union. Its justification lies in the fear of the Great Powers that they might be forced into costly and dangerous action by a majority vote of irresponsible small states—irresponsible, that is, in the sense that those who vote for such action would not be able to contribute much to the action, the burden of which would necessarily fall upon the Great Powers.[21] Efforts were made at the First Assembly to amend the Charter or otherwise modify use of the veto, but the Great Powers opposed any such change.[22] It is improbable that the veto will be surrendered, though perhaps its use might be limited as, for example, with reference to control of the atomic bomb. The United States has suggested this course, and has also urged that the Five Powers agree among themselves to limit the use of the veto in practice. The possibility seems remote of substituting for the veto some form of graded representation which would give to the Great Powers sufficient voting strength to protect themselves.

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[20] See p. 438 below.

[21] H. Kelsen, "Organization and Procedure of the Security Council of the United Nations," *Harvard Law Review*, 59 (1946), p. 1087; Dwight E. Lee, "The Genesis of the Veto," *Int. Org.*, I (1947), p. 33; J. B. Reston, "Votes and Vetoes," *Foreign Affairs*, 25 (1946), p. 13; F. O. Wilcox, "The Yalta Voting Formula," *Pol. Sci. Rev.*, XXXIX (1945), p. 943; F. O. Wilcox, "The Rule of Unanimity in the Security Council," *Proc. Am. Soc.* (1946), p. 51; *Report to the President*, p. 71; *UN Bull.*, I, December 24, 1946.

[22] The General Assembly, however, adopted a resolution (No. 40 (I)) calling upon the Security Council to "ensure that the use of the special voting privilege of its permanent members does not impede the Security Council in reaching decisions promptly."

FUNCTIONS. The sole function of the Security Council is the maintenance of international peace and security, for which it is given "primary responsibility" by Article 24 of the Charter. The regulation of armaments is included and the Council has the task of formulating plans to this end (Article 26). Thus there is a much clearer differentiation of function than between the Council and Assembly of the League of Nations, and the field of action of the Security Council, though highly important, is much more restricted than that of the General Assembly. It should be noted, however, that the idea of security was stretched to enable the Council to share in, and usually with the veto, the admission of new Members, the suspension or restoration of rights and the expulsion of Members, the procedure of amendment, the election of judges of the Court, the administration of certain trust areas, and the selection of a Secretary-General. While the Security Council has a few continuing activities, it is designed for crises, and for one field of activity only. It cannot be regarded as an executive committee for general purposes, as the Council of the League tended to become. It is one of three Councils, each limited in function and to some extent dependent upon and supervised by the General Assembly. Of the three, the Security Council is probably most independent, but it must make annual and special reports to the Assembly (Article 24); it depends upon the Assembly for its financial needs; and the Assembly may review and criticize its actions.

The function of security and the authority and activity of the Security Council in this field will be discussed in a later chapter.

§ 80. The Economic and Social Council.[23]—No such organ as the Economic and Social Council was provided in the League of Nations System. Its inclusion in the United Nations is a recognition both of the increasing importance of the work to be done in this field, and of the need of additional international machinery to deal with it.[24] While the emphasis of the Dumbarton Oaks Proposals was primarily upon security, it was recognized that conditions of stability and well-being are necessary for friendly relations among nations (Article 55), and that achievement of

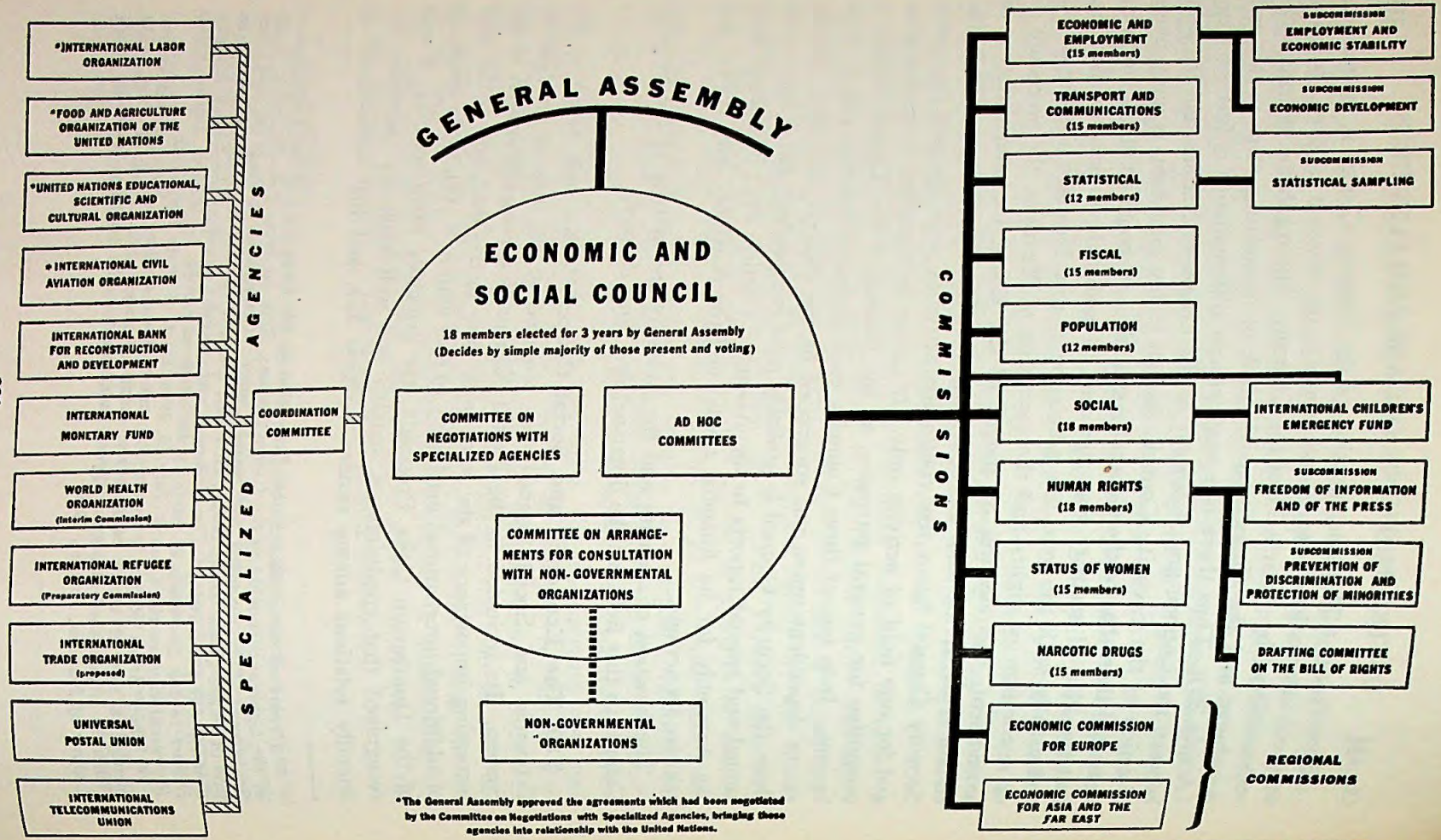
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[23] *Report of the United States Delegation to the First Part of the First Session of the General Assembly of the United Nations,* Dept. of State Pub. No. 2484; L. D. Stinebower, "The Economic and Social Council," Commission to Study the Organization of Peace (New York, 1946); H. Finer, *The United Nations Economic and Social Council* (W.P.F., 1946); *The Economic and Social Council of the United Nations. Report to the Secretary of State by the Honorable John G. Winant, United States Representative on the Council, July 15, 1946,* Dept. of State Pub. 2600.

[24] The "Bruce Report," toward the end of the League of Nations, had recommended a special organ to supervise work in these fields. L of N Doc., 1939. General. 3, published also as a Special Supplement to the *Monthly Summary of the League of Nations,* August, 1939.

STRUCTURE OF THE ECONOMIC AND SOCIAL COUNCIL

AT THE CONCLUSION OF ITS FOURTH SESSION (MARCH 29, 1947)



*The General Assembly approved the agreements which had been negotiated by the Committee on Negotiations with Specialized Agencies, bringing these agencies into relationship with the United Nations.

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such conditions would be conducive to peace.[25] At San Francisco, the somewhat meagre outlines of the Proposals were expanded into two chapters of the Charter, and additional references were put into other parts of the Charter, such as Articles 1 and 14.

ORGANIZATION. The Economic and Social Council is composed of eighteen members elected by two thirds vote of the General Assembly, six each year for three-year terms (Article 61). No special provision for the Great Powers is made here; there are no permanent seats and no veto. This may be due to recognition of the fact that their cooperation is so indispensable in this field that no special privileges were needed for them, or to the fact that there is in this field no authority to take decisions against which a veto might be needed. No criteria are set for their choice; the Assembly has entire freedom in selecting them. In this Council, Members are eligible for immediate reelection and the Assembly may thus continue those states whose participation seems most needed. As in the other Councils, each Member is allowed one representative.

Article 68 authorizes the Council to set up such commissions as it may need, and specifies that there shall be a Commission on Human Rights. At its first meeting, then, in January 1946, the Council established one full commission (Narcotic Drugs), and five "nuclear" commissions: Human Rights, with a subcommission on its Status of Women; Economic and Employment; Statistical; Temporary Social; Temporary Transport and Communications. Each of these was to have fifteen members, except the Human Rights and Social Commissions, which have eighteen, and the Statistical Commission, which has twelve. After some debate as to whether members should be chosen as experts or as government representatives, the latter method was approved, though with the hope that governments would select experts as its representatives. There was also established a Committee on Negotiations with Intergovernmental Agencies (specialized agencies); a Committee on Arrangements with Non-Governmental Organizations;[26] a Special Committee on Refugees and Displaced Persons; a Technical Preparatory Committee for an International Health Conference; and a Preparatory Committee for an International Conference on Trade and Employment.

PROCEDURE AND VOTING. Each member has, of course, one vote in the Economic and Social Council, and decisions are taken by a majority of those present and voting (Article 67). There is no veto, nor any distinction

[25] "The creation of conditions which will permit the achievement of an enduring peace is the keystone of our national policy," Mr. Winant, U.S. Representative on the Economic and Social Council, in his *Report, op. cit.*, Dept. of State Pub. No. 2600.

[26] A novel idea (Article 71) by which consultation would be possible with such bodies as the World Federation of Trade Unions, the International Cooperative Alliance, the American Association for the United Nations, etc.

between procedural and other questions; a decision by bare majority disturbs no one, since it can at the most be a recommendation binding no member without its own ratification. The Council is required to invite to participate without vote any Member not represented on the Council for discussion of any matter "of particular concern" to that Member. Unless this phrase is restrictively interpreted, most Members could claim a right to participate in Council discussions. The Council will presumably determine whether a matter is of particular concern to a state. Entitled to sit with the Council on the same basis, and also in the Commissions, are representatives of the specialized agencies; [27] and arrangements are to be made with non-governmental organizations, either national or international, for consultation, but not participation.[28] The Council will thus be equipped to obtain expert information from wide sources, and to disseminate information concerning its own activities through various agencies.

The Charter leaves to the Economic and Social Council complete freedom as to the number and dates of its meetings, except for the requirement that a meeting must be held upon request by a majority of members of the Council. The methods of action through which the Council may work are to "make or initiate studies and reports," to "make recommendations," to "prepare draft conventions" or "call international conferences" (Article 62). The draft conventions, or treaties, must be submitted to the General Assembly, which would presumably submit them for ratification by Members. International conferences can be called only for matters within the competence of the Council—a very broad field; and they must be "in accordance with the rules prescribed by the United Nations." This presumably means regulations stated by the General Assembly, which is by Article 60 made responsible for activities in this field. No power is given to the United Nations, or to any agency thereof, to impose rules or decisions upon any Member in this field; on the contrary, Article 2, § 7 forbids any intervention by the United Nations in domestic matters, and this was particularly emphasized in the Committee. What is to be accomplished in this field must be done through voluntary cooperation of nations; the Charter states objectives and provides ample machinery, but no independent authority.

FUNCTIONS. Two chapters of the Charter are devoted to this field, and Chapter IX states aims and obligations which are to be implemented through the machinery called for in Chapter X. These objectives are stated

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[27] This is reciprocal, and representatives of the Economic and Social Council may participate in the deliberations of the specialized agencies.

[28] In the case of a national organization, the approval of its government must be obtained. The arrangements thus far made are summarized in the *Report of the Secretary-General* of June 30, 1946, UN Doc. A/65, pp. 24-25; and see *Resolutions of the General Assembly*, No. 49 (I) and UN Doc., E/189/Rev. 1.

in terms of contribution toward peace and they put upon the United Nations (Article 55) the duty of promoting:

> a. higher standards of living, full employment, and conditions of economic and social progress and development
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion

It is the duty of Members "to take joint and separate action" for the achievement of these ends, a phrase which represents a compromise between those who wished more international action and those who wished to leave such matters within the domestic competence of states. The result is that Members are not bound by recommendations, but are pledged in a general way to cooperate with the United Nations to achieve the purposes of Article 55.[29]

If the Charter seems overfull of phrases, this was due to the eager desire of many delegations to advance the cause of human rights and welfare; and this desire overflowed into other Articles, such as Article 1, § 3, Articles 13 and 14, or the Preamble. Such a phrase as "full employment" has come to have a connotation in public thinking, and was therefore preferred to the more accurate phrase, desired by some, "high and stable levels of employment." For similar reasons the phrase "economic, social and other humanitarian" was perhaps unnecessarily extended to include specific mention of health, cultural and educational cooperation. Committee discussions made it clear that the word "economic" should include trade, finance, communications and transport, access to materials and markets, and economic reconstruction after the war; and paragraph 6 was intended to include traffic in dangerous drugs. The phrase "human rights and fundamental freedoms" represents a universal interest, and opens up an enormous new field for international endeavor. It is reinforced by the words following, which forbid discrimination because of race, sex, language, or religion—a principle several times stated in the Charter, and of fundamental importance no matter how difficult it may be to apply. Not only respect, but observance of these rights is called for; but statement of the rights remains to be made.

Specialized Agencies. The idea of having the work in the economic and social field done by technical and expert bodies, rather than by the political organs, was further expanded in the concept of "specialized

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[29] See the Report of the Committee which drafted this section in UNCIO, Doc. 861, II/3/55 (1); also, Goodrich and Hambro, pp. 192-3.

agencies." These are separate international institutions, each founded on its own treaty statute, with its own staff, and working in its own specialized field.[30] The Charter does not create such agencies, though it authorizes the Council (Article 59) to initiate negotiations among states for the creation of such agencies as it thinks are needed. The Charter seeks to correct the resulting decentralization through agreements to be made between the agency and the Economic and Social Council by which the agency is to be "brought into relationship with" the United Nations.

The Economic and Social Council is the organ designated to prepare the agreements by which the specialized agencies are to be brought into relationship with the United Nations. Since the relationship is with the entire Organization, and since the agreements must be approved by the General Assembly, it may be concluded that the Council acts as the negotiating agent and does not acquire a special relationship of its own with the specialized agencies.[31] The Council may attempt to secure coordination between the various specialized agencies through consultations with and recommendations to such agencies; the possibility of success is somewhat increased by authorizing it to make recommendations also to the General Assembly and directly to the Members of the United Nations. It should be recalled that most of the Members of a specialized agency would be Members also of the United Nations; consequently, it would be expected that each such state, having agreed in the General Assembly to a certain course, would likewise pursue that course in the specialized agencies to which it belonged. Article 64 attempts, ineffectively, to demand reports from the specialized agencies; actually, the making of such reports will depend upon the agreements negotiated with them. A further connection is provided in Article 17, § 3, under which the General Assembly must approve any budgetary or financial arrangements entered into with a specialized agency, and may make recommendations as to the budget of any of these agencies. Again, the actual degree of control will depend upon the agreements to be made. Coordination of their activities is to be sought through recommendations by the General Assembly or, under its direction, by the Economic and Social Council. Together with the various subordinate agencies to be described below, the United Nations thus has a wide system built largely upon a technical and expert basis, for handling economic and social affairs; and it is clear that the General Assembly has the power of supervision and direction over all activities of the United Nations in this field.

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[30] See Ch. 14, below.

[31] "Thus, the possibility is not excluded of specialized agencies having direct relations with other principal organs of the United Nations where this is clearly to the mutual advantage of the parties concerned." *Report of the Secretary-General,* UN Doc. A/65, 1946, p. 21.

A further duty of the Economic and Social Council is to assist the Security Council when requested by that body to do so—a function conceivably of great importance, since no provision was made in the Security Council or in the Military Staff Committee for an expert staff capable of directing economic sanctions. The Economic and Social Council, however, is not set up as a body for administering sanctions, and its usefulness in the security field would seem to be limited to the supply of statistics.

PROGRAM. The following table of subordinate agencies [31a] which have been created indicates to some extent the wide program of work upon which the Economic and Social Council has embarked.

A. Commissions
1. Economic and Employment
2. Transport and Communications
3. Statistical
4. Human Rights
5. Social
6. Status of Women
7. Narcotic Drugs
8. Fiscal
9. Population

Regional Commissions
10. Economic Commission for Europe
11. Economic Commission for Asia and the Far East

B. Standing Committees
1. Committee on Organization of the Council
2. Committee on Negotiations with Specialized Agencies
3. Committee on Arrangements for Consultation with Non-Governmental Organizations
4. Agenda Committee

C. *Ad hoc* Committees

D. Special Bodies
1. International Children's Emergency Fund

The Economic and Employment Commission was instructed to advise the Economic and Social Council on:

(a) economic questions of a general character
(b) economic questions involving concerted study and action by more than one specialized agency or commission of the Council

[31a] *Structure of the United Nations*, UN Doc., 1947, I. 12, May, 1947.

(c) the world economic situation and economic problems requiring immediate attention from time to time [32]

Subcommissions were set up to deal with the Economic Reconstruction of Devastated Areas, Employment, Balance of Payments, and Economic Development.

The Temporary Transport and Communications Commission is to advise as to the adequacy of international organization in these fields and to report as to problems requiring immediate attention. It was directed to confer with the Provisional International Civil Aviation Organization (PICAO) with regard to the agreement to be made with that specialized agency, and meetings of telecommunications and postal experts were summoned to discuss bringing the International Telecommunications Union and the Postal Union into relationship with the United Nations. It is to study the establishment of a world-wide inter-governmental shipping organization, and the coordination of safety measures in aviation, shipping, and telecommunications. By resolution of the Economic and Social Council this committee was made a Permanent Committee, authorized to serve as a conciliation agency in disputes and to assist the Security Council and Trusteeship Council when called upon. It has called attention of governments to the need of reorganizing the machinery dealing with railway transportation and with inland waterways in Europe. A Committee of Experts is to prepare for a conference on passports and frontier formalities.

The Statistical Commission was instructed to assist the Council to promote the development of national statistics, to coordinate the statistical work of the specialized agencies, to develop central statistical services for the Secretariat, to advise the organs of the United Nations as to the use of statistics, and to promote improvement in general of statistical methods. It has drafted the article with regard to statistics for the agreements with the various specialized agencies. A World Statistical Conference is to meet at Washington in September, 1947.

The Social Commission (which has now become Permanent) was given, in accordance with its own recommendations, the following revised terms of reference:

(a) to advise the Council on social questions of a general character, and in particular on all matters in the social field not covered by specialized intergovernmental agencies

(b) to advise the Council on practical measures that may be needed in the social field

(c) to advise the Council on measures needed for the coordination of activities in the social field

(d) to advise the Council on such international agreements and

[32] See the Report by Mr. Winant, Dept. of State Pub., No. 2600, pp. 35-36; *Report of Secretary-General*, U.N. Doc., A/65, p. 14.

conventions on any of these matters as may be required and on their execution

(e) to report to the Council on the extent to which the recommendations of the United Nations in the field of social policy are being carried out [33]

More specifically, it was asked to consider the care of special groups such as children, aged, and handicapped, social services in areas affected by war, continuation of League of Nations activities, questions raised by the termination of UNRRA, and international machinery for housing and for town and country planning.

The Commission on Human Rights, specifically called for by the Charter, opens a new field of international cooperation, and has attracted great interest. It was directed to submit proposals concerning:

(a) an international bill of rights

(b) international declarations or conventions on civil liberties, the status of women, freedom of information, and similar matters

(c) the protection of minorities

(d) the prevention of discrimination on grounds of race, sex, language, or religion [34]

The subcommission on the Status of Women was converted into a full Commission, and permanent subcommittees on Freedom of Information and the Press, and also on Prevention of Discrimination and Protection of Minorities, were created. An International Bill of Rights is to be drafted, which would presumably include what we know as civil rights and something as to freedom of information and prevention of discrimination; the more difficult part of the problem is the statement of affirmative rights such as the right to food, to education, and to a job. It is recognized that development in this field will be slow, and that much public education will be needed. The Human Rights Commission, therefore, is to compile a yearbook and other publications covering the law and usage dealing with human rights in force, and their development in general. The field of activity of this Commission is peculiarly subject to the provisions of Article 2, § 7, and no sanction, or even implementation, can be assured against a recalcitrant state unless, perhaps, a violation of human rights can be regarded as a threat to the peace.

In addition to the program of work outlined through the Commissions,

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[33] Mr. Winant's *Report, op. cit.*, p. 45.

[34] Economic and Social Council, *Journal*, First Year, No. 12. The first report of the Commission on Human Rights is found in *ibid.*, No. 14, and debate upon it in Nos. 20 and 22. The latest Report of the Commission is designated UN Doc. E/264, February 18, 1947. See also *Report of the Secretary-General*, UN Doc. A/65, 1046, pp. 19-21; Winant's *Report, op. cit.*, pp. 46-49; J. T. Shotwell, "The Idea of Human Rights," *ibid.*, p. 558. "Bill of Human Rights," *Int. Con.*, No. 426 (1946), p. 551; Refer also to pp. 124-126, *supra*.

the Economic and Social Council appointed a committee to prepare for a conference to establish a World Health Organization; the recommendations of this Committee were approved, a conference was held, and an interim World Health Organization has now been initiated.

The General Assembly, in February 1946, referred to the Economic and Social Council the problem of refugees and displaced persons, and a special committee set up for this purpose recommended creation of an International Refugee Organization (see Chapter 12), and urged upon Members that they take all practicable measures for the repatriation of refugees and displaced persons. The Council approved the International Refugee Organization, and laid down certain principles for determination of those who should be helped. In general, it was agreed, *bona fide* refugees should be assisted to return to their own countries, but no assistance should be given to traitors and war criminals. The Council also approved a resolution calling for a Conference on Trade and Employment,[35] and set up a preparatory committee to arrange for it; set up a committee to work with UNRRA, and gave attention to the world shortage of cereals. At its Fourth Session, in March, 1947, it created an Economic Commission for Europe and an Economic Commission for Asia and the Far East, whose primary purpose is to facilitate reconstruction in those areas.

§ 81. The Trusteeship Council.[36]—It was naturally expected that the mandates system of the League of Nations would be considered in some form, but a great deal of difficulty was encountered in readjustment. The subject was not discussed at Dumbarton Oaks, but was left for future negotiation. At Yalta the three Powers agreed that the Charter provisions should apply only to existing League mandates, to territories detached from the enemy in World War II, and to territory which any State might voluntarily place under trusteeship; and that there should be no discussion at San Francisco as to specific assignments of trust territories. The Sponsoring Governments failed, however, to provide proposals for inclusion in the Charter, and discussion started from proposals submitted at San Francisco by various states. A Working Paper was prepared by the United States delegate (Stassen) and, on the basis of this paper, Committee II/4 drafted Chapters XII and XIII providing for the trusteeship system.

[35] Looking toward an International Trade Organization, for which see Chapter 14.

[36] As to trusteeship in general, see K. H. Bailey, "Dependent Areas of the Pacific: An Australian View," *Foreign Affairs*, 24 (1946), p. 494; H. Gilchrist, "The Mandates and the International Trusteeship Systems," *Pol. Sci. Q.*, 61 (1946), p. 408; H. Gilchrist, "Dependent Peoples and Mandates," in Davis, p. 121; A. N. Holcombe, "The International Trusteeship System," *Annals Am. Acad.*, 246 (1946), p. 101; Sir Robert Holland, "Trusteeship Aspirations," *Foreign Affairs*, 25 (1946), p. 118; "Trusteeship and Non-Self-Governing Territories in the Charter of the United Nations," *Dept. of State Bull.*, XIII (1946), p. 1037; V. McKay, "International Trusteeship—Role of the United Nations in the Colonial World," *F.P.A.*, XXII, No. 5 (1946); *Report to the President*, pp. 125-136; UNCIO, Doc. 1115, 11/4/44 (1) (a).

From these discussions there evolved a new concept, now embodied in Chapter XI, with regard to dependent peoples not put under Trusteeship.

Declaration Regarding Non-Self-Governing Territories. Chapter XI deals with a field not covered by the League mandates system, and to be differentiated carefully from the Trusteeship system of the United Nations. It states principles to be applied by Members with regard to their own colonies not placed under trusteeship. No machinery or methods of enforcement are provided, beyond the requirement that each Member should report regularly to the Secretary-General "for information purposes," and subject to such limitations as "security and constitutional considerations may require," information of a technical nature concerning such territories. Discussion and criticism of these reports in United Nations organs will doubtless serve to check abuses such as have led to complaint in the past.

The General Assembly acknowledged receipt, on December 14, 1946, of reports from Australia, France, New Zealand, the United Kingdom, and the United States, and urged others to send in reports by June 30 of each year. These, it recommended, should be analyzed by the Secretariat, and the information transmitted to the specialized agencies. A committee was set up, to which the specialized agencies were asked to send advisers; and regional conferences of representatives of the non-self-governing peoples were suggested.[37]

These principles start with the statement that "the interests of the inhabitants of these territories are paramount"; and Members agree to promote the well-being of inhabitants by (a) respecting culture, ensuring political, economic, social, and educational advance, and protecting against abuses; (b) developing self-government, each in its own way; (c) furthering international peace and security; (d) promoting research and development (Article 73). Members agree also that such colonies should be administered in good-neighbor fashion, with due respect shown to the interests and well-being of the rest of the world.

While the provisions of this Chapter must be regarded as objectives, rather than as legally binding rules, they represent an important advance in the recognition of human rights, and constitute "the most comprehensive set of guiding principles for states administering dependent territories ever agreed upon by an international body." [38] No legal claim could be advanced by a colonial group because of failure to receive "just treatment" or "protection against abuses," but the mere statement of such ideals in the

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[37] The report of the United States under this provision is published in U.N. Doc. A/73, October, 1946. See also *Resolutions of the General Assembly*, No. 66 (I) and 67 (I).

[38] *Report to the President*, p. 132.

Charter, with opportunity afforded for public criticism, represents a large advance over the past. Self-determination seems to be a recognized principle, but only in the sense of self-government; the effort to include "development towards independence" was eliminated from this text, with the understanding that it should be included with regard to trust areas.[39]

THE TRUSTEESHIP SYSTEM. The objectives of the Trusteeship System are stated in Article 76, in terms corresponding to those of Chapter XI, and somewhat broader than those of Article 22 of the Covenant of the League of Nations. They are: (a) to further international peace and security; (b) to promote political, economic, social and educational advancement and development toward self-government or independence, each case being a separate one and limited by the terms of the trusteeship agreement to be made; (c) to respect human rights and fundamental freedoms without discrimination as to race, sex, language or religion; (d) equal treatment for all Members of the United Nations in social, economic, and commercial matters and in the administration of justice, but with a reservation as to existing rights (Article 80). These represent an advance over the League system in that they are universally applicable, rather than differentiated between A, B, and C mandates.

TRUST AREAS. The trusteeship system applies to territories in the following categories which are placed under it by trusteeship agreements: (a) territories now held under mandate; (b) those taken from the enemy in World War II; and (c) colonial territories put under the system by the states responsible for them. Thus, no territory is automatically placed under the trusteeship system. It is clear, however, that an agreement must be made in each case, and it is therefore important to know the parties to such agreements and the method by which the content of the agreements is to be determined. As to this, no more is said than that the agreements are to be made "by the states directly concerned"; and no indication as to these states is given beyond the specific inclusion (Article 79) of the mandatory power in the case of a League mandate. Since the consent of the mandatory state is required, that state appears to have a veto.[40] A solution was found to this problem in the suggestion, accepted by the General Assembly in the second part of its First Session, that the agreement should be drafted by the state which wished to be the administering authority. Acceptance by two-thirds of the General Assembly would be regarded as sufficiently caring for the interests of the unknown "states directly concerned." Upon this understanding, eight draft agreements, all of them for

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[39] UNCIO, Doc. 404, II/4/17; Goodrich and Hambro, p. 229.

[40] The United States in proposing an agreement for the Japanese mandated islands suggested that, if it were not accepted, the control which she exercised over these areas would automatically be continued.

former mandated territories, were submitted to and approved by the General Assembly. The debate as to their provisions was warm, particularly as to the phrase which said that the trust area could be administered as an integral part of the territory of the administering authority. The agreements are to be reviewed at the end of ten years. The effort to eliminate the "defense" clause, which permits military use of the area, did not succeed. The request of the Union of South Africa for annexation of the mandated territory of Southwest Africa was rejected.[41]

With regard to territories detached from the enemy in World War II, the situation is more uncertain. It could be maintained that such territories are at the disposition of the Big Five, or of all the United Nations; in fact, however, the United States holds the Japanese islands in exclusive control. The United States has asked to be made the administering authority for the Japanese islands formerly under mandate, and has promised to put the non-mandated islands under trusteeship, though it was not clear whether the latter would, as the former, be a "strategic area."[42]

No state, finally, has offered to put any of its own possessions (category c) under trusteeship. The Atlantic Charter and other noble expressions were simply forgotten, particularly by the United States.

The terms under which each trust area is to be administered are, according to Article 81, to be stated in the agreement itself; and the administering authority may be one or more states, or the United Nations itself. Thus far, no offer has been made to put a territory under direct trust administration by the United Nations.[43] The agreements in general define the territorial area, designate the trustee state (Administering Authority), pledge it to the objectives of Article 76, and state its rights and duties. The Administering Authority is to ensure equal treatment in the area for all UN Members, and to advance the welfare of the natives along economic, educational and other lines. It agrees to submit an annual report as to the administration of the trust area, and reserves the right to convert the whole or part of the territory into a "strategic area." Some of the agreements provide that disputes arising thereunder shall be submitted to the International Court of Justice. The Charter, and the agreements as well, leave unanswered the difficult question of legal title to trust areas, and they do not provide any clear method of terminating or altering the status of a trust area.[44]

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[41] Resolutions of the General Assembly, No. 63 (I), 64 (I), and 65 (I).

[42] See the statement by President Truman in *Dept. of State Bull.*, XV (1946), p. 889.

[43] It is to be noted that the maintenance and protection of such an area or base under international administration would call for a much stronger UN than was actually created.

[44] References to the agreements adopted may be found in *Resolutions of the General Assembly*, No. 63 (I).

Strategic Areas. National pride and acquisitiveness have not yet become accustomed to the principle of trusteeship or to the idea of international security. A long struggle in the United States between the military services and the Department of State led to the compromise which is embodied in Articles 82 and 83 of the Charter, the provisions of which are regarded by some as a "cloak for imperialism" similar to that of the C mandates of the League of Nations. In any trusteeship agreement, there may be designated a "strategic area," including the whole or part of the territory; and these areas are put under the supervision of the Security Council rather than of the General Assembly, on the theory that such areas should be regarded as part of the international security system, and be available for enforcement action by the Security Council. The principles of trusteeship are to be applied to the peoples living in the area, and for this purpose the Security Council is to ask the assistance of the Trusteeship Council. The only such agreement of this type so far submitted was that by the United States for the Pacific mandated islands, and this agreement leaves little doubt that its purpose is national, rather than international, security. It does not take each area separately, but groups all the mandated islands into one "strategic area," thus bringing a huge area of the Pacific under United States control. The provisions of Articles 87 and 88 are made applicable except that the area may be closed "for security reasons" by the administering authority. The control which the United States may exercise in this area is almost as complete as if the islands had been taken in full sovereignty. The agreement was approved by the Security Council with little debate, and an inviting precedent was thus established for other nations to follow.[45]

The Trusteeship Council. The organ through which the trusteeship functions of the United Nations are to be exercised is the Trusteeship Council, acting under the authority of the General Assembly (Article 87). As one of the "principal organs" of the United Nations, it occupies a more prominent place than did the Mandates Commission under the League of Nations. Its field of action is, as we have seen, stringently limited as to "strategic areas." Unlike the other Councils, the Trusteeship Council does not have a fixed number of members; its number and its composition depend upon the agreements and the parties to these agreements. The process of selection is, therefore, a complicated one.

Article 86 says that it shall consist of the following Members of the United Nations: (a) those administering trust territories; (b) others of the

[45] The draft agreement submitted is in *Dept. of State Bull.*, XV (1946), p. 889. See also the *Official Records* of the Security Council, and the *United Nations News*, II (No. 5), May 1947; *Study of Pacific Bases: Report by the Subcommittee on Pacific Bases of the Committee on Naval Affairs*, House of Representatives, 79 Cong., 1 Session (Washington, 1945).

Big Five which are not trustees; (c) enough other Members, elected by the General Assembly for three year terms, to provide that there shall be as many non-trustee as trustee Members. New mathematical computations may be needed whenever a new agreement is made.[46] An effort was made, upon recommendation by the Executive Committee to the Preparatory Commission, to set up a temporary committee to perform the functions of the Trusteeship Council until agreements could be made and the automatic members could be known, but the effort did not succeed.[47] Not until the trusteeship agreements had been approved at the second part of the first session of the Assembly was it possible to establish the Trusteeship Council. The calculations then disclosed that Australia, Belgium, France, New Zealand, and the United Kingdom were automatically members, since they were "administering authorities," and that the United States, the Soviet Union, and China were also members, since they are permanent members of the Security Council, though not administering trust areas. Mexico and Iraq were elected to complete the required number. Each member state is expected to designate "one specially qualified person" to represent it on the Council.

FUNCTIONS. In exercising supervision over trusteeship matters, the Trusteeship Council, acting under the authority of the General Assembly, is given specific authorizations (Article 78). It is required to prepare a questionnaire with regard to the political, economic, social, and educational advancement of the inhabitants in each trust territory, and the administering authority in each area is required to make an annual report to the General Assembly (with exception for strategic areas) upon the basis of this questionnaire (Article 88).[48] The General Assembly may (Article 87) consider, and presumably make recommendations concerning, these reports. It may accept petitions from trust territories and examine them, but this is to be done in consultation with the administering authority; and it may make visits to a trust territory, but only when the administering authority agrees. Paragraph d of Article 87, however, sets the restriction (though it could conceivably be an extension) that the above actions shall be taken in conformity with the trust agreements. These provisions, and the Rules of Procedure adopted, profit from the experience of the League,

[46] This complicated arrangement arose from the controversy as to the balance between trustee states and the Big Five, as against non-trustee states. See UNCIO, Doc. 877, II/4/35, p. 4. Thus the acceptance of the United States as an Administering Authority will necessitate the addition of two other members to the Council.

[47] *Report by the Executive Committee to the Preparatory Commission of the United Nations* (PC/EX/113/Rev. 1, 12 November, 1945); *Report of the Preparatory Commission of the United Nations* (PC/20, 23 December, 1945); *Journal* No. 26, Supplement No. 4—A/C.4/26.

[48] A provisional questionnaire was approved by the Trusteeship Council in May, 1947, which asks 247 questions, and for statistics under 13 headings. UN Doc. T/44, 8 May, 1947.

and represent an advance over the Covenant provisions, but no means of enforcement are provided, and the freedom of the administering authority is carefully protected.

PROCEDURE. Each Member has one vote, and no veto, in the Trusteeship Council, and decisions are taken by a majority of those present and voting. The Council makes its own Rules of Procedure, and fixes its own dates for meetings. Cooperation with the Economic and Social Council, and with the specialized agencies, obviously desirable, is called for in Article 91.

It is debatable whether the trusteeship system represents advance over the mandates system of the League of Nations, but disappointment has been expressed that no further advance was made. There is apparent a striking dissonance between public professions of support and actual support by states in practice.

§ 82. International Court of Justice.[49]—When consideration of a new international organization was begun, a warm controversy developed as to whether the Permanent Court of International Justice should be continued, or a new one should be built. This question was left open at Dumbarton Oaks where, however, it was decided that the Court, old or new, should be the principal judicial organ of the United Nations, that its Statute should be an integral part of the Charter, and that Members of the United Nations should automatically be parties to the Statute of the Court. A Committee of Jurists met at Washington in April, 1945, to revise the Statute, and its work was passed on to the San Francisco Conference, where a Statute was adopted as part of the Charter.

There was little reason for creating a new Court, granted the excellent reputation of the one already existing, but it was decided that this should be done, and that its name should be changed, largely because of the past unfavorable attitude of the United States toward the older Court, and also because of uncertainty as to the attitude of the Soviet Union. The changes made in the Statute were, however, comparatively trivial, and mostly for adaptation to the United Nations system. The numeration of articles in the Statute is the same. Compulsory jurisdiction was warmly debated, both in the Committee of Jurists and at San Francisco and, though a majority of states apparently favored it, the opposition of the United

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[49] See, as to the Court, the discussion in § 71, *supra*; *Int. Organ.*, I (1947), p. 116 and p. 349; G. A. Finch, "The International Court of Justice," *A.J.*, 41 (1947), p. 103; G. Gilmore, "The International Court of Justice," *Yale Law Journal*, 55 (1946), p. 1049; G. H. Hackworth, in *Dept. of State Bull.*, XIII (1945), pp. 216, 1000; M. O. Hudson, "The Twenty-Fifth Year of the World Court," *A.J.*, 41 (1947), p. 1; M. O. Hudson, "The New World Court," *Foreign Affairs*, 24 (1945), p. 75.

States and the Soviet Union was sufficient to prevent the change.[50] The method of election was slightly changed, causing some difficulty at the first election.[51] A method of amendment was added (Article 69), being the same as that in the Charter. There were other changes of less importance, but the Statute remains in essence what it was. Article 92 of the Charter states, indeed, that the new Statute is based upon the Statute of the Permanent Court of International Justice.

CHARTER PROVISIONS. While sufficient provision is made for judicial independence, the Court is now one of the "principal organs" of the United Nations, and the "principal judicial organ"; its Statute is an "integral part" of the Charter. The connection is further emphasized by the requirement (Article 93) that each Member of the United Nations is bound by the Statute of the Court. Provision is made by which a state not a Member of the United Nations may become a party to the Statute, the conditions of its adherence to be determined by the General Assembly upon the recommendation of the Security Council.[52] Article 94 obligates Members to accept the decision of the Court as binding and adds, surprisingly, a sanction: if a party fails to carry out the judgment, the other party may call upon the Security Council, and the Council may "if it deems necessary," decide upon measures to give effect to the judgment. The interpretation has been offered that this gives to the Security Council no authority beyond that which it would otherwise possess, i.e., that it could take enforcement action only if it declared the failure to execute the Court's decision to be a threat to the peace;[53] yet it seems doubtful that such an act would ordinarily threaten the peace.

The right to ask an advisory opinion from the Court is extended not only to the Council and Assembly, but to other organs and to specialized agencies, approved by the Assembly. This approval can be general, rather than required for each case.[54] An advisory opinion, though not binding

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[50] UNCIO, Doc. 661, IV/1/50; *Report to the President*, pp. 143-145. The American Delegation preferred to pass the matter on to the Senate, and the Senate in August, 1946, approved adherence to the Optional Clause of the Statute. Thus the United States has accepted the compulsory jurisdiction of the Court in principle, but this acceptance was accomplished by damaging reservations, particularly one with regard to domestic questions, "as determined by the United States." See F. O. Wilcox, "The United States Accepts Compulsory Jurisdiction," and L. Preuss, "The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction," in *A.J.*, 40 (1946), pp. 699, 720; *Dept. of State Bull.*, XV (1946), pp. 452-453.

[51] Journal of the General Assembly, No. 25 (7 February, 1946); *Resolutions of the General Assembly*, No. 88 (I).

[52] Such, for example, as participation in election of judges, obligation to accept decisions, financial contributions, etc. See M. O. Hudson, *The Permanent Court of International Justice*, Ch. XI; U.N. Doc. A/239 (accession of Switzerland).

[53] Dr. Pasvolsky, Hearings, p. 287.

[54] Goodrich and Hambro, p. 266; and see *Resolutions of the General Assembly*, No. 89 (I).

upon the Security Council or upon the parties, is of much weight, and it may be expected that it would provide the Security Council, in appropriate cases, with a recommendation which it would make to the parties under Article 37. Reference should be made also to Article 36, § 3, which, in badly diluted strength, suggests that for legal disputes the Security Council should recommend to the parties that they refer their dispute to the Court. Chapter VI, as we shall see, emphasizes the right of Members to settle their disputes by means of their own choice; and this right is reinforced, in relation to the Court, by Article 95. In general, it must be said with regret, the Charter prefers political above judicial means of settling disputes.

The first election of judges for the new Court took place in February, 1946. The first case to be put before the Court was the complaint of the United Kingdom against Albania, referred to it after failure of the Security Council to reach agreement concerning it.

§ 83. The Secretariat.—The experience of the League of Nations demonstrated the importance of the secretariat, and revealed the extent to which the whole system depended upon it; and this experience is reflected in the Charter provisions and in the initial planning for the staff.[55]

SECRETARY-GENERAL. The chief administrative officer of the United Nations is the Secretary-General, and he is made somewhat stronger in his position than his predecessor in the League of Nations. He is chosen by the General Assembly, upon recommendation by the Security Council[56] (Article 97). No term of office was provided in the Charter, since delegates felt that the possibility of a veto might deprive the Secretary-General of his independence, or force out a person of proven capacity whose reelection might be desirable.[57] The Fifth Committee recommended, and the Assembly approved, that the first Secretary-General be appointed for five years, with the possibility of renewal for the same period. It also approved a salary of $20,000, plus a representation allowance of $20,000, and a furnished residence. Mr. Trygve Lie of Norway was chosen as the first incumbent of the post.

The functions of the Secretary-General are to serve in that capacity for all meetings of the General Assembly, and of the three Councils. At these meetings, he sits by the side of the Chairman, ready to offer assistance as

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[55] The planning of the Secretariat can be traced through the *Report by the Executive Committee to the Preparatory Commission* (PC/EX/113/Rev.1, 12 November, 1945), Ch. VI; *Report of the Preparatory Commission* (PC/20, 23 December, 1945), Ch. IX; and finally the adoption by the General Assembly of the recommendation made by the Fifth Committee of the Assembly on Feb. 13, 1946—U.N. Doc., A/41.

[56] Which means that the veto may be used. This was justifiably opposed by many delegates as an undue extension of the security function.

[57] Goodrich and Hambro, p. 269.

it may be needed; and he is responsible for the very complicated recording, printing, and rapid distribution of all debates and documents, for which a large staff is required. He has, to assist him in his enormous task, an Executive Office, which maintains relationships with Members, with organs and specialized agencies, and non-governmental organizations, and which manages the agenda of the General Assembly, prepares reports, and channels to the appropriate divisions the responsibilities laid upon the Secretariat. A novel evidence of the intent to make him a stronger official than under the League of Nations is the authority given him to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. Mr. Lie has from the beginning exercised his authority to speak as the representative of the United Nations;[58] it must be recalled that all outside the Secretariat are national representatives and that he and his staff must uphold the Charter from an impartial international viewpoint. This viewpoint he is required to assume under Article 100. He appoints other Members of the staff under regulations provided by the General Assembly; and he is required to make an annual report to the Assembly on the work of the Organization.[59]

STAFF. The Sponsoring Powers at San Francisco proposed election by the Assembly, upon recommendation of the Security Council, of four Deputy Secretaries-General. The League of Nations had had painful experience with this problem, and the proposal was strongly opposed. It was feared that these posts would be seized upon by the Great Powers, and that they could not be changed except by amendment, including Great Power veto. It was pointed out that they would be independent of the Secretary-General, who would in that situation be unable to act as the responsible head of administration, and that such a provision for administrative offices which it might be desirable to change would be too rigid if included in the Charter.[60]

In the end, nothing was said in the Charter concerning these offices, and the Secretariat was organized, in accordance with the recommendations of the Preparatory Commission, into eight Departments,[61] as follows:

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[58] Thus, in the midst of the dispute over Iran, he sought to correct a Security Council misinterpretation of Ch. VI. (see p. 438, below); and later he claimed the right to conduct an investigation of his own into the circumstances of a dispute. Both claims were approved by the Security Council.

[59] The first such report was issued June 30, 1946, UN Doc., A/65, and provides an excellent survey of the accomplishments of the United Nations during the previous period.

[60] See *Report to the President*, p. 150.

[61] *Report of the Preparatory Commission* (PC/20, 23 December 1945), pp. 88-90; *Report of the Secretary-General*, A/65, 30 June 1946, pp. 54-56; *UN Bull.* 2, January 21, 1947.

1. Security Council Affairs: to serve the Security Council, and also the General Assembly when it deals with the maintenance of peace and security.

2. Economic Affairs: to deal with general economic questions, financial questions, transport and communications questions, and statistics.

3. Social Affairs: to deal with questions concerning health, narcotic drugs, other aspects of social welfare, cultural and educational matters, and human rights. It is to be coordinated with the Department of Economic Affairs, and with the specialized agencies.

4. Trusteeship and Information from Non-Self-Governing Territories: to discharge functions under Chapters XI, XII and XIII of the Charter.

5. Legal: to advise on legal and constitutional matters and the drafting of agreements, to handle the registration of treaties and immunities and privileges under Article 105 of the Charter.

6. Public Information: includes press, publications, broadcasting, films, graphics and exhibitions, public liaison and reference.

7. Conference and General Services: to handle conference and liaison activities, the library, the documents and language services, and all matters relating to building management, transportation, mail, etc.

8. Administrative and Financial Services: to include the Budget Office, Personnel Office, and Comptroller's Office.

Each of these Departments is headed by an Assistant Secretary-General, and each is subdivided in various ways.

The many tasks laid down by the General Assembly necessitated rapid recruitment, largely upon a temporary basis and largely American. Readjustments are now being made, but the complaint is made that geographical distribution is difficult because nations do not supply enough capable persons, especially for the higher posts. Salaries range downwards from $13,000, plus an allowance of $8500, for Assistant Secretaries-General. A great deal of study is being given to recruitment (on a world-wide basis), conditions of employment, classification, tenure, retirement and such matters, in the effort to make work with the Secretariat sufficiently attractive to induce capable persons to leave their own countries and come, at much expense and inconvenience, to work with the United Nations. Many difficult problems must be solved with regard to such matters as immigration, taxation, immunities, vacation and travel allowances, housing, etc. The staff numbered 1200 at the beginning of 1947. The largest part of the budget, of course, goes to maintain the staff. Protests are already being made against the size of a budget which *in toto* amounts to about one-tenth of the cost to the United States alone of one day of war, and would hardly purchase one destroyer. On the other hand, there has already been among employees something resembling a strike, in protest against insufficient remuneration and conditions of work.

The Report of the Preparatory Commission properly emphasized the key position of the Secretariat in that, while responsibility for adoption of policies rests with the delegates acting for their respective nations in the various organs, the task of preparing and executing these decisions devolves mostly upon the Secretariat. If the staff is to enjoy the confidence of the Members, then it must be truly international in character. It is to be observed also that the members of the Secretariat are the only persons who speak and work for the organized community of nations; the delegates who make up the various organs represent their respective nations and work to advance their interests. Article 100 of the Charter seeks to ensure the international character of the Secretariat, on the one hand by forbidding staff members to seek or receive instructions from any external authority (including their own governments) and on the other hand by pledging Member states not to seek to influence staff personnel in the discharge of their responsibilities. A member of the staff is required to avoid any action which might reflect adversely upon his position as an international civil servant. He may not hold an office which in the opinion of the Secretary-General is incompatible with his duties to the United Nations; he must resign if he becomes a candidate for any political office; and he may receive no honor or gift from outside the Organization, except for war services.

The Charter requires (Article 101) that staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and to other organs as required. As interpreted by the Preparatory Committee, this means that each organ has at its disposal the whole Secretariat, with the one exception that the Department of Security Council Affairs is to serve the Security Council exclusively. The Security Council, however, and all other organs, may call upon the entire Secretariat. The Department of Economic Affairs is to serve primarily the Economic and Social Council, and the Department for Trusteeship and Information from Non-Self-Governing Territories is to serve primarily the Trusteeship Council, but both may be called upon by other organs. Thus the Secretariat is set up as a single working body: its primary common task, the unifying principle of the whole Organization, being that of maintaining peace and security. It is hoped also thus to avoid rivalries and to prevent duplication.

The paramount consideration in the selection of the staff (Article 101) is the highest standards of efficiency, competence, and integrity. After this, consideration is to be given to selection on a geographical basis as wide as possible. Since the same problems of staffing will arise in the specialized agencies, the General Assembly authorized establishment of an International Civil Service Commission which would standardize requirements and make possible interchange of personnel. Consultation is now proceeding with the specialized agencies with regard to setting up this Commission.

CHAPTER 14

SPECIALIZED AGENCIES

We have noted above that a number of "specialized agencies" were contemplated, and that they were to be "brought into relationship with" the United Nations. These were to be independent bodies, each founded upon its own treaty and with its own special staff and functions. We have noted, too, that the League of Nations attempted to bring all such activities under one general system of supervision, though it did not succeed in doing so; and that the Bruce Committee in 1939 recommended that all the economic and social activities of the League should be brought under one central agency.

§ 84. Centralization or Decentralization.[1]—The United Nations was thus faced with the question as to whether it should include all its activities in one organization, as the League had tried to do, or whether there should be a number of organizations. Centralized direction is usually regarded as important in efficient administration. The haphazard creation of the International Public Unions had led to overlapping of work; for example, the Conference for the Protection of Life at Sea overlapped the fields of the Codification of Maritime Law, Radio Telegraphy, and Maritime Police. On the other hand, lack of a coordinating direction might leave important matters untouched.

The experience of the League had shown that some of the independent agencies were of a proper efficiency; that the interconnection between their functions was increasingly apparent, that proper coordination of their work was difficult to achieve; that little public interest could be aroused in small organizations working remotely in limited fields, and that for each function only a certain number of the Members of the League of Nations would be interested enough to participate actively.

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[1] H. D. Gideonse, "Integration or Proliferation of International Economic Agencies," *Proceedings of the Institute on Money and the Law* (New York, 1945), p. 121; Louis K. Hyde, Jr., "Specialized Intergovernmental Agencies," *Dept. of State Bull.* XIII (1945); D. Mitrany, *A Working Peace System* (Royal Institute of International Affairs, 1943); G. Pallaczek, "The United Nations and Specialized Agencies," *A.J.*, 40 (1946), p. 592; Smith Simpson, "International Organization in the Area of Social and Humanitarian Problems," *The Social Service Review*, Vol. XIX (1945), p. 1; *The Development of International Cooperation in Economic and Social Affairs* (Bruce Report), L of N Doc., A.23. 1939.

FOR CENTRALIZATION. Those who were seeking to strengthen the economic and social functions of the new United Nations system, as it was being built, had this experience before them, and various theoretical arguments leading in either direction. In favor of a centralized control, it was pointed out that numerous separate institutions mean duplication of staff and expense, requiring each member state to have a larger staff of its own in order to maintain liaison with the work, and that there were proven dangers of an overlapping jurisdiction with conflicts on the one hand and, on the other hand, of omissions of jurisdiction which would result in certain matters having no institution to care for them. Such a matter might be taken up only if some state should have the interest and the initiative to call a conference to deal with it, and the conference would be an isolated affair without staff preparation or sequence. In the Assembly of the League it might have helped if some of the many problems there raised for discussion could have been assigned to existing administrative bodies. Each such body, however, chose its own work and made its own decisions.

Each institution tends to develop its own personality, to seek exclusive control of its field, and to be in jealous rivalry with other similar bodies. Further, since each works in its own corner, lighted only by its own little candle, pressure groups could operate upon it, and there would be no assurance of responsible operation. It was also urged that the various organizations would be separated from the Security Council or other United Nations organs, to which they should be related, and in general that they would be divorced from the political interests and authorities which only could breathe life and vigor into them.

FOR DECENTRALIZATION. Strong arguments were adduced, on the other hand, for a decentralized system with various independent units.[2] This really means a functional approach to international problems, and it is pointed out that this is the prevailing trend in domestic government. More reliance is now being placed upon the technical experts than upon the political representatives of nations.[3]

It was politically easier to establish such institutions as states might be willing to agree upon than to attempt to secure agreement upon one general governmental institution, including all such functions and powers. Their work is largely technical and advisory, and should be separated from the controversies inherent in a political system. To put all authority in one body might mean that political differences and jealousies would limit a

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[2] This argument is largely derived from D. Mitrany, *A Working Peace System* (Royal Institute of International Affairs, 1940).

[3] This trend has been challenged, in the United Nations, by insistence that members even of a committee such as the Commission on Human Rights must be governmental delegates. See *Report of the Secretary-General*, U.N. Doc., A/65, 30 June, 1946, p. 14.

particular field of activity which should proceed upon an expert basis; it would arouse fears, whereas little danger to national sovereignty could be seen in disparate and limited specialized agencies. If there were danger, it would be weakened by being scattered through the various agencies. States might be willing to grant more authority to institutions of limited function and technical purpose than to an over-all body having political significance, and to cooperate more freely therein.

Furthermore, experience seems to demonstrate that not all states were interested in all fields; each would be free to join those bodies in which it was interested and not be compelled by membership in the United Nations to share (at greater expense) in all fields. An inland state might not wish to occupy itself with maritime problems; Ecuador might have little interest in the navigation of the Rhine or Danube Rivers. Some agencies, such as Health, might expect participation by all or most states; some few states, having broad interests, might belong to all or most agencies. Because they were interested, states would work harder in those agencies to which they chose to belong; they would send more expert representatives, and it would be possible for a small state to acquire more prestige through sheer ability than it could ever acquire in a centralized organization in which the political power of great nations would always dominate. There would thus be less accumulation of power within the hands of a few large states.

Each institution would be separately planned and adapted to its own needs. There would be room for experimentation and functional differentiation; different types of representation, voting, dues, and procedures could be tried; in general, each would tend to become expert in its field and less subject to political considerations. Their activities would fit in with modern trends of government which now call for more independent commissions (e.g., the FCC or the ICC) whose job is not so much to prohibit or enforce as to administer and help. Nations are accustomed to such international bodies, but fearful of a centralized international government which could reach into all fields.

In general, it is claimed, solutions would be reached upon the basis of merit and reasonableness rather than upon the basis of national pride and rivalries. Technical experts would be more interested in scientific solutions than in political considerations. Since the work is done by small staffs of experts, it would be hoped that they would more truly represent the community of nations as a whole and work in its interests rather than, as would delegates to the General Assembly, in the interests of their own nations, and upon the ancient basis of national honor and vital interests. If one questions this happy result, it may at least be said that it is a step in the proper direction.

RELATION TO THE U.N. For such reasons, and perhaps also in reaction against the League system, the United Nations Charter provides for a more decentralized system. Various specialized agencies, each with its own constitution and staff, have been and continue to be built up; and encouragement is given to this process by Article 59, which authorizes the U.N. itself to initiate negotiations for the establishment of other such agencies. The problem of coordination of their activities is now being studied. Article 57 contains the important provision that such agencies "shall be brought into relationship with the United Nations," through agreements made between each of them and the Economic and Social Council (Article 63). When these agreements have been made, a pattern of relationship will appear which will doubtless reveal that the system lies somewhere in between the extremes of centralization and decentralization.

We turn now to separate consideration of each agency, after which we shall study the relationships which have thus far been established and the extent to which the United Nations and the specialized agencies constitute a system.

§85. International Labour Organization.—The International Labour Organization has now become one of the various specialized agencies, but it occupied for some years a unique position in international affairs and has much experience behind it. During World War I, a great deal of pressure was exerted by labor to provide an organization which could advance its interests upon an international scale.[4] As a result, Part XIII of the Treaty of Versailles was included, as the Charter of a new international organization for labor. It was an independent body which, alongside the similarly independent Court, formed part of the League of Nations system. Membership in the League carried with it membership in the ILO, though in practice it proved possible to have separate membership.[5] Its budget was part of the budget of the League,[6] and there were various other connections between the two bodies. They developed in quite different fashion, the ILO having more the appearance of an industrious business concern, the League more that of a formal and diplomatic body. There was, however, close cooperation and no rivalry between the two.

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[4] The demand for international labor action goes as far back as Robert Owen in 1816. A conference met at Berlin in 1890 and one at Berne in 1906. An International Association for Labour Legislation met annually, and the ILO was largely an outgrowth of its effort.

[5] Thus, the United States joined the ILO in 1934, without being a Member of the League. See *P.C.I.J.*, Series B, No. 19. The maximum membership reached was 62 states.

[6] The budget of 1939 was some $2,000,000, of which the United States paid about one-tenth.

FUNCTIONS. The aim of the ILO was stated in the Preamble to its Charter to be the establishment of social justice, as the basis of an enduring peace. This meant:

> The regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons, and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures.

According to the Charter, its functions were to include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour (Article 396); the framing of conventions and recommendations for adoption by Members; and follow-up and enforcement of measures so adopted.

THE CONFERENCE. The organization of the ILO, according to the Charter, was "to consist of: (1) a General Conference of Representatives of the Members and (2) an International Labour Office controlled by the Governing Body described in Article 393." The most distinctive and famous characteristic of the ILO was its method of tripartite representation, which was carried on even into committees. Each Member had four delegates to the Conference, of whom two represented the government, one the employers, and one labor; and each delegate was entitled to vote independently. All were designated by the Government, but they must be "chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or work-people, as the case may be, in their respective countries." The Conference could refuse to admit a delegate whom it deemed not to have been nominated in accordance with this article. There have been some difficulties in working out this principle, for in some countries proper organizations did not exist, and in others there was dispute as to which organization should be consulted.[7]

The ILO also broke new ground with regard to conference procedure and international legislative effort. The Conference, voting by majority, may take action which eventuates in a recommendation or a draft convention. The former is submitted to Members "for consideration with a view to effect being given to it by national legislation or otherwise"; the draft convention is for ratification by Members. Each member is obligated to

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[7] See for example, *P.C.I.J.*, Series B, No. 1.

bring the recommendation or draft convention within a year or eighteen months "before the authority or authorities within whose competence the matter lies" for legislative or other action.[8] A special committee (which was reconstituted in 1946) examines and reports upon these actions by members, and the effort to secure ratification is vigorously pushed. Where ratification has been given, the member is obligated to report to the ILO upon the measures taken to put it into effect. Complaint may be made by associations of employers or workers that a state is not observing its obligations. Various means of pressure are provided, and economic sanctions may ultimately be invoked against a member not living up to its obligations. The procedure of the Conference, as a legislative process, is well worth study, including the efforts to solve the problem of revision of treaties.

THE GOVERNING BODY. Corresponding to the Council in the League of Nations is the Governing Body, but the latter is more of an executive body, and less spectacular in performance. It consists of twenty-four persons, of whom twelve represent governments and six each are elected by the employers' and the workers' delegates to the Conference. Thus the tripartite principle is continued, and, further, the non-governmental delegates are chosen by international rather than national groups. Of the twelve persons representing governments, eight must be chosen "by the Members which are of the chief industrial importance"; and the criteria laid down for this selection were: total industrial population, including miners and transport workers but excluding agricultural and commerce workers; proportion of industrial to total population; total horsepower, steam and water; horsepower per inhabitant; length of railways in proportion to area; tonnage of merchant marine. The other four government representatives are chosen by member states selected for the purpose by the government delegates to the Conference, excluding the eight states of chief industrial importance. The term of office is three years, and voting is by majority. The Governing Body selects and directs the Director, prepares the agenda for the Conferences and the budget, handles complaints, and works upon specific problems of the Organization either directly or through committees of experts.

THE INTERNATIONAL LABOUR OFFICE. The secretariat of the ILO is known as the Office (*Bureau*) and was established by the Charter at the

[8] This means the body competent to put it into effect. It was thought, for example, that it might be necessary to submit them to the forty-eight state legislatures in the United States. By the time of the War, sixty-seven conventions had been submitted to Members, and 902 ratifications had been received. *Report of the Director*, 1945, p. 114. See also *Summary of Annual Reports under Article 22 of the Constitution of the ILO* (Montreal, 1946); *I.L.O. Constitutional Questions* (Montreal, 1946), p. 195; and F. G. Wilson, "The Preparation of International Labor Conventions," *A.J.*, 28 (1934), p. 506.

seat of the League; it has, in fact, a well-equipped building of its own at Geneva, antedating the League palace. Its first Director was Albert Thomas, who made himself a dominant and constructive force in the early development of the work. A staff of several hundred, largely experts and technicians, took care of its functions, which were defined in Article 396. It collects and distributes information "on all subjects relating to the international adjustment of conditions of industrial life and labor"; it publishes a number of periodicals, of which the *International Labour Review* is most useful to students; a series containing national labor laws, and many special studies of great usefulness. It prepares for the Governing Body the agenda of Conferences, and makes such studies as are asked by them, frequently calling conferences of experts to assist in the work. During the War, the Office was moved to Montreal, from which it carried on its work, though of course on a much reduced scale.

Present Situation. Though the staff continued its work, no meetings of the Conference were held from 1939 to 1945. In the latter year, the Conference met in its 26th regular Session, at Philadelphia, with 41 states represented. It agreed upon a "Declaration concerning the Aims and Purposes of the International Labour Organisation," an important restatement of its objectives for the post-war era. Meanwhile, it was becoming clearer that the ILO must now readjust itself in relation to the new United Nations, and this problem was somewhat complicated by uncertainty as to the attitude of the U.S.S.R., and by the appearance of the World Federation of Trade Unions. At the 1945 meeting of the Conference (Paris) it was decided to "enter into relationship with" the United Nations, and three consequently urgent amendments to the Charter were submitted to Members: (1) that any Member of the United Nations would become a Member of the ILO merely by signifying its desire to do so (2) that the Organisation be able to make budgetary and financial arrangements with the United Nations (3) that the Charter be amended by vote of two-thirds of the Member countries, including five of the eight States which held non-elective seats on the Governing Body. Negotiations were begun with a committee of the Economic and Social Council, and an agreement stating the terms of the relationship was adopted by the General Assembly at its 1946 meeting in New York.[9] The International Labour Organization now becomes one of several, instead of the only, specialized agency.

§ 86. United Nations Relief and Rehabilitation Administration.— Toward the end of war, it was clear that an unprecedented need for relief would exist. The weapons and the unusual severity of the methods of

[9] U.N. Doc., A/72, 30 September 1946; ILO, *Report of the Director*, 27th Session (Montreal, 1945).

war left millions destitute, maimed, starving, or helpless; and political animosities and terroristic methods displaced from their homes numbers estimated at around 12 million in Europe, and 30 to 40 millions in the Far East. The voracious needs of war had consumed so much in the way of materials and had so disorganized the industrial production of the world that food and clothing were difficult to obtain, and houses, public utilities, agricultural machines, factory equipment, and means of transportation could not soon be refitted and organized to meet needs. Disease could therefore be expected on a large scale, as well as disorder; and the fact that numerous governmental systems would require time for rebuilding would make more difficult the task of maintaining order.

CREATION. During the war, a great deal of money for relief purposes had been raised in the United States; it became necessary for Congress to pass laws for the regulation of such efforts, and the President appointed a committee to coordinate relief activities. In September, 1941, the governments-in-exile in England set up an Inter-Allied Post-War Requirements (Leith-Ross) Committee and began to estimate what their respective needs would be. On November 21, 1942, the United States established the Office of Foreign Relief and Rehabilitation Operations, with Governor Lehman as Director, whose purpose was "to supply food and other basic necessities of life to peoples in areas liberated from Axis control who have been ravaged, despoiled, and starved." Meanwhile, discussion had been in progress among the Four Powers, and in June, 1943, the United States submitted a draft agreement for a United Nations Relief and Rehabilitation Administration. This was studied by other nations and their criticisms reduced Big Four control, assured that contributions from each state would be dependent upon legislative action in that state, and added a right of withdrawal. On November 9, 1943, the agreement was signed by forty-four nations at the White House.[10] On the following day, the Council of the new organization had its First Session at Atlantic City, and laid down principles and machinery for implementing the agreement.

FUNCTIONS. The functions of UNRRA, as stated at this meeting, were to provide, "immediately upon the liberation of any area," aid and relief for the population therein, to help in the return of prisoners and exiles; and to assist in the resumption of agriculture and industry. It was not to work in areas under military command unless by permission of the commander and under his control, a provision which greatly limited its usefulness. The area was to be determined by the Director General, in consultation with government and military authorities. The liberated

[10] See *Documents on Am. For. Rel.*, Vol. V, pp. 262-283, and Vol. VI, Ch. VI. UNRRA had its own set of documents including quarterly reports by the Director General and records of the Council meetings.

countries of western Europe proved able to take care of their own troubles, and UNRRA actually operated only in Eastern Europe and China. The help given was in the form of relief supplies (food, clothing, medicine, etc.), relief services (health, repatriation, welfare), and rehabilitation (seeds, raw materials, machinery, technical aid, etc.). Responsibility for distribution of this help was placed upon national governmental authorities, and normal agencies of trade and transportation were to be used as much as possible, in order to encourage self-help and rebuilding. Supplies were never to be used as a political weapon, and there was to be no discrimination as to race, creed, or political belief. Its purpose was relief rather than reconstruction; its principle was to help people help themselves.

Organization. The governing body of UNRRA was a Council composed of one representative from each of the 47 member nations. It established policies and made recommendations for action by member states. When it was not in session, a Central Committee carried on, composed of representatives of the Four Powers and France and Canada. The Director-General had full power to carry on operations within the resources and policies laid down by the Council. Its headquarters were in Washington, with numerous branch offices; its staff amounted to about 10,000 persons.

Its work was carried on through a Committee on Supplies, whose members were representatives of those states (as named by the Council) which were likely to be the principal sources of supply, and by two regional committees (Europe and the Far East) which were to make recommendations in regard to relief and rehabilitation in those areas. A vast job of obtaining supplies and arranging transportation and distribution was carried on, complicated by the necessity of arrangements with military authorities, Shipping and other Combined Boards, and national governments. It operated in Greece, Yugoslavia, Italy, Albania, Czechoslovakia, Poland, San Marino, Finland, the Ukrainian and Byelorussian Republics, China, Korea, and Formosa. Its work was to be completed for Europe by the end of 1946, and for the Far East in the first quarter of 1947.

According to the agreement, financial contributions were made by each Member at its own will and according to its own constitutional processes. The Council recommended a contribution of 1% of national income, and apportioned the budget so that the United States would pay 40%, the United Kingdom and the Union of Soviet Socialist Republics 15% each, and smaller amounts from other states. The total budget pledged was $3,611,942,710, toward which the United States made two contributions of $1,350,000,000 each.

The career of UNRRA was somewhat hectic. It suffered the uncertainties of the first of the United Nations agencies to be built; its plans were upset by the assumption of responsibility for their own areas by certain

states, by uncertainty as to national support, and especially by the refusal of the military to permit operations in their areas, and by some mismanagement due to inexperience. It nevertheless performed an indispensable service to mankind and greatly alleviated suffering in wartorn areas. Its life was ended by refusal of the Congress of the United States to carry it on, and the United Nations has found it necessary to carry on some of its work through the International Refugee Organization.

§ 87. The International Civil Aviation Organization.

BACKGROUND. We have noted earlier the first efforts to regulate international aviation, which eventuated in the Convention of Air Navigation of 1919 as the foundation for a new system applicable over a large part of Europe. As amended in 1929, the permission from a state to fly over its territory or to land there was made optional rather than mandatory,[11] thereby limiting the opportunity for development of international aviation. In the Western Hemisphere, a Commercial Aviation Convention was signed at the Havana Conference of 1928, under which permission must be obtained from each state for traffic in or over it. Consequently, aviation developed on the basis of bilateral or reciprocal arrangements; and the United States airlines, after transoceanic flights became possible, obtained similar agreements to establish landing privileges in Britain, France, and other European countries. Meanwhile, Great Britain was establishing air routes to her dominions and colonies. Thus the world was being divided among three groups—the continental European countries, Great Britain, and the United States; and the economic and military importance of aviation was recognized to such an extent that nationalistic rivalries were inevitable.

World War II produced important changes in this situation. An enormous development of aviation resulted, with larger and faster planes, and it was apparent that air transport would be much more reliable and more widely used after the war. European aviation industries had disappeared from the scene. The British had during the War concentrated upon the production of combat and training planes, while the United States developed large carriers for long distance transport, and gained much experience and knowledge of routes around the world. The British were worried by this handicap, and fearful of the future; they called for international regulation, and an International Air Authority. The United States, confident in its superiority, forgot its former ideas of protection and was eager for unrestricted competition in the field, though also favoring an international organization.

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[11] O. J. Lissitzyn, *International Transport and National Policy* (New York, Council on Foreign Relations, 1942), p. 254.

CHICAGO CONFERENCE.[12] As the defeat of Germany became imminent, the United States extended an invitation to some 50 countries to attend a conference on civil aviation to meet in Chicago, November 1, 1944. The Conference worked through four technical committees: (1) Multilateral Aviation Convention and International Aeronautical Body (2) Technical Standards and Procedures (3) Provisional Air Routes (4) Interim Council. Not much difficulty was encountered on the technical side, and twelve annexes (Appendix V) to the Final Act of the Conference went far toward meeting technical difficulties. An Interim Agreement on International Civil Aviation[13] provided for a provisional organization (PICAO), to be composed of an Interim Assembly and an Interim Council, having its seat in Canada. The Council was to be composed of 21 states, elected by the Assembly, and representing (1) states of chief importance in air transport (2) others which make the largest contribution to the provision of facilities (3) geographical distribution. A Secretary General and staff were provided, and expenses were to be borne by Members as decided by the Assembly. By Article VIII of the Agreement, each state was given "complete and exclusive sovereignty over the airspace above its territory." Each state was to make its own regulations, but must apply them without discrimination. The Conference also issued a Convention on International Civil Aviation, an International Air Service Transit Agreement, and an International Air Transport Agreement, all of which were to be regarded as drafts for study by member states and by the Interim Organization.

After much disagreement as to freedom or regulation in the air market, a Canadian study broke the problem into separate headings: (1) to fly across a territory without landing (right of innocent passage), (2) to land for non-traffic purposes; (3) to carry traffic taken on in the country of the aircraft's nationality, (4) to take passengers or cargo destined for the country of the aircraft. Of these "four freedoms," agreement was reached upon the first two, but not upon the latter two, thus leaving unsolved the problem of intermediate countries. A "Fifth Freedom" to cover this by permitting pick-ups en route was suggested by the United States, and a compromise solution provided for two multilateral conventions, one accepting only the first two "freedoms," the other accepting all five. In the latter instrument, a reservation could be made to eliminate the "fifth freedom." Twenty-eight nations signed the former, and eighteen the latter.

[12] The texts of the instruments adopted are in Dept. of State Pub., No. 2282. See also *Blueprint for World Civil Aviation*, *ibid.*, No. 2348; J. Walstrom, "The Chicago Air Conference," *Dept. of State Bull.*, XI (1944), p. 843; S. W. Morgan, "The International Civil Aviation Conference at Chicago: What It Means to the Americas," *ibid.*, XII (1944), p. 33; statement by Assistant Secretary Clayton, *ibid.*, XIV (1946), p. 1004.

[13] In effect, upon acceptance by twenty-six nations, on June 6, 1945. *Ibid.*, XII (1945), p. 1056; see also *ibid.*, XV (1946), p. 688. As to the executive agreement, *ibid.*, pp. 1101-1108.

The United States and the United Kingdom met at Bermuda to reconcile their still divergent views, and on February 11, 1946, signed three documents: a Final Act, a Bilateral Agreement, and Heads of Agreement relating to the Civil Use of Leased Air Bases. Both nations had accepted "Freedoms I and II" of the Chicago Conference; they now reached agreement that rates would be subject to governmental review, that each country would determine the frequency of operation of its own airlines, that "Fifth Freedom" traffic could be carried subject to defined principle, and that disputes be referred for advisory opinion to PICAO.[14] On March 27, the Conference on North Atlantic Air Routes at Dublin reached agreement on safety rules for transatlantic flying. With these agreements made between the United States and the United Kingdom, other nations followed, and a working solution of the difficult problem of international civil aviation was achieved. The problem is far from solved, however. In no field is such an administrative and regulative body as badly needed, but nationalistic feelings have thus far prevailed to prevent it, and strong competition between nations will doubtless continue.

On March 4, 1947, the 26th state ratified the Convention, and thirty days later the permanent organization came into being. The first meeting of the Assembly of ICAO was held at Montreal on May 6, 1947; a number of regional air navigation meetings have been held.[15] Consideration was begun of an agreement with UN, and, in accordance with a General Assembly resolution, it was decided not to admit Franco Spain to membership. It was also decided to continue the Air Navigation and Air Transport Committees, and to establish an International Law Committee to unify and codify Air Law.[16]

§ 88. International Monetary Fund and Bank.—The breakdown of the gold standard during the first World War, the financial uncertainties of the depression period, and the ruthless methods of economic warfare instituted by Germany furnished ample warning that international financial cooperation and institutional aid would be needed after World War II.[17]

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[14] *Dept. of State Bull.*, XII (1945), p. 67. See S. Latchford, "Comparison of the Chicago Aviation Convention with the Paris and Habana Conventions," *ibid.*, p. 411; J. C. Cooper, "The Bermuda Plan: World Pattern for Air Transport," *Foreign Affairs*, 25 (1946), p. 59.

[15] *Dept. of State Bull.*, XV (1946), p. 302; documents in *ibid.*, p. 584. The United States had concluded with 25 nations, by February 1947, bilateral agreements under which the "fifth freedom" is defined as follows: "The privilege to take on passengers, mail, and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such country." *Ibid.*, XVI (1947), p. 449.

[16] *Ibid.*, pp. 709, 713, see also *Int. Organ.*, I (1947), pp. 128, 356.

[17] The economic and financial problems involved cannot, of course, be discussed here. Reference is made, out of a vast literature, to *International Currency Experience: Lessons of the Inter-War Period* (League of Nations, 1944); W. A. Brown, Jr., *The International Gold Standard Reinterpreted, 1914-1934* (New York, 2 vols.,

Efforts such as the Brussels Conference of 1920 or the Genoa Conference of 1922 had provided no international machinery. The Bank for International Settlements,[18] which was set up in 1930 in connection with the "Young Plan" for reparations, did not have sufficient financial strength or authority to be of much assistance during the chaotic decade following 1930. The spontaneous collaboration which had for long upheld the gold standard was gone, and it seemed apparent that organized international effort would be required in the financial field, if the great task of post-war reconstruction was to be accomplished.

In 1943, the United States published a plan by H. D. White for an International Stabilization Fund, and almost at the same time the British published a plan for an International Clearing Union prepared by Lord Keynes. The two were widely compared and discussed,[19] and conversations between the British and American Governments led to a "joint statement" which was the base of discussion for the United Nations Monetary and Financial Conference which assembled at Bretton Woods, New Hampshire, July 1-22, 1944, on the invitation of the United States. Two related, though separate, institutions were provided for at this Conference, an International Monetary Fund and a Bank for Reconstruction and Development.

Purposes. The purposes of the Fund, as stated in Article 1 of the Agreement,[20] may be summarized as follows: To promote international monetary cooperation; to facilitate the expansion and balanced growth of international trade; to promote exchange stability; to assist in the establishment of a multilateral system of payments and in the elimination of foreign exchange restrictions; to encourage confidence by making the resources of the Fund available to members; and thus to shorten the duration and lessen the degree of disequilibrium in international balances of payments. The key point among these aims is exchange stability.

Operation. While governments are members, the Fund will deal with the treasuries, central banks, or such agencies of states (Article V). Each member contributes to the Fund a certain amount, calculated upon volume of trade, national income, and amount of gold held. The total is 8.8 billions

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1940); G. N. Holm, *International Monetary Cooperation* (University of North Carolina Press, 1945).

[18] See M. O. Hudson, "The Bank for International Settlements," *A.J.*, 24 (1930), p. 561; Bank for International Settlements, *Fifteenth Annual Report* (Basle, 1945).

[19] See J. Viner, "Two Plans for International Monetary Stabilization," *Yale Review*, Vol. LII, 1943; and references in M. A. Heilperin, *International Monetary Reconstruction* (New York, 1945).

[20] United Nations Monetary and Financial Conference, *Final Act and Related Documents*, Dept. of State Pub., No. 2187 (Washington, 1944); *Documents Am. For. Rel.*, VI (1943-44), pp. 331-398; *Int. Organ.*, I (1947), p. 124.

of U.S. dollars; of this the share of the United States was 2750 millions, as compared to 1300 for the United Kingdom or the U.S.S.R., or a half million for Panama or Liberia. These quotas are subject to revision, a four-fifths majority being required for the purpose (Article III, Sec. 2).

In general, the Fund operates through buying, selling, and controlling exchange. To assist members in temporary deficits, the Fund is to sell foreign exchange against the national currency of that member. A member is entitled to buy the currency of another member in exchange for its own currency to an amount not to exceed 25% of its quota, though the Fund authorities may waive this limitation. A charge is made for this service by the Fund, not only because it is a service, but also to discourage too frequent or too extensive use of the Fund. Members are expected to repurchase their own currency from the Fund when the emergency is over (Article V, Sec. 7). The general purpose is to provide temporary assistance, and there are provisions to discourage use of the money "contrary to the Purpose of the Fund" (Article V, Sec. 5).

The obligations of a member with regard to its own currency have been summarized as four:[21] (1) to define its currency in terms of gold (2) to keep its currency within 1% of that value (3) not to restrict currency transactions or purchase and sale so far as currency is concerned (4) to make changes in currency valuation, not to exceed 10%, only after consultation with the Fund. The intent of such provisions is to prevent nations from restricting imports and devaluing currency; in general, to let money be freely used in its function as a medium of exchange.

We shall not attempt here to enter further into the complexities of financial operations under the Fund. Attention is called, in order to differentiate the Fund from the Bank, to the words of Article XIV: "The Fund is not intended to provide facilities for relief or reconstruction or to deal with international indebtedness arising out of the war."

ORGANIZATION. The Fund is given "full juridical personality," and is entitled to immunity from judicial process or other governmental action, from taxation, and for its officers and employes (Article IX). Membership is open to other states on terms prescribed by the Fund; and a member may withdraw upon notice, settling its accounts[22] in accordance with Schedule D of the Appendix. A member which fails in its obligations may be declared ineligible to use the Fund, or required to withdraw. Voting power is distributed in accordance with the financial contribution made,

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[21] In a speech by Dean Acheson, Assistant Secretary of State, March 23, 1945 (Dept. of State Pub., No. 2306).

[22] For a list of the first membership, see *Dept. State Bull.*, XIV (1946), pp. 219, 528. Lebanon, Syria, Turkey, and Italy were admitted by April 5, 1947.

each having 250 votes plus one for each one hundred thousand U.S. dollars contributed, and decisions are taken by a majority of the votes cast (Article XII, Sec. 5). Amendments may be suggested by a member, a Governor, or the Executive Directors and, if approved by the Board, are submitted by circular letter or telegram to members. Amendments enter into force when approved by 3/5 of the members amounting to 4/5 of the voting power. For certain changes, acceptance by all members is required (Article XVII). The headquarters are located in the member having the largest quota, now the United States. In relation to non-members, members agree to do nothing contrary to the purposes of the Fund.

"The Fund shall have a Board of Governors, Executive Directors, a Managing Director and a staff" (Article XII, Sec. 1). Each member appoints one Governor and one alternate, to serve five years. All powers of the Fund are vested in the Board of Governors which may, however, delegate to the Executive Directors any such powers except those listed in Article XII, Sec. 2(6). The Executive Directors are responsible for general operations of the Fund. Of the twelve Directors, five are to be appointed by the members having the highest quotas; five others by members not in that category; two others by the American Republics; and possibly two more to represent those countries whose currencies are being used in the largest amounts, if they are not already represented. The Executive Directors are to be in continuous session. Each appointed member is entitled to cast the number of votes allotted to the member which appointed him; each elected Director may cast the number of votes which counted toward his election. There is also a Managing Director, chosen by the Executive Directors, who selects and manages the staff and conducts the ordinary business of the Fund. Questions as to the interpretation of the Agreement are referred to the Executive Directors, and may be appealed to the Board of Governors whose decision is final. Article X contains the usual provision for cooperation with other international organizations, with the protecting clause that modifications of the agreement may be effected only through the amending process. No agreement with the United Nations had been made at the time of this writing.

A meeting was held at Wilmington Island, Savannah, Georgia, on March 8, 1946, to establish the Fund and the Bank; the first meeting of the Executive Directors was held on May 6 and the first meeting of the Board of Governors at Washington on September 27. Formal operation was begun on March 1, 1947. Some new members were admitted, quotas of various states were revised, and an Advisory Council was created.[23]

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[23] "First Annual Meeting of the Board of Governors," *Dept. of State Bull.*, XV (1946), p. 704; Report of the Executive Directors and Summary Proceedings September 27, October 23, 1946 (I.M.F., Washington 1946), which contains quotas and voting power of members.

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT.[24] The Bank, we have noted, was created at the same time as the Fund, though as a separate institution, under a separate agreement. It is not so complicated an institution, and has not aroused as much controversy as did the Fund.

PURPOSES. The Bank is for short-term purposes. It is intended (Article 1) to assist in reconstruction and development by facilitating investment of capital for productive purposes; to promote private foreign investment by means of guarantees or participation, and to supplement private funds when necessary; to encourage international investment for development of productive resources, "thereby assisting in raising productivity, the standard of living and conditions of labor in their territories"; to establish a priority of urgency and usefulness in projects; and to bring about smooth transition from wartime to peacetime economy.

OPERATION. In an economically insecure world, the private lender may be unable or unwilling to take risks with his money, though the need for the money might be great. The Bank is intended to be strong enough to meet this need. It may lend its own money for either a whole loan or a share; it may borrow funds for such a purpose; or it may guarantee loans by private investors. The borrower may be a government or a private concern supported by his government, and the lender is reassured in the sense that he may rely upon both the borrower's government and the Bank. In technical detail, provision is made for dealing in different currencies, and for safe loans. The Bank must not lend more than 100% of its capital, reserves, and surplus. The loan must be for a specified purpose. By March, 1947, loans had been requested by nine states, to the extent of 2½ billions.

ORGANIZATION. The Bank, like the Fund, is given juridical personality and similar immunities and exemptions. Members of the Bank must be also members of the Fund; provisions for admission, withdrawal, and supervision are similar. The authorized capital is ten billions in United States dollars, and is divided into 100,000 shares of a par value of $10,000 apiece. Each member subscribes to a minimum number of shares (set forth in Schedule A). Actually $9,100,000,000 was allocated, and of this the United States pays 3175 million. Each member is entitled to 250 votes, plus one for each share of stock, and decisions are usually by majority vote. Provision is likewise made for cooperation with other international organizations, but no agreement between it and the United Nations has yet been made.

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[24] *Documents Am. For. Rel.*, VI (1943-1944), pp. 373-398; *Int. Organ.*, I (1947), pp. 126, 354.

§ 89. Food and Agriculture Organization.

Purposes and Functions. Some explanation of the reasons why a Food and Agriculture Organization seemed desirable are to be found in the First Report of the Interim Commission.[25] It was there observed that mankind has been indifferently successful in its search for food; that if millions have enough, millions of others starve. This, we know now, is not inevitable. Scientific studies have showed us how to increase the productiveness of land and to improve breeding of crops and livestock, and they have developed new means of combating diseases and insect pests. Machinery has been developed which enables larger production with fewer laborers, and improvements in handling, processing, storing, and transporting foods have made possible more even distribution of foods, both geographically and over periods of time. Advances in the science of nutrition, as important as earlier discoveries in bacteriology, contribute greatly to the health of the peoples of the world. This scientific progress continues steadily, and needs to be supported by organized international effort. Mankind now may develop a new mastery over the forces of nature, but only by cooperative effort and wide dissemination of knowledge. The distribution of food resources must be improved so that those who do other work than production of food may rely confidently upon obtaining what they need; otherwise, a remedy may be sought in war. There is little doubt that the problem of freedom from want can be solved, if nations are willing to cooperate sincerely to that end.

Creation. President Roosevelt remarked, in his message to Congress of November 1, 1943: "Food is as important as any other weapon in the successful prosecution of the war. It will be equally important in rehabilitation and relief in the liberated areas, and in the shaping of the peace that is to come." During the war, in 1942, the United States and the United Kingdom set up the Combined Food Board, in order to secure maximum utilization of the food resources of the United Nations for purposes of the war. Toward the above ends, for purposes of peacetime, the United States invited a conference on Food and Agriculture which met at Hot Springs, Virginia, May 18 to June 3, 1943.[26] This conference set up an "Interim Commission" to plan the organization, and recommended that it propose to governments (1) a plan for permanent organization (2) a declaration in which each government would recognize its obligation:

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[25] *First Report of the Interim Commission* (Washington, August 1, 1944). The Constitution is to be found in the Appendix to this Report, and also in *Documents Am. For. Rel.*, p. 434. See also H. Belshow, "The Food and Agriculture Organization of the United Nations," *Int. Organ.*, I (1947), p. 291.

[26] The Final Act of the Conference may be found in Dept. of State *Bulletin*, VIII (1943), p. 546; *Documents Am. For. Rel.*, V (1942-3), p. 302; VI (1943-4), pp. 410-443.

(i) To raise the levels of nutrition and standards of living of its own people;

(ii) To improve the efficiency of agricultural production and distribution;

(iii) To cooperate, so far as may be possible, with other nations for the achievement of these ends;

(iv) To undertake to submit periodically to the other participants, through the permanent organization, reports on the action taken and the progress achieved toward these ends.

The Interim Commission made its first report, proposing a Constitution, on August 1, 1944. By the end of that month the twenty ratifications necessary to put it into effect had been received. The first Conference [27] of FAO met in Quebec, where the Organization was brought formally into existence on October 16. Forty-seven states had become members by the end of 1946.

ORGANIZATION. The members are those listed in an Annex who accept the Constitution within five years, and others who are admitted by two-thirds vote of all members. Withdrawal is permitted after five years. The Organization is given legal status, and its staff have the usual immunities. An amendment to the Constitution which involves new obligations for members must be ratified by two-thirds of the members and binds only those who accept it; other amendments may be made by a two-thirds vote of the Conference. Expenses are divided among members as determined by the Conference.

The organs of FAO are the Conference, to which each member sends a representative, each having one vote; the Executive Committee of 9 to 15 persons, chosen by the Conference from among qualified persons; and the Director-General and his staff. The Conference determines policy, makes recommendations or submits draft conventions to Members, and arranges for consultation with governments or with other international organizations. The Executive Committee carries out the instructions of the Conference; its members serve not as delegates of their own governments, but on behalf of the whole Conference. The Director-General has full authority to direct the work of the Organization. Various Standing Advisory Committees, such as for nutrition, agricultural production, or statistics, conduct studies and may make proposals. Finally, provision is made for such regional and liaison offices as the Conference may wish. An agreement between FAO and the Economic and Social Council of the UN was approved by the General Assembly on December 14, 1946.[28]

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[27] FAO, *Report of the First Session of the Conference, Quebec, October 16 to November 1, 1945* (Washington, January, 1946).

[28] UN Doc., A/78, 30 September 1946; *Resolutions of the General Assembly*, p. 78.

OPERATIONS. The purposes of FAO include research, the dissemination of knowledge in various ways, advice to governments, and agricultural credit and commodity arrangements. Its field includes Fisheries and Forestry, and the word agriculture includes plants other than those for food purposes.

The First Conference of FAO (Quebec) made many recommendations looking toward expansion of production and consumption through commodity arrangements, raising the nutrition level, reorientation of production, and emphasizing the interdependence of agriculture and industry. The Conference worked through six committees dealing with (1) nutrition and food management (2) agriculture (3) forestry and forest products (4) fisheries (5) marketing (6) statistics. Arrangements were instituted for terminating and taking over the property and functions of the Institute of International Agriculture and other international organizations in the field. A budget of 2½ millions was set for the first year, but it was expected that the annual budget thereafter would be twice that amount. The Executive Committee, meeting directly after the Conference, determined as its first project a statistical world picture of production and trade in food, forestry, and fisheries, as compared with an estimate of needs. It was agreed to use temporary committees of experts to make studies and recommend plans rather than to build a large staff for the purpose. Each member state was asked to set up a national committee to maintain liaison with FAO, as a first step toward regional organization.

The urgency of the food situation in 1946 led the FAO into action sooner than it had anticipated. As a result of a resolution adopted at the General Assembly in London, a conference on urgent food problems was summoned to meet in Washington on May 20.[29] The reports of three Committees were adopted: (1) The Committee on World Food Appraisal called for an international food, agriculture, and fisheries research and information service be established at once by FAO; (2) the Committee on Conservation and Expansion of Supplies was concerned with making the best use of the 1946 supplies, and proposed to divert as much as possible from livestock to human consumption; (3) the Committee on Future Machinery considered the transition from the temporary UNRRA to the permanent FAO, and recommended that the Combined Food Board of wartime be replaced by an International Emergency Food Council of wider membership.[30]

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[29] *Report of the Special Meeting on Urgent Food Problems* (Washington, FAO, June 6, 1946); *First Annual Report of the Director-General to the FAO Conference* (Washington, FAO, 5 July 1946).

[30] This body began work on June 20, 1946. FAO, *Information Service Bulletin*, Vol. I, No. 5, August 5, 1946.

The Second Session of the Conference met at Copenhagen, Denmark, September 2-13, 1946. It created a Preparatory Commission whose task is to work out a long-range world food program. Two reports were put before the Conference, one a World Food Survey, the other a proposal by Sir John Orr that a World Food Board be created to stabilize prices of agricultural commodities, funds being supplied for the purpose; to establish a world food reserve for emergencies; to provide funds for financing the disposal of surplus products in countries where they may be needed; and to cooperate with organizations concerned with international credits and with trade and commodity policy. This proposal met with some opposition because it seemed to overlap the purposes of the nascent International Trade Organization. A Preparatory Commission, created to carry on further study of the World Food Proposals, urged increased production and trade in agricultural products, stabilization of prices, and commodity agreements among governments. It concluded that no further UN organizations were needed, and that, rather than a World Food Board, a World Food Council should be set up as part of FAO itself.[31]

In March, 1947, a mission was sent to study the situation in Greece. It recommended a loan from the International Bank for irrigation, hydroelectric power, transportation, and other projects, suggested the need for agricultural research and education, and made many other constructive suggestions. To carry them into effect, a United Nations Advisory Mission was proposed, to be composed of representatives from the Economic and Social Council and various specialized agencies. A similar study of Poland has been under consideration. Though such proposals would seem to be precisely what the UN and the specialized agencies were created for, they appear to be sidetracked by the unilateral program of United States aid to Greece proposed by President Truman in his message to Congress of March 12, 1947.[32]

§ 90. United Nations Educational, Scientific and Cultural Organization.—A figure of speech—"republic of letters"—has long been in use among scholars, to indicate the common interest, transcending political boundaries, of those engaged in intellectual activities. After the first World War, international organization was provided for this "republic" by the League of Nations, the Institute of Intellectual Cooperation, and other bodies. The activities of these agencies was upon a high level, and had been criticized because they did not reach the average human being at all.

[31] *Proposals for a World Food Board* (Washington, FAO, 5 July 1946); *World Food Survey* (Washington, FAO, 5 July 1946); *Report of the FAO Preparatory Commission of the World Food Proposals* (Washington, FAO, February, 1947).
[32] *Report of the FAO Mission for Greece* (FAO, Washington, March 1947); *Dept. of State Bull.*, XVI (1947), Supplement, May 4, 1947.

The failure of the League of Nations directed attention to the need of education toward better understanding among peoples, and toward more support for the international organization itself.

CREATION. During the War, discussions took place among the Allied Ministers of Education in London, and in the United States unofficial studies were made. In April, 1944, a United States delegation headed by Senator Fulbright was sent to London to meet with the Allied Ministers, and presented a draft constitution for an international educational organization which, as modified by the Conference, was sent to the United Nations for study. Meanwhile, the Charter of the United Nations included "educational and cultural cooperation"; and the French delegation at San Francisco proposed an international conference which, at the invitation of the British Government, met at London on November 1, 1945. The general interest in and support for an education organization led to rapid meeting of minds, and in some sixteen days the Conference adopted the Constitution of a United Nations Educational, Scientific and Cultural Organization, to be located at Paris, and an Instrument establishing a Preparatory Commission to set up the new unit.[33]

PURPOSES. In general, the purpose of UNESCO is indicated by its name, though the United States Delegation made it clear that it was to function not merely in the fields listed in the title, but

> in all fields useful to the development of international understanding, including specifically the fields of mass communication between the peoples of the world by press, radio, and moving pictures, the exchange of publications, the access to library holdings on an international basis, international access to the fruits of scholarly and scientific research, cooperation in the advancement of knowledge, and all other means and methods of increasing the sense of the community of human life.[34]

The Preamble, which was regarded as an important statement, makes the central objective of UNESCO the realization of mutual understanding among peoples, and the development of means of communication between them to this end. These purposes are more fully stated in Article I of the Agreement.

ORGANIZATION. Members of the United Nations have "the right to membership" in UNESCO, and states not Members of the United Nations may be admitted by two-thirds vote of the General Conference, with the

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[33] *The defenses of peace; Documents Relating to UNESCO*, Parts I and II, Dept. of State Pub., Nos. 2457 and 2475 (Washington, 1946); *Hearings of the Committee on Foreign Affairs*, House of Representatives, on H. Res. 215, May 10, 15 and 17, 1945; *ibid.*, on H. J. Res. 305, April 3-5, 1946.

[34] *The defenses of peace, loc. cit.*, Part II, pp. 13-14.

approval of the Economic and Social Council. The provisions of the United Nations Charter with regard to suspension and expulsion apply to UNESCO automatically; no provision is made for withdrawal, but the situation of the United Nations in this respect would presumably be the same for UNESCO. The legal status of UNESCO is that provided by Articles 104 and 105 of the Charter. Amendments become effective upon two-thirds vote of the Conference, except those which "involve fundamental alterations in the aims of the Organization or new obligations for Members," in which case they must be submitted for "subsequent acceptance" by two thirds of the Members.

"The Organization shall include a General Conference, an Executive Board and a Secretariat" (Article III). The Conference is composed of delegates (five) chosen by their Governments "after consultation with the National Commission, if established, or with educational, scientific and cultural bodies." Each delegation has one vote, and decisions are taken by a simple majority except where a two-thirds majority is called for (submission of international conventions, inviting observers, proposal of amendments). The Conference is the chief organ; it determines policies, summons conferences, submits proposals to Members, elects the Executive Board, appoints the Director-General, considers reports from member states, and advises the United Nations within its field. A distinction is made between "recommendations," for which a majority vote is sufficient, and "international conventions" submitted for acceptance by states, which require a two-thirds majority. States are obligated to submit both recommendations and conventions to competent national authorities within one year, and to report periodically upon action taken to implement them.

The Executive Board consists of eighteen members elected from among the delegates by the Conference. They are required to act as representatives of the Conference rather than of their own governments, and are supposed to be experts; they are chosen for a three year term and are eligible for only one more term. The functions of the Board are to execute the program adopted by the Conference, to prepare its agenda, to recommend new members, to consult with other organizations, and to present the annual report of the Director-General.

The Conference chooses a Director-General, upon nomination by the Executive Board, who is responsible for selecting and instructing the Secretariat. Arrangements may be made with the United Nations for common services and interchange of staff personnel. The property rights of the League of Nations in the International Institute of Intellectual Cooperation are being transferred to UNESCO.[35]

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[35] *Official Records*, Economic and Social Council, First Year, Third Session (Oct.-Dec. 1946), Supplement 10, Annex 41.

Each Member is urged to form a National Commission [36] to advise its delegation. Each Member is required to report annually its laws and statistics with regard to educational, scientific, and cultural life, and the action taken by it in pursuance of recommendations and conventions. The Conference controls the budget and apportions financial responsibility among members. The constitution includes provision for cooperation with the United Nations with regard to "approval and financing of the budget," and with other specialized agencies and with non-governmental organizations. The agreement between UNESCO and the Economic and Social Council was approved by the General Assembly on December 14, 1946.[37]

The Preparatory Commission began its task of establishing the new institution early in 1946, and adopted a report in July.[38] The Constitution came into force, having received the requisite twenty ratifications, on November 4, 1946.[39] The first session of the General Conference met at Paris, which had been chosen as headquarters for UNESCO, on November 19, 1946. Dr. Julian Huxley was elected as the first Director-General, and three Commissions were organized: Program; Educational Reconstruction and Rehabilitation; Financial, Administrative, Legal, and External Relations. A budget of six million dollars was adopted, over protests that many million more were needed.[40] Over a hundred proposals were put before the Conference. Among those regarded as deserving immediate attention were educational rehabilitation in devastated areas (through voluntary funds), illiteracy, tensions leading toward war, free flow of information, and a tropical Institute of the Amazon.

§ 91. **World Health Organization.**—In the field of health, as we have seen, there has long been international cooperation and organization, on a scale broader than in any other field, and with less political interference. The reorganization of the health work after World War II was similarly non-political and successful. An International Health Conference, called by the Economic and Social Council, met at New York June 19-July 22, 1946, and adopted four instruments, signed by sixty-one states.[41] An

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[36] The first United States National Commission Report, together with a list of its members, may be found in *Dept. of State Bull.* XV (1946), p. 683.

[37] UN Doc. A/77, 30 September 1946; *Resolutions Adopted by the General Assembly*, UN Doc., A/64/Add. 1, p. 78. See also *Dept. State Bull.* XVI (1947), p. 250.

[38] *Dept. State Bull.*, XIV (1946), p. 432; XV (1946), p. 259.

[39] *Dept. State Bull.*, XV (1946), p. 1192.

[40] See the *Dept. of State Bull.*, XVI (1946), and three articles by Herbert J. Abraham in subsequent issues (pp. 374, 645); also *Int. Organ.*, I (1947) p. 362.

[41] See *Final Acts of the International Health Conference*, held in New York from 19 June to 22 July 1946, UN Doc. E/155. This contains the Constitution, the "Arrangement" setting up an Interim Commission, and the Protocol taking over the Office of Public Health in Paris.

Interim Commission of eighteen states set to work to build the new organization, which is to take over the League of Nations Health Organization, the Office of Public Health at Paris, and some of the work of UNRRA. Regional health organizations, such as the Pan American Sanitary Bureau, are to be integrated by mutual agreement.[42]

PURPOSES. The Preamble to the Constitution of WHO defines health as "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity," and regards the highest attainable standard of health as a right of every human being, fundamental to peace and security. Its objective is stated in Article 1 as "attainment by all peoples of the highest possible level of health," and a long list of functions to be exercised toward this end are stated in Article 2. Among these are "to act as the directing and coordinating authority on international health work"; to assist governments and the United Nations in various ways; to maintain epidemiological and statistical services; to promote nutrition, housing, sanitation, etc.; to encourage cooperation among scientific groups and advance research.

ORGANIZATION. Membership in WHO is open to all states, and those who were not initial members may be admitted by majority vote of the Health Assembly. Members who fail to meet their financial obligations may have their voting privileges and services suspended. Provision is made for admission of non-sovereign territories as Associate Members (Article 8). The Health Assembly decides upon the budget and apportions expenses among members. Each member has one vote; decisions on important matters (listed in Article 60) require a two-thirds majority of those present and voting, and other decisions a bare majority. Provisions as to legal status and immunities are as stated in the terms of the United Nations Charter, but are to be defined in a separate agreement among Members. Amendments must be adopted by two thirds of the Health Assembly and accepted by two thirds of Members. Disputes as to the interpretation or application of the Constitution are to be referred to the International Court of Justice.

The organs provided are a World Health Assembly, an Executive Board, and a Secretariat. Each Member may send three delegates to the Health Assembly, who should be technically qualified and preferably representing the national health administration. The Assembly is to meet annually and in various countries. It determines policies, decides upon Members to be represented in the Board, appoints the Director-General, instructs the

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[42] See articles by H. V. Z. Hyde in *Dept. of State Bull.*, XV (1946), pp. 453, 756. The Constitution is to be found in *ibid.*, p. 211.

Board as to action to be taken, supervises budget and finance, brings matters of health to the attention of Members (through the Board or Director-General) considers recommendations bearing on health made by other organizations, promotes research, etc. It may adopt conventions or agreements for submission for ratification by Members, and Members are obligated to act upon them within eighteen months. It is given authority to make regulations with regard to sanitary and quarantine requirements and other procedures to prevent the spread of disease; to adopt nomenclature with regard to disease, causes of death, and public health practices, and standards with regard to diagnostic procedures and with regard to safety, purity, and potency of biological and pharmaceutical products moving in international commerce; and concerning labeling and advertising of such products. Such a regulation is binding upon members unless they reject it within the time limit stated in the notice. In no other organization has as much legislative power been granted, or as much expert representation asked, though sovereignty remains fully respected.

The Executive Board is composed of persons designated by eighteen states selected by the Assembly and technically qualified in the field of health. Their term of office is three years, and they may be reelected. The Board is to meet twice a year, at places designated by itself. It acts as executive organ, carries out functions assigned by the Health Assembly, submits proposals to and prepares agenda for the Assembly; and it is authorized to take emergency measures to combat epidemics and to share in health relief in calamities. The Director-General is appointed by the Health Assembly on nomination of the Board. He is the chief technical and administrative officer of WHO; he prepares the budget, and appoints the staff. He is authorized to arrange with Members a procedure of direct access to their various health administrations and organizations, with other organizations and with the Regional Offices.

A unique chapter is devoted to Regional Arrangements. The Health Assembly may define areas and, with the consent of Members in such an area, establish in it a Regional Committee and Office. Such regional organizations are integral parts of WHO, and their rights and duties are to be determined by the Health Assembly in consultation with Members in the area. All existing regional organizations are to be brought under the administration of WHO.

WHO is one of the specialized agencies, and the agreement by which it is to be brought into relationship with the United Nations requires approval by two-thirds vote of the Health Assembly. It may (Article 70) make agreements with other international organizations, may cooperate with non-governmental bodies, and may take over functions and resources within its field from other organizations.

§ 92. **International Trade Organization.**—Trade between nations is essential; in a world of interdependence and specialization, life and prosperity depend upon it. It is perhaps because of this very importance that nations have kept trade under severe national restrictions, but the results of such restrictions have been disastrous. For many years, efforts have been made toward better regulation of such trade but, while experts could and did agree upon recommendations, nations would not put them into effect.[43] The Atlantic Charter proposed "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"; and in the Lend Lease agreements made with the United States there was a commitment to eliminate discriminatory treatment and to reduce tariffs and trade barriers. Within the United States, the long struggle over the reciprocal trade agreements illustrated the controversial character and difficulty of the problem.

The United States had devoted a great deal of study to this problem, and in November, 1945, had prepared "Proposals for Expansion of World Trade and Employment."[44] This noted that international trade is kept small by four things: (1) restrictions imposed by governments; (2) those imposed by private combines and cartels; (3) fear of disorder in the markets for primary commodities; (4) irregularity in production and employment. Recommendations were made for each of these situations, and a conference was suggested to meet in 1946. The Economic and Social Council of the United Nations called for such a conference in February, 1946, and set up a Preparatory Committee to plan for it. For this meeting, the United States revised its earlier Proposals into a Suggested Charter for an International Trade Organization,[45] which served as a basis of discussion for the first meeting of the Preparatory Committee, in London, October, 1946. The Report of this meeting accepted a very large part of the United States Proposals, and added a new chapter on Economic Development, which lays down various principles of governmental aid and international cooperation. The chief problem to be faced is how to allow national protection of industrial development and at the same time to reduce trade barriers effectively. Chapter III deals briefly with employment, which of course depends heavily on the development along other lines. Chapter V deals at length with reduction or elimination of barriers to trade,

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[43] An excellent summary of the background of this problem is to be found in a pamphlet by E. G. Mears, *A Trade Agency For One World* (New York, Citizens Conference on International Economic Union, 1945). An example is the World Economic Conference of 1927.

[44] Dept. of State Pub., No. 2411; see articles in the *Dept. of State Bull.*, XIV (1946), pp. 403, 455, 509, 561, 616, 630, 647.

[45] Dept. of State Pub. 2598; summarized in *Dept. of State Bull.*, XV (1946), p. 585.

Chapter VI with Restrictive Business Practices, and Chapter VII with Intergovernmental Commodity Arrangements.

ORGANIZATION. The provisions for organization are found in Chapter VIII. There would be a Conference, to which each Member would belong, and it would have final authority to determine policies. Members agree to act, within 18 months, upon recommendations submitted by the Conference. An Executive Board is planned, but there was so much disagreement as to its choice that four alternative methods were offered. Three Commissions are to be created by the Conference: on Commercial Policy, on Business Practices, and a Commodity Commission. The members of these Commissions are to be experts, chosen by and responsible to the Executive Board. There would be also a Director-General and Secretariat, whose conditions of service would be in conformity with those of the United Nations and other specialized agencies. The ITO is to cooperate with other agencies, may make use of non-governmental bodies, and may absorb other international organizations by agreement with them. Legal status necessary for the fulfilment of its purpose is granted, and immunities for its personnel. Amendments of the Charter may be made by a two-thirds vote of the Conference, except where such amendments would involve new obligations upon Members. In this case, the amendment would be effective for the Members which had accepted it, granted a two-thirds majority, and other Members might withdraw or be obliged to withdraw by decision of the Conference. Disputes arising under the Charter would be submitted to the Executive Board, but justiciable disputes[46] must be submitted to the International Court of Justice if any party so demands. Each member is to contribute toward expenses as determined by the Conference, and may be deprived of its vote if it falls into arrears. A right of withdrawal is stated.[47]

It should be noted that, at this writing, the Charter of the ITO has not been adopted. It is to go into effect when twenty states have ratified it. The Preparatory Commission held its second meeting at Geneva in April, 1947; and the International Conference on Trade and Employment was scheduled for the fall of that year.

§ 93. International Refugee Organization.[48]—Reference has been made earlier to the large problem of displaced persons and refugees following World War I, and to the various efforts made to deal with it. Though

[46] See p. 231, *supra*.

[47] The Charter may be found in *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, UN Doc., E/PC/T/33, London, October, 1946.

[48] The Constitution of IRO, and action of the General Assembly concerning it, may be found in *Resolutions of the General Assembly*, No. 62 (I), Annex; see also *Report of the Economic and Social Council to the General Assembly*, UN Doc.,

some aid was given, no permanent solution was ever found, and the situation became far worse after World War II. At the end of 1946, over a million persons remained unplaced in Europe, and many more millions were displaced in Asia.[49] The desperation of these people not only called for relief on an international scale, but aroused political issues and dangers —as, for example, the determined efforts of Jews to enter Palestine.

The General Assembly, at its first session, recognized the importance of this problem. The Economic and Social Council submitted a draft constitution for an International Refugee Organization which, by vote of the General Assembly in December, 1946, was submitted to member states for acceptance. A Preparatory Commission was set up, which began its work at Geneva in February, 1947.

ORGANIZATION. Members of the United Nations have a right to membership in IRO, and other peace-loving states may be admitted by a two-thirds vote of the General Council. The organs are, as usual, three in number: a General Council, to which all Members belong and which is the policy-making organ; an Executive Committee consisting of representatives of nine members chosen by the General Council; and a Director-General and staff. Three budgets are provided for—administrative, operational, and large-scale resettlement—and members agree to contribute to the first two as decided by the General Council. Contributions toward large-scale resettlement are on a voluntary basis. The first proposed budget called for $4,800,000 for administration, $151,060,000 for operation, and $5,000,000 for large-scale resettlement. The share of the United States was 39.89% of the administrative budget, but 45.75% of the operational cost.

Amendments are effective when approved by two thirds of those present and voting in the General Council, but no amendment which creates a new obligation is binding upon a Member which has not accepted it. Provision is made for cooperation with or absorption of other international bodies within its scope of action. Disputes as to interpretation or application of the constitution must be referred, ultimately, to the International Court of Justice.

The IRO was set up rapidly because of the need which would arise when UNRRA ended its operations in the middle of 1947. It is to come into force when accepted by 15 states, whose contributions amount to 75% of the operational budget. It is regarded as a temporary unit of the United Nations system, and it is hoped that its work will be terminated in four or five years.

A/125; *Int. Organ.*, I (1947), pp. 137, 359; *Dept of State Bull.*, XV (1946), p. 935, and XVI (1947), p. 423.

[49] *Hearings before the Committee on Foreign Relations*, 80th Congress, 1st Session, March 1, 1947, p. 33; UN Doc., A/127.

FUNCTIONS. As stated in Article 2, the functions of IRO are: repatriation; identification, registration and classification; care and assistance; resettlement and reestablishment. These functions are to be exercised with regard to certain categories of persons carefully defined in an Annex. Very great difficulties, political and emotional in character as well as technical, were involved in these definitions: should certain persons be required to return to their own countries? should certain countries be required to receive some of these persons? should quislings and war criminals, or enemy persons, be assisted? In general, what is a displaced person? Further difficulties appear as to the administration of funds, since the United States must contribute the larger part of the finances, and its Congress seems disposed to set conditions upon their use.

§ 94. A Coherent System?—At the beginning of this Chapter there was a discussion of the general question of centralization as against decentralization in international organization. Having surveyed briefly the structure and functioning of the various specialized agencies, we may now inquire as to the extent to which, when considered together with the United Nations itself, all these various international institutions may be regarded as constituting a coherent or unified whole.

CHARTER PROVISIONS. The Charter manifestly contemplated the separate existence of certain international bodies "having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, health, and related fields"; indeed, Article 59 authorizes it to initiate new ones. It was as clearly intended that these bodies should be coordinated in some way. Article 57 provides that they "shall be brought into relationship with the United Nations"; Article 58 that the Organization "shall make recommendations for the coordination of the policies and activities of the specialized agencies." This is to be accomplished largely through agreements to be entered into between the Economic and Social Council and each agency (Article 63). The Economic and Social Council is in general made responsible for such coordination, "under the authority of the General Assembly" (Article 60); it may coordinate these activities through consultation and recommendation, through reports from each agency and comments to the General Assembly upon such reports (Article 64); through reciprocal representation (Article 70), and in other ways to be laid down in the agreements.

At its first session, then, the Economic and Social Council set up a Negotiating Committee, and invited five of the agencies to set up corresponding committees to conduct negotiations.[50] The Bank and the Fund,

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[50] *The Economic and Social Council of the United Nations,* Dept. State Pub., No. 2600, July 15, 1946.

not being sufficiently organized and being in any case in an exceptional situation, were not ready to make such an agreement; ILO, FAO, and UNESCO did make agreements, which were approved by the General Assembly. Since then, ICAO has made its agreements, and others are in progress. These agreements are all similar, and their contents have been summarized in an official United States report as follows:

> (1) those establishing the fundamental relationship between the United Nations and the agencies, which include the articles recognizing the competence of the agencies in their particular fields; reciprocal representation; membership; proposal of agenda items; recommendations of the General Assembly and the Council; exchange of information and documents; relationship to Security Council, Trusteeship Council, International Court of Justice; budgetary and financial arrangements; and inter-agency agreements;
>
> (2) those providing for administrative and technical cooperation, which include the articles on statistical services; headquarters and regional offices; personnel arrangements; administrative and technical services; financing of special services; liaison; and
>
> (3) those establishing the status of the agreements themselves, which include articles on implementation of the agreements; revision; and entry into force.[51]

A resolution offered by the United States and adopted by the Council on September 21, 1946, established a committee on coordination "to insure the fullest and most effective implementation of the agreements entered into between the United Nations and the specialized agencies."[52]

Means of Coordination. Taking into consideration the Charter of the United Nations, the constitutions of the various agencies, and the agreements which have been made, certain fairly uniform means of coordinated activity between the United Nations and the various agencies may be shown.[53] In the first place, the United Nations will be engaged in study of numerous problems, from which study will emerge matters which can be referred to a particular agency working in that field. The Economic and Social Council may make recommendations concerning such matters to the agency or agencies involved, or to Member states, or to the General Assembly, and it may consult with the agencies for this purpose. An uncertain phrase of Article 64 entitled the Economic and Social Council to "take appropriate steps to obtain regular reports from the specialized

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[51] *Ibid.*, p. 21.

[52] Economic and Social Council, *Official Records*, First Year, Third Session, p. 43; also Supplement No. 2, Annex No. 5.

[53] It should be noted that the points here made, while generally uniform, do not necessarily apply in all cases. Some of the agreements have not yet been made, and there are some slight variations in those which have been made.

agencies"; the agreements provide that such reports shall be made. The Council may transmit to the General Assembly its observations upon these reports and, though neither has authority to require action, its critical comment will have great influence upon the decisions of the agency.

The specialized agency agrees to put upon its agenda items referred to it by the United Nations; reciprocally, the Economic and Social Council and its commissions and the Trusteeship Council are to include on their agenda items proposed by the agency. Formal proposals by the United Nations to any agency are to be acted upon as soon as possible by that agency, which is also to consult with the United Nations and to report to it the action taken to give effect to such a proposal. In order to further this cooperation, representatives of the United Nations are entitled to sit, without vote, in the deliberations of the agency; and representatives of the agency may participate, without vote, on matters "within the scope of its activities," in meetings of the General Assembly and the Economic and Social Council and their commissions or committees, and the Trusteeship Council. Written statements may also be distributed, through the United Nations Secretariat, to Members and organs of the United Nations. Regular exchange of information (presumably all documentation) is provided for, and special information asked for is to be supplied. The specialized agencies, according to Article 66 of the Charter, may ask the Economic and Social Council to perform services for them.

The specialized agencies agree to cooperate with the Security Council, "including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security"; and with the Trusteeship Council in carrying out the functions of the latter organ. The agreement contains an authorization from the General Assembly to request advisory opinions from the International Court of Justice "on legal questions arising within the scope of its activities other than questions concerning the mutual relationship of the Organization and the United Nations or other specialized agencies." The agency is also to furnish information to the Court when requested by the Court to do so.

The idea has been advanced of a consolidated budget for all United Nations organs and specialized agencies. There would be certain obvious advantages and conveniences in such an arrangement, but it would also mean more control by the United Nations over the specialized agencies, and they have so far been unwilling to put themselves under the United Nations budget. Article 17 of the United Nations Charter authorizes no more than examination of the budgets of the agencies "with a view to making recommendations to the agencies concerned." Thus the United Nations has no authority to change an agency budget, though its recommendation would be of powerful influence. The agreements provide that there shall be consultation with the United Nations in the preparation of annual bud-

gets, and for consultation as to future inclusion of the agency budget in the budget of the United Nations. Indeed, it is agreed that as a matter of principle "close budgetary and financial relationships" are desirable for efficient and economical operation. Meanwhile, each agency will submit its budget annually to the consideration and recommendations of the United Nations, and will consult with and exchange representatives to meetings for discussion thereof. The United Nations may arrange to collect for an agency contributions from states which are members of both organizations.

A further field of cooperation is with regard to technical services and personnel. Close coordination is provided for with regard to the collection, analysis, and publication of statistics. Information is to be exchanged on a very broad basis. In financial and budgetary arrangements standard practices set by the United Nations are to be followed. The agreements recognize the desirability "in the interest of administrative and technical uniformity and of the most efficient use of personnel and resources" of avoiding competitive or overlapping facilities and services.

There would seem to be a particularly useful field for cooperation with regard to the staffs of the various bodies, and the provisions concerning them. The Preparatory Commission in November 1945 recommended that there should be established an International Civil Service Commission, to advise as to common standards; and this recommendation was approved by the General Assembly in February 1946. A working committee was set up to plan this Commission, which would have some distinctive problems. The International Civil Service, when established, will seek to obtain some uniformity with regard to standards and methods of recruitment, salaries, leave, retirement and insurance, advancement, complaints, and similar matters. A central file of candidates for appointment could be maintained, and transfers made possible from one institution to another; to some extent, and informally, this is now being done.

Uniformity. All the agencies are built to follow closely a common pattern, structural and functional. They all have three organs: a conference which is controlling; an executive board, usually chosen by the conference, and a director and staff. They were made in much the same way, through conferences usually called by some Member, which conference drafted a constitution, and created an interim organization. When a specified number of ratifications had been obtained, the permanent organization was established. None of the specialized agencies has any power of legislation. Only the WHO can issue so much as administrative regulations, and these are subject to rejection by any member. Each agency may submit draft conventions which are binding only upon those who ratify them. Few provide any sanctions or penalties, but several of them require a report on action taken in pursuance of obligations. In general, membership is open

to Members of the United Nations and to others if they were not Axis sympathizers. A right of withdrawal is sometimes stated and sometimes unmentioned, but never denied. Voting is on the basis of equality, except in the Fund and Bank, and always by a majority which varies for different purposes. Financial support comes from contributions by members according to a scale laid down by the conference organ. All are given a legal status and privileges and immunities in varying degrees. All state the same requirement of loyalty and conditions of service for the staff, and provide in much the same way for relationships with other organs.

Some provision is also made for cooperation among the agencies themselves and with other bodies, including non-governmental ones. There is an obvious interconnection and interdependence: the effort of the ILO to raise standards of living would depend upon the success of the ITO in building up economic prosperity; the efforts of the FAO to improve the agricultural situation in Greece might depend upon loans made by the Bank for irrigation or transportation purposes. Representatives or observers from one agency may attend meetings of others; there may be conferences or common committees; et cetera. Their membership is largely the same, with some variations; and their members are usually also Members of the United Nations. A state which follows a certain policy within one body will presumably follow the same policy in others; consequently, it may reasonably be hoped that recommendations made by the General Assembly would set a policy which would be harmoniously followed throughout all the specialized agencies, as well as within the United Nations organs.

It is apparent that a great deal of progress has been made toward common methods and cooperative action. Organizational jealousy and pride of personality will doubtless slow up this development, and difficulties will occur because of variations in function, membership, etc. The Committee of Coordination will doubtless have to study the powers of each group, to see what friction or overlapping or omission needs to be remedied, to find ways of reducing expense and of increasing efficiency through common action, and to channel policy. A question of United Nations policy has also been raised through the action taken in calling a conference to establish IRO, and more particularly by its creation of the Economic Commissions for Europe and the Far East, as organs of its own, in the face of a recommendation by the European Central Inland Transportation Organization that a specialized agency be created.

In general, it may be said that, while the specialized agencies retain autonomy and while the United Nations has no authority to require performance from them, the relationships thus far established justify one in speaking of a United Nations system, of which the specialized agencies are a part. The question of centralization or decentralization is not one

of black or white, but one of degree. To use the words of Mr. Winant, "It is to be anticipated that by way of these agreements an integrated pattern of economic and social endeavor will be evolved which, while achieving coordination and unity of purpose, will allow a desirable measure of flexibility and decentralization of responsibilities." [54]

[54] *The Economic and Social Council of the United Nations: Report by the Honorable John G. Winant, July 15, 1946. Dept. of State Pub.*, No. 2600, p. 25.

PART V

We have recorded the slow and frequently unconscious development toward government in the community of nations. We have seen law evolving through custom and treaty, and methods and agencies developed by sovereign states for carrying on the increasingly needed intercourse between them. We have noted the effort to establish the League of Nations as an overall and centralized body and seen that it was a skeleton of government which was not given the life blood of authority to make and enforce law.

The League did not succeed, and the problem of control over war remains the most pressing of the many which today confront harassed humanity. To uproot so ancient and established an institution as war is no easy task; it will require much study, approach from various directions, and wide reconstruction of the society of nations.

We have, therefore, reserved for separate study the problem of the control of war. We shall first attempt to analyze the problem in relation to the various proposals and efforts heretofore made; then consider the experience of the League of Nations in this respect; then study the United Nations security system; and finally survey briefly current trends of thought looking toward world government.

CHAPTER 15

THE PROBLEM OF WAR

§ 95. **What is War?**—International lawyers have never been able to provide a satisfactory definition of war. The earlier writers thought of it as a means for settling a dispute as to rights; the path of approach in the minds of these writers was the "just war." It was with the problem of the justice of the war that Grotius was concerned, and Vitoria and Suarez, followed by Vattel and others, asserted that the justifiable cause of war was a wrong received. But this did not answer the question: the definition of war, and the moral or legal justice of war, are different matters. International lawyers, called upon by national sovereignty to justify its actions, but unwilling to legalize immoral acts, abandoned the attempt to say what is a just or a legal war, and accepted war as a sad fact. International law neither acknowledged nor denied war; it was simply a happening beyond the power of law to control, like an earthquake, or fire. The law of nations has contented itself, until our own day, with efforts to ameliorate the horrors of war by making rules for its conduct.[1]

In the broad sense, war is simply the use of force between states. It has been beyond law, and was therefore incapable of legal definition. Clausewitz, the master of military science, described it as means, a political instrument, through which a state seeks to achieve its purposes. It is a weapon, which may be used for good purposes or for bad purposes, and international law, not being competent, raised no question as to the legitimacy of its purpose or of its use. It might be a defence of a legal right; it might be a brutal act of aggression. But international law was forced to take into account its existence and its results, and has tried to circumscribe it in various ways, such as regulation of the methods to be employed once war is started or by attempting to regulate the effects of war upon neutrals or belligerents and their nationals.

A Legal Status. It may be said, therefore, that a legal status was created by the existence of war. When war is begun, many changes in the law between nations automatically occur. The law of war and the law of neutrality to a large extent replace the law of peace. Insurance or other

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[1] See Wm. B. Ballis, *The Legal Position of War: Changes in its Practice and Theory from Plato to Vattel* (The Hague, 1937).

contracts may become operative or inoperative; rules as to contraband and blockade go into effect; ordinary acts of trade may become illegitimate and subject to heavy penalties. Individuals or states may stand to gain or lose because of the incidence of the new rules. It matters a great deal, for this and other reasons, to know the exact moment when the legal status of war begins and ends.

But international lawyers have not been very successful in saying when this metamorphosis occurs. Professor Wright, in his exhaustive treatise on war, defines war in its broadest sense as "*violent contact* of *distinct* but *similar* entities," and its narrower and more useful sense as "the *legal condition* which *equally* permits two or more *hostile groups* to carry on a *conflict* by *armed* force." [2] According to Hyde, war "may be fairly described as a condition of armed hostility between states," [3] and this definition is more in harmony with the actual facts than many definitions, narrower in scope. But is every status of armed hostility to be called war? "There must be," says Wright, "at least two parties to a war, and in law one or both of them must have intended war. A state of war can not, in legal contemplation, flow from accident or negligence." [4] Is intent, then, an essential part of a legal definition of war? It may be asked, first, whether a declaration of war is necessary. Except possibly for states bound by the third Hague Convention of 1907, the answer must be negative. There is no general rule of international law which forbids a surprise attack. Failure to acknowledge intent to make war might mean certain advantages resulting from the inapplicability of the laws of war.[5] Apparently, declaration by one party is sufficient to create a legal status of war, though it does not seem reasonable to burden the community of nations with the consequences of the status of war simply upon the declaration of one party.[6]

Acts of War. If there is no declaration of war, how is it possible to determine whether the legal status of war exists? The action of the Marines of the United States in Nicaragua was not, technically, war; the bombardment and seizure of Corfu by Italy was denied by her to be war,

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[2] Wright, *Study of War*, I, p. 8.

[3] Hyde, III, § 597; See also C. Eagleton, "The Attempt to Define War," *Int. Con.* No. 291, June, 1933; A. D. McNair, "The Legal Meaning of War and the Relation of War to Reprisals," *Grotius Society*, X (1925), pp. 29-50.

[4] In Q. Wright, "Neutrality and Neutral Rights following the Pact of Paris for the Renunciation of War," *Proc. Am. Soc.*, 1930, p. 79. See also C. Eagleton, "The Form and Function of the Declaration of War," *A.J.*, 32 (1938), p. 19; Q. Wright, "Changes in the Conception of War," *ibid.*, 18 (1924), p. 765.

[5] For this reason, states sometimes prefer to describe their forceful action as "intervention" rather than as war.

[6] Or, for that matter, upon the declaration of both parties. The status of war may apparently be found where the declaration is accompanied by no warlike measures whatever. Thus a number of states which declared war against Germany offered little if any military or naval aid against her in either of the World Wars.

nor did Greece allege it to be war. Armed intervention is not necessarily war—in the opinion of some writers it ceases to be intervention when it becomes war. Writers have, in a laudable effort to delimit war, differentiated between war and other "non-amicable modes of settlement," leaving it possible to take forcible action in support of rights—or of ambitions—without bringing into play legal war.[7] Nevertheless, certain acts are apparently recognized as producing war, regardless of declaration. European states accepted the blockade of the Confederate ports by the United States as sufficient evidence that the law of war was in effect, and they consequently assumed the position of neutrals. An English court, at the outbreak of the Spanish-American War, considered the capture of one Spanish vessel sufficient proof that war existed.[8] It is usually said that an act of force, without formal declaration, does not bring about the status of war unless it is regarded as war by the state against which the act is directed. If the latter takes up the challenge and calls it war, then the law of war becomes operative. Thus there may be acts of war without a state of war—a distinction which appeared in Article 16 of the Covenant of the League.

Manifestly there is much confusion, often manifested in judicial decisions, as to what constitutes war. Yet, if one is to control or "outlaw" war, it is a matter of primary importance to know what war is.[9] Certainly, in future legal development, the distinction between war and other forcible measures must be considered. The end of preventing the use of force between states will not have been attained if war is prohibited but defined in a narrow sense, leaving states free to indulge in "acts of war" not amounting to technical war. On the other hand, if forcible intervention alone, rather than war, is prohibited, states which wish to use force will be

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[7] "It is urged that the political and judicial departments of each Government recognized the other as an enemy; that battles were fought and blood shed upon the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each Government from the other and 'held for exchange, punishment or retaliation, according to the laws and usages of war.'" The Supreme Court held that such acts did not constitute public war, "but limited war in its nature similar to a prolonged series of reprisals." *Wm. Gray, Administrator, v. U.S.*, 21 Ct. Cl. 340 (1886).

[8] "I will state why it is a fact that a state of war then existed. An act of hostility had been committed on April 22 by American men-of-war against Spanish traders, or, at all events, against one Spanish trader, which act, in my opinion, was only consistent with the existence of a state of war. Further, on April 22, the American President issued a proclamation in which he declared a general blockade of Cuba . . ." *U.S. v. Pelly*, 4 Commercial Cases 100 (1899).

[9] In the debates of the Committee for the Amendment of the Covenant of the League of Nations in order to Bring it into Harmony with the Pact of Paris, Dr. von Bulow (Germany) remarked: "Governments naturally desired to know what was war in the old sense—now prohibited—and what was police action. A definition of war did not exist, and it was not for the Committee to insert one in the Covenant." *Minutes*, p. 31, 1930.V.10.

compelled to go to the extreme of war in order to achieve their ends. If a law is to be made forbidding war, war must be clearly defined, or else the law must state what uses of force are to be illegal.

Self-Defence. The same problem appears when the effort to control war is directed along the line of determining whether it is a "just" or an "unjust" war. In recent times opinion has returned to the attempts made by Grotius and his followers to forbid unjust wars, but no satisfactory criterion has yet been found. The defence of a right has always been regarded as justifiable; unfortunately, there has been no means provided for determining whether or not it is a right, and states have not been willing to wait upon the arbitrament. It might be possible to establish a rule compelling states to wait for a decision, but if the decision is to be enforced by war against the defeated party, only strong states could be sure of enforcement, and the ends of justice would not be served. Self-defence, or, on the other hand, aggression, has been tried and found wanting; a special committee of the Temporary Mixed Commission, assigned to study the definition of aggression, came to the conclusion that "no satisfactory definition of what constitutes an act of aggression could be drawn up." [10] It is manifest that if aggression is simply first attack, the party having a just complaint would frequently be the aggressor. Indeed, if aggressive war only were forbidden, it would be impossible for the community of nations to apply its sanctions against the offender, if military sanctions are regarded as war. There are numerous cases in which self-defence should be deemed illegal, and numerous cases in which an aggression should not only be legal but a duty.

Sanctions not War. While it is uncertain just what forms of the use of force deserve to be called war, one essential element of a definition is historically established. For many centuries, war has been the prerogative of the state: war is the use of force (however limited) by a state against another state. To forbid war, then, is to forbid to states the right to use force for their own purposes—as an "instrument of national policy." Such a prohibition cannot apply to the use of force, as a sanction, by the organized community of nations, and such a use of force should not be called war, but police action.[11]

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[10] *Records of the Fourth Assembly*, 1923, p. 184. See C. Eagleton, "The Attempt to Define Aggression," *Int. Con.*, No. 264 (1930); *Research in International Law*, Draft Convention on Rights and Duties of States in Case of Aggression (1939); Q. Wright, "The Concept of Aggression in International Law," *A.J.*, 29 (1935), p. 373.

[11] If the Security Council of the UN were to call upon Members for forces and employ them against an aggressor, this would be something quite different from war. If one state should, without authorization from the UN, use force against another, this might be war. The status of action undertaken under Article 51 of the Charter is as yet uncertain.

§ 96. **Analysis of the Problem of War.**[12]—It is only within the last half-century that people have begun to think seriously of the possibility of eliminating the scourge of war. For centuries, the average person accepted war as the peasants of the *ancien régime* accepted their hard lot, regarding it as a providential visitation to be compared with plague or flood or fire. But these things have been brought by human intelligence under a large degree of control; why cannot the same be done for war? The terrible cost of modern war, of which we have spoken earlier, has spurred on the effort. The lessons of the two World Wars, whose cost can never be repaid, was final proof of the argument advanced by Norman Angell that there is no gain possible in war.[13] Earlier efforts were, however, misdirected, and much energy was wasted on ill-considered and fantastic proposals. It is not enough to teach hatred for war, for war will not disappear simply because it is hated. Nor is it enough to say that hate produces war, for the opposite is more true; nor that war is due to love of glory and martial fanfare, and that soldiers should therefore be dressed in brown derbies; nor that munitions makers, or bankers, or other scapegoats should be put into the first ranks of battle; nor that it must be disregarded and left to die. There are no such single solutions; the problem is far wider and far deeper.

Why War? The first point to note is that war is not an end in itself. Few if any persons or nations instigate war solely for the purpose of making war. War is a means for achieving an end, a weapon which can be used for good or for bad purposes. Some of these purposes for which war has been used have been accepted by humanity as worthwhile ends; indeed, war performs functions which are essential in any human society. It has been used to settle disputes, to uphold rights, to remedy wrongs; and these are surely functions which must be served. They may, indeed, be stated as the primary functions of government, but no government has been provided among nations, nor any other means, except war, for serving these fundamental needs. One may say, without exaggeration, that no more stupid, brutal, wasteful or unfair method could ever have been imagined than war for such purposes, but this does not alter the situation. Intelligent human beings have provided no other method, and they have only themselves to blame.

From the above, the conclusion inescapably follows that war will not cease until a substitute for it is in operation which can, at least as satisfactorily as war, perform these necessary functions. A state can not be expected to give up the use of war, nor would its people permit it to do

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[12] The material for this discussion is drawn largely from C. Eagleton, *Analysis of the Problem of War* (New York, 1937).

[13] Norman Angell, *The Great Illusion* (4th Am. ed., New York, 1916).

so, unless there were some other adequate means by which that state could settle its disputes, uphold its rights, and remedy its wrongs. The whole purpose of the state is to protect and advance the interests of its people: it would not be permitted by its people to surrender the means now at its disposal, incompetent as they may be, until other satisfactory means of caring for the interests of its people have been put into operation.

We must go deeper into the problem than this, for it reaches into the fundamental values of human life. The question is sometimes asked: is war ever worth while? is there anything more important than peace? The answer which history gives is that there are certain things for which human beings have always been willing to fight. We may sum them up in the word "justice"; and immediately the question arises, what is justice? Without debating this abstractly, the answer relevant to this discussion is that justice is whatever the organized community, through its laws and courts, says that it is. In the absence of such a decision in the community of nations, it may be expected that each nation will continue to make war to gain what it regards as justice for itself.

Thus, what is involved is much more than the mere prevention, or absence, of war; the mere elimination of war would not accomplish what human beings desire. Force seems to be an essential part of life, at least until that happy day arrives, dreamed of by philosophical anarchists, when each person will know and respect the rights of others, and force will not be used among men. Until that happy day, the problem will be one of controlling the use of force among nations so that it will be used for desirable rather than undesirable ends. The solution to that problem as between individuals has been to make force a monopoly belonging to the organized community.

There are thus many approaches to the problem of war, and all must be taken into consideration. If war is now an assurance of security, then confidence in security must be provided in some other way. If war is a means of self-defence, then other means of defence must be provided. If war is rooted in human psychology, it must be slowly uprooted. If justice is to be obtained only by war, some other way of guaranteeing justice must be found. If the existence of war is part of the economic system, it must be taken out with due consideration for economic effects.[14] And if war has legal bases, the necessary legal consequences of its elimination must be studied. The task is not merely one of destruction, the abolition of war. That would leave a vacuum which must be filled; substitutes must be found for the services which it performs. It is precisely this constructive aspect of the problem that has so far frustrated human agreement.

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[14] As to war in its economic effects, see E. Silberner, *The Problem of War in Nineteenth Century Economic Thought* (Princeton University Press, 1946).

§ 97. **Previous Efforts at a Solution.**—Various proposals have been offered or attempted in the effort to get rid of war. It will help to understand the problem if we examine some of these proposals and test them against the analysis above made. We shall then be better able to reach conclusions as to the manner in which war can be brought under control.

DISARMAMENT. The greatest effort so far put forward for the purpose of escaping the burden of war is doubtless that looking toward disarmament.[15] The American people and government for long supported this as a panacea; the League of Nations made intensive studies and exhaustive efforts to reach agreement, all of which were fruitless. For this, there were two general reasons: the technical difficulties, and the inconsistency in principle of the proposal. Space can not be taken here for discussion of the technical problems involved; it is uncertain whether they could have been solved if other difficulties could have been overcome.

Worse than the technical problems, however, is the matter of logic and principle involved. To disarm is to put the cart before the horse. No state can afford to disarm so long as war is the only means by which it can uphold its interests as against other nations. If war were not used, there would be no need for arms, and disarmament would be automatic and doubtless precipitate, for no state wishes to spend three-quarters of its taxes upon arms; but so long as war exists, armaments must be maintained, at whatever cost. This logic is undeniable, and was proven by the experience of the disarmament effort. The First Hague Peace Conference (1899) was called to reduce "the staggering burden of armaments"; instead, it issued the Convention for the Pacific Settlement of International Disputes, and established the Permanent Court of Arbitration. The Second Hague Conference (1907) was sought for the same purpose, but disarmament was finally dropped from its agenda. The Covenant of the League of Nations called for reduction of armaments (not disarmament), and the League held hundreds of meetings in an impressive effort to reach agreement. Yet its whole history can be summed up in the change of the name of one of its committees, which started as a committee on Reduction of Armaments, and ended as a committee on Arbitration, Security, and Disarmament. The latter order of words represents the evolution of the thinking of the League.

There were two approaches to the problem: the direct method, pursued by the United States and later by the Soviet Union, which held that the way to disarm is to disarm; and the indirect method, which regards disarmament as dependent on security. This latter principle, logically inevitable, dominated all subsequent efforts, and made impossible agreement

[15] The disarmament effort is more fully discussed at §§ 101 and 112, *infra*.

at the Conference on Reduction and Limitation of Armaments[16] (1932), even though the draft treaty there proposed invited states to write in whatever limits they were willing to state.

Arms do not cause war; it is war which produces arms. The effort to regulate the private trade in arms, so popular in the United States in the 1930's, is still further away from the mark. The effort may be worth while from the viewpoint of such financial saving as could be effected by minor reductions, or from the psychological viewpoint of encouraging confidence among nations. But disarmament, even if complete, would not solve the problem of war; it would provide no means for settling disputes, for upholding rights, or for remedying wrongs. Men would still fight with fists and sticks and stones. If war is to remain the means by which intelligent human beings are to serve these purposes, then it will be the duty of each state to build its warmaking power to the greatest strength possible.

THE CAUSES OF WAR. It is frequently observed that war can be eliminated only by removing the causes of war, and to many people international organization and law therefore seems useless. No plan has ever been proposed to accomplish this worth-while end, and it may safely be assumed that those who advance the idea have not thought it through. It is an idea urged most strongly by those who are convinced that substitution of another system for the capitalistic economy would automatically remove the causes of war, those causes being economic ones.

It is of course most desirable to remove the causes of war, but this is no easy task, to be accomplished by saying *"Presto change."* Much dispute exists in the first place as to what are the causes of war,[17] and this raises a question as to the authority which is able to determine them. Each party to a dispute would doubtless insist that his cause was real while that of his opponent was unreal. Assuming that the causes of war could be ascertained, it would appear that they could be removed only by an authority of overwhelming strength. If communism were declared to be a cause of war, it would not be lightly surrendered by those who believe in it; nor would capitalism. And if, by some providential intervention, all causes of war were removed today, a thousand new causes would develop tomorrow, for the causes of strife are ever changing.

One must conclude that the causes of war can be eliminated only by a powerful international government, continuously at work, able to decide authoritatively what is a cause of war, to legislate or otherwise provide a remedy, and to enforce its decisions upon those who disagree. So long as

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[16] See pp. 409-440, below.

[17] See Q. Wright, *A Study of War* (Chicago, 1942), Vol. II, Ch. XIX, and elsewhere. Professor Wright concludes that the cause of war is the absence of law and organization to control war.

nations exist, there will be causes of strife between them, and this would be true of the most perfect communistic theory; and when there are no longer nations, causes of strife and the use of force as between individuals will still have to be handled by law and government. It is always one of the primary functions of government to remove causes of strife, but the mere statement, without implementation, that the causes of war must be removed is no solution to the problem of war.

EDUCATION. The same sort of an answer must be given to those who say that education is the only answer. Education to what? If it is intended to teach people to dislike war, it is a work of supererogation, since practically everyone already dislikes war and, in any case, war will not cease merely because it is disliked. If it is intended to train every human being, or nation, to such a point that war will not be needed, we are again approaching philosophical anarchy. This would mean omniscience and infallibility on the part of each, so that there would always be agreement as to rights and justice; it would mean also that each would respect the conclusion reached. Not all the preachers and teachers and philosophers, or even the mighty power of government, has been able to raise human beings to such a level of perfection.

There is a further question: who is to decide what is to be taught? The only possible answer, and it is a dangerous answer, is that an international authority should decide upon the curriculum and should do the teaching. No nation would agree to such control. Such an authority could not be established, and if it were established, it would be confronted with the question of what to teach? How are we to get rid of war? Thus, we are back where we started. Education, like the removal of the causes of war, is something much to be desired, but a uniform education could only be achieved through international government. It is a problem in itself, not a solution of the problem of war.

PASSIVE RESISTANCE. A few years ago there was strong support for the proposition that the way to eliminate war is to refuse to support war. Students, preachers, and others took formal pledges never to support another war; various organizations worked to this end. The tide of interest in this concept has now diminished greatly, but the concept itself must be examined.

It should be said, in the first place, that those who live up to their pledge and refuse to fight in war (conscientious objectors) cannot be dismissed as cowards. On the contrary, they face disgrace, ostracism, even execution. The quarrel is not with their character or their courage, but with their judgment. In these cases, the individual claims a right to decide for himself what is right and what is wrong; he rejects the community decision, and does not accept its law. He decides for himself that war is

bad, or that he is not willing to kill his fellow man. If enough persons should accept this view, in all countries, there would be no war; but also, there would be no solution. Passive resistance destroys the means—granted that they are stupid means and of uncertain result—but offers no substitute for war as a means of upholding rights or remedying wrongs. It puts peace above justice, and this attitude has always been rejected by human beings. It is a negative, rather than a constructive, approach to a solution. It leaves force supreme, if the other party uses force; if both parties refrain from force, it leaves the situation as it is, however bad that may be.

Some passive resisters, dissatisfied with this result, have sought a more positive approach through mass passive resistance, or "non-violent coercion." Their inspiration is derived from the success of Gandhi in India, who was able not only to resist superior force, but to compel it to accept his wishes. Through organized effort, they would say, passive resistance can be a powerful instrument, a constructive force. But if this be true, then it is a weapon, a means to an end, just as war is; it could be used for purposes as unworthy as those of which war is accused. It would be necessary to ask who is its leader, and what ends does he pursue? He might be a Hitler or a Huey Long, rather than a Gandhi. He can not be made to order for each occasion.

The difficulty with the pacifist position is that it is an individualist position, taken precisely in that field for which law and government were created. It is impossible to permit each individual to decide what is justice for himself; that must be a community judgment, at least in those fields where force is threatened. We must conclude, then, that passive resistance does not offer a substitute for war; it does not provide the means for upholding rights and for remedying wrongs which humanity demands to the degree of using war as a means.

§ 98. Outlawry of War.—Another approach to the problem, very popular in the United States, was the movement to outlaw war; and it has some positive achievement to its credit. It is a surprising thing that not until around 1921 had the idea occurred to anyone that war should be declared illegal. One reason for this was, doubtless, that an outlaw is presumed to be in flight from government; but there was in the community of nations no government, no sheriff which might set a posse in pursuit of the outlaw state. The movement in the United States, however, opposed the idea of an international government with power to act against the state which illegally went to war. It was content to issue a *fiat,* and to have a court which could declare that a state was an outlaw, and it fought bitterly against any further authority in the international system. It had the important result, however, of leading into the so-called Kellogg Pact, more properly, the General Treaty for the Renunciation of War.

Pact of Paris. On the anniversary of American entrance into the World War, April 6, 1927, M. Briand, then Foreign Minister of France, announced in a newspaper interview that "France would be willing to subscribe publicly with the United States to any mutual engagement tending to outlaw war, to use an American expression, as between these two countries." No official answer was returned, and on June 20 the French Government submitted a draft treaty for consideration, which was considered for six months longer. Meanwhile public opinion was pressing for it, and on December 28, 1927, Secretary Kellogg answered with the proposal that, instead of a bilateral treaty, an effort should be made to obtain the adherence of all the principal powers of the world to a declaration renouncing war as an instrument of national policy. After some negotiation, during which Secretary Kellogg uttered certain important interpretations of the treaty,[18] it was signed on August 27, 1928, in a historic ceremony at the *Quai d'Orsay,* and ratifications subsequently poured in until they now number sixty-four. It is a brief document, containing the following two articles of substance:

> Article 1. The high contracting parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> Article 2. The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

The two articles are complementary. Technically, war is not outlawed; it is condemned and renounced, but it is not declared to be illegal. Moreover, it is renounced only as an instrument of national policy. The meaning of this phrase is not clear, but it is of importance as leaving free the use of war for an *international* policy, and thus permitting the use of forcible sanctions which, however, are of course not provided for by the treaty.

The second Article is the more important of the two, and, so far as the wording of the treaty goes, more nearly makes war illegal than does Article 1. The statement is broad and covers every type of dispute, but it is a negative form of statement, and creates no positive obligation to seek a settlement. If a settlement is sought, it must be by pacific means, but one state may be satisfied to leave things as they are and refuse to take

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[18] *Notes Exchanged between the United States and Other Powers on the subject of a Multilateral Treaty for the Renunciation of War* (Washington, Government Printing Office, 1928), p. 33. The correspondence is printed also in *Int. Con.*, No. 243 (October, 1928) and in D. P. Myers, *Origin and Conclusion of the Paris Pact*, *W.P.F.*, XII, No. 2 (1929). Mr. Kellogg's speech containing the interpretations is in the *Proc. Am. Soc. Int. Law*, 1928, p. 141.

any steps whatever toward a settlement. Thus the state which desires to maintain the *status quo* has a distinct, and perhaps unjust, advantage.

RESERVATIONS. The real meaning of the Treaty, however, is not so much to be found in its actual wording as in the explanations concerning it communicated by Secretary Kellogg to the other signatories and accepted by them—explanations which greatly limit its meaning. By far the most important of these interpretative statements was that concerning self-defence:

> There is nothing in the American draft of an antiwar treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.

Secretary Kellogg had rejected the French proposal to outlaw only "aggressive war," yet his interpretation admitted that the Treaty applies only to wars of aggression, since it does not exclude wars of self-defence. The exception of self-defence may be said to admit almost any war; it does so unquestionably when each state "alone is competent to decide whether circumstances require recourse to war in self-defense." In modern days no state would admit that it was fighting an aggressive war, but reasons of self-defence can always be found so long as each state is its own judge. The legal effect of the Treaty is undoubtedly much weakened by this exception.

VALUE OF THE PACT. It is unfortunately true that the Pact of Paris, of itself, has little legal effect,[19] but it states a vitally important principle. It could have been made highly effective if certain legal rules or certain machinery had been adopted to implement it. If, for example, there were a positive obligation to arbitrate disputes, there could be said to be a violation of the treaty when arbitration was refused. Or, if a definition of aggression had been agreed upon, it might be possible to say when the treaty had been violated. But no definition of aggression has thus far been found, and each state was left free by Secretary Kellogg to make its own definition for its own purposes. The Treaty was practically worthless without machinery for putting it into effect.

It does not follow, however, that the Treaty was insincere, or an idle gesture. On the contrary, it is one of the most important documents in

[19] When added to the Covenant of the League, however, it produced important legal effects for those bound by the Covenant, and the League made efforts to harmonize it with the Covenant. See *Report of the Committee for the Amendment of the Covenant of the League of Nations in order to Bring It into Harmony with the Pact of Paris*, 1930.V.2. See also *Records of the Eleventh Assembly*, First Committee, pp. 131-132.

human history. Never before had public opinion arrived at a stage at which it dared to deliver a frontal attack upon war. Never before had humanity dared affirm, even in principle, that war is illegal. Regardless of legal uncertainties, the Pact has made its impression upon the mind of the world; it has been accepted by public opinion everywhere; and it became one of the bases of the Nuremburg trial, whose affirmation by the United Nations would seem to accept as a rule of customary law that aggressive war is illegal.

Thus, the outlawry of war movement made a contribution toward solution of the problem of war but, like the Pact of Paris which was its fruit, it was incomplete. The mere declaration that war, or a certain type of war, is illegal is not sufficient to stop war. There must be an agency with authority to decide that the law has been violated, and strength sufficient to stop the aggressor. Not until the great strength of the victorious Allies was available could the Pact of Paris be made effective.

§ 99. **Neutrality.**—It may be said that a discussion of neutrality is irrelevant to the problem of controlling war, and there would be much truth in the assertion. While it has been argued that the law of neutrality restricts the spread of war, it can not well be argued that neutrality is a method by which war could be eliminated. It nevertheless deserves some consideration, partly because of its historical importance in relation to war, and partly because it brings to a head the issue between national and international action, between isolation and collective security.

Fundamental Principles. War, we have noted, creates a certain legal status. Any state has the right to go to war; it has equally a right to remain neutral. The neutral state announces no judgment upon the issue; it takes no part in the conflict; it displays its impartiality by refraining from any act injurious or favorable to either belligerent. There are two legal positions to be considered: the belligerent has certain rights and duties; and the neutral has certain rights and duties. The problem of international law has been to find a proper equilibration between them.

On the one hand, the belligerent state has the right to make war against its opponent, and this implies a right to take certain repressive measures against that opponent, even though these measures result in injury to neutral states. On the other hand, the neutral state, though it must respect belligerent rights, can not legally be compelled to suffer too much from a quarrel in which it has no concern. In this sense, neutrality has been of much value: it has set limits to unlicensed warfare. But the conflict between belligerent and neutral has reached the breaking point. A belligerent, fighting for what it conceives to be its very existence, is disposed to disregard the rights of neutrals. In such a conflict the neutral is at a decided disadvantage in comparison with its prepared opponent, and in

the long struggle to balance belligerent rights equitably against neutral rights, the neutral has lost steadily.

In the first place, the neutral must not participate in the conflict, even in an impartial manner. It can not, officially, express its sympathy for either side. According to the Convention Concerning the Rights and Duties of Neutral Powers in Naval War, signed at the Second Hague Conference, "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war ships, ammunition, or war material of any kind whatever, is forbidden." Loans could not be made to either belligerent, nor credits extended. A neutral could not allow its territory to be used as a base of operations against an enemy. Permission to a belligerent for its troops to cross neutral territory must be refused. The duty to prevent the construction of a war ship for a belligerent, in a neutral state, was illustrated by the famous case of the *Alabama*. Except for emergency, captured ships could not be taken to neutral ports; nor could a belligerent set up a prize court in a neutral state,[20] nor could a belligerent war ship take refuge in a neutral port for longer than a specified time.[21] A capture could not be made in neutral waters; during the Civil War the United States apologized to Brazil for the capture of the *Florida* within her territorial limits. Certainly a neutral state could expect, and had a duty to do all that was reasonably necessary to assure, that its territory should not be made the scene of military operations, as Belgium did in two World Wars.

But a neutral state had no duty to prevent the sale of munitions of war by private individuals from within its borders, and at this point the rights of belligerents began to appear. If a neutral state had no duty to prevent this trade, the trade was nevertheless illegal, and the belligerent state had a right to stop it and to penalize it.[22] On the other hand, if a belligerent were able to avail itself of this source of supply, it would have a great advantage over the belligerent which was unable to do so. Thus England, during the World Wars, was able to draw needed materials from the United States and elsewhere, while at the same time preventing Germany from doing so. The burden was upon the belligerent to prevent such supplies from reaching his enemy, and in the interplay of rights and duties thus created is to be found the most fertile field for friction.

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[20] *The Appam*, 243 U.S. 124 (1917). In general as to the duties of neutrals, see Fenwick, Ch. XXIX to XXXII; Hackworth, *Digest*, Vol. VII, Ch. XXIV; Hudson, *Cases*, pp. 1428-1465; Hyde, Vol. III, Title K; Moore, *Digest*, VII, Chap. XXVIII.

[21] For this reason, the *Alabama* went bravely forth to destruction from a French port during the Civil War.

[22] Article 7 of the above-quoted Hague Convention says: "A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet."

For the most part this situation was covered by the laws of contraband and blockade, and the question thus presented was: how far should a belligerent be permitted to interfere with the ordinary trade and intercourse between private individuals in neutral states and the enemy state and persons therein? Originally, the belligerent had no compunctions in seizing anything destined for his enemy, but gradually his rights were restricted. There grew up lists of articles to be regarded as contraband, and therefore as subject to capture by a belligerent. In legal theory, the basis of this list was the usefulness of the articles for purposes of warmaking, but what articles deserved to be placed upon the list was an extremely and increasingly difficult problem, dependent upon the nature of the article and the uses to which it might be put from one period to another, and upon the changes in the methods of warfare. If contraband lists were settled for one war, or agreed upon by convention, new discoveries in war-making would cause the limits thus set to be disregarded, with the argument that certain articles had now become of direct use in military operations.[23] By the time of the second World War, practically everything was included in the Allies' contraband list.

The other important weapon by which the belligerent defended himself against supplies going to his enemy was blockade. The declaration of a blockade meant cutting off all access to the blockaded districts, regardless of whether the goods carried were contraband or not. The Declaration of Paris in 1856 laid down the rule that a blockade to be binding upon neutrals must be effective—must be able, that is, actually to stop access to the enemy. On the other hand, rather than provide naval strength to meet this requirement, belligerents might extend the lists of contraband until, without blockade, they could claim to capture everything within sight. During the two World Wars, blockade was extended to cover not merely one port, but the entire continent of Europe, and to prevent export from, as well as import into, that area.

In order to guard themselves against violations of their rights, belligerents maintained the right of visit and search. A neutral vessel suspected of contraband carriage or of blockade running could be stopped and searched upon the high seas; if it resisted, whether innocent or not, it could be sunk. This practice, always a source of abuse and friction, has

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[23] Since the time of Grotius, a three-fold classification of contraband has been attempted: (1) articles of use only in war (absolute contraband); (2) those of no use in war (not contraband at all); (3) those of use both in war and in peace (conditional contraband). But the result is simply to make the problem more intricate, as the belligerent shifts articles from one group to another. The story of neutrality is told in P. C. Jessup and F. Deak, *Neutrality: Its History, Economics and Law*, 4 Vols. (New York, Columbia University Press, 1935-1936); and see C. G. Fenwick, *American Neutrality: Trial and Failure* (New York University Press, 1940).

been extended to cover the world. Contraband, blockade, and visit and search were stretched into a system which controlled the movements of practically every ship in the world.

It was not difficult in earlier days to pick out the articles essential to warfare, for their number was limited. In a modern war, however, far more than guns and powder are needed; indeed, there is little for which it does not call. The vast size of modern armies makes such things as clothing and food primarily military supplies; indeed, the civilian population is put upon rations so that the armies may be supplied. The change is much more fundamental than this, however. It raises the whole question as to the distinction between combatants and non-combatants. Hitherto, war had been conducted against combatant forces, and the law of war carefully protected the civilian population. But now it could be argued that the activities of civilians at home were an essential part of warmaking; and it could be said with very good reason that a girl manufacturing shells in a munitions factory was doing as much to win the war as the infantryman at the front. If this argument be correct, the historic distinction between combatant and non-combatant becomes valueless, and a belligerent is justified in attacking the entire population of the enemy country.

Failure of the Law of Neutrality. Thus the law of neutrality broke down completely in the first World War. No effort was made to revive it, and little attention was paid to it during the second World War. The position of the neutral had become untenable in the face of modern war. If he wished to maintain his rights as a neutral, he found that he must fight for them, but then he was no longer a neutral. This was the experience of the United States in the first World War; and a strong opinion, reflected in the Neutrality Legislation of 1935, asserted that if the maintenance of neutral rights leads to war, then we should not maintain those rights. But this means simply surrender and encouragement to the aggressor, and it led to Pearl Harbor in 1941. The conclusion is inevitable that neutrality leads to war, rather than discourages war.

But the lesson is deeper than this. Neutrality in effect disavows desire to stop war; it rejects any share in the community responsibility for preventing war. To surrender to the aggressor, as the United States did before Pearl Harbor, allows the aggressor to grow in strength until the day when he is strong enough to devour the unprepared neutral. Neutrality has been shown to be both immoral and unpracticable, and its failure has cleared the thinking of many, and permitted a more sensible attitude toward the problem of war. Certainly, neutrality served in no way as a substitute for war in settling disputes, in upholding rights, or in remedying wrongs.

§ 100. **Conclusions.**—From the brief survey of ideas and efforts to limit war, certain conclusions may be drawn. It is probably as untrue to say that war can be completely eliminated as to say that the use of force can be eliminated from life; the most that we can hope for is to find substitutes which can serve the functions which it now performs, and thus reduce the occasions on which it might be regarded as necessary. Such a substitute should be able to do various things, for which a strong international organization is needed. None of the proposals above considered do this. Disarmament might reduce the cost of war in blood or money, but it offers no solution and no security, and can not therefore be accepted. Both education and the removal of the causes of war are highly desirable, but both beg the question; neither can be accomplished except through international authority. Passive resistance, in an individual sense, means surrender to injustice; in the mass sense, it presents the same problem as war, since it is also a weapon which must be controlled. War cannot be outlawed unless there is a sheriff to handle the outlaw; the warmaker can be stopped only by a force superior to him, and the only way to provide such a force is through the collective action of the community of nations.

Thus, we are forced back always to the need of international organization—though we are far from a final solution when we have said this. Modern interdependence calls pressingly for limitations upon national freedom of action; those limitations must be set by law, and the law must be made by the community. Modern war, from which no one escapes, faces a nation with the choice between continuous fighting to uphold or achieve its desires, and collective action which can assure those of its desires which are approved by the community. Every state gains by the collective protection of those rights agreed upon by the community; as to other claims or ambitions which a state has, it may be recalled that the road of history is strewn with the wrecks of states which have sought to have their own way.

The inescapable conclusion is that states must accept responsibility for organized community action, and submit to the law of the community. But this they will not do, and should not do, until the community can give them at least as much assurance of justice and security as war has given them. The international organization, then, must have behind it sufficient authority and physical force to prevent wrongful use of force by one state against another; and this is the great issue which faces the peoples of the world today. The pressure of great forces pushes the world toward international government; ancient tradition and loyalties to the sovereign state resist these pressures. International organization, as we have seen, has been steadily developing. The first effort to control war through international organization was the League of Nations, and to this effort we now turn.

CHAPTER 16

THE LEAGUE OF NATIONS AND WAR

The Covenant of the League of Nations attacks war from various angles. One of the two functions of the League, as stated in the Preamble, was "to achieve international peace and security"; but the other function, to "promote international cooperation" was not dissociated from this purpose. The Covenant contains no general statement that war was thereby made illegal. Its provisions, however, postponed war in every case, made it illegal in most situations, and adopted in legal principle, if not in practical possibility, sanctions against the illegal warmaker. An effort was made to guarantee independence and territory. There were excellent provisions for the peaceful settlement of disputes, and it might be said that the general principle underlying the Covenant was that there should be no war until there had been at least a preliminary effort at settlement in accordance with the procedures prescribed. Reduction of armaments was also to be undertaken.

The provisions for the maintenance of peace are to be found in Articles 8-17 of the Covenant, and we will examine the experience of the League of Nations with regard to control of war in the order of these articles.

§ 101. Reduction of Armaments.[1]—The League did not regard disarmament as an important step toward elimination of war. The Covenant does not call for disarmament, but for reduction of arms, and no obligation was imposed upon Members by Articles 8-9 except the contingent obligation that if and when a limit of armaments had been set, no member could thereafter exceed that limit except by permission of the Council.[2] There

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[1] From the vast literature concerning disarmament, the following references are taken: *Armaments Year Book* (annual) of the League of Nations; P. J. N. Baker, *Disarmament* (London, 1926); S. de Madariaga, *Disarmament* (New York, 1929); D. P. Myers, *World Disarmament: Its Problems and Prospects* (World Peace Foundation, Boston, 1932); Laura P. Morgan, *A Possible Technique of Disarmament Control* (*Geneva Studies*, Vol. XI, No. 7, November, 1940); Th. Niemeyer, *Handbuch der Abrüstungsprobleme* (Berlin-Grünewald, 1928), 3 vols.; N. Sloutzky, *The World Armaments Race, 1919-1939* (*Geneva Studies*, Vol. XII, No. 1, July, 1941); H. Wehberg, *Die internationale Beschrankung der Rustungen* (Stuttgart und Berlin, 1919).

[2] It was therefore important to reach agreement upon such limits, so that the Council might acquire jurisdiction, and this helps to explain the laborious and continuing effort to arrive at a treaty.

was simply the statement that the reduction of armaments was desirable, and the criteria for such reduction were to be, on the one hand, national safety, and, on the other hand, a strength sufficient for "the enforcement by common action of international obligations." Consideration was also to be given to the geographic situation and special circumstances of each state. The Council was not authorized to compel reduction; it could only formulate plans, upon which Members must agree. It was affirmed that the private manufacture of munitions was "open to grave objections"; and members agreed to exchange "full and frank information" concerning the scale of their armaments, military programs, and war industries. Article 9 provided for a permanent committee, of military character, to advise the Council.

Direct Method. The Council set to work at once along the lines of what was called the "direct method," which asserted that the way to disarm is to disarm. The Permanent Advisory Commission asserted that reduction was impossible until (1) integral execution of the military, naval, and aerial clauses of the Treaty of Peace had been accomplished, (2) this execution was assured by international supervision, and (3) the League of Nations was organized for rapid emergency action. The Assembly, dissatisfied with this lack of constructive proposal, demanded a committee not composed of military experts, and set up the Temporary Mixed Commission. A scheme was put forward by Lord Esher which called for a mathematical coefficient, or "yardstick," which he set at 30,000 military and air force men, and which assigned (for example) 6 units to France, 4 to Italy and Poland, and 3 to Great Britain. It was rejected on the ground that numbers alone do not measure military strength, and that such factors as material and financial strength must be taken into consideration.[3] The direct method failed partly because of the political problem, to which we shall turn in a moment, but also largely because of the enormous technical difficulties involved. These were later summed up in one of the numerous such questions in a questionnaire sent out by the League of Nations Preparatory Commission for the Disarmament Conference of 1932: "By what standards is it possible to measure the armaments of one country against the armaments of another—e.g., numbers, equipment, expenditures, etc.?"[4] Who is a soldier? Regular army, trained reserves, National Guard, merchant marine, policemen, Boy Scouts? What is an instrument of war?[5] A gun mounted on a truck, and there-

[3] Report of the Temporary Mixed Commission, L of N Doc., A. 31. 1922, C.T.A. 173.

[4] Report of the Preparatory Commission, quoted in *Ten Years of World Cooperation* (League of Nations, 1930), pp. 83-84.

[5] "The Commission examined the matter and penetrated into a regular labyrinth of subtleties and distinctions with the result that they declared that while the steel

fore the truck, the wheels, the axle grease? How measure naval and air force as against land forces? What are the relative needs of each nation in each military category? When the Soviet Union, at the Disarmament Conference, suggested total disarmament, the British delegate replied that this would leave Russia with the largest armed force, since her vast area would require more police, customs, and frontier guards than any other country would have. How can mobilization of men be measured against mobilization of industry? Today, the technical problems are far greater; we shall have occasion to mention them later.

Indirect Method. From the very beginning, the question of security had been raised, particularly by France. In 1922, on the basis of proposals by Lord Robert Cecil, the Assembly adopted the famous Resolution XIV, which became the foundation of later disarmament efforts. It is summarized as follows:

> No scheme for the reduction of armaments can be successful unless it is general. In the present state of the world, the majority of Governments could not carry out a reduction of armaments unless they received satisfactory guarantees for the safety of their respective countries; such guarantees should be of a general character. And, finally, there can be no question of providing such guarantees except in consideration of a definite undertaking to reduce armaments.[6]

Thus disarmament became linked with security, and security involved arbitration and many other elements, so that the efforts of the League were necessarily directed toward building up a coherent system for the whole matter of peace.

During 1922 and 1923 the Temporary Mixed Commission prepared a draft treaty which was communicated to the various governments by the Fourth Assembly. Its first article declared that "aggressive war is an international crime"; but a war waged by a state which had accepted the judgment according to the proper procedure was not to be regarded as aggressive if it did not violate Article 10 of the Covenant. Sweeping powers were given to the Council for the purpose of preventing war. On the one hand, signatory states were obligated to come to the aid of one of their number when the Council decided that it was the object of aggression, provided the latter had reduced its armaments as stipulated. On the other hand, if hostilities actually broke loose, the Council was to determine

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and wood necessary to manufacture a rifle were war material, the complete rifle, if stored up in an army depot and not in actual service, ceased to be war material and became an inoffensive object of peace." Madariaga, p. 200.

[6] *Ten Years of World Cooperation*, p. 57; see also p. 59, and *Records of the Third Assembly*, Plenary, p. 291.

within four days which was the aggressor state, and put into motion against it the machinery of the treaty. Regionalism was recognized in the provision that no state need exert itself beyond its own continent. The theory behind the treaty was that it would furnish enough security to induce states to reduce their armaments; but the treaty did not actually give this assurance.

The great difficulty was to determine when aggression had appeared. Over this problem League bodies had already been struggling, and a special committee had been set to work upon it which had produced a detailed "Commentary on the Definition of a Case of Aggression," in lieu of an agreed definition. The Permanent Advisory Commission had, in so far as it was able to agree at all, reported that it was "impossible to decide, even in theory, what constitutes a case of aggression," and that the former double test of mobilization or violation of the frontier had quite lost its value. The special committee accepted this view and reported that all that could be done was to endow the Council with complete discretion in deciding which was the aggressor. A Committee of Jurists which studied the treaty considered that it would be better to substitute the word "war" for the word "aggression," since the latter could not be defined.[7] This was the chief cause for the failure of the treaty, but there were other objections to it. Some states objected that it did not do enough for disarmament. England felt that it lacked the "element of certainty and reliability." The Council was not trusted for the exercise of so important a function; and there was still a fundamental dislike for assuming responsibility for collective sanctions.

Conference for the Reduction and Limitation of Armaments. The Sixth Assembly set up a Preparatory Commission to prepare for a general conference on disarmament. For four years it worked exhaustively on the subject, in an effort to prepare an acceptable draft treaty. Naval limitation now entered into the picture, there having been several conferences dealing with it.[8] There was disagreement at every point. The United States, Great Britain, Germany, and others demanded that reduction should apply to all armed forces, including trained reserves, and all materials available for immediate mobilization; this was opposed by other countries as negating the advantage of rapid mobilization, and as favoring states with most industrial strength. Should navies be limited by total tonnage, or by categories of vessels? Should limitation of air armaments

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[7] This debate is summarized, with pertinent quotations, in *Int. Con.*, No. 264 (1930). The Treaty of Mutual Assistance is given in *ibid.*, No. 201 (1924).

[8] Conferences on naval armaments were held at Washington, 1921-2, at Geneva in 1927, and at London in 1931.

apply to civil aviation? Should there be one general treaty, or separate ones for naval questions? Could budgetary limitation serve as an adequate measure? Should inspection and enforcement be authorized, or should reliance be placed on the good faith of nations? The entry of Russia brought in a new problem, for Litvinov proposed absolute and universal disarmament within four years. Germany demanded that a conference be called and that the general disarmament promised in the peace treaties be provided.

A draft convention was finally prepared, as of December 9, 1930, calling for limitation and, so far as consistent with national safety, reduction of armaments. Tables were provided for different categories, with blank spaces to be filled in by each member as it wished. The Conference assembled on February 2, 1932, with sixty states represented (including the United States). The Russian proposal for general and immediate disarmament, and its alternative proposal for progressive and proportional reduction, were not accepted. The French proposed an international police force, which Germany opposed as intended to maintain the inequalities of the peace treaties. President Hoover proposed reduction by one third, with specific statement for various categories. The British also had suggestions for "qualitative" reduction. Most agreement was reached with regard to reduction of weapons of offense; tentative agreement was also given on July 23, 1932, to budgetary limitation, control of arms manufacture, supervision by a disarmament commission, prohibition of both chemical warfare and aerial bombardment of civilians. Practical implementation of these principles produced difficulty, and no agreement could be had as to naval limitation.

In general, it was impossible to reconcile the French demand for security, the British and American demands for direct disarmament, and the German demand for equality. Germany, indeed, withdrew, and the Conference was able to reconvene in 1933 only after the Five Powers had approved equality for her. Meanwhile, the political situation in Europe was becoming disturbed, and Mr. Ramsey MacDonald laid new proposals before the Conference. The United States went so far as to agree to consult with other states in case of aggression and, if she agreed as to the aggressor, to take no action which would interfere with the efforts of other states to maintain peace. By now, however, Germany was under Hitler and rearming, and France was seeking alliances. In October, 1933, Germany withdrew and the Conference met no more. Studies and negotiations continued and the General Commission met in May, 1936; but the air was filled with political thunder, and the effort was fruitless. Twelve years of intensive effort had failed; they remain as lessons for the future.

§ 102. **Territorial Integrity.**—Article 10, according to President Wilson, was the "backbone of the whole Covenant," and around it many battles have been waged.[9] Generally speaking, the principle which it embodied was one which we have earlier discussed, that title by conquest is to be denied; but the article had other far-reaching implications. Some feared that the Treaty of Versailles, or the *status quo* in general, would be guaranteed by Article 10; others feared that American mothers would be called upon to sacrifice their sons in faraway corners of the world in which the United States had no interest. After such portentous expectations as these, a study of Article 10 as it developed is something of an anti-climax.

By Article 10, Members "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." This is not an attack upon war: there might be wars under the Covenant, but not wars of conquest. How far Article 10 imposed a legal obligation upon Members to support by arms an attacked state was a subject of theoretical debate. President Wilson asserted that it was only a moral obligation, since each state was free to make its own decision as to which was the aggressor; and it was held that the sanctions of Article 16 were not applicable to Article 10. The Council could only advise; it could give orders to no state. Nor could it advise except by unanimous agreement, so that any Member of the Council which refused to cooperate could block the entire recommendation. The obligation assumed was only "as against external aggression." Again we encounter the difficulty of explaining what is meant by aggression. There would seem to be no doubt that self-defence would be permitted under this rule; but if the defending state should win the war, could it seize territory from its adversary? There was little force to the argument that Article 10 was simply a guarantee of the Peace Settlement, and perpetuated the *status quo* in general. There was clearly room for legitimate change; the only change forbidden was that accomplished by violence.

Within the League itself, two opposing currents of interpretation appeared at once, the one fearing infringement upon the freedom of national action, the other fearing that weakening of Article 10 would weaken that security which attracted so many states to the League. The former attitude was represented by a Canadian amendment, offered at the First

[9] See as to Article 10, J. C. Baak, *Der Inhalt des modernen Völkerrechts und der Ursprung des Artikels 10 der Völkerbundsatzung* (Berlin, 1926); H. Kelsen, *Legal Technique in International Law, Geneva Studies*, Dec. 1939, Vol. X, pp. 67-81; Gonsiorowski, II, Chap. VII; T. Komarnicki, *La question de l'intégrité territoriale dans le Pacte de la Société des Nations (l'Article X du Pacte)*, (Paris, 1923); Ray, *Commentaire*, pp. 343-371; A. Rolin, "L'article 10 du Pacte de la Société des Nations et l'intégrité territoriale," *Bib. Viss.*, I (1923), pp. 91-156; B. Williams, *State Security and the League of Nations* (Baltimore, 1927); Yepes and da Silva, Vol. I, pp. 278-310.

Assembly, to abolish Article 10. This was later modified into an interpretative resolution, limiting the application of the Article without destroying its principle. The other viewpoint was emphatically represented by Persia, who cast the only negative vote against the proposed resolution—although there were 22 states absent or not voting.[10] The Chairman declared the motion neither adopted nor rejected and there was thus no official change. Nevertheless, the current opinion within the League did not favor effective use of Article 10, and it was little called upon.

§ 103. Settlement of Disputes.—Articles 8-10 deal with special problems; with Article 11 we enter upon a coherent system for the maintenance of peace. This article serves as an introduction to the system; it is followed by four articles which provide for the pacific settlement of disputes and which lead up to the determination of aggression. Article 16 provides sanctions, and Article 17 deals with non-Members.

Prevention of War. Article 11 endowed the League with a wide competence for considering any question capable of disturbing the peace. "Any war or threat of war" was a matter of concern to the entire League, and could no longer be reserved as a matter of national sovereignty. A meeting of the Council was required upon the request of any Member. The attention of the Council could also be called to less important matters, though no special meeting was necessary in this case. The purpose of Article 11, as indicated by its position in the text and as stated by the Assembly in 1928, was to forestall future wars; decision of a dispute upon its merits and actual repression of war were provided for in later articles. It could not be said that Article 11 gave to the Council the power to arrive at a decision binding upon disputants, and the Council was itself bound by the rule of unanimity with, in this article, no exception made for the votes of the disputants. Nevertheless, the Council was remarkably successful in preventing war, even though it did not always achieve a satisfactory settlement. More disputes were brought up under Article 11 than under other articles, though if the dispute became serious it might be transferred to Article 15, under which the vote of the disputant was not counted.

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[10] The significant portions of this Resolution are as follows:

"It is for the constitutional authorities of each Member to decide, in reference to the obligation of preserving the independence and the integrity of the territory of Members, in what degree the Member is bound to assure the execution of this obligation by employment of its military forces.

"The recommendation made by the Council shall be regarded as being of the highest importance, and shall be taken into consideration by all the Members of the League with the desire to execute their engagements in good faith."

The Canadian efforts seem to have been due partly (they were officially so explained) to their desire to satisfy the United States and secure her entry into the League; and for the same reason many states reluctantly voted affirmatively (e.g., France), and others refrained from voting. *Records of the Fourth Assembly,* Plenary, pp. 73-87.

It was possible to intervene under the broad terms of Article 11, even though it might not be possible to do so under other articles.

Renunciation of War. While Article 11 may be regarded as prophylactic in purpose, the following articles put upon Members an obligation to substitute pacific settlement for war as a means of settling disputes, and provided for common action against a Member which failed to observe this obligation. Article 12 required Members to submit all disputes, without exception, to one or the other of the methods of settlement formulated, and "in no case to resort to war until three months after the award by the arbitrators, or the judicial decision, or the report by the Council." They might choose between three (really two) methods of settlement: arbitration, judicial settlement, or inquiry by the Council (conciliation).[11] The result was not so much to proscribe war as to prescribe pacific settlement. Some wars were licit; most became illicit; but the criterion was not sought in the nature of the dispute or the justice of the cause. The test was simply whether an attempt had been made to secure peaceful settlement; and the obligation was to refrain from war against the state which has accepted the results of that settlement. The right of self-help was not taken away finally from the claimant, as it is within a state, but he must now wait for a decision upon the merits of the case. Whatever the situation, the winning party could not undertake a war of execution until three months after the award or recommendation.

Arbitration. The methods of pacific settlement suggested in Article 12 were developed in detail by Articles 13-15, and the consequences of failure to live up to these obligations were stated in Article 16. Arbitration (which term for our present purposes will be used to include judicial settlement) was not itself compulsory, but was one of two alternatives. The parties themselves must agree that the dispute is "suitable for submission to arbitration"; they were not bound to submit cases of the types listed in the following paragraph, although the presumption was that these types should be submitted to arbitration. If arbitration were chosen, a decision was inevitable, and there was no loophole for escape. Such a decision was based upon law, and Members were obligated to carry out in full good faith the award announced. If they did this, they could not be legally attacked; but if a state refused to accept the award, the Council "shall propose what steps should be taken to give effect thereto." Here war was possible, for any state was free to go to war against the state

[11] Both arbitration and judicial settlement call for decision according to law, and differ only as to machinery. The phrase "judicial settlement" was added after the Court was created and refers to settlement by the Court, while arbitration implied a tribunal created by the parties. It may now be observed that the Covenant combined into a comprehensive and obligatory system the methods of arbitration and conciliation, whose development was separately traced in an earlier chapter.

which rejected the award. There was no assurance that the Council could guarantee execution to the state in whose favor an award has been announced, and its only recourse might be to go to war against the state whom it had defeated in court.

Inquiry by Council. If the disputants did not agree upon arbitration, they were bound by Article 15, § 1, to submit the matter to the Council. The dispute must be one "likely to lead to a rupture," but a refusal of the Council on this ground to hear the case would encourage the rejected applicant to take violent measures so as to produce a rupture. For the purposes of the dispute, the disputant states might be given special representation in the Council. The Council could seek advice from a committee of jurists, or from the Permanent Court, or could appoint a committee from its own membership, with one member as *rapporteur*. The duty of the Council was to "endeavor to effect a settlement of the dispute," and it had a range of action limited only by its own powers of imagination as applied to the opposing desires of the disputants. It was actually very successful in finding a settlement satisfactory to all disputants, until the last great clashes with the fascist states.

If the dispute was not settled to the satisfaction of all parties, and thus ended, the Council was required to publish a report, and to make "recommendations which are deemed just and proper in regard thereto." This process was one of compromise based not necessarily upon rules of law, and states are not usually so willing to accept the conclusions of such a process as binding as in the case of an arbitral award. Whether the recommendation of the Council was or was not unanimous became therefore a matter of some importance. If the decision was unanimous (votes of disputants excepted), Members of the League were obligated not to go to war against the state accepting this unanimous "recommendation." Several possibilities present themselves at this point. Both parties might accept the recommendation, and the Council made every effort to achieve this ideal end, even to postponing action for many months. Or, one party might refuse while the other accepted. In this case, the party which accepted was assured against attack from other Members, and was free to proceed against its foes, as was also any other Member; while, on the other hand, the foe was obligated not to go to war against the Member which accepted the unanimous recommendation of the Council, and subjected itself to the threat of Article 16 even if it acted in self-defence. Finally, the recommendation might be rejected by both parties, in which case it would appear that there were no restraints at all—except, of course, the ever-present obligation not to go to war for three months.

In case of failure to agree unanimously upon a recommendation (a situation surprisingly rare) "the members of the League reserve to them-

selves the right to take such action as they shall consider necessary for the maintenance of right and justice." This was the notorious "fissure" in the Covenant, perhaps its weakest spot. The delay of three months would still apply but, aside from that, war would seem to be unrestrained. Another well-known gap in the Covenant was found in Article 15, § 8, which reappears now in the U.N. charter.[12] This clause deprived the Council of jurisdiction if the matter was one which "by international law is solely within the domestic jurisdiction" of the party claiming it. As to whether it was such a matter the Council had the right to decide; but if the Council should admit that it was a domestic question, it could make no recommendation, and states were again free to make their own decisions and, after the three months' delay, to resort to war.

Non-Members. By Article 17, in case of a dispute between a Member and a non-Member, or between non-Members, an invitation could be extended to the non-Members to accept the obligations of the League for the purposes of that dispute, under conditions laid down by the Council. The non-Member state was free to accept or to decline the invitation, as it saw fit.[13] If, however, the invitation was rejected and war was undertaken against a Member, the sanctions of Article 16 were automatically released against the state which rejected the invitation to pacific settlement under the auspices of the League. If the invitation was accepted, the provisions of Articles 12 to 16 were applicable, with such modifications as were deemed necessary by the Council, although, according to Article 17, § 2, the Council could proceed with an inquiry from the moment the invitation was issued. A non-Member was, of course, not juridically bound by Article 17, but in practical effect the theory of consent was overruled.

Licit Wars. It has been observed that the Covenant did not pretend to outlaw all wars. On the contrary, in a number of cases war was permitted, either because it seemed a necessary act of justice, or because of the insufficiency of the organization of the League. In seven cases, it would appear, war was licit: (1) When one disputant refused to abide by the arbitral award or unanimous recommendation of the Council, war against it was permitted to all other Members. (2) When both refused, there seemed to be no limitation at all upon the right to make war. (3) When the Council was unable to reach a unanimous decision, freedom of action was reserved. (4) If the Council conceded that the matter was one which by international law was solely within domestic jurisdiction, it had no con-

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[12] Refer to p. 310, *supra*.

[13] This was made quite clear by the Permanent Court, in the *Eastern Carelia Case:* "The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent." *P.C.I.J.*, Series B, No. 5, pp. 26-27.

trol. (5) Civil wars, in which belligerency is recognized, were wars under international law, but were not covered in the Covenant. (6) If the arbitral award or recommendation of the Council was not given within a reasonable time, the state involved would appear to recover its liberty of action. (7) States not Members of the League, not bound by the Covenant, could claim the right to wage war in accordance with the international law existent before the creation of the League.[14]

§ 104. Sanctions.

Illicit Wars. We have sketched the obligations of Members of the League for the maintenance of peace: preliminary submission of disputes to pacific settlement; choice between arbitration and conciliation, with the latter as the necessary final resort; no war in any case for three months; no war at all against the party accepting the award or the unanimous recommendation of the Council. We have noticed that there were several gaps in the Covenant leaving war legal; we may now list four cases in which war was made illegal: (1) war commenced without submission to arbitration or judicial settlement, or to the Council (Article 12, § 1); (2) war commenced without waiting until three months after the award or recommendation (Article 12, § 2); (3) war against a state which accepted the award or unanimous recommendation of the Council (Article 13, and Article 15, § 6); (4) war by a non-Member under Article 17.

What penalties were provided against states which engage in wars of these types? At this point we arrive at the heart of the problem of war, the question of sanctions, and it is important to note that the principle of collective action against offenders, as a duty resting upon members of the community of nations, was recognized for the first time in history by Article 16. The advance made was in the recognition not only of a right—an advance in itself—but of a duty on the part of members of the community to assume responsibility for the maintenance of order.

Economic Sanctions. It is to be observed, in the first place, that the sanctions of Article 16 were applicable only as against a state which had actually gone to war, and to war in violation of the obligations mentioned above, and were not applicable to any other obligations under the Covenant.[15] And it should be noted further that the state which went to war

[14] This list, as well as the following list of illicit wars, is taken from J. B. Whitton, "La neutralité et la Société des Nations," *Hague Acad.*, 1927, II, Chaps. II-IV.

[15] Aside from the last clause of Article 16, which deals with expulsion. See as to Article 16, A. E. Highley, *The First Sanctions Experiment: A Study of League Procedures, Geneva Studies*, Vol. IX, No. 4, July, 1938; N. Petrascu, *Les mésures de contrainte qui ne sont pas la guerre* (Paris, 1927); N. Politis, "Les représailles entre états Membres de la Société des Nations," *R.D.I.P.*, XXXIII (1924), pp. 5-16; W. Schiffer, *L'Article 16 du Pacte de la Société des Nations* (Paris, Geneva Research Centre); C. G. Tenekides, "L'évolution de l'idée des mésures coercitives et la Société des Nations," *R.D.I.L.C.*, 3rd Series, VII (1926), pp. 398-418.

in disregard of its covenants under Articles 12, 13, or 15 "shall *ipso facto* be deemed to have committed an act of war" against all other Members. But this act of war did not create a state of war unless the challenge flung down was taken up by another state.

Various questions arose at this point. To define war is itself a difficult legal question; who could say that a state had resorted to war, and in disregard of these particular articles of the Covenant? Once decided, how and by whom were the sanctions to be put into effect? To answer such questions a Blockade Committee was set up and, on the basis of its report, the Second Assembly adopted interpretative resolutions which admitted that the League itself could not decide these questions, since "such a power would not be consistent with the sovereign rights of the various states." It was therefore the duty of each Member to decide for itself who was the aggressor. If and when it made such a decision, it was then obligated to break off economic intercourse with that aggressor.[16]

The automatic economic action apparently intended by Article 16 was obviously weakened, if not destroyed, by this interpretation. There was no League organ which could organize these economic sanctions or lead those Members willing to apply them, and apparently no provision for suspending some rather than all economic intercourse. The potentialities of the economic weapon are enormous in this interdependent world, and enough to daunt any aggressor if they could be properly concentrated against him; but their application is very difficult. There is required detailed knowledge of the economic needs of the aggressor, and also of each prosecuting Member in its economic relation to him. If any important state fails to join in (e.g., the United States, as against Italy in 1935), the aggressor may be able to supply his needs from this state. Universal action is called for. In each application, the burden will fall unequally upon various Members, and arrangements must be made for equalizing this burden, which in some cases might be dangerously heavy.[17] Similarly, within each state the burden would fall unequally upon individuals—upon oil dealers in the case of Italy, upon silk dealers in the case of Japan—which would require equalization within each state. Finally, certain states might be attacked by the aggressor if they engaged in economic measures against him; the Italo-Ethiopian affair made it clear that economic sanctions cannot be effective unless backed by sufficient military force.

The observations above help to explain the difficulties and the complicated procedure followed in the only case in which the League attempted

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[16] *Records of the Second Assembly*, Third Committee, p. 385.

[17] This duty was recognized in Article 16, § 3, but without implementation. The Eleventh Assembly adopted a Convention for Financial Assistance to States Threatened with Aggression, but its signature was to be delayed until the disarmament treaty was signed.

to use economic sanctions. It remains uncertain whether it can properly be said that the League itself applied sanctions, though the initiative undoubtedly came from the League.[18] It seems clear that the League action was recommendatory, and that Members decided for themselves the extent of their actions. Some refused to cooperate from the beginning; others terminated their participation without waiting for collective decision. While cooperation was surprisingly well maintained, the experience shows the necessity of advance study and planning, and of a central authority to direct the effort. This, however, is difficult to achieve in a system which recognizes the sovereignty of its Members.

Military Sanctions. While economic sanctions were supposedly automatic under the Covenant, the obligation of Members to contribute to military action against an aggressor was not clearly stated, and was not accepted in practice. The Council was given the duty, in case economic measures had failed, to "recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League." Apparently the makers of the League contemplated unwillingly the necessity for military action, and made slight provision for it, in the hope that economic pressure would be sufficient. For this, the unwillingness of national sovereignty to submit to such control was doubtless the compelling argument. When the matter of preparing in advance these military measures was brought before the Assembly in 1927 the "Rutgers Memorandum" displayed a fear that such measures would shake mutual confidence among Members; others retorted that if there could be greater security, there would be greater confidence. The Covenant, it may be said, recognized military coercion as a matter of principle, but did not implement it. The machinery was available, and the right stated, if Members cared to make use of either; but on no occasion was any effort made by Members to employ military sanctions.

§ 105. Later Efforts of the League.—Members did not fail to recognize that the League did not offer as much security and confidence as had been desired, and they attempted in many directions to make improvements. We have noted, in connection with the disarmament effort, the proposed Treaty of Mutual Assistance, which appeared as a result of the growing consciousness that reduction of arms depended upon security.

Geneva Protocol. In spite of the failure of this treaty, efforts were still continued upon the theory that security must precede disarmament. A draft treaty by an American committee was submitted, and rejected, which

[18] For a thorough discussion of the action taken, including the above point, see A. E. Highley, *The Actions of the States Members of the League of Nations in Application of Sanctions Against Italy, 1935/1936* (Thesis, University of Geneva, 1938).

defined the aggressor state as the one which refused arbitration. By now it was becoming realized that provisions for maintaining peace must be positive as well as negative—that states could not simply sit by and allow peace to arrive. If states are to give up war and arms, there must be means provided for determining and protecting rights. The Treaty of Mutual Assistance had emphasized security; attention was now directed toward Article 12 of the Covenant, and thus the trilogy was completed—arbitration, security, and disarmament. Following this orientation, the Fifth Assembly devoted itself to strengthening arbitration, and prepared the Protocol for the Pacific Settlement of International Disputes, the famous "Geneva Protocol." It was called a protocol to avoid the implication of being a movement outside of the Covenant, and its purpose was to close up the "fissures" of the Covenant. "The Protocol may be defined in one sentence as being an attempt to promote disarmament by creating security, to create security by outlawing war, to enforce the outlawry of war by uniting the world against the would-be aggressor, and to base this union of mutual protection upon the fundamental principle of compulsory arbitration." [19]

The connection with the Covenant was emphasized both in the Preamble and in Article 1. By the latter, signatory states undertook to make every effort to amend the Covenant along the lines of the Protocol. By Article 2, they renounced war against a state which accepted the obligations of the Protocol, except "in case of resistance to acts of aggression," or when enforcing the Covenant or Protocol. Provisions for pacific settlement were strengthened, and compulsory arbitration became the backbone of the system; the jurisdiction of the Permanent Court became compulsory *ipso facto* for cases included in Article 36 of the Statute. In other cases, arbitration could be had if the parties so agreed, but if no agreement were made the Council was to take up the case and report upon it. If the recommendation of the Council was unanimous, it was final; if not, the Council would refer the case to a special arbitral tribunal, whose decision would be final. Thus a decision was achieved, either by the judgment of the Court, or by the unanimous recommendation of the Council, or by the award of the special tribunal. The gaps of the Covenant were closed.

But the Protocol also provided sanctions against a state which should violate its obligations. An ingenious test for determining the aggressor was set up by Article 10. In case of hostilities, that state was presumed to be the aggressor which had failed to submit to the specified procedure of pacific settlement or to accept the decision, or which had disregarded a

[19] W. E. Rappard, *International Relations as Viewed from Geneva* (New Haven, 1925), p. 156. See as to the Protocol, P. J. N. Baker, *The Geneva Protocol for the Pacific Settlement of International Disputes* (London, 1925); D. H. Miller, *The Geneva Protocol* (New York, 1925); H. Wehberg, "Le Protocole de Genève," *Hague Acad.*, 1925, II, pp. 5-149.

decision that the dispute arose from a matter solely within the domestic jurisdiction of the other state, or which had violated the provisional measures enjoined by the Council under Article 7. The automatic presumptions thus set up might be overcome by unanimous vote of the Council. Aside from these cases, if the Council did not succeed in determining the aggressor it should decree an armistice, and the state which violated the terms of this armistice was held to be the aggressor. The aggressor state having been determined, each state was bound by the obligations of Article 16 of the Covenant, which "shall be interpreted as obliging each of the signatory States to cooperate loyally and effectively . . . in the degree which its geographical position and its particular situation as regards armaments allow" (Article 11). Thus the system seemed complete, and no way open by which war was legally possible.

It needs to be recalled that the original purpose of all this work was the reduction of armaments. The Geneva Protocol was in a sense preparatory to disarmament, and it consequently provided that if the conference on disarmament, called for by Article 17 of the Protocol, did not succeed in making an acceptable plan of disarmament, the Protocol should not go into effect. Under this condition, of course, it would not yet be in effect; actually, however, it failed at once. It was adopted by the Assembly and signed by a large number of states, but it was ratified by none. At the Council meeting in March, 1925, Sir Austen Chamberlain gave it the *coup de grace*. His speech displayed dislike for the increase of responsibility resulting from compulsory arbitration and from compulsory sanctions; but the position of England was primarily due to her unwillingness to assume obligations which might call for the use of her navy in enforcing sanctions under conditions rendered perilous through the possible maintenance by armed force, on the part of the United States, of the rights of neutrality.

The Protocol revealed more clearly the weaknesses of the Covenant, and in attempting to remedy them made important progress in the study of the means of controlling war, such as the lesson of the futility of attempting to define aggression. As M. Branting of Sweden remarked, it is preferable to speak of "the suppression of war contrary to the Covenant," rather than in terms of aggression or self-defence. While the Protocol is open to criticism in some parts, it marks even yet the greatest advance made by the community of nations toward the elimination of war. There are many who believe that any final settlement of the problem of war will involve a return to these principles.[20]

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[20] See, in the *Records of the Sixth Assembly*, Plenary, pp. 117-125, the remarks of Paul-Boncour; *Records of the Eighth Assembly*, Third Committee, pp. 16-17 (de Brouckère) and p. 31 (Politis); also Madariaga, pp. 113-114; D. H. Miller, *The Geneva Protocol* (New York, 1925), p. 112.

THE LOCARNO TREATIES. In the same speech in which Sir Austen Chamberlain pronounced the doom of the Protocol, he suggested that obligations which seemed too onerous for general acceptance might be arranged for by limited special agreements among groups which have special common interests or face common perils. "The best solution," he said, "would be to supplement the Covenant, with the cooperation of the League, by making special arrangements in order to meet special needs." Negotiations were soon initiated by Germany, looking toward greater security along her frontiers, and these efforts were approved by the Sixth Assembly. At the end of 1925, seven treaties were signed which, together with a Final Act, and a letter to the German delegation with regard to interpretation of Article 16 of the Covenant, make up the Locarno system.

The most important of these was the Rhine Pact. By it, the signatory Powers collectively and severally guaranteed the territorial status with regard to the frontiers between Germany and Belgium and between Germany and France, established by the Treaty of Versailles; and Germany and Belgium, and Germany and France, mutually agreed not to resort to war against each other except in self-defence, or in execution of League sanctions, or for action taken under Article 15, § 7, of the Covenant. They were obligated to pacific settlement in accordance with treaties signed at the same time. If the treaty should be violated, appeal was to be made to the Council; and if the Council was satisfied that there had been a breach, the signatory Powers promised to come to the aid of the state attacked. In case of "flagrant violation" they need not wait upon the Council decision, although they must submit to it when later given. The Treaty was to go into effect as soon as Germany had entered the League, and to remain in effect until the Council by two-thirds vote should assert that it was no longer necessary and that the League could give sufficient protection.

The provisions for pacific settlement were more extensive than those of the Covenant, and represented a high stage of development in the use of arbitration and conciliation.[21] "All disputes of every kind" which involve a dispute as to rights were to be submitted to arbitration, with the exception of disputes arising in the past. The parties might first, however, by mutual agreement, submit the dispute to a Permanent Conciliation Commission, created by the same treaty. If no agreement was reached before this body, the dispute must go to arbitration. Other questions, not settled by judicial decision, must be submitted to the Conciliation Commission, and if no agreement was reached through it, they were to be taken over by the Council and handled under Article 15 of the Covenant.

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[21] See N. Politis, "Les accords de Locarno," *R.D.I.L.C.*, 3rd Series, VI (1925), pp. 713-721; K. Strupp, "Die Verträge von Locarno," *R.D.I.* (Genève), III (1925), pp. 303-341.

The eastern frontier of Germany was also included in the Locarno system, but not upon the same basis of guarantee. Similar treaties of arbitration were obligatory but, if they were violated, the guarantee was found in alliances between France and Poland and between France and Czechoslovakia. The Pact of Locarno was a regional agreement and, within its geographical limits, it carried on the principles of the Covenant and the Geneva Protocol.

General Act of 1928. The defeat of the Geneva Protocol represented a distinct check in the development of the Covenant, and efforts were directed toward regional agreements, which were encouraged by the praise accorded to the Locarno system. A period of uncertainty and confusion followed. Some states favored more study of arbitration; others wished to speed up disarmament. It had long been recognized that the two were inseparable. In September, 1925, the Assembly passed a resolution "declaring afresh that a war of aggression should be regarded as an international crime," and proposing to work for peace "by the sure methods of arbitration, security, and disarmament." Shortly thereafter, the Preparatory Commission for the Disarmament Conference was set up, and study was again directed toward filling up the "fissures" of the Covenant.

At the Eighth Assembly, a resolution was passed that "all wars of aggression are, and shall always be, prohibited"; and M. Loudon and Politis asserted that the necessary next step was to condemn "not only wars of a certain category, such as wars of aggression, but in general all wars." The Assembly resolution of October 14, 1921, was brought up for reconsideration, and the question asked whether the right was really given to each state to decide for itself when the Covenant had been broken. The Dutch proposal to resume study of the Geneva Protocol, however, frightened Sir Austen Chamberlain, and it was toned down to "study the principles of disarmament, security, and arbitration which are expressed in the Covenant." Accordingly, the important Committee on Arbitration and Security was set up, which made three reports to the Assembly. They were prepared in collaboration, and the general introduction to all called attention to the significant fact that "the Covenant itself creates a measure of security which needs to be appreciated at its full value, and that its articles are capable of being applied in such a way that in the majority of cases they can prevent war"; that "the will for peace can be exercised effectively within the framework of the Covenant"; and that regional pacts of security should be regarded as supplementary guarantees, available for those states which do not consider that the Covenant affords them a sufficient degree of security.

The Committee on Arbitration and Security also offered a series of model treaties in varying degrees of completeness. There were three of

them: one exclusively for conciliation; one providing for conciliation and also for the compulsory jurisdiction of the Permanent Court where questions of right were involved; and one submitting all disputes whatever either to arbitral settlement or to the Court. The Assembly collected the three instruments into one "General Act" containing one chapter for each of the above texts, and a fourth chapter combining them all. At the same time there were offered a treaty of collective mutual assistance, a collective treaty of non-aggression, and a bilateral treaty of non-aggression.

The Assembly recommended the General Act for signature, with some explanation of its purposes. In the first place, the system was intended to be elastic enough to meet the needs of different states. This was achieved by (1) allowing a choice between the General Act or bilateral treaties; (2) allowing choice between three methods of settlement; (3) permitting reservations. In the second place, in spite of its elasticity, it was intended to assure obligations of equal force, by providing that failure to agree on a *compromis* should not stop the arbitral process, by excluding certain reservations, and by interpretation of the General Act by the Permanent Court. Whereas the bilateral treaties were merely guides, the General Act was thrown open for signature, with provision for total or partial adhesion, denunciation, and reservations. It was to go into force upon receiving two adhesions, which Norway and Belgium at once gave. By 1938, twenty-two states had ratified the General Act.

This offering could fairly be described as "one of the most considerable efforts so far made to organize peace." It had a sample to suit the taste of every state. But the variety itself of the offering was disconcerting and aroused a division of opinion. In general, it was argued that such a variety of obligations led too far away from the purposes and from the control of the League.[22] On the other hand, it was argued that the numerous efforts to strengthen the Covenant had failed, and that the only hope for advance lay in agreement between states which were willing to advance; that such agreements were rigidly in line with the Covenant; that they filled some, at least, of the gaps in the Covenant; and that by affording a greater degree of security to certain states, these states will be encouraged to a greater degree of responsibility and participation in the work of the League.

Other Proposals. Mention may be made of a few other efforts and proposals. A plan for European Union was put forward by Premier Briand

[22] "Why," asks Professor Brierly, "in view of the conciliation functions of the Council of the League, is this system of a multiplicity of separate conciliation commissions recommended to us at all? . . . If we are to multiply them in the wholesale fashion contemplated by the Act and to give them a priority over a tried machinery already existing for the same purpose, we are entitled to ask for reasons." *B.Y.I.L.*, 1930, pp. 120-121, 124.

of France in 1929, and a Committee of Enquiry worked until 1931 on the matter, without result.[23] A Convention on Financial Assistance for a victim of aggression was signed in 1930, but received few ratifications. In 1931 a Convention to Improve the Means of Preventing War was adopted, but failed with the Disarmament Conference. The French Government proposed, in 1932, an international police force, and concerted action by signatories of the Pact of Paris in case of threat to the peace. Attention was diverted from League reform by the Four Power Pact of March 1933.[24] After the collapse of the disarmament effort, and with growing tension in Europe, a Committee on the Organization of Collective Security was set up in 1935, and in 1936, after the Italo-Ethiopian affair, a Committee of Twenty-Eight to study Application of the Principles of the Covenant, rather than reform of the Covenant. This committee inquired how to secure the cooperation of non-Members, which led to an interesting report by Lord Cranborne [25] and to the withdrawal of Chile because of failure to accept her ideas as to universality and non-coercive character for the League. At the next Assembly, the issues thus raised were further discussed, and it was clear that Members were unwilling to accept obligations concerning military, or even economic, sanctions. After a communication from the United States revealed willingness to cooperate in the non-technical work of the League, the "Bruce Committee" made recommendations concerning economic and social cooperation, including establishment of a Central Committee for Economic and Social Questions. The Bruce Report was approved at the twentieth session of the Assembly, in December, 1939, and an Organizing Committee was appointed. It thus appears that the coercive authority of the League was diminishing in the minds and support of its Members, and that it was tending, in its final hours, to become machinery for cooperation rather than an agency for the maintenance of security.

§ 106. Survey of Disputes Handled by the League.—Space does not permit study of the various cases before the League,[26] but a brief survey will perhaps disclose something as to its procedures and its success. The first case before the Council (as later before the Security Council of the United Nations) was between Russia and Persia, and was settled by Russian withdrawal from the town of Engeli, on the Caspian Sea.

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[23] As to the European Union, see § 114, *infra*.

[24] J. W. Wheeler-Bennett, *Documents on International Affairs, 1933* (London, 1934), p. 242.

[25] *Report of the Special Committee Set up to Study the Application of the Principles of the Covenant, L of N Doc.*, A.1938.VII, also in *O.J.*, Special Supplement, No. 180.

[26] Some thirty disputes up to 1920 are listed in *Ten Years of World Cooperation*, pp. 25-26. See for discussion of many of these cases, Knudson, pp. 68-113.

AALAND ISLANDS. Great Britain brought before the Council on July 11, 1920, under Article 11, § 2, a dispute between Sweden and Finland concerning the Aaland Islands. The latter state was not a Member, and Article 17 was applied. There being as yet no Court, a Committee of Jurists was called upon to decide whether the issue was a "domestic question," and the Committee decided that it was not. A commission was sent to the Islands, and on its report, the Council confirmed Finnish sovereignty and suggested certain safeguards for the Swedish inhabitants, and also neutralization. Both parties accepted the recommendations.

POLAND-LITHUANIA. A long-drawn-out struggle over borders between Poland and Lithuania was brought up in September, 1920, also under Article 11. Efforts at a settlement continued for a decade or more, and while fighting was not entirely prevented, war was to some extent smothered. No satisfactory settlement was ever attained.

ALBANIAN BOUNDARY. The unsettled frontiers of Albania led to conflicts with her neighbors, and she appealed to the Council under Article 11 in April and June, 1921. Debate in the Council as to use of economic sanctions, and support of Albania by Italy, led to acceptance by Yugoslavia of boundaries as delimited by the Conference of Ambassadors.

UPPER SILESIA. The area of Germany known as Upper Silesia was, under the Treaty of Versailles, to hold a plebiscite to determine to whom it should belong. The plebiscite showed preference for German rule, but agreement could not be reached upon a boundary. The Conference of Ambassadors requested assistance from the Council, which appointed a committee of neutrals to study the matter, and suggested a boundary and also certain economic and social adjustments. These were accepted by the parties.

HUNGARIAN OPTANTS. There was involved in this dispute expropriation by the Rumanian government of the property of Hungarians transferred by the peace settlement. Hungary presented their case to the Council in March 1923 and it remained upon the Council agenda until 1930. It was brought up under Article 11, under which the votes of the disputants are not excluded. A *rapporteur* was appointed and arguments were heard. Settlement was reached in connection with the reparations settlement in 1930, and Hungary withdrew the case.

CORFU. One of the most famous cases before the League resulted from the murder of an Italian member of a commission of the Conference of Ambassadors which was seeking to establish the boundary between Greece and Albania. Italy issued an ultimatum to Greece, and seized the island of Corfu. Greece appealed to the Council in September 1923, under Articles

12 and 15 of the Covenant, and a conflict of jurisdiction arose as between the Council and the Conference of Ambassadors. The Council made certain recommendations, and communicated them to the Conference of Ambassadors, which assessed penalties against Greece. Italy gave up Corfu, but her position as a Great Power resulted in satisfaction of most of her claims. The League could not claim credit (or discredit) for the settlement, but lost in reputation by surrendering the case to the Conference of Ambassadors.

Mosul. Great Britain, having failed to agree with Turkey as to boundaries in the Mosul area, appealed to the Council in March 1924. Since the Treaty of Lausanne was involved, an advisory opinion was asked from the Court, which replied that the Council had jurisdiction, and should act under Article 15. A boundary line was then agreed upon by the parties in a treaty of June 5, 1926.

Greco-Bulgarian Affair. This was another famous case, from which the League emerged with enhanced reputation. It was a case in which war was clearly averted, since orders to attack had been issued by Greece. The controversy arose over a border shooting, and the President of the Council at once dispatched a telegram calling upon both states to observe their obligations to retire their troops behind their own frontiers. An extraordinary meeting of the Council was summoned, which demanded confirmation that troops had been withdrawn. This was given and, hostilities having been forestalled, a commission was sent to investigate on the spot. It was preceded, in fact, by representatives of the Secretariat, who obtained the information sought and prepared recommendations for the Commission. The Council held Greece responsible, and required an indemnity from her. The League thus showed itself able to act promptly and decisively, and an important precedent was established.

Chaco. No such brilliant success attended the efforts to resolve the dispute between Bolivia and Paraguay over the territory known as the Gran Chaco. Both states preferred settlement of their own, by arms, and the Council intervened on its own initiative in December, 1928. The affair was made delicate by the fact that both the United States and a conference of American Republics were at the same time attempting to settle the controversy, and the Council refrained from action. In 1932, Paraguay appealed to the Council under Articles 10 and 11, and the Council, after waiting for approval by the United States, sent a commission of inquiry. A truce was arranged, but failed, and Bolivia then appealed under Article 15. The dispute was transferred to the Assembly and an embargo on munitions against both states was agreed to. Paraguay announced her withdrawal from the League, and the American republics again attempted

a settlement, with the approval of the Assembly. A settlement was reached at last (1936), probably due mostly to the exhaustion of the disputants.

MANCHUKUO. Japanese troops, in 1931, seized the town of Mukden in Manchuria, and on September 21, the Chinese appealed to the Council under Article 11. It was a difficult situation for the League, involving a Great Power, far away and lying between two other Great Powers who were the most interested parties, but not Members of the League. The Council was concerned as to the participation of the United States, which took the unprecedented step of authorizing its consul at Geneva to sit with the Council. The United States was willing to invoke the Pact of Paris, to which it was a signatory, but this treaty had no sanctions behind it. The Council was further weakened when the United States withdrew from the Council and would consult only at Paris, a ridiculous situation. The Council sought first to limit hostilities by asking Japan to withdraw her troops, by proposing a neutral zone, and in various other ways. On the contrary, the Japanese continued to advance. It was then decided to send a Commission of Inquiry (Lytton Commission) which made fair and impartial recommendations. Japan, however, organized "Manchukuo" as an independent state. Meanwhile, the United States, on January 7, 1932, announced the "Stimson Doctrine," a sort of a negative sanction, refusing to recognize a change in a legal situation brought about by the use of force contrary to treaty obligations.[27] China transferred her appeal to Article 15, and to the Assembly, which adopted a resolution condemning Japan. Japan thereupon gave notice of withdrawal from the League. The League had failed in this difficult case, and with this failure, disorder increased in the world, and aggressors became more daring.[28] It was a gain, however, that the situation could be brought before a world forum, and that world opinion was concentrated against Japan.

THE LETICIA DISPUTE. On September 1, 1932, armed Peruvians occupied the town of Leticia, in Colombia, and Colombian forces were sent to repel the "aggression." Peru disclaimed official participation, but asserted that she must protect her citizens, and fighting ensued. Peru appealed to the Permanent International Conciliation Commission under the Havana Treaty of 1929; Colombia replied that it was a domestic matter, but later called first upon the signatories of the Pact of Paris, and then upon the League of Nations. Meanwhile, the Brazilian Government attempted to mediate, without success. The Council of the League in January asked both

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[27] This principle was approved by the Assembly on March 11, and other precedents allow argument that it is now part of customary international law.

[28] See M. O. Hudson, *The Verdict of the League: China and Japan in Manchuria* (World Peace Foundation, Boston, 1933); W. W. Willoughby, *The Sino-Japanese Controversy and the League of Nations* (Baltimore, 1935).

parties for information, reminded them not to use force, and appointed a Committee of Three. Both parties refused arbitration. The Council proposed an international Commission to take charge of the disputed territory, and this was agreed to. The League thus administered the territory until a settlement was reached between the two parties in a treaty of May 24, 1934. The United States had supported both Brazilian and League efforts. The case may be regarded as one of the League's successes.

Italo-Ethiopian Affair. A clash of troops of Italy and Ethiopia occurred at Wal-Wal in December 1934, and both governments referred the matter to the Council, which encouraged direct negotiations, and then arbitration. In September, 1935, Ethiopia appealed under Article 15 and a Committee of Five was appointed, and later, a Committee of Thirteen, to prepare a report under Article 15, § 4. Italy attempted to block all action by the League, and moved her troops forward. On October 7, the Council held that Italy had resorted to war contrary to Article 12, thus bringing Article 16 into play, and called upon the Assembly to cooperate in arranging economic sanctions. The Assembly, with the exception of Albania, Austria, Hungary (and of course Italy) approved, and established a complicated set of committees to arrange for the economic measures to be taken.[29]

Various difficult problems arose. An embargo on arms, measures to prevent financial resources reaching Italy, and prohibition of importation of Italian goods were agreed to at once. The problem of mutual assistance among the sanctioning states was not so easy. It was difficult to measure losses suffered, to divert trade routes and substitute other markets, or to manage a mutual aid fund. Some states had difficulty with their national laws, others who were dangerously close to Italy (Albania, Austria, Hungary, Switzerland) sought special exemptions. The cooperation of several non-Members was needed if Italy was to be deprived of supplies, and mere parallel action was not enough. If the United States Neutrality Legislation incidentally deprived Italy of some items, it also injured Ethiopia. There were political angles as well, as manifested by the notorious "Hoare-Laval deal," which would have surrendered much Ethiopian territory to Italy, but which was killed by public opinion. Meanwhile, Italy proceeded to conquer all of Ethiopia, breathing threats of military action against any state which might interfere, and thus raising a question as to the ability of the League to protect a Member which might be attacked by Italy. In July, 1936, the Assembly conceded failure, and lifted sanctions. At the same time, they refused to recognize the conquest, and later admitted Ethiopian representatives.

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[29] See Highley, *op. cit.*

The failure of the League was due to various reasons, a chief one being inability to secure cooperation of the United States. At the same time, the rise of Hitler, German rearmament, and the seizure of the Rhineland preoccupied statesmen with the vision of greater dangers to come. There were now three Great Powers acting in defiance of the League, and tending to combine their opposition. It would have been almost impossible for the League to stop Japan in 1931, but the weakness then revealed encouraged others to aggression. A stronger stand was attempted against Italy, but the League did not have enough authority and was not universal enough to succeed. France and England, for political reasons, did not wish strong action against Italy; having failed here, it was too late when they anxiously sought its help against Germany. The existence of the League machinery, however, had focused attention and concentrated public opinion, so that when the inevitable crisis developed, the world was already opposed to the Axis combine.

Civil War in Spain. The terrifying tide of events pushed its way next into Spain, where the fascist forces of Franco sought to overthrow the constituted government.[30] Franco was recognized and was assisted by Germany and Italy, and the republican Government appealed to the Council under Article 11. On the other hand, France and England had organized twenty-seven European states into a Non-Intervention Committee, to prevent intervention or shipment of arms by foreign powers. The Council approved this effort in a special meeting on December 10, but left responsibility to the Non-Intervention Committee. The failure of the League to act can be explained by the fact that the Spanish Civil War was regarded as a domestic struggle over which the League had no jurisdiction under the Covenant. The success of Franco was, however, another step on the road to war.

Sino-Japanese War. At Liukuchiao, in July, 1937, the latent struggle between China and Japan flamed up into open hostilities. China first notified the signatories of the Nine Power Treaty [31] of what she alleged to be a violation of that treaty. On September 12, she appealed to the Council under Articles 10, 11, and 17 (Japan having withdrawn from the League) of the Covenant. A Far East Advisory Committee was given charge of the question. Its first step was to condemn aerial bombardment of open towns by the Japanese; the United States concurred, but by parallel action, through its non-voting representative on the Committee. A resolution was later adopted by the Assembly to invite a conference of the signatories of

[30] N. J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (New York, Macmillan, 1939).

[31] *League of Nations Treaty Series*, Vol. XXXVIII (Geneva, 1925), p. 278; Hudson, *International Legislation*, Vol. II (Washington, 1931), p. 823.

the Nine Power Treaty. This action was due in the first place to the fact that Japan was not a Member and that the League was not prepared to apply sanctions as might have been necessary had Article 17 been invoked; it was due also to the hope that Japan would feel it necessary to attend such a conference, and to the fact that the United States could participate directly, whereas it would not so participate in a League action.

The Conference met at Brussels on November 3. Japan refused to attend, the U.S.S.R. and Germany were especially invited, and the former did attend. Nothing was accomplished at the conference, beyond restatement of moral principles. The Chinese addressed an appeal to the 100th Session of the Council which passed a resolution deploring the situation. Actually, the trend of events was beyond control. The signature of the Anti-Comintern Pact by the Axis Powers in the midst of the Brussels Conference made hopeless efforts at conciliation. The League had no authority to provide military sanctions, and especially in the degree now needed; and the United States still sought to "keep out of war." Reason, intelligence, and cooperation appeared after the attack on Pearl Harbor; the community of nations had not learned how to use them for purposes of peace.

§ 107. Conclusions.—The League of Nations was the first organized effort of the community of nations to regulate the use of force among nations, and it was to be expected that it would be weak, both in constitutional authority and in support from its Members. It proved to be of much use in conciliation of disputes between states which were willing to reach a settlement, and can also be credited with generating enough pressure to induce some unwilling states to submit to settlement. In a few cases, though this is largely conjectural, it is reasonable to believe that war was prevented, and in others hostilities were ended. The cases above surveyed are only a part of those handled, and it is to be observed that Great Powers, and not merely small states, submitted to League recommendations. For most cases, the League worked effectively; it failed in the case of Great Power aggressors of the most obstinate type. It might have succeeded here had Members been willing in the earlier conflicts to back the League with military action which the League itself had not the authority itself to take, though it would have been embarrassed by the non-participation of the United States, the U.S.S.R., and others. Lessons may be drawn from this experience as to the need of universality and of whole-hearted support by Members; without the latter, no association of sovereign states can hope to succeed.

While impatience was often expressed at the slow and often roundabout methods employed, the flexibility of League methods deserves consideration. It did not seek to arrogate power to itself; it was willing to turn a matter

over to the states most directly concerned, such as the American Republics or the Signatories of the Nine Power Treaty; it called in non-members whether of the Council or of the Assembly. Its purpose was to maintain peace, and it is praiseworthy that it sought this end in every possible way. Disputes between nations often involve complicated and difficult problems, and they also often involve strong popular emotions. Time is required to find solutions and for emotions to cool off; patience is indispensable.

It is surprising how often the Council and Assembly were able to secure the unanimous vote required under the Covenant; it would almost be correct to say that it never failed. This, of course, meant watering down some proposals to a common level of acceptance. It was important, too, that the veto could not be used by a disputant. While this was possible under Article 11, and was used by Japan, disputes could be transferred to Article 15, under which a disputant could not vote. The required procedures for settling disputes were flexible but comprehensive, and it was not difficult to determine, in most cases, who had failed to live up to these obligations.

The part played by the Assembly is also worthy of notice. Cases could be transferred, and occasionally were, from the Council to the Assembly by the parties, or by the Council itself. The result was to provide a broader foundation of support, to substitute expression of ideals of justice for the sometimes coldblooded realism of the Council and, at the least, to concentrate the attention of the world upon the problem being discussed in this forum.

With regard to the use of sanctions, the primary weaknesses of the League appear to have been lack of authority to bind Members by its decision as to the aggressor, lack of machinery and authority for use of economic sanctions, and the entire absence of authority to use armed force against an aggressor. It is often said that the failure of the League was the failure of its Member nations and while this is true, it is also true that Members would be more prepared to furnish the needed support if they were obligated to do so. Some would doubtless fail, but it would be difficult to refuse support when others were fulfilling their obligations. One of the great lessons of League experience is the growing effect of world opinion upon the conduct of an individual nation. Nevertheless, there will always be dissenters ready to use force, and the final lesson of League experience teaches us that such an organization must be able to call upon sufficient physical force to overcome such nonconformists.

CHAPTER 17

THE UNITED NATIONS AND WAR

The failure of the League of Nations was disappointing to the world, even to the complacent American people who had rejected responsibility for it; and the destructive potentialities of a war implemented by modern science, alarmingly apparent after World War II, made increasingly urgent the desire to bring war under control. It was the hope of a "security organization" able to guard them against war which brought about the conversion of the American people from isolation into active leadership and planning of the UN; it was such a hope among all peoples that assured from the beginning the establishment of that institution. We have noted above the structure and characteristics of this new organization; we turn now to more detailed study of its functions as a security system. It is the "primary responsibility" of the Security Council to maintain international peace and security, and this task includes the settlement of disputes among states as well as the prevention or repression of aggression.

§ 108. Pacific Settlement of Disputes.—It can be debated whether the Charter of the UN represents any advance over the methods for the settlement of disputes of the League of Nations, and especially as regards legal or judicial settlement. It was hoped that the "gaps" of the League Covenant would be filled in the new system, but there is actually in the Charter no requirement of a final settlement between parties in a dispute. The Security Council has a wide freedom of recommendation, within which it is little bound by law or definition of aggression or other standard of guidance, but it can do no more than recommend; it has no power to impose a final settlement upon parties.[1] And, of course, hanging round its neck like millstones are the veto and the "domestic questions" clauses.

MEANS OF THEIR OWN CHOICE. The key to the procedure for the settlement of disputes as provided for in the Charter is to be found in Article 33, which asserts that the "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and

[1]The Dumbarton Oaks Proposals did not even authorize the Security Council to recommend terms of settlement. Terms were added at San Francisco; without them, the Charter would have been far behind the Covenant. See UNCIO, Doc. 2, G/29, p. 4.

security, shall, first of all, seek a solution" by means of their own choice. Certain methods are listed in this article but this listing does not exclude other means; for example, the parties could doubtless agree among themselves to submit their dispute to the Security Council, though the Council is not included among the means therein named.[2] The obligation imposed upon Members to settle their disputes exists only for a certain type of dispute, as described in the unwieldy words above quoted. The text emphasizes that it is the right, as well as the duty, of Members to settle their disputes by means of their own choice; indeed, five of the six articles in Chapter VI relate to settlement by the parties themselves, and the participation of the Security Council in the settlement is stringently limited.

In the first stage of settlement, two possible situations appear. The dispute may be one not regarded as likely to disturb the peace, and as to which, therefore, no obligation to settle exists. The parties may nevertheless wish to settle such a dispute, and they are free to do so by whatever procedure they may wish to follow. The other situation is one which might be regarded as dangerous to future peace, but which has not yet been so designated by the Security Council (Article 34). In this situation, an obligation to settle does exist, and the parties are actually trying to settle it between themselves. In neither of these cases does the Security Council have jurisdiction for more than discussion. Not until the Council has determined that the matter is one "the continuance of which is likely to endanger the maintenance of international peace and security" does the Council have jurisdiction to make formal recommendation to the parties either of procedures or of terms of settlement.

What Is a Dispute? The procedure usually to be expected would begin with Article 35, under which a state, Member or not, would bring a dispute or a situation to the attention of the Security Council or of the General Assembly. The matter could also be brought before the Security Council by the Secretary-General (Article 99), or by reference from the General Assembly (Article 11, § 2); and the Security Council could refer a matter to the General Assembly.[3] It is important to note, however, that the Security Council may intervene in any situation and may conduct an investigation to determine whether or not it is the type of a dispute which, under Article 33, obligates the parties to seek a settlement. The Council may take this action upon its own initiative, without awaiting a complaint from another source; even if the question had been referred by the parties

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[2] Article 38 authorizes this, but was really intended to make possible the reference to the Council of disputes which Members are not obligated to settle.

[3] As was done in the case of the Franco Government in Spain. The part of the General Assembly in the settlement of disputes has been discussed above (pp. 323-324), and will not be considered further here.

to the General Assembly, the Security Council could presumably take it into its own jurisdiction by making the decision under Article 34.[4]

It would appear, further, that the Security Council *must* decide, under Article 34, that the matter is one "the continuance of which would endanger the maintenance of international peace and security" before the Council itself would be able to take jurisdiction for the purpose of making recommendations, whether of procedure or of settlement. Otherwise, it would be possible for one party, by its own mere assertion that the dispute was one of the type creating obligation, to compel the Council to take up the dispute; and this would deprive the Council of the right of decision given to it under Article 34. On the other hand, if the Council did not make the decision, either party might assert that the dispute was not one of the required type and thus by its own mere allegation exclude the Security Council from jurisdiction and escape its own obligations under Article 33.

The Council did not, in the earlier cases before it, undertake to decide whether or not a dispute did exist, apparently because of uncertainty as to whether the veto could be used in the voting on that question; and it was unable to draw up rules of procedure. A party to a dispute cannot, under Article 27, vote in its own case, but if it can veto the decision that a dispute exists, it has blocked action more effectively than if it could use the veto in action on the dispute itself. The Council can not make recommendations either as to procedures or as to terms of settlement until it is known that there is a dispute; and of course it would not be known who are the parties to a dispute, and therefore who is entitled to vote, until there is a dispute. Consequently, the handling of disputes by the Security Council has been uncertain and unsatisfactory to all concerned, and efforts to evade the *impasse* by informal or roundabout methods brought much complaint, particularly from the Soviet Union.[5]

Authority of the Security Council. Assuming that the decision has been made under Article 34 and that the Security Council has thus acquired a jurisdiction of its own over the dispute, what can it do? Two further stages lie before it, neither of which would necessarily arrive at the

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[4] The first situation in which the Security Council undertook such an investigation was with regard to Greece, early in 1947.

[5] Especially in the Iranian case, discussed briefly below. It is claimed that the Council has made no recommendation and has done no more than to "consider and discuss," and that if in the discussion various desirable courses of action seemed to be agreed upon or implied, these were not formal "recommendations" by the Council. It was this procedure against which the Soviet Union revolted, and which the Secretary-General claimed to be unjustified under the Charter. See C. Eagleton, "Jurisdiction of the Security Council in Disputes," *A.J.*, Vol. 40 (1946), p. 513; *Journal of the Security Council*, pp. 522-524; *Report by the President to the Congress* 1946, Dept. of State Pub., No. 2735, pp. 33-34.

stage of a final settlement. It may first (Article 36) recommend "appropriate procedures or methods of adjustment," a right which is three times stated in Chapter VI, and which appears again in Article 39. It may first (Article 33, § 2) "call upon the parties to settle their disputes" by the means suggested in Article 33; it may (Article 36, § 1) recommend a specific procedure of settlement; it may choose again to recommend a procedure rather than terms of settlement (Article 37); and it is again given an opportunity to recommend a procedure of settlement rather than enforcement measures in Chapter VII. It is of course most desirable that disputants should settle their own disputes, but the great emphasis laid upon their right to do so, and exhortation rather than decision by the Council, are other evidences of the intent of the makers of the Charter, and primarily of the United States, to protect the sovereignty of Members. This is further shown in the last two paragraphs of Article 36: the Security Council must, in recommending procedures, respect the choice of the parties themselves; and it cannot itself refer legal disputes to the Court—it can only recommend to the parties that they refer their dispute to the Court.[6]

The next, and final stage, appears (Article 37) when the parties have failed to reach a settlement by means of their own choice, including perhaps the procedures recommended to them by the Council. They must, in this case, refer the dispute to the Security Council which may again recommend further procedures of adjustment, or now, and not until now, recommend terms of settlement.[7] The Council can only recommend terms of settlement, and the parties are not obligated to accept them.[8] Thus, there is no final settlement provided in the Charter, and in this respect no advance beyond the League of Nations procedure. It is nevertheless true, as shown in the experience of the League of Nations, that such recommendations have great force. They bring a great pressure of public opinion to bear upon recalcitrant states, and few states dare to defy the pressure. The recommendations of the Council of the League were almost always respected, and none of the suggestions of the Security Council has been disregarded thus far.

One possibility remains to be noted. The procedure of pacific settlement itself is exhausted by the stages above described, but the Security Council may, under the enforcement action of Chapter VII, decide that

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[6] Once compulsory jurisdiction for the International Court of Justice was rejected, it was maintained that it was not possible to include in the Charter a requirement that disputes be referred to the Court.

[7] The explanation was made in Committee III/2 that if one party does not refer the dispute to the Council, the other may do so. UNCIO, Doc. 433, III/2/15.

[8] This was clearly understood and expressed in the debates at San Francisco. UNCIO, Doc. 433, III/2/15, p. 2, and Doc. 498, III/2/19, p. 2. Testimony before the Senate Foreign Relations Committee indicated that the Security Council could not impose terms of settlement even after enforcement action was taken. *Hearings*, pp. 275-279.

almost any situation constitutes a breach of the peace and may then employ the sanctions of Chapter VII to correct the situation. The Council might, then, decide that the failure of one of the parties to accept the recommendations of the Council under Chapter VI was a threat to or breach of the peace, and take action against it on that basis. A threat to or breach of the peace, it should be noted, is more grave than a dispute the continuance of which might endanger the maintenance of peace, and entails much graver consequences. It would be expected that efforts to settle a dispute peacefully would continue even while enforcement action was being considered or prepared. The two procedures would thus become commingled and confused, but they rest upon different grants of authority and are different procedures.

§ 109. Cases before the Security Council.—Before the Security Council had organized itself, or provided itself with rules of procedure, a flurry of cases descended upon it. Some of these were initiated, and all were affected in procedure by the political or propaganda purposes of various states; few of them were worthy of the attention of the Council. In the absence of rules of procedure, especially with regard to the veto, there was much uncertainty and confusion and few useful precedents were established, though perhaps some useful lessons have been learned. These cases are briefly summarized below.[9]

IRAN. The Government of Iran, in a note of January 19, 1946, charged that Soviet interference in Iranian affairs, backed by the continued presence of Soviet forces in that country, had produced a situation likely to lead to international friction. The Soviet Union replied that a solution could be reached through bilateral negotiation between the parties and that in fact such negotiations were proceeding; consequently, since the provisions of Article 33 were being observed, the Security Council had no basis upon which to intervene. The Soviet delegates were willing to discuss procedure, but not to discuss the case upon its merits. After several days of discussion, the Council unanimously agreed that the negotiations in process should be continued and requested the parties to inform the Council as to the result of these negotiations. This could hardly be regarded as a Council recommendation, either of procedure or of terms of settlement, and the Council took no decision as to whether or not the matter constituted a dispute under Article 34.

GREECE. Apparently by way of reprisals, the Soviet Government on January 21, 1946, asked for discussion of the continued presence of British troops in Greece. The Soviet delegate, forgetting the procedural questions

[9] They may be found in the *Journal*, and later in the *Official Records*, of the Security Council.

which he had raised in the Iranian dispute, took up the case on its merits and attacked the United Kingdom through many pages of the *Journal*. Mr. Bevin, in his eagerness to have the charges against his country disculpated, also disregarded procedure and discussed the case on its merits. The delegate of the United States, who had argued that the Iranian matter should be a continuing concern of the Council until a settlement had been reached, now argued that the Council had no authority to make recommendations since it had not found that a dispute existed. The matter was informally closed by permitting the President of the Security Council to issue a statement which took note of what had been said, neither condemned nor approved, and declared the matter closed.

INDONESIA. The Ukrainian delegate made various extreme accusations with regard to the presence of British troops in Indonesia, and demanded that a commission be appointed to investigate and "establish peace in Indonesia"—a task obviously beyond the authority of the Council under Chapter VI. The Ukrainian proposal was defeated.[10]

SYRIA AND LEBANON. A note of February 4 brought to the attention of the Security Council a "dispute" concerning the continued presence of French and British troops in Syria and Lebanon. The two countries jointly asked for the "total and simultaneous evacuation" of these troops. Since neither of these states had a seat on the Security Council, both were invited to sit with it but on the understanding that the invitation did not constitute a recognition that a dispute existed. Various delegates insisted that it was the right and duty of the Council, and not of the complainant, to say whether a dispute existed within the meaning of the Charter. Long and involved efforts were made by the Soviet group to induce the Council to make recommendations. Britain and France volunteered to withdraw their troops and to abstain from voting so as to arouse no questions of procedure. Seven votes were obtained for this solution, but the Soviet delegate objected that without his vote the resolution was not carried. The British and French were not content with this strange way of escape offered them, promised to withdraw their troops, and did so.

IRAN AGAIN. It seems appropriate to designate the renewal of the Iranian case as another case, since it was raised this time upon a different Charter footing, as a dispute rather than as a situation. The ensuing debate was warm and difficult to comprehend, and eventuated in a question of

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[10] *Journal of the Security Council*, pp. 252-256. The President stated that the vote was taken under Article 27, § 3, which requires a majority of seven, including all the permanent members of the Council. Only the USSR and the Ukrainian Republic voted for the proposal and no negative count was taken. *Quaere:* did the other four permanent members veto? Later practice seems to indicate that abstentions will not be counted as negative votes.

fundamental procedural importance. The United States was represented by Secretary Byrnes, who was now taking a more firm attitude against the Soviet Union. The Council had not decided that there was a dispute before it, and Mr. Gromyko charged that the United States was acting as if a mere communication from Iran was sufficient to compel the Council to deal with the substance of the matter as if it were an acknowledged dispute. Mr. Byrnes disclaimed this, and later insisted that the Council should not deal with the substance of the question, but only with procedure. Nevertheless, the resolution which he offered on April 4 took note of statements that Soviet troops were to be withdrawn and that no conditions were attached to the withdrawal, and asked that both Governments report by May 6 as to whether they had been withdrawn. This could be interpreted merely as a request for information from the parties, rather than as a "recommendation" of the Council stating terms of settlement; it could also be interpreted as an ultimatum. The Soviet Union took the latter viewpoint. Its delegates had already refused to attend meetings of the Council because its request for a few days' delay had been refused; and when the Byrnes resolution was passed, they filed a demand that the Iranian question be removed from the agenda of the Council as being in conflict with the Charter. Meanwhile, the Secretary-General had presented a memorandum to the Council which maintained that the matter could not be on the agenda unless the Council had found that it was a dispute of the type referred to in Article 33—which it had not done. The Council overrode this objection as too narrow, and appeared to argue that its authority (under Article 24) to maintain peace was superior to a procedural limitation set by the Charter. The attempt to remove the matter from the agenda having failed, the Soviet delegate did not appear on May 6, the date set for the report. Soviet troops were actually withdrawn, and perhaps would have been withdrawn in any case. The action taken was inconclusive, whether as a triumph over the Soviet Union or as a triumph over the terms of the Charter.

SPAIN. The delegate of Poland, in a note of April 8, called attention to the "international frictions" arising from the existence of the Franco regime in Spain, and suggested action under Article 34. A committee was created to study the objection that this was a domestic question, thereby excluding Council jurisdiction; and this committee made a report of 103 printed pages. After extended discussion of this report, Mr. Evatt (Australia) offered a resolution on June 26 noting that the subcommittee regarded the situation in Spain as one likely to endanger the peace and calling upon the Council "without prejudice to the rights of the General Assembly under the Charter," to keep the matter on its agenda. He explained that it was implied in this resolution that the Security Council

would, at the proper time, remove the matter from its agenda so that the Assembly would be free to discuss it. The resolution was vetoed by the Soviet delegate, but the Spanish question was later removed from the list of matters before the Security Council so that it could be considered by the General Assembly. That body, after long debate, voted to exclude Spain from membership in the specialized agencies, to request Members to break off diplomatic relations with the Government of Spain, and decided that, if within a reasonable time a democratic government were not set up in Spain, the Security Council should then consider what measures should be taken to remedy the situation. Since no decision was ever taken that the Spanish situation constituted a threat to or breach of the peace, it is difficult to explain how jurisdiction could be taken over such a domestic question.[11]

Military Forces in non-Enemy States. The Soviet Union, on August 29, 1946, orally (and later in writing) argued that the presence of allied forces in non-enemy territory was causing much anxiety, and proposed that Members be required to submit information as to the numbers and locations of such forces. This was an indirect charge against the United States, which argued that no allegation had been made of a situation likely to endanger peace. The Council refused to put the matter on its agenda. The Soviet Union later raised the question in the General Assembly, where it became entangled in the debate over disarmament.

Greece. On August 24, 1946, the Ukrainian Republic charged that the Greek Government was provoking border incidents on its Albanian frontier, persecuting minorities, invading Albania and shooting at peasants, and that the presence of British troops in Greece was the principal factor in this situation. The Netherlands representative appealed to the Security Council to maintain its dignity and not allow itself to become the "sounding board of unsubstantiated grievances"; and the British delegate objected to putting on the agenda "for extraneous and irrelevant purposes, frivolous counter-charges designed to distract attention from real issues." After several weeks of heated discussion, a number of resolutions were brought to a vote and all were defeated, including a proposal for a committee of investigation, which was vetoed by Russia.[12]

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[11] It is of further interest that it was the General Assembly rather than the Security Council which called for an action authorized in Article 41 of the Charter.

[12] In connection with this proposal, the Secretary-General asserted an independent right to conduct his own investigation of such a situation. Security Council, *Official Records*, First Year, Second Series, No. 16, p. 404. The statement was approved by the President of the Council (Gromyko) and was challenged by no one. This step, together with the submission of the memorandum on the Iranian case, may be regarded as strengthening the position of the Secretary-General.

The question was then simply abandoned, the Council passing to the next item on its agenda. On December 3, 1946, however, the Greek Government submitted a plea, under Articles 34 and 35, alleging that guerrilla warfare was being waged against Greece by her neighbors, Albania, Bulgaria, and Yugoslavia.[13] A proposal by the United States to send a commission of inquiry to the Balkans was this time unopposed, and a commission, composed of representatives of all members of the Council, was dispatched in January 1947. This was the first commission of inquiry established under Article 34, and the terms of its report, made in June 1947, appear to have exceeded the authority given in that Article, in that it recommended specific terms of settlement.[14]

ALBANIA. Two British warships were damaged by mines in Corfu Channel, and the British Government, charging the Albanian Government with having caused the damage, brought the matter before the Security Council under Article 35, on January 10, 1947. Albania was invited to send a representative, who arrived after some weeks' delay and assured the Council that Albania knew nothing whatever about the mines, and that the United Kingdom was carrying on "organized and consecutive provocations." A resolution having been vetoed by the Soviet Union, and the Council being thus rendered incapable of action, it was agreed to submit the dispute to the International Court of Justice.

Two other matters brought before the Security Council, though not as disputes, may be mentioned at this point.

TRIESTE. The Chairman of the Council of Foreign Ministers sent to the Security Council a letter dated 12 December 1946, requesting the Council to approve the Statute of Trieste, in accordance with the Treaty of Peace for Italy, and to assume the task of assuring the integrity and independence of Trieste.[15] In the debate which followed, it was argued that the Charter did not endow the Security Council with authority to administer such a territory or to guarantee its independence, and that in any case the possibility of a veto would render such a guarantee illusory. On the other hand, reference was made to the broad grant of power under Article 24, and a memorandum from the Secretary-General cited documents from the San Francisco Conference to show that it was not intended to limit the Council to powers specifically mentioned, and also to show that mem-

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[13] UN Doc., S/203, Security Council, *Official Records*, First Year, Second Series, Supplement No. 10, Annex 16.

[14] Article 34 authorizes investigation for no more than to ascertain whether the continuance of the situation is likely to endanger the maintenance of peace, i.e., whether a dispute exists.

[15] The Statute and other documents are found in Security Council, *Official Records*, Second Year, Supplement No. 1.

bers would be bound to carry out the decisions of the Council. It was decided that the Council should accept the responsibilities involved. Though the job may be a difficult one, and though the Security Council may be inadequately equipped for it, the UN is the logical body to assume the administrative task. The precedent thus established should broaden its functions and extend its potentialities.

TRUMAN DOCTRINE. The Security Council was officially informed on March 28, 1947, of a proposal by the United States to provide some $400,000,000 for aid to Greece and Turkey. This proposal had been made by President Truman in a message to Congress on March 12,[16] in which he pointed to the need of economic aid to Greece and, to a lesser degree, to Turkey. He included military aid, because "it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures." He asserted that the situation was of immediate urgency, and that "the United Nations and its related organizations are not in a position to extend help of the kind that is required." Senator Vandenburg, representing a public opinion somewhat shocked at this disregard of the United Nations, led Congress to adopt a resolution under which the aid provided should cease whenever the Security Council or the General Assembly should by majority vote find that such aid is unnecessary or undesirable.

In presenting this action of the United States to the United Nations, at a later date, the delegate of the United States asserted that the purpose of his nation was to strengthen the UN and to advance the building of collective security. Others, however, felt that the United States had ignored the UN. It was pointed out that the decision had been taken even while a UN commission of investigation was in Greece and that, if there were a threat to the peace to be considered, the proper course would have been to bring it before the Security Council. It was observed that Turkey was in no need of economic relief; and attention was called to a General Assembly resolution of December 11, 1946, under which Members were not to use relief supplies as political weapons.[17] When the United States proposal was later broadened into an offer of help for the reconstruction of all Europe, it was again done without reference to the United Nations, which had already created an Economic Commission for Europe.

It is obvious that a vital issue has been raised by this attitude of the United States. With regard to economic aid, the UN could be of some assistance. The Food and Agriculture Organization had already investigated the Greek situation and had made recommendations, including the

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[16] *Dept. of State Bull.*, XVI (1947), p. 534.
[17] *UN News*, II, May, 1947; *Resolutions of the General Assembly*, No. 48 (I).

establishment of an administrative body. It would have been possible for other Members to make some financial contribution; the Bank could make loans for specific projects; WHO could be of assistance. Such possibilities were disregarded by the United States, nor were they insisted upon by Members. Insofar as a threat to the peace was involved, it was clearly a matter for the Security Council to handle. If the UN is too weak to deal with such a situation, it should nevertheless be tried, and it could be strengthened. The European statesmen who are discussing economic aid to Europe apparently are linking their discussions with the UN and perhaps this will lead action back into proper channels. The issue is between unilateral national action and the collective action to which Members are pledged by the Charter of UN, and the future development of UN will depend heavily upon the decision taken.

§ 110. Enforcement Action.—Governmental responsibilities for handling disputes and for handling the use of force are quite different functions. The policeman who stops a fight on the street does not pause to decide who is right and who is wrong; it is his task to prevent the use of force between the parties, and a court will later pass upon the claims of the disputants. For the UN, the Security Council has responsibility for both these tasks, but it must be borne in mind that they are different functions. The Council is not given the authority to employ the sanctions of Chapter VII against any violation whatever of international law, or even to require performance of the terms of settlement recommended by it under Chapter VI; the measures of enforcement at its disposal are limited to use in cases of "a threat to the peace, breach of the peace, or act of aggression."

The Security Council has more definite authority within its limited field of action, and its decisions are more binding upon Members, than was the case with the Council of the League of Nations. Members are obligated by the decision of the Security Council as to who is the aggressor, and also obligated to take certain action when called upon by the Security Council. The action for which it can call is not so automatic as was the case under Article 16 of the League Covenant; the Security Council has much more flexibility in adjusting its actions or in calling upon Members. It has a very wide discretion as to what should be done to meet a situation or a threat of violence, and it may in principle call upon Members to assist to the utmost in carrying out its plans.

This authority, however, is subject to certain conditions, or contingencies, which have so far left the Security Council with little ability to act. A veto by one of the Five Powers may prevent a decision being taken by the Security Council, though it is to be regarded as a gain that only five of its members, as compared with all members of the League Council, have a veto. Again, the Security Council will not be able to demand definite

armed forces from Members until the agreements have been concluded under Article 43 and that, as we shall see, is a task of great difficulty. Finally, Article 106 delegates to the Five Powers the authority to maintain peace and order in the world "on behalf of the Organization" until a sufficient number of the agreements under Article 43 have been concluded; and the decision as to when the Security Council shall resume its authority is subject to veto. For an indefinite period of time, then, the Security Council will be without jurisdiction as well as without armed forces. Even its power to determine the aggressor would seem to be of little value in the face of Article 106, and is perhaps also limited by Article 2, § 7.[18]

Determination of Aggression. The word 'aggression,' as we have seen, has never been successfully defined. It came to have, in the practice of the League of Nations, the broad meaning of a situation in which sanctions would be applicable: the aggressor was the state against which those sanctions were to be employed. The need for a definition became important in the sense that if aggressive war is to be forbidden, one must know what is aggression and what is war. The League of Nations made several studies of this problem, to which reference has been made earlier in this text. No agreement was ever reached as to the legal meaning of the term. Probably the most popular definition was resort to force without preliminary efforts to arrive at a pacific settlement in accordance with prescribed procedures. At the Disarmament Conference, Russia sought to return to the dictionary definition of first attack and to define aggression as the first violation of a frontier. Long and futile discussions led to the conclusion that the word was inadequate to cover the many possible situations and to abandonment of efforts in this direction. No definition was attempted in connection with the Pact of Paris for the renunciation of war, though the right of self-defence was confirmed in the negotiations connected with the making of that treaty.

The word aggression was added to Chapter 7 of the Charter because of its effect upon popular understanding, but the concept itself is entirely lacking. Article 39 leaves the Security Council quite free (except perhaps for the vague words of Article 2, § 7) to designate any situation as a "threat to the peace, breach of the peace, or act of aggression." This seemed to many to give to the Security Council an arbitrary power, and strong efforts were made at San Francisco to insert a definition of aggression. These efforts were defeated, but resulted in the addition of the words "in conformity with the principles of justice and international law" in Article 1.[19]

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[18] See p. 310, *supra*, and note 26.

[19] An attempt to insert these words following the words "suppression of acts of aggression or other breaches of the peace" in Article 1 was rejected, and they were put after the words dealing with settlement of disputes.

The rejection harmonized with the prevalent feeling that the Security Council should have wide latitude in determining the aggressor, and with the fear that any definition made might exclude an unforeseen situation of danger. The Security Council, then, is bound by no definition of aggression and by no legal criteria in its determination with regard to a situation before it. Nor is it limited to situations of actual war or use of force or to naming a particular state as an aggressor before it can take action; it may describe a situation in which force has not appeared as a threat to the peace, and it may take action against all states involved rather than against a convicted violator. It is thus possible, as it was not possible for the League of Nations, for the Security Council to play the role of the policeman who stops all participants in a fray, and to leave decision as to the merits of their dispute until later. It is against the use or threat of force, and not merely against aggression, or war, that the words of the Charter are directed.

It should be recalled, in this connection, that Article 25 requires all Members to "accept and carry out the decisions of the Security Council in accordance with the present Charter." The obligations thus accepted are subject to later specification with regard to the amount of armed force to be supplied by each Member, but they are unlimited insofar as they require acceptance of the decision of the Security Council as to the threat to the peace or aggression. If a Member does not agree that a threat to the peace exists, or that a certain state is the aggressor, it is nevertheless bound by the decision of the Security Council. So broad a grant of power to the Council was looked upon with apprehension by some states who sought to limit this power by requiring the Council to act in accordance with a definition of aggression, or with international law, or by referring legal disputes to the Court, or in other ways. The desire to make possible quick and decisive action against an aggressor, however, even before he might strike, overcame such scruples; and the possibility of a veto and the requirement of a majority of seven votes in the Security Council seemed to offer a fair amount of protection against abuse by the Council of its power. Indeed, there was more fear that the Council would not make use of its power when it should do so.

Non-Military Measures. Having determined that a "threat to the peace, breach of the peace or act of aggression" exists, the Security Council has a wide range of action open to it. In the Charter system, graduated steps of pressure are presumably to be employed against the aggressor. Starting with recommendation of procedures to be used by the parties themselves, the Council may proceed to recommendation of terms of settlement, or to the more grave step that a threat to the peace does exist. After it has made this latter decision, it may still renew its recommendations, and

may impose provisional measure upon the parties (Article 40). It may then proceed to the non-military measures of Article 41, or to the military measures of Article 42. It should be noted, however, that while this would be the expected order of action, the Council is free to take these steps in any order that it may wish. It may declare an aggression without waiting for decisions under Chapter VI, and it may plunge into military action without preliminary milder measures.

A number of examples of non-military action are listed in Article 41, which is not intended to be exclusive; indeed, with regard to Spain, a quite different step was recommended (by the General Assembly), *i.e.*, that the Spanish Government be not permitted to participate in the specialized agencies. The breaking off of diplomatic relations is a step which indicates grave displeasure and produces some inconvenience. More inconvenience would be produced by interrupting postal and other communications, or transportation by rail, sea, or air, or all of them. A great deal of pressure can be brought to bear by severance of economic intercourse, in part or in whole. Deprivation of rubber, fuel, or other materials, adjusted to the needs of the delinquent state, or control of financial or exchange relationships, might make it impossible for that state to carry on aggressive plans.

The system differs from the economic sanctions of the League in that the action is not automatic. The Security Council may call upon all or some states, and for particular measures rather than for entire cessation of economic intercourse. We have observed above the difficulties with regard to the use of economic sanctions. They are sufficiently complex to justify the establishment of some sort of an Economic Staff Committee comparable to the Military Staff Committee. The Charter contains no provision along these lines, though the provisions with regard to the composition of the Military Staff Committee seem to exclude economic experts from that body. Since decisions of the Security Council are binding upon Members they are obligated, when the Council calls upon them, to apply economic sanctions as directed, in this respect again differing from the League of Nations.

Military Measures. The ultimate step against a disturber of the peace is "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Article 42). The idea of graduated stages of pressure is continued here, for the Article suggests lighter measures, such as military demonstrations or blockade, before resort is had to force *à outrance*. These operations are presumably to be conducted by contingents of national armies, though the phrase "may include" would not exclude operations by an international body, if it were desired to create one. The Council may also decide (Article 48) whether to call upon all Members or for particular members for each operation,

and this applies to military as well as non-military measures. Since five of the Members would have a favored position—because of ability to use the veto—other states objected to being called upon, with no voice whatever, to do whatever the Security Council might demand.[20] As a result of this objection, Article 44 was added, under which Members not represented on the Security Council must be invited by the Council to participate in its decisions concerning the armed forces to be supplied by that state. It would thus appear possible that some time might be spent in negotiation before the Security Council could get into action against an aggressor. Each Member is obligated not only to act directly, when called upon by the Security Council, but also to act through the various international bodies of which it is a member. They agree also (Article 49) to give each other mutual assistance in carrying out the decisions of the Council, and if a Member is confronted with particular economic problems arising from the action undertaken, it may appeal to the Council for assistance.

§ 111. The Problem of Supply of Forces.[21]—Both the League of Nations and the United Nations accepted in principle the use of armed force against a state illegally resorting to force; neither, however, solved the problem of obtaining the armed forces needed. This is, indeed, the central problem of international government, closely related to the whole structure and functioning of such a system. The extent of armed strength which can be obtained depends upon the extent to which national sovereignty is willing to submit to international law and enforcement; and there has so far been little evidence of such willingness. The size of the international force will vary in inverse proportion to the amount of armed force maintained by Members. For our purposes, the possible methods of obtaining the forces to be used by the United Nations may be grouped under three headings: (1) an independent international force, maintained by the United Nations (2) contingents of national forces (3) compromise methods.

An International Police? The popular concept of a powerful international police force, analogous to domestic police, is not as simple or as satisfactory as many of its advocates think that it would be. It implies, in the first place, a much stronger governmental system than the United Nations was planned to be, and the American people especially have shown

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[20] UNCIO, Doc. 881, III/3/46; Goodrich and Hambro, p. 168.

[21] See Lord Davies, *The Problem of the Twentieth Century: A Study in International Relationships* (London, 1930); P. E. Corbett, *Post-War Worlds* (New York, 1942), Chap. XII; Ely Culbertson, *Total Peace* (New York, 1943); P. C. Jessup, "Force Under a Modern Law of Nations," *Foreign Affairs*, 24 (1946), p. 90; O. Newfang, *World Government* (New York, 1942); Royal Institute of International Affairs, *International Sanctions* (Oxford University Press, 1938); J. M. Spaight, *An International Airforce* (London, 1932); H. Wehberg, *Theory and Practice of International Policing* (London, New Commonwealth Institute, 1935).

themselves fearful of anything which approaches a "superstate." So strong a force as this, sufficient to overwhelm any aggressor or probable combination of aggressors, would be dangerous. If a Napoleon or a Hitler could gain control of such a force, he might be able much more easily to accomplish his purposes of world domination than if he used his own national forces. Granted the present weakness of the United Nations, or granted the uncertainties which would exist if it were made stronger, responsible statesmen can not afford to abandon their own national forces and to depend entirely upon the international force; this might prove to be more of a danger than a protection. The development would have to be gradual, national forces being diminished in the measure that the international system proved more and more able to guarantee security.

Objections of a technical nature are also raised. How would recruits be obtained? Would enough be secured through volunteering, or would it be necessary to resort to drafting, and if the latter, what constitutional problems would be raised within Member states? International bases and administration would be required for the maintenance of these forces, which would call for a stronger United Nations than was created. If the international police was to be sufficiently independent, would it have to maintain its own plants for the production of munitions and other needs? This would mean not only vast industrial enterprises, but complicated problems of access to materials, transportation, and competition with private enterprise. There are numerous other technical problems, such as command, distribution according to nationality, use of men against their own countries, or necessary scientific research.

It was for such reasons as these, and particularly because the concept did not harmonize with the weak United Nations system planned, that the idea of an independent international police force was rejected at Dumbarton Oaks. On the other hand, there are various theoretical arguments in favor of such a force. It is undoubtedly the strongest system of security which could be devised, granted that its dangers could be brought under control; if it calls for a stronger United Nations to administer it, this in itself could be regarded as a gain. It would be a more efficient military instrument than a congeries of national forces; it could strike more rapidly and decisively and with the advantage of unified command. If the required numbers could be obtained by volunteering—as might be reasonably expected if states were disarmed and pay and conditions of service made sufficiently attractive—then the need for drafting soldiers within each state would be eliminated. Member nations would be relieved of a great burden of anxiety as to the financial cost of maintaining large military establishments and as to the conscription and training of their personnel. This assumes, of course, that national armaments would be considerably reduced.

The problem of convenient location and use of troops would not be so great in an air age, and bases could easily be obtained for them. If the atomic bomb and other modern weapons could be reserved for the international police, it would have an enormous technical advantage; very probably, scientific weapons would make unnecessary maintenance of huge numbers of men.

National Contingents? At the other extreme of thinking with regard to supply of forces for the United Nations, there would be no international, or independent, forces whatever, and such forces as would be needed by the United Nations would be supplied from the national armies of Members. The arrangements which might be made in this way could vary considerably. At the lowest, there would be no obligation upon Members to contribute forces, and they would do so by *ad hoc* agreement for each need as it might arise. There might, as a next stage, be a general obligation to contribute, but in whatever way each Member might decide for itself. Again, the obligation might be to contribute specified amounts. Finally, each Member might be obligated to contribute whatever amounts were required of it by the Security Council, or the international military staff. Questions of command, and of reduction of national armaments would be important and difficult in connection with any of these proposals.

The argument against reliance upon national contingents is that such a method is ineffective and unreliable. There would be uncertainty as to whether certain national contingents would be forthcoming, and as to how well trained and equipped they would be; it would take time to assemble them, and it would be difficult to establish a unified command or a discipline under which they could operate jointly. States would not trust such a system to provide security and would therefore remain armed, thereby making both disarmament and suppression of aggression more difficult. States are not eager to contribute where their own interests are not directly affected and even when obligated to contribute they will argue as to proportionate amounts and interpret obligations as restrictively as possible. Furthermore, such a system implies a continuation of the methods of power politics rather than development toward an international governmental order.

On the other hand, it is argued that it is better to take short steps than to attempt too long a jump; that nations are as yet too uncertain as to the new system to risk such submission as a strong police would mean; that each nation by the method of national contingents reserves armed strength for its own protection; that such a reserve of national strength is needed as a protection against the danger of, or in place of, an international police which might seek to dominate the world. States would naturally be glad to reduce their armed strength to the extent that the new system proved

itself able to do the job of protecting national security. And, finally, the idea of a super-state implicit in the international police is not yet acceptable to peoples who still think in terms of sovereign nations; consequently, the system of military action, like the rest of the United Nations system, should be planned in terms of the associated action of sovereign states.

Other Methods. In between these extremes of thought there are other approaches to the problem. An ingenious scheme has been proposed by Ely Culbertson, combining both ideas. This would divide up the total armed strength of the world in such a measure that the United Nations would have, say, 22% of that force and no one nation would have more than, say, 20%, with others shading down into smaller percentages. Thus, he argues, the United Nations alone would be able to deal with any single aggressor and could call for help from its Members if more than one aggressor was involved; on the other hand, nations would reserve to themselves sufficient strength, by combination of their resources, to counterbalance the danger of seizure of world control by the international police itself.[22]

Various other compromise proposals have been suggested. The Soviet Union upheld at Dumbarton Oaks the idea of an international air force. A small force, not necessarily air forces alone, has been advocated as providing a spearhead force able to act quickly and perhaps able to prevent by itself some uses of force. It might also have a deterrent effect, particularly if armed with the atomic bomb; and it might serve as the experimental beginning of a larger international police. Suggestions have been made for regional forces, to take care of regional disturbances, in addition to whatever provisions might be made by the United Nations. This would raise questions as to their relationship to the United Nations, and they would be subject to the same questions as raised above. The least form of international control would be an international staff to direct national contingents.

Supply of Forces under the Charter. The idea of an independent international police force was rejected, though it received some support, at Dumbarton Oaks and San Francisco; and it was decided that the United Nations should rely entirely upon contributions to be made to it from the armed forces of its Members.[23] This represents, in theory, a great advance over the League of Nations, which could not of legal right call upon its Members to supply forces; indeed, it potentially provides for overwhelming

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[22] Ely Culbertson, *Total Peace* (New York, 1943), pp. 280-284 and *passim*.

[23] It is believed that no amendment of the Charter would be required to establish a United Nations military force. If the General Assembly were willing to supply the funds, the Security Council could doubtless set up such a police force.

force to be used against a disturber of the peace. Unfortunately, however, the provision for supply of forces is a contingent one, and until this contingency is resolved the United Nations will not be able to take military action against an aggressor state.

We have seen that Members are bound by the decisions of the Security Council (Article 25), which would include determination of the aggressor and the use of military measures. There can be no doubt of the obligation resting upon Members to contribute forces and facilities, and this is made quite clear by the first paragraph of Article 43; but the obligation remains to be worked out in the agreements called for in that article. These agreements are to govern the numbers and types of forces, their location and readiness for use, and the facilities and assistance to be provided by each Member. Article 45, which is a vestigial remainder of the Soviet proposal of an international air force, is also subject to this condition. This article does no more than the previous article, except possibly to assure that air forces shall be kept more readily available.

The Security Council is responsible for the negotiations, and the parties to the agreements are on the one hand the Security Council itself and, on the other hand, a Member or groups of Members.[24] The agreements are subject to ratification by each state according to its own constitutional processes.[25] It is fairly certain that each Member will wish to compare the obligations assumed by itself with those assumed by other Members; consequently, it would seem more probable that a multilateral instrument would be signed than bilateral agreements between the Security Council and each Member.

Making the Agreements. The difficulties which lie in the way of the making of these agreements are so enormous that long delay may be anticipated, and indeed some pessimism is allowable as to whether they can ever be made. It is of the greatest importance that they be made, not only because the United Nations will have no forces to use against an aggressor until they are consummated, but also because the Security Council will actually have no jurisdiction over such a case during that period. This situation is explained by Article 106, which, pending the coming into force of such agreements, authorizes the Five Powers to take such action "on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security." The Council itself is to decide when a sufficient number of agreements have been made to "enable it to

[24] This is an innovation in international law, since hitherto states only have had a capacity to make treaties. "Groups of Members" would also be novel as parties to a treaty; this presumably refers to regional groups.

[25] Could the United States be obligated by an executive agreement? See Goodrich and Hambro, p. 167. Assurance was given to the Senate that these agreements would be submitted to it as treaties. *Hearings*, pp. 645-6.

begin the exercise of its responsibilities under Article 42," but this decision is subject to veto by any one of the five to whom the maintenance of peace is now confided. The article contains no obligation upon the Five Powers that they should act in conformity with the Charter. The United Nations is therefore left impotent, insofar as military action may be necessary, until the agreements under Article 43 have been achieved.

When one recalls the long, intensive, and completely futile efforts of the League of Nations extending over fifteen years to reach any agreement whatever as to the limitation or reduction of armaments, he is left with a great deal of pessimism with regard to the much more difficult task of making the agreements called for under Article 43. In addition to the former task of establishing a limitation upon the armed forces which a state may have, there is now the task of setting a minimum of forces below which a Member can not go, that is to say, of maintaining enough forces to contribute to the needs of the United Nations. Articles 26 and 43 of the Charter are inextricably tangled together. On the one hand, the willingness of Members to reduce their armaments will depend upon a supply of forces adequate to give them security; on the other hand, the number of forces needed to put down aggression will depend upon the extent to which potential aggressors are disarmed. In addition to this, new technical difficulties have appeared out of the new ways of waging war, and shifts in the balance of power have upset previous ways of thinking. Finally, the lesson of the League of Nations was that the disarmament effort is linked with collective security. Consequently, the making of the agreements under Article 43 involves not only supply of forces for the use of the Security Council, but regulation of armaments (including the atomic bomb) and the whole matter of international security.

The technical difficulty is to be found largely in the question: what criteria, or measures, can be devised to serve as a basis of comparison so as to get a fairly proportioned distribution of contributions from Members? The disarmament discussions of the League of Nations showed that it was difficult to know what should be counted as a soldier or as a weapon of war; and the problem is far more difficult today because scientific instruments and machines have become more important than men. How, for example, is the atomic bomb to be measured against men? If the United States should contribute to the UN one atomic bomb, would that be equal to the contribution of, say, a million men by another state? would it be a sufficient contribution for Switzerland to provide services of hospitalization, for Belgium to provide rights of passage and transportation, for a South American country to provide food? These are essential "facilities" in war-making. If a state can contribute essential industrial production and financial aid, which other states cannot give, should it be called upon also

to supply manpower? Would it be fair to say that the cost of killing one soldier, or of maintaining one soldier, should be taken as a unit of measurement, and that for each financial unit so contributed, a state need provide one less person? Should persons be counted equally, when one is trained in the scientific use of radar or the atomic bomb, and the other has only physical ability? Is the girl who works in a munitions plant to be counted? These questions illustrate the great difficulty of working out the agreements; and behind them lies the question whether states could be induced to accept a scientific formula of comparison if it could be found.

Report of the Military Staff Committee. Such difficulties help in understanding why the Report of the Military Staff Committee (May 3, 1947) revealed little progress toward a solution of the problem.[26] Only 26 of the 41 articles in the Report were accepted by all the Committee. Implicit in the Report was the understanding that the armed forces of the UN could not be employed against one of the Big Five. Members would not be expected to train and keep available special contingents; on the contrary, the forces supplied to the Security Council would be drawn from "normally maintained" national forces. Agreement was not reached as to the overall strength which would be needed by the UN, as to the amount to be contributed by each Member, or as to bases to be put at the disposal of UN forces. The Big Five "shall contribute initially the major portion of these forces"; other states would be permitted to add to these forces if they so wished. It was agreed that contributions of other states might be in the form of facilities and assistance, rather than of forces. The Soviet Union stood firmly for quantitative equality of contribution, in overall strength and in composition, though no way has yet been discovered of measuring the comparative strength of national forces. The omissions in the Report are as significant as its terms are of the difficulty of making the agreements under Article 43 upon which so much depends.

It would have been simpler and probably as effective to permit each state to announce its own contribution, in whatever extent it might wish, without waiting for the negotiating and bargaining of the agreements required. There would, of course, be bargaining behind the scenes in any case, but it is probable that national pride or similar motives would lead states to offers of armed forces and facilities as generous as would be obtained through long bargaining. In the case of the specialized agencies, or some of them, the financial contribution made by each Member is what it wishes to make, but the agency itself makes suggestions as to proportionate contributions and these have been followed very closely. A similar method

[26] UN Doc., *Report on General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the United Nations*, S/336, April 30, 1947.

might make it possible for the Security Council to have armed forces of some sort available in much shorter time than appears necessary for the making of the agreements under Article 43.

Various other questions arise with regard to the supply of forces and facilities, some of which will have to be answered in the agreements which we have been discussing. Are reservations to the agreements to be permitted; for example, could the United States stipulate that the forces which she supplies should be used only in the Western Hemisphere?[27] The Security Council may call upon all or some states for help; may it also call for all or part only of the armed forces pledged by each state, or must it call in equal proportion from all? What is meant by availability: organized units ready to move at a moment's notice, or simply regular and reserve forces? Who is to pay for the maintenance of these forces while under Security Council direction: should the United Nations bear this cost, or is it included in the contribution of each Member?[28] What is meant by facilities (munitions, bases, radar, atomic bomb?) and assistance (money, food, soldiers?) and does the United Nations pay for such things? Speaking in terms of the United States, what effect would the obligation assumed have upon her military organization? Would it require conscription and military training in time of peace? Would Congress have to approve each sending of troops at the call of the Security Council?

Command and Direction. No provision is made in the Charter for the command of the diverse contingents of national armed forces; according to Article 47, § 3, such questions are to be worked out subsequently. A Military Staff Committee is, however, provided. Its functions are to advise and assist the Security Council in the making of "plans for the application of armed force" (Article 46); and on "all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament"; and it is made responsible for "the strategic direction of any armed forces placed at the disposal of the Security Council."[29]

The Military Staff Committee consists of the Chiefs of Staff of the five Great Powers, "or their representatives" and since the Chiefs of Staff are well occupied otherwise, less important persons actually do the work. The MSC is therefore a group of the most competent military authorities in the world, which is both an advantage and a disadvantage. Assuming

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[27] Mr. Dulles gave an affirmative answer to the Senate Committee on Foreign Relations. *Hearings*, p. 653.

[28] At San Francisco, this was left for later decision. UNCIO, Doc. 681, III/3/46.

[29] Apparently, the Charter gives the Military Staff Committee no jurisdiction whatever over economic sanctions.

their ability to agree, they should be able to give efficient direction to a military action undertaken. Each, however, represents his own nation, and *ex officio* is primarily responsible for guarding the interests of that country; it is not to be expected, then, that they will contribute knowledge of new weapons or of military improvements nor reveal information to their disadvantage for purposes of planning the strategy of the United Nations against their respective states, as potential aggressors. Nor, as the experience of the League of Nations showed, can it be expected that professional military men will contribute greatly to the disarming of their own countries. Such effort as was made by the League of Nations was due to the Assembly, which soon took over the management of the attempt at limitation of armaments; the General Assembly of the United Nations has already disclosed a similar interest, and may yet set up such an organ as the Temporary Mixed Commission of the League of Nations.

Some, though not much, objection was expressed against the exclusive membership of the Five Powers in the MSC. It was recognized that the burden of any important military action would fall upon these Powers, and that they would be able to furnish the most competent military direction. It was provided, however, that any other Member should be invited to be associated in the work of the MSC if that body should decide that the efficient discharge of its responsibilities required the participation of that Member—which means no more than that the Security Council may if it wishes call others into its consultations. The veto is not provided for in the case of the Military Staff Committee, but each person thereon would of course act according to the instructions of his own government, and decisive action can be taken only in the Security Council. Consequently, decisions as to the method of employment of armed forces, or the forces to be called for from each Member, or as to command, or as to recommendations for regulation of armaments, et cetera, may be blocked by lack of unanimous agreement among the Big Five. In practice, the Military Staff Committee has been an exclusive and highly secret body, and its record thus far offers little hopes for its success in the future.

§ 112. Regulation of Armaments.—According to the Charter, the General Assembly may consider and make recommendations concerning "the principles governing disarmament and the regulation of armaments" (Article 11), but the responsibility rests upon the Security Council, assisted by the Military Staff Committee, to formulate plans "for the establishment of a system for the regulation of armaments" (Article 26). During 1946, the subject came up not so much as an item upon the agenda as evolving from discussion of other subjects, such, for example, as arrangements with regard to control of the atomic bomb. It appeared also in the course of the long-continued effort by the Soviet Union to require

announcement of the numbers of Allied troops in non-enemy territories. This was (as we have seen) rejected in the Security Council, as constituting no threat to peace; and the Soviet delegates then raised it in the General Assembly debates, where they diverted their argument to maintain that such information would be useful to the Military Staff Committee. The United States was willing to go along provided the count included also the numbers of troops in home territory, to which the Soviet delegate replied that it should include also information as to weapons (which would include the atomic bomb). The United States was not willing to go so far until adequate controls had been established.

Meanwhile, Mr. Molotov had, on October 29, 1946, proposed a plan for reduction of armaments, which would include prohibition of the use of atomic energy for military purposes. This was consistent with the earlier support given by Russia at Geneva to direct disarmament. The suggestion was supported by the United States on condition of adequate provision for inspection and control, including the implementation of Article 43. Mr. Bevin and others also emphasized that Article 43 must be considered in connection with Article 26. Thus, the old lessons were being restated; it was clear that regulation of armaments was part of the general problem of assuring security to Members.

In the very complicated debates which followed, four points were at issue and were finally compromised into a resolution adopted by the General Assembly on December 14, 1946. In the first place, the Soviet Union made advance possible by two concessions: that there should be inspection to see whether a nation was living up to its obligations as to armaments, and that in the organs to be created for this purpose, the veto would not be used—though of course, it would be used, in their view, in the Security Council, where final decisions would be made. In the second place, the United States insisted strongly that control of the atomic bomb was the most pressing issue and that it must be handled separately through the Atomic Energy Commission. The Resolution adopted called on the Security Council to formulate measures "according to their priority," and asserted that nothing therein altered the resolution of January creating the Atomic Energy Commission. It provided also for establishment "within the framework of the Security Council" of an international system, operating through special organs, "which organs shall derive their powers and status from the convention or conventions under which they are established." [30] In the third place, the problem of procedure was worked out by urging the Atomic Energy Commission to "expeditious fulfilment" of

[30] Thus reassuring the Russians that control remained with the Security Council and at the same time making clear that the organs created under separate conventions would not be bound by the Charter rules for voting.

its task; by urging that the Security Council expedite consideration of the report of that Commission and prepare draft conventions for creation of a system of inspection and control, which should include prohibition of atomic and other weapons of mass destruction; and by calling upon the General Assembly to submit these conventions, after consideration in special session for the purpose, to Members for ratification under Article 26. In the fourth place, the Resolution recognized that the problem of security is closely connected with that of disarmament, and urged the Security Council to accelerate the making of the agreements under Article 43 so that forces would be at its disposal. It also asked Members to withdraw their troops stationed in other countries as rapidly as possible and to undertake reduction of national armed forces.[31]

Control of Atomic Energy. The atomic bomb was not known at the time of the making of the Charter; what effect it might have had upon that instrument it is interesting to speculate upon. It is clear, however, that it must be studied as part of the general problem of disarmament and security, and that it does not constitute an independent problem, though its vast importance and menace to civilization justify priority and emphasis for it. The Congress of the United States at once passed domestic legislation for guarding the secret, and the President recognized its international importance by calling in the Prime Ministers of Canada and the United Kingdom (which states had shared in the production of the bomb), and issuing with them an Agreed Declaration calling for international control and for adequate safeguards against violations of whatever agreement might be made.

At the first meeting of the General Assembly, a resolution was unanimously adopted (January 24, 1946) creating the Atomic Energy Commission, to be composed of a representative of each state represented on the Security Council, plus Canada. The Commission was to report to the Security Council, which should transmit these reports to the General Assembly and make them public, unless in its opinion the interests of peace and security should forbid it. The Commission was to make proposals:

> (a) For extending between all nations the exchange of basic scientific information for peaceful ends;
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> (b) For control of atomic energy to the extent necessary to ensure its use only for peaceful purposes;
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> (c) For the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction;

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[31] *Resolutions of the General Assembly*, No. 41 (I). It may be found also in the *Report by the President to the Congress* (1946), Dept. of State Pub., No. 2735, p. 95. It is discussed in this Report at p. 2.

(d) For effective safeguards by way of inspection and other means to protect complying States against the hazards of violations and evasions.

Finally, the resolution required that the work of the Commission proceed by "separate stages, the successful completion of each of which will develop the necessary confidence of the world before the next stage is undertaken." [32]

Since the United States possessed the secret of the bomb, it was necessary for her to take leadership with regard to its international control. A Department of State committee was set up in January, 1946, which issued what became known as the Acheson-Lilienthal Report, in which it was boldly proposed that an international Atomic Development Authority be set up to control all activities with regard to atomic energy. It called for strong measures of inspection, and listed stages of progress according to which information would be released (thus assuring national security) until finally, when adequate guarantees had been provided, existing bombs would be destroyed and no new ones made. When Mr. Baruch became the United States representative on the Atomic Energy Commission, his staff made further studies, and he presented a resolution much along the lines of the earlier report, but rejecting the use of the veto in connection with control over the new weapon. A few days later (June 19), the Soviet delegate proposed that a treaty be made under which the use of atomic weapons would be outlawed and existing stocks destroyed within three months; thereafter, national legislation for control of atomic energy would be passed. A fundamental divergence of approach to the problem was thus presented. In neither plan was provision made for enforcement action which might be needed to back up inspection or prevent violations.

The United States then presented three memoranda which suggested the content of a treaty establishing the Authority, and outlined its functions and the relations between it and the United Nations organs. The Authority was to be autonomous and related to the Security Council in such manner as to leave to the latter its general function of maintaining peace and at the same time enable action to be taken without hindrance from the veto. It was suggested that Article 51 of the Charter might be called upon, and that collective self-defence could be used against a state which was preparing to use the atomic bomb. The Soviet representatives opposed these ideas, including inspection, and preferred national to international controls. Attention was then turned with more profit to technical discussions, and from this viewpoint it appeared that controls were technically possible.

[32] *Resolutions of the General Assembly*, No. 1 (I), p. 9. See also *Report of the United States Delegation to the First Part of the First Session of the General Assembly of the United Nations*, Dept. of State Pub., No. 2484, pp. 18, 33.

This led into study of the types of control which would be necessary to prevent diversion of atomic materials (uranium, thorium, and their fissionable materials), to prevent clandestine operations, and to prevent seizure of plants and facilities. The conclusion was reached by the Atomic Energy Commission and reported to the Security Council that an international control agency was necessary.

In December, Mr. Baruch pressed for adoption of his proposals by the Atomic Energy Commission. Meanwhile, the subject of general disarmament had come before the General Assembly and, as has been seen, atomic energy became involved in that discussion. The concessions made by the Soviet Union with regard to inspection and use of the veto aided agreement, and on December 17, 1946, the Atomic Energy Commission adopted the United States recommendations in general and approved a report (December 30) to the Security Council. Much progress had therefore been made, but more slowly than the urgency of the matter required. The matter of political controls, as well as all details, remain to be worked out.[33]

Conclusions. To sum up, it may be said that while in principle a much stronger security system is provided than under the League of Nations, the provisions for security are so hedged about with limitations and contingencies, especially as regards the Big Five, that no guarantee of security is offered to any state, and particularly to the Great Powers. In the first place, the Security Council thus far has no armed forces to use against an aggressor, and indeed has no jurisdiction over an aggression under Article 106 and until the agreements of Article 43 have been made. In the second place, the veto may block action and the possibility that it will do so discourages reliance upon the United Nations for security, and makes it necessary for states to keep up their national armaments.

The only aggressor whom the United States needs to fear is another Great Power, and against this danger the system does not operate, since that Power can veto action against itself. Since the United States has, at present, no aggressive intent, the veto which she regards as necessary to protect her national interests works to her disadvantage in the field of security, and already she displays a tendency to modify the veto in this connection, though she could not well afford to abandon it entirely as yet. It seems clear that protection against the sort of war which the American people fear cannot be given by the United Nations so long as the veto is maintained with its present broad range. On the other hand, the Soviet

[33] The documents upon which this necessarily brief survey is based may be found in the *Official Records* of the Atomic Energy Commission of the United Nations; *A Report on International Control of Atomic Energy*, Dept. of State Pub., No. 2498; *The International Control of Atomic Energy, ibid.*, No. 2661 (Scientific Information) and No. 2702 (Growth of a Policy). The most useful general source of information is the *Bulletin of the Atomic Scientists* (1126 E. 59th St., Chicago).

Union will not be willing to modify the veto until there is more evidence than the United States has thus far provided that the United States does not intend to organize the United Nations against the Soviet Union. It is a very difficult problem, and not to be solved by mere denunciation of the veto.

ARTICLE 51. In this *impasse,* Article 51 of the Charter gains in importance. This article was added, as will be seen in the next Chapter, because of regionalism; but it has much wider possibilities. The principle of self-defense is a recognized legal principle, but so long as each state has the right to decide that it is fighting in self-defence—as it of course always does!—it is of little value in international relations. The past broad scope of the principle is somewhat limited in this article by the words "until the Security Council has taken the measures necessary to maintain international peace and security" and by the right of the Security Council to intervene at any time. Presumably, the Security Council could decide that so-called defensive measures were actually a threat to the peace against which the enforcement action of the United Nations could be invoked.

However, Article 51 becomes of more importance with regard to a situation in which the Security Council, because of the veto or for other reason, finds itself unable to act. Members have the right, individually or collectively, to take measures of self-defence. This right is limited to defence against "armed attack" which leaves it uncertain whether, for example, action taken against a state which prepares atomic bombs in violation of an agreement made would be permissible. Article 51 does, however, make it possible for Members, whether individually or collectively, to resort to use of force without violation of the Charter against attack from another state. They may therefore voluntarily organize combined action against an aggressor when the Security Council is unable to do so. While this voluntary action would not have behind it the obligations of the Charter to give it weight, it might be stronger than the usual process of going to war individually and competing with the enemy for allies. The frequent lack of unanimity among the Five Powers thus far displayed has caused more attention to be given to Article 51.[34]

It cannot be maintained, then, that the United Nations offers any automatic guarantee of security to its Members. It affords a means and an opportunity through which the Members themselves could provide security, and whether these potentialities can be realized or not will depend, as was the case with the League of Nations, upon the willingness of Members, and particularly of the Five Powers, to agree and to cooperate to this end.

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[34] Attention is called to it, for example, in the *Report to the Security Council,* Atomic Energy Commission, *Official Records,* Special Supplement, p. 19; Dept. of State Pub., No. 2737, p. 22.

It is doubtless true that the obligations assumed and the procedures provided will exert much more community pressure to take action against an aggressor than if such a system did not exist. It is a gain, too, that the outmoded concept of neutrality has been replaced by the obligation of Members to act against an aggressor, and it may possibly be assumed that, granted their knowledge of the increasing terribleness of war, peoples will be more willing than in the past to join forces against an aggressor. The security system of the United Nations may be characterized not so much as a slight advance as a contingent advance; if the contingencies should be met, the system would be a very powerful one. Its success will depend upon the extent to which peoples will support it rather than, as in the past, depending upon national strength for their security. This is particularly true of the Great Powers to whom, in any case (Article 106), the security of the world is now mortgaged.

CHAPTER 18

REGIONALISM AND WORLD GOVERNMENT

We have been following throughout this book the development of the community of nations and it is clear by now that the trend of that development has been toward an international law and organization for the whole community. This development had naturally to overcome the opposition of the existing political theory of nationalism, which asserted that there could be no authority higher than that of the state and which was solidly established in the emotional loyalty, *ne plus ultra,* of individuals for their respective states. The opposition has been overcome (insofar as it has been overcome) by the slow realization on the part of peoples that the state is not able alone to take care of their needs, and that their very economic existence depends upon satisfactory intercourse with other nations. More recently, people have been further pushed out of their old habits of thought by their increasing fear of war, magnified now by the possibilities of atomic war. While the force of nationalism is far from ended, and while national sovereignty is still upheld in law and practice, it seems safe to say that "isolationism" will no longer be dominant and to assume that the trend above mentioned will continue. The concept of international organization, and perhaps in principle the concept of international government, is now accepted, and it remains to be considered in what direction the current of thought will now move.

On the one hand, there are many who accept the idea of international collaboration and organization, but who would limit the area of this collaboration. They do not like the idea of a universal system, though they may admit it for some purposes; they prefer to think in terms of a group of states who are neighbors in one region or, perhaps, have common interests though not in the same region. The regional movement represents the provincial side of human nature, as have the clan, the tribe and the nation. It is primarily concerned with the selection of members.

On the other hand, there are those who are dissatisfied with the progress so far made by mankind, who look with horror at the anarchy of international society and the useless waste of war, and who therefore demand that the international organization be strengthened until it can provide a real and enforceable law and order in the community of nations, a world gov-

ernment. This group thinks (usually) in terms of a universal system. It is not so much concerned with the selection of sympathetic or geographical associates as it is with governmental authority. It is willing to see national sovereignty subordinated to international law, as made and enforced by some sort of majority decision in the community of nations.

Regionalism is cautious and conservative, clinging longingly to the past; world government is impetuous and eager, looking as longingly to the ideals of the future. Neither has as yet provided a complete platform on which to stand and work; and there are variations in both through which they tend to approach each other. Both announce their loyalty to the UN and their intention to work sympathetically through and with UN. The success of either, however, would modify greatly the present concept and authority of UN.

§ 113. Regional Systems.

The Inter American System. The earliest movement toward regionalism was in the Western Hemisphere, where the famous South American statesman, Simon Bolivar, summoned a conference which met at Panama in 1826 and adopted a "Treaty of Perpetual Union." In 1889 Secretary Blaine summoned the first of a series of Conferences of American States which have continued ever since.[1] The Pan American Union was created at that time, though it was not given legal status or a clear definition of function until 1929.[2]

A great deal of waste motion has characterized the development of the system. Many treaties were negotiated and never put into effect, or never used; special conferences were held which produced little; administrative institutions were created (such as the Pan American Postal Union, or the Trade Mark Bureau) which duplicated existing institutions or developed into little in the way of actual accomplishment. There was a long effort to build up an "American International Law" (which would seem to be a contradiction in terms), an American court of justice, an American League of Nations. Such ideas came into conflict, when the League of Nations appeared, with the idea of universal international organization. At the Havana Conference of 1929, these separatist ideas appear to have been defeated, and American regionalism was accepted as part of and subordinate to a world organization.[3]

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[1] See *International Conferences of American States, 1889-1928,* edited by J. B. Scott (Oxford University Press, 1931), and *First Supplement 1933-1940* (Carnegie Endowment for International Peace, 1940).

[2] J. L. Kunz, "The Pan American Union in the Field of International Administration," *Iowa Law Review,* 31 (1945), p. 58.

[3] See Margaret Ball, *The Problem of Inter American Organization* (Stanford University Press, 1944); A. Guani, "La solidarité internationale dans l'Amerique latine," *Hague Acad.,* 1925, III, pp. 207-337; J. R. de Orue y Arrequi, "Le regional-

The American Republics became much alarmed by the extension of Nazi influence and by the aggressiveness of Mussolini and Hitler, and they drew together under that danger into a somewhat more coherent system. They had hitherto tended to draw away from the United States and to safeguard themselves against Yankee imperialism in the League of Nations; now, the "Good Neighbor Policy" enunciated by President Roosevelt and his rejection of intervention on the part of the United States, together with the diminishing strength of the League of Nations, all operated to bring them into closer cooperation in the Western Hemisphere. The United States, on the other hand, striving to keep out of war and at the same time to build up defences against Hitler, was eager to cooperate with them. Consultation was arranged through Meetings of Foreign Ministers; an Inter American Defense Board, a Neutrality Committee (now the Inter American Juridical Committee), the Emergency Committee for Political Defense, and numerous other agencies were created to meet common defense needs. The manifest dangers revealed by the War, and the increased cooperation with the United States, led to more definite efforts to organize the Western Hemisphere into a security system at the Mexico City Conference in 1945.

THE ACT OF CHAPULTEPEC. The result of this effort was to create a real problem concerning the relationship to be arranged between such a system and the United Nations. There were some who wished to decentralize the League of Nations upon a continental basis, some who wished an independent American League of Nations, and some who wished to be independent but in full cooperation.[4] The last of the three viewpoints had seemed to prevail at the Lima Conference and elsewhere, but this would call for more definite regional organization than existed. At the Mexico City Conference (February 21-March 8, 1945) a resolution was adopted On the Establishment of a General International Organization (Resolution XXX) which approved in general of the Dumbarton Oaks Proposals but suggested a number of changes in them. At the same time, two other resolutions were adopted which raised important questions as to the relationship with this "general international organization." One was Resolution VIII, known as the Act of Chapultepec, which bound the American Republics to resist aggression from amongst themselves and from the out-

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isme dans l'organisation internationale," *ibid.*, 1935, III, pp. 7-94; J. M. Yepes and Pereira da Silva, *Commentaire théorique et pratique due Pacte de la Société des Nations et des Statuts de l'Union Pan Américaine,* 3 Vols. (Paris, 1934). The chief exponent of an American international law is A. Alvarez, with many writings on the subject.

[4] See J. L. Kunz, "The Inter American System and the United Nations Organization," *A.J.*, 39 (1945), p. 758, and references therein given; also, Yuen-li Liang, "Regional Arrangements and International Security," *Grotius Society,* 1946, p. 216.

side as well. The other was Resolution IX, Reorganization of the Inter American System, which stated some of the steps in such a reorganization, but called for a conference to be held in the following year to work out a comprehensive charter for the American regional system.[5] That conference has not yet met, presumably because of United States objection to the participation of Argentina. Many other resolutions were adopted, and it appeared that definite organization of the Western Hemisphere was under way.

THE BRITISH COMMONWEALTH OF NATIONS. No regional system has yet achieved enough in the way of organization to play effectively the role assigned to such systems by Chapter VIII of the Charter of the United Nations. The concept of regionalism in the Charter was sufficiently broad to cover mutual assistance and non-aggression pacts, and it may be permitted to think of the British Commonwealth of Nations as a grouping which would fall under the Charter. This grouping has a long history behind it, and is the result of decentralization rather than of combination. It is uncertain how much unity remains, and how much there is in the way of means or probability of common action among them.

No one would now question the actual independence of the various nations which are collectively called the British Commonwealth of Nations (the United Kingdom, Canada, Australia, New Zealand, South Africa, Eire) whatever the constitutional situation may be. They did not, as Members of the League of Nations, constitute or act as a bloc. When Sir Cecil Hurst in 1925 appeared to speak in the name of these nations, he was challenged by the representatives of Eire and of Australia.[6] Sir Austen Chamberlain objected to the registration with the League of Nations by Eire of the treaty by which Eire was given independence, but it would be difficult to deny that the Covenant, as now the Charter, must govern the relationships of Members, whether parts of the British Commonwealth of Nations or not. In practice, the Dominions have acted and voted independently.

An uncertain amount of unity and common action remains. Some mention has been made above of the international position of the Dominions. The King remains the titular head of each, and treaties are signed in his name by most of them. Each determines its own foreign policy, but con-

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[5] The resolutions of the Mexico City Conference may be found in *Inter American Conference on Problems of War and Peace* (Pan American Union, Washington, 1945).

[6] L of N Doc., *Records of the Third Assembly* (1922), Plenary, p. 146; *Records of the Sixth Assembly* (1925), Plenary, pp. 24-25. As to the position of the Dominions in the League, see Ray, pp. 97-101.

sults with the others on important matters in that field.[7] A Dominions Office was set up in 1925, as a channel of communication between them. There are High Commissioners from each Dominion to London, and the United Kingdom has a High Commissioner in each. Consultation is regularly maintained, and there are occasional conferences. It is probably correct to say that the British Commonwealth is as well equipped for regional action as is the Inter American system. In neither case is there sufficient common machinery and obligation to play effectively the part envisaged in Chapter VIII of the Charter.

A question is raised at this point as to the possibility of membership in more than one 'regional' system. It does not seem essential that the units of such a system should be contiguous or adjacent, and it would seem proper that in some cases a state should belong to more than one region. Thus, Canada might belong to the Inter American system as well as to the British Commonwealth, or Australia or the United Kingdom might belong to one in the Pacific area. Whether other parts of the British Empire will become parts of the Commonwealth remains to be seen. India seems to be considering such a status; the attitude of Palestine or Egypt is more doubtful. The British Commonwealth of Nations as it now stands is a potentially strong grouping, and the weakened position of England as a result of the Second World War may mean tightening of bonds within the grouping.

European Union.[8] The idea of combining the states of Europe into some sort of a system goes back for many years. An organized movement in this direction was initiated by Count Coudenhove-Kalergi in 1926, and a number of conferences were held. It became a practical and formal proposal when Premier Briand offered it as such to the representatives of twenty-seven European states in 1929. This effort resulted from discussion in the League of Nations and, in the Memorandum which he was charged to prepare, M. Briand stated as the purpose of the proposed Union the creation of "some kind of a federal bond" between European nations

[7] "... first, that each member of the Commonwealth must determine its own foreign policy and, second, that it is a conventional rule of the Commonwealth association that every effort should be made to obtain agreement among the members on the fundamental principles of foreign policy." Royal Institute of International Affairs, *The British Empire* (Oxford U. Press, 1938), p. 230. See also P. J. Noel-Baker, *The Present Juridical Status of the British Dominions in International Law* (London, 1929); W. Y. Elliott, *The New British Empire* (New York, 1932); R. B. Stewart, *Treaty Relations of the British Commonwealth of Nations* (New York, 1939).

[8] As to European Union, see *Documents relating to the Organization of a System of European Federal Union*, L of N Doc., 1930, VII. 4, found also in *Int. Con.*, Special Bulletin, June, 1930, and No. 265, December, 1930; R. N. Coudenhove-Kalergi, *Pan Europe* (New York, 1926); same author, *Crusade for Pan Europe* (New York, 1943); E. Herriot, *Europe* (Paris, 1930).

which would encourage them to "study, discuss and settle problems likely to be of common interest." He insisted that such a formula for European cooperation should be in conjunction with and subordinate to the League of Nations, and he argued that the economic problem should be subordinated to the political problem. The machinery proposed was simple: a regular "European Conference," a permanent political committee acting through special technical committees and a secretariat. It was not to be used as an economic weapon against outside states.

In this Memorandum, nine "questions of practical application" were proposed for discussion: (1) general economics, under which the League's economic program was to be achieved in Europe, cartels to be controlled, and a progressive reduction of tariffs undertaken (2) coordination of the economic equipment of Europe, such as roads and canals (3) regulation and improvement of traffic of all kinds (4) encouragement of financial credits for less developed areas (5) solution of labor problems (6) improvement of health (7) intellectual cooperation (8) utilization of the Inter-Parliamentary Union (9) formation of European bureaux in certain international bodies.

The replies received to this proposal from twenty-six governments varied widely. All accepted the thesis that more cooperation in Europe was essential, but as to methods and principles there was much divergence. Some feared that the League of Nations might suffer; some feared that it would lead to inter-continental rivalries; some disagreed with the proposition that political questions should precede economic ones. At the Eleventh Assembly, a European Union Commission was constituted, to meet in January, 1931. It did meet and passed certain resolutions regarding agricultural problems, unemployment, et cetera; but meanwhile the economic situation was becoming worse, fears of the Soviet Union were appearing, and, with the rise of Hitler, interest in European Union faded away.

During the Second World War, the idea was revived. Prime Minister Churchill early proposed union with France, but this was rejected. In a speech in 1943, he spoke of a Council for Europe and a Council for Asia. Field Marshal Smuts, in a speech of November 25, 1943, proposed a union between the United Kingdom and the smaller Western European democracies. These suggestions were blocked by the hostile attitude of the Soviet Union toward any sort of European Union, which it regarded as a threat to itself. Such proposals are always embarrassed by the question whether Britain and the Soviet Union, on the periphery, should be included in the Union, and by the danger that, if they were not included, a revived Germany might dominate the system. It should be noted that various suggestions have been made for smaller European groupings, such as a Baltic, Balkan, or Scandinavian union, or a Central and Western European group.

The lesson of the advantages gained by the United States through federal union and the removal of barriers between states is obvious, and increasing fear of the Soviet Union may lead to a combination of the Western European states, such as was suggested by Smuts. The idea has recently been advocated in the United States by Mr. John Foster Dulles and others, and is reported to have the favor of President Truman. Many members of parliaments in the countries concerned are interested, and Count Coudenhove-Kalergi plans a conference in the summer of 1947 of such members of parliament. Impetus is now given to the effort by the offer of United States economic assistance to Europe, made in the summer of 1947.

THE ARAB LEAGUE. An Arab nationalist movement began to take shape after the Turkish Revolution of 1908, and definite gains toward independence in various areas resulted from the political exigencies of two World Wars.[9] Iraq, Palestine, Syria, and Lebanon were administered as mandates; Saudi Arabia and Yemen were more or less independent. In 1932, Iraq was admitted as a Member of the League of Nations. The Second World War produced promises of independence for Syria and Lebanon, and they were in fact admitted to the new United Nations. Palestine remained a unique problem.

Upon the initiative of Egypt, exploratory conversations with regard to Arab unity were begun, and in September, 1944, delegates of the Arab states held a meeting which debated full union as against federal union, and agreed upon a League of Arab States.[10] The agreement was signed by Syria, Transjordan, Iraq, Saudi Arabia, the Lebanese Republic, Egypt, and Yemen, and opportunity is offered to any other independent Arab group to enter the League. It has a Council, a permanent Secretariat, and a committee for each of the following stated purposes: economic and financial matters; communications; cultural matters; matters connected with nationality, passports, extradition, and execution of judgments; social welfare; health. In case of disputes not involving sovereignty and territorial independence, the decision of the Council is final; for other disputes, the Council is to conciliate. The Council is also to determine the measures necessary to be taken to repel aggression, acting in this case by unanimous (except for disputants) vote. Withdrawal is permitted on a

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[9] See G. Antonius, *The Arab Awakening* (London, 1938); Philip W. Ireland, *The Near East: Problems and Prospects* (Chicago, 1942); H. Kohn, *History of Nationalism in the East* (London, 1929).

[10] The Pact of the League of Arab States, signed at Cairo, March 22, 1945, may be found in UNCIO, Doc. 72, III/4/1. See also M. Khadduri, "The Arab League as a Regional Arrangement," *A.J.*, 40 (1946), p. 756; same author, "Towards an Arab Union: The League of Arab States," *Pol. Sci. Rev.*, 40 (1946), p. 90.

year's notice; amendments require the approval of two-thirds of the members, and those who do not accept the amendment may withdraw.

Thus, some clarification is beginning to appear in the tangled politics of the Near East,[11] and the only fully organized regional system has appeared. Five of the seven members were invited to the UNCIO, and became Members of UN; Yemen and Transjordan did not adhere to the Declaration by United Nations. These five formed a bloc at the San Francisco Conference and in the UN since then. They sought but did not obtain a seat on the Security Council; they displayed interest in Palestine; and they were instrumental in obtaining Article 80, § 1, of the Charter. They combined with the Latin American group in the controversy over regional arrangements which resulted in Article 51 of the Charter. The relationship of the Arab League with the UN in regard to regional security matters remains, like that of the Inter American system, to be worked out.

Pacific Regionalism. No steps have been taken toward regional organization in the Far East, though a number of studies have been made. Great discrepancies exist in this area between the various political entities as to weight in the community of nations, governmental development, industrial production, and other factors. Large areas of the Pacific and the Far East belong to or are under the influence of states far away from the area. Vast distances, huge population, political rivalries and emotions are involved, making the problem of regional organization extremely difficult.

There has existed for some time a private institution, the Institute of Pacific Relations, which cannot be regarded as a regional organization of official nature, but which has served as a medium of cooperative study, including the problem of regionalism. The Nine Power Treaty, made at the Washington Conference of 1921-1922, proposed a Board of Reference to adjust questions arising under the Treaty, but the Board was never established. At an IPR conference in 1933, Japanese delegates proposed a regional organization backed by a non-aggression treaty, and other such proposals were studied at later conferences. One such study envisaged three groupings: (1) Netherlands Indies, Philippines, Burma and British Malaya, to include after the War Thailand (Siam) and Indo-China in an "Indonesian Union" (2) a "Far Eastern Group" of China, Manchuria, Japan, the "Indonesian Union" and India (3) a "Pacific Association" to include the United States, Canada, Australia, and New Zealand, the western coast of South America, and the "Far Eastern Group." [12] Professor

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[11] At the same time, unfortunately, that the desperate effort of Jews to gain a foothold in Palestine necessitated a special session of the General Assembly of UN.

[12] K. Mitchell and W. L. Holland, *Problems of the Pacific 1939* (New York, Institute of Pacific Relations, 1940), p. 127.

Corbett suggested a more limited organization, to include China, Japan, India, and an Indonesian Union.[13]

The latest and most competent study of regionalism in the Pacific, embracing consideration of previous proposals, was made by Dr. Chow.[14] He points out the particular need of such an organization in the Far East because of its remoteness and because of unfamiliarity of outsiders with its problems, because of coming colonial emancipation and rising nationalism, and because of shifts in the balance of power and in the degree of freedom from external control. He would include in a "Pacific Association of Nations" China, Soviet Russia, India, the United States, Canada, Australia, Philippines, Great Britain, Netherlands and, after peace had been made, Japan and Siam. Korea might in due time be included. These states would be bound by a non-aggression pact, and a regional organization with its own military forces, distributed at strategic points, would be prepared to act against an aggressor. The organization would be composed of a General Conference, a Pacific Council, a Court, a Military Staff and a permanent Secretariat, and it should work positively to advance the interests of the area as well as negatively to prevent the use of force. It would be subordinated to the United Nations, but with the general principle that matters of purely local concern should be left to the regional system. No steps in the direction of such a regional system for the Far East have been taken, and none are to be anticipated until a peace settlement has been made and more stable conditions established than now exist.

§ 114. Regionalism and the United Nations.—The debate over regionalism is not concluded, though some principles of adjustment have been stated in the Charter of the United Nations. It may be well, therefore, to survey the arguments for and against regionalism, in the broadest sense, and then to consider the relationship of such units to the United Nations.

ARGUMENTS FOR. The following arguments have been offered in favor of regionalism:

1. Development should be attempted gradually, rather than in one jump toward world government. Such a world system could be better built upon the solid foundation of regional systems.

2. A threat to security is most apt to originate between neighboring states; the peoples in that area are the ones most affected and consequently the ones most willing to undertake security measures. Outside states, on

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[13] P. E. Corbett, *Post War Worlds* (New York, 1942), p. 73.

[14] S. R. Chow, *Winning the Peace in the Pacific* (New York, Macmillan, 1944). See also N. Peffer, *Basis for Peace in the Far East* (New York, 1942); Institute of Pacific Relations, *War and Peace in the Pacific* (New York, 1943), and other publications of the Institute.

the other hand, would be less willing to send their soldiers to be used in the settlement of distant quarrels in which they have little interest.

3. Action against an aggressor would be undertaken not only more willingly, but with more dispatch and efficiency by those within a region. There would be delay and uncertainty if it were necessary to await action by faraway states with long distances to traverse.

4. Aside from aggression, many other problems are local ones and should be handled by local people, since outsiders have neither the interest nor the knowledge to solve them.

5. In each region there would be a dominant Great Power, thus constituting a balance of power under the deserved leadership of the Great Powers.

6. Homogeneity of interests of various kinds, such as language, culture or economic interests, produce a natural trend toward regional groupings.

ARGUMENTS AGAINST. Equally strong reasons for opposition to regionalism may be offered:

1. International problems are today worldwide in scope and can be solved only by a universal system. This is the result of increasing economic and other interdependence.

2. If decentralization is desired, it would be better to plan it upon a functional rather than upon a geographical basis.

3. While disputes may originate between neighboring states, they tend to develop into global wars, and the universal community of nations must therefore take an interest in every dispute, and make sure that it does not produce general conflagration.

4. Regional groupings are simply enlarged alliances, leading to "bigger and better" wars.

5. In such regional systems, smaller states would be submitted to the domination of the Great Power within the area, and the region would not be able to control the Great Power. This could only be done from the outside, by other Great Powers. If there were more than one Great Power in the region, the problem would simply be more complicated.

6. There is little more reason to hope that nations in a given region could work together with more cooperation and efficiency than could all nations in a universal system.

7. The possible regions vary so much in industrial and military power that it could not be expected that there would be a balance of power between them, and it would hardly be possible to organize an artificial balance.

8. If security enforcement were attempted through regional systems, authority and power would be divided and the potential strength which

could be massed against an aggressor would be much smaller. Economic sanctions could not be used within a region, since they must be universal if they are to be effective.

Regional systems and a universal system are, however, not mutually exclusive, and a combination of the two might be useful as providing a check upon a too powerful or too unwieldy universal system. A universal system cannot, of course, be excluded; it is essential at the least to care for disputes between regions, and to prevent aggressions from without a region, or even by a great power or combination of states within a region. If one thinks in terms of international law or legal order, one expects a law which applies equally to all states and does not vary from region to region. Many economic problems could not be solved, in this interdependent world, except by arrangements with states outside the region. On the other hand, a division of labor would relieve a world organization of many details and enable it to act more efficiently on larger problems. Local interest and knowledge should be able to care for many local problems; local cultures and customs should be maintained. A regional organization might be able to handle most local disputes, to conduct prompt investigations on the spot, to provide intermediate policing on behalf of and until the world enforcement authority could arrive, even to subdue minor uses of force. If such aid could be given, regional arrangements might prove to be useful auxiliaries to the indispensable universal system. Such conclusions led the makers of the Charter of the UN to include Chapter VIII, providing for regional arrangements. Certain difficulties of relationship were not ironed out at San Francisco and remain to be worked upon.

Regionalism Under the UN Charter. Nothing in the Charter, says Article 52, precludes the existence of regional arrangements for matters appropriate for regional action, provided they are "consistent with the Purposes and Principles of the United Nations." The term regional arrangements, it should be noted, was intended to cover pacts of mutual assistance, such as the British-Soviet treaty, as well as arrangements for definite areas. The articles of the Charter as written represent a compromise between the advocates of these types of arrangements, and between conflicting claims of regional autonomy, universalism, and Security Council control through the veto.[15]

Insofar as the settlement of disputes is concerned, the Security Council and Members are urged to employ regional methods where possible, and "resort to regional agencies or arrangements" was included among the means of settlement listed in Article 33. The rights of the Security Council

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[15] See V. Belaunde, *La Conferencia de San Francisco* (Lima, 1945); Goodrich and Hambro, Chap. VIII; Liang, as cited in Note 4, *supra;* UNCIO, documents of Committee III/4.

under Articles 34 and 35, however, were not impaired, and this means that Members may refer disputes to the Council and that it may investigate and decide whether a dispute exists which the Members are obligated to settle. Having so decided, however, the Security Council is obligated to "encourage" settlement through regional agencies, either on the initiative of the parties themselves or by "reference from the Security Council." Since the Security Council is not elsewhere given the right to refer a dispute to any method of settlement, and since under Chapter VI it can do no more than recommend a procedure to the parties, it is to be doubted that it could require parties to submit to regional means of settlement if they did not desire to do so. If the regional agreement requires that disputes between members of the regional system be submitted to regional procedures for adjustment, there would seem to be no conflict of jurisdiction, since Members of the UN are free under Chapter VI to choose such procedure as they may wish. If and when such efforts have failed, it would appear that the Security Council would be able to recommend terms of settlement under Article 37.[16] The Pact of the Arab League does not require submission of a dispute to the Council of the Arab League, but it does authorize that Council to conciliate in disputes which might lead to war. The procedures for settlement of disputes between the American Republics have not yet been stated.

The provision of sanctions by regional systems raises more difficult questions. Article 53 makes it clear that no regional enforcement action may be undertaken by a region without the prior authorization (exception made for enemy states) of the Security Council. The Act of Chapultepec calls for a treaty to be made among the American states to establish the means by which those states could jointly repel aggression against one of their number, and this treaty is to include the same types of non-military and military sanctions as are called for in the Charter of the United Nations. It is indeed specified that the treaty provisions must be consistent with the Purposes and Principles of the United Nations, and this would seem to mean that such enforcement measures could not be employed by the American regional system unless it was so ordered by the Security Council. This treaty will have to be carefully made if conflict of authority is to be avoided.

The result of the Charter provisions would be that a Great Power outside the region could by veto prevent measures of enforcement or of resistance to an aggressor being taken by the region for its own protection, and objection was reasonably made to this situation, and likewise to the situation in which the inability of the Security Council itself to act (because of the veto) would mean that the region was unable to protect itself.

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[16] If the regional system also claimed the right to impose a settlement, when the efforts of the parties had failed, the situation would not be clear.

Such objections led to the inclusion of Article 51, at the end of the preceding Chapter, under which individual or collective self-defense is permissible. This article, though it originated in the regional problem, has a much wider bearing. In any case in which the Security Council is paralyzed by the veto or in other way, Members of the United Nations may act jointly or collectively, whether or not as part of a regional system, in measures of self-defense.

§ 115. **World Government.**—Another current of recent thinking moves in the direction of a much more powerful universal international organization. Before World War II, and in the declining days of the League of Nations, supporters of the League were thinking in terms of its reform. In England and elsewhere there were suggestions of a world legislature, and in the United States the effect of Pearl Harbor and later of Hiroshima was a swing of the pendulum of public opinion in the direction of a strong international police. Organizations and literature began to appear advocating "world government."

Federal Union. One of the earliest thinkers in this direction was Clarence Streit who, as the Geneva correspondent of the New York Times, had for many years watched the struggles and the failures of the League of Nations, and had concluded that a stronger system was desirable. He proposed [17] that an international government be established upon the model of the American federal union, and his arguments were persuasively presented in terms of the experience of the United States. He regarded the League of Nations as patchwork, extending rather than controlling the concept of national sovereignty; he compared it with the Articles of Confederation in American history and asserted that with regard to the League, as in the case of the Confederation, mere amendment was not enough. He proposed to start with fifteen democracies (the Anglo-Saxon and western European democracies) which furnished a combination of the greatest power with the strongest natural bonds. These were to constitute a nucleus, but the ultimate goal was a universal system, and states would be admitted as they became sufficiently democratic. Enforcement action, he argued, is possible only against individuals, not against nations; consequently, the system must be a Union rather than a League, and the central government should be able to reach down to and control individuals. Furthermore, states should be represented, not on the usual basis of equality of voting, but upon the basis of population, and the delegates should be chosen directly by the people in each nation. Representation by population would be checked, as in the United States, by a bicameral legislature. Under this apportion-

[17] C. K. Streit, *Union Now* (New York, Harpers, 1939).

ment, the smallest state would have four representatives, and the United States would have 136.

The powers of the Union would be limited but would include the right to grant citizenship, to make treaties, to raise forces and provide for the common defense, to regulate commerce, to issue and regulate money, to own and operate the postal and other communications services, and to issue patents and copyrights. Other powers than those delegated to the central government would be reserved to the states. His illustrative constitution begins with a Bill of the Rights of Man. Instead of a President, there was to be a Board of Five and a Premier.

An organization was established to propagate the idea of federal union, and it gained many adherents. Objection was raised, however, to the narrow membership, which would exclude the Latin American states, the Far and Near Eastern states, and the Soviet Union. There were some who disagreed with the practical possibility of international control over individuals, and some who were uncertain as to the scheme of representation and of direct popular election. The movement therefore broke up into several groups, all, however, advocating some form of federal world government.

World Federation. A quite different scheme, both regional and federal in principle, was proposed by Mr. Ely Culbertson.[18] He rejected the idea of a strong central government and a closely knit union of states and asked no more than an association of eleven regional federations, artificially created, in each of which only the most populous state could be a member of the World Federation, and would speak therein for its group. A Provisional Council of Temporary Trustees was to make peace, bring relief to the liberated states, and establish a "World Police" on an ingenious "quota force" principle. According to this principle, the armed strength of the world would be divided as follows: 22% to an independent international police force; 20% to the United States; 15% each to Britain and the Soviet Union; 6% each to the French and Chinese; 3% each to Germany, Poland, Turkey, and India; 2% each to Malaysia and Japan. As a result of this distribution of power, the world government would be able to deal with any single state, and could presumably expect help from other states against a combination of aggressors; on the other hand, the danger of an all powerful international police force would be countered by the possibility of the combination against it of national forces. There was to be also a World Supreme Court, and it would be the authority which would call for economic or military measures against aggression. While the quota force idea has gained some sympathetic consideration, the scheme as a whole does not seem to have gained many supporters.

[18] Ely Culbertson, *Total Peace* (Garden City, New York, 1943).

THE ATOMIC SCIENTISTS. The knowledge that atomic energy was now available for increasing the terror of war greatly accelerated interest in and study of the problem of achieving stronger world government. The atomic scientists themselves, more shocked than anyone else because they knew better the potentialities of their discovery, organized themselves and entered the political field where, in spite of their dismay as they discovered that political science depends upon public opinion rather than upon logical formula, they worked with energy and with great effect.

Under the auspices of the Carnegie Endowment for International Peace, a large committee of atomic scientists and others prepared a draft treaty for the control of the atomic bomb.[19] It was proposed to outlaw atomic weapons except insofar as authorized by the Security Council, which might authorize a state to make use of the atomic weapon as part of enforcement action under Chapter VII of the Charter. Violation of this rule could be regarded by the Security Council as a threat to the peace, and Members were obligated to use all the means at their disposal against any state which made unauthorized use of atomic weapons. Ownership and operation of the production of atomic energy was left to states, under license from the International Commission, the latter body having a right of investigation within states to see whether there were infringements of the treaty. The International Commission might give its evaluation of the gravity of the situation to the Security Council, but decision as to action to be taken was left to the Council, and subject to the veto.

A somewhat similar draft was prepared by a group of atomic scientists working with international lawyers at the University of Chicago. Certain acts by individuals would be regarded as international crimes, and individuals guilty of such offenses could be called for trial before a United Nations Criminal Court by any state permanently represented on the Security Council. Enforcement would be left to the Security Council according to its own procedures, but Members would be free to act under Article 51.

On March 17, 1946, the Department of State's Committee on Atomic Energy released its report, known as the Lilienthal Report. This Committee had been set up following the Agreed Declaration of November 15, 1945, by the President of the United States, and the Prime Ministers of Canada and the United Kingdom, in which a pledge was made to put the secret of atomic bombs under international control when "effective safeguards" had been devised. In this Declaration, it had been pointed out that the bomb was a revolutionary means of destruction, that there was no adequate military defense against it, and that it was a weapon which no state

[19] Bulletin of the Atomic Scientists, Vol. 2, Nos. 1 and 2, July 1, 1946; *International Conciliation*, No. 423, September, 1946.

could have as a monopoly. It also asserted the important principle, somewhat disregarded later, that "the only complete protection for the civilized world from the destructive use of scientific knowledge lies in the prevention of war."

The Committee made the radical, though sensible, proposal that there should be an international Atomic Development Authority "conducting all intrinsically dangerous operations in the nuclear field, with individual nations and their citizens free to conduct, under license and a minimum of inspection, all non-dangerous, or safe, operations." [20] No state would be permitted to own an atomic bomb. The materials and plants, however, though owned and operated by the ADA, would be located in different states, and inspection maintained through researchers and international employes. No provision was made for enforcement measures through the United Nations or otherwise except that, if an aggressor should seize upon the production in his area, other states would be free to take over production in their areas and use the atomic bomb, if they should wish to do so, against the aggressor, again under Article 51. The report of this Committee contributed greatly to the understanding of the problem and possible means of attacking it, but did little in the way of putting strength behind the solutions proposed.

Demands for a Stronger System. The suggestions above outlined for control over atomic weapons were made by experts with a view to possibility and practicality. They lacked much in the way of necessary international control, and were unsatisfactory to many who were interested in a safer world in which to live. The vain efforts of the UN Atomic Energy Commission were further disappointing.[21] The UN itself had been built without knowledge of the atomic danger and was constitutionally incapable of controlling it. The opposition of the Soviet Union to international controls and to elimination of the veto as regards atomic controls added to the sense of frustration. Various eminent and responsible citizens were led to study the problem, and to demand something stronger than the UN.

In October, 1945, some fifty persons of importance gathered in a conference at Dublin, New Hampshire, and declared that the United Nations was inadequate. It demanded that there be substituted for it a "World Federal Government, with limited but definite powers to prevent war." At a later meeting in Princeton, this group modified its original demand for abandonment of the United Nations, and instead presented to the General Assembly formal proposals for amendment of the Charter. Another such group met at Rollins College, Florida, in the spring of 1946 and adopted similar reso-

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[20] *A Report on the International Control of Atomic Energy*, Dept. of State Pub., No. 2498.

[21] See pp. 455-459, *supra*.

lutions. Various such groups, including the World Federalist groups, met at Asheville, N. C., in February, 1947, and combined into United World Federalists. It adopted the following Policy Statement:

Statement of Beliefs

We believe that peace is not merely the absence of war, but the presence of justice, of law, of order—in short, of government and the institutions of government; that world peace can be created and maintained only under world law, universal and strong enough to prevent armed conflict between nations.

Statement of Purposes

Therefore, while endorsing the efforts of the United Nations to bring about a world community favorable to peace, we will work primarily to strengthen the United Nations into a world government of limited powers adequate to prevent war and having direct jurisdiction over the individual in those matters within its competence.

Earlier extreme demands for the abolition of the UN have given place to realization that it was difficult enough to secure adherence even to so weak a system and that it would be impossible to replace it with something stronger. Practically all groups now plan to work through improvement of the United Nations rather than through building *de novo*.

Characteristic Elements. Agreement has not yet been reached upon a systematic scheme for world government, but a few elements can be picked out which seem to be common to all proposals. Most of them are federal in character and derive their inspiration from the Constitution and experience of the United States. That Constitution, it may be recalled, was new in its day; and it is conceivable that in the new and variegated problem of establishing a world government, something entirely new may be developed. Most of the plans call for a world legislature, whose powers would be very much limited, leaving to sovereign states most of their authority except insofar as limitations may be necessary for the purpose of bringing war under control. It would have power to take action by majority vote of some kind, and this action would be binding even upon states which had not consented to it. It is frequently proposed that such a legislature should be composed of delegates, or representatives of the people, chosen upon some scheme of graded or proportional representation. This would reject the long established principle of equality of voting and would give to each state a number of votes corresponding to its actual weight in the counsels of the community of nations.[22] A strong, independent international police force is generally called for, and it is realized that this means

[22] See the citations given at Note 3, p. 322, *supra*.

provision of an executive department, and also a court having compulsory jurisdiction. A Bill of Human Rights is frequently included.

The key feature of all proposals would seem to be the ability on the part of the world government to reach down to individuals within a state. This is of course characteristic of a federal system, within which both the national government and the member states have each a certain defined jurisdiction over individuals. The difficulty of achieving world government may be measured in terms of this principle. It has long been maintained that international law deals only with states, and that only states may deal with individuals—though, as we have seen earlier, this assumption has been much weakened in practice. Much more difficult than legal theory, however, is the matter of popular attitude, and established popular loyalties. It would be novel and probably disliked if a UN inspector entered with authority into an American city or factory, searching for an individual who, for example, was illegally using atomic energy, and arresting that individual within the jurisdiction of the United States. The other side of the picture is the protection which the UN might be called upon to give to an individual as against his own state, and the loyalty which might be required of an individual to the UN. Could the UN, for example, protect a citizen who reported to it that his own state was preparing to use the atomic bomb for illegal purposes? could it protect an individual whose own state had violated his rights under an International Bill of Rights?

It is manifest that the proposals for world government are far reaching and fundamental. There is little doubt that they move in the right direction; the question is, how fast is it wise to move? A poll conducted in 1946 by the Columbia University Bureau of Applied Social Research produced almost unanimous agreement among the experts consulted that thinking must be in the direction of world government and equal agreement that progress toward it must be made by and through the United Nations. The experts disagreed greatly as to whether such a change could be accomplished in a short or a long time. These were experts; the decision, however, must be made by the people. It is impossible in a democracy to take such rapid steps until the people are prepared to move, and there is little indication of such a desire on the part of the mass of the American people. The suggestion that an international legislature should be able to change a tariff which protects an American citizen would probably evoke an instant reaction against the whole idea. However regrettable it may be, the advance toward world government will probably be slow.

§ 116. Nationalism v. Internationalism.—As the last sentence above indicates, the issue is still one as between nationalism and internationalism. There can be no doubt that strong international government is needed, but nations give up their sovereignty as unwillingly as individuals submit to

new restrictions upon their liberty. Until sovereign states are willing to accept limitations upon their freedom of action, a strong international system can not be built; and until peoples realize the need of submission to international law and government, their states cannot act. This is a matter of particular notice to the American people, and it is with this lesson that the book will be ended.

All nations are reluctant to surrender any freedom of action or submit to new restrictions. They do so because they have learned, usually through economic loss or the losses of war, that they stand to gain more through international cooperation than through independent national action. The smaller states are more apt to have learned the lesson; so also are those whose dependence upon other nations is great, such as Great Britain; most of all those who are swept by war are willing to pay the price of submission to an international government which can save them from war. The United States has had little education of this sort. It is great and prosperous and fears no one; it has ample resources to live on, though it now knows that its standards can not be maintained on those resources alone; and modern war has barely touched it. Its people, therefore, have not been forced to realize, as others have, the need for, and the advantages to them of, an international government which could maintain order and peace among nations.

It is true that they have officially and theoretically accepted the idea of membership in an international organization, and this was a remarkable change of opinion, a revolutionary advance. But the system which they accepted was the weakest which could possibly have been devised. The statesmen who planned it could not, in a democratic system, accept responsibilities to which the people had not agreed; and the American people had not made it clear that they were willing to pay the cost in national sovereignty of a strong system. They have not done so yet. For this the President or the Department of State or the Congress can not be blamed; they are the servants of the people, and it is the people who must speak.

This fact becomes of particular importance in the circumstances of the world situation today. The United States emerged from World War II having suffered less than any other great nation, more powerful, and with more money. Other nations depend upon the United States to an extent for which a precedent could hardly be found in history. No progress can be made toward stronger international government except through the active leadership of the United States. It is doubtless true that other nations cling strongly to national sovereignty, and that the Soviet Union is as reluctant to advance as any. These, in the circumstances, are secondary considerations, for nothing can be done except through the United States. No other nation could take the necessary lead; the initiative and responsibility rests upon the American people. Strong leadership might not suc-

ceed, but it is quite clear that unless the United States supports and builds up the UN, it can not hope to gain.

The record of that leadership thus far gives little reason for other nations, already distrustful of the United States because of past experience, to feel confident that the United States intends to rely upon, and build up the strength of, the United Nations. They weigh in the balance such policies and actions as trusteeship, bases, or the military program in South America, and ask whether such steps as have been taken by the United States display intent to go her own way as she had done before joining the UN. The "Truman Doctrine" now brings the issue into clear focus, and it is somewhat reassuring that the disregard shown for the UN in the original proposal met with widespread criticism from the American people. If each nation is to decide for itself what is a threat to the peace in the world, and what is to be done concerning it, there would be little reason for having the United Nations. If it is not strong enough to do what needs to be done, an effort could be made to strengthen it. The United States has participated in the activities of the UN in proper fashion, but has thus far exerted little effort toward building it into something stronger.

In the middle of the year 1947, there seem to be three schools of thought. One of these is what might be called the "realists," who in the name of realism think in terms of power politics and rely upon national action. They are not in fact realistic, for no nation can stand alone today and it is to the advantage of each to have the support of others through the obligations and machinery of an international government. At the other extreme are the advocates of world government, whose thinking, though not yet crystallized, is so far in advance of the average citizen that hope of achievement must lie far in the future. In between are those who accept the UN. Unfortunately these, while in the majority, are content to accept it; the most of them do not accept responsibility for improvement or even for efficient operation.

Certain steps may be suggested for final consideration, steps which might be possible if the United States should take the lead in demanding them. Certainly the process of settling disputes could be improved, on the one hand by submitting Members to a final settlement when they can not agree among themselves; on the other hand, by submitting legal disputes to a court for settlement. The United States could, at the least, remove the reservations which it attached to its acceptance of the Optional Clause, accepting without reservation the compulsory jurisdiction of the Court for legal disputes. It would be possible immediately to pledge a certain amount of armed forces to be ready for use by the Security Council when needed; the example thus set would almost necessitate similar contributions by other states. A further advance in this direction would be the creation of

an independent UN police force, to serve as a spearhead of action against an aggressor or as a deterrent against action in smaller crises. An air force would seem especially helpful. Again, the United States which was chiefly responsible for it, might initiate steps to remove or modify the restrictive "domestic questions" clause. So long as equality of representation is maintained, the Great Powers can hardly be expected to give up the veto; but it might be possible to secure modifications in its use, e.g., for disputes, or for control of atomic weapons. Other suggestions for improvement could be offered, with regard to trusteeship or bases, et cetera.[23] These are mild steps, which should not be frightening. They would not establish world government, or even effective security, but their value would be enormous in proving to other nations that the American people are sincerely interested in the success of the United Nations and are prepared to accept improvements which would strengthen it.

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[23] See the *Fifth Report* of the Commission to Study the Organization of Peace (New York, 1947).

APPENDICES

APPENDIX I

COVENANT OF THE LEAGUE OF NATIONS[1]

THE HIGH CONTRACTING PARTIES,

In order to promote international cooperation and to achieve international peace and security.

by the acceptance of obligations not to resort to war,

by the prescription of open, just and honourable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and

by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,

Agree to this Covenant of the League of Nations.

ARTICLE 1

1. The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a Declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

2. Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

3. Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

ARTICLE 2

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

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[1] The Covenant is given with annotations as found in *Ten Years of World Cooperation*. Amendments in force are included in the text in italics; other proposed amendments have been added in footnotes. The paragraphs are given as officially numbered by an Assembly resolution of September 21, 1926.

ARTICLE 3

1. The Assembly shall consist of Representatives of the Members of the League.

2. The Assembly shall meet at stated intervals and from time to time as occasion may require at the Seat of the League, or at such other place as may be decided upon.

3. The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

4. At meetings of the Assembly, each Member of the League shall have one vote, and may have not more than three Representatives.

ARTICLE 4

1. The Council shall consist of Representatives of the Principal Allied and Associated Powers,[2] together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Spain and Greece shall be Members of the Council.

2. With the approval of the majority of the Assembly, the Council may name additional Members of the League, whose Representatives shall always be Members of the Council;[3] the Council with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council.[4]

2 *bis.*[5] *The Assembly shall fix by a two-thirds majority the rules dealing with the election of the non-permanent Members of the Council, and particularly such regulations as relate to their term of office and the conditions of re-eligibility.*

3. The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

4. The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

5. Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council

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[2] The Principal Allied and Associated Powers are the following: The United States of America, the British Empire, France, Italy, and Japan (see Preamble of the Treaty of Peace with Germany).

[3] In virtue of this paragraph of the Covenant, Germany was nominated as a permanent Member of the Council on September 8, 1926.

[4] The number of Members of the Council selected by the Assembly was increased to six instead of four by virtue of a resolution adopted at the third ordinary meeting of the Assembly on September 25, 1922. By a resolution taken by the Assembly on September 8, 1926, the number of Members of the Council selected by the Assembly was increased to nine.

[5] This amendment came into force on July 29, 1926, in accordance with Article 26 of the Covenant.

during the consideration of matters specially affecting the interests of that Member of the League.

6. At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative.

ARTICLE 5

1. Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

2. All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.

3. The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

ARTICLE 6

1. The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary-General and such secretaries and staff as may be required.

2. The first Secretary-General shall be the person named in the Annex; thereafter the Secretary-General shall be appointed by the Council with the approval of the majority of the Assembly.

3. The secretaries and staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Council.

4. The Secretary-General shall act in that capacity at all meetings of the Assembly and of the Council.

5.[6] *The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly.*

ARTICLE 7

1. The Seat of the League is established at Geneva.

2. The Council may at any time decide that the Seat of the League shall be established elsewhere.

3. All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.

4. Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

5. The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

ARTICLE 8

1. The Members of the League recognise that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with

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[6] This paragraph came into force August 13, 1924, in accordance with Article 26.

national safety and the enforcement by common action of international obligations.

2. The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.

3. Such plans shall be subject to reconsideration and revision at least every ten years.

4. After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

5. The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

6. The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes, and the condition of such of their industries as are adaptable to warlike purposes.

Article 9

A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Articles 1 and 8 and on military, naval and air questions generally.

Article 10

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

Article 11

1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council.

2. It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

Article 12 [7]

1. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration *or judicial settlement* or to enquiry by the Council and they agree in no case to resort to war until three months after the award by the arbitrators *or the judicial decision* or the report by the Council.

2. In any case under this Article, the award of the arbitrators *or the judicial decision* shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

Article 13 [7]

1. The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration *or judicial settlement,* and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration *or judicial settlement.*

2. 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, are declared to be among those which are generally suitable for submission to arbitration *or judicial settlement.*

3. *For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.*

4. The Members of the League agree that they will carry out in full good faith any award *or decision* that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award *or decision,* the Council shall propose what steps should be taken to give effect thereto.

Article 14

The Council shall formulate and submit to the Members of the League for adoption plans for the 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.

Article 15

1.[8] If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration *or judicial settlement* in accordance with Article 13, the Members of the League agree that they will

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[7] The amendments printed in italics relating to these articles came into force on September 26, 1924, in accordance with Article 26 of the Covenant.

[8] The amendment to the first paragraph of this article came into force on September 26, 1924, in accordance with Article 26 of the Covenant.

submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof.

2. For this purpose the parties to the dispute will communicate to the Secretary-General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

3. The Council shall endeavour to effect a settlement of the dispute and, if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

4. If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

5. Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

6. If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

7. If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

8. If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

9. The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute provided that such request be made within fourteen days after the submission of the dispute to the Council.

10. In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

Article 16

1.[9] Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

3. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

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[9] The following proposal for the amendment of paragraph 1 of Article 16 now awaits ratification:

"Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, *which hereby undertake immediately to subject it to the severance of all trade or financial relations and to prohibit all intercourse at least between persons resident within their territories and persons resident within the territory of the covenant-breaking State and, if they deem it expedient, also between their nationals and the nationals of the covenant-breaking State, and to prevent all financial, commercial or personal intercourse at least between persons resident within the territory of that State and persons resident within the territory of any other State, whether a Member of the League or not, and, if they deem it expedient, also between the nationals of that State and the nationals of any other State whether a Member of the League or not.*

"It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council, the votes of Members of the League alleged to have resorted to war and of Members against whom such action was directed shall not be counted.

"The Council will notify all Members of the League the date which it recommends for the application of the economic pressure under this Article.

"Nevertheless, the Council may, in the case of particular Members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such a postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimise the loss and inconvenience which will be caused to such Members."

It is proposed also to delete the words "in such case" in the following paragraph.

Article 17

1. In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

2. Upon such invitation being given the Council shall immediately institute an enquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

3. If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

4. If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

Article 18

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

Article 19

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

Article 20

1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any agreements inconsistent with the terms thereof.

2. In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligation inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

Article 21

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

Article 22

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be intrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

4. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

5. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

6. There are territories, such as Southwest Africa and certain of the South Pacific islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can best be administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates.

APPENDIX I

Article 23

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(*a*) will endeavour to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;

(*b*) undertake to secure just treatment of the native inhabitants of territories under their control;

(*c*) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs;

(*d*) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(*e*) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind;

(*f*) will endeavour to take steps in matters of international concern for the prevention and control of disease.

Article 24

1. There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

2. In all matters of international interest which are regulated by general conventions but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable.

3. The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.

Article 25

The Members of the League agree to encourage and promote the establishment and co-operation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.

Article 26[10]

1. Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly.

2. No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.

ANNEX

I. Original Members of the League of Nations, Signatories of the Treaty of Peace

United States of America
Belgium
Bolivia
Brazil
British Empire
  Canada
  Australia
  South Africa
  New Zealand
  India
China
Cuba
Ecuador
France
Greece
Guatemala
Haiti
Hedjaz
Honduras
Italy
Japan
Liberia
Nicaragua
Panama
Peru
Poland
Portugal
Roumania
Serb-Croat-Slovene State
Siam
Czechoslovakia
Uruguay

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[10] The following amendment has been offered to replace Article 26, and now awaits ratification:

"Amendments to the present Covenant the text of which shall have been voted by the Assembly on a three-fourths majority, in which there shall be included the votes of all the Members of the Council represented at the meeting, will take effect when ratified by the Members of the League whose Representatives composed the Council when the vote was taken and by the majority of those whose Representatives form the Assembly.

"If the required number of ratifications shall not have been obtained within twenty-two months after the vote of the Assembly, the proposed amendment shall remain without effect.

"The Secretary-General shall inform the Members of the taking effect of an amendment.

"Any Member of the League which has not at that time ratified the amendment is free to notify the Secretary-General within a year of its refusal to accept it, but in that case shall cease to be a Member of the League."

APPENDIX I

States Invited to Accede to the Covenant

Argentine Republic
Chile
Colombia
Denmark
Netherlands
Norway
Paraguay
Persia
Salvador
Spain
Sweden
Switzerland
Venezuela

II. First Secretary-General of the League of Nations

The Honorable Sir James Eric Drummond, K. C. M. G., C. B.

APPENDIX II

PROPOSALS FOR THE ESTABLISHMENT OF A GENERAL INTERNATIONAL ORGANIZATION

THERE should be established an international organization under the title of The United Nations, the Charter of which should contain provisions necessary to give effect to the proposals which follow.

CHAPTER I. PURPOSES

The purposes of the Organization should be:

1. To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means adjustment or settlement of international disputes which may lead to a breach of the peace;

2. To develop friendly relations among nations and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in the solution of international economic, social and other humanitarian problems; and

4. To afford a center for harmonizing the actions of nations in the achievement of these common ends.

CHAPTER II. PRINCIPLES

In pursuit of the purposes mentioned in Chapter I the Organization and its members should act in accordance with the following principles:

1. The Organization is based on the principle of the sovereign equality of all peace-loving states.

2. All members of the Organization undertake, in order to ensure to all of them the rights and benefits resulting from membership in the Organization, to fulfill the obligations assumed by them in accordance with the Charter.

3. All members of the Organization shall settle their disputes by peaceful means in such a manner that international peace and security are not endangered.

4. All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.

5. All members of the Organization shall give every assistance to the Organization in any action undertaken by it in accordance with the provisions of the Charter.

6. All members of the Organization shall refrain from giving assistance to any state against which preventive or enforcement action is being undertaken by the Organization.

The Organization should ensure that states not members of the Organization act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.

Chapter III. Membership

1. Membership of the Organization should be open to all peace-loving states.

Chapter IV. Principal Organs

1. The Organization should have as its principal organs:
   a. A General Assembly;
   b. A Security Council;
   c. An international court of justice; and
   d. A Secretariat.
2. The Organization should have such subsidiary agencies as may be found necessary.

Chapter V. The General Assembly

Section A. Composition

All members of the Organization should be members of the General Assembly and should have a number of representatives to be specified in the Charter.

Section B. Functions and Powers

1. The General Assembly should have the right to consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments; to discuss any questions relating to the maintenance of international peace and security brought before it by any member or members of the Organization or by the Security Council; and to make recommendations with regard to any such principles or questions. Any such questions on which action is necessary should be referred to the Security Council by the General Assembly either before or after discussion. The General Assembly should not on its own initiative make recommendations on any matter relating to the maintenance of international peace and security which is being dealt with by the Security Council.

2. The General Assembly should be empowered to admit new members to the organization upon recommendation of the Security Council.

3. The General Assembly should, upon recommendation of the Security Council, be empowered to suspend from the exercise of any rights or privileges of membership any member of the Organization against which preventive or enforcement action shall have been taken by the Security Council. The exercise of the rights and privileges thus suspended may be restored by decision of the Security Council. The General Assembly should be empowered, upon recommendation of the Security Council, to expel from the Organization any member of the Organization which persistently violates the principles contained in the Charter.

4. The General Assembly should elect the non-permanent members of the Security Council and the members of the Economic and Social Council pro-

vided for in Chapter IX. It should be empowered to elect, upon recommendation of the Security Council, the Secretary-General of the Organization. It should perform such functions in relation to the election of the judges of the international court of justice as may be conferred upon it by the statute of the court.

5. The General Assembly should apportion the expenses among the members of the Organization and should be empowered to approve the budgets of the Organization.

6. The General Assembly should initiate studies and make recommendations for the purpose of promoting international cooperation in political, economic and social fields and of adjusting situations likely to impair the general welfare.

7. The General Assembly should make recommendations for the coordination of the policies of international economic, social, and other specialized agencies brought into relation with the Organization in accordance with agreements between such agencies and the Organization.

8. The General Assembly should receive and consider annual and special reports from the Security Council and reports from other bodies of the Organization.

Section C. Voting

1. Each member of the Organization should have one vote in the General Assembly.

2. Important decisions of the General Assembly, including recommendations with respect to the maintenance of international peace and security; election of members of the Security Council; election of members of the Economic and Social Council; admission of members, suspension of the exercise of the rights and privileges of members, and expulsion of members; and budgetary questions, should be made by a two-thirds majority of those present and voting. On other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, the decisions of the General Assembly should be made by a simple majority vote.

Section D. Procedure

1. The General Assembly should meet in regular annual sessions and in such special sessions as occasion may require.

2. The General Assembly should adopt its own rules of procedure and elect its President for each session.

3. The General Assembly should be empowered to set up such bodies and agencies as it may deem necessary for the performance of its functions.

Chapter VI. The Security Council

Section A. Composition

The Security Council should consist of one representative of each of eleven members of the Organization. Representatives of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Republic of China, and, in due course, France,

should have permanent seats. The General Assembly should elect six states to fill the non-permanent seats. These six states should be elected for a term of two years, three retiring each year. They should not be immediately eligible for reelection. In the first election of the non-permanent members three should be chosen by the General Assembly for one-year terms and three for two-year terms.

Section B. Principal Functions and Powers

1. In order to ensure prompt and effective action by the Organization, members of the Organization should by the Charter confer on the Security Council primary responsibility for the maintenance of international peace and security and should agree that in carrying out these duties under this responsibility it should act on their behalf.

2. In discharging these duties the Security Council should act in accordance with the purposes and principles of the Organization.

3. The specific powers conferred on the Security Council in order to carry out these duties are laid down in Chapter VIII.

4. All members of the Organization should obligate themselves to accept the decisions of the Security Council and to carry them out in accordance with the provisions of the Charter.

5. In order to promote the establishment and maintenance of international peace and security with the least diversion of the world's human and economic resources for armaments, the Security Council, with the assistance of the Military Staff Committee referred to in Chapter VIII, Section B, paragraph 9, should have the responsibility for formulating plans for the establishment of a system of regulation of armaments for submission to the members of the Organization.

Section C. Voting

(NOTE.—The question of voting procedure in the Security Council is still under consideration.)

Section D. Procedure

1. The Security Council should be so organized as to be able to function continuously and each state member of the Security Council should be permanently represented at the headquarters of the Organization. It may hold meetings at such other places as in its judgment may best facilitate its work. There should be periodic meetings at which each state member of the Security Council could if it so desired be represented by a member of the government or some other special representative.

2. The Security Council should be empowered to set up such bodies or agencies as it may deem necessary for the performance of its functions including regional subcommittees of the Military Staff Committee.

3. The Security Council should adopt its own rules of procedure, including the method of selecting its President.

4. Any member of the Organization should participate in the discussion of any question brought before the Security Council whenever the Security Coun-

cil considers that the interests of that member of the Organization are specially affected.

5. Any member of the Organization not having a seat on the Security Council and any state not a member of the Organization, if it is a party to a dispute under consideration by the Security Council, should be invited to participate in the discussion relating to the dispute.

Chapter VII. An International Court of Justice

1. There should be an international court of justice which should constitute the principal judicial organ of the Organization.

2. The court should be constituted and should function in accordance with a statute which should be annexed to and be a part of the Charter of the Organization.

3. The statute of the court of international justice should be either (a) the Statute of the Permanent Court of International Justice, continued in force with such modifications as may be desirable or (b) a new statute in the preparation of which the Statute of the Permanent Court of International Justice should be used as a basis.

4. All members of the Organization should *ipso facto* be parties to the statute of the international court of justice.

5. Conditions under which states not members of the Organization may become parties to the statute of the international court of justice should be determined in each case by the General Assembly upon recommendation of the Security Council.

Chapter VIII. Arrangements for the Maintenance of International Peace and Security Including Prevention and Suppression of Aggression

Section A. Pacific Settlement of Disputes

1. The Security Council should be empowered to investigate any dispute, or any situation which may lead to international friction or give rise to a dispute, in order to determine whether its continuance is likely to endanger the maintenance of international peace and security.

2. Any state, whether member of the Organization or not, may bring any such dispute or situation to the attention of the General Assembly or of the Security Council.

3. The parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security should obligate themselves, first of all, to seek a solution by negotiation, mediation, conciliation, arbitration or judicial settlement, or other peaceful means of their own choice. The Security Council should call upon the parties to settle their dispute by such means.

4. If, nevertheless, parties to a dispute of the nature referred to in paragraph 3 above fail to settle it by the means indicated in that paragraph, they should obligate themselves to refer it to the Security Council. The Security Council should in each case decide whether or not the continuance of the particular dispute is in fact likely to endanger the maintenance of international

peace and security, and, accordingly, whether the Security Council should deal with the dispute, and, if so, whether it should take action under Paragraph 5.

5. The Security Council should be empowered, at any stage of a dispute of the nature referred to in paragraph 3 above, to recommend appropriate procedures or methods of adjustment.

6. Justiciable disputes should normally be referred to the international court of justice. The Security Council should be empowered to refer to the court, for advice, legal questions connected with other disputes.

7. The provisions of paragraph 1 to 6 of Section A should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the state concerned.

Section B. Determination of Threats to the Peace or Acts of Aggression and Action With Respect Thereto

1. Should the Security Council deem that a failure to settle a dispute in accordance with procedures indicated in paragraph 3 of Section A, or in accordance with its recommendations made under paragraph 5 of Section A, constitutes a threat to the maintenance of international peace and security, it should take any measures necessary for the maintenance of international peace and security in accordance with the purposes and principles of the Organization.

2. In general the Security Council should determine the existence of any threat to the peace, breach of the peace or act of aggression and should make recommendations or decide upon the measures to be taken to maintain or restore peace and security.

3. The Security Council should be empowered to determine what diplomatic, economic, or other measures not involving the use of armed force should be employed to give effect to its decisions, and to call upon members of the Organization to apply such measures. Such measures may include complete or partial interruption of rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic and economic relations.

4. Should the Security Council consider such measures to be inadequate, it should be empowered to take such action by air, naval or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea or land forces of members of the Organization.

5. In order that all members of the Organization should contribute to the maintenance of international peace and security, they should undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements concluded among themselves, armed forces, facilities and assistance necessary for the purposes of maintaining international peace and security. Such agreement or agreements should govern the numbers and types of forces and the nature of the facilities and assistance to be provided. The special agreement or agreements should be negotiated as soon as possible and should in each case be subject to approval by the Security Council and to ratification by the signatory states in accordance with their constitutional processes.

6. In order to enable urgent military measures to be taken by the Organization there should be held immediately available by the members of the Organization national air force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action should be determined by the Security Council with the assistance of the Military Staff Committee within the limits laid down in the special agreement or agreements referred to in paragraph 5 above.

7. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security should be taken by all the members of the Organization in cooperation or by some of them as the Security Council may determine. This undertaking should be carried out by the members of the Organization by their own action and through action of the appropriate specialized organizations and agencies of which they are members.

8. Plans for the application of armed force should be made by the Security Council with the assistance of the Military Staff Committee referred to in paragraph 9 below.

9. There should be established a Military Staff Committee the functions of which should be to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, to the employment and command of forces placed at its disposal, to the regulation of armaments, and to possible disarmament. It should be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. The Committee should be composed of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any member of the Organization not permanently represented on the Committee should be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires that such a state should participate in its work. Questions of command of forces should be worked out subsequently.

10. The members of the Organization should join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

11. Any state, whether a member of the Organization or not, which finds itself confronted with special economic problems arising from the carrying out of measures which have been decided upon by the Security Council should have the right to consult the Security Council in regard to a solution of those problems.

Section C. Regional Arrangements

1. Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization. The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the states concerned or by reference from the Security Council.

2. The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council.

3. The Security Council should at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

Chapter IX. Arrangements for International Economic and Social Cooperation

Section A. Purpose and Relationships

1. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms. Responsibility for the discharge of this function should be vested in the General Assembly and, under the authority of the General Assembly, in an Economic and Social Council.

2. The various specialized economic, social and other organizations and agencies would have responsibilities in their respective fields as defined in their statutes. Each such organization or agency should be brought into relationship with the Organization on terms to be determined by agreement between the Economic and Social Council and the appropriate authorities of the specialized organization or agency, subject to approval by the General Assembly.

Section B. Composition and Voting.

The Economic and Social Council should consist of representatives of eighteen members of the Organization. The states to be represented for this purpose should be elected by the General Assembly for terms of three years. Each such state should have one representative, who should have one vote. Decisions of the Economic and Social Council should be taken by simple majority vote of those present and voting.

Section C. Functions and Powers of the Economic and Social Council

1. The Economic and Social Council should be empowered:
   a. to carry out, within the scope of its functions, recommendations of the General Assembly;
   b. to make recommendations, on its own initiative, with respect to international economic, social and other humanitarian matters;
   c. to receive and consider reports from the economic, social and other organizations or agencies brought into relationship with the Organization, and to coordinate their activities through consultations with, and recommendations to, such organizations or agencies;
   d. to examine the administrative budgets of such specialized organizations or agencies with a view to making recommendations to the organizations or agencies concerned;

e. to enable the Secretary-General to provide information to the Security Council;

f. to assist the Security Council upon its request; and

g. to perform such other functions within the general scope of its competence as may be assigned to it by the General Assembly.

Section D. Organization and Procedure

1. The Economic and Social Council should set up an economic commission, a social commission, and such other commissions as may be required. These commissions should consist of experts. There should be a permanent staff which should constitute a part of the Secretariat of the Organization.

2. The Economic and Social Council should make suitable arrangements for representatives of the specialized organizations or agencies to participate without vote in its deliberations and in those of the commissions established by it.

3. The Economic and Social Council should adopt its own rules of procedure and the method of selecting its President.

Chapter X. The Secretariat

1. There should be a Secretariat comprising a Secretary-General and such staff as may be required. The Secretary-General should be the chief administrative officer of the Organization. He should be elected by the General Assembly, on recommendation of the Security Council, for such term and under such conditions as are specified in the Charter.

2. The Secretary-General should act in that capacity in all meetings of the General Assembly, of the Security Council, and of the Economic and Social Council and should make an annual report to the General Assembly on the work of the Organization.

3. The Secretary-General should have the right to bring to the attention of the Security Council any matter which in his opinion may threaten international peace and security.

Chapter XI. Amendments

Amendments should come into force for all members of the Organization, when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by the members of the Organization having permanent membership on the Security Council and by a majority of the other members of the Organization.

Chapter XII. Transitional Arrangements

1. Pending the coming into force of the special agreement or agreements referred to in Chapter VIII, Section B, paragraph 5, and in accordance with the provisions of paragraph 5 of the Four-Nation Declaration, signed at Moscow, October 30, 1943, the states parties to that Declaration should consult with one another and as occasion arises with other members of the Organization with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

2. No provision of the Charter should preclude action taken or authorized in relation to enemy states as a result of the present war by the Governments having responsibility for such action.

NOTE

In addition to the question of voting procedure in the Security Council referred to in Chapter VI, several other questions are still under consideration.

WASHINGTON, D. C.
October 7, 1944

APPENDIX III

CHARTER OF THE UNITED NATIONS

We the peoples of the United
Nations determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom,

and for these ends

to practice tolerance and live together in peace with one another as good neighbors, and
to unite our strength to maintain international peace and security, and
to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
to employ international machinery for the promotion of the economic and social advancement of all peoples,

have resolved to combine our
efforts to accomplish these aims.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I

Purposes and Principles

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the

peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II

Membership

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

CHAPTER III

Organs

Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.
2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV

The General Assembly

COMPOSITION

Article 9

1. The General Assembly shall consist of all the Members of the United Nations.

2. Each Member shall have not more than five representatives in the General Assembly.

FUNCTIONS AND POWERS

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.

Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

VOTING

Article 18

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

PROCEDURE

Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

CHAPTER V

The Security Council

COMPOSITION

Article 23

1. The Security Council shall consist of eleven Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect six other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members, however, three shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

FUNCTIONS AND POWERS

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in

Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

VOTING

Article 27

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

PROCEDURE

Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited

to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI

Pacific Settlement of Disputes

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII

Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action

by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII

Regional Arrangements

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX

International Economic and Social Cooperation

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on re-

spect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

Article 58

The Organization shall make recommendations for the coordination of the policies and activities of the specialized agencies.

Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

CHAPTER X

The Economic and Social Council

COMPOSITION

Article 61

1. The Economic and Social Council shall consist of eighteen Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, six members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election, eighteen members of the Economic and Social Council shall be chosen. The term of office of six members so chosen shall expire at the end of one year, and of six other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

FUNCTIONS AND POWERS

Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

VOTING

Article 67

1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

PROCEDURE

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER XI

Declaration Regarding Non-Self-Governing Territories

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

CHAPTER XII

International Trusteeship System

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76

The basic objectives of the trusteeship system, in acordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship

system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XIII

The Trusteeship Council

COMPOSITION

Article 86

1. The Trusteeship Council shall consist of the following Members of the United Nations:

a. those Members administering trust territories;

b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and

c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

FUNCTIONS AND POWERS

Article 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

a. consider reports submitted by the administering authority;

b. accept petitions and examine them in consultation with the administering authority;

c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and

d. take these and other actions in conformity with the terms of the trusteeship agreements.

Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

VOTING

Article 89

1. Each member of the Trusteeship Council shall have one vote.

2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

PROCEDURE

Article 90

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

CHAPTER XIV

The International Court of Justice

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

CHAPTER XV

The Secretariat

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

CHAPTER XVI

Miscellaneous Provisions

Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

CHAPTER XVII

Transitional Security Arrangements

Article 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations

with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

Article 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

CHAPTER XVIII

Amendments

Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

CHAPTER XIX

Ratification and Signature

Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

Article 111

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

Article 1

THE INTERNATIONAL COURT OF JUSTICE established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

CHAPTER I

Organization of the Court

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Article 13

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 16

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.
2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.
2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.
3. Any doubt on this point shall be settled by the decision of the Court.

Article 18

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.
2. Formal notification thereof shall be made to the Secretary-General by the Registrar.
3. This notification makes the place vacant.

Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.
2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.
2. The President and the Registrar shall reside at the seat of the Court.

Article 23

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

2. Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Article 26

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labor cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this Article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy despatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Article 32

1. Each member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.

5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their traveling expenses refunded.

8. The above salaries, allowances, and compensation shall be free of all taxation.

Article 33

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

CHAPTER II

Competence of the Court

Article 34

1. Only states may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.

2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto.

CHAPTER III

Procedure

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

1. The procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

4. A certified copy of every document produced by one party shall be communicated to the other party.

5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

Article 44

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Article 47

1. Minutes shall be made at each hearing and signed by the Registrar and the President.
2. These minutes alone shall be authentic.

Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Article 53

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Article 54

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

2. The Court shall withdraw to consider the judgment.

3. The deliberations of the Court shall take place in private and remain secret.

Article 55

1. All questions shall be decided by a majority of the judges present.

2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Article 56

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the judges who have taken part in the decision.

Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

Article 62

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request.

Article 63

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

CHAPTER IV

Advisory Opinions

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Courts shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

CHAPTER V

Amendment

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

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