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Carnegie Endowment for International Peace
Division of International Law
Washington

PROCEEDINGS
OF THE
SIXTH CONFERENCE OF TEACHERS
OF
INTERNATIONAL LAW AND RELATED
SUBJECTS

HELD AT WASHINGTON, D. C.
APRIL 27-30, 1938

WASHINGTON
CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE
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TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS
AND THE INSTITUTIONS REPRESENTED

JESSE S. REEVES, University of Michigan,
Director of the Conference

BALL, M. MARGARET	Wellesley College
BERDAHL, CLARENCE A.	University of Illinois
BORCHARD, EDWIN M.	Yale University Law School
BRADLEY, PHILLIPS	Amherst College
BRIGGS, HERBERT W.	Cornell University
BROWN, PHILIP MARSHALL	Washington, D. C.
BUEHRIG, EDWARD H.	Indiana University
CAGLE, A. P.	Baylor University
CALLAHAN, J. M.	University of West Virginia
CHILDS, JAMES B.	U. S. Library of Congress
COLEGROVE, KENNETH W.	Northwestern University
CORBETT, PERCY E.	McGill University
CRECRAFT, EARL WILLIS	University of Akron
DAGGETT, ATHERN P.	Bowdoin College
DEÁK, FRANCIS	Columbia University
DENNIS, WILLIAM C.	Earlham College
DICKINSON, JOHN	University of Pennsylvania
DUNN, FREDERICK S.	Yale University
EAGLETON, CLYDE	New York University
ELLIS, ELLEN DEBORAH	Mt. Holyoke College
FENWICK, CHARLES G.	Bryn Mawr College
FINCH, GEORGE A.	Carnegie Endowment for Inter- national Peace
FLEMING, D. F.	Vanderbilt University
FRASURE, CARL M.	University of West Virginia
GANZERT, FREDERIC W.	University of Utah
GARNER, JAMES W.	University of Illinois
GOSNELL, CULLEN B.	Emory University
HAZARD, HENRY B.	U. S. Department of Labor
HEALY, THOMAS H.	Georgetown University
HILL, CHESENEY	University of Missouri
HODGES, CHARLES	New York University
HOLDEN, ALICE M.	Smith College
HORNBECK, STANLEY K.	U. S. Department of State
HOUGHTON, N. D.	University of Arizona
HUNTER, S. A. DULANEY	Georgetown University
HYDE, CHARLES CHENEY	Columbia University
JAEGER, WALTER H. E.	Georgetown University
JANZEN, HENRY	Hamilton College
JESSUP, PHILIP C.	Columbia University
JORST, VALENTINE, III.	University of Illinois

JOHNSTONE, WILLIAM C., JR.	George Washington University
KALLIARVI, THORSTEN V.	University of New Hampshire
KUNZ, JOSEF L.	University of Toledo
LAATSCH, MELVIN H.	University of Vermont
LAING, LIONEL H.	College of William and Mary
LESSWELL, HAROLD D.	University of Chicago
LEEHRICK, K. C.	Syracuse University
LENOIR, JAMES J.	University of Mississippi
LEROY, HOWARD S.	National University
MACKENZIE, NORMAN	University of Toronto
MARTIN, CHARLES E.	University of Washington
MCDANEL, R. C.	University of Richmond
MIDDLEBUSH, FREDERICK A.	University of Missouri
MORROW, RISING L.	University of Maine
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MYERS, DENYS P.	World Peace Foundation
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OGDON, MONTELL E.	Texas Technological College
PADELFORD, NORMAN J.	Fletcher School of Law and Diplomacy
PFANKUCHEN, LLEWELLYN F.	University of Wisconsin
PIPEIN, CHARLES W.	Louisiana State University
PORTER, KIRK H.	Iowa State University
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SPENCER, JOHN H.	U. S. Department of State
SPICER, GEORGE WASHINGTON	University of Virginia
STALEY, EUGENE	Fletcher School of Law and Diplomacy
STEINER, H. ARTHUR	University of California at Los Angeles
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STONE, IVAN M.	Beloit College
STOWELL, ELLERY C.	American University
STRACHAN, WILLIAM M.	Ohio Wesleyan University
STUART, GRALIAM	Stanford University
SWENSON, SAMUEL WARREN	University of Oklahoma
THOMAS, ELBERT D.	U. S. Senate (formerly Univer- sity of Utah)
TORIN, HAROLD J.	Dartmouth College
VALLANCE, WILLIAM R.	U. S. Department of State

VANDENBOSCH, AMRY	University of Kentucky
VAN EK, JACOB	University of Colorado
VINACKE, HAROLD M.	University of Cincinnati
WHITE, HOWARD	Miami University
WHITE, WILBUR W.	Western Reserve University
WILLIAMS, BENJAMIN H.	University of Pittsburgh
WILSON, GEORGE GRAFTON	Harvard University
WILSON, ROBERT R.	Duke University
WRIGHT, HERBERT	Catholic University of America
WRIGHT, QUINCY	University of Chicago
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 CHILDS, JAMES B. Library of Congress
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 ELLIS, ELLEN D. Mount Holyoke College
 GANZERT, FREDERIC W. University of Utah
 JESSUP, PHILIP C. Columbia University
 WILSON, ROBERT R. Duke University
 WRIGHT, HERBERT Catholic University of America
 WYNNE, CYRIL Department of State

Committee on Vocational Opportunities in the Fields of International Law and Relations

NOBLE, G. BERNARD, *Chairman* Reed College
 DENNIS, WILLIAM C. Earlham College
 HEALY, THOMAS H. Georgetown University
 HORNBECK, STANLEY K. Department of State
 MYERS, DENYS P. World Peace Foundation
 STALEY, EUGENE Fletcher School of Law and
 Diplomacy
 STOWELL, ELLERY C. American University
 THOMAS, ELBERT D. U. S. Senate (formerly University of Utah)
 WILLIAMS, BENJAMIN H. University of Pittsburgh
 WRIGHT, QUINCY University of Chicago

Committee on Curricula of Small Colleges

OGDON, MONTELL E., *Chairman* Texas Technological College
 RANDOLPH, BESSIE C. Hollins College
 STONE, IVAN M. Beloit College
 TOBIN, HAROLD J. Dartmouth College

RESOLUTIONS ADOPTED BY THE SIXTH CONFERENCE OF TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS

State Department Publications

The Sixth Conference of Teachers of International Law and Related Subjects, reiterating the interest manifested by two prior Conferences in the expansion of the publication program of the Department of State;

Noting with satisfaction the achievements recorded in the reports of the Conference's Committee on Publications;

Asserts its conviction that the continued development and expansion of that program is necessary both for purposes of scholarship and for the democratic control of the conduct of the foreign relations of the United States; and

Records its appreciation of the whole-hearted coöperation which its committees have constantly received from the Department of State and its officials; and

Congratulates the Department of State on its admirable publication record, which has been made largely through the devoted efforts of Dr. Wynne, Chief of the Division of Research and Publication, strengthened by the support of Assistant Secretary of State Messersmith; and

Expresses also its gratification at the intelligent and generous interest which the Committees of both Houses of Congress have taken in supporting this program; and

Urges upon both the Department of State and the Congress the need for constant attention to the steadily progressive furtherance of the publications program of the Department of State (pp. 103 and 313).

Inter-American Documents

The Sixth Conference of Teachers of International Law and Related Subjects, realizing the need of improving the extent and scope of publications of the international conferences and commissions of the American Republics,

1. Commends the successful production of the publications of the Seventh International Conference of American States by the Government of Uruguay as a demonstration of the practical utility of uniform printing standards;

2. Notes that standards of uniform printing are, in accordance with Resolution LIV of the Seventh International Conference, in force for the publications of the international conferences of American States;

3. Recommends (a) that the Governing Board of the Pan American Union consider the formulation of a plan whereby the proceedings and records of the international conferences of American States may be even more promptly edited and published, (b) that the Governing Board authorize the publi-

cation of its minutes from the beginning, and (c) that the Governing Board authorize the publication of its current proceedings in whatever form seems practicable (p. 311).

Publications of the Pan-American Union

The Sixth Conference of Teachers of International Law and Related Subjects (a) suggests to the Governing Board of the Pan American Union the development of the Union's various series of informational publications, and their wider distribution through its system of depository libraries, and (b) recommends coordination in the production and distribution of the records of inter-American activities other than those of the international conferences of American States, and the concentration within the Pan American Union of both production and distribution of all such material as soon as its budget will permit (pp. 311-12).

Far Eastern Studies

The Sixth Conference of Teachers of International Law and Related Subjects, appreciative of the publications of the Committee on Far Eastern Studies of the American Council of Learned Societies, and of the Institute of Pacific Relations, which publications have given American scholars greater access to Oriental materials,

1. Expresses interest in the publication of translations into English (a) of articles by Oriental scholars in the vernacular, on international law and relations, and on Far Eastern government, public law and politics, and (b) of documents of Asiatic Governments printed in their official languages, and,
2. Expresses the hope that a quarterly journal for such publications may be established, and that the Committee on Far Eastern Studies and the Institute of Pacific Relations may find it advisable and possible to establish or assist toward the establishment of such a journal (pp. 312-13).

International Exchange of Official Publications

The Sixth Conference of Teachers of International Law and Related Subjects expresses its appreciation to the Librarian of Congress, the Chairman of the Committee on Library of the United States Senate and the Chairman of the Committee on Library of the United States House of Representatives for their great service to scholars and teachers in creating a collection of official publications of many countries and in promoting an international exchange of official publications between the United States and various countries.

The Conference expresses the hope that these activities, and particularly those relating to the collection of Chinese and Japanese Government documents, will be continued and expanded (p. 314).

Carnegie Endowment for International Peace

The Sixth Conference of Teachers of International Law and Related Subjects expresses its gratitude to the Carnegie Endowment for International Peace for the generosity which has made possible the meeting of the conference; for its hospitality as is evidenced in the luncheon given to the conference, and in other ways; and for its recognition of the importance of these conferences to the improvement and encouragement of the teaching of international law and related subjects (p. 315).

James Brown Scott

The Sixth Conference of Teachers of International Law and Related Subjects records its very deep regret that the sickness of Dr. James Brown Scott has deprived it for the first time of the inspiration and invaluable guidance that he, as the founder of our organization, has given us at all previous meetings. We wish for him a most speedy recovery (p. 315).

Committee on Curricula of Small Colleges

The Sixth Conference of Teachers of International Law and Related Subjects requests the Carnegie Endowment for International Peace to undertake a study of the curricula of small colleges, under the supervision of a committee of this Conference to be appointed by the Director, which shall be empowered to limit the field of investigation according to the resources available (pp. 101-2).

Committee on Vocational Opportunities

The Sixth Conference of Teachers of International Law and Related Subjects recommends that a study be made, by a committee appointed by the Director of the Conference, of the vocational opportunities in the general fields of international law and relations, with a view to making clear to all interested persons the nature and extent of the openings of a professional character that exist in these fields (pp. 316-17).

SIXTH CONFERENCE OF TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS

THE BROOKINGS INSTITUTION, WASHINGTON, D. C.
APRIL 27-30, 1938

FIRST SESSION

Wednesday, April 27, 1938, at 2:30 o'clock, p.m.

Presiding: Jesse S. Reeves, Professor of American Institutions, University of Michigan, Director of the Conference.

Chairman REEVES. Will the meeting please come to order?

By virtue of the authority vested in me by the Fifth Conference of Teachers of International Law and Related Subjects I now declare that the Sixth Conference is open.

I believe the first item on the agenda is the roll call.

Mr. GEORGE A. FINCH. Mr. Chairman, there are a number of the members of the conference attending committee meetings which are not yet over. I suggest you entertain the meeting with your opening remarks and defer the roll call until later.

Chairman REEVES. This comes a little in the nature of a shock, not a shock to find that a committee is engaged in prolonged discussion but a shock that anyone considers it a necessity that the presiding officer make remarks when so many remarks are to follow from others.

It is rather interesting to recall that the first of these conferences was back in 1914, and the second in December, 1916. That conference met and had some joint sessions with the Pan American Scientific Conference which was meeting in Washington at that time.

That Second Conference met when there were tragic conditions in the world. The Great War had been going on for some time, and we were challenged by some Philistines: Why a conference on the teaching of international law when since August, 1914, there had been none, and what would we find to talk about? At that time we were very much buoyed up by the presence here of scholars from the countries to the south of us seriously interested in international law and its teachings. And it was at that time in 1916, as you may remember, that the Section on International Law of the Pan American Scientific Conference adopted a statement of principles having to do with the fundamental rights and duties of nations which now has, in large measure, found itself expressed in treaties signed and, to some extent, ratified by the Pan American countries. After that it was a long time before we had the next conference, not until 1925. Others followed, in 1928 (in connection with the meeting of the Institute of International Law), in 1929, and in 1933.

I think the topics for discussion have shown a certain element of abiding interest, at least so far as the teaching of international law is concerned. But it is interesting to note that this year for the first time we international lawyers are willing to admit that there may be contributions, or at least official admission that there may be contributions, from allied fields and that economists may have something to tell us, and psychology, and particularly the psychology of propaganda.

Yet I fancy before we are through, when debate is open, we shall find ourselves ranging about some of the fundamental questions that we have discussed before. For instance, on the program I find no special topic in which the respective claims of the right to teach international law are set forth by the law schools on the one hand and by the colleges on the other. Yet I fancy before we get through we shall hear something on that subject.

Again, on the question of methods, I fancy we shall hear before we get through some discussion as to the place of the case book and the use of documents.

I am happy to note that the program of stated papers will not exhaust the time at our command and that we may have full discussion about many matters that have been given a special place upon this program. That remains to be seen.

It is not my place to welcome you. It might be my place on behalf of you to express my appreciation of being here and for the opportunity of holding this Sixth Conference.

One cannot think of a meeting of any group interested in international law in Washington or beyond the United States—widening out into the Americas or into the world—without having at once in mind the man who more than anyone else for more than thirty years has had the inspiration, the vision, the courage, the interest in international law—Dr. James Brown Scott.

Certainly no conference like this is quite complete if Dr. Scott be absent. And I know that you all share with me the very deep regret that illness is keeping Dr. Scott from being with us this afternoon. In his absence I shall ask Mr. George A. Finch to say a few words of welcome.

MR. FINCH. Mr. Chairman, members of the Conference of Teachers of International Law and Related Subjects:

In Dr. Scott's name I wish to offer you a most cordial welcome to this meeting and to say in a very brief way something which I feel he might have said more *in extenso*.

This is the sixth of a series of similar conferences which have been held as the result of the initiative of the Board of Trustees of the Carnegie Endowment for International Peace, taken at its second meeting back in 1912 at the suggestion of the late Andrew D. White, who thought that a very essential field of the activity of the Endowment was the improvement of the teaching of international law and the extension of its study. A formal resolution was

passed by the Trustees of the Endowment making those objects a part of the program of the Division of International Law of the Endowment. In order to carry out that assignment, it was decided to ask the advice of the American Society of International Law which had been in existence some five years before the Endowment was established. Those proposals were placed upon the program of the Society, and it recommended that there be held a conference of teachers of international law and related subjects to consider what might be done.

A conference of teachers was held in connection with the annual meeting of the Society in April, 1914, and a series of recommendations was adopted. Among them was the recommendation that the Endowment should offer fellowships in international law. And I am happy to see here present a number of members of this conference who have held fellowships in international law awarded by the Endowment. There are many other former Endowment fellows not here who now hold important positions in the teaching of international law and related subjects in the colleges and universities in this country.

The First Conference of Teachers, held in 1914, was so productive of good results that the conferences have been continued; and this is the culminating one up to the present time. We feel confident that this conference will be just as productive of commendable recommendations as its predecessors have been.

I know that Dr. Scott does not feel pessimistic about the future of international law. He does not regard the advance of international law as being essentially dependent upon the adoption of methods of enforcement, which is a branch of the subject that some of our colleagues are more concerned with at the present time. Dr. Scott identifies international law more with justice than with force; and he is confident that in the end justice will prevail.

If we take that point of view we have every encouragement to go forward with the work which we have been doing for many years, to try to improve our methods of teaching and to try to continue to enlist the interest of others in the study of international law.

I think it is not immodest if I make the statement that since these conferences were started in 1914, and the putting into effect of some of their recommendations such as the establishment of the fellowships in international law, there has been great progress in the study and teaching of international law and international relations.

The Endowment has conducted several surveys of the teaching of international law in our colleges and universities, and on each occasion they have shown a large increase in the number of teachers and students. Of course, world events have had a great deal to do in promoting that interest; but I think we are entitled to claim our share of credit due to our own activities.

If there are any ways by which the collective judgment of this conference can recommend further steps to be taken to stimulate that interest and

make further progress, I am sure the Endowment would welcome a statement along those lines, and it will do whatever is within its power to carry out those recommendations.

Mr. Chairman, I shall now proceed with the routine part of my task. I shall first call the roll and then I shall make a few announcements which you ought to hear.

We do not wish to conduct this meeting along the lines of a businessmen's luncheon club, but I think it would be interesting if those who are here would rise when they respond to their names so that all of the rest of us may have a view of them. Undoubtedly there are some members who are not present. They are either attending committee meetings or plan to arrive later on. But I shall go through the entire roll, and I shall ask those who are present to rise when their names are called.

(The roll was then called by Mr. George A. Finch, Assistant Secretary, Carnegie Endowment for International Peace.)

Mr. FINCH. If you will permit me, Mr. Chairman, before I leave the platform, I would like to make a few announcements.

We ask that all of the members of the conference register at the desk. Those who have not done so may do that as they leave, because we wish to have a complete record of all the members here. We expect to print the proceedings of this conference and to include the names of the participants, with their universities or colleges.

We will ask all members to indicate to the registration clerk whether they will attend the luncheon at the Carlton Hotel on Friday at 12:30. At that luncheon you will be the guests of the Endowment.

Also those who have claims for reimbursement for transportation may get a voucher for that from the desk. You are requested to fill it out and deliver it to Mr. Phillips, the Bursar of the Carnegie Endowment, whose office is on the corner of this block. Checks in payment of these claims will be issued before the members leave Washington.

There are two visits scheduled on the program for Thursday afternoon. There will be a visit to the National Archives and also a visit to the Department of State.

Members who wish to visit the National Archives should meet at the Pennsylvania Avenue entrance of the National Archives Building on Thursday afternoon at 2:15 o'clock p.m. They will be met by guides who will conduct them through the building and offices. This tour has been arranged under the personal supervision of Dr. R. D. W. Connor, the National Archivist. I hope very much there will be an attendance to justify the trouble and the pains that the officials there are taking in order to show members of the conference what they have in that important government building.

The visit to the Department of State will take place on the same afternoon. We are indebted to Dr. Cyril Wynne, Chief of the Publication Division, for arranging a very attractive visit there. I hope all of you will go.

You are asked to be at Dr. Wynne's office, Room 392, State Department Building, at 3:30 o'clock Thursday afternoon, when you will be shown places in the State Department that may be of interest.

In addition to being shown interesting places in the Department, the members will have brief receptions by Assistant Secretary of State Messersmith, Assistant Secretary of State Sayre, and Counselor Moore. We have arranged these two trips on the theory that you will have time to go through the National Archives between 2:15 and 3:30 and be at the State Department at that time and make a good showing there. I urge this especially because the State Department has been very much influenced by the recommendations emanating from these conferences. When we started them a few years ago there was a universal complaint among professors of international law that they did not have sufficient documentation covering the work of the State Department. As a result of the work of the committee of this conference and of the American Society of International Law, we obtained an adequate appropriation to enable the State Department to increase its publications. If we wish the State Department to continue to be impressed with our importance I think we should appear at these receptions before Assistant Secretaries Sayre and Messersmith and Counselor Moore in goodly numbers so that hereafter when recommendations emanate from us they will not think that they are resolutions of three little tailors but from a goodly number of people whom they have seen and with whose appearance they are impressed.

I shall now turn the gavel back to the Chairman.

Chairman REEVES. The next item of business is the report of the Committee on Publications, this committee having been appointed and the personnel determined at the Fifth Conference. This report will be made by Professor Robert R. Wilson, the chairman of the committee.

Professor ROBERT R. WILSON. Mr. Chairman, ladies and gentlemen: The report which I shall read has been prepared through the active coöperation of all members of the committee with the exception of one member, who has been in Europe for several years and who did not feel that he was sufficiently in touch with the present work of the conference to join in the preparation of the report. I may say that the report was prepared in draft form and circulated, and then, on the basis of the suggestions which came in, the final form was made up, and it has been approved today by your committee.

REPORT OF THE COMMITTEE ON PUBLICATIONS

By ROBERT R. WILSON

Professor of Political Science, Duke University

This committee has considered facts with reference to source material now available for the teacher of international law and related subjects, has undertaken an evaluation of certain developments since the Fifth Conference, and has reached some conclusions as to needs for additional publica-

tions. Sections of this report will deal briefly, in turn, with (1) treaty collections, digests of international law and of diplomatic correspondence; (2) publications of the Department of State; (3) the listing of publications of foreign governments; (4) publications of inter-American public organizations; (5) the republication of certain documents, and proposals for the establishment of additional journals; and (6) the general use of documentation.

I. The five-year period since the Fifth Conference has seen the expansion of some much-used treaty collections, and the provision in more convenient form of texts of many bilateral and multilateral agreements. It is quite unnecessary to draw the attention of the conference to the League of Nations *Treaty Series*, which now comprises approximately 180 volumes and 4,100 numbered instruments. As is well known, the League of Nations Library issues a *Chronology of International Treaties and Legislative Measures*, a stated purpose of which is "to give a survey of the development in the sphere of law, and particularly of international law, which is daily taking place." Study of the current treaty product is also facilitated by the League's publication of facts on the ratification of agreements and conventions concluded under the auspices of the League.

The appearance, in 1936 and 1937, respectively, of Volumes V and VI of Hudson's *International Legislation*, bringing this collection down to 1935, has been an important development. The set includes some texts of unratified conventions; later volumes undertake to give more details concerning action taken by governments subsequently to the signing of agreements. Since the 1933 conference two additional volumes in the extraordinarily useful Miller edition of the treaties of the United States have been issued, and others are in prospect. On May 24, 1937, the United States Senate agreed to a resolution¹ authorizing the Committee on Foreign Relations to prepare a fourth volume of the so-called Malloy collection of treaties of this country, covering the period since March 4, 1923. The supplement will probably be issued in May of this year. There have been some specialized collections, such as that which appeared in 1937 entitled *Treaty Provisions Defining Neutral Rights and Duties, 1778-1936*, edited by Professors Jessup and Deák.² In general, adequate indexes to treaty materials are exceptional. A *Subject Index of the Treaty Series and the Executive Agreement Series* of the United States, which appeared in 1932,³ is of limited usefulness. Publication of a comprehensive analytical index of all inter-governmental acts to which the United States has been or is a party, would fill a real need.

Toward providing digests of court decisions involving international law, and digests of diplomatic correspondence, organized effort has continued to be directed, through agencies some of which are private, and some public.

¹ S. Res. 132 (75th Cong., 1st Sess.).

² Senate Doc. No. 24 (75th Cong., 1st Sess.).

³ U. S. Department of State, Publication No. 291.

In the year of meeting of the last conference there appeared two additional volumes of the *Annual Digest of Public International Law Cases*. Begun nearly a decade ago by scholars who suspected, as they explained in the preface to the first volume, that there was "more international law already in existence and daily accumulating 'than this world dreams of,'" the project has been of special interest to American teachers, and its continuance is, from their point of view, highly desirable. In 1933 were published, in John Bassett Moore's *International Adjudications*, Volumes V and VI of the Modern Series, and in 1936 Volume II of the Ancient Series. The careful editing is illustrated in the fact that, in the fifth volume of the Modern Series, there are 54 pages of index.

The carrying out of the recently announced plan to bring Moore's *Digest of International Law* down to date,¹ should furnish tools of much value. The additional material is expected to fill six volumes, two of which are scheduled to appear some time during the fiscal year 1938-1939. The publication, in 1932 and 1935, respectively, of the first two volumes on *Great Britain and the Law of Nations*, under the editorship of Professor H. A. Smith of London, marks another important venture and suggests the possibility of similar undertakings which would make available comparable material of other major states.² The *Fontes Juris Gentium*, which received considerable attention at the Fifth Conference,³ embraces within its plan digests of decisions of international tribunals, of some national courts, of diplomatic correspondence, of opinions and decisions of international organs other than courts, and of treaty clauses. An additional volume was published in 1934 and another in 1937, making a total of eight volumes which have appeared to date.

II. The publications policy of the Department of State since the conference of 1933 has involved a steadily expanded program and a steady increase in the amount of money appropriated for this purpose.⁴ The committee is in a position to say that, more recently, this has been due, in large part, to the active interest of Assistant Secretary of State Messersmith. The favorable attitude taken by Chairman Thomas B. McMillan and his associates of the Sub-Committee of the Committee on Appropriations, House of Representatives, seems deserving of commendation. Since this conference has a separate Committee on Department of State Publications, and since the Chief of the Division of Research and Publication is to address

¹ Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 75th Cong., 3d Sess., on Department of State Appropriation Bill for 1939, pp. 99-102 (testimony of Mr. Hackworth).

² The recently published volume on Canada and the Law of Nations, by Norman MacKenzie and Lionel H. Laing, is a case book, and therefore somewhat different in plan.

³ Proceedings, Fifth Conference, pp. 8, 9, 166-171, 174.

⁴ The amounts appropriated for printing and binding, over five fiscal years, have been: 1935, \$107,180; 1936, \$121,000; 1937, \$150,000; 1938 (including deficiency appropriation) \$164,300; 1939 (appropriation bill) \$172,750.

the conference at this session, the present report will not attempt to cover the whole subject. It will deal only with the Conference Series, the Arbitration Series, *Foreign Relations*, *Press Releases*, and the *Bulletin of Treaty Information*.

The Conference Series, while it does not cover in detail all conferences with which the United States has something to do, has furnished for certain ones, such as the London Naval Conference of 1935, fairly complete documentary information for the scholar.¹ The committee chairman has heard some individual expression of regret that the United States did not publish a record of the effort exerted at Geneva for limitation of armament on a more comprehensive basis. The practice, now regularly followed, of publishing for each fiscal year a list of *American Delegations to International Conferences, Congresses and Expositions, and American Representation on International Institutions and Commissions*,² supplies a summary and an indication of the source of fuller information on each particular conference. It is to be hoped that the Conference Series will provide, as nearly as practicable, the proceedings of all of the more important international conferences in which the United States is a participant, unless the material is published in adequate form through another agency.

In the Arbitration Series have appeared seven numbered publications since 1933 and up to January 1, 1938. Rather complete records—including, for example, cases and counter-cases, are made available in the published report of such a proceeding as the arbitration of the *Salem* claim.³ However desirable it may be in principle, there seems little ground for hope that the United States will publish "a record of all international arbitrations, whether the United States is a party or not," as was suggested by one speaker at the Fifth Conference.⁴ Diplomatic settlements of claims are not necessarily included in the Arbitration Series. For example, the opinions and report of Fred K. Nielsen in the American-Turkish Claims Settlement, effected in 1934, were printed by authority of an Act of Congress in 1937,⁵ and a very limited number of copies were distributed by the Carnegie Endowment for International Peace. The American student of international law may still experience difficulty in securing authentic records of important adjudications to which his own government is not a party, and which are handled by bodies outside the Permanent Court of Arbitration or the Permanent Court of International Justice.

The perennial complaint in connection with Department of State publications has been occasioned by the long interval which comes between the occurrence of important events in American foreign policy and the recording of these in *Foreign Relations*. The criticism is not set at rest by careful

¹ U. S. Department of State, Publication No. 896.

² Illustrated in U. S. Department of State Publication No. 1014. *

³ U. S. Department of State Publications Nos. 364, 367, 421, 483, 497, 663, 669.

⁴ Proceedings, Fifth Conference, p. 40.

⁵ Act of March 22, 1935, 49 Stat. 67.

compliance with the now familiar order of March 26, 1925, to the effect that the material when published shall be "substantially complete,"¹ or by the excellence of the volumes when they do appear. Nor is it an entirely convincing answer that the gap cannot be closed because of failure to secure consent from foreign governments for earlier publication of their communications to the United States Government, if it is possible to remedy or improve this situation through the effort of the United States. The committee understands that some such effort is now being exerted in discussions with the Foreign Offices of certain foreign governments. It is to be hoped that success may be achieved in reducing the "lag" to considerably less than fifteen years.² The early publication of *Foreign Relations* volumes on the Peace Conference of Paris, with the Minutes of the Council of Four, would fill a long-felt need.

The plan of having part of the record for a particular year published within a relatively short period after the occurrence of the events, and another part of it published later in order to provide correspondence for the earlier publication of which consent could not be obtained, seems to some members of the committee to have merit. A committee of the American Society of International Law which explored this possibility brought out that, under such a plan, the material first published would be fragmentary and would contain little more than what now appears in the *Press Releases* and other current publications.³ It is apparent that the *Press Releases*, useful as they are for certain purposes (and particularly in view of the commendable cumulative index), do not supply the complete record which is needed. The publication of as much of the correspondence as it may be practicable to publish, before the material has come to be of mere historical significance, is desirable. If it be conceded that there are some communications from foreign governments that should not be published without the prior consent of the sending governments—a rule which has apparently come into use by the United States only in the last quarter century—it still remains true that undue delay in the publication of most of the material for a particular year may create suspicion in the public mind rather than safeguard the real interests of the nation. Should any such plan as that mentioned—for publication in two sections—be tried, the first volume might contain a table of contents for both sections (but not the detailed calendar of the second volume) and there might be a single index for all material for a

¹ U. S. *Foreign Relations*, 1914, Supp., pp. iii-iv.

² On the publication by the Peruvian Government of diplomatic documents less than two years old, see the Report of the Committee on Publications of the Department of State, in *Proceedings, American Society of International Law*, 1937, pp. 239-249. "Appropriate diplomatic representations" were made by the Ambassador of the United States to the Peruvian Foreign Office. See also p. 104 of *hearings cited supra*, p. 7, note 1.

³ *Proceedings, American Society of International Law*, 1935, pp. 199-209.

⁴ John Bassett Moore, "The Dictatorial Drift," *Virginia Law Review*, Vol. 23 (1937), pp. 863, 865.

given year. There would perhaps be a certain amount of duplication or cross-reference, and there would obviously be an incomplete record for a particular year until the final volume for that year was issued. These disadvantages would have to be weighed, however, against the desirable effect of a return to the plan of more nearly current publication of diplomatic papers.

The committee is informed that two *Foreign Relations* volumes for 1922 and two for 1923 are to be published within the present calendar year, and that two volumes of Lansing papers will probably appear in this series in the spring of 1939. The committee expresses the hope that a combined index volume, to cover the period 1900 to 1918, may soon be available.

For students of current treaty developments, the monthly *Bulletin of Treaty Information*, the subscription list to which has been discouragingly small,¹ has definite value. The Department of State now issues regularly, as a supplement to the publication entitled *List of Treaties Submitted to the Senate, 1789-1934*,² a list of treaties submitted to the Senate during each particular year, with an indication of action taken upon them and the status of the instruments at the end of the year.³ In the opinion of the committee, it would be desirable to have published more frequently—perhaps biennially—a supplement to the *Bulletin of Treaty Information* to bring up to date the *Supplement* to No. 39 of the *Bulletin* (December, 1932),⁴ showing the treaties still in effect for the United States. A new edition of this list is expected during the present calendar year.

III. Certain developments relating to foreign government documents seem sufficiently related to the work of the conference to warrant reference to them in this report. As at the conference of 1933, attention will be directed chiefly to bibliographies or indexes. A brief mention of particular countries will perhaps suggest the direction of some recent effort in connection with the listing of documents. As to British documents, there is at the present time a need for a comprehensive checklist of all publications from the earliest times to the present, including particularly the Foreign Office publications. (The British Stationery Office List does not undertake to list items not for sale.) The committee understands that the British Library of Information, New York City, has been interested in the work of promoting a reprint of the set of parliamentary indexes covering the first half of the nineteenth century. The publication by the American Library Association, in 1935, of a guide to Canadian government publications has been an important development. In France steps have been taken looking toward the preparation of an introductory report on government publications since 1920, and an inter-departmental committee has recently had under consider-

¹ As of October, 1937, there were 158 individual subscribers; 78 copies went to libraries and exchanges, 378 to depositories, 2 to the National Archives; 200 copies were prepared for sale by the Superintendent of Documents, and 1200 for the Department of State.

² U. S. Department of State, Publication No. 765.

³ *Ibid.*, Nos. 817, 966, 1126.

⁴ *Ibid.*, No. 436.

ation the setting up of a central documents office for French official publications. In 1937 there appeared a second supplement, covering the years 1931-1935, to the general catalogue of Italian Government publications, 1861-1923. In Sweden an annual list of official publications is now issued by the Parliamentary Library.

In Latin America, while few governments have centralized the printing and distribution of official publications, most of the countries have central printing offices, and in Brazil, Colombia and Guatemala these offices sell some of the publications. In Colombia a brief list, and in Guatemala a full descriptive list of publications of the previous year, can be obtained in an annual report. Government publications received considerable attention in the second issue of the *Handbook of Latin American Studies*,¹ which also contained a section on international relations since 1830. The Division of Documents of the Library of Congress has prepared a guide to official Mexican publications, but has not published it.

Following up a suggestion made by a member of the Fifth Conference of Teachers, your committee made some investigation of the possibility of securing the publication by governments in the Western Hemisphere of additional material that would be useful to students of international relations, on promise of a minimum number of subscriptions from institutions and libraries in the United States. Because of the specialized nature of the material and the relatively small number of libraries which might be expected to cooperate in such a plan, the committee is not prepared to recommend that this project be undertaken. Some indication of the distribution in the United States of material already being issued by Latin American governments was had from a list furnished to the committee through the courtesy of the Mexican Embassy in 1935. This list shows that, at that time, official publications concerning foreign relations of Mexico were going to thirteen non-university libraries, 26 colleges and universities, 22 other institutions, bar associations and societies, 28 reviews and periodicals (including newspapers) and sixteen individuals (at least eleven of them members of this conference). From the officer in charge of one Latin American legation came the suggestion that, as compared with the plan of distribution now in use, a general arrangement through the Pan American Union, which has a franking privilege through the countries composing the Union, might be more satisfactory.

Growth of the collection of foreign documents in the Library of Congress is promoted by the making of additional agreements for the exchange of publications, such as those which the United States concluded by exchanges of notes recently signed with Peru and Chile, respectively.²

IV. In general, the need for better publication of documents on public inter-American relations seems to call for special emphasis. A new edition

¹ Edited by Lewis Hanke (Harvard University Press, 1937).

² U. S. Executive Agreement Series Nos. 103, 112.

of the proceedings of the general conferences of the American Republics could be thoroughly justified. An investigator who recently had occasion to compare the manuscript records of the International American Conference of 1889-'90 with the printed records¹ was struck with the need for revision in order to have accuracy or completeness. There appears to be a lack of adequate printed material on the development of the Pan American movement, even in the pre-1906 period. Only parts of the correspondence were printed in publications of what is now the Pan American Union. The provision of source material on the functioning of the Union after creation of the central agency by the 1889-'90 conference,² and a more complete edition of the proceedings of the subsequent general conferences, seem to the committee to suggest projects deserving of full support.

Publication of the minutes of the Governing Board of the Pan American Union, both from the beginning and currently, would afford another valuable source of information. The *Bulletin* of the Union, while carrying some bibliographical matter, and some information on current treaty developments (such as tables, periodically revised, which show the status of treaties and conventions signed at the international conferences of American States and at other Pan American conferences³), gives only brief statements concerning actions taken by the Board.

When following out a suggestion referred to above, in regard to distribution of documents published by the various Latin American governments, the committee learned that the Library of the Pan American Union has undertaken to secure from the several governments lists of all publications issued currently at government expense. The members of this conference would doubtless profit from the Union's making this information available in whatever manner seems most practicable.

A committee of the American Society of International Law, in a report made in 1935,⁴ recommended, in part, that proceedings of all Pan American conferences and papers relating thereto should, in principle, be published under the auspices or direction of the Pan American Union, that committees and commissions having authority to publish should conform to the general policies of publication laid down by the Union, and that the Union should be authorized to sell proceedings of the conferences to the general public. While aware of the peculiar difficulties which the carrying out of these recommendations might involve, your committee is of the opinion that the working out of the most satisfactory policy in this matter will probably

¹ International American Conference, Reports of Committees and Discussions Thereon, Washington, 1890, 4 vols.

² Some of this material can be found in Peruvian documents, especially in *Boletín del Ministerio de relaciones exteriores*, 1904-1906; Ricardo Aranda, *Congresos y conferencias internacionales en que ha tomado parte el Perú*, Lima, 1909-1920, 5 vols.

³ See, for example, *Bulletin of the Pan American Union*, Vol. 70 (1936), pp. 706-709; Vol. 72 (1938), pp. 123-126.

⁴ Proceedings, American Society of International Law, 1935, pp. 210-214.

come only when the editing and distribution is concentrated in the offices of the Pan American Union. Any step looking in this direction, which might be judiciously taken in connection with the conference to be held in Lima in December, 1938, would seem to be commendable.

V. The committee has not dealt in this report with documentation of public international organizations other than inter-American, except as to certain League of Nations publications. In connection with the latter, the question has been raised in the committee of the desirability of the United States Government's republishing some of the more significant documents produced by League of Nations bodies. Some of the publications on nutrition, produced in 1936 and 1937,¹ have been suggested. The United States has at times reprinted documents of the kind described. The committee does not have a recommendation on the subject, but would draw the attention of the conference to it, in order that there may be opportunity for discussion for the guidance of a succeeding committee.

To some members of the committee there appears to be a special need at the present time for a periodical in which could be published accurate translations of Japanese and Chinese documents and of scholarly articles from journals in the Far East on problems of international law and international relations. If such a project were undertaken, care would need to be used to avoid having the translations duplicate those already made available in the British and American press, in English-language journals in China and Japan, or in the summaries of leading articles in the Chinese press as provided by the Royal Institute of International Affairs. One suggestion has been that the proposed journal of translations should ordinarily confine itself to the translation of Asiatic serial publications, and follow the policy of giving in digest form all portions of the serial publications not translated. American scholars who do not use the languages of the Far East might have furnished them, through this means, a representative cross-section of Asiatic materials, and might become less dependent upon the choice of materials by other Westerners. The increasing general importance of the regional information involved seems to make this matter a proper one for discussion at the present conference.

The Committee on Publications of the Fifth Conference recommended the establishment of a periodical which would methodically publish current diplomatic correspondence.² In the present committee the belief has been expressed that the time is propitious for the establishment of what might be called an "American Journal of International Affairs." The object of such a journal would be to provide, for scholarly articles in this field, an additional outlet over what exists at present, and perhaps a wider one in the sense that emphasis would not be placed primarily upon legal aspects of questions.

¹ See, for example, Nutrition: Final Report of the Mixed Committee of the League of Nations on the Relation of Nutrition to Health, Agriculture and Economic Policy, League of Nations Doc. A.13.1937.II.A.10.

² Proceedings, Fifth Conference, p. 9.

In view of the extent of present international relations, and the amount of study being given,¹ the obtaining of meritorious articles would presumably be less difficult than at certain times in the past. While not bringing a specific recommendation on this matter, the committee regards the general idea without prejudice and would draw the attention of the conference to the possibilities, with a view to obtaining expressions of opinion.

VI. The limitations of a short report preclude detailed mention of many useful publications in addition to those already referred to, such as the new volumes in the Carnegie Endowment's *Classics of International Law*, the materials made available for the teacher through the work of the Harvard Research in International Law, or the publications of the Conference on International Studies. In connection with the last-mentioned, it may be said incidentally, American scholars should value a wider distribution of the documentation of the annual conferences.

Instead of attempting a further survey, it may not be out of place to direct attention to some more general aspects of the problem of publications. This problem, for specialists in the international field, is not separate from that of the student of public affairs generally. It is obvious that not all of the useful source material for the worker in the field of American foreign relations, for example, is in the publications of the Department of State. There may be found in the *Federal Register*, an official undertaking begun since the last conference, information on such subjects as regulations implementing an important fisheries treaty,² or the naturalization of aliens married to citizens of the United States.³ The *Monthly Summary of Foreign Commerce* and the weekly *Commerce Reports* of the Department of Commerce contain valuable information on current developments. Publications of the Tariff Commission have furnished useful facts on such subjects as national interests in fisheries, or the extent of equal tariff treatment in foreign countries. The provision of adequate government publications is, for the student of public business either foreign or domestic, a proper concern. The comparatively rapid progress which has been made since 1933 does not justify an attitude of complacency on the part of teachers who professionally depend upon the accessibility of reliable texts. It is their obligation to look diligently to the provision of even more adequate means of information.

Finally, the committee would direct attention to the obligation that must attend the effort, which has continued since 1933, toward provision of better publications. Some members of the committee feel that the success achieved by interested groups in securing the publication of materials has not been matched by diligence in making the best possible use of what has been provided, or in directing others in its use. The surprisingly small

¹ See Mary Alice Matthews, *Education for World Peace: The Study and Teaching of International Relations and International Law* (1932); Edith E. Ware, *The Study of International Relations in the United States* (1934); *ibid.*, *Survey for 1937* (1938).

² See, for example, the *Federal Register* for March 9, 1938, pp. 635-638.

³ *Federal Register* for January 13, 1938, p. 110.

number of subscriptions to some of the most useful publications of the Department of State, such as have been referred to above, will illustrate. Again, there has been expressed in the committee a feeling that, in a discouragingly large number of cases, there has been a tendency toward carelessness and looseness in referring to official materials. The latter can be utilized to the fullest, by those whom the members of the conference may guide in their thinking, only if there is care in citation, as well as in analysis and evaluation. The responsibility of the teacher and publicist clearly increases with the provision for him of the means of fuller and more accurate information.

Chairman REEVES. You have heard this interesting and valuable contribution made by the Committee on Publications.

I think before discussing this particular report it would be well to follow through with the program involving two other reports. Therefore, unless there be objection, I shall next call upon Dr. Cyril Wynne, Chief of the Division of Research and Publication, Department of State.

PUBLICATIONS OF THE DEPARTMENT OF STATE

By CYRIL WYNNE

Chief, Division of Research and Publication, Department of State

When I had the privilege of addressing the Fifth Conference of Teachers of International Law in 1933 on the subject of publications of the Department of State I emphasized, as was but proper, the fact that the publications program or publication policy of the Department, initiated in 1929, was undertaken largely because of the assistance rendered by teachers of international law and by lawyers with an international practice. The extent to which this program or policy has developed since that formative period may be seen from a comparison of the first or April 1930 issue of the periodical pamphlet *Publications of the Department of State, A List Cumulative from October 1, 1929*, with the latest (April 1938) number of the pamphlet in question. Here again may I speak of valuable assistance rendered and say that this development has been to a great extent due to suggestions and constructive criticisms of members of the teaching and legal profession interested in international affairs and in having, therefore, official publications of the Department available for use in connection with their work. I shall later have occasion to refer specifically to some of these suggestions and show how helpful they were in adopting or carrying out certain publication projects or in dealing with certain publication problems.

Before discussing some of the more important publications of the Department, a few words may be said regarding the all-important question of the attitude of Congress with respect to the appropriation of the necessary funds to enable the Department to carry out its publication program. As

some of you may recall, I remarked at the Fifth Conference of Teachers with regard to carrying out this program that "Barkis is willin'" but it depends on appropriations by Congress. It is with pleasure, therefore, that I report to the Sixth Conference of Teachers that since 1935 the appropriations for printing and binding have steadily increased as indicated by the following table covering the fiscal years 1935-1939, inclusive:

<i>Fiscal year</i>	<i>Appropriation</i>
1935	\$107,180
1936	121,000
1937	150,000
1938	164,300 ¹
1939	172,750

In addition to the appropriations for printing and binding which I have just enumerated, Congress has also, as part of the appropriations for our participation in certain international arbitrations and conferences, made allotments for the *printing* of reports or relevant publications dealing with these arbitrations and conferences. The appropriations in question have enabled the Department to go ahead with its regular publication program without having to divert funds from the regular printing and binding appropriation to meet the cost of printing the arbitration and conference publications. An idea of the value of these separate appropriations will be gained from the fact that they have paid for the printing of important publications in the Arbitration Series and Conference Series which I shall discuss in considering these two series of documents.

A reference to the attitude of Congress with respect to the Department's publication policy would not be complete without mentioning the Subcommittee of the Committee on Appropriations, House of Representatives, which hears and passes upon the various estimates in the Department of State appropriation bills. At the last two meetings of the American Society of International Law reprints of the hearings on the printing and binding estimates in the 1937 and 1938 appropriation bills before this Subcommittee were distributed to the members of the Society. Reprints of the hearings on the printing and binding estimates in the 1939 appropriation bill will be distributed to the members of the Teachers Conference and of the Society at this year's meeting. I believe those of you who have been following these hearings for the past ten years will agree that the reports of the hearings during the last three years show that the present chairman of the Subcommittee, Representative Thomas S. McMillan, of South Carolina, and the ranking Republican member of the Subcommittee, Representative Robert L. Bacon, of New York, and their able colleagues have a special interest in the Department's publication policy and in the views of representative organizations such as the American Society of International Law,² the American Historical Association, etc., with respect to the Department's publications.

¹ Includes deficiency appropriation of \$18,000.

As you know, the annual reports of the Committee on Publications of the Department of State of the American Society of International Law have been made a part of the record of the House Appropriations Committee hearings for the past three years. The questions of Representative Millan during the course of these three hearings show how carefully he has read the comprehensive reports of the Publications Committee.

I turn now to a discussion of the more important publications of the Department, since there is obviously not sufficient time to refer to all the titles enumerated in the pamphlet *Publications of the Department of State*. Probably the best known of these is *Papers Relating to the Foreign Relations of the United States*, usually referred to by its brief title, *Foreign Relations*. This publication consists of volumes containing official papers for a given year, such as diplomatic correspondence, etc., exchanged between the Government of the United States and foreign countries and correspondence between the Department and its diplomatic missions and consular offices. The procedure which is followed in assembling, editing, and preparing for publication the documents compiled in the *Foreign Relations* volumes is set forth in the well-known Department order of March 26, 1925, of which I have several copies here. In preparing these volumes for publication our effort has been to present a record of documents which will be, to quote from the order, "substantially complete as regards the files of the Department."

I believe such a record has been presented. Judging by the reviews of recent numbers of the *Foreign Relations* volumes which have appeared in such publications as the *American Journal of International Law* and the *Political Science Quarterly* and by the communications which the Department has received from such organizations as the American Bar Association and the American Historical Association and from distinguished educators and lawyers, the volumes in question have been of real value to the interested public. Some of these communications are printed in the record of the hearings before the House Appropriations Committee on the 1939 appropriation bill which I mentioned. Reference may also be made to the statements regarding the recent *Foreign Relations* volumes in the reports of your Committee on State Department Publications as well as in each of the last three reports of the Publications Committee of the American Society of International Law.

While the recent *Foreign Relations* volumes are apparently deemed to be complete and to meet the requisite standards of scholarship, there has been, as you know, some criticism because of the alleged delay in publishing them. During the past two fiscal years the Department has published two 1920 volumes, two 1921 volumes, and the Russia 1919 Supplement volume. Two 1922 volumes should be off the press next month and it is expected that two 1923 volumes will appear in September. Reference may also be made to the fact that two volumes containing the official papers of the late Robert Lansing during the period he served as Counselor of the Department and as

Secretary of State are in the course of preparation and should be published during the coming fiscal year. Although this is a record and a program of publication which stands out in the *Foreign Relations* series, distinguished authorities on international law whose views are entitled to the highest consideration have expressed the belief that these publications are too far behind. These authorities point out that the dates of the documents in the recently published regular *Foreign Relations* volumes are approximately fifteen years behind the date of publication. It is alleged that the volumes should be published within two or three years of current events.

As has been explained during the course of the hearings before the Appropriations Committee, the so-called "fifteen-year gap" has resulted from the reluctance of certain foreign governments to consent to the publication of their important papers or correspondence which are close to current events. The Department's order of March 26, 1925, contains the following provision:

The Chief of the Division of Publications is expected to initiate, through the appropriate channels, the correspondence necessary to secure from a foreign government permission to publish any document received from it and which it is desired to publish as a part of the diplomatic correspondence of the United States. Without such permission, the document in question must not be used.

Reference may also be made to the statement of Secretary of State Hull on January 20, 1936, that "this Government cannot undertake to make public confidential communications without the permission of the government which reposed confidence in this Government."¹

Now, the Department's aim, as I said, is to publish *Foreign Relations* volumes which contain a record that is complete. It is believed that if a *Foreign Relations* volume omits important documents of foreign governments the record will not only be incomplete, it will also be misleading. After all, there are two sides to the proverbial shield. In brief, our experience during the past few years has been that if the volumes are to be complete and not misleading the documents printed in them will be approximately fifteen years behind the publication date.

I may say, however, that the Department has been endeavoring to reduce or cut down the "fifteen-year gap." During the past few months strong instructions have been sent to a number of our diplomatic missions to make appropriate representations to the foreign offices of the governments concerned regarding this publication issue. In order that the views of the interested public in the United States might be clearly presented to the foreign offices, the instructions contained, as enclosures, copies of relevant resolutions and reports of such organizations as the American Society of International Law and the American Historical Association, and of addresses and articles on the subject by distinguished lawyers and professors. Since replies have not yet been received from all the missions to whom these in-

¹ Press Releases, Vol. XIV, No. 330, January 25, 1936 (Publication 831), p. 100.

structions were sent, I am not in a position at this time to inform you what the result will be. I may say, however, on the basis of the replies which have been received, that our diplomatic missions are doing all they possibly can to secure a reduction of the fifteen-year period.

As you all know, the Department has been receiving numerous resolutions from historical and international law societies and communications from outstanding authorities and scholars in the field of international affairs urging the publication of the records of the Paris Peace Conference following the World War. The Department has been prepared to publish these records in *Foreign Relations* supplement volumes dealing with the Peace Conference, but it was felt that if the desired publication was to be of value to the interested public it should contain substantially all the important papers and documents of the conference. The late Dr. Joseph Fuller, former chief of the Research Section in the Department, a profound scholar whose heart, I may say, was set on publishing the Peace Conference records, made a very careful survey in 1930 of all the Peace Conference material in the Department's files. Dr. Fuller recommended that unless the *Foreign Relations* supplement volumes could include substantially all the relevant minutes or papers of the Council of Four, the Department should not go ahead with the project; in brief, it would be a production of Hamlet without Hamlet in the drama.

Under the Department's policy as outlined in the order of March 26, 1925, the consent of the interested governments must be obtained to print the Council of Four documents and also, of course, other confidential Peace Conference material. It has not been possible to obtain this consent, but in 1937 the prospects of doing so appeared to be brighter when the Department published the Russia 1919 Supplement volume, which contains important extracts from the Council of Four files. The time appeared to be appropriate, therefore, to discuss once more with the interested governments the question of publishing all the Peace Conference material. I am pleased to report to you, ladies and gentlemen, that such discussions have been going on during the last few months. Final replies on the subject have not yet been received from all the governments so I can only express at this time my sincere hope that an interesting announcement on this very important publication question can be made in the near future.

Before leaving the subject of the *Foreign Relations* volumes I may point out that the Department is preparing a combined index volume to the *Foreign Relations* volumes covering the years 1900-1918. The last combined index volume was for the years 1861-1899. Those of you who have had to dig through the separate indexes of each number of the 38 *Foreign Relations* volumes published since 1900 will appreciate the value of such a combined index. It is expected that the work will be completed and the index volume published by 1940. It gives me pleasure to state that the gentleman responsible for this index volume is Professor Herbert Wright, of Catholic

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University, who, in his capacity as chairman of the Committee on Publications of the Department of State of the American Society of International Law, sold the idea to the then Under Secretary of State, Mr. William Phillips, who in turn issued appropriate instructions for the preparation and publication of the index.

Although the documents compiled in the *Foreign Relations* volumes are, as I have said, some years behind the publication date, there are other publications of the Department which, it is submitted, contain considerable information of current interest. Among the publications containing such current information are the weekly printed *Press Releases*, the *Treaty Information* bulletin, the documents in the Arbitration and Conference Series to which further reference will be made, the addresses of the Secretary of State, Under Secretary of State, and other high officials of the Department which frequently include important statements dealing with various aspects of our foreign policy, documents in other special series such as the Commercial Policy, Inter-American, and the European Series, and documents in the so-called Miscellaneous Publications group.

The weekly printed *Press Releases* comprise copies of the daily mimeographed releases prepared by the Division of Current Information for the use of the newspaper correspondents and copies of those mimeographed releases issued by the White House during the week which relate to foreign affairs. The last three reports of the Committee on Publications of the Department of State of the American Society of International Law have considered in detail the printed *Press Releases*. Most of you are familiar with these reports; hence I may refer you to the statements in them regarding the comprehensive character of this weekly publication. I note, however, that in the report of the Committee on Publications which is being submitted this year to the Teachers Conference by the Chairman, Professor Robert Wilson, of Duke University, certain suggestions are made involving the publication of diplomatic correspondence in the *Press Releases* or in a similar publication. Somewhat similar suggestions were recently made by Dr. Wright and members of his committee when they visited the Department and discussed the publication program with the Counselor, Mr. R. Walton Moore, Assistant Secretary Messersmith, and other Department officials. As these officials informed Dr. Wright, the Department is now considering certain publication projects which may result in the expansion of the *Press Releases* or the issuance of a special publication dealing with what may be termed current subjects.

Secretary of State Hull declared during the course of his address delivered at Des Moines, Iowa, on February 19, 1938: "There is today no greater force in the world for the advancement of stable prosperity and peace than the reciprocal trade-agreements program." Needless to say, the Department is giving due attention to this very important program in its publications. For example, notices of intention to negotiate a trade agreement with a particular government are published in the Department's *Press Releases*,

as well as in the *Federal Register*, the *Treasury Decisions*, and the *Commerce Reports*. An analysis of the agreement is also published in the *Press Releases* and in other Government publications. Reference may also be made to the memoranda published on special phases of the trade-agreements program such as *The Midwest and the Trade-Agreements Program*¹ prepared by Dr. H. S. Patton, then of the Trade Agreements Division. It may also be noted that statistical material and studies showing the results of the trade-agreements program are frequently printed in the *Press Releases*. In this regard mention may be made of the two studies on the trade agreements with Cuba and with Canada, covering the first six months and the first year these agreements have been in effect.

Besides this information, there are the addresses of the Secretary of State, Under Secretary of State, and the Assistant Secretaries on the general subject of the reciprocal trade-agreements policy. These addresses are of particular value because they set forth the policy of the United States Government on the many fundamental questions which are associated with the trade-agreements program. In order to meet the very great demand for copies of some of the more important addresses, they are also issued in separate pamphlet form. It may be added that the titles of these addresses of the Secretary and his assistants are listed in the Commercial Policy Series of the Department's quarterly list of publications.

The texts of the trade agreements are printed as numbers in the Executive Agreement Series. As you know, Executive agreements, like treaties to which the United States is a party, are issued in separate pamphlet form and are also printed in the *United States Statutes at Large*.

A very important publication of the Department is Mr. Hunter Miller's *Treaties and Other International Acts of the United States of America*, of which five volumes have been published. Volume 1 (which has been issued in short-print form) describes the scheme of the publication as a whole. Volumes 2-5, inclusive, comprise the treaties and other international acts negotiated during the period 1776-1852. Volume 6, which should be off the press during the coming fiscal year, will cover the years 1853-1858.

I venture to say that no foreign office of any state has issued such a treaty compilation as this great work of Mr. Hunter Miller. The Miller Treaty Edition, as it is frequently called, comprises complete and literal copies of the texts, in chronological arrangement according to the date of signature, of treaties and international acts of the United States which are or have at any time been in force. The text of each treaty is followed by notes containing a perfect mine of information regarding the treaty, its setting, the circumstances incident to its negotiation, its effect, and other relevant data of value to the lawyer and the scholar. For example, the recently published Volume 5 of the Miller Treaty Edition includes the Treaty of Guadalupe-Hidalgo of February 2, 1848. This treaty comprises

¹ Commercial Policy Series 27. Publication 929.

four papers--the treaty proper, the additional or secret article which was never ratified, the authenticated map of the United Mexican States known as Disturnell's map, and the authenticated plan of the Port of San Diego. We find in Volume 5 the text of the treaty in English and in Spanish, the additional or secret article also printed in English and in Spanish, a facsimile of the earliest of the 1847 editions of Disturnell's map reproduced in color, and a facsimile of the plan of the Port of San Diego. As for the notes following the treaty texts, I can only say that they are a striking example of painstaking and intensive scholarship. They cover 192 pages of 10-point and 8-point solid type and consider in detail every phase of the negotiations and subsequent history of this famous treaty. It is really a marvelous piece of work and yet no more so than Mr. Miller has done with respect to every treaty or international act in his treaty edition.

The next published volume in the Miller Treaty Edition will cover, as I said, the period 1853-1858. Needless to say, it will be several years before this edition is brought up to date. I may point out, however, that current information concerning bilateral and multilateral treaties that are in force or have been signed between the United States and other countries of the world is made readily available in *Treaty Information*, a monthly bulletin which is compiled under the able direction of the Chief of the Treaty Division, Mr. Charles M. Barnes. Its purpose is to publish all facts regarding these treaties, such as dates of signature, the coming into force, ratification, and deposit of ratifications, termination, the reservations if any have been made, and the countries accepting or rejecting such reservations. The same type of information is also given for the more important treaties and conventions concluded by foreign governments.

The monthly bulletins also publish summaries or regulations and judicial decisions interpreting treaty provisions rendered by State and Federal courts and by the Supreme Court of the United States, as well as similar decisions of the Permanent Court of International Justice and other important international and national tribunals. Information is also given in regard to international conferences and to international commissions established under the various treaties of arbitration and conciliation. It may be added that from time to time the texts of important treaties which have not yet appeared in the official Treaty Series or which are not readily available in the United States are printed in *Treaty Information*.

A series of publications which have been very well received, particularly by teachers and students of diplomatic history and international relations, are those in the Map Series. A map in this series to which special reference may be made is "The Trade Agreements Program: Countries with Which Trade Agreements Have Been Concluded, or with Which Negotiations Are in Progress or Contemplated, as of March 10, 1938." This is a large map in black and white which graphically portrays the progress of the trade-agreements program. I may add that the Office of the Geographer is now working

on a map of Liberia which should be published within the next fiscal year. A map of the Pacific area is also being prepared.

I am sure you will be pleased to learn that the Office of the Legal Adviser in the Department, under the direction of Mr. Hackworth, is engaged in preparing a publication which will, in brief, bring up to date the monumental *International Law Digest* of John Bassett Moore which was published in 1906. Since that time many and various things have happened in the domain of international affairs, and a digest of international law covering the years 1906-1937 based on the relevant files of the Department should be of value not only to Department officials, such as the legal advisers in Mr. Hackworth's office, but also to professors of international law and to attorneys with an international practice. As Assistant Secretary of State Messersmith said during the hearings before the House Appropriations Committee on the 1939 appropriation bill in discussing the proposed international law digest publication:

Then there is a further major consideration. Mr. Hackworth and his associates in the legal division are greatly embarrassed in their research work, which is increasingly important under present conditions, by the fact that in order to get this material they have to search through all kinds of files and many volumes. If this necessary material were available in the digested form in which it is now being prepared it would save a great deal of time and greatly facilitate our work not only in the Department but also on the part of people on the outside who are very greatly interested in our international relations. This applies with equal force to attorneys and private business interests engaged in international enterprises.

I may add that the first two volumes of the *International Law Digest* should be off the press during the coming fiscal year. The publication, when completed, will consist of some six or seven volumes with additional volumes to follow as occasion requires.

Another publication prepared in the Office of the Legal Adviser is Dr. Marjorie M. Whiteman's *Damages in International Law*, of which the first two volumes were published last year. As you may recall, these volumes were favorably reviewed in the *American Journal of International Law* by Dr. Charles Cheney Hyde, former Solicitor of the Department and now Professor of International Law at Columbia.

Two important series of publications which were started in 1929 at the request, I am pleased to have this opportunity to say, of teachers of international law and of members of the legal profession, are the Arbitration and the Conference Series. The publications in the Arbitration Series, as the name indicates, deal with arbitrations to which the United States is a party. Among the recent publications in this series which appear to have pleased lawyers and teachers alike are: The Salem Claim against Egypt¹ in which

¹ Salem Claim: Claim of the United States of America on Behalf of George J. Salem v. the Royal Government of Egypt Under Protocol of January 20, 1931. Arbitration Series 4. Publications 364, 367, 421, 483, 497, 668, 669.

the entire record including not only the extensive pleadings but also the oral arguments of counsel were printed; the so-called Swedish Ships Case;¹ and the American and Panamanian General Claims Arbitration.²

The Conference Series documents pertain to international conferences in which the United States participated. A few of the recent publications in this series which may be mentioned are those dealing with the Radio Conference at Lisbon, 1934,³ the London Naval Conference, 1935,⁴ the Inter-American Conference for the Maintenance of Peace, Buenos Aires, 1936,⁵ the Pan American Institute of Geography and History, Washington, 1935,⁶ and the recent conference convened at Brussels in November 1937.⁷ Judging by the letters and communications we have received in the Department from those who have had occasion to consult these Conference Series publications for legal, research, or other purposes, the publications in question have been found to be quite satisfactory. I may add that the Conference Series also includes addresses given by the Secretary of State or the Under Secretary of State regarding certain conferences. I believe these addresses are of great value to a person making a study of a particular conference. They set forth the position of the United States with respect to the conference in question and, I may add, do so in that direct and frank manner which is characteristic of the addresses of Mr. Hull and Mr. Welles. Among these publications are the compilation of the addresses and statements of Secretary Hull in connection with his trips to attend the conferences at Montevideo⁸ and Buenos Aires,⁹ Mr. Hull's address on "Some of the Results of the Montevideo Con-

¹ Arbitration Between the United States and Sweden Under Special Agreement of December 17, 1930: The "Kronprins Gustaf Adolf" and the "Pacific." Arbitration Series 5. Publications 358, 359, 360, 361, 402, 610, 611.

² American and Panamanian General Claims Arbitration Under the Conventions Between the United States and Panama of July 28, 1926, and December 17, 1932: Report of Bert L. Hunt, Agent for the United States. Arbitration Series 6. Publication 593.

³ International Radio Consulting Committee (C. C. I. R.), Third Meeting, Lisbon, September 22-October 10, 1934: Report of the Delegation of the United States of America, and Appended Documents. Conference Series 21. Publication 827.

⁴ The London Naval Conference, 1935: Report of the Delegates of the United States of America; Text of the London Naval Treaty of 1936 and Other Documents. Conference Series 24. Publication 896.

⁵ Report of the Delegation of the United States of America to the Inter-American Conference for the Maintenance of Peace, Buenos Aires, Argentina, December 1-23, 1936. Conference Series 33. Publication 1088.

⁶ Pan American Institute of Geography and History: Proceedings of the Second General Assembly, Held at Washington, October 14-19, 1935. Conference Series 23. Publication 995.

⁷ Conference of Brussels, November 3-24, 1937, Convened in Virtue of Article 7 of the Washington Treaty of 1922.

⁸ Addresses and Statements by the Honorable Cordell Hull, Secretary of State of the United States of America, in Connection with His Trip to South America 1933-1934 to Attend the Seventh International Conference of American States, Montevideo, Uruguay. Publication 694.

⁹ Addresses and Statements by the Honorable Cordell Hull, Secretary of State of the United States of America, in Connection with His Trip to South America to Attend the

ference"¹ delivered before the National Press Club on February 10, 1934, and the address entitled "The Practical Accomplishments of the Buenos Aires Conference,"² which some of you heard Mr. Sumner Welles deliver before the Academy of Political Science in New York on April 7, 1937.

Lawyers and teachers of international law frequently desire information concerning passport regulations and the granting of passports to American citizens. Information of this nature is contained in the Passport Series publications prepared under the direction of Mrs. Ruth B. Shipley, Chief of the Passport Division. The subjects of the immigration work of the Department of State and of the admission of aliens are also of special interest to the legal profession. Publications relating to these subjects will be found in the Immigration Series. Needless to say, these publications are being constantly revised to keep up with the latest laws and regulations.

Other publications of the Department to which a brief reference may be made are the so-called periodical or regular publications. Among the periodicals are: the *Diplomatic List*, which is a monthly list of foreign diplomatic representatives in Washington; the *Foreign Consular Offices in the United States*, a semiannual list of foreign consular offices in the United States, its territories and insular possessions, and the Canal Zone; the *Foreign Service List*, a quarterly list of American diplomatic and consular representatives abroad, their classification in the Foreign Service, and assignments, with a description of the consular districts and the tariff of consular fees; and the annual *Register of the Department of State*, which is, as its title indicates, an annual register of the organization and personnel of the Department and the Foreign Service, with relevant information.

There are also the Treaty Series and the Executive Agreement Series. The Treaty Series consists of the official texts of treaties and conventions entered into between the United States and other powers, which are published in pamphlet form as soon as they have been ratified with the advice and consent of the Senate and proclaimed by the President. The Executive Agreement Series comprises the official texts of international agreements (other than treaties) to which the United States is a party, such as are entered into by an exchange of notes. As I have said, the important reciprocal trade agreements are published as numbers in the Executive Agreement Series.

All kinds of subjects relating not only to international affairs but also to the "domestic functions" of the State Department are included in the so-called "Miscellaneous Publications" group. A few of the titles in this group which may be mentioned are: *The Department of State of the United States*,³ a work on the Department, its functions, administration, etc., prepared by Drs. Spaulding and Blue of the Division of Research and Publication; the

Inter-American Conference for the Maintenance of Peace, Held at Buenos Aires, Argentina, December 1-23, 1936. Conference Series 31. Publication 1019.

¹ Conference Series 18. Publication 560.

² Conference Series 29. Publication 1012.

³ Revised edition, June 1936. Publication 878.

Style Manual of the Department of State,¹ for use in the preparation of correspondence and state papers, prepared by Miss Margaret M. Hanna, now consul at Geneva, and Miss Alice M. Ball of the Division of Research and Publication; *International Transfers of Territory in Europe, with Names of the Affected Political Subdivisions as of 1910-1914 and the Present*,² by Mrs. Sophia Saucerman of the Office of the Geographer; *International Traffic in Arms: Laws and Regulations Administered by the Secretary of State Governing the International Traffic in Arms, Ammunition, and Implements of War and Other Munitions of War*,³ and *The American Foreign Service: General Information for Applicants and Sample Entrance Examination Questions*.⁴ The miscellaneous publications also include addresses delivered by the Secretary of State, the Under Secretary, the Counselor of the Department, and the Assistant Secretaries on a variety of questions dealing with the foreign policy of the United States, work of the Department, etc.

In conclusion, I venture to express the hope that what I have said will give you some idea of the publications of the Department of State and of our efforts to meet the demands of teachers of international law and of practicing lawyers for publications containing information which will be of value to them in their work. I can assure you that under the leadership of Secretary of State Hull and of Assistant Secretary of State Messersmith, who is in charge of the general direction of the publication program of the Department, these efforts will continue. As those of you who have discussed the subject with him know, Mr. Messersmith is strongly in favor of a liberal publication policy. I am in a position to say that during the less than a year's time he has been serving in the Department as Assistant Secretary of State he has endorsed and supported this policy at every opportunity. All this promises well for the future as regards the Department's publication program—a program which, as I have said, was really started on its way a few years ago by a group of energetic professors and lawyers at one of these conferences of teachers of international law and related subjects.

Chairman REEVES. I think we should lose the proper perspective if we failed at this time to render thanks to Dr. Wynne for his admirable paper, which is not only of value here, but when printed it will be a document of reference for all of us.

What lies back of that paper, the attitude on the part of the Department of State, is something of which I think we might well take grateful notice. And those of you who, like myself, began to have impressions on this subject a number of years ago can see how the picture has changed, partly as a result of the initiative of the predecessors of this conference and partly because of a changed attitude on the part of the Department of State.

I don't know of any matter on which we as teachers of international law have more reason for congratulation. Perhaps you may find, before we

¹ Publication 954. ² Publication 1003. ³ Fifth edition. Publication 1147.

⁴ Revised to December 1, 1937. Publication 1160.

have concluded our labors, that it might not be inappropriate to make a formal notation of our sense of obligation to the Department of State for what it has been able to do for us and for the interested public in these last few years, with a promise of more to come.

Now, if you will permit me, we shall pass over for the immediate present the report of the Executive Committee in order to hear a report upon a different topic, a report upon the Conference on International Studies of the Committee on Intellectual Coöperation, to be given by one who has been, I should say, one of the inspirers, or organizers, of the movement of post-war intellectual coöperation, who has been active in that work, who has been able not only to interpret American thought to others in this regard, but to interpret international thought to us Americans on this important subject.

You will remember in your Boswell that Samuel Johnson is made to say that he too would have been a philosopher had not cheerfulness always been breaking through. In these days we are faced with many varied schools of philosophy. One perhaps somewhat dominant is that of critical realism. I think the speaker this afternoon is of a somewhat different type of philosopher, a philosopher who has been able to persist as a philosopher even though cheerfulness has been breaking through. And the speaker is not perhaps a critical realist but a critical optimist. As a historian he furnishes the critical background; but out of his own personality he furnishes that unconquerable element which you may call optimism. He can look with a critical eye to the future and yet be to some extent optimistic. Therefore it seems hardly necessary for me to introduce but rather to welcome Professor James T. Shotwell, Chairman of the American Committee on International Intellectual Coöperation of the League of Nations.

THE CONFERENCE ON INTERNATIONAL STUDIES OF THE COMMITTEE ON INTELLECTUAL COÖPERATION

BY JAMES T. SHOTWELL

*Chairman, American Committee on International Intellectual Coöperation
of the League of Nations*

Mr. Chairman, ladies and gentlemen: I am very glad I came here this afternoon because of the formal recognition by the United States Government that Dr. Wynne was so kind as to convey by way of anticipatory omens of the pragmatic philosophy which I have struggled to maintain in the study of international affairs and which is the theme of my talk. Unfortunately, my mind, as the chairman indicated, functions historically even when I am dealing with international relations of the present time. And the only way I can describe for myself the institution that I am to describe to you this afternoon is to give you a little historical sketch of its origin and see if we can more or less draft or design the curve that may give some clue as to its potentialities.

Back in the Peace Conference days two intellectuals from Belgium, Mr. La Fontaine and Mr. Otley, who had been among the leaders of the peace movement in Europe, came with the suggestion that we should not limit our work to the formation of the International Labor Organization, with which I had been associated, but that alongside of labor we should recognize the intellectual workers and give them some positive organization in the League of Nations.

It is now not indiscreet to disclose the fact that this created a great deal of opposition on the part of the realistic British who were there, the Americans being on more or less unfamiliar ground and more or less indifferent. But Lord Cecil said "This means opening the League of Nations to cranks and idealists, while our work should be devoted to very realistic ends." So there was no place found at the start for the Committee on Intellectual Coöperation, as it was called later.

However, Leon Bourgeois, speaking from the standpoint of the French, who understood the Belgian attitude, insisted that recognition be given to international intellectual interests. And it was so agreed; but with the reservation, mainly from the insistence of the British, that the program of intellectual coöperation should be as intellectual as possible; that is, it should be pure science and art and literature and should not deviate into those fields which really have a natural interest in international questions, namely, political or economic studies.

So the organization began at Geneva with imaginative writers, chemists, physicists and mathematicians. Einstein, Madame Curie and Painlevé were there. Others, equally renowned, gave great distinction to the initial stages of the Committee on Intellectual Coöperation. Some of us, however, including myself, were critical of this action of the League of Nations in its refusal to face the study or enlist the interests of the political sciences. To make good on that line there were frequent committees, and there was a succession of studies of history and political science in the service of the League. These were sometimes under the auspices of the Committee on Intellectual Coöperation but sometimes they just blossomed out from other angles of the League's organization. It was not until about 1925 or so, if I remember correctly—I have no notes to check up—the committee on organization got ready to deal with the subject of our interests on a more systematic basis. That was when the French Government stepped up with the offer of 2,000,000 francs a year or so, to establish a Secretariat, or a coördinating Institute in Paris. The Committee was later called an Organization, which is the technical term at Geneva for something that is not a committee but has other committees under it.

The setting up of the Institute in Paris was a great step forward. It was criticized by some ungenerous people as an effort on the part of the French to support French propaganda. That was the criticism that was principally heard. But let me pause right here to say that at the present time and in

these last years that criticism has completely died away, as it would on the part of anyone who knows how Mr. Henri Bonnet runs the Institute in Paris.

However, the moment the Institute got under way we began then to see prospects of getting the studies that political sciences recognize; and a conference was called, known as the Conference of the Institutions for the Scientific Study of International Relations. It is now known as the International Studies Conference, a title that is quite vague and therefore confusing. The Conference of the Institutions for the Scientific Study of International Relations met year after year for five years or more. They had representatives of societies or academies in different countries, in some cases the foreign offices, presenting the statement of what was done by each country in this field of our interest.

The English and American representatives here and in England were Chatham House, the Royal Institute of International Affairs, and the Council House, the Council on Foreign Relations of the United States, which, as of course you know, were born together out of the labors of the Peace Conference. These two bodies were to represent the institutions engaged in the study of international relations in their different countries. But it became evident that whatever the case might be in other countries, the Council on Foreign Relations did not and could not, in the nature of the case, nor could anybody, represent by itself the varied ramifications of the academic interests in international relations in the United States. So it was necessary to see whether some sort of federal arrangement could be made more representative of the different parts of the country or of the different interests in international relations. The Council House itself created or transformed its body into a coordinating committee. It was to have a committee of experts along with it.

Then came the problem of membership—who should be represented in this body in the United States? In England Chatham House was sufficiently national. I always feel that the situation in this regard in England is more or less simplified. The people Chatham House would normally wish to gather in are there at any meeting. Here it is extremely difficult. So the proposal was made and carried out that the Director of the Social Science Research Council should nominate the members of the Coordinating Committee from different parts of the country, loosely representing different districts, and it should have a committee of experts to prepare for the meetings of the conferences.

In the meantime the program of the conferences changed and instead of discussing the present reports of what they have done during the previous year the proposal was made and carried out in 1931 at Copenhagen at the annual meeting there that they should have each year one main subject to discuss in addition to their administrative sessions. From that time on the International Studies Conference had a definite subject before it each time it met.

When we try to get agreement in an international body of this character—and I am speaking now of the European conference—on whatever subject you are dealing with, you will find that it is easier to agree if the subject is a large one. That is one of the laws of psychology. If a subject is presented in vague and general outlines, it is less likely to arouse nationalist susceptibilities than if it is given with concrete definiteness. That is one of the reasons why the language of diplomacy is so often abstract. When dealing with a ticklish question it is often better not to call a spade a spade, so when the subject for debate is given as "The State and Economic Life" it is not likely to bring out large headlines in the Italian press even if the meeting is held in Milan. But the danger of dealing in such generalities is that the conference itself tends to lose realism, and this is especially the case if vast subjects are merely discussed at a single meeting of the conference, which then speeds on to other fields equally important and equally vast. At this point I fear that I am becoming personal, because I have objected to this rapid disposal of great issues by the annual conferences. It seemed to me that they were bound to give the impression of inadequacy no matter how carefully the documentation might have been prepared. It has been my opinion, which I have maintained throughout, that if these conferences are to be worth while they must recognize that there are only three possibilities before them, first, they might limit their subject to something that can be accomplished in a single conference or, in the second place, they might continue the discussion of a single subject through a series of conferences, or, in the third place, they might make provision that their initial stage of exploration, which is all that can be accomplished at any one time, should be open for further development outside of the conference. These are, in my mind, the only three possibilities for successful development of the International Studies Conferences.

Now, coming down to the present development of the program, we found that it was impossible to meet every year. The cost of going so far to meetings was too great. So it was determined in 1936 in Madrid, or perhaps it was brought up the year before, that we should have the full-dress debate on the subject every second year and that in the intervening years the conference should be devoted primarily to the teaching of international relations, so that there would be an alternation of problems of research with those of teaching.

This was worked out finally in Madrid just two weeks before the Civil War began, and we prepared then for the conference of last summer, which was on the subject of "Peaceful Change." This summer we have in Prague the meeting on the teaching of international relations. There will be some additional matters, but that is the main thing.

Throughout my connection with it I have held that the main subject at the intermediate meeting should be a discussion or a consideration of the teaching of the subject that had been the subject of research the year before, to try to bring more continuity into the program.

For instance, last summer we hardly came to grips with the subject of discussion, and not at all with the problem of including it in an academic course of study. So that will be the topic, or one of the main topics, that will be discussed by the teachers of international relations in the Prague conference this summer. The method of work at these conferences is somewhat similar to the Institute of Pacific Relations, with which we are all familiar, except that it is more closely held to a definite program and has more emphasis, perhaps, upon the preparatory work. We have monographs prepared by specialists who are competent to deal with the particular topic of the conference.

These, in the case of the American delegations in the past, have been printed in book form and are available through the Council on Foreign Relations or through their publishing at Harvard such things as the *Study on Tariffs*, by Professor Bidwell, on *Collective Security*, by Professor Jessup, *The Question of Raw Materials*, by Professor Staley, that of *Population Movement and the Possibilities of Settlement*, by a series of studies under President Bowman's direction. There were other studies as well. Finally Professor Dunn summed up the procedures of specific change, which might be pertinent to these different kinds of questions.

When we met this last time on "Peaceful Change" we found most of the other delegations or other bodies there from different nations had excellent reports on data papers on raw materials, population problems and so on. There was one meeting on the feature of "Peaceful Change," but that did not get any further than preliminary discussion. So that is one reason for continuing that subject in the forthcoming program for the following year, 1939. We shall have "Peaceful Change." But we shall have a lot more. Professor Condliffe, known to most of us, the economist who, after having been researcher for the Pacific Relations, was in the Financial and Economic Organization of the League, has prepared an admirable digest of economic problems which confront the European governments in the economic field if they are to redress their grievances or adjust the situation in international relations. He is to be the *rapporteur* for the 1939 conference.

Let me say in closing that one of the things that has mostly been on my mind is the making of these documents available to teachers. Among the documents presented at these conferences there are many that are presented in mimeographed form in that long folio mimeograph, on both sides of a paper which is used in League documentation, and which disintegrates very quickly. So a great deal of it is not very readily available nor will it be preserved in any adequate way.

A year ago—I am bringing this into the picture alongside of the rest of our documentation study of this afternoon—I was somewhat instrumental in the establishment of the International Document Service of the Columbia University Press, taking over for distribution the documents of the League of Nations. In addition to the League documents, it is my hope that we will

be able to have a place in this country to which we can turn for the more or less transitory documents of the character I have just described. It is not only those of the International Studies Conference. I am hoping we can build up a place for the distribution and perhaps the preservation of the documents of the International Studies along with those of the rest of the League. The documents, of course, of the Committee on Intellectual Co-operation are there already. It may interest some of you to know that we still receive the Japanese documents just as fully as ever; some of them are very valuable. That phase of service to the teaching profession is one I should like to see worked out.

May I therefore ask all of you who have any ideas as to how such a service of a university press can be more useful to you to let me or the Columbia University Press know either now or later. We have very little money, but we have some. And we can at least try out a field which is in its very modest way parallel to a great work of the Department of State, and, I hope, make more ready access to these discussions.

In closing let me say that I think this effort to establish an international discussion of the study of international relations at the present time needs the support of every one who is engaged as we are in the clarification of this mysterious problem that confronts the world today. And I do not think that the cleavage which has grown up between Nazi-Fascist and the other countries is a necessary impediment to a further development of that character. I think just as in the days of the Protestant reformation when Luther smashed open—as the Nazis have today—the old doctrines of the past and substituted new doctrines similarly strong, similarly intolerant, a way was ultimately found for tolerance. So today, or in the not distant future, we may justify political science objectively and so get a clearer vision of the drift and current of affairs. Whether that can be done in the international world today remains to be seen. But the one thing I think the International Studies Conference stands for is the effort to have the intellectual leaders of the world study as objectively as far as they can, with the materials at their disposal, problems unsolved by our time and perhaps for long centuries to come.

Chairman REEVES. On behalf of the conference I thank Professor Shotwell for his admirable account of those activities in which all of us should have an interest.

Now we turn to the report of the Executive Committee. I shall ask Professor Clyde Egleton, the chairman, to report for the committee.

REPORT OF THE EXECUTIVE COMMITTEE

By CLYDE EGLETON

Professor of Government, New York University

Mr. Chairman, my report will take only two or three minutes. The only reason it is made at all is because of an instruction that was contained

in the proceedings of the conference last year which says that "The Executive Committee of this conference be constituted in addition a committee on the teaching of international law and related subjects and be instructed, in collaboration with the Committee on Policy of the American Political Science Association, to prepare a report for submission to this conference at its next meeting, including any suggestions which might be made as to the improvement of the teaching of international law and related subjects in this country."¹

As to the international law and related subjects in this country, of course, that is the entire purpose of this conference. I do not think the Executive Committee should attempt to lay down a program for the future, the more so since it has been my experience in this brief job that it is better to leave to the Executive Committee each time the program for the next meeting except in so far as the conference may lay out a specific project of study.

For one such project of study a motion will be made later in the conference with regard to the curricula of small colleges. Perhaps others will arise from the floor in the discussion.

As to the other part of this instruction, the Policy Committee of the American Political Science Association rapidly became moribund and was officially ended at the meeting of the Political Science Association last Christmas. Consequently there is not much I can report in the way of cooperation there, although I did start some years ago to do it.

That completes my report, Mr. Chairman.

Professor EAGLETON. Now, I would like to make two motions, if I may. One of them is that the Director be instructed to appoint a nominating committee of five to nominate a Director, a Chairman of the Executive Committee and a Chairman of the Committee on Publications for the next conference.

Chairman REEVES. We will take the motion first. Did the motion receive a second?

(The motion was seconded.)

Chairman REEVES. It has been moved and seconded that the chair appoint a nominating committee of five to make nominations for the office of Director, Chairman of the Executive Committee, and Chairman of the Committee on Publications for the next conference—of course, the assumption being that there will be a next conference. It may be five years from now.

Are you ready for the question? Are there any remarks to be made? If not, I shall put the question.

(The motion was put to a vote and carried.)

Professor EAGLETON. I move that the conference elect as the Secretary for the Sixth Conference Professor Herbert Wright. Does that conform to proper procedure?

¹Proceedings of the Fifth Conference of Teachers of International Law and Related Subjects, 1933, p. 207.

Chairman REEVES. Perhaps the chair was in error in not seeing to the appointment of a Secretary somewhat earlier. But if Professor Wright is chosen Secretary, he is known to have such an excellent memory that without much difficulty he can reconstruct and put on paper everything that has taken place from the time the meeting was called to order. So I shall consider this motion in order.

(The motion was seconded and carried.)

Chairman REEVES. The motion is carried and Professor Wright is declared elected.

Is Professor Wright present?

I see he is. I take it you have taken in what has happened here?

Professor HERBERT WRIGHT. I have been taken in.

Chairman REEVES. The chair will make the announcement of the nominating committee shortly.

This concludes the stated program. But what is the pleasure of the conference with reference to discussion?

Professor PHILIP C. JESSUP. If it is in order I would like to move an amendment to the excellent report submitted by Professor Wilson of the Committee on Publications.

In that report they referred to the volumes appearing in the series of the *Annual Digest of Public International Law Cases*. At that point in the report I think it would be very desirable to call attention to the very commendable volume of MacKenzie and Laing on *Canada and the Law of Nations*, which consists of a unique collection of published international law cases having to do with international law, from the Canadian point of view. It is one of the volumes currently appearing in the Carnegie Endowment's series of studies on the Relations of Canada and the United States. I should like to move, with the agreement of the committee, that that volume be commended in the report along with the other similar volumes.

Chairman REEVES. Professor Wilson, are you willing to accept that?

Professor WILSON. I accept it with enthusiasm.¹

Chairman REEVES. These reports are before you. We have not acted upon them. What will you do, this interpolation having been made, with the report of the Committee on Publications, made by Professor Wilson?

(The motion to accept the report of the Committee on Publications was duly seconded and carried.)

Chairman REEVES. Then there is the report of the Executive Committee.

Mr. DENYS P. MYERS. I move that the report of the Executive Committee be accepted.

(The motion was duly seconded and carried.)

Chairman REEVES. Now, what is the further pleasure of this meeting this afternoon?

¹ See *supra*, p. 7, note 2.

PROFESSOR HERBERT WRIGHT. With regard to Dr. Wynne's statement, I would like to take an exception by saying that he did not give a complete record in his reference to me as instigating the proposal for an index to *Foreign Relations*. He failed to mention that, if it had not been for his efforts, its realization would not have been possible.

CHAIRMAN REEVES. Will you permit the chair to say that he wished, as one or a number of these reports was being made, that there might have been a reference to that admirable collection of diplomatic documents of Mr. Manning, the Latin-American relations or inter-American relations, of which I think twelve volumes have appeared. It is certainly an indispensable body of material for the understanding of our historical relations with the countries to the south of us. I do not think that was referred to. As most of you know, that series of publications on Inter-American Affairs is published by the Carnegie Endowment for International Peace.

What is your further pleasure?

MR. MYERS. Mr. Chairman, apropos of the report of the Committee on Publications, I think the publications of the Pan American Union should have a place in this program. Feeling that way and knowing that some others also feel that way, I have been groping around for the last 24 hours trying to put on paper something that might be effective in starting the ball rolling a little better than it has been.

As some of you know, the whole Pan American movement is a set of *prima donnas*. You have to handle everything just exactly so; and usually the way you think it ought to be handled is not the way that proves to be most effective. Having spent some time and much thought on it, I have attempted to put into the form of a couple of resolutions what I think might be usefully done here with respect to Pan American publications. The text, as I say, has been built on a psychological situation as I understand it and, if I may, I would like to present these resolutions for consideration. They read:

The Sixth Conference of Teachers of International Law and Related Subjects, being convinced that the progress of Pan American ideals and the closer coöperation of the American Republics depend in no small degree upon the extent and substance of the available information concerning them and its accessibility to students and the general public, record our considered judgment that the following steps are desirable to attain these objects:

1. There is a real need for improving the extent and scope of the publications of the Pan American system and their distribution by the Pan American Union.

2. The successful production of the publications of the Seventh International Conference of American States by the Government of Uruguay demonstrated the practical utility of the uniform printing standards adopted for the purpose.

Most of you who are in the American Society of International Law will recall that there was a committee¹ which met with the officials of the Pan American Union and took up the idea of the uniform scheme which has been in general adopted and used in the proceedings of the Seventh Conference.

3. This conference notes that those standards of uniform printing are now regarded as in force for the publications of the International Conference of American States.

4. The Director General of the Pan American Union should consider the formulation of a feasible plan by which the documents of the International Conference of American States may be even more promptly and completely prepared, edited and published.

5. Careful consideration should be given to the possibility of further utilization of the staff of the Pan American Union in the technical services of inter-American gatherings.

6. This conference urges the desirability of publishing a historical compilation of the minutes of the Governing Body of the Pan American Union and of the adequate publication of its current proceedings.

That is one resolution. The other one deals with a little different phase of the matter:

The Sixth Conference of Teachers of International Law and Related Subjects, being desirous of following more fully and intelligently the numerous Pan American activities,

Urges upon the Pan American Union the development of its various series of informational publications and of its system of depository libraries;

Regrets the lack of coördination in the production and distribution of the records of Pan American activities other than those of the International Conference of American States and commends to the Governing Body of the Pan American Union the concentration within it of both the production and distribution of all such material as soon as budgetary requirements can be met.

Mr. Chairman, I move the adoption of those resolutions.

Chairman REEVES. We will take up the first resolution. You have heard the first of the two resolutions before you.

(The motion was duly seconded.)

Chairman REEVES. It has been moved and seconded that this resolution be adopted.

Professor JESSUP. Is discussion in order?

Chairman REEVES. Yes; discussion is in order. It has been moved and seconded, and the resolution is now before you.

Professor JESSUP. Mr. Chairman, I should like to say that this is a subject in which I have taken a great deal of interest, and I am very much in

¹ The "Report of Special Committee on Documentation of Pan American Conferences" is printed in American Society of International Law, *Proceedings*, 1935, pp. 210-14; see also *ibid.*, 1936, pp. 252-3.

sympathy with the object of both resolutions. I should also like to say that there is no individual I know of who, in my opinion is more competent to prepare a resolution on the subject than the author of these two resolutions, Mr. Myers.

At the same time, I find both resolutions so long and so complicated that I do not feel that I can express any individual opinion on the great multitude of proposals named in those resolutions. I wonder if Mr. Myers would be willing to have the vote on these resolutions go over until our business meeting at the end of the conference, so that those of us who are interested would have a chance to study the text of the resolutions in the meantime, and perhaps have our Committee on Publications consider them and bring in its report at that time indicating their opinion as to the desirability of adopting them.

I do not suggest that at all for the purpose of beating the resolutions, because I want them to pass. I merely think we should give them a little more consideration than is possible with one reading.

Professor JAMES W. GARNER. I quite agree with that suggestion.

Chairman REEVES. What is Professor Jessup's intent, to make a motion of reference?

Professor JESSUP. I believe there is a motion on the floor. I don't know whether it is in order to make another motion. May I make a substitute motion?

Chairman REEVES. You may make a motion of reference.

Mr. MYERS. May I accept the amendment?

Chairman REEVES. I think the better procedure would be to have a motion to refer the question to a committee, which would be the Drafting Committee with instructions to draft it and make a report or recommendation at the close of the business session.

Professor JESSUP. The Drafting Committee or the Committee on Publications?

Chairman REEVES. The Committee on Publications. It has been moved and seconded that the first resolution proposed by Mr. Myers be referred to the Committee on Publications with directions that the Committee on Publications report upon it with recommendations at the closing business session of this conference.

Are you ready for this motion of reference?

Mr. FINCH. Mr. Chairman, I wish to approve the motion; but while on my feet I would like to make this statement. I think it would be very desirable to have some such method adopted as Mr. Myers has suggested for making available the Pan American documentation. It seems to me it is a very large question. The Endowment published in 1928 in English a volume containing the texts of the six International Conferences of American States held up to that time. We are now engaged upon a revision of that book, which will bring it up to date, containing the resolutions of the Seventh

Conference held at Buenos Aires and also several side conferences. We expect to have that book, which will be in Spanish, printed during the coming summer in time for use at the Eighth International Conference scheduled to be held in Lima next December.

At the same time, we have collected a large amount of material dealing with the technical conferences outside of the great public conferences, and we are planning to publish those texts in a separate volume later on. Of course, that does not take care of everything that Mr. Myers mentioned in his resolutions, particularly the proceedings of the conferences themselves. I think the Committee on Publications should have this information before it before they act upon Mr. Myers' resolution.

Chairman REEVES. Are there any further remarks upon this motion of reference?

If not, the motion is before you.

Chairman REEVES. The motion is carried and it is so referred.

Now, the second resolution offered by Mr. Myers.

Mr. MYERS. Mr. Chairman, may I amend my own motion and move that that be similarly referred?

Chairman REEVES. Mr. Myers now makes a motion of reference similarly to the Committee on Publications of the second resolution.

(The motion was then duly seconded.)

Chairman REEVES. It has been moved and seconded that this second resolution likewise be referred to the Committee on Publications.

(The motion was put to a vote and carried.)

Chairman REEVES. The motion is carried and the second resolution is likewise referred to the Committee on Publications.

Professor K. C. LEEBRICK. Mr. Chairman, would it be in order to ask that these resolutions be mimeographed for the members so that we may consider them?

Chairman REEVES. We might request the chairman of the Committee on Publications to have them mimeographed, if it is possible to do so.

Professor WILSON. Do you mean in the present form?

Chairman REEVES. No; as you decide to recommend them.

Professor WILSON. Yes; I think that will be possible.

Chairman REEVES. That will be satisfactory, will it not?

Professor LEEBRICK. We would like to study them when the report comes back from the Committee on Publications.

Chairman REEVES. Of course, the difficulty about that is that of time. We have a schedule, and the final business session will be on Saturday afternoon. I think it would not be wise to make it imperative upon the Committee on Publications to consider this and have it mimeographed and in the hands of everyone, but we might request that they do so, if possible. That would be satisfactory, wouldn't it?

Professor QUINCY WRIGHT. I would suggest that I think the Institute

of Pacific Relations would be glad to know what types of publication this group wants and, consequently, I would like to move that the Committee on Publications take into consideration a specific recommendation addressed to the Institute of Pacific Relations as to publications which would come within the field of the Institute and which would be useful to this group, and that the Committee on Publications report such a recommendation at the final session.

(The motion was seconded.)

Chairman REEVES. It has been moved and seconded that the Committee on Publications formulate a recommendation addressed to the Institute of Pacific Relations as to publications which this conference would appreciate.

Professor JAMES W. GARNER. Perhaps nobody is more familiar with the work of that Institute here than Professor Wright. Why doesn't he prepare a motion himself embodying the sort of thing he thinks ought to be in this motion and not leave it to the Committee on Publications? It seems to me that is the better way to deal with that problem.

Professor WRIGHT. I shall be very glad to. I am not prepared at the moment to formulate it, but I shall be glad to confer with the Committee on Publications and to assist them, with the help of Professor Shotwell and others.

Chairman REEVES. The chair is going to adopt Professor Garner's suggestion and rather ruthlessly rule that Professor Quincy Wright shall prepare such a recommendation and submit it to the chairman of the Committee on Publications in ample time so that the Committee on Publications can refer back to this conference at its final meeting that resolution. And it is so ordered.

Professor KENNETH W. COLEGROVE. I would like to ask Professor Wright if he would be willing to have his motion include the Committees on Far Eastern Studies of the American Council of Learned Societies. The American Council of Learned Societies at the present time, through these two committees, contemplates the translation of works in both Chinese and Japanese, and more than this, its special Committee on Japanese Studies is interested in the translation of diplomatic items.

On this point may I add that it is not generally known in the United States that the Japanese Government has already started the publication of the *Dai Nippon Gwaike Bunsho* or Diplomatic Documents of Japan, a series which corresponds to the *United States Foreign Relations*. This is a revolutionary undertaking in Japanese diplomacy. Two volumes of the *Gwaike Bunsho* were published at the end of last year and two more volumes have just come off the press, making four volumes altogether, and covering diplomatic correspondence for the years 1867 to 1869. There are selections from those volumes that well might be translated into English. I wonder if Professor Wright would be willing to accept an enlargement of his resolution in order to include such translations.

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Chairman REEVES. The chair is going to undertake to solve this. As Professor Garner very properly stated, Professor Wright is better qualified than most of the rest of us to formulate a recommendation with reference to the Institute of Pacific Relations. And, I suggest, who is better qualified than Professor Colegrove of Northwestern University, to formulate a recommendation with reference to this Far Eastern situation? Therefore, I think you will agree with me that we might request Professor Colegrove to formulate it and submit it to the Committee on Publications.

Does that receive your consent?

Professor COLEGROVE. I think Professor Wright might object.

Chairman REEVES. No; I think we should have a division of labor.

(The ruling of the chair was approved by the conference.)

Professor HERBERT WRIGHT. Might I suggest that the Director follow that same rule which he has just adopted and draft a resolution form as to the liberal publication policy of the Department of State?

Chairman REEVES. The chair recognizes as an executive his own limitations, and would much prefer expert guidance in the drafting rather than to undertake it himself.

Professor WRIGHT. If the Director declines to do so may I suggest that it be referred to the Committee on Publications?

Chairman REEVES. Very well. Do you make that as a motion?

Professor WRIGHT. Yes.

Chairman REEVES. *The motion is made by Professor Herbert Wright that the Committee on Publications draft a suitable expression of opinion of this conference as to the present policy of the Department of State with reference to publications.*

(The motion was duly seconded and carried.)

Chairman REEVES. I am sure the Committee on Publications will draft this to your satisfaction.

Professor MONTELL E. OGDON. I wonder if the motion as to the present policy of the Department of State and continuation of that policy considers the question of the policy of the Congress.

Professor HERBERT WRIGHT. Might I suggest, if I am not out of order, that, in addition to formulating a resolution on appreciation of the efforts of the Department of State, that the same resolution or another one include an appreciation of the action of both Houses of Congress, that is, the action of the Appropriations Committees of both Houses of Congress.

Professor WILSON. May I direct attention to the fact that there is a special Committee of the conference on State Department Publications, of which Professor Jessup is Chairman. It seems to me that these last suggestions should be referred to that committee.

Chairman REEVES. Very well. Then, the motion is that the Committee on State Department Publications be charged with this duty.

Professor JESSUP. In view of this conflict of authority I suggest that the Secretary of the conference prepare it.

Chairman REEVES. There is no conflict of authority whatever. As chairman I should say that the appropriate committee to which this should be referred is the Committee on State Department Publications and, therefore, it is referred to that committee.

Is there any further business?

Professor WILSON. Before Dr. Wynne left he handed me these copies of the Departmental Order of March 26, 1935, Department of State, which has to do with the manner in which the *Foreign Relations* volumes are prepared. He also left with me some reprints of the Department of State Appropriation Bill. If members would like to have copies of this I think there are sufficient copies for everyone.

In view of the recent motions, Mr. Chairman, I think it necessary that there be a short meeting of the Committee on Publications here at the front of the room.

Chairman REEVES. Very well. A meeting of the Committee on Publications is called, to meet here after the close of this meeting.

Is there any further business to be brought before this meeting?

Our next session, as you know, will be this evening at 8:15 here in this room.

Before adjourning I will appoint the Committee on Nominations. The Nominating Committee will consist of: Professor Clarence A. Berdahl, University of Illinois, as Chairman; Ellen Deborah Ellis, Mt. Holyoke College; F. A. Middlebush, University of Missouri; K. C. Leebrick, Syracuse University, and Benjamin H. Williams, University of Pittsburgh.

(Whereupon, at 5:30 o'clock p.m., the conference adjourned until 8:15 o'clock p.m.)

SECOND SESSION

Wednesday, April 27, 1938, at 8:15 o'clock, p.m.

Presiding: Jesse S. Reeves, *Professor of American Institutions, University of Michigan, Director of the Conference.*

Chairman REEVES. It was, I think, no less than an inspiration for the Executive Committee to arrange a session during which we may become more conscious of the obligations which international law has to other fields of thought—other “disciplines,” they are sometimes called. It was long after international law had won for itself a place in the college curriculum, that it found its way into the law school and into the graduate school. In the latter, it is generally one of the fields of political science. The seeker after the doctorate usually pursues some cognate fields of study, history, economics, and even psychology. With that catholic outlook that we naturally expect from Professor Eagleton and his associates we begin to realize that, after all, there is a certain indebtedness which international law owes to other fields of knowledge.

And now, without further enlarging, I shall ask Professor Eugene Staley, of the Fletcher School of Law and Diplomacy, to present to us a picture of the contributions which economics make to our field of international law.

CONTRIBUTIONS FROM ALLIED FIELDS: ECONOMICS

By EUGENE STALEY

Associate Professor of International Economic Relations, Fletcher School of Law and Diplomacy

Your committee has asked me to comment on the place of economics in a curriculum of international studies, to discuss what material from economics the teacher of international law and international relations should include in his courses, and why, and to offer some suggestions as to readings that might be used.

There is no need for flights of eloquence to labor the point that the “getting-a-living” side of human activities is very important, or that economic activities act upon and are acted upon by every other phase of social relations. Everybody admits that economic factors play a significant part in international affairs. Economic interests help to shape legal doctrines, such as those that surround the protection of citizens abroad. The growth of mass production and world markets affects the whole tenor of diplomacy. Unemployment and economic misery overthrow régimes and change the international policies of governments. Needs for access to raw materials and outlets for population pressures are urged as reasons for imperialistic expansion. This is obvious to all.

In fact, economists these days, far from having to "sell" their subject to their colleagues and to the general public, rather need to issue warnings against exaggerating the extent to which economics can provide explanations and cures for our international ills. Economists quite rightly point out that most of the problems they have to deal with would be much easier were it not for the survival, in a world whose chief characteristic is technological and economic interdependence, of vestigial notions like the legal doctrine of state sovereignty and the psychological disease of nationalistic patriotism. Let me quote from the recent *Report of the Committee of Experts to the Conference on World Economic Coöperation*, Washington, March 23-26, published by the National Peace Conference:

It is almost hopeless to expect practical application even of the immediate economic program we have suggested so long as statesmen and peoples everywhere in the world are confronted by a continuous menace of war, with no security except their own military and economic preparedness. . . . World economic coöperation for the welfare of the common people cannot be hoped for, will almost surely give way to a frantic economic preparedness even more costly than military preparedness, unless definite progress can be made at the same time toward relaxing political tensions, lessening the fear of war, and increasing the sense of security of peoples throughout the world.

With words like these, you see, the economist can easily toss the ball back to the other side of the fence, into the domain of the political scientist, the international lawyer, and the professor of international psychiatry. Of course, the truth is that, to quote again from the same report:

There is a circular relation between international economic troubles, a badly working economic system, and the dangers connected with political tension and insecurity. All these problems must be attacked simultaneously if any is to be solved.

After all, the distinctions we sometimes make between economic problems and political problems are not so much in the data as in our heads. Economic factors and legal factors refer to a difference in point of view, not to a difference in subject matter. These distinctions are purely a matter of convenience, useful where a certain specialization in methodological approach is useful, harmful where the watertight-compartment habit of thinking blinds us to interrelations. They should be maintained only where helpful for the purpose in hand, and in the field of international studies today there is often very little reason for trying to segregate the "economic" from other factors. World history played an ironical trick on at least one university department in this country which adopted the supposedly more modern title, "Department of Economics," about a decade ago, only to find that nowadays its subject-matter would be much better described by the old title, "Political Economy."

While phrases like "basic economic causes," "the inevitable struggle for

the necessities of life," "it all goes back to the quest for gain," etc., etc., can easily be overworked and become a meaningless mumble of solving-words, there can never be too much careful, critical study of the actual interplay between those aspects of social activity that we like to call economic and those aspects of world affairs commonly described as political, legal, psychological, or historical. The problem of the teacher is how to help students to get a better understanding of these interrelations. From now on I shall try to be practical and concrete.

First of all, as a means of presenting my idea of some of the topics from economics that are worth including in the curriculum of international studies, let me describe briefly a course which we have organized at the Fletcher School and which I am now teaching.

The problem at the Fletcher School differs from the problem of the teacher in the general college, of course, because our students are graduate students only. On the other hand, it resembles the problem of the teacher in the general course on international relations for the reason that our students are not specialists on the economic aspect of international affairs, but many of them in this very course that I am about to describe find their main interest in fields such as international law, comparative law, diplomacy, history of international relations, and political science.

The course that we have set up, therefore, represents what we think is most generally useful to students who work in all of these general fields of international relations. The title of the course is "International Economic Intercourse: Theory and Policy."

The first semester is entirely and rigorously theoretical. Remember that we are dealing with graduate students; if you are leading immature students into this realm a different approach might be better.

The first semester covers three topics, with emphasis on the first two. The first is "The Mechanism of Adjustment of International Balances," dealing with the balance of payments, the classical theory of the forces set in motion by various factors which may disturb the balance of payments, modern developments of this theory and criticisms of it, applications of theory to the analysis of such problems as transfer of debt payments and effects of import duties.

The second topic is "The Theory of International Value," in which we study Ohlin's analysis, the classical analysis, and neo-classical analysis today, especially as expounded by Taussig, Viner, and Haberler, considering such problems as the conditions of trade, gains from trade, effects of trade on prices of factors of production, the classical argument for free trade and the qualifications of it and attacks upon it.

The third topic, treated very briefly, is "Localization Theory." That is the theory which expounds the general principles of the most economical location of industries with regard to geographical factors, market factors, and so on.

The second semester turns, then, to governmental policy, using the theoretical tools developed in the first semester. Topics include the following:

First. Arguments on free trade and protection; tariff methods and newer protective devices; the United States trade agreements program.

Second. Raw materials in international relations: their strategic significance, their relation to trade problems and colonial problems. Food-stuffs and the problems of agriculture and nutrition in relation to international economic policies.

Third. Politico-economic problems of international investment.

Fourth. Population problems: "population pressure," its relation to trade and territorial questions.

Fifth. The economics of state expansion: the various theories of imperialism, a brief factual survey, and critical discussion of the economic value of colonies.

Sixth. Policy-forming and administration in international economic relations. Here we examine the machinery, if you wish to use that term, of international economic relations, including United States agencies for dealing with these problems and international or world agencies.

In connection with the second semester of this course, which deals with practical questions of governmental policy, I have been using a method that has been quite successful and which might perhaps be mentioned as suggestive. The students elected a steering committee and that committee, together with the instructor, worked out a program of topics for report by committees of the students. The reports were made on the assumption that the whole class was a legislative or at least an advisory assembly, that they were there to listen to the reports of their committees, debate them, and adopt or reject or amend them. The chairman of the steering committee, a student, presides at these sessions. We held one extra session at which we went into some of the elementary principles of parliamentary law—precedence of motions and the like—having felt a need for such knowledge in the first debates. The reports, though prepared and written out by a group, are usually presented by one *rapporteur* on behalf of the committee in charge, and at the conclusion of his remarks he moves the adoption of the committee's recommendations. The rôle of the instructor is that of critic. Sometimes he participates in the discussions and sometimes he does not, bearing in mind that if he participates too much and too boldly at first he might keep the students from doing so. These are the topics on which we have had reports:

1. Tariff-making: Should it be by legislative action or by treaty bargaining?

2. The most-favored-nation clause: Should it be used to break up regional or multilateral tariff-lowering arrangements?

3. The reciprocal trade agreements program: Should the United States make concessions through this program to Germany, Italy and Japan?

4. What should be the policy of the United States toward the German demands for colonies and raw materials?

5. Should the United States continue to insist on equality of opportunity in China in regard to (a) trade, and (b) investments?

6. What should be the policy of the United States toward investments in Mexico?

7. Population pressure: Does it justify Japanese expansion?

8. U. S. merchant marine policy.

9. Debate: "Resolved, that socialism would be more likely than capitalism to prevent war."

10. What needs to be done about internationally significant production control schemes?

11. U. S. policy toward the I. L. O. What pending conventions should be ratified? What procedure should be used in adapting the I. L. O. conventions to our Federal system?

12. The economic and financial work of the League of Nations and proposals for its reorganization.

I should add that by custom it has become established that each committee passes out one or two mimeographed sheets containing the resolutions that it proposes for adoption and a brief bibliography on the topic under discussion. The reports read in class are afterwards placed in the library where they can be consulted.

This scheme of committee reports and parliamentary discussion was started on the understanding that we would try it for six weeks and then decide whether to continue. At the end of that time the steering committee thought it a success, and so did the instructor, so we are having reports once a week throughout this semester.

Besides the general course I have been describing, we offer another course at the Fletcher School which deals in a more specialized way with the monetary and financial problems of international society, and we have two seminars for advanced work in the economic field. One seminar is devoted mainly to the interrelations between politics and economics at the international level—economic factors in the causes of war, and the like—and the other to international monetary problems.

Naturally, the problems of institutions differ, and other schools could not use exactly the set-up that has just been outlined. Let me turn, next, to a listing of some topics that might possibly be of use in colleges where the problem is that of fitting economic materials into a general course in international relations or into an undergraduate sequence on international affairs. Since it is manifestly impossible to lay down fixed rules, I thought the most helpful procedure might be to present a considerable number of topical units, more than could be included in any one general course, from which local circumstances might suggest certain selections. You have in your hands a mimeographed list of such topics, including some reading sug-

gestions for each.¹ The reading suggestions do not include all the good books on these topics, but merely some that I happen to have found most useful and others that might be readily available for class use. There is a good deal of pamphlet material included, for many excellent pamphlets in the field of international economic relations are appearing these days, and they have definite advantages for teaching purposes.

The first topic is, "Tools of analysis for appraising international economic policies; that is, international economic theory, a specialized phase of general economic theory." It seems to me very important that everybody who goes into the field of international relations should get somewhere in his training at least some acquaintance with the theoretical notions of international economics. He should at least be put on his guard against such elementary fallacies as the notion that an unfavorable balance of trade is something bad, or the notion that production cost differences between countries should be equalized by tariff duties and that to do so is to construct a "scientific" tariff.

The second topic, "Commercial policies of nations," includes questions of tariff policy, tariff techniques, the newer devices of protectionism, the efforts of various international agencies to restore international trade, and so on.

The third topic, which might fit into many general courses on international relations, is a consideration of the economic causes of war, so-called. Here you will find the memorandum by Bonn and Siegfried quite useful because it is short and because it gives a good survey of many aspects of the problem of how economic factors affect the peace of the world. And if you don't know it already, the brilliant little book by R. G. Hawtrey on *Economic Aspects of Sovereignty* should go on your "must" list for a careful reading.

The fourth topic I have put down is that of "Foreign investments and protection of citizens' economic interests abroad," which has an obvious relation to certain phases of international law.

The fifth topic, "Access to raw materials and markets," can be used as a relatively painless means of leading students into the general study of international trade and trade barriers.

A sixth topic suggested is "Population pressure." That, with the questions of raw materials and foreign investment, gives the instructor three problems of great practical interest at the present time through which avenues of approach might be worked out to the general principles that it is desirable to get across.

A seventh topic is "Economic work of the League of Nations and other international organizations." Current documentation is one of the most useful ways of teaching the subject.

Eighth, and very closely connected with the matter of international or-

¹ The list referred to is appended at the end of these remarks.

ganization for handling economic problems, is the work that has been done by the League and other organizations on the relation of nutrition to health, agriculture and economic policy. This offers one of the best means of approach now open to teachers of international relations for getting students interested. It starts with things they can grasp, and that seem of immediate and vital importance to them. If you present data on nutrition and the newer knowledge of what constitutes adequate nutrition, then compare the actual amount of foodstuffs of various kinds consumed in the world, then examine barriers to the import of foodstuffs in many countries, the result is a vivid sense of poverty in the midst of potential plenty and a realization of the practical meaning of present international economic and political difficulties.

The ninth topic is "Costs of war," which again can be used to give a practical, concrete appeal to the study of international relations.

Tenth, either as an introduction or as a summing up, some of the concrete proposals and programs that are being advanced in the field of international economic relations might well be taken up for discussion. "What to do about it?" is a question that always helps to focus the attention and the interest of students. The report drawn up for the Washington Conference on World Economic Cooperation is short, and is conveniently available through the National Peace Conference. For more detailed analysis of modern international economic problems and recommendations on them, the Carnegie Endowment and International Chamber of Commerce study is very valuable.

Let me suggest one more general idea, in conclusion, on the relation of economics to international affairs. Most of us agree that what this world sorely needs is great and rapid improvement in international organization, both on the political and on the economic side. Economic measures alone will certainly not suffice, and, in fact, no fundamental improvement can be made in world economic conditions so long as the existing political anarchy keeps the menace of war constantly to the fore in the minds of statesmen and peoples. But economic measures may help, and the attempt to bring about coöperative economic action may prove to be one of the best avenues leading towards the more effective political organization of the world community that is the major need of our time. In other words, I am suggesting that international economic questions offer a particularly good "handle" for taking hold of world problems much broader than what we usually include in economics.

It is interesting to observe the sequence of events in that "Critical period of American history" just before the adoption of the Constitution. The Federalists knew that the country needed, and that they themselves wanted, a more perfect political union. But they had to work against obstacles, and sometimes by indirection. Recall the two conferences that were the immediate precursors of the Philadelphia convention which drafted the Constitution. The first was the Mt. Vernon conference of 1785 between commissioners from Maryland and Virginia to discuss—what?—navigation of that "in-

ternational river," the Potomac! The commissioners also discussed state tariffs and currencies. Out of the Mt. Vernon meeting came the call by Virginia's legislature for the Annapolis convention (1786), "to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same."¹ In other words, the Annapolis convention was what we call these days an international economic conference. And it was this convention that recommended the calling of the 1787 convention at Philadelphia.

It seems to me that there is something suggestive about that sequence of events when we contemplate world problems today. It constitutes an additional reason for giving attention to economic questions in courses on modern international relations.

ECONOMICS AND THE TEACHING OF INTERNATIONAL LAW AND RELATIONS

A BRIEF LIST OF TOPICS AND READINGS

1. TOOLS OF ANALYSIS FOR APPRAISING INTERNATIONAL ECONOMIC POLICIES (INTERNATIONAL ECONOMIC THEORY, A SPECIALIZED PHASE OF GENERAL ECONOMIC THEORY).

Haberler, G. *The Theory of International Trade*. N. Y.: Macmillan Co., 1936. (Intermediate to advanced.)

Harrod, R. F. *International Economics*. Cambridge Economic Handbooks No. VIII. N. Y.: Harcourt, Brace and Co., 1933. (Intermediate.)

Ohlin, B. *Interregional and International Trade*. Cambridge: Harvard University Press, 1933. (Very advanced.)

Whale, Philip Barrett. *International Trade*. London: T. Butterworth, Ltd., 1932. (Elementary.)

Viner, J. *Studies in the Theory of International Trade*. N. Y.: Harper and Brothers, 1937. (Very advanced.)

2. COMMERCIAL POLICIES OF NATIONS.

Bastiat, F. *Economic Sophisms*. (Especially the petition of the candlemakers of Paris. Exposure of common protectionist fallacies.)

Beveridge, Sir Wm. H., and others. *Tariffs, the Case Examined*. London: Longmans, Green and Co., 1932.

Carnegie Endowment for International Peace and International Chamber of Commerce. *The Improvement of Commercial Relations between Nations, and International Economic Reconstruction*. 1936. (Two volumes of memoranda by experts, and some practical recommendations.)

Crowther, Samuel. *America Self-Contained*. Garden City, N. Y.: Doubleday, Doran and Co., 1933. (Crowther's writings are excellent for teaching purposes as sources of horrible examples and naïve fallacies.)

Grady, H. F. "New Trade Policy," *Foreign Affairs*, Jan. 1933. (Excellent in support of unconditional MFN policy of trade agreements program.)

¹ Gaillard Hunt and James Brown Scott (ed.), *The Debates in the Federal Convention of 1787* (New York, 1920), p. xlvii.

- Haberler, G. *Part II.* (Listed under Topic 1 above.)
- League of Nations, Economic Committee, "Some Considerations on the Present Evolution of Agricultural Protectionism." II Economic and Financial, 1935. II. B.7.
- Robbins, L. *Economic Planning and International Order.* London: Macmillan and Co., Ltd., 1937.
- Sayre, F. B. *America Must Act.* World Affairs Pamphlets No. 13. Boston: World Peace Foundation, 1936.
- Slichter, S. H. *Modern Economic Society.* N. Y.: Henry Holt and Co., 1931. (Chapters 29 and 30. A good textbook treatment.)
- Tippette, Charles S. *Self-sufficiency.* Public Policy Pamphlets No. 5. Chicago: University of Chicago Press, 1933.
- Wallace, Henry A. *America Must Choose.* World Affairs Pamphlets No. 3. Boston: World Peace Foundation, 1934.
- Williams, B. H. *The Economic Foreign Policies of the United States.* N. Y.: McGraw-Hill Book Co., 1929.
3. ECONOMIC CAUSES OF WAR—GENERAL.
- Bonn, M. and Siegfried, A. "Economic Tendencies Affecting the Peace of the World." Geneva, April 9, 1929. Originally not for publication. Later reprinted in *Annals of American Academy*, Vol. 150 (July, 1930), 192-222. (A joint memorandum prepared at the request of the League of Nations, outlining topics for study in this field. A good introductory survey.)
- Hawtrey, R. G. *Economic Aspects of Sovereignty.* London, New York, and Toronto: Longmans, Green and Co., 1930.
- Angell, Sir Norman. *The Unseen Assassins.* N. Y.: Harper & Bros., 1932; *The Great Illusion.* New York: G. P. Putnam's Sons, 1933.
- Woolf, Leonard, et al. *The Intelligent Man's Way to Prevent War.* London: Col-lance, 1933. (See especially Chapter 8 on "The Economic Foundations of Peace," by Harold Laski, and see criticism of some of the argument in Staley, *Foreign Investment and War*, a pamphlet cited under topic 4 below.)
- Vinor, J. "Economic Factors and International Organization for Peace," *Interdependence* (Journal of the League of Nations Society in Canada), Vol. 13, Nos. 3-4, 1936, pp. 218-223.
- Langer, William L. *The Diplomacy of Imperialism.* N. Y.: Knopf, 1935.
- Moon, P. T. *Imperialism and World Politics.* N. Y.: Macmillan, 1927.
- Woolf, Leonard. *Empire and Commerce in Africa.* London: G. Allen and Unwin, 1919.
4. FOREIGN INVESTMENTS, AND PROTECTION OF CITIZENS' ECONOMIC INTERESTS ABROAD.
- Dunn, F. S. *The Protection of Nationals.* Baltimore: Johns Hopkins Press, 1932; *The Diplomatic Protection of Americans in Mexico.* N. Y.: Columbia Univ. Press, 1933. (Especially Chapters 10, 11, 12.)
- Feis, H. *Europe: the World's Banker, 1870-1914.* New Haven: Yale Univ. Press, 1930.
- Kepler, O. D. and Soothill, J. H. *The Banana Empire.* N. Y.: Vanguard Press, 1933.
- Lippmann, W. "Vested Rights and Nationalism in Latin America," *Foreign Affairs*, April, 1927.
- Staley, E. *War and the Private Investor.* Garden City: Doubleday-Doran, 1935. (Particularly Chapters 13 and 16, and introductory and case-study material such as in Chapters 1, 2, 3, 5.) *Foreign Investment and War.* Chicago: University of Chicago Press, 1935. Public Policy Pamphlet No. 18.
5. ACCESS TO RAW MATERIALS AND MARKETS.
- Clark, Grover. *The Balance Sheets of Imperialism.* N. Y.: Columbia Univ. Press, 1930.

- Emeny, Brooks. *The Strategy of Raw Materials*. N. Y.: Macmillan Co., 1936.
- League of Nations, *Report of the Committee for the Study of the Problem of Raw Materials*. Geneva: A.27.1927.II.B.
- Royal Institute of International Affairs. *Raw Materials and Colonies*. Information Department Paper No. 18. London: 1933.
- Southworth, Constant. *The French Colonial Venture*. London: P. S. King and Son, Ltd., 1931.
- Staley, E. *Raw Materials in Peace and War*. N. Y.: Council on Foreign Relations, 1937.
- Stewart, M. S. *Colonies, Trade, and Prosperity*. N. Y.: Public Affairs Committee, 1937. Public Affairs Pamphlet No. 13.
- Stone, W. T., and Eichelberger, Clark. *Peaceful Change, the Alternative to War*. F. P. A. Headline Book, 1937. (A brief survey prepared for the National Peace Conference Campaign for World Economic Cooperation.)

5. POPULATION PRESSURE.

- Angell, Sir Norman. *Raw Materials, Population Pressure, and War*. World Affairs Pamphlet No. 14. Boston and N. Y.: World Peace Foundation, 1936.
- Carr-Saunders, A. M. *World Population*. Oxford: Clarendon Press, 1936.
- Dunn, F. S. *Peaceful Change*. N. Y.: Council on Foreign Relations, 1937. (Chapter 3.)
- Penrose, E. F. *Population Theories and Their Application, with Special Reference to Japan*. Stanford University, Calif.: Food Research Institute, 1934. (Pp. 49-60, ch. 4, pp. 241-7, chs. 9, 10, 11. These chapters contain an excellent general discussion, despite the forbidding title of the book, of the relations of population problems to international conflict and to technology, trade, and trade barriers.)

7. ECONOMIC WORK OF THE LEAGUE OF NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS.

- McClure, Wallace. *World Prosperity as Sought through the Economic Work of the League of Nations*. N. Y.: Macmillan, 1933.
- Current documents and annual reports of the I. L. O., various League agencies, etc., obtainable through the international document service recently established by the Columbia University Press.

3. NUTRITION, HEALTH, AGRICULTURE, AND ECONOMIC POLICY.

- League of Nations. *Nutrition: Final Report of the Mixed Committee . . . on the Relation of Nutrition to Health, Agriculture and Economic Policy*. Geneva: A.13.1937.II.A. (An excellent document, opening an avenue of approach to international economic problems that ought to appeal to many students.)
- League of Nations, Information Section. *New Technical Efforts towards a Better Nutrition*. League of Nations Questions No. 7. Geneva: 1938. (Pamphlet summary of the work on nutrition.)
- Boudreau, F. G. "The International Campaign for Better Nutrition," *Milbank Memorial Fund Quarterly*, Vol. XV, No. 2, April, 1937. (The Milbank Memorial Fund, 40 Wall St., N. Y., is pushing the nutrition campaign in this country and can doubtless supply reprints of this article or other material useful in teaching.)

1. COSTS OF WAR.

- Clark, J. M. *Costs of the World War to the American People*. New Haven: Yale University Press, 1931.
- Condliffe, J. B. *War and Depression*. World Affairs Pamphlet No. 10. Boston and New York: World Peace Foundation, 1935.
- Staley, Eugene. *War Losses to a Neutral*. Pamphlet, League of Nations Association, 1938. (Pp. 62-66 especially.)

10. PROGRAMS AND POLICIES.

Report of the Committee of Experts to the Conference on World Economic Co-operation, Washington, March 23-26. Campaign for World Economic Co-operation of the National Peace Conference, 8 West 40th St., N. Y.

Carnegie Endowment for International Peace and the International Chamber of Commerce. *The Improvement of the Commercial Relations between Nations, and International Economic Reconstruction*. 1936.

Chairman REEVES. As you notice by the program, there are two principal papers tonight and, therefore, I take it that it was in the mind of the program committee that these papers would be open to discussion.

What would you prefer to do—to have both papers read before discussion or proceed to the discussion of this paper and then take up the next paper?

If there is no immediate desire to discuss this paper, this interesting treatment of Professor Staley's, we will proceed to the next paper, hoping that discussion will be aroused.

The next is certainly a subject about which there might be a considerable amount of controversy. I am quite sure the writer of the paper is not of a dogmatic type who does not desire to open the door to controversy.

Psychology of Propaganda, by Professor Harold Lasswell, of the University of Chicago. We all agree Professor Lasswell is just the one man to take up this subject and present it to us.

PSYCHOLOGY OF PROPAGANDA

By HAROLD D. LASSWELL

Associate Professor of Political Science, University of Chicago

Mr. Chairman and colleagues: For the benefit of the Chairman I must say that I appreciate this opportunity to represent a small Baptist college, earnestly devoted to the pursuit of truth wheresoever it may be, a university located in that great Middle West, which is quite widely misinterpreted in the "Far East."

On this occasion, therefore, I come not only as one who is interested in the analysis of certain aspects of a technical question which may have some interest for students of international law, but I come in the strange multiple capacity, which I particularly welcome.

Perhaps before I start any analysis of the psychology of propaganda, I shall introduce my comments by making some introductory remarks about the relationship of the study of propaganda to the analysis of law.

The thesis is that the study of propaganda is a logical expansion of the study of law and politics. As I understand the matter, the specialist in law, private or public, is a specialist in deciding which words are law. As I understand the matter, the specialist on propaganda may hope to contribute to the answering of questions like the following: Which words become law? Which words, if law, are obeyed?

I conceive, then, that the exploration of the facts of propaganda contribute to the exploration of the conditions under which certain words are accepted as law and certain accepted words are obeyed as law. Explorations of the kind indicated are designed to place legal rules in relation to the significant aspects of the context in which they operate. It may be that one is able to predict which words will become law in a given period by examining the fighting effectiveness of the parties who use the words. Any such hypothesis would, of course, allow for a technique of analysis which would be sufficiently well developed to enable one to compare not only the fighting effectiveness of individual states but also combinations of states.

Another hypothesis of interest to one investigating the relationship between legal rules and context would relate to the outlook of groups. I take it that many people say that one of the clues to the understanding of which words will become law is an examination of the "interests" of specified groups. From the standpoint of the student of propaganda, a relevant reformulation of that question would be: "Under what conditions do specified groups accept certain interpretations of their interests?" Thus an exploration of the "interests" of importers or exporters would call for the careful examination of situations in which the market aspects of the situation were held constant.

Some investigations of which words become rules might include such relatively less important questions as the effect of the technical phrasing of the rule on acceptance. One sometimes gleans the impression, as one examines diplomatic correspondence, that one is able to predict which claim of law will be accepted as law by investigating the comparative rhetoric in which the controversy is couched. Those who are weak frequently resort to impassioned rhetoric or to extremely sharp and systematic logical analyses.

I have made these initial comments only for the sake of indicating that those who specialize in the discovery of the words which are law (for a selected period and in selected communities) may have their efforts supplemented by other specialists, specialists who hunt for the clues which enable one to predict which words are most likely to be accepted as law. These supplementary specialists include those who study "propaganda."

It would no doubt be of some interest to us to define the "propaganda" which I have been asked to discuss. I do not propose to spend much time over the definition of propaganda. However, I shall not avoid presenting a sample definition. Whether this definition will obscure communication between us or assist communication between us I shall leave for the future to determine.

By propaganda I mean, for the purpose of this discussion, the deliberate manipulation of controversial attitudes by means of symbols.

This excludes from the field of propaganda the examination of procedures by which the accepted as distinguished from the controversial is transmitted. I need scarcely remind this gathering that this exclusion does not

seriously restrict the field of propaganda investigation when you consider the world as a whole. This definition also excludes from the field of propaganda the use of symbols in the inculcation of skill.

We have referred to the use of symbols in manipulating attitudes. This is to be distinguished from the use of symbols in training, in logical analysis, in social scientific analysis, in legalistic analysis. Moreover, this definition excludes from the field of propaganda efforts to manipulate controversial attitudes by the use of violence, by the use of boycott, by the use of specific economic advantages.

So I repeat that this term "propaganda" may be understood to refer to the deliberate manipulation of controversial attitudes by means of symbols.

What is the present state of investigation on the place of propaganda in international relations?

The first answer to that question which one should give, I think, is this: Research is recent and subject to all of the characteristic limitations of a comparatively new field of investigation. Among the foremost limitations which I might mention is the unstandardized terminology in the field. It requires some careful, critical reading to translate the language of one group of psychologists into a language which is understood by another group of psychologists.

This limitation is not particularly serious at the present time in view of the availability of such excellent and critical presentations of the field of social psychology as Murphy and Newcomb's volume.

I have referred to the research as comparatively recent. I mean to emphasize the fact that the people who deliberately undertake to examine the place of propaganda in international politics are themselves in a state of dissatisfaction with themselves, with their present methods, with the available results so far achieved. Their dissatisfaction with themselves is only surpassed by their dissatisfaction with what other people have tried to do in this field. The analysis of desirable modes of procedure has rendered these specialists acutely aware of the astounding inadequacy of the books which undertake to depict changes in "public opinion" during historical periods.

Let me make one or two casual comments about the present voluminous literature on "public opinion" or the "collective attitudes" in selected historical periods. Most of these books summarize what persons *demand* with great detail and with some system. One can find in these books about public opinion summaries of what certain statesmen said they wanted—what they said to themselves when they wrote intimate memoirs, and what these men said to others in different phases of their participation in the total act.

Usually you find satisfactory compilations of programs. Usually you have a satisfactory compilation of what the functional groups wanted which met in convention. Usually you have satisfactory samplings of what petitions were presented during a specified period. So most of the books which

say they are about public opinion present some material in fairly satisfactory fashion.

However, when you ask for the systematic treatment of the symbols of identification during historical periods you find that the literature is meager and unsatisfactory. By symbols of identification I refer to the words which name groups. If at the present moment you pose yourself with this question: "What was the relative frequency with which pseudo-biological terms were invoked by influential persons in the different decades of the nineteenth century for the purpose of naming groups," you will find that the existing literature will give you no systematic and satisfactory answer. This is of importance in view of the significance of symbols of biological or pseudo-biological relationships in contemporary politics. If you undertake to explore the relative frequency with which terms like "continent" have been invoked through time by selected territorial or functional groups you will find the same paucity of systematic material. This is typical: if you explore the symbols of identification as distinguished from the symbols of demand, you find the existing literature is unsatisfactory to a degree.

When you raise more exacting questions you discover that the literature is even less adequate. No investigation of public opinion material can be said to be very satisfactory which neglects to present in some systematic fashion the "facts" which are accepted as true about the probable future and about the elapsed past.

This problem is extraordinarily difficult and is still in a comparatively fragmentary state of solution. Of course, I exclude such brilliant discussions as Mr. Bury's *History of Progress*. I also exclude some recent studies of attitudes which, though fragmentary, are highly stimulating.

I refer here to that extremely interesting, rapidly expanding and highly technical field which is devoted to the measurement of attitudes. Many devices have been developed in the last decade for exploring attitudes. At the present time some general acceptance has developed in our particular society for devices of this kind. We are no longer exposed to weather maps only or to charts which register only the variations in prices or in the production of commodities. Today the systematic appraisal of the distribution of attitudes has become part of the daily experience of large numbers of people who make decisions about public and private affairs.

There are extremely fascinating technical problems partially explored in this field. I refer, for example, to the difference in results which may be attributed to differences in method. We may study attitudes by means of interviews which are conducted according to procedure "A" or procedure "B." What difference does it make whether you use method "A" or method "B?"

At the present time some of these questions can be posed and answered. But most of the relevant questions cannot be answered; they can only be posed.

So much for these comments about the present state of investigation. I have not painted a very rosy picture. On the other hand, I have not undertaken to minimize the intellectual enthusiasm and technical skill which has gone into some studies of collective attitudes.

Suppose now I spend a few moments presenting to you in very simple sentences some principles of propaganda management.

I present these not because they are revelations. In fact, I present them largely for the sake of reminding you that the contributions which specialists in this field may make to our problems consists less in inventing new hypotheses than in devising new ways of getting better answers.

Let me lay down now in rather dogmatic fashion a few principles of propaganda.

Effective propaganda points toward overt acts. Let me indicate what is involved in the neglect of this principle. Quite recently several groups in the United States, which look upon themselves as potential scapegoats in times of insecurity, hired a specialist to tell them how to protect themselves. This specialist recommended a tremendous campaign against dictatorships. He repeated to them the oft quoted commonplace, but very important commonplace, that one way to defend themselves from being scapegoats is to pick someone else for it. The suggestion was that "dictatorship" would be an excellent scapegoat.

This was extremely bad advice technically. Why? Because this propaganda did not secure from the persons sponsoring this propaganda a clear indication of which overt acts they wanted. There was no agreement as to who wanted what, when.

The moment discussions of this kind were started differences at once appeared. Everybody applauded a campaign against "dictatorship." Few people agreed on what overt acts would reduce the possibility of dictatorship.

This propaganda is bound to be a waste of money. What it will do, perhaps, is to produce certain verbal responses. Possibly as a result of this propaganda more people will pronounce the word "dictatorship" with a hiss than before. Their speech responses may be modified; but their overt acts will not be significantly affected.

Let me now make a very few comments about certain tactical problems of propaganda. Propaganda involves the choice of certain symbols to be repeated, and the choice of certain methods of varying those symbols.

It is plain that the choice of the symbols to be repeated is of the utmost consequence. Some symbols which are chosen for propaganda campaigns have very poor evocative quality. (For example, "The Reorganization Bill.")

Sometimes propagandists adopt vague or clumsy words for describing what they want. Not long ago in a certain country the Chief Executive proposed a change in the judicial tribunal. But there was no simple, telling phrase which was offered to state what was wanted. Hence enemies of the

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proposal were able to spring into the field and talk about a "pack the court" bill.

I have chosen two bad examples of technical skillfulness in propaganda, because some of the persons responsible for these particular failures have won the admiration of specialists in propaganda in other connections.

Sometimes the symbols which are chosen for repetition in the propaganda have negative associations. The Chinese, when they considered how to organize propaganda in certain democratic countries were advised to put the label of "militarism" on Japan and to pin a more pacific and civilian label on themselves. However, it was noticed that an important figure in China was called "The Generalissimo," in English and it seemed slightly anomalous for "The Generalissimo" to be heading a civilian anti-militaristic campaign. So one specialist recommended the English title might wisely be altered.

In some quarters there is the impression that specialized propagandists invent new words out of the whole cloth or design wholly new emblems for their campaigns. Sometimes this is true. But more commonly the key symbols are elaborations of the symbols which are already at hand.

An example of this is the "Three Arrow" campaign which was launched by the Social Democrats in the belated answer to the National Socialist campaign in Germany. The three arrows, which were first used in Baden, were originally suggested by a worker who said, "The Nazis have an extraordinarily effective symbol. What we Socialists need is a symbol equally plain, equally arresting, equally telling, a symbol which we can use quickly to cover the Swastika when it appears." The man who was acute enough to see the possibilities of the three arrows was a man who had himself worked out several dozen possible emblems, all of which he rejected as inferior to this suggestion. Here was a man clever enough as a propagandist to recognize a good idea when it was presented to him.

I will now in passing make one or two technical points which will revive memories of some of your own propaganda campaigns where you considered your symbols and slogans in detail.

The propaganda expert to whom I have referred recognized that it was very important to have three arrows drawn in such a way that they could cover up the hooked cross, and would not lend themselves to anything ridiculous in turn. Long experiments were made to determine just exactly how to draw these three arrows. In one of the experiments the three letters were drawn vertically. Just imagine the three arrows pointing upwards. A smart Nazi youngster came along and finished up a little umbrella over the three arrows, making it perfectly ridiculous and putting a stop to that idea. A great number of variations were tried out before the final solution was reached.

It is often useful to classify symbols according to the responses which you are trying to control. I am going to resist the temptation to give you a

U. S. G.

classification of appeals or drives or impulses, not because I haven't one but because I have published one; but it is of no more nor less importance than several other lists. The important thing in such classifications is not to work out a list of words which everybody will accept but to associate the term, whatever it is, with the technical methods by which its meaning is established.

This is why anybody who objects to the alleged frequency of, strange and unusual symbols among psychologists is a person who reveals himself as one who has neglected to observe the most important point, which is that the meaning of a term is to be found in the special method with which it is associated, and not in the random associations of the person who hears the words. And when you explore the method associated with the work you will discover that practically all of the terms in present use are relatively unambiguous.

I might pass from tactical questions and discuss briefly the principles of propaganda strategy. I shall condense that discussion into about three sentences. The principles of propaganda strategy may be reduced to two: First, the principle of preponderance, and, second, the principle of precaution. What I mean by preponderance and precaution I think will immediately become clear.

The principle of preponderance means considering the cheapest winning combination. The principle of precaution emphasizes the importance of preventing a combination of opponents while one is yet weak.

A few examples of this sort of thing: According to the principles of preponderance it is sometimes possible to get what you want from certain Senatorial committees by concentrating your propaganda campaign in certain constituencies. Some propagandists waste money by failing to concentrate.

It is plain, I believe, that an example of the principle of precaution is the secrecy which is characteristic of subversive movements, movements which remain underground until they have sufficient strength to cope with their opponents.

I think it is plain that China in relation to Japan formerly afforded an example of the skillful use of the principle of precaution. One of the factors which contributed to the preservation of the appearance of disunity in China was the recognition of the probability that whenever China began to be strong and united, Japan would wage a preventive war.

I might also comment upon the great skill of Mr. Hitler in the use of the principle of precaution. Often his reassuring statements succeeded in throwing his opponents off guard.

In summary: In opening this particular discussion, I have said that the study of propaganda is a logical expansion of the study of law and politics. I have indicated that this is still a new field of investigation which is characterized by vivid dissatisfaction with itself and with much of what other people imagine to be contributions to the field. I have made certain comments about tactical and strategical principles, and I have presented them

rather for the sake of stimulating your own creative contributions to our common discussion than for the sake of recommending formulae for your private use.

Chairman REEVES. It would seem to the chair that this is a provocative paper. I am almost inclined to call on certain persons in this audience to discuss it. Both papers are open for discussion. Mr. Berdahl, will you not say something on this subject of propaganda and international relations and possibly international law?

Professor CLARENCE A. BERDAHL. I think I am a little too modest. I would like to see someone else take the lead.

Chairman REEVES. Mr. Dunn, I will ask you if you will say something on this subject.

Professor FREDERICK S. DUNN. It seems to me that the subject is so broad that it should be discussed at length but I do not feel that I am in position to make any impromptu comments whatever.

Chairman REEVES. Mr. Corbett, would you care to make some comments?

Professor PERCY E. CORBETT. I think I can only repeat what Mr. Dunn has said. I found both of these papers very suggestive. But in one case I am taking away the written document which I intend to use very considerably. As to the other, I am not sure that I can express any thought in terms that can be understood. I need further reflection on the subject.

Professor CHARLES HODGES. Mr. Staley's paper interested me tremendously. I feel Mr. Staley raised a most important problem for us, which is augmented by the reception of Mr. Lasswell's paper, namely, that these things which ought to help us seem to strike us as so strange, or that we have such difficulties in expressing our ideas on this subject that instead of helping the more professional brethren—I refer to the international lawyers—it confuses them; and they would like to have at least twenty-four hours to gather precepts on the subject.

Professor FREDERIC W. GANZERT. Mr. Chairman, now that the ice has been broken, I will say this. As Professor Lasswell was talking about the late lamented proposal for reforming the Supreme Court, that is, lamented in some quarters, I was wondering just what the President's slogan might have been, and I began to think of a possible slogan, as for example: "check the Supreme Court" or "reform the Supreme Court," or "stop the Supreme Court." Yet it seemed to me that there were plenty of emotional appeals such as "Save the Constitution!" that the opposition had that it could take advantage of, no matter what kind of slogan the President should have. Perhaps Professor Lasswell can enlighten us on that a little further.

Professor LASSWELL. Would it be appropriate for me, perhaps, to make some comments later on in the discussion, or would it be more interesting to start now?

Chairman REEVES. Let's go on right now. There is no time like the present.

Professor LASSWELL. I would like to suggest that I used the illustration in question because I wanted to make a certain technical point. The technical point was that the President, in recommending changes in the Supreme Court, did not choose a single telling phrase which could pass readily from mouth to mouth in winning the support of the people. Just what phrase he might have chosen is a legitimate question.

I will call attention to one possibility: That the President might have been well advised to consider presenting himself as the champion of the Court. The words "Supreme Court" still, I believe, are treated with respect in the United States. He could have avoided the appearance of attacking the Supreme Court. He might have introduced a "Protect the Court" measure.

But my point is merely the technical one if the President had presented his measure as a "Protect the Court" measure. These words could have sprung quickly to the lips of the public.

The same tactics might have been used in connection with the reorganization bill. It is quite thinkable that the President might have arranged to have had Congress insist upon the modernization of the Executive in the interest of Congressional control and would have chosen phrases which would have exalted legislative control. Or, again, if he had anticipated the possibilities of attack he had several other alternatives such as presenting this measure not as a dull reorganization measure but as a means of protecting democracy. This is the sort of thing I mentioned.

Many of you here I know from past experience are experts in the choice of winning language. And I hope some of you will be moved to tell us what other alternatives you considered and rejected. That would be tremendously valuable.

Mr. PHILIP MARSHALL BROWN. I realize the value of symbols, but I am always a bit fearful of the use of symbols and words which mean one thing to one person and another thing to another person. Certainly we depend a great deal upon definitions. I was struck by the fact that Professor Lasswell seems to have given to propaganda a definition somewhat different from what perhaps many of us are accustomed to.

If I may be permitted a criticism, Professor Lasswell, it would seem to me that what you have been speaking about is more in the nature of publicity or strategy. It is a very common thing in political propaganda to invent good slogans as for example, "A full dinner pail," "Economic royalists," and like phrases deliberately chosen for the purpose of putting over a program.

Frankly, it would seem to me that propaganda as far as we international lawyers are concerned is of a different sort from what Professor Lasswell has described. International propaganda of the insidious effective kind, as I understand it, is for the purpose of influencing opinion without the public

knowing that they are being influenced. That is a very difficult matter for many of us who have been conscientious in our reading of current history.

May I illustrate? I have been tremendously impressed with what seems to me an adroit propaganda of an indirect kind by the Communists in the use of the word "democracy," in focusing attention on Fascism and making us rally around the grand and glorious idea of democracy. It does not seem to me that the object of the Communists is an overt act in this case. The object of the Communists in their tactics now, notably in Spain, is to divert attention from Communism and to get us all thinking "*There is the enemy, in Fascism.*" It is an indirect way of influencing public opinion. And the extraordinary result is that a lot of my friends have fallen for that sort of thing. They are shouting for Democracy and "Down with Fascism." All the time the Communists are laughing in joyful glee because apparently we are on their side. That would seem to me to be a marvelous bit of propaganda in the international sense, a tremendously clever psychology.

But to define propaganda as you have done, Professor Lasswell, seems to me to be rather in the nature of an analysis of publicity or strategy in publicity, which is another sort of thing. I will be very grateful if Professor Lasswell will explain further why he has defined propaganda in the way he did.

Chairman REEVES. I am sure Professor Lasswell will be very glad to do so.

Professor LASSWELL. Mr. Chairman and Professor Brown, the choice of definitions in this field at the present time is extraordinarily difficult. There are some specialists who have undertaken to define propaganda in such a way that all propaganda is "evil" or "concealed." This, I take it, would be the definition which would be more congenial to you. And I have no objection to anyone who decides to use the term "propaganda" in the sense in which you have defined it.

I have, however, used a more inclusive definition for several reasons. One of the important problems in connection with efforts to change attitudes is the conditions under which one's objectives may be most expeditiously achieved by publicity or secrecy. This is a technical issue which can be very profitably discussed. Quite often it is unwise for persons who want to promote a change of attitude to disclose early in the operation just what they want to do.

Your remarks give me an opportunity to comment that the definition of propaganda which will be serviceable for the legal analysis of propaganda may not be a definition of propaganda which will be serviceable for a naturalistic analysis of social relationships.

It is often advisable to split the terminology for legal and naturalistic meanings. All of us are painfully aware of the difficulties which are involved in the definition of sovereignty. Shall we talk about "legal" and "political" sovereignty, or shall we use "sovereignty" in a strictly juristic sense and

invoke another term to talk about naturalistic relationships ("power" "predominant influence")?

May I make one other comment concerning the mental associations with the word "propaganda." The term propaganda is used in a matter of fact and non-invidious sense on the continent. Persons in French and German public life may use the word propaganda to refer to what they are doing when they undertake to influence attitudes, without inventing any synonyms, like "education" or "enlightenment." In the United States the term propaganda, since the war, has had an invidious connotation. Before then when anybody talked about it they had it associated with the foreign missionary activities of the Roman Catholic Church. One of the reasons for my comprehensive definition of propaganda is to avoid using this term in an invidious sense. If I accepted the definition of veiled manipulation as propaganda many persons, I think, would jump very quickly to the conclusion that there was some moral judgment involved, that under no conditions should secrecy occur. Therefore, I have deliberately sought to use propaganda in a way which would not be invidious.

Professor EDWARD H. BUEHRIG. Mr. Chairman, I should like to ask Professor Lasswell a question. What is the relative importance, in your opinion, of symbols in a controversial situation, such as was that involving the Supreme Court, as over against rational and logical principles? Or, to put the question in other words, what is the relative importance of intellectual processes in the influencing of behavior?

Professor LASSWELL. I think this can be dealt with in a naturalistic spirit by laying down straightforward definitions of what one will mean by the intellectual process in contrast with some other process. You might say that persons who have exposed themselves to training in the acquisition of skill in the analysis of the relations in question are those who fall into the category of those whose decisions are rational.

From this point of view you would say that persons who express opinions about economic policies are expressing rational opinions, thanks to the fact that they have exposed themselves to training in skill in the analysis of economic problems.

You might say: "No. That definition is too restricted. We want to make it possible for some opinions to be called rational which are uttered by people who have no skill in analyzing the relations in question."

If you still want to use the term rational to refer to such opinions, then it is obviously necessary to use a more comprehensive definition of the criteria of rational choice.

You may say, "We will accept as rational the opinions which are uttered by persons who, though they do not necessarily have skill in the analysis of relationships, are persons who have spent a great deal of time carefully discussing with people who disagree with them or who are also in doubt."

There are many other definitions which are possible and which may be very useful for different purposes.

I would take it for granted that some situations would not be included as subject matter of propaganda study if the discussion proceeded in a technical fashion. Thus, if Mr. "A" presents to his colleagues in international law a certain series of words in which he leads up to the recommendation that such and such a neutrality policy should be recommended to the people of the United States, this act of talking to his colleagues in a situation in which the person adduces ifs, ands and buts in an accepted technical fashion would be excluded from propaganda.

However, I suggest the following qualification to what I have just said. It might be you had some evidence that persons talking technically before some professional associations—not international law associations—were persons who had some private, personal interest in championing the particular view, and if you wanted to add to the formal method of presentation certain data about their degree of detachment from personal interests you would include some speeches to other professional organizations as propaganda. The point which I desire to comment upon is this: It is more important to develop a *series* of relationships than it is to insist very sternly or strictly upon analyzing the world by the use of two words: rational, non-rational.

The important point for analysis is to develop ways of dealing with the complicated questions which are involved. And your question gives me the opportunity to say that I advocate whatever use of words increases the possibility that these distinctions will be more common.

Professor QUINCY WRIGHT. You point out there is no distinction between logic and propaganda. But, as I understood Mr. Lasswell, he distinguished between propaganda on the one hand and coercion and corruption on the other. If you give an individual a dollar for his vote, I suppose that would be corruption. But if you *promise* to give him a dollar if he votes your way, wouldn't that be propaganda? If you put an individual in prison, that is coercion; but if you *threaten* to put him into prison if he does not act the way you want him to act, isn't that propaganda? Mussolini persuaded the world that sanctions mean war. Is that coercion or propaganda?

I wonder whether Professor Lasswell could elaborate on the difference between propaganda, coercion and corruption.

Professor LASSWELL. Mr. Chairman, I am very much interested in indicating quite a large series of distinctions in this field. I do not want to intrude my own definitions too far here, because my general purpose was rather to call attention to some of the problems which are to be found in this field of investigation than to propose my own systematic formulations. However, I can give certain answers to the pertinent question which was just posed.

Let me say that in the literature devoted to methods of manipulating attitudes you will find one interesting category which is called the propa-

ganda of the deed. You discover that people talk about the propaganda of the deed when they are describing situations of the following kind: Situations in which the use of a symbol is closely associated with some overt act, such as coercion, and in which there is a striking disproportionality between the attitudes which it is expected to influence and the change in the environment by the supporting act. For example, assassination.

The theory of political assassination, as you know, as formulated by the leading experts in that field, is as follows: Assassination aids revolutionary movements when the act strikes terror into the hearts of the enemy. Experts distinguish killings which arouse only local terror from killings which arouse a great deal of terror in the community as a whole.

The second type of killing is propaganda of the deed, thanks to the disproportionality between the killing of one man and the size of the response.

There need be no confusion in classifying if one will include as propaganda the manipulations which occur in a situation in which the response expected is extremely large in proportion to the change in the environment which is involved in that which is manipulated. The critical term is "symbol." But I shall not attempt to define it in isolation from other important categories in social psychology.

These comments raise more supplementary questions than they dispose of. But they may indicate the way along which one can work out a systematic classification of environment as symbolic and non-symbolic, and so on through the list of terms that one would have to employ.

Professor G. B. NOBLE. I am interested in the implication of some of these discussions of democratic governments and the preservation of democracy. I am wondering, if we hope to preserve democracy, how we should approach it. Is it by analyzing and dissecting the propaganda? As Professor Brown suggests, democracy is attacked by the Communists. I am sure he will admit also that it is being attacked from the other side, and the question is whether we might rely upon the rational process for the promotion of democracy, or whether we have to invent other symbols to compete with them; in which case I am wondering if that is not the abandonment of the basic principles upon which, presumably, democracy rests. In other words, if we carry these arguments to their logical conclusion, can we assume the possibility of the continuation of democracy through rational processes? If so, what should be our method of attack to achieve it?

Chairman REEVES. Would you be willing again to contribute to this most trenchant question, Professor Lasswell?

Professor LASSWELL. At the risk of boring you to proverbial extinction, I will say that if you define democracy as I define democracy you will decide that one characteristic of democracy is relatively free opportunity for propaganda. As I understand the matter, democracy can be defined to include the competitive manipulation of symbols to influence public policy.

I believe that the analysis of the conditions under which democratic practices can increase or decrease will probably indicate that certain propagandas in defense of democracies are necessary to the preservation of democratic practices.

I suspect that the analysis of those conditions under which democracy occurs will suggest that it is less by the repetition of the word "democracy" that democracy will be safeguarded than by the deliberate use of propaganda to organize concerted acts which reduce crises of insecurity.

What you can accomplish by propaganda are the following: First, you can produce catharsis, by which I mean harmless discharges of sentiment, harmless in the sense that the fundamental features of the established order are untouched. To some extent democracy can defend itself by the use of propaganda for catharsis. But it is more important to develop propaganda which diminishes the objective causes of insecurity.

So I suspect one will be led here to consider the relative contribution which is made to insecurity crises by such practices as those to which Professor Staley made reference in the earlier discussion. We must consider the extent to which our present credit and currency routines precipitate recurring crises. We will then be in position to consider which propaganda devices will bring about whatever changes are indicated.

I think the study of propaganda will probably show that propaganda may not only lead to catharsis, but that propaganda may also intensify crises to a point where they can only be resolved by resort to violence. Any propaganda runs the great danger of adding just another confusing voice, thus increasing the probability that persons will become responsive to combinations of propaganda plus violence.

So my answer to your fundamental question would be this: I suspect that an analysis of the conditions under which democracy occurs will indicate that the fate of democracy depends upon the level of security. To some extent propaganda can diminish insecurities by catharsis. Types of propaganda which modify the practices which precipitate insecurity will contribute to the preservation of democracy. However, unless these propagandas are skillfully conducted in time, the probability is that they will contribute to the intensification of crises of insecurity to such a pitch that combinations of propaganda and violence will for the time being extinguish democracy.

Professor NOBLE. Is there not a close connection between propaganda and the inexactness of the social sciences; and isn't it true that in so far as social sciences have become more exact, to that extent we may emphasize facts rather than propaganda symbols and thereby reduce and perhaps ultimately eliminate propaganda?

Professor LASSWELL. If the experts agree among themselves that certain measures will in point of fact have certain results, then your propaganda problem is greatly simplified, because you and I as earnest persons will not find ourselves in a state of confusion when we consult experts. It is only to

that extent, I think, that the development of agreement among experts will contribute to our problem.

Professor KENNETH W. COLEGROVE. Before the session closes tonight, may I ask Professor Lasswell a question, to be answered in just one word? Do you always clearly distinguish between propaganda as an art and propaganda as a science?

Professor LASSWELL. I shall be delighted to give the answer in one word, if you know what it means to me. The answer is yes.

Chairman REEVES. I think the time has come when we must close the discussion. I think we should have some regard for the staying qualities of Professor Lasswell, which I think are very great.

Professor NOBLE. I think we should be allowed to have a few more words on that last question.

Chairman REEVES. Do you want to add a few words to that, Professor Lasswell?

Professor LASSWELL. Only if Professor Colegrove cares to make more specific what he has in mind.

Chairman REEVES. I am not sure we have the time for that. It is now half past ten; and I am rather inclined to say that I feel we are under great obligations to the speakers for their contributions here tonight. Certainly they have directed our thought into lines that have not been worn into deep grooves at earlier conferences of teachers of international law and related subjects. It is extremely interesting to me that this subject of propaganda should have gotten into a conference of this sort. And I think the reactions here tonight produced by Professor Lasswell's talk are themselves very enlightening; and I think we can say that we have profited by this discussion. It might perhaps be carried on at another time, particularly when Professor Colegrove has simplified his question and will permit a simplified answer other than a single yes or no. But I do not think we have time for that tonight. Unless there is objection, we will adjourn until tomorrow morning, when we will take up the subject of "International Law in the Curricula in Small Colleges."

(Whereupon, at 10:35 o'clock p.m., the conference adjourned until 10:00 o'clock a.m. of the following morning.)

THIRD SESSION

Thursday, April 28, 1938, at 10:00 o'clock a.m.

Presiding: Jesse S. Reeves, *Professor of American Institutions, University of Michigan*, Director of the Conference.

Chairman REEVES. The meeting will please come to order.

Glancing back in memory at the results of our previous conference recall that we have had discussions of college teaching, law school teaching, graduate teaching, and so on. I am very glad indeed that the program committee made a place in the program for and devoted an entire session to a subject in which I think all of us as teachers must be very much interested, whether we happen to be teaching in a large or a small college or whether we happen to be teaching professionally in a law school. This growing interest in and attention to international law in the smaller colleges in this country must excite our interest and arouse our imagination. For, after all, we must remember that international law was taught in small colleges in this country before it was taught in universities or in law schools. The law of nations was taught in the College of William and Mary before the Declaration of Independence. And when international law was introduced into the curriculum of Yale, Yale was a small college and not a great university. It found its place also during the first third of the nineteenth century in a number of American colleges. It was usually taught by the president of the college to a class of seniors, a course in international law integrated more or less with a course of ethics, flanked by a course in philosophy. And I am inclined to think that is a good place for international law. The support of the one hand of philosophy and on the other hand of ethics to my mind makes a very glorious academic trinity. And I am inclined to think that each needs the other two.

In these days the president of the college, ordinarily being out enlarging the endowment fund, has very little time for this type of instruction. There are some colleges that keep the older faith although open to the new truths.

This morning, according to the program, we are to have a series of papers on the "Curricula in Small Colleges." I have great pleasure in introducing one who has taught international law for a number of years before being called to the presidency of her college and who, I am glad to say, is so overburdened with executive and administrative duties that it was necessary for her to forsake the teaching of international law. It gives me great pleasure at this time to introduce President Bessie C. Randolph, of Holyoke College.

SOME GENERAL ASPECTS OF INTERNATIONAL
CURRICULA IN SMALL COLLEGES

BY BESSIE C. RANDOLPH

President, Hollins College

In all honesty I must say that I am not now teaching international relations but I am doing a good deal of damage in another portion of the field.

We have on our program this morning four papers, Dr. Reeves, and this little talk that I shall proceed to give is, frankly, an introduction to the other more important papers that are to follow. It is a brief discussion of some general aspects of international curricula in small colleges and will introduce a more detailed discussion by my three colleagues.

You will note in the program this morning that the field of curricula in small colleges is not divided up by international boundary lines. So if the four of us run into each other, you will see the reason.

THE CHANGED OUTLOOK SINCE APRIL, 1933

Since we last met in this very room five years ago this week the United States has become a very different place in which to teach international law and relations. This is true for several reasons which perplex and distress us.

One is the occurrence of several major international aggressions which have occurred in spite of all the international understanding and machinery of international adjustment and prevention which we hoped we had set up since 1918. A second reason is the notorious fact that democratic government itself, which we certainly had considered as accepted throughout the world, in principle at least, is now being shaken and its very ideology questioned. Moreover, we can not escape the glaring fact that there is a direct, organic, flesh and blood connection between the internal structure and political ideals of a nation and its whole attitude toward international law as a binding system, and towards international obligation—based as it must always be on the good faith and integrity of contracting nations. Since 1933 those of us who have had to deal constantly and anxiously with the proposed content and administration of courses in international affairs have come to think less about the principles and procedures of international law and relations and more and more of the attitudes, causes and basic roots of these relations—roots in human nature, and in the nature of the state; less of the detailed nature of those relations and more of the ways whereby in our own democratic republic and in others those relations may be preserved within and without from disastrous attack. This means that while technical professional schools remain invaluable as ever in their field, the liberal arts college (whether part of a university, or of a polytechnic college, or independent) must carry more vigorously than ever the responsibility of inspiring our citizens in the philosophy and idealism of international life as well as training them in its techniques. I think you know that a great many of the

little colleges of the country are neither independent nor parts of true universities; they are parts of polytechnic colleges—that is, a college consisting of a central college with one or two small schools of law or something else attached; but still they are not universities. For it may well be that, if we are not vigilant in supplying a right ideology, the training in technique will do us little good.

Unless the colleges do this work there are plenty of organizations and agencies quite ready to assume the task: some of them are already doing so in swift and sometimes in irresponsible, dangerous fashion. The movie, the radio, the press are doing a vast amount of international education which even if innocent is bound to be haphazard and inconclusive. Since the smaller colleges, say, those under 600 students, must continue to carry a very large proportion of the American undergraduate student body, training in international thinking and leadership must be centered in those colleges: we have to remember too the thousands of students registered in junior colleges, and in teachers colleges and other technical or semi-technical colleges where the line between professional and liberal arts courses is sometimes pretty dim. For a long time to come the country will have to depend on the smaller, liberal arts colleges to maintain and advance the standards of citizenship. By this we mean not only the duties of individuals to their own home government but the citizenship of our particular country in a world of nations, where the ultimate welfare of each must ultimately depend on an attitude of toleration, coöperation and mutual support in our relations with other powers on our planet.

ENROLLMENT IN LIBERAL ARTS COLLEGES

By far the greater number of so-called "private colleges" as distinct from so-called public or tax supported colleges (I refuse to give the latter group a monopoly of the adjective *public*) are liberal arts institutions. I might say here that private colleges are creatures of the State. They are chartered by the State and presumably are set up for a certain purpose which the State could not supply itself. So all of these colleges are public in that sense; hence any statements concerning these colleges apply automatically to a very large percentage of liberal arts colleges and those of smaller size.

At the annual meeting of the Association of American Colleges in January figures were presented which showed a decided decline in the enrollment of liberal arts college, *i.e.*, a slowing down of increase in all liberal arts units. A few years ago liberal arts enrollment in the United States was far higher than at present—about ninety per cent of all college population, and a high percentage of the enrollment was in small colleges. In the last ten years (1925-26 to 1935-36) freshman enrollment has fallen behind compared with that of other schools, especially schools of commerce, a result due in large measure to the depression.

The small liberal arts colleges have suffered considerably in finances and in student enrollment since 1929. Because the larger colleges, especially those state supported, can operate on lower fees, their overhead per capita being lower, there has been and is a marked tendency for students to flock to larger institutions.¹ Generally speaking, it is necessary for the small endowed college to justify itself by maintaining an intensive, distinctive type of work and intellectual environment. Smaller colleges should do their full share of educational experimentation.

Within this smaller liberal arts enrollment the social subjects have made enormous gains, much of this gain being, I grieve to say, at the expense of the humanities—languages, literature, philosophy and religion. Many students in this larger enrollment are devoting themselves to one extent or another to international courses.

Clearly then it is not enough for us as educators and teachers to multiply, broaden and enrich international courses as such in small liberal arts colleges, whether inside the department of political science or not. In other courses—languages, literature, science and mathematics, and the fine arts—the teaching of the international mind and attitude should go on. In many a smaller college too there are professional courses which, strictly speaking, belong in special schools—library science, teaching, journalism, etc.

CURRICULUM TRENDS SINCE 1933

1. *Function of the liberal arts college* is more clearly realized and defined than ever before. At four educational conferences since 1936 I have heard about six leading educators lay down and define the articles of faith in the liberal arts college, especially the smaller institutions. In these pronouncements liberal arts courses were carefully distinguished from the vocational or professional, and *correlation* and *overlapping* were kept separate also, that is, these descriptions, these platforms of faith for the simon pure liberal arts colleges.

2. *Curriculum building* in the international field is of capital importance and is so recognized by every earnest, progressive college today. For years the curricula of higher institutions were made by the faculty, subject matter specialists teaching and researching with apostolic zeal in their respective fields, *educated* men and women but not *educators*. To this system of curriculum making by faculties alone without much guidance from college officers, we owe a large part of the curricular sins, negligencies and ignorances of

¹ Then too the decreased enrollment in public elementary schools through the eighth grade must be watched. In the above decade this enrollment fell off about one million boys and girls, the most serious loss being in the first five grades. Even the Catholic schools feel the difference. This decrease is due to the exclusion of immigrants and to a declining birth rate. In a year or so this will affect high school enrollment and later that of the colleges, after about 1942. (For those and other statistics used in the paper, see Raymond Walter's "Statistics of Registration in American Colleges and Universities," *Schools and Society*, December 18, 1937.)

which we are notoriously guilty. Today curricula are more generally made or strongly guided by educators as such or by outside experts. In order to be an educator or curriculum architect now one must be a social scientist, able to discover if he can what real problems in the modern world must be met and solved by education.

3. *Integration and interrelation* of broad fields of international subject matter—political science, history, economics, psychology, etc.—are recognized and enforced in curricular offerings and administration. Most good colleges have now very little patience with the old, traditional system of sovereign or autonomous departments each sufficient unto itself and ready to wave the bloody shirt at all the other departments. (I once saw a department establish a pacific blockade against another department and you will be scandalized to learn that this blockade was promptly recognized by third powers—other departments unlucky enough to be housed on the same floor of the building!) Tributary courses—not *service* or *tool* courses—to a principal course in international relations are more clearly defined and adjusted than ever before. It is bad enough as it is, but there has been a very great improvement.

In each of the features just mentioned the small college possesses and is using a very great advantage. They have in many, probably a majority of cases, a clear vision of their function in a democratic world and have been busy with merciless self-castigation—and reform. Their curricula are guided by real leaders who are social scientists, earnest thinkers on international problems determined to make of their campuses grounds of future international citizenship. Thirdly, they are integrating, to a degree difficult to attain in larger institutions, those courses they do offer into a convincing whole. Any student in his personal curriculum can fit together into a rich and satisfying program all the international courses or parts of courses on the campus. Every extra-curricular event, lectures, round tables, international relations clubs, forums, field trips, etc., can—because of the daily common experience of faculty and students—be woven together into a seamless garment of knowledge.

I need not point out to you that these three important advantages at least, the small college has to offer in the daily curricula of international affairs if it lives up to its high privileges. The formal curriculum in classroom, library and laboratory is less ambitious in actual offerings than many larger institutions but the informal curriculum can be strong and good. In such colleges in spite of limited resources many an excellent job is being done today in the formation of international attitudes—the application of nobler human attributes to international obligation—without which the supremest knowledge of international facts and principles may go for naught.

Chairman REEVES. With your permission we will defer discussion until the conclusion of the final paper.

One wonders what is meant by the phrase "small college" when one knows the academic position of the next speaker. Its most distinguished alumnus many years ago said "it is a small college but there are those who love it," which might seem to imply that the lovers confine themselves to the smaller colleges. But the tradition of Dartmouth College, I suppose, is that of a small college or—let us eliminate the word "small" and say, the tradition of a college. The small and large, like everything else these days, especially under the influence of symbols, is relative.

Without pursuing that line further for fear we might resume the discussion of the second paper of the last meeting, I now have great pleasure in calling upon Professor Harold Tobin, Dartmouth College—a hundred years ago a small college but even then great, now both large and great. There are now those who love it; but today a college anything but small, and certainly with a body of alumni who love it just as warmly as Daniel Webster did more than a century ago.

Professor HAROLD J. TOBIN. I was very much relieved to have this preface given for me, as I felt a little bit like a boy of fourteen who is still wearing short pants.

You can see from the heading which I have given to this part of the discussion, "Teaching of international law in New England private colleges," I have gotten around this limitation of size which was put on me.

The statement is quite correct that, in spite of the fact Dartmouth has 2,300 students it is still in the college category inasmuch as there is practically no graduate work. I have therefore classed it with other colleges which differ essentially only in size, not in the extent of the courses that they can give; and otherwise resembling it very closely. On that basis I shall review the situation so far as international relations are concerned.

THE TEACHING OF INTERNATIONAL LAW IN NEW ENGLAND PRIVATE COLLEGES

By HAROLD J. TOBIN

Professor of Political Science, Dartmouth College

The discussion which follows is based on data collected from a group of privately endowed New England colleges which almost completely lack graduate departments. This group is located in a region where commercial relations with foreign states have always been a reality to deal with, and where questions involving a national frontier have periodically called for solution. Consciousness of international law as a living science has not surprisingly therefore been reflected in the curricula of these institutions, even though in many cases their student bodies are small. In each case it numbers less than 1,000, except for Dartmouth, which has 2,300 undergraduates. All of the institutions emphasize the broad general training commonly called a liberal arts education. None is located in a large city where impor-

tant public library facilities or graduate schools are located. All send a fair percentage of their students to higher institutions after graduation.

International law in these institutions is not on probation, but stands largely on its own feet, either as a separate course, as a distinct part of or an essential base for the broader topic of international relations, or actually replacing it as being more effective. Bowdoin gives a year's course called International Law, which is a very thorough case book course. In other institutions the emphasis on exclusively one year courses may mean combining international law with relations; such one year courses are given at Amherst, Williams and Wesleyan. The Amherst course does not divide the subject matter, but uses each to supplement the other. Williams devotes about four weeks exclusively to international law, while Wesleyan, which gives the course only in alternate years, uses international law as introductory material for relations, considering a knowledge of the rules essential before the game can be intelligently followed.

Prerequisites are commonly limited to a year's work in history or government, usually contemporary, though Bowdoin will accept ancient history as a substitute. Though restriction to upperclass registration is not universal, sophomore registrations are usually not common even where permitted.

International law or relations is fitted into a political science major or one which includes related courses from the fields of economics, sociology or history. Williams combines its course with European History, Government and Business (a study of economic planning here and abroad), and the Psychology and Philosophy of the State. Wesleyan by alternating its one-year International Relations course with that in Constitutional Law, permits a combination of the two which covers a much broader field than their titles indicate. Honors work, though generally given, is not necessarily confined to international law alone, sometimes combining thesis work, for example, with international relations. Williams, however, permits assignment of extensive research on legal problems alone.

A combination of text book and case book is favored, whether the course deals with law alone or in combination with relations. There is a wide diversity in both. Wilson's class cases are used at Williams to be written up as documented briefs. Hudson's shorter selection is useful. Briggs' book is welcomed as a combination of case material and discussion of topics not adequately covered by cases.

Dartmouth's larger size, 2,300 students compared with the less than 1,000 of each of the others, perhaps warrants the special treatment which I now propose to give it. Its library, approaching 500,000 volumes, has its full share of international law material. Yet it has neither graduate faculty nor courses. Its one-semester course in International Law attracts a registration annually of approximately 25 students, all upperclassmen except by special permission sometimes accorded to sophomores. The basic prerequisite is a one-year course in Modern Social Institutions, required of all freshmen. Most

of those who elect the course, however, are students majoring either in political science or in the so-called topical major of international relations. For either of these majors, basic courses in economics, political science and sociology, in addition to the course in social institutions, are required. Non-majors in these departments must take a second year course called Contemporary American Institutions. Next year's international law class will be the first test of the adequacy of this preparation, as the plan is only in its second year of operation. If it works it will greatly diminish the amount of historical review heretofore deemed necessary in the international law course. The tremendous area covered by these basic courses probably will not produce a thorough historical grounding in any one period however.

The political science major is similar to such majors elsewhere. The courses from which a choice can be made for the international relations topical major might, however, be of interest. They are culled from the four leading social science departments. The economics courses include International Trade, Money and Foreign Exchange, Economic History, Social Aspects of War, Economic Reform, Economic Geography, and International Economic Problems. In history the major student may choose from courses on China and Japan, European Diplomacy, Europe from 1500 to 1815, the World War, and Europe since 1920. Besides International Law the political science courses include European Governments, International Organization, and American Foreign Relations. In sociology there are the courses in National Patterns of Culture, Chinese Culture, Modern China, and Conflicts in Modern Civilization. During senior year major students are required in addition to take a broad, general course called Causes of War, which purports to pull together the elements of the courses mentioned above.

The content of the one-semester International Law course itself offers nothing notably different from that of the other colleges considered. Until the institution of the survey course requirement mentioned above it was considered necessary to devote at least two weeks to a survey of the Western state system, to even out at least partially the inequalities in the preparatory work in history of the students. Preliminary map quizzes also were necessary to test their knowledge of geography, often very scanty. In addition to the usual case and text book work each student is assigned a topic of current newspaper interest, such as current aspects of neutrality, blockade, and recognition of insurgency and belligerency, on which he must prepare a statement of heretofore accepted law and its applicability in the present case. These statements are given orally, by the question and answer method, the student being allowed ten minutes to develop his point.

This feature seems to have met with the general approval of the students, to judge from the anonymous questionnaires called for at the end of the course. A few protested that it was painful to listen to the extraction of information by the instructor when there was little to extract. Most con-

sidered it a happy alternative to more written work, and felt that it made more vivid both the events investigated and the law based on them. Some felt that it improved their power to judge the significance of current events.

This student survey brought out other items of interest. Text book work was almost universally disliked, explanations by the instructor (tempered to their existing knowledge) being preferred. Cases were better liked, especially if their historical background was given when they were assigned. Assignments of parts of treaty texts included in some case books was a constant cause of grief; it seems to serve its purpose only when used as an adjunct to research on a specific treaty problem. There is some complaint that the course is too short for even the usual survey of existing law, though it is not established that a much stronger objection might not be raised in the other direction if the course were lengthened to a year.

Student reasons for taking the course are not always reassuring or flattering, when given under cover of anonymity. Many felt the need of the law to supplement their work in the Diplomatic History of Europe or the United States, or in the course in International Organization or Comparative Government. Some take it frankly as part of the requirement for their major. The most damning negative reason was the following: "I did not approve of the professors of the other two optional courses, while Prof. Tobin was of (*sic*) unknown quantity so far as I was concerned". A few idealists look on it as an instrument to help bring about a better world organization or at least international coöperation. Some careerists want it as a step toward the foreign service. Of last year's group of 23 admitted to the foreign service, three were recent Dartmouth graduates, and this fact has stimulated undergraduate interest. Occasionally a prospective lawyer will take it, feeling that it is an interesting luxury course which he cannot afford in law school.

The views of the instructors do not correspond to those of the students. The latter seldom appear to discover its value as an intellectual discipline. Yet this discipline seems an increasingly important factor with the progressive disappearance of the classical languages and with the abhorrence felt by the average student of political science or history for mathematics, the exact sciences in general, or for any abstract ideas. Accuracy and sharpness of impression, the development of logical argument, clarity of oral or written expression, facility in the discovery and use of research material, are all developed by a properly planned course. It is this development of the tools which are useful in any field which has encouraged some institutions to use international law as a base on which to build their work in international relations.

What would be an ideal course in international law in such institutions as those discussed? The first essential would be students of adequate intelligence and background. The problem of the former is handled partly by entrance requirements. Ordinarily these institutions have more applica-

tions than can be accepted, and this permits some elimination of the unfit, though far from being complete. A solid background of European history and government and of American diplomatic history is indispensable for both students and instructors, and in the case of the former is much too rare. Case material should be simple, with the setting of the case in an accompanying note or explained by the instructor, who must constantly supplement the book with explanations of recent developments. It is difficult to plan the ideal text book. If brief enough for a simple one-semester course it is difficult for such books to present an accurate picture of the law. If they are complete enough to traverse adequately the limits of the law they are apt to leave a confused picture in the undergraduate mind. They can cover, more adequately than a case book, the philosophy of the law, but the short course has little room for its proper treatment. With a system of editor's notes such as those used in Briggs' *Law of Nations* the gaps left in case law can be filled without use of a text.

The ideal course should be useful as an instrument to sharpen men's understanding of world affairs, the outlines of which should be obtained elsewhere. For colleges faced with the need of giving a picture of our modern civilization in its proper background within a space of four years, therefore, there seem to be objections to devoting more than one semester to international law. Some institutions which organize their courses in one-year units omit international law from their titles in consequence, uniting the subject matter with relations instead.

Research facilities sufficient to permit teaching proper research methods need not be very extensive in the usual simple course, and the facilities of the institutions covered are quite adequate. For advanced work even on the small scale used in honors work, the ideal library would approach that of the great graduate schools. The equivalent of Martens' pre-war treaty series, plus the *League of Nations Treaty Series*, plus Miller's *United States series* would cover that field. Where complete series such as Martens or the *League series* are lacking, collections such as Hertslet's, MacMurray's, Malloy's and Hudson's are in most cases adequate. Moore's *International Arbitrations* and the Permanent Court of International Justice decisions and opinions should be available, as well as the *Carnegie Classics* and the *U. S. Foreign Relations*. A good historical and periodical library is indispensable. The few advanced students in an undergraduate institution can always secure the cooperation of their own library, however, to borrow what it does not own.

What is ideal training according to the college standard may not be from the point of view of the graduate school. There, complaint is sometimes registered that undergraduate teaching has been too dogmatic, leaving the student with a lack of elasticity of thought which handicaps him in the graduate school. Criticism has even been voiced against any undergraduate course at all, based on a belief that the time might better be spent on preparatory work in history, or even more basically on learning how to read

carefully, write intelligibly and think clearly. There is no ready answer here. It seems to be a general belief in each grade of educational institution that the one below our own in grade should confine its efforts to laying the groundwork for us to build on. If it were possible to give several courses, that is, one for those going to law school, one for those planning to teach, one for those who want the course as part of a liberal education, and one for those who want to avoid cram schools for the foreign service, we could lay a better groundwork; that is to say, if we could at the same time eliminate from college the student who wants merely to get through, and who clogs up such courses as are given. What the undergraduate course can do as preparation for the graduate student in any field, however, is to teach him logical thinking, how to use research material, and how to express the results of his work orally or on paper. He can learn to respect international law as a body of law, and as a guide for the behavior of states. He can learn the evolutionary process of its development, and the significance of enforcement of law in a legal system. For these services to the student neither the graduate school nor the world at large would refuse to the undergraduate institution its hearty thanks.

Chairman REEVES. Following this admirable survey of the teaching of international law in the New England colleges we now turn to the Middle West. And I have the pleasure of calling on Professor Ivan M. Stone, of Beloit College, Beloit, Wisconsin.

CURRICULA IN SMALL COLLEGES

BY IVAN M. STONE

Chairman, Department of Government, Beloit College

Mr. Chairman, if I may be permitted to do so, I want to deviate somewhat in the discussion of this topic from the suggestion offered to me by Professor Eagleton some weeks ago. When I received his letter asking me to take part in the discussion of this topic of curricula in small colleges, I asked myself two questions: First, what are the curricula problems; second, how shall I be able to uncover and examine them? I proceeded by two methods: first, by an examination of college catalogs, and second, by a series of letters to members of college faculties teaching in international relations. In this cursory and no doubt superficial survey are the offerings of 26 of what I consider representative liberal arts colleges, practically all of them in the Middle West.

I want to explain that there is no mystic reason or magic formula for the number 26. When I decided to stop I found I had contacted in one way or another 26 colleges. There might as well have been fifteen, thirty, or fifty.

I think all of us appreciate that in relying upon catalog statements we find they may be somewhat misleading because most attachés of liberal arts

colleges know that catalog statements are sometimes employed for what we may call advertising purposes. If I were to judge by the number of replies to the letters I sent out, there are no curricula problems in several of the liberal arts colleges, because about one half of the letters were unanswered. But that was no doubt to be expected because this was an attempted survey, and the thing I sent out was a modified questionnaire, which speaks for itself.

Obviously, the limitation of faculty personnel, library facilities and material resources all condition the curricula in small colleges as compared with the larger universities. That is not always the case, however. I can refer you to one catalog of a small liberal arts college in which one professor in the social sciences is listed for nine separate courses and another professor in the same college who is listed for ten!

As I have said, the survey was confined almost entirely to the Middle West, principally to colleges in Iowa, Illinois, Minnesota, and Wisconsin. I included two from Maine, one from Oregon and one from Florida, mostly for comparative purposes. I don't know that I should burden you by reading the list of colleges, but I will say there are four from Illinois, four from Wisconsin, two from Ohio, and others from Kansas, others from Indiana, and so on. I do not defend my selection of colleges. The selection was made on no formal basis. I was merely trying to include certain colleges representative of their sections; that is, representative of the Middle West section primarily. The results of this rather hurried and cursory survey are as follows:

Of the 26 institutions studied, 22 of which are in the Middle West, I may say that practically all of them are in the small college class. Only two of them are over one thousand, most of them are in the 500, 600 and 700 class, while a few are below the 500 enrollment class. Of these 26 colleges, twelve give courses in international law as such. Six of these colleges offer two-semester courses in international law while six offer a one-semester course. Two of the colleges give a course which is entitled "International Law and Relations." The most popular course of all is that of international relations,—sometimes called "World Politics." Fourteen of the 26 colleges give courses of this nature.

So, including these three—international law, international law and relations, and international relations as such—21 of the 26 colleges give courses in these fields.

Five of the institutions studied offer no courses at all in this field, although two of the five give courses in "American Diplomacy and Foreign Relations," which, naturally, includes related subject matter.

That leads me to say that in the colleges studied, eleven of the 26 institutions give courses in the particular field of American Diplomacy, American Foreign Relations, or American Foreign Policy. These courses are not always given in the political science or government department. Most of the colleges studied give some international work in the history department.

One college gives all of its international relations work in the history department. Another gives it in the economics department.

Following the courses mentioned, the course in Latin-American Relationships or Relationships between Latin-America and the United States is the most popular course. Four of the 26 institutions offer courses in this field.

Then there follows a long list of miscellaneous courses. I don't know whether I should bore you with reading them or not. Perhaps I should read you a few to give you an idea of the spread of the international relations field covered by these colleges. They are as follows: Nationalism and Imperialism; The Far East; The Near East; Problems of World Organization; Mediterranean Problems; Contemporary International Political Problems; Current World Problems; Contemporary History and International Relations; History of American World Relations; Culture and Current Problems of the Orient; Political Relationships of the Orient and the Occident; Liberalism, Socialism and Modern Dictatorships; Regional Geography; International Politics and Government; Survey of World Politics in the Twentieth Century; The Economic Factor in International Relations; The World Since the Great War; Government and International Relations; International Economic Relations; European State Systems; The British and Latin Empires and their Disintegration; Modern Russia; Modern Germany, and so on.

A number of the colleges find room in their curricula for only one course in the international law and relations field. One college makes a definite attempt to synthesize the best elements of all courses which might deal with international relations to give the students a bird's-eye view of the field. And the college contends that even if this treatment is superficial, it is better than to attempt to cover more thoroughly any one phase of the field.

All of the colleges studied offer helpful supplementary courses in history, such as The Modern World or Modern European History, courses in government, such as Comparative European Governments; courses in economics, such as International Economic Relations or Policies; Labor Problems, Money and Banking, and Public Finance.

With respect to the teaching personnel, some of the colleges studied have only one teacher giving the work in the international field; several of them have two, and a few of them have three. There is only one of those studied which has more than three, and that is Carleton.

I want to pause for just a moment to explain briefly what Carleton does, because this institution offers courses far more extensive than other colleges in that area. The reason, as you may all know, was the substantial gift last year by the late Frank Billings Kellogg, establishing a Department of International Relations. It is the only college in the area that maintains a separate Department of International Relations. I might read from the statement of purpose of this special department, it being in part as follows:

"... to give opportunity to students to familiarize themselves with the formative forces and tendencies in world politics today . . . by the study of organizations which may serve to further the development of an ordered and stable world; by the critical examination of those formative ideas which determine political and social movements in the . . . world."

These courses are especially intended to study the causes of wars, the possible remedies therefor, and to aid in the establishment of a more equitable and stable world order.

The paramount practical aim of this department founded on the Kellogg Foundation is to further the ideals of the Pact of Paris.

The department at Carleton gives special attention to students who propose to continue the study of international relations in graduate schools or in foreign countries. It is also aimed to attract students anticipating going into the fields of diplomacy, the consular service, journalism, and teaching.

In this Department of International Relations which, I might say again, is in addition to the Department of History and Political Science, Carleton offers no less than eight courses. Five additional courses in the international relations field are offered in the Department of History and Political Science. Such courses as the following are given in the Department of International Relations: (1) Survey of World Politics in the Twentieth Century; (2) Liberalism, Socialism, and Modern Dictatorships; (3) Contemporary Political Problems; (4) Political Relationships of the Orient and the Occident; (5) The Cultures and Current Problems of the Orient; (6) Problems of World Organization; (7) Mediterranean Problems; (8) The Economic Factor in International Relations.

Another thing we find is that, in many if not in most of these colleges, all of the courses in international law and relations are not given in any one year. It is common to alternate the courses year after year; so that in one year perhaps international law is given and in the next year international relations, and so on.

With respect to prerequisites, international law is usually confined to students in the junior and senior years, with such prerequisites as American Government, European History, World Politics, International Relations, six hours of college history, or by permission of the instructor.

If one registers for the course in international relations, the requirements are not quite so stringent. One institution, in fact, gives a freshman course in international relations. It is the only one I know of which does that.

I think I see in these colleges a certain tendency to emphasize the current and the contemporary with a slight trend away from the more purely historical treatment. There is a decided trend away from the old major, or major and minor, arrangement. Instead, a number of colleges are now developing or have developed a field of concentration—colleges like Grinnell, Knox,

Lawrence, Beloit, Monmouth, Washburn, Wabash and Kenyon, to mention some. This field of concentration may be only a different way of doing much the same thing that has been done under the old major or major and minor arrangement.

The field of concentration in most colleges operates something like this: Approximately twenty to twenty-four hours in the field of government. This may be in international relations or it may be in some other phase of government. Then approximately twelve to eighteen hours of supplementary courses closely related to the field of major interest; and these courses are especially to be chosen from history and economics. The field of concentration is chosen normally at the end of the sophomore, or at the beginning of the junior year. In most cases the student's course is climaxed by a comprehensive examination, which may be either oral or written, or both.

A number of institutions couple the field of concentration arrangement with honors work. Schools like Lawrence, Reed and Beloit are doing this. Some of the others include a special curriculum of honors or work in the honors field, the idea being, of course, to give more discretion to the student and more reliance for guidance upon the department head, and less reliance upon hard and fast catalog requirements.

One or two schools are experimenting with seminars. I find, too, that most of the colleges contacted get valuable aid in maintaining interest in the international relations curriculum from the international relations clubs sponsored by the Carnegie Endowment. Other colleges bring in outside speakers for one or two or three weeks or several months, and sometimes throw these lectures open to the public.

That leads me to another point. Two or three colleges are doing work in adult education and rendering a community service by bringing in an outside lecturer, let us say, and giving the course for credit to the students in the college and, at the same time, making the lectures public for those in the community.

In conclusion, if I may make two or three remarks, I think it is rather obvious from this cursory survey that a few colleges might rather well re-think their curricula in the international law and relations field. I think we need, as has already been pointed out by the other speakers, a greater integration of courses in the international field and the development of a more critical attitude concerning international problems, in order to help students resist being captured by obviously sentimental or radical slogans.

I think an opportunity might be given to the better students in international law and relations to progress more or less independently. I think we might give a somewhat greater emphasis to the important supplementary courses in other departments, especially economics, history, sociology, psychology, philosophy and geography.

It might be possible for two departments, let us say economics and government or history and government, to give courses carrying credit in the

two departments. At the same time, we ought to do everything we can to make it easy for students to cross departmental lines. We might even have courses with instructors sitting jointly or concurrently. There could be correlating seminars in international relations, made up of faculty members of various departments, for advanced and particularly for honors students. Such experiments might well prove stimulating not only for the students but also for the faculty members involved.

The idea of exchange professorships occurs to me also. And I mean exchange in this country, because it is obvious in the small college field that foreign exchange is pretty much out of question. Again, such a thing might be helpful both to students and to the teachers, because we all need to see new faces and make new contacts, and perhaps occasionally the students deserve a rest!

Liberal arts colleges are not dominated by the idea of specialized scholarship to the same extent as the larger universities. They exist, it seems to me, not to give technical training but to furnish sufficient background, sound mental processes, adequate methods of examination, and substantial preliminary preparation. I think we may remember that not always is the important thing the *number* of students interested but it is the *thoroughness* of those interested that counts.

May I conclude by quoting from one of the best loved and most highly respected liberal arts teachers in the Middle West. This gentleman says:

A course in international relations, rightly treated, is in my mind one of the most important problems for a liberal arts college. I agree entirely with Norman Angell that it is perfectly useless to fill the heads of the students with statistical figures and data of diplomatic history if they do not know the nature of those fundamental currents of opinion and sentiment (probably called ideologies) which determine the present system of power politics. A critical analysis therefore of nationalism, race-ism, imperialism, socialism, communism, and fascism is absolutely indispensable for the understanding of the present international situation. The childish naïve peace ideology of the last two decades, which brought us every year nearer to the catastrophe, was not to a small extent the result of the memorizing of incoherent data, the overstatement of jural formalities, and the sentimental admiration of the League of Nations. Without a solid theory of peace and international conflict the future citizens will be as much bewildered by the international reality as are the present ones.

Concerning the organization of the courses in question in the curriculum of the liberal arts college compared with that of the large universities, I would say that the colleges cannot compete with the universities in specialization, but they may give as good a background and as serious endeavor towards a coherent and adequately synthesized point of view of international relations. What Professor Schuman tried to do in his *International Politics* is not beyond the scope and possibilities of a good college in which teachers are not memorizing textbooks but are interpreting facts in the spirit of a broader philosophy. Combining a sound theory with a few really significant facts will make

the student more internationally minded than hundreds of data about international trade or colonial history.

Chairman REEVES. We turn now to the Southwest and hear from Professor Montell Ogdon, of Texas Technological College.

Professor MONTELL E. OGDON. Mr. Chairman, ladies and gentlemen: Although I was prepared to give this paper last night I am glad I did not give it under the conditions. This morning I spent some time in the very select library of the Brookings Institution revising the paper and trying to put it into language which we could understand.

Although I come from an institution called a technological college, the institution is not primarily a technological school, because it has a liberal arts division of more than a thousand students. It is not exactly a small institution, either, because we have registered this year more than 3,400 students.

Please pardon a slight subjective approach to this subject because I am primarily interested in international law. I developed a love for international law as an undergraduate student in 1924 when I took my first course in the subject with Professor Garner.

If anyone should wonder why we teach international law and related subjects in a so-called technological college, it might be easier for him to understand if he would consider the subject matter as social engineering.

PURPOSE AND METHOD OF TEACHING INTERNATIONAL LAW IN THE SMALLER COLLEGE

BY MONTELL E. OGDON

Professor of Government, Texas Technological College

Do the present and probable future conditions, namely, the aptitude of the student, the library facilities, and the need, justify our teaching international law and related subjects in colleges and universities other than the large institutions? If so, what should be our objective? By what technique may we seek to attain that objective? And what results may we hope to achieve?

There is observable in the first place a rather deep interest among undergraduate students in international relations, and there is a belief that the problems of foreign affairs necessitate earnest study. Not all students are convinced that they themselves should do that studying, but it is significant that they are interested and do express an appreciation of the importance of the subject. Secondly, students of today are becoming increasingly socially-minded. Thirdly, at least in the school in which I teach, I feel it is safe to say that well over half of the students of international law continue their studies either in a recognized graduate school or law school. In a sense the undergraduate college bears the same relationship to the large university which the minor league bears to the major league in baseball. The raw mate-

rial in law school or graduate school comes in a large part from the inland undergraduate college. Our objective must take these facts into consideration.

Definitely one objective is to prepare the student for advanced work. In the words of the head of my Department of Government another one of our objectives in teaching international law and international relations "is to encourage the development of a sound and intelligent public opinion which is believed to be essential to democratic government." I might add here that I adhere to the view of Professor John Dewey that a clear public opinion necessitates a statement of the problems in a language which the public may understand.

As early as their first year course in American government college students may be familiarized with the fact that the welfare of one section of this country is dependent upon events and conditions in other countries. In addition to American government it is believed that potential students of international law and related subjects will need from six to twelve semester hours of additional orientation work in their second or third year of college. This is of great importance, perhaps no less important than the study of international law or the related subjects.

The student needs to learn, before he undertakes to study international law, as much as possible about the social problems of man and the agencies which have been devised for their solution.

The method by which we attempt to meet this need is by offering a three-semester-hour course in the introduction to political science, open to sophomores who have had American government. Here they learn that man is a social being, a member of a community who must find solution to certain major problems through political organization. Law is one of the instruments for regulating social relations. Its functions change with the needs and capacities of man. Both the law and the political organizations of man may vary according to the type of civilization, the amount of social intercourse, the nature and complexity of the economic problems, the degree of industrialization, the natural hazards and resources, the political capacity of the people, or the gravity of foreign relations.

The same basic problems confront groups nationally and internationally. These arise, for example, out of geography, race and population, psychology, religion, culture, historical background, economics and governmental organization. Coöperation in the international sphere, even at the sacrifice of some individualism, may be as necessary in order to enjoy security, as in the local sphere. International coöperation, like coöperation among individuals, may be less costly than insistence upon one's own liberty regardless of the common welfare. The rather iconoclastic sophomore student demonstrates a capacity for realistic approach to a subject. He demonstrates a capacity for tearing down the fiction that the state's principal characteristic is a supreme, uncontrollable, indivisible, unlimited authority termed "sovereignty." When given an opportunity he can see that jurisdictional

authority—this thing sometimes called “internal sovereignty”—is in the last resort based on the acquiescence of the people and is subject to moral, functional, self-imposed and international limitations. Try asking a sophomore class what would happen if an irresistible force were to strike an immovable mass. Most of them agree with the Archbishop of York that if such a thing were possible the result would be, in one brief word, “Hell.” Here the teacher may also observe that neither the rules of logic nor the laws of physics recognize the existence of two powers each of which is superior to the other.

A succeeding course in comparative or European government gives an opportunity to illustrate the principles studied in the introduction to political science and to acquaint the student with the relation between basic factors on the one hand, such as geography, and political organization on the other hand.

Introduction to the study of law, which can hardly be offered before the third year, is a course in the elements of jurisprudence which serves to give the essential introduction to international law. First of all, it is a liberal arts and social science course in the fundamentals of jurisprudence and not a course in substantive or adjective law. It is designed for majors who are interested in the study of law as an agency of social control and for pre-law students in the hope that they will do four years of preparatory work prior to the entry to law school and will undertake their study in schools of the highest grade. It is believed that such a course discourages the superficial study of law for the purpose of passing the bar and encourages its study as a social institution. The syllabus of the course covers the following: (1) definition of legal terms; (2) the nature of law; (3) sources of law; (4) modes of legal growth; (5) courts and the judicial function; (6) the judicial process; (7) legal concepts; (8) divisions of law; (9) current legal problems; and (10) recent trends in jurisprudence.

The possible value of a course in jurisprudence prior to the study of international law may be gathered from the importance of defining the word law. Is law the command of a “sovereign”? Or rather is it a set of rules indicating a direction of action made and enforced by society itself with regard to the exercise of *both* rights and duties? If defined in the latter sense, law thus still contains the essence of a rule of conduct—not an unchangeable rule—but a rule which has purpose and which gives society the credit of having the ability to go forward. International law is not then an impossibility, and while its growth may be slow it is sure.

Now we come to the technique of teaching the courses properly in the field of international law and related subjects. Comprehensive courses in each subject within the field need not be offered every year, but may be “staggered” with each other very effectively. There is room for the following curriculum in a three or four man department of political science: political geography, 3 semester hours; world politics, 3 semester hours; American

foreign relations, 6 semester hours; international law, 6 semester hours. The value of political geography lies in the fact that it creates an understanding of the problems of other peoples. The course may be developed effectively in accord with the idea that there is a community of interests which may serve as the basis of international coöperation. The course can hardly be limited to a text book, but demands source material on physical and human geography including raw materials, trade and population, similar to the bibliography presented last evening by Mr. Staley. The course provides the basis for the second semester which is a study of world politics. The latter course is a study of the mechanics of international relations in relation to the basic factors. It is primarily a study of the correlation of geographic factors and political institutions. The unifying and centralizing forces are studied for example with illustrations of the form in which the forces exhibit themselves. Thus the approach to the question of the unification of Germany and Austria may be handled by the teacher scientifically without arousing prejudice. At the same time the student observes that the conflicting interests of states are usually not reconciled to the best interest of the people involved by the use of force. American diplomacy as a political science subject is better studied topically than historically. Source materials include Malloy's *Treaties*, Miller's *Treaties*, United States *Foreign Relations* and other official publications of the Department of State.

In teaching international law there is no place, in my opinion, for the teacher who bases his course upon a doctrine of isolation, absolute sovereignty of states or a static law. To me international law is an organic law which cannot be reformed unless we know what it is. It is in a formative state and must be allowed to grow. I expressed some of my views on the rôle of international law before the Institute of Public Affairs held at Dallas last year under the auspices of the Carnegie Endowment for International Peace.¹ The following paragraphs state the theme of how and why I think that international law should be taught in the smaller colleges:

The international community orders itself from day to day in accordance with usage and convention. Usage is difficult to change. Customary rules are painfully slow to evolve—too slow during a period of rapid development in other walks of society. I rather think that we have not paid enough attention to the processes of legal growth in the field of world affairs. We must study the processes by which international customary law has grown and we must learn the technique of stimulating it—furthermore, of molding the law to meet the needs of the international community. These things we may do by seeking out the evidences of custom (and I might add purpose) resulting from the more enlightened practices of foreign offices. We can use such enlightened acts as precedents for building and speeding up the growth of the law.

Law comes into existence and should continue to exist because it fulfills a need. It could not come into existence without purpose.

¹ Proceedings, 1937, pp. 15-26.

When it loses its purpose it may pass into desuetude. Our customary law fails to keep abreast of the times because we forget its purpose, and presume to follow it simply because it is law.

As the purpose of society changes and is expressed through the action of foreign offices, the judges will find that they are no longer bound by obsolete rules to which writers have long been paying lip service. When social conditions change, law ceases to be a stabilizing influence if it still tries to maintain the *status quo*. The law must afford redress for injuries to the reasonable interests of states. Until it does so, states will seek redress by unilateral action instead of through the permanent agencies created for the adjustment of disputes.

The problem of choosing a text book, a case book, or both, for undergraduate students is one which is still with us. The single factor of finding the right combination of teaching implements may as much as anything else prevent the offering of a course in international law in the smaller college. One must take the fact into account that the undergraduate may develop an anathema for a course if he is required to buy two voluminous books, and something barely short of real horror may be contracted if he is expected to learn what is in both volumes.

The course may become more valuable and at the same time more attractive if the assignments are given in diverse sources. I find that the student may be required to have a brief text which covers the essentials and gives continuity to the course. Any of the smaller text books will serve this purpose. Other standard texts must be placed in the library. Briery's *Law of Nations* (1936), and George Grafton Wilson's *Handbook of International Law* (1927) make an effective complement of text materials. I personally use Wilson's *Handbook* for the required text book because it is clear, concise and confined to the discussion of international law. The student from the beginning feels that, while international law may have its shortcomings, it is after all real law and the United States has helped to develop it. Where rather exhaustive treatment is desired I give collateral reading assignments in such standard treatises as Hall, Hyde, Oppenheim and Westlake. I sometimes give optional readings in Fauchille or Bluntschli, either of which is rather easy for the student who knows only a little French.

All other things being equal I believe that cases should be selected on the basis of their contribution to the growth of the law, and their illustration of the purpose of the law. I have relied largely upon Dickinson's *Cases and Other Readings on the Law of Nations*. Other necessary collections of cases for the reserve shelf, each of which is meritorious, are Cobbett, Evans, Fenwick, Hudson, and Scott and Jaeger. *The British Yearbook of International Law* and the *American Journal of International Law* are also essential.

The above requirements are undoubtedly within the financial limits of even the smaller colleges. Other source materials which can be acquired at moderate cost, if not already possessed, are the publications of the Department of State and the Carnegie Endowment for International Peace. Spe-

cific examples of rich sources which we have found within our reach and which make the teaching of international law more effective are the following: Moore's *Digest and International Adjudications*, Hudson's *International Legislation*, Miller's *Treaties and Other International Acts of the United States*, two volumes of McNair and Lauterpacht, *Annual Digest of Public International Law Cases*, the *Draft Codes and Comments* of the Harvard Research in International Law, and both the judgments and advisory opinions of the Permanent Court of International Justice.

While the newer case books approach more and more the needs of the academic course it is not believed that there is yet within the covers of a single book a sufficiently clear exposition of the purpose which exists within the law, or the necessary historical background of facts or statements of the sequences of events which would justify an attempt to teach international law with the aid of the case book alone. In the words of Judge Moore, "Judicial judgments, in order to be intelligible and of constructive value must be read in the light of the circumstances which gave rise to them."

I thus conclude the formal part of my paper, without having evaluated the results of this attempt to give the student an introduction to the bases of international law and related subjects. A pedagogue can hardly be expected to render an impartial judgment of his own case—but statistics will bear out, I think, the statement of one of our graduates, now a student at Georgetown University Law School, that the student who takes these courses in international law and international relations acquires a breadth of horizon and ambition which encourages him to continue his studies in the hope that he may some time play an active part in molding the law. Our students in international law and related subjects have been for the most part a select and promising group—they have gone on to other and larger schools. Two of them have gone to the University of California at Berkeley, one to Chicago, two to Colorado, one to the University of Geneva, four to Georgetown, two to George Washington, two to Harvard, one to Michigan, one to Louisiana State University, one to Oxford University, two to Yale, and several go annually to the University of Texas. Many of them become the ranking students in the schools to which they go. The ones who teach in secondary schools exercise a rôle in the clarification of public opinion in their communities. Several hold influential positions in the Government. A few who study law seem to revert back to what might be called the Hegelian concept of a lawyer in a state of nature. None are among the ranks of the unemployed—neither are they agitators in the popular sense of the term—but the large majority of them retain their liberal social objectives, a realization of the necessity of encouraging the natural processes of growth and above all a cheerful optimism. To paraphrase the famous statement of Tourtoulon, quoted by Morris R. Cohen in his *Law and the Social Order*, why starve and throw to the lions all those who do not have an opportunity to feed at the altars of the gods?

Chairman REEVES. It is a matter of great satisfaction that the papers this morning closed with an optimistic note. A still further optimistic note will be presented by Mr. George A. Finch, who has some announcements to make. Announcements should always be optimistic.

But pending Mr. Finch's arrival, let us go forward with the discussion of these papers.

Professor CLYDE EAGLETON. Mr. Chairman, I should like to introduce a motion. I am not going to propose it at this moment for fear of playing politics, but I want to put it before you now so that it will help the discussion which will come later.

I hope you will reserve time, if you please, sir, for this—a motion that *this conference request the Carnegie Endowment to conduct an investigation and study of the curricula of small colleges and that the Director be authorized to appoint a committee to supervise the work done.*

I have reason to believe, sir, that the Carnegie Endowment will undertake that work. And I hope that the discussion that comes from these papers will be available for the use of the committee when it comes to read over the proceedings, providing the motion passes, which I hope it will.

Chairman REEVES. If Professor Eagleton will present his motion in writing we will have it presented before the close of the session.

Mr. Finch, we are now ready to hear from you.

Mr. GEORGE A. FINCH. Mr. Chairman, I wish merely to repeat some of the announcements that I made at the opening session yesterday for the benefit of some of the members who may not have been able to be present at that time.

The two visits this afternoon are visits to the National Archives and to the State Department, and they will be in charge of Professor Briggs. If Professor Briggs is here, he might stand up.

Professor HERBERT W. BRIGGS. Mr. Finch, may I say that it will facilitate matters immensely if I could be informed as to where the National Archives Building is.

Mr. FINCH. It is at 7th Street and Pennsylvania Avenue.

Professor BRIGGS. In view of the fact that a number of people are not present this morning, it might be a good idea to leave the address at the desk.

Mr. FINCH. It will be left at the desk. The building is on Pennsylvania Avenue between 7th and 9th Streets. It is a very large building.

The members who wish to go to the National Archives—and this is a fine opportunity to go there—are to meet at the National Archives Building at 2:15. It will take fifteen minutes to get there from here. If Mr. Briggs will make himself and his group known at the Pennsylvania Avenue entrance, there will be guides there to show you around. I hope as many as possible will make that visit, because I have arranged it personally with Mr. Connor, the National Archivist. I think all of you will find things of interest there.

The National Archives has recently taken over large quantities of materials from the other Departments, including the Department of State. So later on when you go back to your colleges, if you want to make inquiries about material that is some years old, you will probably have to conduct correspondence with the National Archivist as well as the State Department, and it will be well to get acquainted with the officials in charge and see just what they have.

From the National Archives you will go to the State Department. Those who do not wish to go to the National Archives may go direct to the State Department. But be there at 3:30 in the office of Dr. Wynne, Director of the Division of Research and Publication, at Room 392. The State Department is but a half block from where we are now. It is immediately across Pennsylvania Avenue from the office of the Endowment.

In addition to being shown the Great Seal of the United States, which is kept under very close custody, and other things and places of interest in the Department, it has been arranged that Assistant Secretary of State Sayre and Assistant Secretary of State Messersmith, and Counselor Moore will receive the group for a very few minutes, and you will have the opportunity when you go back home to say that you have had the pleasure of shaking hands with these important officials in Washington.

The program also contains a statement that the Endowment is tendering a luncheon to the members of this conference tomorrow at the Carlton Hotel at 12:30 o'clock. We have asked those who wish to go to this luncheon to make their wishes known at the registration desk and to obtain a ticket for identification.

The opening session of the thirty-second annual meeting of the American Society of International Law takes place at 8:15 this evening in the Carlton Hotel. All of the members of the Society have received advance notice of that and know about it. I wish to take this occasion to remind the members of this conference who may not be members of the Society that they are expected to attend all of the sessions of the Society. The first session will be held in the Carlton Hotel at 8:15 tonight, followed by sessions tomorrow morning, tomorrow afternoon, tomorrow night and Saturday morning. Those who are members of this conference and who wish to attend those meetings are very welcome to be present.

Chairman REEVES. Now, Mr. Eagleton, have you a motion to present before we proceed with the discussion or would you rather wait until after the discussion?

Professor EAGLETON. My idea was to have the discussion first.

Chairman REEVES: Very well, then. Mr. Fenwick?

Professor CHARLES G. FENWICK. Mr. Chairman, I am very much pleased that the Program Committee included the topic of this morning's meeting. It cheers me, as it cheered Professor Ogdon. I, too, am an optimist, except when I meet certain colleagues from the larger institutions!

I am pleased with the program because it shows that our smaller colleges are doing the great constructive work of trying to develop an international law that will be worthy of the name. Too long the professional schools have concentrated upon the technique of the law, upon the cases, if you please, which give practical application to the minor rules that are relatively inconsequential in the great development of the law.

Surely our country and the world are faced today with the great issue of reconstructing international law. Here we come together, teachers from all over the country, and we should be asking ourselves the question that President Randolph raised in her opening address—What can we do to make international law a law that will be really worthy of the name?

Our older text books gave no attention to that whatever. Turn the pages of Hall, Westlake and Oppenheim and you get absolutely no critical discussion of the defects of international law. There is an assumption that international law is law; and they let it go at that.

The international law of 1914, such as great text book writers gave us, offered us nothing to prevent the catastrophe of the World War; and, unhappily, it has looked of recent years as if we were turning back to that old attitude toward the law, which can give us no help for the avoidance of another similar catastrophe.

From the smaller colleges, then, seems to come the critical attitude toward the law, the study of jurisprudence which will guide us in seeing what defects there are in the existing system. How can we talk about international law in any strict sense when the law is inadequate to protect the rights of the members? In what sense are we using the term "international law" today when the community of nations is witnessing the gravest violations of the law, and little or nothing is done about it, and the greatest of the powers, where international law is most widely studied, stands aside and for all practical purposes is indifferent to the violations of the law?

I am greatly cheered, then, to know that in the smaller colleges this critical constructive work is being done. We are studying international organization, which is an essential part of international law; we are studying how the present defective law should be made a really efficient law, a law that will keep the peace of the community and promote justice.

That is our function. And it is encouraging to find that from the smaller colleges is coming this leadership in the analysis of the great problems upon the solution of which depends the development of true law tomorrow.

Professor T. V. KALLIARVI. Mr. Chairman, I wish to second Mr. Fenwick's remarks and to raise one question. I wonder if President Randolph would care to discuss the question of what can be said for including courses in international law and international relations in the curricula of small colleges.

President RANDOLPH. Mr. Chairman, I believe that at the American Society of International Law and in this conference that subject has been quite frequently—and I think in the main—very well discussed. As I un-

derstand the question asked by our colleague from the University of New Hampshire, it is: "What justification is there for teaching international law and relations in small colleges?" Is that right?

Professor KALLJARVI. Yes; that is right.

President RANDOLPH. I imagine that perhaps in the mind of the speaker there is some doubt of the wisdom of the small college, in the sense in which it has been defined this morning, teaching international law. I imagine he is speaking about the problem of teaching international law rather than international relations. I think his point is well taken. And I think the small colleges ought to have a reason for the faith that is in them for the teaching of international law.

I believe, Mr. Chairman, that in the small or large college there is no place for the teaching of a purely legalistic or, in some cases, a semi-professional course in international law. I do not think that adjective law on procedure has a place in the course. I think substantive law has. This comes from a good many years of teaching experience in international law and relations and in history and in trying to get something in the way of a good curriculum. In a number of small colleges, where the population is small, I do not see how you can teach an effective course in international relations without doing something in a broad general way in the teaching of international law.

One object of teaching international law in a liberal arts college is to get into the heads and into the hearts and into the backbone of your future students a sense of international obligation. I think the course in international relations which does not contain a modicum, a sensible, well-balanced modicum of international law is almost emasculated. The small colleges make a great mistake (and some of them are making that mistake right now) in trying to put in ambitious courses of international law into international relations. I think the smaller institution is making a mistake in going into many, many details of international intercourse and international law. I think it is a mistake not to include in the course in international relations some of the outline principles of international law by which modern states are supposed to be governed in their relations with each other. For instance, the hot question now everywhere is what to do with American neutrality. Are we going to be neutral for many years to come or are we going to do something else in the system of collective security?

Taking that as an example, I do not see how students can be properly trained in respect of what neutrality is as a matter of American foreign policy without knowing much about the international law of neutrality.

I believe, Mr. Chairman, that the inclusion of a sensible amount, but not too much in the way of details, of international law should be included in every course in international relations. I think it ought to be included even in the courses of junior colleges. And, mind you, we have three or four hundred junior colleges all teaching international relations. In the second year

of the junior college, to say nothing of the liberal arts colleges or universities, we should have a reasonable amount of international law.

President WILLIAM C. DENNIS. Mr. Chairman, I want to endorse every word that has just been said. I do verily believe that every course of international relations must include some teaching of international law. Furthermore, I want to submit, by way of emphasis, that the teaching of international law in the college ought to include at the same time the teaching of international relations. I appreciate the force of the suggestion that you ought to know the rules of the game before you commence to play. Theoretically, yes. Theoretically it would be very desirable for everybody to have a thorough course in international law as an introduction to the study of international relations. But we all know that the question of education, the question of teaching, is simply the question of arousing the interest of the students. I know of no way of arousing the interest of the student in international law so effectively as letting him use his knowledge on the daily paper as it comes in.

Of course, that breaks up to some extent the continuity of the course. You have to determine as a matter of judgment just how much of that will be permitted. But when the question of the absorption of Austria by Germany came up, I submit in the ordinary college course it was time to stop and think about the problems of state succession. And the added interest which will come to the student by going to the daily newspaper will make up for any break in the continuity of the course.

Again, as has been said, the smaller college has the needed facilities for this work. It does not take very many books on international law and international relations. We have a great library right at the door in the daily newspaper. It seems to me that to try to teach international law in the college course without making use of that source from time to time is a very great mistake.

Now, as to the matter of text books and case books, I quite agree that in all probability until each one of us has written a text book and case book, we shall not be satisfied. I know I shall not. But there is a wealth of material; for instance, Professor Wilson's book for the purposes for which it was intended is simply splendid.

And I do want to call attention to another point: I think some of the earlier books, and particularly Hall's, are worth while to have and to introduce to the student, because he needs to be familiar with a legal classic which the courts themselves have annotated. On some points it is not as useful as some of these other books. But I think every student of international law ought to be made to read some portions of Hall, and particularly students who may be intending to practice law or to go into the Foreign Service. They need to get the vocabulary and the bibliography, which is a matter quite apart from knowing the general principles of law so admirably stated in some of the later works.

Professor JAMES W. GARNER. I was very much interested, as I am sure all of you were, in what Miss Randolph said about the high rate of mortality among the classics courses in the college curricula for the last ten years. Of course, the explanation is simple enough. It is a demand for courses of study on such subjects as marriage, social engineering, the administration of dude ranches and the like.

Nevertheless, for us who are interested in international law and international relations, certainly nothing should discourage us, because I think it is a matter of fact that during the last ten years the registrations in international law and international relations have undoubtedly doubled. The truth of the matter is I am a little bit concerned at the swing of the pendulum in this direction. I think in my own university perhaps a majority of the graduate students in the Department of Political Science are primarily interested in international law and international relations and they are all expecting us to find jobs for them when they get through.

A very difficult problem has thus been raised. It is also becoming more and more difficult to find suitable thesis subjects for candidates in these fields.

Only the other day, someone informed me that he wanted to major in international law and international relations. I asked him what he was going to do when he got his degree. He said he wanted a professorship of international law. I said obviously we can't guarantee you a job in that field. So, as I said, I am a little concerned at the increasing disposition of graduate students to major in these particular subjects. While I would not discourage any student from studying in this field, I do believe that we are reaching the point where it is at least our duty to warn them that the supply of potential professors is very much larger than the demand, and we might advise them to major in other allied fields where the demand is greater. I think we shall have to do it sooner or later.

Professor KIRK H. PORTER. Mr. Chairman, I was very much interested when I saw this subject announced in the program, for I hoped that at least one of the speakers would say a kind word for the very, very small and insignificant sort of thing that I myself have been doing.

I have come to these meetings several times and always with a rather uncomfortable sense of inferiority, because my major work has been far afield from international law and relations and because, I confess, I never had but one course in international law, although I have been teaching it for twenty years.

The one course was an undergraduate course; and the sort of course I have been teaching and that I suspect at least some others of you have been content to teach, is one not intended to prepare people for jobs. They have no possibility of getting a job out of anything they learn. It is a very elementary course in international law that I pretend to teach. They are not expected to, and do not, go forward to graduate work in the field of interna-

tional relations. We have no graduate course in international law. I do not suppose five per cent of the students who take international law at my institution have the slightest expectation of ever taking any more of it. Yet there have always been between fifty and sixty students in that class.

If my arithmetic is right, Professor Reeves, there are at least a thousand people walking the streets who have been exposed to international law by you through me vicariously. I hope I have never done you wrong.

For that elementary course there is no prerequisite whatever. I don't care whether they have had this course in history or that course in history, or an introductory course in political science, or anything else. I have found very few students who came into that class who could not manage to do a pretty good job, a fairly respectable job, with a text book such as Professor Fenwick has given to us, who could not go through a few of the simple cases familiar to all of us, who could not read current events and understand them a little better because of reading the text book and because of studying cases and being exposed in that very small, insignificant way to the fundamental principles of international law. I humbly submit that sort of thing is useful.

President RANDOLPH. Mr. Chairman, I think Dr. Garner and Dr. Porter have just touched upon a very important part of our problem. Of course, the students going on to study in the technical way are immensely important. But I think we should never forget that very large body of general students who, perhaps, take only one course in international relations, and that is all they get in their whole life.

Professor Garner is certainly right in saying that if too large a number of young men and young women are undertaking to specialize in the field of international law and relations, we would do a much better job in those institutions, and in the large colleges, if we warned them away from the field of specialization, but did give them as general students quite a large number of courses, as much as they could qualify for and profit by, in the field of international relations, wherever it happens to lie in the curriculum in the particular institution.

I would like to say if we do undertake a survey of these courses in the small colleges that the courses that are open to, and efficient for, the general student are very important. In teaching general students we fit them to influence international law and relations in other fields.

I know now a man who is teaching international relations in the fine arts in a very conscientious and fine way. The fine arts are international. So while these special students in which we take such great pride are important there is a still larger number of general students who help to make international relations.

Chairman REEVES. I remember hearing the Principal of St. Andrews University, that great chemist, Sir James Irvine, say that if he had a hundred undergraduate students of chemistry he would be gratified to find ten of them of excellence, and of that ten of excellence if one went forward trained

with a vision capable to expand the bounds of human knowledge of chemistry he would be well repaid indeed.

Dr. Garner was expressing an idea which I think has been in the minds of many of us who have been responsible for the direction of studies. We are all looking for that hundredth person. I have pleasure in looking out upon a considerable congregation of those hundredth persons who have "come through," who had their attention directed to international law as undergraduates somewhat in the way Professor Porter spoke of a little while ago. We take great pride in that hundredth person. But we fail to realize our opportunities if we fail to keep in mind, those of us who have the faith—for, after all, it is a matter of faith—that there is not a single subject in the curriculum more necessary for the free man and the free woman than the fundamental principles of public international law.

I feel that in the year of Grace, 1938, even more than I felt it the first year that I taught international law at Dartmouth College, thirty years ago. So we here, I think, are keeping the faith and not losing sight, in hunting for the hundredth person, of our responsibility for all the hundred who started. That is the responsibility of the college teacher!

The discussion is still open to you.

Mr. JAMES O. MURDOCK. Mr. Chairman, I would like to raise one point in view of the more or less unanimity of opinion of all the speakers that the teaching of international law in the small colleges is essentially an introductory or survey course. Would it not be desirable to call such courses international legal relations or principles of international law? Obviously, an undergraduate student, whether he be a junior or a senior, cannot hope to master the material which would make it possible for him to become the agent of a country in handling international legal questions. I don't think anybody who teaches the principles of international law in the undergraduate colleges holds that out. Yet the name "international law" in the college catalogs tends to give some students the impression that, once having had the elementary course, they have completed their studies in this broad field. While teaching introductory courses in international law is most desirable, would it not be preferable to have such courses accurately described in college catalogs?

Chairman REEVES. I think the question is answered by saying yes, an advanced specializing along professional lines will lead into different fields. But does that mean the starting point? Is it the starting point? Are there not certain fundamental principles which by consensus of opinion ranging over three centuries are called international law and still are? It is just conceivable that that process may begin for some elsewhere than in a professional school. And I think that is as far as we are going. Would it be said, therefore, because one man may get to a point of extreme specialization and have the professional attitude that he thereby denies the system of a non-professional general body of knowledge?

I always felt that those of us who have a professional point of view are so apt to repeat the very ancient platitude, namely, that a certain initiation into the elect is necessary for the purpose of specialization. I think it is *wrong to say that a little knowledge is a dangerous thing*. Perhaps a little knowledge is a dangerous thing, but by no means as dangerous as no knowledge at all.

Perhaps I am unduly influenced by my own experience over a period of thirty years of attempting to teach international law and I should not engage in the business of controversy as a nonpartisan chairman. Therefore, I should like to hear this question, which is a very fundamental question, raised. We have heard it not for the first time in our conferences. This question had been raised, I think, in the very first conference back in 1914. There is, we must recognize, a considerable element which would not admit the term international law to a body of knowledge taught outside of professional schools. With equal justice we can say that physics is not taught until one is a special student in the graduate school of physics. It is still physics in the high schools, elementary though it may be.

Professor SAMUEL W. SWENSON. Mr. Chairman, I was a little disturbed or depressed by the remarks just made by Professor Garner. I had not suspected that the study of international law was to be considered as being confined to the prospective teacher of international law exclusively. Out there at the institution where I happen to be located it has appeared to me that a big proportion of the students have ambitions of reaching at *some time some political office, at least the governorship*. I wish it were in my power to send a few of those future officials out there in our state over to Illinois to fill the seats in Professor Garner's class room that may become vacated by his own students through his discouragements. I feel that there is a *field for international law outside the academic area*. And it occurs to me that this ambition, which seems to be so general, to reach public office at some time in life might be used to encourage more students into the studies of international law.

Chairman REEVES. Is there any further discussion?

Professor FREDERIC W. GANZERT. Out at the University of Utah I have been giving two courses that Senator Thomas used to give, one in international law and the other in international organization.

As I sat here this morning, I thought perhaps since they are both quarter courses it might be a good idea to combine them into one course covering two quarters, one and two parts, which we might call international law and organization. That might be a suggestion for the nomenclature committee.

I was very much impressed with the emphasis that has been laid on the necessity of making the treatment current or contemporary. I find that very helpful and that my students are very much more interested in international law questions if we decide, for instance, on what the responsibility of Italy is with respect to the former obligations of Haile Selassie. And I have given

them assignments on the Spanish Civil War. In our diplomacy course we are considering the Mexican oil controversy.

Then, with respect to the relative advantage of the case book, I might say Professor Fenwick's *International Law* I have used myself for several years. I find that the students think the cases are more interesting, and it is much easier to arouse their interest by giving them a case than a chapter in a text. Yet on the other hand the case method, as we use it in the limited time afforded by a single quarter, is likely to be sketchy.

I thought I had come to the end of my little talk, but there is just one more thing. We do not feel embarrassed with the number of students that we get in international law. We have around twenty, usually, although last time the number was 34. I thought that compared favorably with Dartmouth. One reason for interest is that we have an institution known as the Missionary System of the Mormon Church, which sends out students for three-year periods all over the world, and I often wonder to what extent they form a leaven in our provincialism after they return.

Sometime, if I no longer have to give thirteen different courses in the space of two years, maybe I will be able to investigate that subject.

Professor PERCY E. CORBETT. Mr. Chairman, as you have informed us, this is probably the last separate meeting of this conference of teachers, there is one new element I would like to inject into this discussion; that is, an element that is at least new for this morning. It was suggested to us last night, you will remember, that all teaching, however neutral or even passive it may be, is, nevertheless, propaganda. Professor Brown suggested one instance of the dire success of propaganda, and another speaker suggested that one of the tools to be used against it is counter-propaganda.

If all teaching is propaganda, however neutral it may appear to be, I would suggest that a very necessary element in the curriculum of the junior colleges, when they teach international relations and international law, is the possibility of getting away to another country. But I realize that there must be a great many colleges in the United States whose students are not able to indulge in that luxury permitted in places like Bryn Mawr, for instance, of spending one year of their course in France, Germany, Italy or elsewhere abroad; but there is a possibility there which I think is being overlooked, and on this point I would like to have the advice of this conference.

The North American continent is politically still divided. There does exist a separate nation to the north, and the relations between that country and this country are very generally taken for granted. But I would suggest to you that if it were possible for students in many of the colleges in the United States, particularly those close to the northern border, to look forward to taking some part of their course at a Canadian college or university, either in the shape of terms of instruction or at some possible summer school, then there might be a chance that even the passive or neutral propaganda of the teaching which they get in this country may be counteracted by ex-

posure to a foreign point of view. It would give an opportunity for exposure and a chance to study at close hand not merely British ideas on the law of nations, but also British institutions working to produce very much the same results as the institutions in this country produce.

Another thought occurred to me when I listened to the gentleman who was asking for another possible name. Perhaps that should be referred to Professor Lasswell. Professor Lasswell would be able to give some idea as to a term, let us say an enticing term, to use instead of international law. I myself can only suggest the old term "Community of States."

My remarks, by the way, are partly directed at the motion which Professor Eagleton has said he is going to introduce. If Professor Eagleton is going to introduce a resolution asking the Carnegie Endowment to investigate the curricula of the smaller colleges in international relations, I should like to have the committee which he mentions consider the possibility of visits to Canadian institutions in such courses, and also perhaps a welcome to Canadian students to come temporarily to American colleges in order that we may do something very practical upon this continent to encourage what President Randolph has called the spirit of international or world citizenship.

Thank you, Mr. Chairman.

Professor K. C. LEEBRICK. Mr. Chairman, I know it is late, but I do want to make three points. In the first place, I was very glad to hear Miss Randolph and others speak here as to these courses in the smaller colleges. There has been a change going on about teaching history. Much of the history is becoming much more current than the old ancient history. Medieval and European history look like they are being deleted or eliminated altogether. Therefore, I believe that the international relations course, whether we call the course international legal relations, as referred to here, or whether we call it by some other name, is in a sense taking up the slack. I want to refer this to the committee Dr. Eagleton has been talking about so that it may recognize the curriculum change that has been going on.

In the second place, practically all of the high schools are changing their teaching of history and civics and bringing more political science under the name of social sciences. The colleges are largely preparing those teachers. It seems to me that the college which is giving the fundamental work but does not include a course that teaches something about our obligations outside of the state, is losing not only its opportunity but is not performing its service to the state.

I believe there are too many people talking about current history who do not have a broad enough point of view. I hope that these courses we desire to be given will include something in the nature of how to read a newspaper and to find out and sort facts so as to know what is propaganda and what kind of propaganda it is. I believe, whether it is the larger or the smaller college or university, this is an obligation.

In the next place, I believe we are looking for the hundredth person.

Many of the graduate students that we get in advanced courses come from our smaller institutions where they have at least become interested and wish to go ahead and try to go farther.

I believe this country has been infected with the spirit of nationalism as some other countries have been. These courses in international relations will do more than anything else in the world to show people that there are problems with other nations and other peoples and that we do have obligations. Whether it is called international law or international relations or international organization, the problem is still there.

Unfortunately, more frequently in smaller colleges, the courses in international relations are taught by a person who comes at it through communism or through English and so on. I have an example of an English teacher teaching pacifism through his English. And he doesn't know what it is all about because he does not have a broad enough point of view. I do not object to his doing it, but I think if he had more international relations he would be more sound about it.

I do not think we need apologize for the smaller or larger colleges if we recognize that the objective is to give a broader point of view so that we may continue our democratic life and not feel an inferiority complex in our national system as against other forms of government which seem to be more effective in the diplomatic field because they have a different form of government.

Professor HELEN D. REID. Mr. Chairman, may I emphasize a point that Mr. Leebrick just referred to, the matter of bringing in the teaching of international law and relations and the close relationship of current events? I have a feeling that our current interest in contemporary affairs, particularly on the part of the young undergraduate students of the present day, is over-emphasized. They think in terms of current events entirely. They do not have enough appreciation of an historical background and the continuity of the things that are going on today in the world and, therefore, place the wrong emphasis upon or misinterpret contemporary events.

It seems to me that the course in international law can do much in that particular field. The course in international law has peculiar facilities for emphasizing the background of current events and the precedents of the past for, after all, similar problems have arisen in the past. Therefore, I think our course in international law should be directed partially to meeting the need of the student of today for an appreciation of the fact that there has been a past which is influencing the present.

Professor OGDON. I feel that we will have some serious difficulties arising if we try to teach international law from the headlines of our newspapers today; they for example will certainly give people a pessimism if nothing else will.

As to the title for an introductory course in international law, the descriptive title which we use is "The fundamental principles of international law, with special emphasis upon American interpretations and contribu-

tions." The title of my syllabus is a little more specific about the nature of the course. It is *"The first principles of international law, an introduction to the rights and duties of states in their relationships to each other."* I borrow from Sir Frederick Pollock for the title of my selection of cases, which I call, *"First Book of Jurisprudence for Students of International Law."*

Professor G. B. NOBLE. I should like to ask whether it would not be worth while making a study, in view of all that has been brought here, of the vocational opportunity in this general field. I think that if the Endowment, through this organization or through some other procedure, would make a survey it would be very valuable.

If it is appropriate, I should like to move that we include some such proposals for study in the work of one of the committees during the ensuing period between now and the next conference.

Chairman REEVES. That is, the opportunities for teaching?

Professor NOBLE. The vocational opportunities in all lines.

Chairman REEVES. I am now going to recognize Professor Eagleton so he can present his motion.

Professor EAGLETON. Mr. Chairman, I move that this conference request the Carnegie Endowment to undertake a study of the curricula of small colleges, under the supervision of a committee of this conference to be appointed by the Director.

(The motion was duly seconded.)

Chairman REEVES. Are you ready for the question? Is there any discussion?

President RANDOLPH. Dr. Eagleton's motion is stated in very brief and general terms. I believe we need a little clearer understanding as to what types of institutions would be included. I believe he said small colleges or small institutions. Is that it?

Professor EAGLETON. I think I said small colleges.

Chairman REEVES. Why not say just "colleges"?

President RANDOLPH. If you say small colleges, of course a small liberal arts college is something very clearly labeled. It is purely a liberal arts college but other things might be included under that term. What about other colleges? There are four or five hundred of them. And that would take a great deal more money. There are a number of quite small institutions which label themselves universities, I regret to say, and there are polytechnic colleges, that is liberal arts colleges surrounded by one or more professional schools. So before we vote on this, I think we should have some clear idea as to the metes and bounds of the question.

Professor EAGLETON. I do not have in mind junior colleges when I make the proposal. I don't know whether we could afford to take in such big fields or not. I did have in mind the smaller institutions of learning, whether they are called colleges or not. I would be willing to include normal schools also.

In general, what I intended was that the committee be appointed by the conference, and should decide itself what the terms of reference should be and determine what investigation is to be made by the Endowment in our behalf. I was going to leave that to the committee appointed by the conference.

PRESIDENT RANDOLPH. Then I think we should have it more or less clear. Five or six thousand dollars would cover a certain group of colleges; ten thousand dollars would take in a larger group; and if the amount is only a certain small amount it would not go so very far.

Take teachers colleges; they have liberal arts to a large extent; they have changed their names to something else, and are no longer strictly professional schools. Some of them give a lot of A.B. degrees, too. We should realize the type of survey would be very different, depending upon whether we do or do not include teachers colleges or whether we do or do not include junior colleges and so on.

PROFESSOR CORBETT. May I ask that it be amended, in line with Miss Randolph's idea, to use some words like these: Which shall be empowered to limit the field of investigation according to the resources available?

CHAIRMAN REEVES. I do not believe we can delimit it here. Do you make that as a motion?

PROFESSOR CORBETT. I make that as an amendment.

CHAIRMAN REEVES. Do you accept that and do you second it, Miss Randolph?

PRESIDENT RANDOLPH. Yes, Mr. Chairman.

CHAIRMAN REEVES. You have heard the amendment and the second.

PRESIDENT RANDOLPH. I just wonder whether it would be convenient to give a salary of \$5,000 or \$6,000 or whatever it is and let us limit the field. That would be an ideal way, if we could do it in that manner, and then we could tie in the efforts of this group together with the committee of the American Political Science Association and other educational organizations. I was just wondering from the standpoint of the Endowment whether they would be willing to give us a blank check in that way.

CHAIRMAN REEVES. The chair thinks we might leave that within the range of this motion as amended.

PROFESSOR CORBETT. Wouldn't the Endowment itself be represented upon this committee?

CHAIRMAN REEVES. Of course this starts as a suggestion, and it will probably take some time to work the thing through. It will be a matter of discussion and negotiation. My own feeling is that you may safely leave the question of the range of investigation and the estimated cost, depending upon the range, to a committee which will be set up. It seems to me the motion as amended gives enough authority to go forward. And I think that is about all we want to do.

(The motion, as amended, was put to a vote and carried.)

Chairman REEVES. I have here a resolution by Professor Padelford, which will now be read:

Resolved, That the Sixth Conference of Teachers of International Law and Related Subjects, reiterating the interest manifested by two prior Conferences in the expansion of the publication program of the Department of State;

Noting with satisfaction the achievements recorded in the reports of the Conference's Committee on Publications;

Asserts its conviction that the continued development and expansion of that program is necessary both for purposes of scholarship and for the democratic control of the conduct of the foreign relations of the United States; and

Records its appreciation of the whole-hearted coöperation which its committees have constantly received from the Department of State and its officials; and

Congratulates the Department of State on its admirable publication record, which has been made largely through the devoted efforts of Dr. Wynne, Chief of the Division of Research and Publication, strengthened by the support of Assistant Secretary of State Messersmith; and

Expresses also its gratification at the intelligent and generous interest which the Committees of both Houses of Congress have taken in supporting this program; and

Urges upon both the Department of State and the Congress the need for constant attention to the steadily progressive furtherance of the publications program of the Department of State.

Chairman REEVES. If you will permit me, I should like to state that I think it should be the Committee on State Department Publications that should convey the terms of this resolution, if the resolution carries. That is the organ of communication we have had before and I think it should continue to be such. Does this resolution receive a second?

(The resolution was duly seconded, put to a vote and carried.)

Professor NORMAN J. PADELFORD. May I suggest the terms of the resolution be conveyed to the Department of State either prior to, after or at the time of the visit of the teachers this afternoon.

Chairman REEVES. Very well. Mr. Jessup, will you be in position to do that?

Professor PHILIP C. JESSUP. As I understand it, the arrangements do not include the actual reception of the group by the Secretary of State, but by the Counselor and the two Assistant Secretaries. I think either I or someone representing the committee should personally give the resolution to one of them at that time.

Chairman REEVES. I want to remind the members of the Nominating Committee that they should wait in the rear of this room after the adjournment of this session for a short meeting. If there is no further business, this conference will adjourn until the next stated session.

(Thereupon, at 12:55 o'clock p.m., the conference adjourned until 8:15 o'clock p.m.)

FOURTH SESSION

JOINT MEETING WITH THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Thursday, April 28, 1938, 8:15 o'clock p.m.

The meeting was called to order by JESSE S. REEVES, Vice-President of the Society and Director of the Conference.

Chairman REEVES. Ladies and Gentlemen: By virtue of the authority conferred upon me by the Executive Council of this Society, I declare this, the Thirty-Second Annual Meeting, now open.

As I do so I am sure that all of you share with me the very great regret that our President, Dr. James Brown Scott, is prevented from coming here by a serious illness. Indeed, a meeting of this Society seems very strange without Dr. Scott. Those of us who began our association with this Society at the outset know that it was Dr. Scott's idea, this American Society of International Law. It was his vision, and it was due to his energy, his devotion, that his idea, his vision, became a reality. We had first as President Mr. Elihu Root, afterwards Mr. Chief Justice Hughes, and now Dr. Scott. Yet I think were Dr. Scott's two predecessors in that office able to testify here tonight, they would willingly say that it was due to him that the Society was started, the Society has grown, the Society has come to be an institution of national, of international significance. Would that he were here tonight to give you his own message.

The object of this Society is to foster the study of international law and to promote the establishment of international relations on the basis of law and justice. In bringing these two words together, law and justice, and thinking of the establishment of international relations upon the twin basis, we may go back in thought to that great humanist, scholar, lawyer, classicist, poet, the last product, we may say, of humanism, of the Renaissance, the great Grotius. There are those who think of Grotius as essentially a compromiser. There are some who have felt that he lacked a certain fiber to make for courageous determination, to take a stand. But Grotius had a good deal of the qualities of that earlier humanist, Erasmus, who likewise has been called a compromiser, who also was thought by many to have been deficient in moral courage in an age of confusion. Both Erasmus and Grotius appear to be compromisers only because by a certain lack of perspective we fail to realize that they, each in his own way, sought to find that Aris-

totelian mean and to bring together as a *modus vivendi*, as a way of living, that solid foundation of custom and precedent, realizing that the idea without its anchorage might float off into space, and that the custom without the idea was apt to be little more than dead-sea fruit.

Grotius was neither wholly a naturalist nor wholly a positivist. He was eclectic. But the difficulty with much eclecticism is the difficulty of finding a solid and firm place upon which to stand. It is so easy under eclecticism to allow one's self to be drawn along the lines of least resistance and, by a process of argument from analogy, to take from the outside ranges of knowledge apparent analogies and use these apparent analogies as a pedestal upon which to erect a superstructure.

It has been a fault of the social sciences for many centuries to start and maintain a train of reasoning upon analogies drawn from another discipline. We in the social sciences are peculiarly prone to do this. As long ago as the thirteenth century, John of Salisbury found many similarities in the state with various features; anatomical and physiological, of the human body. And, oddly enough, one may jump for five centuries and find the *reductio ad absurdum* in that apostle of *laissez-faire*, the now unfashionable Herbert Spencer.

In the eighteenth century, thanks largely to the then recently discovered laws of gravity and of planetary motion, political philosophy was largely an adaptation of celestial mechanics. In the nineteenth century there was a strange perversion of the doctrine of biological evolution drawn into the field of the social sciences purely by way of analogy; for obviously there is little of real similarity between the development of political institutions and the evolution of the animal organism, with progress equated with evolution. Yet without knowing what evolution is as applied to political institutions, we have lived under the analogy and have called it progress, which, as Bury has said, may be nothing more than an optimistic synonym for change.

But of late we are, I think, facing new types of argument from analogy, and these arguments from analogy reach not only social sciences generally, or political science, or sociology, but they are carried over into the field of law, jurisprudence, and, to some extent, into our own field of international law.

There is the doctrine of relativity. I fancy that to a mathematical physicist that will have a definite and scientific meaning. Lord Haldane, some years ago, undertook the application of some of the ideas of relativity to the field of philosophy. That was a serious attempt, with which I have no quarrel. But my objection is to the popular, the ordinary intrusion of some vague concept called relativity into political and juristic thought to the extent that many of us are regarded not only as old-fashioned, reactionary, unenlightened, and medieval, because we still insist, as Grotius did, as Victoria did before him, upon a definite place upon which to stand. And I am inclined to think that this sweeping away of some fundamental, abso-

lute standards has been assisted by certain contributions or pseudo-contributions from other sciences.

We are told, for instance, that morality is nothing more than a cross-section of the morals of people at a certain stage; there is a kind of economic interpretation of history thrown into ethics, that there are no such things as absolute standards, and justice itself is but a symbol. Nobody can defend it. Plato tried to. We have all been trying to do so. And some say it is but a symbol; that it is suffused with emotion; and that it has no absolute quality.

I, for one, insist that even though I may not be able to give a definition of justice which would suit some of my contemporaries, there is justice. There has been discovered no scientific measurement of the idea of justice. Justice cannot be put under the microscope; justice cannot be put under a pump and made to operate *in vacuo*. It is a matter, after all, like faith. And to the extent that we put appeal to it, we appeal to it in much the same way in which it was appealed to in Athens five centuries before Christ.

Immeasurable as it is from the scientific point of view, there is all the more reason why we should have it as one of the words used in setting forth the purposes of this Society, the establishment of international relations on the basis of law and justice.

Many of the modern jurists who want the functional approach or the realistic approach smile with some contempt at the phrase of the Institutes with reference to what justice was once thought to be—to live honestly, to hurt no one, to render to each that which is due. Our concepts of injury change. Our concepts of that which is due change. I do not think there is any change in what is meant by living honestly.

Grotius, realizing the confusion in the world in which he lived, a confusion as great as that which exists in the world today, wrote in the middle of the Thirty Years' War. Unity of empire had disappeared. Unity of church had broken down. In the diversity of states, there was a unity, the unity of law. "All," he said, "is confusion when once we depart from law." And that law which was the fundamental part was the Law of Nature. What was in essence the Law of Nature? The Law of Nature is simply the moral code, the fundamental moral code of rights and duties of individuals.

Grotius was not the first to declare this. I am not claiming that. But Grotius, upon the basis of custom and precedent, undertook to lay down the doctrine that these new political units which were coming to be, these territorial and country states, were not endowed with unrestricted wills, whether the will be power or some other will, but that these states were subject to the same limitations based on the moral level that the individual was. And I insist that in these three hundred and more years of the past since Grotius' great work first appeared, we have no other tolerable foundation on which to order and arrange the relationships of states one with another.

In this country, naturally because it is English tradition, we have taken generally the positivist position. We want our law to be positive. We want

it to be judge-made law. But we have had this curious development, that international law should be a product of will, the collective will of states, and I am inclined to think that the collective will of states, if there be any in these days, is not on a much higher level than the will of any of the particular states making up the alleged collectivity.

There is a single legal order within and without states. I am convinced that the state embodied as justice is fundamentally necessary for the international unity if there is to be an international community and the realization that the state as justice is a different concept from the state as unrestricted will. The state as unrestricted will makes promises, but need not keep them.

A book has been written recently, which no doubt many of you have seen, Mr. Scherman's *The Promises That Men Live By*. There is not much in that book which has to do with the promises of states with each other. There is quite a little that has to do with the promises that states make with their own nationals. The body of the book has to do with the promises which individuals make with each other. And those are in general the promises that men live by, in the hope and reasonable expectation that those promises shall be fulfilled. Upon that civilization depends.

With the insistence that the state is the embodiment of will we have had a strange deterioration of the notion of the moral obligations of states. I am thinking not only in terms of the positive legal obligation. A state will or will not carry through its promises depending upon whether or not it can "get by" with it. A state may not necessarily perform its promises solemnly given to its own people. We have not done so. I mean our government has not done so. And other states have failed in their promises to us and to each other.

As long as things are, after all, "relative," that there is no such thing as an absolute obligation, and that moral obligations are to be interpreted in the light of attendant circumstances, one can develop a whole series of excuses to worm out of legal promises. But back of all this is the moral obligation. I will not say *pacta sunt servanda*. We may go back of the "pactum," which, indeed, is a legal term, and go outside of the area of legal rights and duties and rest our case for a state in the hope of civilization upon the same foundation that the free man rests his case. He makes a promise and keeps it; he receives a promise expecting it to be kept. And to the extent to which the moral duty of keeping a promise and the moral right of a promise are prevalent, to that extent will there be a respect for all of the legal rights or promises that may grow out of it. But a promise betokens a free play of will within the limits of morality. A promise extorted by force is no promise at all.

Old-fashioned as it may seem, I am convinced that there is no foundation for international law other than the age-old principles of morality, applied originally to the individual, and that the truth is still the truth, that righteous-

ness exalteth a nation, and that truth alone, discovered by "right reason," shall make us free.

Professor CHARLES G. FENWICK. Mr. Chairman, I have a resolution to present to the members of the Society, carrying out your remarks at the opening of your address and expressing our very deep regret that the President of the Society, who has been so long with us and has been our guiding spirit and unfailingly devoted to the high purposes of the Society, is not with us tonight. It reads as follows:

The members of the American Society of International Law, in session at the Thirty-Second Annual Meeting, hearing of the illness of the President of the Society, and mindful of his constant devotion to the work of the Society and his faithful attendance at its sessions, send their greetings to their President and hope that he will soon be restored to full health and vigor.

Professor FENWICK. I move that the Society adopt the resolution as read.

(The motion was put to a vote and the resolution adopted unanimously.)

Chairman REEVES. I believe the Secretary has some announcements to make.

Secretary GEORGE A. FINCH. Mr. Chairman, under the Constitution of the Society, which all members, I believe, are desirous of observing in every detail, it is necessary to transact some formal business at this meeting. The Society is required at the first meeting to elect a Committee on Nominations to nominate the officers who will be voted upon at the session on Saturday morning. The Executive Council may submit a list of nominees for the membership of the committee and other nominations may be made from the floor. At the meeting of the Executive Council this afternoon the Council placed in nomination the following members to compose the Committee on Nominations: Ellery C. Stowell, Chairman, Francis Deák, Clyde Eagleton, Frederick A. Middlebush and Amry Vandenbosch.

Chairman REEVES. Are there any other nominations for the Committee on Nominations?

(No response.)

If not, a motion will be in order.

Secretary FINCH. I move the nominations be closed.

Professor FENWICK. I second the motion.

(Upon motion duly made, seconded, and carried, the nominations were closed.)

Chairman REEVES. I will now entertain a motion that the Secretary be instructed to cast the unanimous ballot of the meeting for the candidates named.

(Upon motion duly made, seconded, and carried, the Secretary was instructed to cast a single ballot for the nominees.)

Chairman REEVES. The Secretary has cast the ballot as instructed,

with remarkable deftness and swiftness, and the members nominated are duly elected.

We now turn to the addresses of the evening.

The first address is "The nature, place, and function of international law today," and I have great pleasure in welcoming and introducing Professor Norman A. MacKenzie, of the University of Toronto.

THE NATURE, PLACE, AND FUNCTION OF INTERNATIONAL LAW TODAY

By NORMAN A. M. MACKENZIE

*Professor of Public and Private International Law, University of
Toronto*

Anyone who would presume to deal adequately with a subject of this magnitude in the space of twenty minutes is either very bold or very foolish, and yet that is what I propose to do. As I am neither bold, nor I hope, particularly foolish, the conclusion is that I must have had urgent reasons for doing so. Among these reasons are the following: I think it desirable that scholars in every profession should pause from time to time to examine anew and with a critical eye the whole basis of their profession and their own particular place in it. I feel that this is especially true of the social sciences, which are so much a part and parcel of the variable human nature and changing human society which they investigate and which they serve. The events of the past seven years have forced me, at least, to examine anew the bases of our "science," international law. It is because of this, and because of my feeling that this whole subject should be fully explored, that I have ventured to present briefly and, of necessity, superficially, the results of my thinking. Lest you imagine that I propose to describe the series of aggressive acts committed by certain nations in breach of their international obligations during the past seven years, may I reassure you on this point, for while I deplore them, I do not propose to discuss them. In any event, I consider them less important, fundamentally, than the evidence which I see around me of wide differences of opinion as to the nature and basis of the good, that is, law-abiding society. These differences are so deep and so far reaching that in my opinion they make the creation or continued existence of any society an extremely doubtful prospect.

Apart from my own cogitations as to the nature, place and function of international law, occasioned by contemporary events in the world around, I was brought to this inquiry by two facts. The first was the doubt cast upon the validity of our claim as a profession by serious students in other fields, that there is any such thing as international law, or that it has any real function in the life of individuals or in the relations of states. As an example of

this may I cite the views of Sir Alfred Zimmern, Montague Burton Professor of International Relations at the University of Oxford. In his book, *The League of Nations and the Rule of Law*, he states

For anyone trained in the British tradition, the term "International Law" embodies a conception which is, at its best, confusing and at its worst exasperating. It is never law as we understand it, and it often, as it seems to us, comes dangerously near to being an imposture, a *simulacrum* of law, an attorney's mantle artfully displayed on the shoulders of arbitrary power.¹

In a paper read before the Grotius Society on the 10th of April, 1934, he stated:

the impression that international law is an orderly body of material corresponding either to national law or to the subject-matter of a theoretical science is quickly dispelled on close inspection. . . . Analysis would seem to reveal that international law, or the Law of Nations, as we find it in the present-day treatises, is an amalgam of three separate elements imperfectly fused together and indeed incapable of real fusion. These three elements may be described as a survival, an etiquette, and an anticipation—a survival from certain conditions that have long since passed away, an etiquette to regulate certain conditions which still exist, and an outline; or at least a preliminary sketch, for use in certain conditions which it is hoped will come into existence in the future.²

And still again, on October 26, 1937, before the Royal Institute of International Affairs he said:

There is, in fact, at present no world community in existence. . . . And in the absence of a world society, and of the morale which such a society would carry with it, there cannot yet be world institutions. . . . international law derived its title, as law, and its original authority from its connection with the Christian tradition of the law of nature. But this foundation has been increasingly undermined. . . . Indeed, anyone coming fresh to the subject [international law] from other fields of study cannot help becoming aware of a permanent condition of *malaise* amongst international lawyers. . . . The conclusion seems unescapable that positive international law, so-called, has no claim to the name of law.³

But enough of Professor Zimmern. I have quoted him at length because he is a distinguished and intelligent representative of that body of scholars who criticize us or hold us up to derision. What of the "man on the street"? What does he think of us and our science? Last autumn I asked a class of first-year university students to write down what they thought of international law. One of the ablest of them wrote: "In order to decide on the state

¹ Sir Alfred Zimmern, *The League of Nations and the Rule of Law* (London, 1936), p. 94.

² "International Law and Social Consciousness," *Transactions of the Grotius Society*, Vol. 20 (1934), p. 25.

³ "The Decline of International Standards," *International Affairs*, Vol. XVII (1933), p. 3.

of international law today—if any—we must review the major international events of recent years.” He then goes on to describe “the Japanese conquest of Manchuria, the invasion of China, the rape of Abyssinia, the reoccupation of the demilitarized zones on the Rhine, the rearmament of Germany and the war in Spain,” and concludes, “Now, the term ‘international law’ is a farce, to be used or discarded at will by any nation who thinks to get any advantage from it. In the next war, there will be no international law, or ‘comity of nations’ but merely the law of the jungle, and of primeval man—each for himself and the devil take the next man.” This is typical of the views expressed by many of these young men and women—a group to the best of my knowledge uncontaminated by any contact with international lawyers or treatises on international law, and it is, I believe, typical of the views of the man on the street. If this be true as to the state of opinion both informed and uninformed, then I submit, gentlemen, that it is time, high time, that we examine ourselves and the bases of our beliefs and professions, and try to answer, to our own satisfaction at least, these direct and implicit criticisms and accusations. This I have tried to do in the following way. I have examined the nature of the concept of law itself. I have then examined the international world in which it is alleged to operate. And finally I have set out certain conclusions in relation to the nature of international law and its operation in the world today.

Professor Zimmern, in the paper cited above, in describing the idea of “law” as conceived by the Greeks of the time of Aristotle and Plato, summarizes it as follows: “Law was not a command imposed from the outside by some superior power. It was the formulation of the will of the community, or better still, an external manifestation of its continuing life.”

Two hundred years before Blackstone, Richard Hooker, in England, stated:

Of law, there can be no less acknowledgement than that her seat is the bosom of God, her voice, the harmony of the world. All things in heaven and earth do her homage, the very least as feeling her care and the greatest as not exempted from her power. Both angels and men and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent admiring her as the mother of true peace and joy.

Blackstone himself writes “Man, considered as a creature, must necessarily be subject to the laws of his creator. This will of his Maker is called the law of nature. This law of nature is, of course, superior in obligation to any other.”

These quotations give two ideas of the source of law—one a manifestation of the community, the other a manifestation of God as expressed in the law of nature.

Professor A. L. Goodhart, in a paper he read before the Grotius Society

on April 23, 1936,¹ outlines an answer or answers to the question of what is law according to the British (that is, English) tradition. He gives three definitions as representing the dominant schools of thought on this subject. The first is the Austinian definition that "a rule of conduct cannot be properly termed law unless it has both a determinate author and a definite sanction in case of breach"; the second was formulated in precise terms by Professor A. V. Dicey as follows: "The law of every country consists of all the principles, rules or maxims enforced by the courts of that country"; and the third was expressed by Sir Frederick Pollock as follows: "The only essential conditions for the existence of law and legal institutions are the existence of a political community and the recognition by its members of settled rules binding upon them in that capacity." Another writer, Professor John Willis, in a recent number of the *Canadian Bar Review*, gives, in somewhat different language, the idea of Austin as follows: "All order, national or international, rests on force or the threat of force. The force that stands behind wishes realized, established institutions as we call them, is no less force than the force that leads the van of wishes not yet realized. Surely he is not misled by our harmless habit of dignifying institution-defending force with the high-sounding names of 'law' or 'collective security,' and vilifying institution-attacking force with the ugly habits of 'violence' or 'aggression' " ² or, as I would add, "revolution" or "civil war."

Professor Harold Laski, in an admirable paper given before the Geneva Institute of International Relations in August, 1931, on the theory of an international society and the place of international law in it, states that: "No really organized world community is conceivable in which there are wide differences of interest between classes or in the constituent states of which there are incompatible philosophies of government."³ Contemporary events would suggest that this holds true for the national as well as the international society.

Personally, I feel that there is some measure of truth in all of these definitions. Otherwise they would not have received the support that they have, or persisted as they have done. But none of them satisfies me completely, in respect of international law at least. For I recognize that there is no "determinate author and no definite sanction" in international law, nor can I help agreeing with Professor Oppenheim that "now-a-days we know that a law of nature does not exist," despite the contribution that belief in its existence may have made or could still make if all men could agree at the same time upon what the law of nature is and agree, too, to obey it. There is much to be said in respect of international law for Dicey's definition that

¹ "The Nature of International Law," Transactions of the Grotius Society, Vol. 22 (1936), p. 31.

² Canadian Bar Review, Vol. XVI (1938), p. 156.

³ "The Theory of an International Society," Problems of Peace, Sixth Series (1931), p. 188.

law consists of the principles, rules, or maxims enforced by the courts, and on examination we may find that at the present time it is the only one usefully applicable to international law. But here, too, there is obviously a difficulty, due to the limited extent of international judicial organization and to the fact that nations, the persons of international law, are neither bound to submit disputes to such courts as do exist, nor, if they do, bound to accept the decisions of these courts.

While I make no pretensions to a standing as a philosopher, although I realize that any definition or description of law must be based on philosophy, may I in all deference submit my own opinion in regard to this matter? To me, *law* is a practical social instrument or agency, conceived and developed, very often in a haphazard, accidental fashion, to give effect to human wishes or to meet human needs. It has nothing of the divine or supernatural about it, save as man himself may in his words and actions express divinity. Its condition, or state of maturity, as well as the purpose it serves, are determined by the nature of the community in which it functions, and the kind or class of control or authority exercised in that community. It has always, and will always express the will, satisfy the desires and meet the needs of those in control or those who exercise power, or will strive to do so. It will be recognized and obeyed, either because it is generally agreed that recognition or obedience is advantageous, or necessary, or both. It differs in no way, in the ends that it serves, from any other human instrument or agency, although as it is a social, that is human, instrument, developed and maintained to serve society and the individual, it has all the variable characteristics of man himself. To be precise, it consists of *rules of conduct which govern the conduct of individuals in their relations with each other*. But it should be noted that these rules may be changed, and are in fact constantly being changed, to meet the wishes of individuals and groups, and that they only govern their conduct when individuals wish them to do so or when they are forced to submit to their commands. What I am trying to emphasize is that there is nothing permanent, or final, or sacrosanct about law as I conceive it.

It so happens that one of the desires or needs of mankind is certainty and security and stability. This is particularly true of those with interests to serve or rights to protect or power or privilege to uphold. It is therefore natural and inevitable that the social instrument, the rule of conduct formulated or devised to meet this need, should be certain and defined and rigid. And law in certain of its aspects is so designed. Unfortunately for those of us who would like to know where we are and to be able to say that the law is this or the law is that, with some degree of certainty and finality, this desire of human nature is not the only desire, nor is it, indeed, the most urgent one. Opposed to it, and just as important and insistent, is the demand for change which exists in every living organism and in every living society.

This desire for change is particularly strong in those individuals or groups who believe that change in the state or nature of their relations with other individuals and groups is necessary to their welfare or existence, and is likely to be strongest among the underprivileged or those without power and position. The result is that in the field of human relations which law serves, there is a constant conflict between the demands for stability and the demands for change. Law perhaps best serves its true function, the interests of the individual and society, when it contributes to a solution of this conflict by procedural means. Conflicts of this kind, unless satisfactorily regulated, tend to result in violence with attendant destruction, and they often do so result. Law, however, and legal procedure in particular, are an alternative to violence, provided always that they are adequate and sufficiently flexible, and provided, too, that the parties prefer them to the often emotion-satisfying adventure of violence.

You may object that what I have said is general enough and vague enough to include human relations in their widest sense, and to include all of the functions of the state, whereas law is, and ought to be restricted to, a certain limited and defined field. I admit this as true, but I still submit that my description of the nature, the function, and the limits of law is reasonably accurate. I agree that in a mature and well-organized community, one can at any given moment discover with reasonable accuracy what is the law or what are the accepted rules of conduct. But note why this is so. There are, in the first place, reasonably objective institutions, the courts to determine or decide on what the law is. There is, in addition, an enforcing authority, the state or its officials, to insure that this decision is generally accepted. But, I submit, neither the judiciary nor the police are themselves the law, and if the "community" disagrees, then tomorrow neither police nor judicial views as to what the law is, will or need be accepted.

You may suggest, therefore, that the "community" is the important element in respect of law. I agree! "*Ubi societas ibi ius.*" But I go on to add that where there are two or more individuals or groups in relationship with each other, there are present the basic elements or conditions of a community or society, and that the definiteness, the maturity and the importance of law in any given community will be determined by the nature, the maturity, and the desires of the community or the group which controls it. To me, this matter of control is extremely important, for to the best of my knowledge the development of the community and the development of law have been the result of the control exercised, usually in their own interests, by one individual or, more often, one group over the rest of the community, either with their consent or by force. But obviously in a community in which the control exercised is minority control, the pressure for change and the possibility of conflict is likely to be great. Whereas a community in which the control is widely distributed and in which there is general agreement as to

the ends to be served, and as to the means of achieving these ends, is likely to be one in which the resistance to desired change and the danger of violence are almost wholly lacking.

But again may I emphasize that law is not the community. It is rather a means, and in the last analysis always an optional means, by which the community or groups or individuals in the community seek to serve certain interests and achieve certain ends. Another thing to be noted is that the real basis of law is self-interest in the fullest and widest sense of that term. In other words, law is law because it works to the advantage of someone or some group or groups, usually those in control, or of the community as a whole. This being so, the sanctions or devices developed to insure respect and obedience for law, such as that of attributing the source of law to the supernatural or to nature itself, or the formalities and ceremonials with which it has been hedged about, as well as the police, are necessary if the basic requirement of the security of *one's legal rights* is to be insured; whereas legislatures and other law-making and law-changing bodies (and even including, in one of their aspects the courts), exist to enable necessary or desired changes to be made in the law on the basis of compromise and without recourse to violent means.

It is salutary for most of us, who have been trained in the English and American tradition, with our heritage of personal liberty, of the rule of law, and of comparative freedom from the arbitrary will or whim of the executive or dictator, to stop and look around us in a realistic way at the world in which we live. For, if I read that world aright, it is one in which the "rule of law" and "personal liberty" are notorious by their absence over wide areas, and in which the will of the dictator or executive, determined by expediency or by emotion, is the measure of justice and of effective law.

As Professor Brierly has put it, "We note the melancholy fact that in the world today the observance of any kind of law is rather a rare thing, the exception and not the rule."¹ I do not mean to suggest that this state of affairs is desirable. I am, however, concerned with emphasizing that it does exist; that, in other words, we are living in an age of revolution, national and international—an age in which laws are made and unmade overnight. But even these conditions have their advantages. They enable us, even force us, to examine the very bases of law, in a way which would not be necessary or even possible in a static period. This examination, as we have seen, brings out several matters of importance. May I summarize them?

The first is the human purpose which law serves, and, because of this, its variable nature. A second, the importance of the community in relation to law. Where the community is a unit and in agreement as to the ends that the law should serve, where there are no great differences between groups and individuals, law is likely to be a stable and orderly system, and changes in it are likely to be provided for in an orderly fashion. Where this is not

¹ *International Affairs*, Vol. XVII (1933), p. 26.

true, then law and its attendant procedures are likely to be chaotic (though they will exist and be utilized) in the sense of *rapidity of their change*, uncertainty as to their content and meaning, and in the readiness to ignore them or to interpret them as one sees fit. A third is the important place that the courts and the judiciary play in respect of law. Since law is a rule determining conduct between interested parties, it seems absolutely essential that some relatively important and objective person or body should pass upon the meaning of this rule and of the rights and duties arising under it. Otherwise the rule is likely to be subject to as many interpretations as there are interested parties, and each of these interpretations is entitled to equal respect. A fourth is the place that force or control plays in respect of law. It may and usually does determine the rule or the law in the first place. It may determine its interpretation. And finally, it may and usually will determine obedience to it. It is particularly important in revolutionary periods, and should be contrasted with that less spectacular law-making and law-enforcing factor, the slowly developed custom or practice of a community. Reason is related to one aspect of the law of nature, and is perhaps the only effective modern remnant of that doctrine. As reason is likely to be subjective, however, it cannot be an accurate determinant save perhaps in a community homogeneous in experience, in outlook, and in desires. Consent and, coupled with it, inertia are no doubt important elements in the enforcement of obedience to or acquiescence in rules of conduct or law. But these again, like reason, are important only in a homogeneous society, and are never likely to be a dynamic force in law-making or changing.

Turning then from this rather general exposition, let us examine in the same way the nature and function of international law. While it is always wise to observe the caution that *international law and domestic or national law* are not identical, I believe they are sufficiently similar (in respect of their nature and function) to warrant the closest comparison. Professor Oppenheim has defined international law as "the name for the body of customary and conventional rules which are considered legally binding by civilized states in their intercourse with one another." Without commenting upon this, let us go behind it and consider the nature of the international society, if there is one—if none exists, then we need proceed no further—and the function of law in it. The first thing we notice is that the persons of the international society are *sovereign states* and that they do, in varying degrees, have relations with one another. Thus there is a community or society or, to be more exact, an association of sorts; but as sovereignty by its very nature implies freedom from control and irresponsibility for action or the consequences of action, it is not surprising to discover that control does not exist in the international community, and there are resulting deficiencies in the respect for or obedience to rules of conduct.

Here, perhaps, it should be noted that the international community in a world-embracing sense is of very recent origin. True, there were empires

like that of Rome, and continental or maritime regions like Europe or the Mediterranean which were sufficiently a community to give rise to a system of laws or rules of conduct governing their relations. And there were philosophies like the Stoic, or religious organizations like Christianity, which in the Middle Ages under the leadership of the Western Catholic Church provided a degree of homogeneity which enabled a community and laws to develop. But even in these situations or periods, as Dr. van Vollenhoven points out in his little treatise on *The Law of Peace*, "the history of international law is tantamount to an epic, a vast unceasing struggle between two primeval forces. On the one side is to be seen a real law of peace, a puny creature, yet possessing a will to live. On the other side may be observed the powerful and ruthless forces of war and a spurious law of war." And the full development of both world community and world law have waited upon our day and generation, for I think it no exaggeration to state that within the past seventy-five years the world, for the first time in history, has become a community in the sense that all of it, and each division separately, is aware of, and reacts to, and has some degree of relationship with all of the rest and its parts and divisions. But having said that, one must hasten to point out that it is only a community in the most primitive and limited sense of that word. It is heterogeneous in almost every possible way, for its members differ in race, religion, culture, philosophy, and are in constant competition or conflict in respect of their various interests and ends. But the fact that they have relations with one another, the fact that the observance of certain rules of conduct sometimes is an advantage, and the presence of traditions that have survived from the earlier and more restricted international communities of Europe and Christendom, as well as the influence of the experience of the "state" itself, have resulted in the development and utilization of that system or those systems of rules of conduct which we now term international law. Many factors have contributed to this development, not the least of which have been the writings of students and scholars.

But, as with national law, there are one or two matters which stand out and impress themselves upon one whenever international law is examined and analyzed. The first is the primitive state, the immaturity of the international community, mentioned above. The second is that resort to international law is, in the last analysis, optional, for, as with national law, it exists and functions because the parties interested believe it serves their interests, while, unlike national law, the parties are almost wholly exempt from any compulsion except that of fear of the other party and that of the questionable pressure of adverse public world opinion. If we keep these two last points in mind, i.e., (a) that submission to international law is based on a belief that it serves a selfish national interest more satisfactorily than rejection of it and resort to violence or other means would, and (b) that it has no institutions or authority associated with it competent to insure obedience to it, then I believe we are in

a position to understand our contemporary society and the place of international law in it.

Another matter of importance is the defective state of the machinery or procedure for determining in an objective, non-party way, the rights of parties and the content of the law applicable. Even more important and more surprising is the apparently generally held belief that this non-party procedure is not essential—a belief that can be explained only by reference again to the fact and nature of the irresponsible sovereign state. As far back as the beginning of the seventeenth century, Hugo Grotius, in that epoch-making work *De Jure Belli ac Pacis*, distinguished between the *just* and the *unjust* war. He said that a war waged in defense of national territory, to recover property wrongfully taken, or to right a wrong, was a *just* war and therefore legally permissible. But Grotius and practically all who have succeeded him leave the decision as to when this state of facts exists, that is the justice or injustice, the legality or illegality of the war, to the determination of the parties or to a public opinion always liable to be victimized by the clever propagandist. Here one cannot help noticing the similarity between the national law in respect of self-defense and the *just war* of Grotius. But there is this all-important difference. In national law there is always a non-party, objective body, the court, available to determine the legality of, or justification for the degree of self-defense resorted to. In international law this has been left to the parties themselves, with the natural result that all wars and acts of violence are invariably justified by the parties resorting to them, and usually on the grounds of self-defense.

Another matter of supreme importance in respect of international law is the complete absence of any centralized control or of sanctions based upon the legalized and centralized employment of force. This again is traceable to the existence and nature of the sovereign state. But its absence results, as one might expect that it would, in the constant threat or reality of anarchy—anarchy not in the sense that there is no law and no community, but anarchy in that laws are constantly flouted, obligations broken and violence resorted to on the grounds either that such action is, from the party point of view, legally justified, or, what is more important, seems likely to be attended by material rewards.

I have indicated earlier, that control and the legalized, that is centralized or government use of force are characteristics of every society possessing any semblance of law and order. I suggested further that, to the best of my belief, control in every modern society is exercised by a group or groups in their own interests who impose their will upon or win the acquiescence of the others in the community. I suggested that the greater the homogeneity of the community the smaller the control and force necessary, so that it is conceivable that in the ideal community, Utopia, we may achieve a true democracy where the control exercised is exercised in the interests of everyone equally, and because of this, the force necessary to insure compliance with the regulations and

laws laid down would be the minimum necessary to deal with the careless, the selfish and the anti-social. One might expect therefore that a necessary stage in the development of any real international community and of any recognized system of international law would be the establishment of central control and of agents to enforce its commands and instructions and of courts to determine and interpret the content of and meaning of these commands.

But again because of the sovereign state, this does not seem probable, at least in our lifetime. The alternative or perhaps parallel development is in the direction of a homogeneous community of the world. This cannot be homogeneous in respect of traditions and race, in the appreciable future at any rate. It may become homogeneous as to way of life, or philosophy of government, and as to ends to be served and the means adopted in serving the ends. I think it is probable that this is what was optimistically hoped for in Paris in 1919 when the League of Nations was founded. At that time it was conceivable that the victorious Powers, particularly Britain, France and the United States, might have organized the centralized control necessary to impose their will and law upon the world, and for a time Britain and France did so after a fashion upon Europe. But as was to be expected in a community marked by freedom of choice on the part of each individual member in respect of conduct and action, it was natural and inevitable that each would go its own way and seek such selfish interests as seemed most attractive to it at the time. The United States almost immediately took refuge in isolation; Russia in Communism; and Italy in Fascism. Great Britain and France and some fifty-six other states continued to experiment with certain forms of coöperation in their attempt to establish an international government. But the heritage of the past, coupled with economic nationalism and economic hardship, made this coöperation difficult. And as the first resort to self-help in defiance of the rules laid down, as practised by Japan in Manchuria, paid or seemed to pay material dividends in terms of prestige and territory and freedom of action, it was inevitable that other similar incidents would speedily follow, as they did in Abyssinia, in Spain and in Austria. For, as I said earlier, the fundamental basis and final determinant of all law, as of all action, is an affirmative answer to the question—Does it pay? Or does it meet a need or satisfy a desire? If it does, it is likely to be adopted. If it does not, or if some other procedure or action seems preferable and possible, that will be resorted to.

But it should be noted that the immediate post-war period has made notable contributions to the development of an international community and to international law. Whether these contributions will be permanent remains to be seen. But whether permanent or not, the experience gained is a permanent heritage. Among the important developments in this post-war period are the following: (a) The creation of certain permanent institutions of government for the international community. These have in many respects proved their worth and, League or no League, they will continue to function if

the international community remains a fact. (b) The establishment of "non-party" procedure for passing upon the legality or justice of the behavior of states. This filled a gap in international law, a gap which was evident ever since Grotius wrote of the *just war*. As the application of this procedure was a definite limitation upon the freedom of action of individual states, and as it could be argued that it benefited those who sat in judgment, even if indirectly, it is not surprising that it has been subjected to the severest criticism, opposition, and in several cases defiance. But the fact that an objective procedure was set up to pass upon the legality of the behavior of states and the fact that it has functioned on a number of occasions is of great significance in the development of international law. Coupled with this procedure for judgment has been procedure to enforce obedience and to penalize disobedience of these "non-party" rulings. None of these, whether in the form of economic sanctions or of the disapproval expressed in world public opinion or the Stimson penalty of non-recognition, have proved an effective deterrent to unilateral, and in that sense anti-social, action by a number of states. But again these experiments and this experience are of great significance in the history of international law, and I would venture to predict that we have not heard the last of them. Here again we see an attempt being made to introduce into the international community procedures that are commonplace in the national and local community.

The Permanent Court of International Justice is not unique in the sense that these other procedures are, for it had its origins in the pre-war world. But its practical achievement is a contribution of the post-war period, and an extremely important one. For the first time in history there exists a court continuously available to all states to assist them in the determination of "justiciable" disputes which arise between them. I use "justiciable" advisedly, for while I agree with Dr. Lauterpacht that any dispute which the parties choose to submit to an unlimited court may be determined by them, and if no other procedure exists this may be desirable, I believe that both courts and law itself best serve their purposes and the community when they are restricted to a certain defined field which I briefly if unsatisfactorily describe as justiciable.

Writing of these changes in international law, Dr. A. D. McNair, in his inaugural lecture as Whewell Professor of International Law at Cambridge, states:

What I wish to emphasize is the legal character and the historical significance of what is now being done. The first feature is that it is an unheard of thing that fifty non-belligerents should meet and expressly concur in singling out one of two belligerents for condemnation as a treaty-breaker and an aggressor. The second is that most, if not all, of the measures now in force in the name of sanctions would twenty-five years ago have been serious breaches of the law of neutrality, affording to the victim of them good ground for reprisals or more serious action.¹

¹ Arnold D. McNair, *Collective Security* (Cambridge, 1930), p. 14.

I think, however, despite all this, that if we are honest we must admit that these new procedures are definitely, if only temporarily, in abeyance, and that the members of the world community still seem to prefer freedom of action and partly interpretation of law to organized restraint and objective interpretation. It is necessary therefore to look at the state of international law in the contemporary scene and to ask ourselves several questions.

But first may I distinguish between what I consider to be international law and the so-called laws of war. In so doing, I do not mean to suggest that the laws of war do not serve a useful purpose. They do, and for that reason are to be commended and supported. But here again I think a distinction is necessary between the laws affecting non-belligerents or neutrals and those affecting the conduct of belligerents in their relations with each other. The last, in my opinion, have no more place in an orderly and organized system of law, than laws providing for and governing the conduct of revolution and civil strife have in the *Constitution* or statute books of the United States. As one interested in human welfare I welcome anything which will limit the probability of and mitigate the suffering attendant upon war. If rules governing the conduct of hostilities will do this, then I approve of them, but both in fact and in theory I see little evidence of the truth of this. Certainly if faced with defeat and possible extinction as a nation, it is unlikely that any state would abide by the laws of war if their breach would seem to promise some hope of victory and security; whereas I know that no individual soldier will concern himself with any limitation upon his actions which may result in his own death. I do agree that, in certain circumstances, prescribed restrictions may be effective and valuable. I know that they have an effective propagandist value in time of war. But in all deference I submit that they should not be included as an integral part of international law. In attempting to do so, I believe we markedly weaken the bases of our subject.

The laws governing the relations of belligerents and neutrals I consider to be in a different category. Here, ordinary rights and duties are affected and ordinary rules of law should apply, subject of course to the extraordinary circumstances which have resulted in the belligerents obtaining certain special rights and privileges and which are embodied in law and recognized by neutrals. As these rights and duties are, within limits, capable of legal determination, there is a place for them in a legal system. The limits mentioned arise out of the possibility that the exceptional circumstances and conditions may force, and usually have forced, the belligerents to ignore or to change these laws. As the acts of the belligerents may be based on grounds of self-preservation, protests are likely to be useless and action for damages of doubtful value. Reprisals and penalties are, of course, possible lines of action and are obvious deterrents, but they are likely to be poor substitutes for the material losses suffered. But here again one must agree that the laws of war, both belligerent and neutral, are part of orthodox international law and,

regardless of their reality or validity in action, they must be given due consideration.

The first question, therefore, that I would ask is, Is there any such thing as international law? My immediate answer is an emphatic "Yes." The second question is, What does it consist of? My answer to that is, "The rules of conduct which may be resorted to by states or nations in their relations with other states." I say *may* advisedly, for in the present state of international society a state has the option of accepting recourse to international law or of rejecting it altogether and resorting to other measures, notably violence. Or it may insist on an interpretation of fact or law favorable to its own claims and not consonant with that of the other state's view or even with the generally accepted opinion.

But here it may be useful to include one or two definitions of the subject so that we may see what others have thought of this matter. Brierly states that "The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another."¹ Hall considers that "International Law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."² Fenwick describes it as "the body of general principles and concrete rules which the states that are members of the community of nations recognize as binding upon themselves in their mutual relations."³ Schuman says the law of nations has "now become a well-defined and logically integrated set of principles indicating the rights and obligations of States in almost every conceivable international situation."⁴ Stowell defines it as "a set of rules observed and enforced by the states in order to preserve the peace of nations and to facilitate international commerce."⁵ Hatschek postulates "a legal system based upon co-ordination (parity of ranking?) and governing the relations of states *inter se* in so far as they have contact with one another as equally entitled units in the society of states."⁶ Baty describes it as "the common consciousness, mainly inarticulate, of these human beings, regarding the rules which ought to regulate those relations constitutes the Law of Nations. Statesmen are guided by it. Jurists endeavour to discover it. But neither statesmen nor jurists make it. Statesmen can make treaties; but treaties do not make law: they depend on the law."⁷

¹ Brierly, *The Law of Nations* (2nd ed., Oxford, 1936), p. 1.

² Hall, *International Law* (8th ed., Oxford, 1924), p. 1.

³ Fenwick, *International Law* (2nd ed., New York, 1934), p. 32.

⁴ Schuman, *International Politics* (New York, 1933), p. 121.

⁵ Stowell, *International Law* (New York, 1931), p. 10.

⁶ Hatschek, *An Outline of International Law* (London, 1930), p. 3.

⁷ Baty, *The Canons of International Law* (London, 1930), p. 24.

These and all of the many other definitions of the subject (I have selected but a few and these because they happened to be at hand) have, as one might expect, much in common. Similarly, the various *authorities* agree in a general way as to the origins or sources of international law. It follows that any contemporary student of the subject can discover with reasonable definiteness and accuracy what is generally agreed to be international law at the present time. Or at least he can discover it with about the same accuracy that the student can discover the content of municipal law in the common law countries. But does this apply with equal accuracy to the states themselves? Can they discover and do they know what are the rules of international law and are they bound by these rules? In theory they can and do. In practice however it is not so simple, as I have tried to point out earlier in this paper. For the fact is that the states or their representatives are interested parties and as such they strive, in respect of international law, as of other things, to protect and further their own interests. Further, as they are under no compulsion to submit their dispute to arbitration or to a court of law, there is always the temptation to refuse to do so, particularly if they suspect that they may lose by so doing or if they believe that they will gain by refusing. This means that we as a race, or as a community of states, have evolved a reasonably adequate body of rules of action or conduct governing the relations of states but that compliance with these rules is still a matter of choice or option for each individual state. Further, we have set up certain courts and established certain procedures which insure that interested parties (or states) may obtain an intelligent and impartial decision or opinion in respect of legal disputes. But, again, the states are, in the main, under no obligation to submit their disputes to arbitration or judicial settlement. And finally, there is no authority or sanction which requires or insures that a state shall comply with the decision or finding of the court or arbitral body. The result is that in too many cases both international law and international legal procedures are either ignored by states or are distorted by the parties in an attempt to further their own interests. But the fact remains that we have both law and procedure, and as in a great many cases, particularly those of lesser importance, it is more satisfactory (*i.e.*, it pays) to submit them to legal settlement, this is done.

Then it must not be forgotten that the existence of this body of law has an important influence upon settlements which are non-legal or semi-legal, *e.g.*, in diplomatic negotiation and conferences. And it is particularly important in assisting municipal courts to determine issues involving points or principles of international law.

What I have just written applies to what I term ordinary international law, or the law of peace. But it is (to me regrettably) still competent for a state to ignore this and to resort to what I term the extra-legal procedure of violence or war. And when this happens, a new set of circumstances arises

and a new attitude and new procedure become necessary. It is true, as I have pointed out, that international law and international lawyers try to regulate both resort to war and the conduct of war, but, as I attempted to suggest, the very nature of the remedy or procedure makes this of questionable value in the legal or juristic sense. To me war is the antithesis or the denial of law. It, like revolution, occurs only when legal means have failed, when law as a remedy has broken down or when a party or parties have decided upon action regardless of law and legal procedure. Law, judicial settlement, and arbitration, as Professor Brierly has so aptly stated, are no more a substitute or necessary alternative to war than water is a substitute for whisky.¹ Nations resort to judicial settlement to obtain a settlement of their claims according to law. Nations resort to war to impose their will upon other nations or to prevent other nations imposing their will upon them. There is rarely if ever any consideration of precedent legal rights in the final settlement, and very little in the conduct of the hostilities, save upon grounds of policy and expediency, in a bitterly contested modern war. For these reasons, while recognizing the existence of war, and of the measures outlined or agreed upon to regulate and control resort to war and its conduct, I prefer to place them apart by themselves in a section labeled "the extra-legal relations of states," and to treat them as such.

Sometimes one or two practical illustrations are a useful aid to an understanding of a thesis or point of view. In conclusion, therefore, I propose to resort to this device. I have argued that both law and international law are human in their origins and exist to serve definite human ends. This being so, they are susceptible to human interpretation and to being changed in the interests of human beings. I then went on to note the differences, particularly in respect of what I term the procedural field, between national and international law, and I suggested that these differences in respect of courts and submission to them, authority and sanctions, were due to the nature of the sovereign state and the primitive and heterogeneous condition of the international community as contrasted with the position and status of the individual citizen and the often mature and homogeneous national community. May I for the purposes of comparison, therefore, and subject to the objections and limitations which I realize are inherent in such comparisons, refer you to the effect of the doctrine of *rebus sic stantibus* upon contracts in municipal law and upon treaties in international law. If I make a contract with one of you, and later, you try to force me to carry out my part of the contract, I may refuse on the grounds that the conditions have so materially changed that I am no longer bound. If I do, and if you disagree, the remedy is simple. You hale me before a court of law and the judge decides whether you are right or whether I am. In other words, the judge determines what is the meaning of

¹ "The Function of Law in International Relations," *Problems of Peace*, Third Series (1928), p. 203.

the doctrine *rebus sic stantibus*; he decides whether it is applicable in this particular case and orders accordingly; and his order or decision is enforced by the authority of the state acting through its officials.

But suppose Canada makes a treaty with the United States about navigation on the St. Lawrence, or about the export of hydro-electric power, and later our Government refuses to carry out the terms of the treaty on the grounds that the conditions have altered and that we are no longer bound because the doctrine or rule of *rebus sic stantibus* applies. The United States may then do one of a number of things. It may—though I am glad to say that I do not believe it ever would—ignore possible legal remedies entirely and declare war upon Canada, or, in the modern style, seize Ottawa and hold a plebiscite. Needless to say, such a settlement would not be in accordance with my ideas of law and justice. Or the United States would, in all probability, enter into negotiations with the Canadian Government and on a bargaining basis reach an agreement about the matter in issue. The two countries might agree to submit the matter to arbitration; in that case their representatives would argue the pros and cons of the various theories or concepts of the doctrine of *rebus sic stantibus* and the judges or arbitrators would determine both this and the rights of the parties. But no officials or authorities are available to see that the decision is carried out, and obviously if it imposed obligations upon the United States which the United States rejected or ignored, there would be little that Canada could do about it. Or, finally, the matter might be allowed to settle itself, which seems to be the case in respect of the Jay Treaty of 1794, or at least of certain terms of it. For here it appears that both Canada and the United States have reached independent decisions in respect of their obligations under it and apparently do not propose to do anything more about it.

After this adventure into the realm of subjective philosophy and jurisprudence it is perhaps fitting that in conclusion I should give my answer to the views expressed by Professor Zimmern and the student to whom I referred. I would reply to them that there is a broad and well-organized system of international law; that it is of very real value when nations choose to use it; that even when they reject it, it still has very considerable influence, as witness the fact that nations usually claim, even in rejecting it, that they are complying with its terms; that, as its rejection is often a disadvantage in the long run because of the attitude of other states, this possibility serves in some respects as a sanction; that when it is invoked, states usually accept the ruling agreed upon or handed down; that its existence is of great importance in assisting national courts in the determination of issues involving international law. Having said this, I would then go on to meet their general criticisms and objections by pointing out that the international community is primitive and heterogeneous; that there is no central authority or organized group exercising control in it; that its procedural facilities are definitely limited; that resort to the extra-legal procedure of violence and war, as an option or sub-

stitute for law and legal procedure, is still possible and proper; that much, if not all, of the popular criticism directed at international law arises out of this fact, and out of the practice of international lawyers claiming that such violent procedure is within the field of international law. I would go on to point out the changes in this regard suggested in the immediate post-war period, and note the effect that these are likely to have upon international law and submission to it. I would draw special attention to the fact that here in North America, between two relatively homogeneous states, international law has been of great service, and submission to it seems to be an accepted practice; and finally, I would go on and say that, just as within the state, law has proved to be a more satisfactory instrument than violence or any other alternative, so it is reasonable to expect that unless autarchy becomes the rule, the community of nations as their relations increase, and as their interests coincide, will agree that reference to law is preferable in returns received to the other alternatives, notably war. I would in addition suggest that the weakness of international law is not in the substantive law itself, which is, in my opinion, reasonably well developed and adequate, but in the unorganized state of the international community and in the weakness or deficiency of the existing procedural facilities, as for example, non-party procedure, control, compulsory jurisdiction, organized sanctions and penalties, and a recognized and organized law-making and law-changing body.

Chairman REEVES. The second address of the evening will be upon "The theory of international law," by Dr. Josef L. Kunz, of the University of Toledo, Ohio. Would that we might have also a situation that would permit of a professor from the University of Toledo, Spain. I have great pleasure in presenting, therefore, Dr. Kunz.

THE THEORY OF INTERNATIONAL LAW

By JOSEF L. KUNZ

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The history of the post-war years shows that international law is sometimes overestimated, sometimes underestimated. The truth is, that international law is, in the words of Professor Brierly "neither a chimera nor a panacea."¹ And this is true not only of international law, but of all law. But this cognition is already the fruit of theoretical insight into international law. And this remark brings me directly to the basic importance of the theory of international law. For, if the layman sometimes questions the value of international law, many an international lawyer questions the value of the theory of international law.

In another connection I have tried to analyze the particular character of the American science of international law, its peculiar virtues and eventual

¹ J. L. Brierly, *The Law of Nations* (2nd ed., Oxford, 1936), pp. v, vi.

shortcomings.¹ Among the latter I ventured to suggest its a-theoretical, or sometimes even anti-theoretical attitude, not only its neglect, but its fear of theory; and I tried to trace the reasons of this anti-theoretical attitude—the basic mental attitude of Britons and Americans, overestimation of natural sciences, the predominance of the “case” and the “case method,” the over-emphasis on the practical, the adoration of “success.” The “pressure of practicality” is responsible for the more professional than scientific character even of the law schools. Add to that the complexity and technicality of the common law which forces “Law Faculties to emphasize technique at the expense of the broader problems which underlie the modern legal systems.”² Even the law schools have still fully to conquer their proper task, which cannot be to teach success, but alone to advance the science of law; this is the job of the new profession of the scholars of the law, a profession which came into existence in America with the victory of the law schools. And I am happy to say that this transformation from the purely professional to the truly scientific character is already under way, in the fields of common law as well as in international law, whether taught in the law schools or in other departments. The newer development of the casebooks on international law shows the turning-point to a more theoretical treatment; this transformation is particularly visible in the recent work by Briggs.³

It is, therefore, already at a moment where the importance of the theory of international law is being more and more recognized in America, that I feel it my duty strongly to underline this importance. It is perhaps pertinent to stress, first of all, the true meaning of the conception of theory, to do away with the misconceptions, according to which theory is often identified with idle curiosity, with Utopia, misconceptions according to which theory is nothing but mental acrobatics, a pure *jeu d'esprit* of scholars, utterly devoid of any practical value, far remote from the so-called “real life.”

The word “theory” is the Greek word “*θεωρία*,” which comes from “*θεωρεῖν*.” And this verb means to look at, to contemplate, to look into, to view, to behold, to gain a deep insight of an object. *θεωρία*, therefore, means a deep study, a full insight or beholding, a systematic statement of rules or principles. Theory means the pure, abstract knowledge, the knowledge of principles and methods. It is in this sense that theory is often contrasted with practice. It is in this sense that Kant has written a critique of pure, i.e., theoretical, and a critique of practical reason. The theoretician is concerned with what is, the practitioner with what one should do. It is in this sense that Aristotle distinguished the scientific man from the politician: “*θεωρητικὸς τῶν ὄντων, πρακτικὸς τῶν δεόντων*.” The theoretician's attitude is concerned with the general validity of the solution of problems, the practi-

¹ Josef L. Kunz, “The American Science of International Law,” in *Law: A Century of Progress 1835-1935* (New York, 1937), Vol. II, pp. 166-194.

² *Modern Theories of Law* (London, Oxford University Press, 1933), p. v.

³ Herbert W. Briggs, *The Law of Nations, Cases, Documents, and Notes* (New York, 1938).

cian sees only the single, concrete case. The theoretician is interested in truth, the practitioner in success.

And yet, theory and practice, while different, are by no means separated from each other by an unbridgeable abyss; they are closely and necessarily correlated to each other. Kant¹ has definitively shown that the idea that something may be all right in theory but not have the slightest value in practice is an untenable error. On the one hand, theory exists in order to be applied; the theory of law is the theory of the possible, positive law; on the other hand, no practice is possible without theory. At the very basis of every action, however practical, there is always necessarily theory. A practice which tries to go ahead by rejecting theory on principle must lead to absurd results; the neglect of or opposition to the theoretical insight takes its revenge in the crashes of practice. "Yet at the threshold of this subject," wrote Professor Garner and Mr. Jobst in their excellent Report, "one encounters the fact that there is no clear and well-defined law of treaties."² While fully endorsing this statement, I would like to add that we have not yet a clear and well-defined theory of international treaties. And may I further suggest that one of the reasons for the fact deplored by the authors is exactly the lack of an adequate theory.

Theories are often influenced by events, but events are often influenced by theories. The theories of international law in the post-war years have been influenced by the effort theoretically to explain a given historical situation,³ and the changed international situation of today is reflected in different theories. But, on the other hand, these theories have, in a far-reaching way, influenced the events, and do influence them.

The importance of theory, its distinction from, but correlation to practice, finds its expression in science. Every science is essentially theory. It is true that law is a practical matter; but law is not identical with the science of law: international law is not the same thing as the science of international law.

No science is possible without theory, *i.e.*, an effort to coordinate the facts, to think them. A science is not a mere aggregate, but a system, and in order to arrive at a system, we need, as Kant has shown, a method, *i.e.*, a procedure according to principles of reason by which alone a diversity of cognitions can become a system. For the scholar of international law, the methodological problem is, therefore, of greatest importance. Let us here again remember what the word "method" means—the way.⁴ How can we reach a goal without knowing the way?

¹ I. Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (Kant's *Sämtliche Werke*, ed. by Vorländer, 6 vols.), pp. 69–113.

² *Law of Treaties* (Supplement to *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 29 (1935), pp. 666, 667).

³ For an excellent and detailed analysis, cf. Walter Schiffer, *Die Lehre vom Primat des Völkerrechts in der neueren Literatur* (Leipzig and Vienna, 1937).

⁴ From the preposition *per* and *hinc*, the way.

We international lawyers as such are the scholars of international law; as such, we are not diplomats, statesmen, government advisers, counsel for plaintiff or defendant in international cases. Our profession is the science of international law, our task is to advance this science; our task is a scientific, *i.e.*, theoretical one. How could we neglect theory? We are, indeed, by profession, the theoreticians of international law.

If our profession is not the practice, but the science of international law, it is necessary, for further clarification to state that this term has different meanings, that international law can be approached from many angles, can be made the subject-matter of different sciences which are all legitimate, even necessary, for a full understanding, but which are different in their subject and, in consequence, in their methods.

As I have explained on other occasions in greater detail,¹ there is the history of international law, the sociology, the psychology of international law, there is politics of international law. But, in the stricter sense, the science of international law is a *legal* science, working with juridical methods, concerned with the international law that *is*. And this task is a theoretical one. One of the fundamental methodological postulates is not to confuse the science of international law with the politics of international law, the statement of the law that is with subjective wishes as to what the law should be.

Apart from this danger of confusion, there is the further danger arising out of the confusion as to the methods of the legal science in the proper sense, dangers which come from two opposite sides: from those who would confuse law and morals—the natural law lawyers, working with a dualism of legal orders, the positive law and some “higher law” and often trying to bring about a conciliation between their two legal orders by a fictitious presumption, as *e.g.*, Scelle's *hypothèse du bien légiféré*; and from those who would in a fashionable but clearly untenable way identify legal science with natural sciences.

We international lawyers as such, are, as I have stated, by definition and profession, the scholars, *i.e.*, the theoreticians of international law. The theoretical task is our *raison d'être*. Our theoretical work determines our place and our usefulness in a society built upon the principle of division of labor. As there is no practice without theory, so it is certain that no solution of the very practical problems of the reorganization of international relations is possible without theory. The theoretical, scientific work is, *par excellence*, our contribution to this solution.

It is, therefore, clearly necessary that we cultivate the theory of international law in our teaching as well as in our research. For teaching and

¹ Cf. Josef L. Kunz, “The Vienna School and International Law”, in New York University Law Quarterly Review, XI/3, 1934, pp. 370–421, and my remarks in Proceedings of the Fifth Conference of Teachers of International Law and Related Subjects, 1933, pp. 91–93. Cf. Georges Scelle, *Précis de droit des gens* (2 vols., Paris, 1932, 1934).

research are closely interconnected and reflect upon each other. In laying stress on the theoretical in our teaching, we will build up a generation of men who are not merely legal technicians, but jurists who, in turn, may be able to make their contribution to the advancement of the science of international law. By doing so we will create a basic understanding of international law and its theoretical problems without which no sound practice is possible, we will teach them that international law, as law in general, is more than a mere technique, more than a way of making a living, that "law is the calling of thinkers."

But the place of theory in teaching presupposes the place of theory in our research. Our theoretical work is our particular contribution, and far from being of no practical value, it is the theory of international law which guides the practice. It is the theoretical work of the scholar which the municipal judge having to decide cases involving problems of international law needs as well as the international judge. The theoretical work of the scholar is indispensable to foreign offices. It is indispensable to legislators, to statesmen, to diplomatists. The work of the theoretician is finally indispensable for the politics of international law. The codification of international law, the preparation of international conferences, of treaties, the setting-up of international institutions, everywhere the work of the theoretician of international law is indispensable.

But here, perhaps, a warning is necessary. The success of the politics of international law presupposes theoretical preparation and guidance. Politics itself is not a science, but an art, the art of what is possible under given circumstances. The determination of the new international law is not the task of science, but of politics, not of the scholar, but of the statesman. It is for the statesman to make the political decision. In making this decision, which is always an experiment, the scholar of international law as such has no superiority over the statesman. His advantage lies in formulating the contents decided upon by the statesman.

Theory, we said, is the viewing, the beholding of the essential, the deep insight into principles and methods. Objectivity and impartiality are therefore necessary for the theoretician. Up to now I have dealt with two dangers: the anti-theoretical attitude, and the confusion of methods. But the theoretician of international law is threatened by a third danger, the danger of a politically prejudiced attitude. Legal science, like all social sciences, is here in a much more difficult position than natural sciences. The theoretician of international law may be subject to pressure from within, consciously or unconsciously, or to pressure from without.

His sole interest as a theoretician, his interest in truth, may be endangered by his own subjective political attitude, whether pacifist or nationalist. Instead of being engaged in the theory of international law, he may indulge in utopias and wishful thinking; or he may become the mere servant of the practical policy of his state or its allies or friends. Then, what goes under

the name of theory of international law is in fact nothing but politics, an ideology to justify a particular foreign policy; the science of international law becomes one more instrument of national policy. This danger is particularly real in an epoch like ours, which is a period of transformation and crisis, a period which has been shaken to its very foundations by the World War and its aftermath.

I have spoken upon the basic importance of theory in the science of international law. One more question comes up. What do I mean by theory, especially where is the dividing line between the theory and the philosophy of international law? For philosophy of law certainly also lies at the basis of the science of international law.

Kelsen understands by theory of law the problems of the nature and the structure of the law, its relations to the state and society, of the fundamental conceptions and the methods of cognition of law, the relations in principle between the different juridical orders of the states and between municipal and international law, and contrasts this theory of law with the philosophy of law concerned with the problem of justice, of a natural, right, absolute, just law. Others, like Del Vecchio,¹ and particularly Recaséns Siches,² hold that the philosophy of law embraces both the valuation of law (the problem of justice) and the theory of law. However that may be, it is this second problem which I designate here as the problem of the theory of international law, *i.e.*, a philosophical theory of possible positive international law.

Having said so much on the importance, the essence, the necessity, the value of the theory of international law, there would still remain the task of giving the theory of international law. This, of course, cannot be done here. To give, or even only to outline the theory of international law, would require not a paper, but a book, not a short address, but a course of lectures. All I can do here is to make a few general remarks.

If international law is law, it must correspond to the theoretical suppositions of law. It follows that the theory of international law must necessarily start with the theory of law, as the philosophical theory of all possible positive law, as the theory of the essence, the structure, the form of law, as the theory of the ultimate and irreducible notions of every legal order.

No theoretical understanding of international law is possible without a theoretical understanding of law. Therefore, the notion of law stands at the threshold of the theory of international law. The theory of law shows that the law is a system of rules or norms, that law is a rule regulating human behavior, that the rule of law connects persons with facts, not according to causality, but to the juridical nexus of imputation. Every rule of law regulates and cannot regulate but human behavior. But not every rule regulat-

¹ Giorgio Del Vecchio, *Lezioni di Filosofia del Diritto* (3rd ed., Rome, 1936), pp. 2-4.

² Luis Recaséns Siches, *Direcciones contemporáneas del pensamiento jurídico* (2nd ed., Barcelona, 1936).

ing human behavior is a rule of law. The law regulates the behavior of men only in their relations with other men. And as man is by nature a social animal, law is coeval with the existence of men.

The rule of law is binding; herein lies its specific characteristic, its validity. That law is binding means that it is supraordinated to, independent of the will of the individual subject to this legal order. As the rule of law is, in contradistinction to the rule of causality, on the level of oughtness, it follows that the rule of law ought to be observed. But the problem *why* it ought to be observed is clearly a metajuridical problem which cannot be answered by the science of law. The rule of law ought to be observed, but it can be disregarded in fact. The violability of the law is therefore essentially inherent in the very conception of law. The rule of law is a compulsory norm; its essential characteristic is not coercion—a problem of fact—but coercibility. Law needs a sanction. But while law, as a normative rule, presupposes a certain tension between the norm and reality, this tension must not become too great. Here the theoretical investigation of the relations between law and force comes in, the insight that on the one hand law cannot be identified with force, on the other hand that no law is possible without the possibility of the application of physical force, a relation which already the Roman legal proverb *gladius legis custos* correctly states.

Every legal order determines who the subjects of this legal order shall be. Every legal order is built up in stages. The theory of law is not only concerned with the validity, but also with the creation of the law. The problem of the two fundamentals of law, stability and possibility of change, comes up here.

It is only on the basis of the theory of law that an adequate theory of international law can be built up. This theory will have to show that international law is law, that it corresponds in its form and structure to the essence of the notion of law. By doing so, it will not only avoid common errors but explain them in their theoretical untenability. It will no longer be said *e.g.*, that the violations of international law, real or alleged violations, speak against its legal character. It will no longer be dogmatically asserted that international law binds only states, not men. For if it is law, it cannot regulate anything but human behavior; but the theory will equally avoid drawing from that the erroneous conclusion that the individual is by necessity a subject of international law. Equally it will be shown that the dogmatic assertion that only states are and can be subjects of international law is untenable, because it is international law itself which determines who shall be its subjects.

The theory of international law will show that international law consists of compulsory norms, that it has a sanction; this sanction of general international law is war and reprisals. The theory will deal with the relations between municipal and international law, will show that international law as law is necessarily supraordinated to its subjects, that the famous

theory of international law as a "law of coördination" is just as much a flat contradiction in terms as the equally famous theory of international law as an "anarchical" law. The supraordinated validity of international law must not be confused with the methods of its creation. The theory of international law will study the sources of international law and their relations to each other, the problem of the hierarchy of these sources, the problem of *jus cogens* and dispositive law, the problem of the so-called "gaps" of international law. It will study its application in the executive and judicial process. It will study the theoretical relation between international law and force, between international law and organization. It will study the fundamental problem of stability versus change.

The theory of international law will study, on the basis of the general theory of law, the particularities of the present positive international law. The theory of international law will do away with the idea that by necessity international law must always remain in the stage of development it actually possesses, that the so-called "weakness" or "imperfection" of present-day international law is inherent in the very conception of international law, that it is by necessity a "law *sui generis*," a "political law," a "dynamic law" and so on, that "it can exist only so long as it has an imperfect degree of positivity, since the perfecting of its true vigor would of necessity mark its end," statements which are now again fashionable not only with nationalist writers, but also with thinkers where we would not expect it.¹

The theory of international law will show that the present international law is a *primitive* law. This is not, as Lauterpacht² would have it, an "excuse," but a theoretical insight. It is no argument that Lauterpacht says that the international community is composed of non-primitive states, that it is in all regards except with regard to its law, non-primitive. For what we state is exactly that it is a *legally* primitive community. The primitive character of international law is a consequence of its primitive organization. The dogma of state sovereignty must, therefore, be in the very center of the theory of international law. But the primitiveness of present international law is no argument against its legal character, nor is it a unique feature of international law; it is a feature which it shares with primitive municipal law. The theory of law must deal with all possible positive law; just as the historical school looked only at primitive law, so the analytical school looked only at advanced laws; in consequence, international law was not law for Austin. But both these schools unduly narrow the conception of law; they are not theories of law, but only theories of a certain type of law.

The primitiveness of international law, as in municipal law, lies in the

¹ Cf. the above quotation from G. Del Vecchio "On the Statuality of Law" in *Journal of Comparative Legislation*, London, February, 1937 (separate print, p. 14), see also Verdross, *Völkerrecht* (Berlin, 1937); p. 48.

² H. Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933).

lack of special organs to enact, to execute, and to enforce the law. The enactment of the law is to a great extent entrusted to the subjects of international law under the rule of unanimity. The execution of general international law is entrusted to the states. The enforcement of international law is not monopolized in favor of the international community, but left to the subjects according to the system of self-help. The states are not only left free to enforce their rights by war or reprisals, but they themselves decide also upon the existence of their rights; there is no compulsory court in general international law. Even where in particular international communities, like the League of Nations, international sanctions are prescribed, their effective application, nevertheless, must rely on the good will of the member states and on their physical force. As a primitive law, international law knows no distinction yet between execution and penalty, knows no individual responsibility for fault, but only collective responsibility for success. Like every primitive law, international law is predominantly static. "The first and simplest idea is that law exists in order to keep peace in a given society; to keep the peace at all events and at any price. This is the conception of what may be called the stage of primitive law."¹ There followed the "transition from the idea of law as a device to keep the peace to the idea of law as a device to maintain the social status quo."²

It is here again that the theory of international law becomes also of the greatest importance for the development of international law. Not as if the theory could bring about a progressive development, as if it could create the conditions which will make such a development possible; the political decisions must be made not by the scholar, but by the statesmen or the people. That is why the attempt of international lawyers to present their wishful thinking as the positive law, by "implying" into treaties things to which the nations obviously were not prepared or unwilling to consent, is not only theoretically untenable, but also practically harmful, because it creates mere illusions in the mind of the man in the street.

The theory of international law cannot bring about the progressive development of international law, but it can influence events by not developing pseudo-theories which are only rationalizations of political practice, but which also strengthen this practice by the *communis doctorum opinio*, such as the famous theory that certain international disputes are by their theoretical nature unjusticiable; by laying down the theoretical conditions which must be fulfilled if a certain desired progress is to be achieved, by showing that such progress needs a powerful organization to enact and to enforce the law; by showing, not that law must replace force, but that a more perfect form of enforcing law must replace the primitive form of self-help; that, even if enforcement through war remains in the hands of the states, war must become first the execution of an international judgment, which

¹ Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven, 1922), p. 72.

² *Ibid.*, p. 76.

presupposes obligatory jurisdiction of international courts; that this stage must be followed by monopolizing the enforcement of their judgments in the hands of the international community; that even this is not enough, as Lauterpacht and Kelsen¹ seem to think. For there remains the need of changing the law; and "peaceful change," as the theory shows, is not possible through judicial, but only through legislative process.

The theory of international law can, therefore, also warn that desired results are impossible if one tries to reach them in neglect of or in contradiction to theoretical insights. So the failure of post-war efforts at disarmament could have been theoretically predicted; for as long as the method of self-help is retained in principle, "he who is without arms is without rights." The theory could have predicted the difficulties of the League, because it is built upon contradictory principles, inspired at the same time by the wish to retain fully the sovereignty of the members and burdening the League with functions which only a supranational community, powerfully organized to enact and to enforce the law, could fulfill. It could have predicted the failure of attempts at abolition of neutrality without abolishing war. It could have predicted the failure of the attempts at elimination of war without creating substitutes for the non-warlike settlement of all international conflicts. For it is clear that no international law, as no law, can abolish conflicts; it only can change the methods of their settlement. Theory could have predicted that even a compulsory court is not enough; for international, as well as internal, conflicts are not only conflicts on what the law is, but also on what the law should be. The necessity for change cannot be eliminated from any system of law. Whether you look on the antagonistic aspirations of nations as conflicts between security and justice, or simply as clashes of interests, it was theoretically to be foreseen that a system built upon purely static lines by simply ignoring these dynamic conflicts must lead, as in municipal law, to restlessness, revolutions, civil wars, to international restlessness, the use of force, wars as a means to change the law.

Science itself is theory. And whereas in the fields of municipal law where there is a fully developed law looking back to a long history, codified or based on a long line of solid precedents and decisions, it is, to a certain extent, possible simply to explain the positive law, a young, undeveloped, primitive legal order like international law needs theory much more. In the science of international law, as, *e.g.*, in the science of conflict of laws, the scientific approach to any problem, however concrete, however restricted, leads necessarily to the very fundamentals of jurisprudence. And in a period of crisis and transformation as our present epoch is, the consciousness of these very fundamentals of the theory is doubly necessary. I have said enough to show the basic importance of theory for the science of international law as well as for its practice. Theory is destined to be applied in practice, and

¹ H. Kelsen, "The Legal Process and International Order," *The New Commonwealth Monographs* (London, 1935).

no practice is possible without theory. May I conclude this paper with a well-known, a little modified word of Kant? A theory of international law which would not have in mind possible practice would certainly be empty; but practice without theory—*theoretisch* means to see—would be blind.

Chairman REEVES. The two addresses are now open for discussion from the floor.

Professor ALBERT A. RODEN. I just want to ask one or two questions of Dr. Kunz before we get too far away from him in the discussion. I think we are especially interested in Dr. Kunz as one of the men of the "Vienna School" of international law, one of the men who has worked on the "pure" theory of the law. I wonder if he could pick out for us some of the basic principles used by the several members of the school as *grundnormen* for their system? Our Chairman has mentioned the basic importance of the observance of treaties—the *pacta sunt servanda* of Kelsen. How would Dr. Kunz's formulation of the *grundnorm* differ from that of Verdross, for instance, in *Gesellschaft, Staat und Recht*?

Dr. KUNZ. I am very sorry, but these problems are so vast and so complicated that it would be absolutely impossible within the time at my disposal even to touch them. May I refer you, sir, to the study on the "Vienna School" and international law, which I published in 1934 in the *New York University Law Quarterly Review*.

Professor JAMES W. GARNER. I very much hope, Mr. Chairman, that this meeting has not left the impression that the American Society of International Law is now on the defensive. I do not believe that the time has yet come when this Society is under any necessity of trying to prove the existence of this thing which we call international law. I read the somewhat cynical evaluation of international law made by Professor Zimmern which was quoted here tonight. I read it when it first came out in published form, and I asked myself the question, what right has Professor Zimmern, who is not an international lawyer but a professor of international relations, to deny the existence of a body of rules which for centuries states have regarded as law, which foreign offices invoke as law every day, which courts of justice, national and international, interpret and apply, and which learned text writers and jurists expound and interpret? What right, I say, has he to deny the existence of what governments, courts and jurists regard as law? I, for one, refuse to be frightened by his denial of the existence of international law. The opinion of Professor MacKenzie's student which he quoted here tonight is the opinion of a great many men and women who are not students. But the trouble with that view is that it is based upon confusion. It is based upon the assumption that when law is violated it ceases any longer to have any existence. Sir Frederick Pollock, whom he quoted, once said, very aptly, that law does not cease to exist merely because it is violated. You may have violations of law in a community, and they may sometimes be very general; but that does not prove anything against the existence of the law.

The truth of the matter is, this pessimism, these attacks upon the very foundation of the whole system, are due to a certain discouragement, a certain loss of faith in the utility of international law because of the somewhat cynical manner in which it is being treated today by a few dictators. Last summer I spent a week-end with one of the most distinguished international lawyers of England. His books are well known to all of you and highly respected. We sat down on his lawn and talked international law for hours. And he said, "Frankly, I am discouraged. You professors teach international law; we lawyers practice it when we can get cases; we sometimes write books about it; but governments ignore it." I said, "My dear friend, I think you are unduly pessimistic. Do you realize that the great majority of governments in the world today are decent? They abide by the law. They respect their treaty obligations. They have no desire to take what belongs to others. The nations that are violating the law and bringing it into disregard are the exceptions. There is a small group of dictators whose attitude toward the law is perfectly natural, for it is entirely logical that a dictator should adopt a cynical attitude toward all law which he does not himself make. This attitude on their part is exactly what we should expect of them."

So, Mr. Chairman, I, for one, do not believe that it is necessary for this Society at this time to answer the attacks against international law that have been made from the beginning by a few cynics and skeptics, and to prove the existence of something we all know exists, something which is absolutely essential to the existence and perpetuity of our civilization. And I see no reason why we should not call it what it is—international law.

Chairman REEVES. Mr. Borchard, will you come forward, please?

Professor EDWIN BORCHARD. It is an important subject, and that is why I venture to intrude upon you.

I was most worried by Mr. MacKenzie's statement that we have a full system of law, but it is optional to observe it; if the state does not care to observe it, it does not have to. If I understand it correctly, that seems to me slightly more anarchistic than anything I have heard from Mr. Zimmern, admitting the unsustainability of his position. It is a contradiction in terms, it seems to me, to call a system of rules law and then say it is optional to observe it. There is much confusion about what is international law because so many laymen and others do not segregate law from politics. Most international relations are political in character and have nothing to do with law.

Take those competing relations that arise out of biological, psychological and economic impulses. They are not much controlled by law. You may say that law commences where political relations end. You may, if you like, call the Treaty of Versailles law for those who signed it. But the discriminating person realizes that that kind of law is highly vulnerable and is bound to change when the conditions which made it are changed. The bulk of the relations between nations are political. The great amount of unfair competition between nations, the scramble for concessions and favors, the mani-

festation of likes and dislikes, the conclusion of alliances, the initiation of hostilities, are primarily political, not legal, in character.

Then, take the great mass of domestic policies which affect international relations, the size of a national army and navy, the size of a tariff wall, the immigration policy; all such matters escape the control of international law. Yet I think most laymen are inclined to believe that all international relations are legal in character. That, I think, is a fundamental mistake.

When we narrow down the field of international law to its legitimate scope, we find that within that narrow ground of identifiable rules the relations of states are conducted by foreign offices under the guidance of law, and within that narrow field the rules are obligatory. The rules are not optional.

One of the reasons for the current pessimism about international law is identified with the belief that in 1919 at Geneva they had found a new system for running the world, a system by which the nations would in council assembled judge each other, and pounce upon a disturber of the peace. The system was fallacious. A legal system among equals is an entirely different legal system from that which grows up inside of a state. The municipal system, where there is a superior laying down law to an inferior which he can and does enforce, is altogether different from that structure which grows up among equals. That is why it is so limited in character, and why enforceability arises through other instruments than societal agents employing a club in the name of the collectivity. The international system is more primitive than the municipal. The mere idea of reciprocal coercion tends to destroy what little confidence and trust there is. There can be no coöperative coercion amongst equals. Article 16 of the Covenant of the League of Nations was based on a profound mistake. Try coercion in your family and see whether coercion among equals operates to produce coöperation.

As already observed, the international legal system is fundamentally different from the domestic legal system. I think the confusion between the two has done a great deal to injure international law. Too much was expected from it. That is one of the things we ought to ask of Mr. Zimmern—not to expect too much from it. We have had to submit to occasional unilateral enforcement of claims, because no better method was available. That is regrettable, but I don't think the concept of "aggressors" and "unlawful war" has been of any help.

The coercive system of Geneva, in my opinion, was bound to break down. And it was not a fortunate contribution to the development of law. Much of it, as you will recall, was associated with the disparagement of well-known principles of international law, such as neutrality, that have grown up over the centuries. For several hundred years the practice of that principle had established rules which were widely known and kept large parts of the world at peace. It responded to life. Whereas this Geneva system of supposedly coöperative coercion did not respond to life; it was contradictory to life.

The first thing a physician ought to do is to make a correct diagnosis of his case. It was an erroneous diagnosis of the nations' conduct of their international relations, to assume that states could reach judgments not dictated by self-interest, by prior commitments, by likes and dislikes. Nations do not judge impartially as do judges in municipal courts.

I think that term "aggressor" was one of the most unfortunate terms ever invented, because it raises the temperature all around. It is a call to arms. Both the nation charged and the nation charging are tempted to reach for the guns, because there is indignation on the one side and self-righteousness on the other. And that is a bad combination for peace. The Geneva theory, in my humble opinion, was erroneous; it was not sound. And that is why it broke down. Of course, I know some of my friends here will differ. But I think it was always an illusion and an incentive to general war. And the sooner we get rid of illusions and provocations to war the better off we are.

To recapitulate, we have to keep the distinction pretty clear between politics and law, I think, to appreciate the narrow field within which we operate. And yet within that narrow field much knowledge is required. Even in this narrow field few men are equally informed in all its divisions. You have to pick out very narrow segments for exploration; and the more you study the more you realize how little you know about your own specialty. There is plenty of work to do within the narrow field without taking in the entire range of politics. But a good lawyer must be equipped with some knowledge of related fields. Political treaties, we know, are vulnerable to change. The boundaries of nations have been subject to change. Political, psychological, historical influences operate to affect the movement of peoples and nations. This is not due to lack of respect for law. Law has little to do with some of these movements. Law has little to do, I think, with some of the violations of the Treaty of Versailles. It is precarious to use the term "law" in that connection, because I think it tends to bring disrespect upon the whole concept of law.

Professor PERCY E. CORBETT. Mr. Chairman, ladies and gentlemen: I was particularly interested to hear Professor Borchard make his criticism of Professor MacKenzie's paper because I wanted to make the same criticism myself. It is impossible, I think, to have submission optional. I followed Professor Borchard to that point with great satisfaction.

He then began to talk about the impossibility of coercion in international law. He began to speak of law as a discipline which has grown up between equals. In other words, he took the complete positivist position and made international law a self-denying ordinance. He applied what I think Dr. Kunz would call the theory of auto-limitation. That, to my mind, is to give Professor MacKenzie back his entire fallacy. If international law excludes all possibility of compulsion, how can we call it externally obligatory?

There is one other point I should like to make, Mr. Chairman. I have studied with considerable interest and much instruction the theories of the

school of which Dr. Kunz is an able exponent, the Viennese theory of the pure science of law. I have accepted its finding of the essential primacy of international law over national law. And I have accepted another thing which Professor Borchard has just denied, an essential oneness of law within the state and the law of the international community. To my mind the law of the international community is not a law which has grown up between equals; it is a law imposed externally upon the members of a community or it is not law at all.

On the other hand, I have not been able to accept the narrow limitation upon the functions of jurists which the Viennese School would seem to impose. Kelsen says the international lawyer is not concerned with how law has come into being, that the international lawyer is concerned only with what the law is. Yet Dr. Kunz, in his last remarks, and because of what he termed the primitive nature of the international society, linked particularly closely theory and philosophy and the discovery of what the law is. There is a point upon which I should like to hear him give a little further detail. Would Kelsen and would the Viennese School in general admit the legitimacy, in studying international law, of this modification? Would they admit that you cannot always answer the question of what the international law on any particular question is, without starting from the philosophy of law and considering the nature of the international community? If the Viennese School forbids me the liberty to do that, I am afraid I must cease to class myself amongst its adherents.

Chairman REEVES. I think Professor MacKenzie is now entitled to a reply.

Professor MACKENZIE. Mr. Chairman, all I want to do is to attempt to clear myself of the allegation that I am an anarchist. I do not expect to be wholly successful, but, at least, I shall try.

I did not claim, as some of my critics have stated, that there is an option within the law. If I might explain: It is conceivable that at the close of this meeting I may desire a drink. If I do, I may go to the bar in the hotel here, and there I have this choice: If I am a bigger man than the bartender is, or think I can get away with it, I may take my drink and refuse to pay him. On the other hand, I may stay within the law, pay him the 50 cents which the law demands and leave quietly. Those are options at my disposal. True, I may suffer as a result of my choice but I still have the choice, and if I were a gangster I might even escape any consequences. Or, if I may put it in terms of international relations: Suppose Canada makes a treaty with the United States about navigation on the St. Lawrence or about the export of hydro-electric power, and suppose that later our Canadian Government refuses to carry out the terms of the treaty, on the grounds that the conditions have altered and we are no longer bound because the doctrine or rule of *rebus sic stantibus* applies. The United States may then do one of a number of things. It may—though I am glad to say that I do not believe it ever would—

ignore possible legal remedies entirely and declare war upon Canada, or, in the modern style, seize Ottawa and hold a plebiscite. Needless to say, such a settlement would not be in accordance with my ideas of law and justice. Or the United States would more probably enter into negotiations with the Canadian Government and, on a bargaining basis, reach an agreement about the matter in issue. Or the two countries might agree to submit the matter to arbitration. In that case their representatives would argue the pros and cons of the various theories or concepts of the doctrine of *rebus sic stantibus* and the judges or arbitrators would determine both this and the rights of the parties. But no officials or authorities exist to see that this decision is carried out, and, obviously, if it imposed obligations upon the United States which the United States rejected or ignored, there is little that Canada could do about it. Those are the hard facts of international relations in 1933. If by stating them I am an anarchist, then I admit to the accusation.

MR. ARTHUR K. KUHN. Mr. Chairman, ladies and gentlemen: Professor Borchard intimated that some of the things that he was about to say would be so controversial as to invite further discussion. I admit that I am stimulated to say what I am about to say by reason of some of the things he said.

I did not understand Professor MacKenzie to say that international law lies within the option of the particular state. I think he made a statement that international law was an "optional procedure." And I understood by that phrase that there was a choice as to whether or not international law should determine a given dispute in connection with some method by which the state should not be a judge in its own case. That seems to me to lead to the crux of the disagreement here. Are we to be satisfied with the present development of international law which makes it impossible to compel another sovereign state to agree to a judicial determination of what the complaining sovereign state claims to be right under international law?

To my mind that is a problem of international organization. Are you going to be satisfied, as Professor Borchard seems to be perfectly well satisfied, to say that there are some things which have been judicially accepted and which can be acknowledged to be questions of law, while there are other questions outside of a rather small category of possible justiciable disputes that are mere questions of politics and, therefore, the international community, if there be one, has no right to consider them at all? Each state is to be a law unto itself. Then, if you agree with that proposition, you certainly accord to international law a very much less important function than we international lawyers, of this Society at any rate, with justifiable pride, let me say, have always placed upon our noble profession, namely, to advance not only the study and the understanding of international law but to expand the jurisdiction and the control which international law should have in the establishment of a stable international community.

And when Professor Borchard rather cynically refers to the failure of the League of Nations—all of us are willing to admit that in many respects

it has failed—it seems to me that he pays a very poor tribute to his own profession as an international lawyer. Our duty is to expand the control of international law and to improve international organization, in order to make war less imminent in the future and to make this world a better place in which to live. I repeat, however immature the efforts to do so may have been, they must go on, and we must learn by our failures to proceed in a way that is more likely to succeed. The result of Dr. Borchard's proposition would be to creep within our shells and say, "Oh, well, this is beyond the sphere of our efforts and, therefore, let things take their course."

We can see what is happening in the world today. So long as the world was convinced that the League of Nations was a real force, that it had strength, and that there was an international sense of right and justice which no single sovereign state had the right to combat on its own account, there was peace. But from the moment it was felt that there was no longer any such coherence among the nations of the world, and as soon as those in favor of power politics began to sense the fact that the coherence which had existed for some fifteen years after the World War had fallen to pieces or at least had been greatly weakened, from that moment on we had the threat of international anarchy. If we had wanted any better argument to prove the absolute necessity of something in the nature of a coherent force in international society, to my mind that was the most impressive argument of all.

I shall close by quoting from Gilbert and Sullivan. The Lord Chancellor in "*Iolanthe*" remarks that the law is the embodiment of everything that is excellent and that he, the Chancellor, embodies the law. If international law is to be embodied in the will or, as they used to say, in the conscience of a single sovereign, then it has a very sad future indeed. After all, *Iolanthe's* Chancellor was a satire upon certain contemporary conditions and not intended to be taken too seriously. But, in all seriousness, if we envisage our profession with faith in the future and believe that it has something to offer for the hope of humanity, then I, for one, prefer to adopt the views expressed here tonight by Professor Garner and by our Chairman, that we must not lose faith and that we must go back to the moralities and get them established by better international organization, that we must learn from the failures we have made in the past.

I do not say that the attempt to define what is an aggressor nation is necessary at this time. I do not insist that collective security is a present possible accomplishment. But I do maintain that we must look forward to a community of standards, a community of morality to be established throughout the world by some organization still inchoate, still suspended somewhere, like Mahomet's coffin, half-way between the earth and the heavens. Mankind must not be allowed to lose confidence in international law and better international organization, that some day we may again have the opportunity of realizing the age-old hope for a stable international society.

Chairman REEVES. It is now 10:30, the time to close. But we will set the clock back five minutes, and Mr. Fenwick will speak to you.

Professor FENWICK. Mr. Kuhn has already anticipated much of what I have to say. When Professor Borchard began to speak I was alarmed to find that I was agreeing with him. But I soon found we were as far apart as ever. The differences between us are very deep-rooted. I believe that the same principles of law and morality apply to nations as apply to individual citizens.

If I understand Professor Borchard correctly, international law is to be limited to the things that are of no particular consequence between nations and that they will not fight over any way. We might have an international law of copyright, perhaps an international law regulating the privileges of diplomatic officers, perhaps an international law relating to extradition. We might go that far. But we must not carry international law so far as to stop lawlessness, because that would, it seems, be extending it into the dangerous realm of "politics." I am not aware that there is any reserved field of politics in the law of the state. In the case of the state there is no sphere of activity outside of the control of the law. The Jones baby is kidnapped: Suppose the law did not extend to that. Suppose that was "politics." Whether the Joneses will get back their baby will depend upon their paying out their money and negotiating in the form of "politics" with the kidnaper. It is outside of the law. Mr. Smith, a third party, is not interested in the kidnapping of the Jones baby; it is not his concern. He is neutral. Preposterous! But equally preposterous if international law is to be limited to matters which are of no concern whatever between nations. On such a basis we shall never keep the peace; we can only look forward to a world of anarchy.

The Geneva system was not wrong in that it attempted to extend the idea of collective responsibility for the peace to all nations. It was wrong because side by side with the effort to suppress violence by collective action it did not go on further to promote justice, economic justice, social justice, by collective action. The system was not wrong because it went too far, but because it did not go far enough. And now we have witnessed the failure of the system—and no one pretends it has not failed. It failed largely, I quite agree with Mr. Kuhn, because we did not give it adequate backing. If we have witnessed the failure of it, it must only be a challenge to every international lawyer to take up again the system, the one system that parallels the law of the State of Pennsylvania, the law of the United States, namely, the collective responsibility of the whole community for the maintenance of peace. But, more than that, the collective system must be extended to the economic situation, which Geneva did not attempt. If we as a group now face this larger problem, and international lawyers take upon themselves the task of formulating principles of collective economic justice, then we shall have peace. Peace lies along the road of collective justice as well as collective law. The two are inseparable.

Chairman REEVES. President William C. Dennis, of Earlham College.

President DENNIS. Mr. Chairman, I do want to take the opportunity to make one more observation on Professor Borchard's very interesting speech, a speech with which, I want to say, I am in general in agreement. But right at the close of his observations he let fall some words which indicated, as has already been said here, that a great many treaties were political, and then he made some specific observations relating apparently to the Treaty of Versailles and to the Nine-Power Treaty, and more or less classed them together, as I understood him. Of course, he was speaking very rapidly.

I submit, ladies and gentlemen, those are very different propositions. Both of them relate to political matters, to be sure; but I do not understand there are any rules that treaties, even though they relate to political matters, are not to be carried out. There is a rule about *rebus sic stantibus*. And I take it that rule has not operated. The situation which exists today, I submit, is substantially the same as that in contemplation when those treaties were made. I cannot stop to argue this proposition. However, I believe that there is a very great difference between them.

The Treaty of Versailles, as I believe, and as I believe the world in general believes, was to a very great extent a violation of the terms of the Armistice under which Germany laid down her arms. And I believe one of the great reasons it is not enforced is that the statesmen in Europe know very well that is the case. Germany laid down her arms on certain promises. One of them was that each and every article of the treaty should stand on its own merits. Then they dismembered old Austria and sent new Austria to the poorhouse, and then put in the provision she could not join Germany without the consent of the League—clearly in violation of the agreement that each item was to be judged on its own merits and in view of the needs and desires of the particular people involved and not in view of the selfish interests of other nations. Having sent Austria to the poorhouse and violated the treaty, morally, I submit, there is no reason why Hitler should not set this article of the treaty aside if he could. It was not legal, of course. His methods were wrong. But morally that was the situation, as I see it. The Treaty of Versailles was a violation of the terms of the Armistice.

The Nine-Power Treaty raises different questions. It contemplates just exactly what happened. The situation in China was just as bad when it was written as it was in 1937. The situation in China in fact was getting better in 1937. Possibly that is the reason why we have the present difficulty.

I realize that every one of these propositions is controversial and each and every item can be argued, but I submit we ought not follow Mr. Borchard in this general statement that all these treaties were political and may be lightly disregarded. The Treaty of Versailles brought woe to the whole world from the day it was signed, because that treaty rests upon an unsound foundation. But we should not therefore say that other treaties entered into

freely between equals, contemplating just exactly the situation which now exists, should likewise be disregarded.

Chairman REEVES. Tomorrow morning in this room at ten o'clock will be the second session of this annual meeting, at which a series of papers will be read on somewhat different topics from those read tonight. These papers will be upon topics which you will find of interest. We hope we shall have the privilege of seeing you again tomorrow morning.

President DENNIS. Professor Borchard says he will not be here tomorrow morning. Should we not give him a chance to reply?

Chairman REEVES. We will set the clock back again for three minutes for Professor Borchard, if Professor Borchard will be good enough to come forward.

Professor BORCHARD. Of course, it is very difficult in a few minutes to clarify all the ideas which have been challenged. I may have misunderstood Mr. MacKenzie in the suggestion that it was optional to observe international law. If I did I apologize for the misunderstanding.

So far as concerns the law being one single concept, I merely wish to reiterate that municipal law is of a type different from international law. I am strongly of the opinion, as you know, that obviously international law must prevail over municipal law. But the system that grows up by legislation and force imposed by a superior upon an inferior is different from a system of law that grows among equals. I think Kelsen presents thirteen different definitions of law.

When I spoke of coöperative coercion I was speaking of Article XVI of the Covenant, of the theory that the nations of the world by delegates could get around a table and judge each other impartially and then enforce upon the recalcitrant their view of what the law or right conduct is. Obviously force has its place, and unilateral force is no advantage. I would like to see it occupy an ever smaller place. But no practical man can deny its importance and perhaps on occasion its necessity, and its defects. It is extremely desirable that each nation should not be the judge of its own interests and rights; thus far the only practical deterrents have been conciliation, mediation, arbitration, negotiation. These methods invoke persuasion, not coercion. But the collective system does not seem to have worked, and I think it has not worked because it was organized from the top down instead of growing up through confidence. That is another question.

Neither do I object, in fact I urge the extension of the domain of law and the gradual control of the domain of economics and politics by laws. But I do venture to maintain that there is a distinction between the political arrangements, the political privileges that nations exercise, and their legal duties and obligations. Take, for instance, our immigration policy. That is perfectly within our rights. But by it we may offend deeply another nation that is handicapped by it. The provocation and the resulting resentment are not within the domain of international law. So that legally privi-

leged acts may arouse political hostilities. We must call on extra-legal remedies. The field of politics and economic competition needs amelioration, adjustment and conciliation. Law does not solve the issue. Take the recent agreement on the Alaskan fisheries. It is quite possible that the Japanese were legally within their rights in fishing on the high seas for salmon that did not carry the American flag on their backs; but they were causing deep resentment in the United States, which thought it had some control over the origin and destination of those salmon. These are among the subjects that need the arts of negotiation and conciliation. The atmosphere for such negotiation and conciliation lies not in threat or coercion, but in intelligent understanding, in the willingness to give and take, in the appreciation of the necessity for change.

My only objection to the Nine-Power Treaty, Mr. Dennis, was this. Of course, it is not the same as the Treaty of Versailles. One was imposed, the other was not. But the Nine-Power Treaty was based upon a condition contrary to fact. The object to be respected, the territorial and administrative integrity of China—and one of the great Powers vitally interested, Russia, was not a party to the Treaty—had not existed for nearly a century. It was an artificial *modus vivendi*. Propinquity always creates special interests. We have a greater interest in Cuba and in Mexico than has Great Britain. Taking into consideration all of these political factors, I think there is a certain danger in attributing too strong a legal foundation to a political treaty like the Nine-Power Treaty.

Chairman REEVES. The session is now adjourned until tomorrow morning at ten o'clock.

(Thereupon, at 10:50 o'clock p.m., the meeting adjourned.)

FIFTH SESSION

JOINT MEETING WITH THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Friday, April 29, 1938, 10 o'clock a.m.

The meeting was called to order by JESSE S. REEVES, Vice-President of the Society and Director of the Conference.

Chairman REEVES. Will the meeting please come to order? According to the program of this morning the discussion will follow each paper. I shall call attention to the regulations regarding papers and discussions, which you will find on the second page of the program: "Principal papers and addresses may not exceed twenty minutes in delivery and informal papers or discussions may not exceed ten minutes for each speaker."

That delimits the responsibility of the speaker. But see what has been put upon your presiding officer: "The presiding officer is required to call for the next speaker at the expiration of the time allotted."

Further, the Executive Council has stated that the resolutions of the Executive Council regulating the time allowed for papers, addresses and discussions be rigidly enforced and that the chairman of the meeting read such resolutions to the Society at the opening of each session.

Therefore, you see we have a collective responsibility, and we may, perhaps, be in need of collective sanction before we get through. Perhaps they may work in this case better than they have in some others. Perhaps we shall not need them. I am inclined to think, after all, that the doctrine of collective security is theoretically not unlike Sorel's doctrine of the general strike.

The first paper this morning, on the subject of "International law of copyright" is by Mr. Wallace McClure, of the Treaty Division of the Department of State. I have great pleasure in calling upon Mr. McClure.

INTERNATIONAL LAW OF COPYRIGHT

By WALLACE MCCLURE

Treaty Division, Department of State

Mr. Chairman, ladies and gentlemen: I shall undertake to keep within the law; and for my guide in that connection I have brought my watch, which will act as a watch-dog against verbosity.

I am going to suggest, in view of what our Chairman has so generously said, that you permit me to depart from the strict letter of the remarks that I had prepared for delivery, which are available in mimeograph,¹ if you care to have them, and that you permit me to depart also from the strict letter of the stated title in order that I may lay before you, rather, some of the prob-

¹ Press release of the U. S. Department of State, April 28, 1938, No. 202, referred to in *Press Releases*, April 30, 1938, p. 523, and separately printed as Department of State Publication No. 1179.

lems and a part of the policy involved in this question of copyright as it confronts you as citizens of your country at the present time.

It is a matter of particular pleasure to me as I meet you this morning to know that I am meeting with a group of educators, a group of men and women who are going to be influential in the formation of public opinion on this subject and on every other subject in which they interest themselves, because the international law of copyright, as the United States is confronted with it, particularly demands at this time, as I see it, the formation of some sort of a public opinion that can attack it from the public point of view and that can bring about such development as may be necessary in the interest of the public at large. To a group of educators who can assist in the molding of public opinion it becomes accordingly a particular privilege to address one's self.

This is a question about which there can be a public opinion. It is not a question, of course, that sways elections or moves vast numbers of people; but within a fairly large circle—and surely that circle should include all of the educators of the country and many others—there can be formulated public opinion about it. That was shown at the time, about fifty years ago, when the greatest single development was made, so far as the United States was concerned, in the international aspects of the copyright problem, when men like Mark Twain, Robert Underwood Johnson,¹ and a host of others whose names are well known to you were, through their organizing ability and influence, able to arouse enough public opinion to insure that the law of the United States would be made such as to recognize that there were authors in other countries; in other words, that there could be passed what sometimes is called the international copyright law, namely, the statute passed by Congress in 1891 when, for the first time, there was given recognition to the authors of other countries and they were permitted to enjoy copyright in the United States. That was a real step forward, so far as this country was concerned, in the international aspects of copyright law.

Moreover, it is true—and because it is true I feel the more justified in asking this privilege of you—that the strictly international law of copyright can be put before you in some sort of picture in a very few words. The international law of copyright, as I see it, may be correctly stated to be comprised in a single treaty or a single group of treaties which make up what is known as the Berne Convention of 1886, as revised from time to time, the latest revision being that of 1928.

This international law of copyright has been interpreted by a number of national courts, but, so far as I have been able to discover, there has never been an international adjudication, that is, one by an international tribunal, interpreting it. The cases which have grown up around it in the national courts are of use but they can hardly be said to comprehend any constructive development.

¹See Dr. Johnson's *Remembered Yesterdays* (Boston, 1929), p. 241, et seq.

We have in this treaty two main features, constituting the international law of copyright in the large sense of the term.

The first important feature of the treaty is that it provides that in every country party to it the authors of all the other countries shall enjoy the treatment that the particular country grants to its own national authors and artists, that is, national treatment such as you are familiar with in many treaties on many and varied subjects.

The second of the two outstanding points is that the enjoyment of this right of copyright must be without formality; that is, it shall automatically accrue in every country to the authors of all the other countries that make up the copyright union. Mention of the union reminds us that the treaty is not only international copyright law, but it is the constitution of an international administrative organization which keeps up with the development of copyright law and arranges for its periodic revision through international conference and ratification by the member states.

Turning for just a moment to the important details, I should call your attention to two of them. First, there is the question of the translating rights. And that is of particular importance in international law because the right of translation so often involves the crossing of international frontiers. Looked at from the point of view of one like myself, working in one of your public offices, that phase of it, the infringement of an author's right of translation, comes up with great frequency. So international copyright law as it is written into the Berne Convention deals importantly and interestingly with the protection of authors in their rights as to the translation of their works.

The second question looked at as another detail of this important law is the question of publication: What constitutes publication and what constitutes simultaneous publication? The rights assured by the treaty accrue to authors of other countries that are not parties to the treaty at all, provided they publish their works in a treaty country; and, through a very generous provision and interpretation of the treaty law, publication may take place simultaneously in a non-union country and in a union country, with the result that it will be considered that the work is first published in the union country; consequently, the author is entitled to the rights granted by this international law of copyright throughout the copyright union.

These details have become very important as practical matters. I am not, however, going to continue to recite details. I wanted to mention these two points just to indicate to you broadly what in general this law is like so far as it gives protection to the authors of the various countries of the world.

Now I want to go into some of the particular problems that confront us as American citizens in dealing with this law. As you know, it is not law in the United States. It has not been adopted as a treaty by the United States. And the statute law of the United States has not been altered so as to conform

to it. The question has been before us, as I have already indicated, for many, many years. It was placed before the United States Congress officially in messages of President Cleveland at practically the same time that the treaty entered into force. *But it was not formally sent to the Senate with request for advice and consent to adherence to it by the United States until President Hoover, in 1931, so submitted the revision of 1903. In 1934 President Roosevelt sent to the Senate with a similar request the 1928 revised version which had meanwhile entered into force. So now for a period of some seven years there has been squarely before the United States Senate the question of whether the United States shall participate in this particular conventional international law.*

The United States, Russia, China, Turkey, and a number of Latin American countries are not parties to it. Roughly speaking, the rest of the world does participate in this treaty and in this general international law that the treaty lays down.

Why is it that the Government of the United States has abstained from participation in it and so deprived its authors and artists and its people generally of the manifest advantages which the treaty offers? That question leads me back immediately to what I said in the beginning. There seems to be lacking a public opinion in this matter. If you will go to the Congress and attend the hearings you will find that the witnesses that come there do not give expression to a broad point of view representative of the country as a whole, such as the people as a whole would be likely to have if they were thinking about it. But, instead, they represent some eight or ten very special interests, interests that are worthy, that are important in the country, and in some cases represent enormous financial and industrial strength. They are represented at the hearings, of course, by their attorneys who are keenly aware of their particular points of view and who present them most ably and most persistently, and also most clashingly, because these interests are concerned wholly with the making of money and in such concern they are affected by copyright law. When copyright is discussed before Congressional committees, it is these clashing interests that make the impact upon the ears and minds of the members of the committees. We the people as a whole don't know what we want and don't know what to do; such seems the situation that confronts Congressmen when they attempt to consider the policy of copyright and the chances of developing copyright law in this country in a way that may be of service to the public.

Copyright law is assuredly a subject of some importance. It was considered of enough importance in 1787 to have mention made of it in the Constitution of the United States, which, in taking up that subject, very definitely laid before Congress a task. A task to do what? To build up for the purpose of the education of the public a system of protection that would encourage the creation of literary and artistic works. It was not a problem of placing someone in a position to make more money; it was a problem of

benefiting the people of this country by having more literature and more art. That was the purpose.

And that shows us, even at this late date, if we are to develop along the line the Constitution-makers intended we should, we must have a public opinion to back up the development of this question; that we must see to it that little congeries of special interests, however individually worthy or unworthy they may be, are not, through the maintenance of a stalemate among themselves, to determine what is and what is not to be the international law of copyright in the United States.

Now, I shall take the time to say just a few words about some of the questions that constitute the stalemate in respect of copyright before the Congress and before the people in this country. There are considerable numbers of them. However, probably I can reduce them to the fairly small compass of three or four that will be sufficiently illustrative and will include those that are of greatest importance. They were in part expressed publicly this year through the proposal of reservations which, it was demanded, should be put in the treaty if the Senate should act favorably upon it. Those reservations grew out of a situation that involved the treaty as a whole, raising the questions: Is the treaty as a whole a self-executing treaty? Does it lay down a law that the courts can enforce without any accompanying legislation?

These questions appear to have resolved themselves with reasonable unanimity in the affirmative. It appears to be generally understood that the treaty, in so far as it lays down copyright law, can be enforced as a treaty without accompanying legislation. But it is also true that in numerous places throughout the treaty alternative courses are left to be decided by each country for itself through legislation. It is very important that the Congress shall, without great delay, enact additional legislation to take care of these particular provisions, and also any other provisions where the application of the treaty may not be clear. But if the Congress is not going to enact legislation or has not enacted legislation adequate for the interpretation of particular parts of the treaty as the Congress thinks they ought to be interpreted, then, it is the idea of those who have proposed them that certain reservations ought to be made in connection with the approval by the Senate of the treaty that would indicate what the Senate thinks is the meaning of the treaty where that meaning seems controversial.

There are several such proposed reservations. The first is whether copyright extends to oral expressions. I don't know precisely what an oral expression is from the point of view of copyright. But perhaps the idea was expressed by Longfellow when he wrote, "I breathed a song into the air." I don't know, but it seems pretty evidently a reasonable interpretation that the treaty, which requires that copyright shall be extended to lectures, sermons, and that sort of thing, did not intend to include the breathing of songs into the air or the results of that particular kind of breathing. There-

fore, a statement by the Congress in an act, or by the Senate in a resolution accompanying the approval of the treaty, would not in all probability be considered by anyone to conflict with the treaty. As long as anyone is nervous about the question and doesn't want to have "oral" copyright recognized, there would appear to be no harm whatever in having the thing so cleared up to the satisfaction of that person by the method suggested, provided the reservation is not made a condition of adherence, but—simply an expression of authoritative opinion for the guidance of Americans.

The second of these things that worry certain special interests is what are called moral rights. These rights are recognized, I believe, in Anglo-American common law. The idea is that those using an author's works shall not corrupt them and use them in a way which so changes them as to give an impression different from the author's meaning. Moral right is of particular importance in connection with the conversion of other works into motion pictures. The Convention of Berne, as revised at Rome in 1928, for the first time includes a provision recognizing this moral right. The difficulty that has arisen about it grows out of the question whether the convention means that this right is inalienable or whether this right may be contracted away by the author if he wants to do so. If he can make a good contract with a motion picture company, let us say, for the use of his works and make it only by contracting completely away this moral right of his, then may he do it under this law or does the law prevent his doing it? So it has been suggested that there should be some sort of interpretation put into the law of the United States to take care of this alleged uncertainty in the Convention. Those who have looked into the interpretation of the treaty without any special interests to serve, appear to believe unanimously that the treaty does not require the author to give up his right to alienate his moral right if he wants to; that is to say, the right of freedom of contract remains. Indeed, a statement to that effect appears in the official organ of the copyright union,¹ apparently written by one of the editorial staff. So there again we have a situation which should not worry people. Any statement by the treaty-making power that the treaty does not mean to interfere with freedom of contract would almost certainly be supported by the courts as the true meaning of the treaty.

In the third place, we have the question of whether the treaty would require retroactive application. There we have a more difficult question, a question which involves too much detail for me to present before you as I would like to, but which question is susceptible—not so clearly, but still is susceptible—of a reasonable interpretation that in no sense would the treaty require a retroactive interpretation upsetting vested rights. Speaking purely from the point of view of the American courts and knowing that they hesitate a long time before declaring, and, in fact, never declare, a law retroactive in effect if they can possibly avoid doing so, it would seem, here again, that

¹ *Le Droit d'Auteur*, March 15, 1938, pp. 35-36.

there is very little to cause concern to those whose rights under the treaty are to be enforced by American tribunals.

Finally, another question and, unfortunately, one I will have to go through with too great rapidity, is whether or not it is proper to repeal a section of the present law of the United States providing, as a condition to the maintenance of copyright here, on the part of people of other countries if their works are in English, that they must manufacture such works in the United States. This is the famous "manufacturing clause" which makes it necessary, in order that the English, the Canadian, or other author writing in English may enjoy copyright protection in the United States, that he have his works set into type and completely manufactured in the United States. Thus is presented a query that surely strikes a very definite key with each of you, whether he happens to be an international lawyer, or an international economist: Why should there be such a duplication of labor? This is probably the first impact that the matter makes on the mind of any one of us. The only reason why the toil of manufacture should be duplicated grows out of an assumption on the part of people connected with the manufacture of books and other similar articles that it will create employment for people in the United States. In other words, it presents a situation such as we heard about some years ago when it was charged that many people on relief in this country were employed in raking leaves up the hill and then raking them down again; it is a situation in which we make work simply for the purpose of making work in order that people may be employed. That may conceivably be justifiable at times. It may be better that we be employed doing useless things than sitting around or doing the devil's work because we have nothing useful to do. But, as a permanent proposition, can anyone defend the retention of such a requirement in the statute law of the United States? It is the general opinion that the Treaty of Berne is irreconcilable with this provision of statute law and, consequently, if adopted, that the treaty will automatically repeal the statute in so far as it touches the nationals of other countries who are parties to the treaty.

Of course, the treaty would not affect the right of the United States Government to require that Americans publish their works in this country. It refers merely to the question: Shall we require that people of other countries whose books, of course, have usually been manufactured in their own countries, re-manufacture them here if they are to have copyright here? I might add to that, that careful investigation has suggested the possibility, indeed, the very strong probability, that the repeal of the manufacturing requirement would not affect the employment situation in this country. On the other hand, the operation of the treaty would probably improve it.

The foregoing are some of the outstanding questions that are before you as citizens and before your Senate in connection with the copyright treaty, as it undertakes to decide whether or not the United States should adhere to it.

What about the future outlook? I shall take two or three minutes, by

a slight extension of time, if I may, Mr. Chairman, to suggest the additional importance at the moment of giving constructive consideration to the copyright problem growing out of the fact that there are about to occur at least two international conferences that will give careful consideration to it, to wit, the conference of the American States at Lima, which will convene on December 9 of this year, and the conference of the Copyright Union that the Belgian Government is expected to call in the near future, probably in the year 1939, the latter, of course, being exclusively concerned with copyright and the former having copyright as one of the important points on its agenda.

There is one outstanding and fundamental question of copyright law as it is developing internationally, that will come before these conferences in the midst of others. It is a question I have already touched upon in mentioning important points in the international law of copyright, the question of whether or not we shall require as a condition of copyright that there be some sort of public recordation and registration, a formality, indeed the outstanding formality, common in national copyright laws; or whether there shall be continued, as in the Berne Convention at the present time, copyright wholly without formality. The regional treaties of the Pan American States for the most part recognize the existence of some sort of formalities, and there is insistence in not a few quarters that the required formalities shall include international registration. Shall there be such a requirement? There are good arguments on both sides. Those arguments may appropriately be brought up in your discussion. The question is a fundamental one and one that is outstanding at the moment in the international law of copyright. Necessarily, then, the question must come before these conferences. The general international law as embodied in the Berne Convention is copyright without formality, no recordation or other formality being permissible as a condition of copyright. But numerous national laws and regional and bilateral treaties presuppose or provide for formalities.

Chairman REEVES. The discussion of this very illuminating and absorbingly interesting paper and topic will be led by Colonel Clement L. Bouvé, Register of Copyrights.

Colonel CLEMENT L. BOUVÉ. Mr. Chairman, members and guests of the Society: After listening to the splendid address of Dr. McClure, there is very little I can do—very little I am called upon to do—except to suggest certain points which may serve as a basis for discussion. Probably there may be no need for my doing so, but here I am.

Now, with respect to the Convention, it is obvious from a reading of that document that while it undertakes to accord special conventional rights which must be observed by the parties thereto, there is great inclination to give the principle that within the territory of a sovereign state the national law governs, such effect as can be reasonably conceded in view of the imposition upon the national law of basically conventional rights and principles. I shall read

just a few of these instances. What I do not read perhaps will be available later.

Under the treaty the domestic legislation of each country governs with respect to works of art applied to industry (Art. 2 (4)); political discourses or discourses pronounced in judicial debates (Art. 2, *bis* (1)); the conditions under which lectures, addresses, sermons and works of like nature may be reproduced in the press (Art. 2, *bis* (2)); the conditions for the exercise of the "moral right" of the author in his work, and the means for safeguarding these rights (Art. 6, *bis* (2)); the duration of the period of protection of rights in literary property as long as the life and fifty years' period provided by Article 7 is not adopted uniformly as the duration of the term of protection (Art. 7 (2)); the duration of the period of protection for photographic works and works obtained by a process analogous to photography, posthumous works and anonymous or pseudonymous works (Art. 7 (3))—but in the instances covered by Article 7 (2) and (3) the period may not exceed the term fixed in the country of origin of the work; the sanction of the obligation to indicate in the press the source of articles of current economic, political or religious discussion reported therein (Art. 9 (2)); the right of borrowing lawfully from literary or artistic works for use in publications intended for instruction or having a scientific character or for works pertaining to useful learning (Art. 10) ; in the matter of regulating the conditions for the exercise of the exclusive right of authors to authorize the communication of their works to the public by radio diffusion—but these conditions cannot adversely affect the moral rights of the author or his right to equitable remuneration (Art. 11 *bis*) ; with respect to the limitations and conditions applicable to the exclusive right of authors to authorize the adaptation of their musical works to instruments serving to reproduce them mechanically, or applicable to such exclusive rights with respect to the public performance of these works by these instruments (Art. 13 (2)). The provisions of the domestic law dealing with this right of adaptation of music to such instruments shall govern where the adaptation has been lawfully made before the going into force of the convention signed at Berlin, November 13, 1908, or before the adherence of such country to the Union (Art. 13 (13)). And where the domestic law makes such adaptations unlawful, such local provision will be regarded as unaffected by the prior cited provisions of Article 13 (Art. 13 (14)). The procedure of seizure of infringing material is to be conducted in conformity with the domestic legislation of the country where the seizure is made (Art. 17 (3)). The treaty specifically recognizes the right of each member state to permit, supervise or forbid by means of legislation or domestic police the circulation, representation or exhibition of every work or production in which competent authority may find itself obliged to exercise this right. The principle that where a work has fallen into the public domain of the country where protection was previously secured, by virtue of the expiration of the term of protection, it will not be protected anew, will be applied in accordance with stipulations to

that effect contained in the special conventions either existing or to be concluded between countries of the Union, and in default of such stipulations, its application will be regulated by each country in its own case (Art. 18 (3)). The Convention concedes the force of local law which contains more favorable provisions which may be enacted by the legislation of a country of the Union in favor of foreigners in general (Art. 19). And such special treaties as the countries of the Union may make between themselves, or may have already made, which confer upon authors more extended rights than those accorded by the Union, or contain stipulations other than those contained in the convention but not in conflict therewith, are conceded full force and effect under the terms of Article 20 of the Convention.

And, finally, attention should be especially called to Article 5 which states in so many words that authors who publish for the first time in another country of the Union have in this latter country the same rights as national authors. And this provision goes in effect hand in hand with the provision in Article 4 (1) which sets out that authors nationals of one of the Union countries shall enjoy "In the countries other than the country of origin of the work" such rights as are accorded to the nationals of that country under the national law as well as the rights specially accorded by the present Convention. Under Articles 4 and 5 the full effect of the national legislation of State X in its application to authors nationals of other states members of the Convention who for the first time publish their works in State X is unconditionally recognized.

It is perhaps unnecessary for me, because of the lack of time and the rules to which our Chairman called attention, to go further into this matter. There are cited in a small statement that I have here perhaps twice as many instances where the principle of the sovereign effect of the law of the territory in which the act is performed governs.

It occurs to me, after having made this brief reference to these particular instances, that perhaps it may be of interest from the standpoint of discussion to refer very briefly to certain provisions of our domestic law.

As Dr. McClure told you, automatic copyright, as it is called, is a principle of the Berne Convention. That is, automatically I am entitled to copyright in what I create because of my authorship. This is viewed by the principles of the Convention as an inherent right. That is not so in our country. Copyright is distinctly not viewed as an inherent right here. Common law rights in unpublished works are thus viewed, but copyright is regarded as a purely statutory right, the copyright system being a temporary concession to the individual for the ultimate benefit of the public.

Under our law copyright in published works is obtainable by a method with which the Copyright Office has nothing to do. Copyright in a published work is accomplished solely by the act of the copyright owner in publishing his work with the copyright notice. With respect to unpublished works, copyright is secured by an application directed to the Copyright Office with a

claim of copyright in the unpublished work. Those are two distinct methods of obtaining copyright.

It may be interesting to note for a moment the methods of protection of literary property which are accorded to foreigners. The Copyright Act provides that when an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work, he is entitled to all of the benefits of our Copyright Act. Now, referring to aliens who are not domiciled here: They are entitled to the benefit of our statute "When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement or law to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require." I am quoting from Section 8 of the Copyright Act.

That is the way foreigners not domiciled in this country get protection or, rather, obtain the right to copyright protection under our law. An author writes a book in France. France is one of the proclaimed states. By virtue of being a citizen of France the author has the right to avail himself of our Copyright Act, which simply means that he can get a copyright in the United States in a published or unpublished work by the methods by which an American citizen can obtain it.

The formality clause, as Dr. McClure has pointed out, is one of the outstanding features of the Convention. Here, under our domestic law, certain formalities have to be complied with in connection with full protection of copyright. In the case of a published work this is done and these formalities are to be performed after the securing of copyright by publication. You get your copyright by publication. You secure your copyright yourself by publication with a notice. Having done so, you are really under the obligation of depositing two complete copies of the best edition of that work with the Copyright Office. You send in your application, you send in two copies, you send in the fee, and then, as a result of that, what you obtain in the Copyright Office with respect to that work is the registration of your claim of copyright; and you also obtain a certificate of registration; these for the large sum of two dollars. But if you do not do it, if you do not make this deposit, and if you do not apply for registration, you cannot proceed in a Federal Court in a suit for infringement. That is one of the little inducements offered to make available to the Library of Congress the copies of your publication. As a matter of fact, if you do not deposit two complete copies, the Register of

Copyrights can call upon you to do so; and if you refuse then to send them in you are liable to a fine of \$100.00, of paying twice the retail value of a complete copy of the best edition, and the loss of the copyright. So there are certain little formalities that are quite important in our law.

One of the most interesting provisions in the treaty is Article 18, which provides that the present Convention applies to all works which at the time it goes into effect have not fallen into the public domain of their country of origin because of the expiration of the term of protection. And there are three or, rather, four ways of copyrightable matter falling into the public domain: first, of course, by expiration of the copyright term; second, by dedication of the copyrightable material to the public. Let us say I write a book; I publish it, but I do not put on it the adequate copyright notice required by law. It is just too bad; that work is dedicated to the public by virtue of my failure to put that notice on it and it falls into the public domain.

Third, by forfeiture of copyright as a penalty. I have already referred to that in connection with the failure to make the deposit required by law after demand has been made upon the offending party.

Fourth, by material being legislatively declared to be uncopyrightable. For instance, Section 7 of the Act provides that there shall be no copyright in any work published here or abroad prior to July, 1909, in which copyright has not been taken out in the United States by July 1, 1909; but under Article 18 a French author of such work would be protected here.

As you know, we have here a system of renewals of a copyright. The original term of copyright is for twenty-eight years from date of publication of the work, but Congress provided that there should be a renewal period. When the 28th year comes along, the author, or his wife, or child, or next of kin, or his executors—not necessarily in that order—has the right to apply to the Copyright Office for the renewal of the copyright to him for another twenty-eight years. And the law provides that if that renewal is made in time by the party coming within the field of those who have the right to renew, then the copyright may be extended for twenty-eight years in addition to the twenty-eight years of the original term.

I believe my time is about up. But it just occurred to me that a reference to these features of the domestic law in connection with certain features which have been so forcibly brought to your attention by Dr. McClure might serve the purpose for which I have the honor to address you.

Chairman REEVES. Thank you very much, Colonel Bouvé. Ladies and gentlemen, the discussion will now be continued from the floor. I recognize Mr. Richard C. DeWolf, Law Officer of the Copyright Office.

Mr. RICHARD C. DEWOLF. Mr. Chairman, I do not come prepared to say anything particularly. If I were a mind-reader and could know what the principal difficulties may be in the minds of the audience I would know better what to say or what aspect of the subject to take up.

The question is always coming up: Why is it that the United States,

which has long been a party to other conventions for the protection of intellectual and industrial property, should have so long remained outside the Convention for the Protection of Literary Property?

I think a little reflection answers that question. We have been, in regard to inventions, a creating or producing nation. Our inventions have gone abroad and our interest has been to see to it that an American inventor was protected in foreign countries without too much difficulty. On the other hand, until quite recently the United States has been a consuming country with regard to the creations of the mind in the narrower sense, that is, works of literature and art. Therefore, the interests of the exploiters of literary property have prevailed in this country over those of the producers. But now the shoe is going onto the other foot. Since the advent of American motion pictures and a certain type of popular music, Europe has come to be much more largely a consumer of American products of these kinds than it was in earlier times. Consequently we are beginning to think of the interests of our own creators of literature and art in foreign countries and we are asking the question why should we have to go to thirty or forty different foreign countries and perform formalities in those different countries in order to be sure that these works of ours are protected there.

Something seems inherently wrong and repugnant to logical thinking in the idea that a man, having written a book—and I presume among all of this audience there is no one who has not done it or has not thought of doing it—should have to go through a lot of burdensome formalities in order to have that work copyrighted in every different foreign country. Of course this was the aspect of the thing that was present in the minds of the people who formulated the International Copyright Convention. Each country, of course, preferred to legislate for itself; each country had a certain national policy with regard to what should be done to protect copyrights and, of course, wanted to adhere to that with regard to the works of foreign authors.

But after a while the system broke down. An Englishman writing a book had to attend to formalities in twenty-five or thirty foreign countries, and a Frenchman likewise. The formalities became so burdensome that everybody got together and said, "Here, we will all make some sacrifices. We will sacrifice our national inclinations so far as the citizens of other countries are concerned and, in return, they will sacrifice their inclinations so far as we are concerned, and we will all get together and wipe out the formalities. And the fact of the matter is that the system has worked, and I am sure they would not think of abandoning it. Yet, as Colonel Bouvé has pointed out, each country is left with a wide latitude with respect to its own citizens and also with respect to the assertion of protection in the courts of the country.

It seems to me that the time has now come when the United States must take up this question seriously. In fact, it has been taken up seriously for some time past. When I first came to the Copyright Office thirty years ago I met Thorvald Solberg, who then and for many years afterwards was Regis-

ter of Copyrights and whom you know as a persistent advocate of the adherence of the United States to the Copyright Convention. I am frank to say that I imbibed these views from him, and I hold them now. I think that really will be the next and greatest advance in the field of copyright law which is now open to the United States.

Chairman REEVES. The Chair will be glad to recognize anyone for the continuation of the discussion of this important question.

Mr. EDWARD DUMBAULD. The subject which my friend Dr. McClure has so ably discussed is one which is of intense though academic interest to me by reason of the fact that I am author of a book which, as you know, has been published in The Hague by the firm of Nijhoff and hence was not printed in the United States and, accordingly, is not copyrightable and not protected in this country. It is a somewhat academic question, however, since I understand that less than a hundred copies have been sold, of which two, I can say, have been purchased by the Library of Congress at their own expense.

There are about three points which I would like to suggest in this connection. The first is that, like all intelligent economists, I believe in the elimination of barriers to trade. And no one knows better than Dr. McClure how difficult it is to accomplish anything in that direction.

Secondly, I agree with Thomas Jefferson that, even if there is a tariff in general, it ought not to apply to books and intellectual productions, because that is a tax upon knowledge and civilization.

Third, if we are to have a tariff and a tariff upon books, I say that that is the proper method of giving protection to any American printers who feel the need of protection, and that to give protection to the printing trade by depriving the authors of copyright, which is a purely intangible and intellectual right, or one created by law, is entirely the wrong way to go about it. If there is to be any protection for the printing trade it should be done by means of a tariff upon the physical commodities imported rather than by denying the intellectual property to those who have created it.

Now, my final point is that there is a great deal of discussion nowadays about monopoly and concentration of economic control in the hands of a few large corporations to the disadvantage of small businesses. It occurs to me in this connection that the present copyright law of the United States, by making it necessary in order to obtain world-wide copyright that a work be published twice at the same time, once from type set in the United States in order to get American protection, and again, duplicating that, as Dr. McClure has pointed out, from type set in some other country which is a signatory to the Berne Convention in order to get protection in those states, necessitates a duplication of the amount of capital to be invested in publication and, therefore, discriminates in favor of the larger publishing houses or the better-known authors, at the expense of those who are less well known and of whose works such a huge sale as would justify the expense of issuing two editions may not be anticipated:

Chairman REEVES. Are there any further remarks?

Mr. GEORGE MIDDLETON. Mr. Chairman, are questions in order?

Chairman REEVES. Yes; I think so.

Mr. MIDDLETON. I happened to be a passer-by and heard of this meeting. I had no intention of speaking. I am a dramatist. For the purpose of identification I will say that at one time I was President of the Dramatists' Guild which, as you know, is a Guild of the Authors' League of America. I wish to state I am in no way speaking with the authorization of the League. I am no longer officially connected with it, except as one of the directors of the Dramatists' Guild.

For the record I should say that the Authors' League for many years was in favor of joining the Berne Convention. As far as the present tie-up is concerned, however, I think you should know the Authors' League has been opposed to joining the Berne Convention by reason of the circumstances in which it finds itself in relation to the American copyright law. I am not in complete touch with the subject. I hope, therefore, you will bear with me, if I try, by questions, to clarify some of the things which are troubling us.

In the first place, I should like to ask whether it is not a fact that, if we joined the Berne Convention, automatic copyright would be given in the United States to foreign authors, whereas American authors would still have to comply with certain regulations here before they could obtain copyright?

Chairman REEVES. Will you permit Mr. McClure to answer this question and then proceed with another question, if you have one?

Dr. McCLURE. The answer is in the affirmative. The treaty, of course, governs the right of the citizens of other countries in this country. It does not govern what the United States does with respect to its own citizens.

Mr. MIDDLETON. That is one of the objections the authors have to this present set-up. In other words, it means if the United States joins the Berne Convention the foreign authors will automatically have copyright here in the United States and complete protection; whereas if the American author, by any chance, slips up or fails to comply with certain technical requirements our domestic law exacts, our copyright material is irrevocably lost. In other words, as our present set-up exists, it would be in essence a discrimination against the American author. Isn't that true?

Dr. McCLURE. In my opinion, the answer is very decidedly in the negative. There is no discrimination involved, as I see it. And I see it that way for this reason: American authors get in the other countries *precisely what* their authors get here, automatic protection. There is plenty of precedent in other countries for such arrangement. The same thing has applied in England and Canada, and it has been upheld by judicial decisions. What the treaty provides for authors is protection in other countries, not in their own. It is an international proposition. Within a country, the national laws thereof are to govern the citizens of that country in the way that their government thinks best. So much for the law on the question.

Now, the question of automatic copyright as a matter of national policy, is, of course, a very real one. Certainly no one can be more sensitive than I myself am to the profound difficulty of the question whether within the United States we should, by statute grant to the authors what they themselves so very much desire, what we authors very much want—if I may follow Mr. DeWolf in his suggestion that all of us here gathered are authors—that there should be no required formality. Regardless, however, of the answer we reach in respect of the future of national law, there is no discrimination in the operation of the treaty, which is perfectly reciprocal.

What we have to do, to comply with the present law in our own country, is a very small matter. As Colonel Bouvé said, it is simply a matter of putting on the notice, which is no trouble, sending in two copies, and paying the two dollars, whereupon the registration takes place and our claim of copyright is duly recorded. Compare what we have to do here with the burden of keeping up with the requirements of the various countries of the world, of having to know what the law in each one of those countries is, and having to comply with each national law in order to be generally protected. I don't know what each country requires. I do know that some other countries require burdensome formalities.

So, in view of the contrast between what we have to do here and what we have to do by way of actual realistic trouble if we overcome the formalities in other countries, the situation to my mind is not well expressed when we refer to it as a discrimination against American authors in their own country. It is to save American authors from the necessity of going through the requirements regarding formalities in other countries that we want this treaty.

To say, on the other hand, that we do not want it simply because we do not get with it something that we haven't got and which the treaty could not possibly affect our getting, if it were in force, and to oppose the treaty on that ground, to my mind is not a strictly logical deduction for those who start from the premise that there should be no discrimination.

Mr. MIDDLETON. But doesn't it still remain a fact that the American author will have to go through certain formalities to protect his product? Is it not a fact that the foreign author, on the other hand, is automatically copyrighted in the United States if we join the Berne Convention, and does not have to go through those same formalities to protect his product?

Dr. McCLEURE. That follows from what I have said. The treaty does not cover what the American author has to do in the United States. It would protect the American author through forty odd countries in the world but would not change his status in the United States. Our status here is governed and will continue to be governed by our own national law; our rights throughout these forty or forty-five countries would be governed by the treaty. Similarly, the rights in the United States of the authors of the forty or forty-five countries would be governed by the treaty. It does not affect their status in their own respective countries.

Mr. MIDDLETON. I myself have every sympathy with the idea of the Berne Convention. There is nothing more absurd than what the American dramatists have to go through at present to protect their property. I merely wish to point out that it is not quite as simple as it seems on the surface. Protection is the great problem of the author today. In the old days, when we wrote a book or a play, it was what it was. Publication or production were practically the only rights involved. Now, all sorts of subsidiary rights have come to life. There have since developed radio broadcasting, disc projection, silent motion pictures, and talking pictures. Television is in the offing. In other words, this question of copyright is not a simple one. The technical element of formalities is involved, as has been pointed out. Something might easily happen whereby the American author, through some slight slip, may lose control of the above important subsidiary rights.

It seems to me before the United States goes into the Berne Convention, the law in this country has to be changed in such a way that the American author may be protected against what we feel—and I think legitimately—are the encroaching claims of the big commercial broadcasting companies. In fact, one of the most difficult things authors have to face today is this question of infringement of our creative efforts by the radio and other mechanical inventions. And Dr. McClure, of course, is perfectly aware of all these things which he may not believe are germane. I think they have something to do with this question of the Berne Convention.

There is only one other question I would like to ask you. Is it or is it not a fact that Germany and Italy are not parties to the Berne Convention?

Dr. McCLURE. Germany and Italy are both parties to the Berne Convention, and consequently adherence on the part of the United States would, as a matter of law, secure perfect protection in both of those countries.

Mr. MIDDLETON. Is it a fact that the laws which have been made in both of those countries concerning copyrighted material of foreigners do not protect them at all in this country?

Dr. McCLURE. I understand there have been passed certain laws apart from copyright legislation which as a practical matter have an unfortunate effect upon all business with those countries.

Mr. MIDDLETON. I thank you very much for your indulgence in this way. I am not speaking in a spirit of controversy. I merely wished to point out that the authors of America have serious doubts about the advisability of joining Berne unless certain changes are made in our domestic law.

Chairman REEVES. I think we are obliged to Mr. Middleton. It has certainly served to emphasize that under this Convention an American author by registering under our national copyright act would have automatic copyright security without any further act on his part in every country a party to the Berne Convention. An American author copyrighting his work under our law, submitting two copies to the Copyright Office and paying his two dollars, without anything more on his part, has automatic copyright security

within every country a party to the Berne Convention. That is correct, isn't it?

Dr. McCLORE. That will result when the United States becomes a party. I wanted to say particularly, both to Mr. Middleton, with whom I have had very delightful conversations on this subject in times past, and to this audience that nothing I myself have said should be considered as meaning the slightest opposition on my part to the passage by Congress of a law which would accord automatic copyright to American citizens. I shall be perfectly glad to see that done. I must not be construed as in any sense opposed to a change like that. But the treaty has to do with our rights in other countries.

Mr. FRANCIS DEÁK. Mr. Chairman, I wanted to make one statement in reply to Mr. Middleton. A study of the copyright situation indicates, Mr. Middleton, that two-thirds of the nations of the world are members of the Berne Copyright Union. Great Britain and all the British Dominions are members. What is even more important is the fact that a great many of the member countries do require from their nationals some formality for obtaining copyright in their own country. France does, so does Switzerland, so does Czechoslovakia, and so does Italy. And I could mention many more which require registration in some form, presentation of copies to the national libraries, paying certain fees, and so on, to secure copyright protection. In the very same countries, despite the fact of discrimination of which you are complaining, the nationals of other countries do get automatic copyright.

I should like to suggest to your organization that you consider, until you will be able to induce Congress to satisfy your perfectly legitimate claim to eliminate this discrimination, the advantage which you, American authors, would receive by our adherence to the Berne Convention. Margaret Mitchell's *Gone With The Wind* could not be pirated in a half-dozen countries!

Chairman REEVES. We have another aspect we want to take up, Mr. Middleton, and perhaps that should be reserved for further discussion between you and Mr. Deák. I think we must pass now to another topic.

Colonel BOUVÁ. If the authors of the United States under our laws are suffering from burdens imposed in connection with copyright, that is simply and solely due to our domestic law itself. With the domestic law itself and with its operation with respect to our citizens, of course, the Berne Convention has absolutely nothing to do. The statement has been made that a discrimination will result. I don't think that is going at the matter from the right standpoint. The point is this: The purpose of any treaty is this: If a French author, say, wants to enjoy a special right in the United States, the answer is that by the treaty the American author obtains a similar right in France. That is the fundamental point. If the American author gets something there that he cannot obtain here—if his getting something in that way means that he can get more there than he does here under our local law, it seems to me that this should not just subject the treaty to attack upon the ground of discrimination. The American author is not discriminated against as a result

of the Berne Convention, because under that Convention the question is not "What does the American author get as a result of it here?" but "What does he get as a result of it in all of the countries of the Union?" It is the time-honored method of a *quid pro quo*. That is basically an essential element of treaties involving reciprocal treatment for the nationals involved.

Chairman REEVES. Now, ladies and gentlemen, we will pass to another topic, being "Some administrative aspects of international broadcasting." I take great pleasure in calling upon Mr. Irvin Stewart, former Vice Chairman of the Federal Communications Commission.

SOME ADMINISTRATIVE ASPECTS OF INTERNATIONAL BROADCASTING

By IRVIN STEWART

Former Vice Chairman, Federal Communications Commission

Though earlier informal arrangements existed both in Europe and America, the first world-wide recognition of the needs of broadcasting came with the Washington Radio Convention of 1927. With respect to broadcasting, the Madrid Radio Conference of 1932 merely proceeded further upon the course set at Washington. Only a few days ago, the Cairo Radio Conference completed its task of assaying the results of the Madrid Regulations and charting the course of radio regulation for the next five years or so. The regulations adopted at Cairo are not yet available in this country.

The growth of broadcasting between the Washington and Cairo Conferences may be shown in a few figures for Europe.

EUROPEAN BROADCASTING STATIONS INCLUDING U.S.S.R. AS FAR AS THE URAL MOUNTAINS*
(150-1500 kc. only)

	1928	1929	1934	Beginning of 1937	Forecast for 1938
<i>Number of stations:</i>					
Not including U.S.S.R.....	119	189	207	292	300
In U.S.S.R.....	4	11	46	50	50
Total.....	123	200	253	342	350
<i>Power of stations (Kw. in the antenna):</i>					
Total power in Kw.....	116	420	4500	7020	8000
Number of stations of 15 Kw. and more.....	1	7	65	93	100
Number of stations of 50 Kw. and more.....	0	0	37	53	67
Number of stations of 100 Kw. and more.....	0	0	15	31	48
Maximum power in Kw.....	16	40	500	500	500
Average power in Kw.....	1	2.1	18	20.5	23

* *Propositions pour la Conférence Internationale des Radiocommunications du Caire, 1938, p. 74.*

These figures emphasize two things: the necessity of international understanding in the technical aspects of broadcasting and the need for flexibility which will accommodate new demands by taking advantage of technical advancements.

The heart of the administrative regulation of radio is in Article 7 of the General Radio Regulations of Madrid; and the most important part of that article is the allocation table, which divides the useful radio spectrum among various services. That table represents a compromise based on the needs of various services. It is amazing that so much agreement has been had with respect to it, even though in practice there have been serious deviations from its provisions.

In the interest of the fullest use of the limited number of frequencies available to any service, the Regulations contain many important provisions relating to equipment and to equipment performance. With a view to forestalling or minimizing interference to existing international services, greatest detail is devoted to the provisions relating to the choice of frequency for new stations and the notification of the chosen frequency through a prescribed procedure.

The International Regulations make use of two agencies to facilitate the application of their provisions. The first of these, the Bureau of the International Telecommunication Union, is primarily a clearing-house for information and a centralizing agency in the preparation for the periodical conferences. Using information largely furnished by governments, the Bureau issues several publications essential alike to the administrator, the station operator and the student.

The second agency is entirely different in character. The International Technical Consulting Committee on Radio Communications (usually referred to as the C.C.I.R.) was first authorized by the Washington Radio Convention of 1927. The reason for its existence lies in the undesirability of trying to establish through international regulations technical standards which would be binding for a number of years.

The pressure of new and expanded services, brought into being either through engineering advances or through the adoption of radio by governments which had been laggard in its use, creates a demand for more frequencies. In the crowded portions of the spectrum, these demands can be met only through an expansion of the band open to the service, through the deletion of existing stations or through a more efficient use of the band. Expansion of the band is difficult if not impossible, for it would mean the dislodgment of services in adjacent bands. Likewise the deletion of existing stations is usually impractical. Thus, more efficient use of the band becomes the one hope for relief. Unfortunately, the cost of apparatus is somewhat proportional to its efficiency. Where the immediate beneficiary of the increased efficiency is not the one to defray the cost, there is often reluctance to make a change.

Considerations such as these are weighed by the C.C.I.R., which issues opinions on technical and related matters. It is not a continuing body, but one composed at each meeting of representatives of such administrations and eligible companies as care to participate.

Its opinions are without binding effect. They represent a compromise reached by representatives of countries of widely divergent technical standards and economic conditions. As such they are persuasive with all governments. They represent the nearest approach to international technical radio standards, not as high as those technically feasible, but higher than those being followed by the countries where development has been slow for economic or other reasons.

In the course of four meetings held in 1929, 1931, 1933, and 1937, the C.C.I.R. adopted a total of 98 opinions. Only about one-third of the 77 opinions which had been adopted prior to the Bucharest C.C.I.R. meeting in 1937 remained in force at the end of that meeting. This in itself is an indication of the progress in the technical aspects of radio and of the need for frequent changes in technical practices in the interest of an efficient use of the medium. Several of the C.C.I.R. opinions relate directly to the technical aspects of international broadcasting, while many others have an indirect effect as they influence the development of other radio services.

The place of the C.C.I.R. is described as follows in the report of the American delegation to the Bucharest meeting:

The C.C.I.R. has become the recognized international forum for the discussion of technical problems affecting international radio communication and its regulation. Its work tends to harmonize radio practices and regulations in the various countries. It also clears the ground in the technical field for the major international radio conferences.

The actual assignment of frequencies to stations is not attempted in the international radio regulations. While the regulations specify the services to be carried on within a particular band, they make no attempt to determine in what countries stations shall be constructed to carry on those services. For this, regional agreements are needed.

Even before the Washington Conference drew up an allocation table with a place for broadcasting, various European governments had worked out a plan for the assignment of frequencies to particular broadcast stations. Following the Washington Conference, this plan was revised; and the revised plan was generally observed up to the Madrid Conference. There were departures from it, however, chiefly to accommodate the great increase in the number and power of European broadcast stations between 1928 and 1932. At the Madrid Conference conflicts between the broadcasters, on the one hand, and maritime and aviation interests, on the other, were so acute at times as to imperil the success of the conference. Agreement on a world-wide scale was finally obtained, with considerable latitude for the European region to

work out its special problems at a later conference. This was tried at a conference held in Lucerne in 1933.

Probably no one was surprised that the Lucerne Conference could not solve all the problems before it. Events proved that the delegates at the conference went farther than their several governments were prepared to go to reach an agreement; for, while the representatives of 27 governments in the European régime (which includes part of North Africa and Asia Minor, as well as Iceland) signed the convention, only 15 governments have ratified the agreement in the four and one-half years following the conference, although several others have stated that they are following the agreement in whole or in part. Nine European governments declined even to sign the Lucerne Convention; and nine of the signatory governments have authorized the operation of broadcast stations on frequencies not allocated to them in the Lucerne plan or any informal adjustment of that plan.

The European situation obviously calls for a continuing organization; and it is furnished by the International Broadcasting Union (usually called the U.I.R.). That Union, which was founded in 1925, is open to all broadcasting organizations in Europe, both state and private, and most of them are members. Broadcasting organizations outside of Europe may and do participate as associate members. The Lucerne Convention recognized the U.I.R. as the technical expert in the application of that convention.

In addition to its central office in Geneva, the U.I.R. has since 1927 operated a control center at Brussels, one function of which is to maintain a constant check of the frequencies being used by all European broadcast stations. Measurements made at the control center are accepted without question in all quarters. By 1936, the number of daily measurements was about 700. When a measurement shows that a station is wandering from its assigned frequency, the control center communicates with it, usually by telegraph or telephone. Some 12,000 such communications had been sent up to January, 1937; remedial measures were usually taken immediately. In view of the crowded condition of the broadcast band in Europe, practically every one of those deviations was a potential source of international friction. In its quiet and efficient way, the control center has contributed substantially to the process of making broadcasting possible in Europe.

Where interference is the result, not of deviation from an assigned frequency, but of operation on assigned frequencies too close to each other, the function of the U.I.R. is quite different. In some cases, it tries to find technical ways of minimizing interference through the use of directional antennas, synchronized transmitters, or other technical measures. In others, it endeavors to ameliorate the situation by procuring a slight adjustment of assigned frequencies—a process which may necessitate shifts by several governments not involved in the initial interference. Thus, under the guidance of the U.I.R., there have been changes in the Lucerne allocation; changes made tentatively and experimentally with permanence following only where

the experiment had shown an improvement over the original situation. By an astute process of juggling, the U.I.R. has ironed out most of the cases of interference. Even now, however, more than four years after the Lucerne plan became effective, there are several cases of interference which have stubbornly resisted all attempts at settlement.

While I have stressed the technical work of the U.I.R., I should note in passing that its program committee has actively furthered the exchange of programs internationally within Europe and, more recently, intercontinentally. Its legal committee is trying to keep pace with legal problems arising from broadcasting, but concrete results in this field are not comparable to those in the technical field. Legal problems studied have included those pertaining to authors' rights, rights of performing artists, property rights in a broadcast, right to reply, moral disarmament, electrical interference, use of phonograph or other records, and a proposed convention on broadcasting.

The growth of short-wave broadcasting, and with it the increase of the interference problem, is reflected in the measurements made at the Brussels control center. In January, 1936, the center measured 121 frequencies being used for short-wave broadcasts. In October, 1937, the figure was 245, or more than twice the January, 1936, figure. Further, the International Bureau has already been notified of the intention of various governments to construct still more stations. One interesting point is that of the 245 frequencies measured for short-wave broadcasts in October, 1937, only 130 were within the bands allocated to that service by the Madrid Regulations, while 115 were outside the Madrid bands. It should be borne in mind that these figures represent measurements actually made in Brussels. If they were to be completed by measurements made elsewhere, the totals would be materially increased. The number of useful frequencies in the Madrid bands according to the U.I.R. standards is 91, or about one-third of those actually measured in Brussels. (This figure does not include 101 channels in the 25,000 kc. band, where measurements failed to reveal a single broadcast station.)

As early as 1935, the Brussels control center reported that the 6,000 kc. band was extremely congested while the 25,000 kc. band was practically unused; that a large number of stations were operating outside the bands reserved for broadcasting; that the majority of the stations were very unstable; that frequency separations were generally insufficient; and that a large number of relatively low-powered stations did not seem to justify the use of short-waves for very long-distance services. The rather alarming conclusion of the control center was that "It may be affirmed without hesitation that, unless the present situation is rapidly rectified, short-wave broadcasting on a world-wide scale will rapidly and progressively become inoperative." The suggested remedies were: fixing a minimum separation in kc. between the frequencies used; strict stabilization of the transmitted frequencies within the limits of tolerances now obtainable under technical prog-

ress; utilization, where the nature of the service permits, of directional aërials; exclusive use of short-waves for broadcast stations intended to give a long-distance, and not merely a national, service; a substantial enlargement of the bands reserved for broadcasting; a preliminary study of the preparation of a world-wide plan for the allocation of short-waves among broadcast transmitters; and, if necessary, the conclusion of agreements for the sharing of time among stations. Proposals based on some of these suggestions were before the Cairo Conference. Partial relief undoubtedly will be forthcoming; but experience under the Madrid Regulations indicates that the maximum relief obtainable under whatever regulations were adopted at Cairo will not be obtained in practice.

During February and March, 1936, the First Intercontinental Meeting of Broadcasting Organizations met in Paris on the initiative of the U.I.R. To the conference were invited representatives of all non-European broadcasting organizations for the purpose of a common study of problems of broadcasting presenting a world-wide character and a consideration of suitable methods of making permanent the intercontinental coöperation thus established. All continents were represented with a total of 41 broadcasting organizations and 27 government administrations participating.

The conference took steps to assure, through the office of the U.I.R., the compilation of information needed to facilitate the relaying of programs between continents; to initiate a series of world concerts (of which four have been transmitted up to the present); and to facilitate the travel of broadcasting reporters and to place them on an equal footing with reporters for the press.

It also provided for the exchange, through the office of the U.I.R., of information relating to copyright in the various countries. Legal questions could not be solved by the conference, but attention of the interested organizations was directed to such problems as the protection of transmission, the recording of intercontinental broadcasts with a view to later retransmission, and liability for the contents of a spoken broadcast originating in one country for reception in another.

The conferees discussed the problem of congestion in the short-wave bands and made several recommendations for the more efficient operation of stations, provided for a further study of certain phenomena, recommended the standardization of recording processes, recognized the importance of a technical control of broadcast transmissions from a distance, and expressed the hope that some relief could be had by a widening of the bands for short-wave broadcasting.

On June 20, 1937, representatives of all but one of the republics of South America signed a South American regional arrangement on radio communications, which revises a similar agreement signed in 1935 by representatives of six of them. That agreement covers both technical matters and matters of broadcast program content. In technical standards it looks for guidance

to the C.C.I.R. opinions; in program content it takes its cue from the International Convention Concerning the Use of Broadcasting in the Cause of Peace signed at Geneva in September, 1936. No permanent organization is set up by the Convention, but provision is made for South American radio conferences at two-year intervals, so the terms of the conventions should never lag far behind the progress of the art.

An Inter-American Radiocommunications Convention was signed at Havana on December 13, 1937, by representatives of 16 governments of North, Central and South America. Among other things, the convention provides for the establishment of a permanent Inter-American Radio Office whose functions, with reference to the Americas, will closely parallel those of the International Bureau under the International Radio Regulations. Accompanying the convention was another document styled an *Administrative Arrangement* concerning Radiocommunications which contains a table allocating frequencies for three zones—North American, Central and South American—largely within the Madrid allocation. It also includes a number of provisions designed to tighten up the technical performance of transmitters, including broadcasting transmitters. A separate North American regional arrangement lays down principles of allocation in the standard broadcast band.

In conclusion, it may be stated that stability in this field is not in sight in the immediate future. Broadcasting is but one of several services which must live together in the radio spectrum. The rate of growth differs for different services, and the jostling for elbow room will continue, though it may occasionally change slightly in direction. Governments will not agree upon the relative emphasis to be placed upon the various services. There will be an ever-growing demand for more consideration on the part of governments whose broadcast services are relatively undeveloped. Governments of relatively prosperous countries will urge with only indifferent success the adoption by less prosperous governments of more efficient—and more costly—apparatus to permit a larger use of radio. A parallel contest will continue between relatively prosperous radio services and those less prosperous. For a number of years to come there must be a considerable fluidity. To attempt rigidity is to invite an explosion which no one can risk, least of all those governments with the highest stake in radio.

Chairman REEVES. It seems to the Chair that Hugo Grotius propounded the doctrine of *mare liberum* as a principle based upon universal and common interest. Have we had any proposition quite like that involved in this matter of the international control of radio? The application of the ancient principle, to use your own so as not to injure another, certainly involves principles which cannot be built up by way of development or by way of analogy from principles that are applied to altogether different types of elements in the world. I think we all begin to realize how fascinating from a purely theoretical point of view, from the point of view of jurisprudence, this aspect is. I cannot help thinking of a remark made last night about attention

paid to some of the less important matters of international law that do not involve questions of war and peace. This does not. It certainly involves a considerable series of questions as to comfortable living on this planet.

We will now turn to a discussion which will be led by Harvey B. Otterman, of the Treaty Division of the Department of State.

Mr. HARVEY B. OTTERMAN. Mr. Chairman, I find myself in rather a quandary as I seek something further to add to the comprehensive and exact statement which Dr. Stewart has made with respect to the administrative aspects of international broadcasting. But his paper has stimulated my thinking on three important matters. They are radio interest and, for the legal profession, a warning and an opportunity.

First then, radio interest. I think it is a matter of keen interest to all of us that so much development along conventional lines and international regulatory lines has been made in the relatively short span of radio life. There are probably two reasons for that development. The first is that radio, in all of its phases, touches so intimately human life and interests, not only the entertainment features of broadcasting but even more the other phases of radio activity, wherein it plays an important part not only in the safety of property and preservation of property but in the actual preservation of human life. And we may only think rapidly of the plans which are now being carried into actual practice with respect to police radio, international broadcasting, broadcasts in times of great emergency which were considered at the recent Havana Conferences, the increasing importance of aeronautical and other mobile radio services and other developments in the radio field.

I think perhaps there is another reason why radio has made a considerable advance in the way of conventions and international regulations. From my very humble experience and slight observation I have been impressed with the fact that technicians, whether engineering, legal or diplomatic, when they attend a radio conference, feel impelled to reach some agreement by which the very life of their industry and their art shall be preserved, and that there is a feeling prevalent that they dare not permit their national and international differences to interfere with the pressing importance of finding some practical solution by which the art may be continued effectively. So much for the interest which has been stimulated in my mind by Dr. Stewart's paper.

Now, as to the warning. As we read in the press and in the magazines and books about the great advance of the radio art, invariably the reference is made not to the legal phases but to the engineering and scientific developments. So it has come to pass that some of us who are working day by day in this field find ourselves thinking of radio not so much in the terms of legality but rather in the terms of engineering phraseology and engineering viewpoints. I think that is unfortunate. If we take from Dr. Stewart's paper the reference which he has made in some detail to the past conventions, we look back to the 1912 Convention signed at London and we realize that there, by that contribu-

tion to conventional law, the radio art was carried out of the wilderness, in which it then was, and the trail was blazed into a clearing whereby radio might develop more effectively and more rapidly. Then, if we come down through the years prior to 1925 and 1926, which may be termed the dark ages of radio, we will be impressed with the fact that the great Washington Convention of 1927 led radio out of a veritable anarchy into a régime of law and order, which was subsequently crystallized by the Madrid Convention of 1932. In all these conventions there has been developed not only technical advancement and understanding, but there has been bred a mutual respect among the technicians representing the various participating states, so that each has come to realize more vividly the problems of the others and has come to respect more sincerely the others' views. Relying upon that presentation, I make bold to issue to this gathering here today the warning that we, as representatives of the legal profession, must not lose sight of the important part that we have to play in the continued development of the radio art.

Then, one more thing. Dr. Stewart's paper stirred up in my mind a sense of encouragement. He rightly said that the very heart of radio regulation is Article VII of the General Radio Regulations, and particularly the allocation table. That is eminently true. I should like briefly to paint a very encouraging picture in that respect. It has been a part of my duties for the past two or three years to watch the reports of international violations of Article VII and the allocation table. Of course, there has been a lot of interference which could not have been avoided with the spectrum so crowded as the radio spectrum is today. But I am talking now about actual violations of an international regulation. To me it has been perfectly amazing that there have been so few violations. Another amazing and encouraging feature to me has been that in the vast majority of cases when violations have arisen and have been presented to the offending governments for their consideration, there have been almost immediate, and certainly in the majority of cases, completely adequate efforts to put a stop to those violations. Certainly the conventions and the regulations of the past have been built upon solid foundations, and the relationships among the technicians of the radio world have been sufficiently happy to permit the fulfillment in large measure of the agreements which have been negotiated.

Now, just one more word in conclusion. I am encouraged not only by what I have said just now, but I am encouraged by the opportunities of the future. We have before us, of course, the ever present problem of a place in the channels of the spectrum for the increasing number of stations desiring space, particularly broadcasting stations. But closely akin to that is something which has appeared from the data which Dr. Stewart gave us this morning. I want you to note with respect to European broadcasting stations, including those of the Soviet Union, that the increase in the number of stations from 1926 to the forecast for 1938 has been threefold, but the increase in total

power in kilowatts for those stations has been 69-fold. On the basis of the varying figures, that increase has been proportionately great for stations of varying increasing powers. So that along with the allocation problem, we have before us the problem of increased power which must be faced and solved.

Closely following that is the problem which finds its way into the troubled world today, that is the problem of propaganda, which is nothing more than the misuse of great power in radio.

Then, too, I should like to refer to the remarks of the Chairman, if I may, when he said a few moments ago that radio did not appear to find its way into the question of peace and war. I have in mind that the place of radio in war must be clarified before many years—nay, perhaps before many months. The place of radio and the control of radio in war time is an urgent problem of the immediate future. In the Ethiopian crisis, we recall that one of the first sanctions was a radio sanction, and that is simply an indication of what we are going to face if hostilities break out on a large scale in any part of the world.

Finally, one more field of opportunity presents itself in the pressing demands of radio services other than broadcasting for space and power.

These are only a few of the opportunities and problems to which not merely the technicians, not merely the diplomats, but, to an increasing extent, the lawyers, and particularly the international lawyers, must contribute toward a solution.

Chairman REEVES. The discussion is now open to the floor. The Chair will be glad to recognize anyone desiring to carry on this discussion.

Professor ROBERT R. WILSON. Perhaps it is not involved in Dr. Stewart's subject of today, but I have been much interested in what he has written about voting at international telecommunication conferences. I wonder if he would care to say a word about whether that is a continuing problem or whether it has been settled satisfactorily.

Dr. STEWART. The full reports of the Cairo Conference are not available in this country. But Mr. Otterman has been watching the proceedings from the standpoint of the Department of State and, I think, is better able to answer that than I am.

Mr. OTTERMAN. I might say that at Havana there was an effort made to solve the entire voting question, but with indifferent success. There sovereignty was taken as a basis for voting, and every state having the qualifications of sovereignty pronounced at Montevideo in 1933 was accorded a vote; but there should be no colonial voting whatever but only adherence on the part of colonial possessions.

They tried to put across the same idea at Cairo, but they were not able to do so. The plan finally decided upon, so far as I have been able to ascertain, is this: That every state or every colony which had a vote at Madrid in 1932 might have a vote in Cairo and in all future telecommunication conferences;

that for new states the question of sovereignty should be paramount, and that consideration should be probably the controlling factor with regard to the right to vote.

Chairman REEVES. Is there any further discussion?

Professor PERCY E. CORBETT. I would like to ask for some practical information. Perhaps I should not have to ask for it, perhaps I should know. But I thought I might assume that Canada is a party to the 1937 Havana Convention.

Mr. OTTERMAN. Yes; that is correct.

Professor CORBETT. When last I heard of it the division of frequencies in the broadcasting band between the United States and Canada was something like 96 to 15. Probably those figures vary. But I should like very much to have Dr. Stewart inform me whether or not that ratio has been maintained, and also on what basis the ratio of distribution between Canada and the United States is established.

Dr. STEWART. The figures given by Professor Corbett are not quite accurate. But, unfortunately, I do not have the accurate figures at my fingertips, so I cannot give him the exact information. Roughly, as I recall it, there are about 90 usable frequencies in the regular broadcasting band. Of those, Canada has exclusive use, under the 1932 arrangement, to some six. A seventh was added when Canada was permitted under the 1932 arrangement to use 540 kilocycles, which was not officially open to broadcasting. Something on the order of a dozen or so frequencies are used jointly by Canada and the United States. The remainder, which would be something like seventy-odd, are open for use by the United States but not by Canada except as use in Canada would not cause interference in the United States.

That arrangement was based upon the so-called gentlemen's agreement which was reached around 1924. It goes back so far that when I searched in all the files I could find in Washington I could find no place where it did not refer to the fact that the arrangement was already in existence. It was purely an informal arrangement which was not reduced to writing until 1932. It has no theoretical basis. The best way I know to get tangled up in a division of frequencies is to try to find a theoretical basis upon which to make the division. Particularly is that true when you take into consideration the fact that Mexico and Cuba have come into the broadcasting picture very definitely since 1924, and each country, of course, would choose that theory which would result in giving it the largest number of frequencies.

Actually the agreement has worked fairly well. There have been slight modifications of it. When Canada feels a little bit too closely pressed in certain respects there is a little waiver, and occasionally the United States is asked to crowd the agreement a little bit. The 1937 agreement has not yet come into effect. So far as I know, no country has ratified it, and it has not yet been sent to the Senate in this country. That agreement very carefully avoids reference to "exclusive channels", which is rather a sore point. In-

stead, it talks in terms of clear channels, the primary service area, and so on. I suspect that upon close analysis you would not find a fundamental difference in the distribution of frequencies in the 1937 arrangement from that in 1932, so far as the United States and Canada are concerned.

Chairman REEVES. With this we will declare this session adjourned, to meet this afternoon at 2:15 in this room.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 2:15 o'clock p.m.)

LUNCHEON MEETING

THE CARLTON HOTEL

Friday, April 29, 1938, 12:30 o'clock p.m.

Presiding: George A. Finch, *Assistant Director, Division of International Law, Carnegie Endowment for International Peace.*

The members of the conference attended a luncheon at the Carlton Hotel on Friday, April 29, 1938, at 12:30 o'clock p.m. as guests of the Carnegie Endowment for International Peace. After the luncheon, the following remarks were made:

MR. GEORGE A. FINCH. Ladies and gentlemen: In welcoming the members of this conference at the opening session, sufficient was said in regard to the origin of these conferences to make it unnecessary to repeat that today. I wish now, however, to express the very great satisfaction which it has given to the officers of the Endowment, and I believe also to the officers of the conference, because of the fine response which has been made to the invitation to most of you to leave your colleges and universities and your work and to come to Washington and engage for three or four days in the discussions in which we are now participating.

As to the program of the conference, there are one or two remarks that I would like to make before introducing the speaker.

I believe this meeting has afforded me the first opportunity or occasion of seeing a group of lawyers completely flabbergasted. At the session where we discussed the psychology of propaganda in relation to international law, after hearing the main speaker, we lawyers were all strangely silent, and the chairman felt called upon to invite the lawyers to speak and to express themselves. But there were various excuses given for not responding to that invitation, which ordinarily would be solicited. One of them was particularly interesting to me. And I would like to remind the gentleman who made the response, who is here now, that I am still waiting to hear his answer. His excuse was that it would take twenty-four hours to digest the address, but that at the end of that time his views might be given. I hope before Professor Corbett leaves this meeting he will be given a chance to give his mature view upon that subject.

The performance reminded me of the old story, which probably most of you have heard, of the professor of psychology who had a human exhibit. This person was a man of subnormal mentality. I believe psychologists have the technical name of moron for him. The technique of this exhibit was to bring this moron out before his class and to offer him two coins with

the privilege of taking either one. One was a five-cent piece and the other was a dime. The moron would always take the five-cent piece and leave the dime. On one occasion there was a visiting professor who witnessed this performance and he became suspicious of collusion between the exhibit and the exhibitor. So after the performance was over he went up to the moron and said: "My dear man, you certainly must know that the dime, although the smaller of the two coins, is worth twice as much as the nickel. Why do you take the nickel?" The moron replied, "Professor, if you will keep it absolutely confidential I will tell you why I do it." The professor pledged himself to secrecy, and the moron confided, "If I do not take the five-cent piece there will be no more exhibitions." Well, in the presence of a psychologist, I felt like that moron. I had some views as to what was being said, but did not dare give public expression to them.

I was interested in another session, the following morning, which almost came off prematurely but finally got back upon the proper schedule, that being the discussion of curricula in small colleges. Not being a professional teacher and not knowing very much about the subject, I sat as a layman and listened to the discussion. I wished to take some part at that time but I felt I was out of place there, so I will take advantage of this occasion when I have the floor for a few minutes to get off what was on my mind.

There was a discussion as to specialization in international law, and some suggestion was made that we were becoming over-numbered in these courses. I would like to remind the older members here and to call the attention of the younger members to the first article which appeared in the *American Journal of International Law*, and, as a matter of information, I have the first number before me. The first article in that first number was written by Mr. Elihu Root. It was very short. It was entitled: "The Need of Popular Understanding of International Law." I would beg your indulgence to read a few paragraphs from this article, because it expresses what I think should be the true attitude toward the teaching and study of international law. It also gives the reason why the American Society of International Law was founded and an explanation of what we are trying to do. Mr. Root said:

The increase of popular control over national conduct, which marks the political development of our time, makes it constantly more important that the great body of the people in each country should have a just conception of their international rights and duties.

And in another quotation:

One of the chief obstacles to the peaceable adjustment of international controversies is the fact that the negotiator or arbitrator who yields any part of the extreme claims of his own country and concedes the reasonableness of any argument of the other side is quite likely to be violently condemned by great numbers of his own countrymen who have never taken the pains to make themselves familiar with the merits of the controversy or have considered only the arguments on their own side.

Mr. Root goes on:

In the great business of settling international controversies without war, whether it be by negotiation or arbitration, essential conditions are reasonableness and good temper, a willingness to recognize facts and to weigh arguments which make against one's own country as well as those which make for one's own country; and it is very important that in every country the people whom negotiators represent and to whom arbitrators must return, shall be able to consider the controversy and judge the action of their representatives in this instructed and reasonable way.

One means to bring about this desirable condition is to increase the general public knowledge of international rights and duties and to promote a popular habit of reading and thinking about international affairs. The more clearly the people of a country understand their own international rights the less likely they are to take extreme and extravagant views of their rights and the less likely they are to be ready to fight for something to which they are not really entitled. The more clearly and universally the people of a country realize the international obligations and duties of their country, the less likely they will be to resent the just demands of other countries that those obligations and duties be observed. The more familiar the people of a country are with the rules and customs of self-restraint and courtesy between nations which long experience has shown to be indispensable for preserving the peace of the world, the greater will be the tendency to refrain from publicly discussing controversies with other countries in such a way as to hinder peaceful settlement by wounding sensibilities or arousing anger and prejudice on the other side.

Then he concludes:

Of course it cannot be expected that the whole body of any people will study international law; but a sufficient number can readily become sufficiently familiar with it to lead and form public opinion in every community in our country upon all important international questions as they arise.

So, ladies and gentlemen, it seems to me that in the teaching of international law and in the study of international law, we are not necessarily preparing other teachers; we are not preparing men to practice before foreign offices or even before courts; but we are carrying on a great countrywide campaign of propaganda in educating as thoroughly as we can everybody in the community with reference to international problems and international rights and duties. And it seems to me we ought to encourage every young man and every young woman to take a course in international law and international relations, not primarily for the purpose of adding to the profession but of placing throughout the country, in every community, men and women who can act as leaders of opinion and instructors of the public when international controversies arise.

It is for that reason that our Society has adopted as its object "to foster the study of international law and promote the establishment of international relations on the basis of law and justice." In adopting that

object we have tried to combine—and I think we have had some success in doing it—the theoretician, as Dr. Kunz would call him, with the practical man. We have invited the professors and teachers to come into an organization where they will meet and confer with the practitioners on the subject. I believe our thirty-two years of existence has proved the feasibility of doing that, and in particular by the program of our thirty-second annual meeting.

In conclusion, on my own behalf and on behalf of the other officers of the Endowment and of the American Society of International Law, I wish to express the great gratification we have had of seeing so many of the younger members of the profession here. Time goes on, and the places of those who started this organization must be filled. And it is a matter of great satisfaction to see so many of the younger generation here. You all have a cordial invitation to become members of the Society. And when the elders have fallen by the way, I know you will be ready to take their places.

As given on the program, Mr. William V. Whittington, of the Treaty Division, Department of State, will address us on the subject "The Making of Treaties and International Agreements and the Work of the Treaty Division of the Department of State."

THE MAKING OF TREATIES AND INTERNATIONAL AGREEMENTS AND THE WORK OF THE TREATY DIVISION OF THE DEPARTMENT OF STATE

BY WILLIAM V. WHITTINGTON

Treaty Division, Department of State

I. INTRODUCTION

This address is limited to a study of procedure in relation to the making of treaties and international agreements, with particular reference to the work of the Treaty Division of the Department of State.

There are many interesting legal problems bearing upon the negotiation and interpretation and execution of agreements with foreign nations. However, except so far as it may be necessary for a better understanding of procedure, we shall refrain from mention of constitutional and legislative factors.

It will not be possible within the time at our disposal to present a satisfactory outline of procedure that will apply equally well in all cases. For that matter, it would serve no useful purpose to attempt to do so.

There is no fixed uniformity in the methods by which treaties or other international agreements are made. All we can hope to present at this time is a more or less general statement, with perhaps a few illuminating examples.

II. THE THREE HISTORIC PERIODS

The primary classification of the procedure by which the power to make treaties has been exercised is based upon a division of our history as an independent nation into three periods.

First, that period from the date of the Declaration of Independence in 1776 to March 1, 1781, during which time there was no constitution or other fundamental law in written form.

Second, that period from March 1, 1781, to March 1789, during which time our Government operated under the Articles of Confederation adopted by the Continental Congress.

Third, that period from March 1789 to the present, during which time the Government has operated under the Constitution.

It must be remembered that, although the Articles of Confederation were adopted in November 1777, the required acceptance by the thirteen States was not effected and the Articles did not become effective until 1781. In the meantime, however, there were concluded and brought into force two treaties.

The Continental Congress, which was vested with the power to appoint plenipotentiaries and to ratify treaties, delegated to Benjamin Franklin and certain others authority to negotiate with the Government of France for the conclusion of a treaty of amity and commerce and a treaty of alliance. These negotiations were of great importance in the revolutionary scheme. The two treaties were signed at Paris on February 6, 1778.¹ It was not until late afternoon of Saturday, May 2, 1778, almost three months later, that these treaties were placed before the Continental Congress. On the following Monday, May 4, the Congress considered the treaties and approved them. These treaties with France are the only examples of treaty procedure during the first of our historic periods.

During the second period, beginning with the effective date of the Articles of Confederation in March 1781, several treaties or agreements with foreign nations were concluded and entered into force, including agreements with France,² Great Britain,³ The Netherlands,⁴ Prussia,⁵ and Morocco.⁶ Still another agreement, a consular convention with France negotiated by Thomas Jefferson and signed at Paris, was pending.

Under the Articles of Confederation it was necessary that nine States

¹ Treaty Series, Nos. 82 and 83.

² Treaty Series, Nos. 83½ and 83¾, two contracts signed in July 1782 and February 1783, respectively.

³ Treaty Series, No. 102, preliminary articles of peace, signed in November 1782; Treaty Series, No. 103, suspension of arms, signed in January 1783; and Treaty Series, No. 104, definitive peace treaty, signed in September 1783.

⁴ Treaty Series, No. 249, treaty of amity and commerce, signed in October 1782.

⁵ Treaty Series, No. 292, treaty of amity and commerce, signed in September 1785.

⁶ Treaty Series, No. 244-1, treaty of peace and friendship, signed in June and July 1786 and January 1787.

give their sanction to a treaty before it could become effective. We have referred to the fact that the Continental Congress delegated the authority and issued instructions directly to plenipotentiaries appointed by it. The Congress, pursuant to the terms of the Articles of Confederation, had control of foreign relations. As far as the making of treaties was concerned, the Congress then performed all those functions, including ratification of treaties, which now are performed by the Chief Executive. The President of the Congress was a presiding officer, without the executive powers now vested in the President under the Constitution.

The third of our historic periods began with the date on which the Constitution of the United States entered into force. Although the Constitution provided that it should enter into force when ratified by nine States, and the ninth ratification was effected in June 1788, it was not until the first Wednesday in March 1789 that the Constitution was declared to be in effect.

Many hundreds of treaties and agreements concerning nearly every conceivable phase of international relations have been concluded since that time. The provisions of the Constitution altered entirely the procedure for making treaties. In the field of treaty making, the President is the sole authority for entering into negotiations and for concluding agreements with foreign countries. The one limitation upon his authority is that set forth in paragraph 2 of section 2 of Article II of the Constitution, reading:

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur.

III. THE PRESIDENT AND THE SENATE

It is necessary that we take the time to comment briefly upon the relative functions of the President and of the Senate in regard to the making of treaties.

It is sometimes incorrectly stated that the Senate ratifies a treaty. It is true that the Constitution provides that two thirds of the Senators present shall give their advice and consent to the making of treaties, and failure of the Senate to give such advice and consent has prevented in a few instances the ratification of treaties. Nevertheless, the approval of a treaty by the required number of Senators does not ratify a treaty and is not mandatory upon the Executive.

Perhaps the principal factor to be borne in mind with respect to the Executive authority in the making of treaties is this: At every point until an international agreement becomes effective the authority of the President is sole and exclusive, with the one exception provided in the Constitution. The President's control, therefore, may be either positive or negative. With reference to the negative control, I quote a portion of an address delivered recently by an officer of the Department of State: ¹

¹ Entitled "Treaties and the Constitution," delivered by Hunter Miller, Historical Adviser and Editor of Treaties, Department of State, to the students of Columbus University,

He may refuse to permit a proposed treaty to be signed on behalf of the United States; if signed he may refuse to send it to the Senate; if sent to the Senate he may withdraw it at his pleasure; if acted on favorably by the Senate he may refuse to ratify it; and he may even ratify it and refuse to exchange the ratifications. At any stage in the making of a treaty, until it is internationally complete, the President may, in the exercise of his own discretion, bring the proceedings to an end.

IV. PROCEDURE

(A) DEFINITION OF TERMS

Before proceeding to a study of the various types of agreements and the procedure for their negotiation, we should have a definition of terms. What do we mean by treaties? What do we mean by Executive agreements?

As to the distinction between bilateral and multilateral, I believe there is no confusion. A bilateral treaty is, in its simplest terms, an agreement or contract between two governments with respect to certain matters of mutual interest. A multilateral treaty is one that has been signed and effected as between three or more governments and dealing with matters of more or less common interest to all of them.

In using the term "treaty" we do so with the language of the Constitution in mind. That is to say, those international agreements which are submitted to the Senate of the United States for its advice and consent to the ratification thereof are deemed to be treaties in the Constitutional sense. They may be called many other things by the nations interested. For instance, they may be referred to as treaties, or as conventions, or as protocols, acts, articles, contracts, or agreements; but it is convenient and proper to refer to them collectively as treaties.

In defining Executive agreements we encounter greater difficulty. For general purposes, it may be said that all those international agreements which are not made with the advice and consent of the Senate and which are made by the Executive in pursuance of the authority vested in him with respect to the conduct of foreign relations, whether or not such agreements have been made under express statutory authority, are comprehended within the term "Executive agreements."

(B) THE MAKING OF BILATERAL TREATIES

The procedure in the making of bilateral treaties may be considered in two parts, the first being that up to and including signature, and the second being that which follows signature.

(1) Procedure prior to and including signature

Probably the first question requiring attention is this: How do the two countries get together? There are, of course, many ways in which this may

be done, but perhaps the most usual method is for one or the other of the governments to communicate to the other, through diplomatic channels, its desire to negotiate an agreement covering certain matters. In such case, it is customary for the government proposing the agreement to submit to the other a complete draft or text of the proposed arrangement.

Thereafter, the actual negotiations may take place in the capital city of either of the interested nations, or at any other place, as the competent authorities may consider most expedient. Let us say that the negotiations are carried on here in Washington, D. C. In such case, the ambassador or minister or other qualified plenipotentiary of the foreign country will represent his government in the negotiations, and for that purpose will consult directly with the Secretary of State or other qualified officers within the Department of State. Throughout the negotiations, the representative of the foreign country may keep in touch with his government and will pursue the negotiations in accordance with instructions from his government.

It may be that the negotiations—that is to say, the discussions and consultations with a view to reaching an agreement with respect to subject-matter and terminology—will be completed within a comparatively short time. On the other hand, these negotiations may and often do require months or even years, depending upon the complexity or controversial nature of the matters to be dealt with in the proposed treaty.

Eventually, we shall assume, an agreement is reached on all points. It is probable that the text of the agreement has been prepared in the languages of both countries, carefully compared and found to be identical so far as the substance of the provisions is concerned. The treaty then may be drawn up for signature, duplicate originals thereof being prepared in what is referred to as the *alternat*—that is, with parallel columns containing the two languages side by side, the language of one of the countries being in the left-hand column of one of the originals while in the other original that language will appear in the right-hand column. We shall refer to this again.

A time and a place are fixed for the signing of the treaty. Let us say the place is an office in the Department of State. Shortly before the time fixed for signature, the qualified plenipotentiary of the foreign nation and the Secretary of State of the United States will appear, and the documents will be placed in readiness for signature. Other interested officers of both governments may be present to assist in or to observe the procedure of signing. When all is in readiness, there having been a formal presentation of full powers, the treaty will be signed, and the respective seals of the plenipotentiaries will be affixed. Perhaps at the same time there will be signed and sealed a supplementary instrument, such as an explanatory protocol.¹

¹ For example, the protocol annexed to the Treaty of Friendship, Commerce, and Consular Rights between the United States and Finland, signed February 13, 1934 (Treaty Series, No. 868).

The treaty having been duly signed and sealed, the plenipotentiary of the foreign nation will retain one of the duplicate originals for transmission to the foreign office of his government, and the other duplicate original will be retained in the archives of the Department of State, subject to the further procedure required in regard to Senatorial approval, and ratification.

(2) *Procedure subsequent to signature*

The negotiations having been completed and the treaty having been concluded (that is, signed and sealed), we are prepared to consider the method by which the treaty is brought into force. For this purpose, it is believed that it would simplify matters greatly if we follow step by step the actual procedure in effecting a comparatively recent treaty--the treaty between the United States of America and Mexico terminating Article VIII of the treaty of December 30, 1853 (the Gadsden Treaty¹).²

This treaty was signed April 13, 1937. On April 19, 1937, the Secretary of State sent to the President a letter (or report), enclosing one of the signed and sealed originals of the treaty, for submission to the Senate of the United States. On April 22, 1937, the President sent to the Senate a message, together with the letter from the Secretary of State and the treaty. On that same date, the treaty was read the first time in the Senate and was referred to the Committee on Foreign Relations, and it was ordered that the treaty, together with the President's message and the accompanying letter of the Secretary of State, be printed in confidence for the use of the Senate. Accordingly, there was printed a confidential Executive document (Executive J) for the use of the Senate, copies thereof being furnished to the Treaty Division of the Department of State for the confidential use of officials of the Department.

It was on June 10, 1937, almost two months after the treaty was signed, that the Committee on Foreign Relations of the Senate submitted its Executive Report (No. 9), recommending that the Senate "do advise and consent to the same." As of this date, the injunction of secrecy imposed by the Senate was removed and the treaty was made public as signed. That did not mean that the treaty was approved by the Senate, but merely that copies thereof would be available for general distribution.

On June 29, 1937, almost three weeks after the Committee on Foreign Relations had submitted its favorable report, the Senate of the United States gave its advice and consent to the ratification of the treaty, without amendment or reservation. Needless to say, in some cases the Senate has given its advice and consent only with certain reservations, which it has been necessary to communicate to the other government in order to ascertain whether the latter would accept them.

At this point, the function of the Senate ends. The remaining action is for the Executive. An instrument of ratification is prepared in the Treaty

¹ Treaty Series, No. 208.

² *Ibid.*, No. 932.

Division for the signature of the President of the United States. This instrument recites the steps that already have been taken, then usually it sets forth the text of the treaty exactly, and concludes with a statement to the effect that the treaty is thereupon confirmed and ratified. In the case of the treaty with Mexico which we are considering, this instrument was signed and sealed by the President of the United States on July 15, 1937, a little more than two weeks after the Senate had given its advice and consent.

Meanwhile, the treaty was under consideration by the Government of Mexico in accordance with its own procedure. It was not until November 9, 1937, that the instrument of ratification of that Government was signed and sealed. It sometimes happens that the foreign government will ratify a treaty before its ratification by this Government.

Under the terms of the treaty, as is now customary with bilateral treaties, the ratifications were to be exchanged at a specified place and the treaty was to go into effect when such ratifications had been exchanged. The instruments of ratification of the treaty were exchanged formally in the Department of State at Washington, December 21, 1937. The treaty thereupon entered into effect internationally, despite the fact that under our national procedure the President had yet to proclaim it.

It is the practice of the Department of State at the present time to prepare instruments of ratification in duplicate, both being signed and sealed by the President. One of these is delivered to the foreign government; the other is placed in the archives with the original signed treaty. This has not always been the case, but as we have indicated already it would not be feasible to attempt an explanation of all the variations in procedure.

There is but one other step in our national procedure, namely, the promulgation of the treaty by the President. There is prepared in the Treaty Division, for the President's signature, a proclamation commencing with the statement that a treaty of a certain kind with a certain country has been signed at a certain place and date, and then setting forth word for word the treaty as signed, and concluding that the treaty has been made public, "to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof." The President of the United States issued his proclamation of the treaty with Mexico on December 27, 1937, less than a week following the exchange of ratifications.

Thus terminates the procedure, as far as the effectiveness of the treaty is concerned, but that is by no means the end of the work that must be done. There remains the matter of publication, of recording, of distribution, and of various other labors, all of which we shall consider briefly when we later discuss the work of the Treaty Division.

(C) THE MAKING OF MULTILATERAL TREATIES

We shall comment now upon the method of effecting multilateral treaties or conventions.

It appears that the earliest multilateral treaty to which the United States became a party was the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Time of War.¹ Since that time, and especially during the past forty years, the participation of the United States in multipartite arrangements has become quite common.

The usual method for the drawing up of multipartite treaties is the calling of an international conference, at a fixed time and place, at which all interested governments may be represented. For example, there has terminated but recently at Cairo, Egypt, a conference on telecommunications—that is, radio, telegraph, and telephone communication. At this conference nearly all the nations of the world, including the United States, were represented by legal and technical experts. Interested private companies also were represented by experts whose aim it was to lend assistance to the official delegates of their respective governments. At this conference there was drawn up and signed a revision of the preëxisting radio and telegraph regulations.

The Cairo conference was called, in accordance with a prior understanding between the interested nations, for the specific purpose of establishing revised regulations to govern telecommunication matters.

In contrast, your attention is invited to the proceedings of the Inter-American Conference for the Maintenance of Peace held at Buenos Aires in December 1936. You will recall that the Secretary of State was in attendance at that conference, the aim of which was to reach an understanding with respect to various matters of interest to countries of this hemisphere.²

At that conference of American republics there were signed eight conventions which the President later ratified with the advice and consent of the Senate.

The procedure following signature for bringing a multilateral treaty into effect with respect to the United States is much the same as with bilateral treaties, with at least two important differences, one affecting the quality of the document submitted to the Senate and the other affecting the date on which the instrument becomes effective.

As in the case of bilateral treaties, the Secretary of State sends to the President a report or letter of transmittal with the multilateral treaty

¹ Treaty Series, No. 377. A treaty was signed in 1825 with the Central American powers (Treaty Series, No. 39), but the latter were at that time a Federation, and the treaty, strictly speaking, was bilateral. [The same is true of the convention of 1827 with the Hanseatic Republics of Bremen, Hamburg and Lübeck, although agreed to by "each State for itself separately."—*SEC.*]

² See letter of May 15, 1937, from the Secretary of State to the President of the United States, transmitting eight instruments signed at Buenos Aires, for submission by the President to the Senate. The Secretary stated in part: "This conference was convened in pursuance of the proposal made by you on January 30, 1936, to the Presidents of all the American republics that the time was opportune for the countries of this hemisphere at a common council table to consider their joint responsibility for the maintenance of peace." (S. Exec. Report, No. 15, 75th Cong., 1st sess., June 10, 1937.)

(or rather, a certified copy thereof) to be submitted to the Senate. The President submits to the Senate a message, accompanied by the Secretary's report and the certified copy of the treaty. The treaty is read and referred to the Committee on Foreign Relations of the Senate, together with the President's message and the Secretary's report. These several documents are printed in a confidential Executive document for the use of the Senate. The Committee on Foreign Relations studies the matter and, under present procedure, submits an Executive report either recommending that the Senate give its advice and consent or recommending such action with reservations. On the date of the Committee's report, as a rule, the injunction of secrecy is removed and the proposed treaty or convention is made public. The matter comes before the Senate for discussion. Sometimes there is none. Sometimes there is a great deal.

If the Senate gives its advice and consent, the President may (but he need not, if he chooses not to) ratify the treaty. The President makes his instrument of ratification or adherence or accession, whatever the case may require, and this instrument is deposited with the original treaty. As in the case of bilateral treaties, the President formally proclaims the multilateral treaty.

(D) BILATERAL AND MULTILATERAL FURTHER DISTINGUISHED

But what of those two differences of procedure to which we referred a moment ago? We said that they affected the quality of the instrument submitted to the Senate and the effective date of the instrument.

When a bilateral treaty is prepared for signature, it is usually in duplicate—that is, there are two originals. In the earlier years of the Nation's history, it often occurred that the treaty was drawn up in triplicate or quadruplicate, because of the risk of loss.¹ When the qualified representatives of the two countries have signed and sealed the treaty (assuming it has been signed in duplicate), each government retains one of the originals. These originals are intended to be and should be identical in substance—that is, in their provisions. As for the form, there may be a distinction. For instance, let us say the treaty is drawn up in two languages, one of the languages in the left column and the other in the right column. It would be regular for one original to have the English in the left column while in the other original the English would be in the right column. Likewise, in the original to be retained by the United States Government the American plenipotentiaries may be given precedence in signature, while in the original to be retained by the other government the plenipotentiaries of that government would be given precedence in signature.

¹ For instance, John Jay sent two copies of the Treaty of 1794 with Great Britain to the United States, one of which was destroyed at sea and the other was unfortunately returned to Great Britain in the instrument of ratification. Since 1930 there has been in the archives of the United States a facsimile of this instrument containing the original treaty. See Hunter Miller (ed.), *Treaties*, vol. 2 (Washington, 1931), pp. 267-8.—*Sec.*

Multipartite treaties may be, and often have been, drawn up in a single language, *accepted as governing in matters of interpretation.*

In submitting a bilateral treaty to the Senate for its advice and consent, the original retained by this Government would be the document transmitted to the Senate. In the case of a multilateral treaty, however, there is usually but one original, and that original is placed—or “deposited” is the technical expression—in the archives of an international organization such as the Pan American Union or the League of Nations, or in the archives of one of the signatory governments. Certified copies of the original multilateral treaty are furnished by the depositary to the several governments concerned. It is this certified copy that, under our constitutional procedure, is sent to the Senate for its advice and consent.

As already mentioned, our instrument of ratification of or adherence to a multilateral treaty is deposited with the original treaty, together with the instruments of ratification or adherence of other governments. In the case of each deposit of ratification or adherence or accession, notification thereof is sent by the depositary to the other interested parties to the multilateral treaty. As a rule the multilateral treaty becomes effective when the number of countries stipulated in the particular treaty have deposited their instruments of ratification. Thereafter, it becomes effective as to each country upon the deposit of its instrument of ratification or adherence. This is in contrast with the procedure in the case of bilateral treaties. It is now generally provided in bilateral treaties that they shall become effective upon the exchange of ratifications.

There is much of interest that we might add concerning the process of ratification, exchange or deposit, proclamation, and so on, but time will not permit of it. It may be said, however, that it is of no particular concern to us what the procedure for ratification or proclamation in the foreign country may be. Nor is it of essential concern to the government of such country what our procedure may be. There is quite a field for legal discussion in relation to what is called the municipal and the international effectiveness of treaties. When the international act has been taken which brings a treaty into force, it becomes for all practical purposes in full force and effect as between the two countries, whatever may be the national effect within each country in accordance with its own procedure. Proclamation or promulgation, for example, is a national act, rather than international, and unless the treaty specifically provides for it, a failure to carry out a legal requirement with respect to promulgation cannot affect the international obligation.

(E) THE MAKING OF EXECUTIVE AGREEMENTS

We are prepared now to discuss the making of so-called Executive agreements. An effort has been made already to define the terms, in order that you may have an adequate conception of the distinction between Executive agreements and treaties in the strict sense.

Not only is the procedure for entering into Executive agreements quite

varied, but the basis or source of authority for their negotiation likewise is varied.

Perhaps the agreement is entered into pursuant to the authority granted in a treaty or convention which has received the approval of the Senate and to which the United States has become a party. For example, the Radio Regulations annexed to the International Telecommunication Convention signed at Madrid in 1932¹ provided that the parties to the convention might enter into regional arrangements with a view to liberalizing the restrictions set forth in those regulations with respect to the operation of amateur radio stations. Pursuant to that authority, the Department of State, for the President, proposed to a number of governments, individually, arrangements governing certain classes of radio communications between amateur stations. Several arrangements of the kind were concluded by the exchange of notes between the governments of the respective countries.²

On the other hand, acting without any statutory or treaty basis, but solely under his Executive authority, the President may cause arrangements in the nature of Executive agreements to be made. For example, an armistice may be effected by the President in his capacity as Commander in Chief.

Then there is that sort of Executive agreement which may be regarded as resting upon an implied authority granted to the President by the Constitution. For example, a so-called *modus vivendi* entered into with a view to preserving the *status quo* or for assuring a higher degree of protection or privilege pending the negotiation of a formal treaty for submission to the Senate.³ Such an arrangement would be regarded as a part of the negotiations, and, as we have seen, the President has the sole power to negotiate.

Considering the nature of the Executive control over the conduct of foreign relations, it is recognized that the President has the authority to enter into arrangements for the determination or adjustment of claims which American nationals may have against foreign governments for redress in case of injury.⁴ That is to say, where there has been a violation either of treaty provisions or of international law, and such violation causes injury to American citizens, and such injury gives rise to claims against a foreign government, the settlement of such claims is a matter of negotiation and ar-

¹ Treaty Series, No. 867.

² Canada, April 23 and May 2 and 4, 1934, Executive Agreement Series, No. 62; Peru, February 16 and May 23, 1934, Executive Agreement Series, No. 66; Chile, August 2 and 17, 1934, Executive Agreement Series, No. 72.

³ For example, the *modus vivendi* respecting the fur-seal fisheries in the Behring Sea, signed June 15, 1891, between the United States and Great Britain. (Treaty Series, No. 140.)

⁴ For example, arrangements with Turkey: December 24, 1923, exchange of notes (not printed); February 17, 1927, exchange of notes (not printed); October 25, 1934, agreement signed by plenipotentiaries at Ankara (Executive Agreement Series, No. 73); May 29 and June 18, 1936, exchange of notes (Executive Agreement Series, No. 113); and October 1 and November 3, 1937, exchange of notes (Executive Agreement Series, No. 115).

rangement which the President may deal with in pursuance of his Executive authority.

Most of the Executive agreements between the United States and foreign countries have been made by the President with the authority of Congress—not the authority of the Senate, but the legislative authority of the House and the Senate in Congress assembled.

The postal conventions, of which there are hundreds, constitute the largest distinct category of Executive agreements. Since 1792 these postal conventions have been made by the Executive under congressional authority.

In commenting upon the basis of the President's authority for entering into that type of arrangement now popularly referred to as Executive agreements, a few of the various methods have been mentioned incidentally. Chief among these, in point of numbers (excluding the postal conventions), is the exchange of notes, probably the simplest of all procedures. Let us say that country A wishes to have an understanding with country B in regard to a particular matter. (An example has been cited in the arrangements concerning amateur radio stations.¹) Country A may prepare an instruction to its diplomatic representative in country B and may set forth in the instruction or enclose with it the text of an arrangement to which it is desired country B will agree. The diplomatic officer of country A will convey to the foreign office of country B, by diplomatic note, an expression of his government's desire, together with the text of the proposed arrangement. In effect, the note will say: "Here is what we want you to agree to. Do you agree?" Assuming that the arrangement is satisfactory to country B, and there is no need for further negotiation, then the foreign office will reply to the diplomatic officer of country A, stating in effect: "We agree."

The arrangement then is complete, unless the notes otherwise provide. It remains only for the diplomatic officer of country A to transmit to his country the note which he has received from the foreign office, together with a certified copy of his own diplomatic note to the foreign office. These two notes then may be, and today usually are, published. Although there may be in some cases more formality in the negotiations and in the exchange of the notes constituting the Executive agreement, the general outline just given is sufficient for our present purposes.

The methods by which Executive agreements may be made depend largely upon circumstance. They may be embodied in protocols, resolutions, recommendations, declarations, or final acts adopted at international conferences, or they may be contained in diplomatic correspondence or in various other documents. Often, especially in late years, the agreement is negotiated, signed, and sealed with hardly less formality than a treaty.

Before concluding our remarks concerning Executive agreements, it is well that we refer specifically to the reciprocal trade-agreements program, in which the entire country has a very great interest. The authority of the

¹ See footnote 2, p. 190.

President for making these tremendously important agreements is contained in the Trade Agreements Act of 1934.¹ As you are aware, that act provides that the President, in return for reciprocal concessions granted by another country to American trade, may grant certain tariff concessions to the imports from such other country.

Reciprocal agreements under the Act of 1934, as extended by joint resolution of Congress,² have been concluded with seventeen countries,³ and negotiations are under way with four other countries, including Great Britain.

These trade agreements are the result of cooperative effort on the part of all the interested Government agencies, comprising what is known as the interdepartmental trade-agreements organization. This organization operates through various committees. Each committee is interdepartmental, being composed of officials and experts from the various interested agencies of the Government. The recommendations finally formulated and submitted to the President are the joint responsibility of the interdepartmental organization, and are based upon a study of all aspects of the particular problems.

Moreover, the cooperation of private interests, including agriculture, labor, and business, is an essential factor in promoting the trade-agreement program. Interested private individuals or groups throughout the country are accorded an opportunity to present their views.

The reciprocal trade agreement, when definitively concluded, usually consists of articles of agreement or general stipulations, followed by schedules listing the products affected by the agreement. There are two schedules, as a rule, the first containing a list of products exported from the United States to the foreign country and an indication beside each product of the concession accorded. The second schedule contains a similar list of products imported into the United States from the foreign country and an indication beside each product of the concession accorded.

This review of the procedure, it must be admitted, is very sketchy. We cannot attempt to explain here the vast amount of labor that is required in the protracted studies and negotiations which lead up to the signing of one of these reciprocal trade agreements. However, you would find it well worth your while to read an article by Assistant Secretary of State Francis B. Sayre on the subject "How Trade Agreements Are Made,"⁴ and also an address delivered by Mr. Charles F. Darlington, Jr., Assistant Chief of the

¹ Public, No. 316, 73d Cong., June 12, 1934; 48 Stat. (pt. 1) 943.

² Public Res. 10, Mar. 1, 1937; 50 Stat. (pt. 1) 24.

³ Names of countries and Executive Agreement Series numbers: Cuba (67); Belgium-Luxembourg Economic Union (75); Haiti (78); Sweden (79); Brazil (82); Honduras (86); Colombia (89); Switzerland (90); Canada (91); Guatemala (92); Nicaragua (95); Finland (97); The Netherlands (100); El Salvador (101); Costa Rica (102); France, provisional (not printed); and Czechoslovakia (not yet printed). [One was signed with Ecuador on August 6, 1938.—*SEC.*]

⁴ Commercial Policy Series 47 (Department of State Pub. No. 1152), 1938. (Reprint of an article by the same title appearing in the April 1938 issue of Foreign Affairs.)

Division of Trade Agreements, on January 28, 1938, on the subject "The Trade-Agreements Program,"¹ in which there is a summary relating to procedure.

(F) LEGISLATION AND PROCLAMATION

Having considered in some detail the variety of treaties and Executive agreements and the methods by which they are made, we should give some attention now to a type of international arrangement which is effected without any of these methods.

Often the effect of an international act has been obtained by the expedient of enacting laws of a national character operating reciprocally in the two or more countries concerned. In other words, the Congress of the United States may enact a law under which this Government will undertake to do something or omit the doing of something if the government of another country will act reciprocally. That other government, we shall assume, meets the requirement, and even though there has been no international act such as a treaty or Executive agreement, there is, in practical effect, an arrangement operating internationally. A few examples will help you to visualize the procedure.

The Congress may approve a law whereby the President is authorized to make public a proclamation to the effect that specific provisions of law will or will not be in operation with respect to a certain named country or certain named countries. The President may be authorized or directed by statute to determine whether a particular state of facts does or does not exist, and upon so determining the facts to declare by proclamation that the certain provisions of law do or do not operate as to the country or countries in question.

Among the earliest examples of the statutory procedure just mentioned is that of the act of March 3, 1815.² A similar act which was passed in 1828,³ and which remains in force, provided that when the President had received from any foreign nation satisfactory proof that no discriminatory tonnage duties were imposed in the ports of such nation upon American vessels and cargoes, the President might proclaim the discontinuance of certain duties as affecting the vessels and cargoes of the nation in question. Numerous proclamations were issued by the President in pursuance of this legislation, following the giving of the required proof by various foreign governments.

Tariff acts have contained provisions authorizing or directing the President to issue proclamations affecting the imposition of duties. In the case of the Tariff Act of 1909,⁴ maximum and minimum tariffs were provided, and the President was authorized to apply the minimum tariff to imports from countries which did not maintain discriminatory tariff regulations against

¹ Address delivered before the Third Annual Economic Conference, Rollins College, Winter Park, Fla. See Press Releases, Vol. XVIII, No. 435, January 29, 1938 (Department of State Pub. No. 1119), pp. 144-156.

² 3 Stat. 224.

³ May 24, 1828; U. S. C., title 46, ch. 5, sec. 141.

⁴ 36 Stat. 11, 82-83.

American trade. Immediately upon the enactment of this law foreign governments sought, through diplomatic channels, to have the minimum tariff applied in their favor. Within a few months the minimum tariff had been applied quite generally to nations with which we had commercial intercourse; the President issued 134 proclamations during the first three months of 1910.

The proclamations made by the President under the Tariff Act of 1890¹ were somewhat different. The President was authorized and directed by that act, whenever he was satisfied that the government of another country which exported to this country certain named articles was imposing upon American products duties which he (the President) considered reciprocally unequal, considering the free entry of the specified articles into the United States, to issue a proclamation discontinuing the free entry of said articles and imposing alternative rates of duty set forth in the act. Although it was not authorized for the President to offer to the foreign country anything other than a continuance of such country's products on the free list, this legislation was sufficient to bring about various tariff concessions affecting the exportation of American products to several foreign countries.

The action taken under the Tariff Act of 1890 is of particular importance because of the constitutional questions to which it gave rise affecting the delegation of powers, leading to the decision of the Supreme Court of the United States in the case of *Field v. Clark*,² which held that there was no unconstitutional delegation of legislative and treaty-making power. The legal theory expounded in *Field v. Clark* and in various other decisions since that time is this: that the President was acting merely in execution of the act of Congress; that he was to determine a matter of fact, and not to make a law; and that he was the mere agent of the law-making department to ascertain and declare the event upon which the expressed will of the legislature was to take effect.

It has been possible in some cases to do by way of statute and proclamation what it has not been possible to accomplish by laborious treaty negotiations, or what it would not be feasible to attempt by such negotiations. For example, the annexation of Texas in 1845³ and the annexation of Hawaii in 1898.⁴ In each case annexation treaties had been signed, but when it became apparent that the required two-thirds vote of the Senate for ratification could not be obtained, the method of joint resolution by both Houses of Congress was used, with the result that Texas and Hawaii were annexed by congressional enactment.

Many other interesting examples could be cited, but I believe our purpose has been achieved. We shall proceed to a survey of the work of the Treaty Division.

¹ 26 Stat. 612.

² 143 U. S. 649-700.

³ Joint Res., Mar. 1, 1845; 5 Stat. 797.

⁴ Joint Res., July 7, 1898; 30 Stat. 750.

V. WORK OF THE TREATY DIVISION

(A) FORMATION, FUNCTIONS, AND PERSONNEL

In the publication, *The Department of State of the United States*,¹ the following is stated concerning the organization and work of the Treaty Division:²

The Treaty Division was organized in response to the need for centralization and consistent direction in the drafting and negotiation of agreements with other countries. Its staff consists not only of those qualified for the general aspects of the work but also of specialists in arbitration, commerce, radio, aviation, and other subjects. This division makes recommendations regarding the submission of treaties to the Senate, prepares them for the consideration of the Senate, and on occasion explains them to the appropriate committees. It handles treaty formalities and maintains extensive files and indexes for both official and general use. It also prepares treaties for publication and compiles the monthly news bulletin, *Treaty Information*.

How shall we attempt to demonstrate more adequately the manner in which the work of the Treaty Division affects the rights and activities of the individual American citizen?

The ramifications of foreign relations affecting the day-to-day activities of the citizens of this country are so diverse and often complex that it would be futile to attempt a review of them.

The Department of State constantly is receiving inquiries—by letter, telegram, or other means of communication—from persons in all walks of life. The lawyer, perhaps, is the most frequent inquirer, communicating with the Department either for himself or on behalf of a client, in order to ascertain certain facts with respect to rights or liabilities of American citizens as affected by foreign relations.

Perhaps it has been a matter of inheritance or property rights in some foreign country, or the liability of naturalized American citizens to military service in the event of a visit to their country of origin, or a question of taxation or duties, or of residence or transit, or of business activity, or personal protection, or freedom of worship, or freedom of commerce and navigation, or the mediation of consular or diplomatic officers in the redress of wrongs or security of rights, or any one of countless other problems.

In all such cases the existence or nonexistence of treaty stipulations, and the proper interpretation of any such provisions, may well be the prevailing factor. It is natural that the citizen should turn to the Department of State, as the Government agency concerned with the conduct of foreign relations, in ascertaining his rights or obligations and in seeking protection. And it is natural that the Treaty Division, as a part of the Department of State concerned with the existence, the interpretation, and the execution of treaty

¹ Rev. ed. June 1936 (Department of State Pub. No. 878), p. 30.

² The order establishing the Treaty Division was signed April 21, 1928.

provisions, should be called upon to share the responsibility in dealing with such matters.

The staff of the Treaty Division includes legal or technical experts trained to know the form, the substance, and the meaning of treaties. Each of these assistants in the Treaty Division, although prepared to perform work of a general nature, has an especial expertness with respect to certain phases of treaty relations, such as fisheries, copyrights and trademarks, radio and telecommunications, property rights, aviation and aerial law, shipping, commercial relations, administrative law and procedure, and ceremonial matters.

Aside from actual treaty negotiations, in relation to which the qualified assistants of the Treaty Division are called upon to give much attention, there are questions affecting the application of treaty stipulations to particular circumstances. The Treaty Division is intimately concerned, for example, in the problem of fisheries in the Pacific. The Treaty Division has a lively interest in controversial copyright questions, which are of particular interest to musicians, writers, publishers, and performers. Everyone who has turned the dial of his radio receiving set and found his favorite station interfered with by the transmissions from some station in a foreign country has witnessed a manifestation of one of the problems with which the radio experts of the Treaty Division are much concerned. The aerial law experts of the Treaty Division are constantly working with aviation authorities of this and other interested nations in an effort to facilitate aerial transportation and to assure proper treatment to aircraft.

There is no need to go further. The situation may be summed up in these words: Any matter which involves conditions, rights, or obligations outside the territorial limits of the United States is apt to involve stipulations in treaties or other international agreements; and the Treaty Division of the Department of State is interested in matters involving such stipulations, their negotiation, their interpretation, and their execution.

(B) PUBLICATION AND DISTRIBUTION OF DOCUMENTS

Among the most popular functions of the Treaty Division—that is, one of its functions most generally observed and appreciated by the public—is that which relates to the publication and distribution of copies of treaties, agreements, and other documents.

(1) *Treaties and Executive Agreements*

The treaties and Executive agreements made between the United States and foreign countries are published in two printed series, the *Treaty Series* and the *Executive Agreement Series*.

The *Executive Agreement Series* was inaugurated less than ten years ago—in 1929 to be exact. Before that time a number of such agreements, but not all, were printed in the *Treaty Series*. Others were printed in the

volumes of *Foreign Relations*, or in the three-volume publication entitled *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers* (commonly referred to as Malloy's), or in other publications, such as the works of writers on international law. There has never been a complete collection and printing of all the exchanges of notes or other Executive agreements; there may be hundreds of them that have never been printed in any form whatever; there is not even an absolutely complete list of them. The most thorough undertaking with a view to the collection and printing of such arrangements with foreign nations is the publication of the volumes entitled *Treaties and Other International Acts of the United States of America*, now being edited in the Department of State. The first few volumes have come off the press, and the work is continuing.

The point which we may emphasize at this time is that since the organization of the Treaty Division in 1928 there has been a more concerted effort toward the printing of all the international agreements of this country. In order to distinguish more adequately between treaties in the strict sense and other international agreements, the Executive Agreement Series was inaugurated. Each agreement is given a separate number in the series. At the present date there are considerably more than a hundred agreements printed in the series, covering many different phases of international relations; for example, radio, aviation, taxation, trade and commercial relations, shipping, personal status of citizens, treatment of consular officers, most-favored-nation treatment, international courts, tariffs and customs treatment, copyrights and patents, claims, military missions, arbitration, registration of international agreements, and others.

In the printed Treaty Series are the texts of more than a thousand separate agreements, some of which (as said before) are more properly classified as Executive agreements.

The task of preparing the texts of treaties and Executive agreements for publication and general distribution, a very exacting labor, is performed in the Treaty Division. Every such document must be compared carefully with the original treaty or agreement.

Due largely to the increasing complexity of foreign relations, there has been a very considerable increase in the negotiation of international agreements, and the task of preparing such agreements for publication and distribution has increased correspondingly.

The Treaty Division likewise maintains very extensive files and indexes relating to the treaties and agreements of the United States. Indispensable dockets, registers, and records are maintained, containing information relevant to treaties and agreements of the United States, both those proposed and those which have entered into force. Much information also is compiled with respect to treaties between other countries—treaties to which the United States is not a party.

It is no exaggeration to say that the office of the Treaty Division, which is concerned with the publication, the recording, and the distribution of the texts of this country's international agreements, is one of the most widely consulted offices in the entire Department of State. It is almost painful to imagine the confusion that would exist in these matters if this office and its records had not been established and developed.

All of this work, constituting but one of the many functions of the Treaty Division, requires the constant attention of a trained and trustworthy personnel. We have such personnel, with long experience.

(2) *The Treaty Information Bulletin*

One of the most widely used publications of the Department of State is the monthly bulletin, *Treaty Information*. The first issue appeared in October 1929. This bulletin is compiled and its publication supervised in the Treaty Division. This *Treaty Information* bulletin is the only official publication making readily available to officials and to the public current information concerning the various treaties and agreements in force or signed between the United States and foreign nations.

Each of the monthly issues of the bulletin contains the information accumulating during the month for which it is published concerning treaties to which the United States is a party, information concerning important treaties to which the United States is not a party, and citations to or quotations from decisions of national and international courts, arbitral tribunals, and administrative agencies relating to treaty matters.

Publication of the *Treaty Information* bulletin was inaugurated by the Treaty Division in order to promote a more adequate and accurate knowledge concerning important phases of the foreign relations of the United States. We believe it has served that purpose.

It appears that the bulletin has become so well known and widely used that it is cited generously in other official or private publications. It is fitting that we should refer to the proceedings of the thirtieth annual meeting of the American Society of International Law, Washington, D. C., April 23-25, 1936, and quote a portion of the Report of the Committee on Publications of the Department of State. It was stated therein:

Another publication, the importance of which is apt to be overlooked, is the monthly *Treaty Information Bulletin*. . . . Here again it is a pity that the value of this publication is not recognized as widely as its contents warrant. . . . This is another publication which should be received regularly by university libraries and the public libraries of the larger cities. . . .

(3) *Other Publications*

From time to time the Treaty Division supervises the publication of other documents of general interest concerning treaties, or concerning foreign relations in pursuance of treaties; for instance, the reports and documents of certain conferences.

Let me cite a single example from my own experience. In 1934 there was held near Lisbon, Portugal, an international conference referred to as the third meeting of the International Consulting Committee on Radio (the C. C. I. R.), at which delegates from the various governments interested in the international regulation of radio were present. The delegation of the United States included five officials of as many Government agencies, including the Department of State, the Federal Communications Commission, the Departments of the Navy and of War, and the Bureau of Standards of the Department of Commerce. As the delegate on the part of the Department of State, it devolved upon me, when the conference had terminated and the American delegation had submitted to the Secretary of State its report, to supervise the publication of this report with the accompanying documents in regard to the work of the conference. This publication, when finally printed, made a fair-sized book of 413 pages and has served as a guide to officials and to private industry in various radio matters.¹

In addition to printed publications, the Treaty Division distributes numerous mimeographed compilations. The Division has been able, for instance, to anticipate a large number of inquiries on matters which may be fitted into a general classification, and to prepare lists or other material available for immediate response. For example, the Division maintains an up-to-date compilation of *Treaty Provisions Relating to the Rights of Inheritance, Acquisition and Ownership of Property, in Force Between the United States of America and Foreign Countries*.

(c) EDITING THE TREATY INDEX

The remarks concerning the work of the Treaty Division should not be concluded without some reference to the very ambitious undertaking recently inaugurated in regard to the preparation of an interpretative index of treaties.

The conduct of international relations has tended, as we have said, to become more and more complex. An increasing use of treaties and other agreements with foreign nations has been found essential for defining and securing various rights, privileges, and immunities. In the negotiation of such treaties or agreements, the problem of research and intensive study with respect to comparable provisions in existing treaties or agreements has become in many instances a paramount consideration. The full import of this statement may not be adequately understood unless one has been compelled to spend many hours, perhaps many weeks or months, in such research and study. However, it can be understood that any systematic plan by which the amount of time required in such labors can be considerably reduced may well serve to increase the efficiency of treaty negotiation and is well worth considering.

¹ International Radio Consulting Committee (C. C. I. R.), Third Meeting, Lisbon, September 22–October 10, 1934: Report of the Delegation of the United States of America, and Appended Documents, Conference Series 21 (Department of State Publication 827), 1936.

Such a plan is the object of analytical labors now being undertaken in the Treaty Division. Considering that there is constant need for the study of treaty provisions, past and present, and considering that the lack of a thorough index (we should again qualify the term by saying "interpretative index") has been heretofore a hindrance to the speedy access to provisions of a pertinent or comparable nature, a system has been conceived for the preparation of such an index. As the plan was explained recently,¹ the proposed index will cover—

. . . all provisions of all treaties and agreements which have ever entered into force between this country and other countries, based upon an interpretative, analytical study of those provisions; an index so devised that every item of substance and every specific right or obligation should be adequately indexed, in order that in any future inquiry or research whatever concerning the provisions affecting such items, rights, or obligations, the Treaty Division in particular or the Department of State in general might have at its command, with the least possible consumption of time, a complete and trustworthy citation of every such provision.

Needless to say, it will require time and careful analysis to complete this work in regard to all those arrangements which have been concluded with foreign countries during our more than 160 years of international intercourse as a free and independent nation.

It may be that some of you would be sufficiently interested in this phase of the work of the Treaty Division to offer constructive suggestions.

VI. CONCLUSION

It has been my aim to give you a fairly coherent summary of the methods by which the international agreements of the United States are made and brought into force, as well as an outline of the work of the Treaty Division. I shall let you judge for yourselves whether or not you have found anything of interest in, or gained any useful knowledge from, my remarks.

Concluding, I wish to express to you my very sincere thanks for having had this opportunity to speak at such length upon this subject. Your interest in the work of the Department of State is well evidenced by the invitation which you extended to me. It is our common purpose to be of service in improving the foreign relations of the United States.

MR. FINCH. Mr. Whittington, on behalf of the conference and also on behalf of the Society, I wish to express our thanks for your very illuminating address upon a subject which I am sure is of interest to every one of us.

Before I declare this luncheon meeting adjourned, I think it only

¹ In an address entitled "Compilation of Analytical Treaty Index," by William V. Whittington, Treaty Division, Department of State, before the Federal Bar Association on April 20, 1938, in Washington, D. C. See Press Releases, Vol. XVIII: No. 447, April 23, 1938 (Department of State Pub. No. 1162), pp. 496-501.

appropriate that I express what is in my mind, and I am sure in the minds of many others here, as to the excellent showing made by the officers of the Department of State on our program. Mr. Whittington is the fourth of those officers who has spoken. And I think they have all acquitted themselves not only with satisfaction but with distinction. Our Department of State is to be congratulated upon having such an efficient corps of experts to help in the conduct of international relations, which are growing every day more complex.

May I remind you that at 2:15 o'clock we are due to continue our program. I thank you all for your presence, and I would suggest that we all proceed now to the room upstairs, where the other speakers are waiting for us.

SIXTH SESSION

JOINT MEETING WITH THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Friday, April 29, 1938, 2:15 o'clock p.m.

The meeting convened, pursuant to the recess, at 2:15 o'clock p.m., JESSE S. REEVES, Vice-President of the Society and Director of the Conference, presiding.

Chairman REEVES. Will the afternoon session please come to order?

Certainly the Program Committee was not engaged in fostering mere antiquarian interests when it provided this program for this afternoon. The topic this afternoon is "International Law of the Air"; first, "International law of the air in time of peace," a subject which will be discussed by Mr. Howard S. LeRoy, member of the bars of New York and the District of Columbia. I have great pleasure in introducing Mr. LeRoy.

INTERNATIONAL LAW OF THE AIR IN TIME OF PEACE

By HOWARD S. LEROY

Member of the Bars of New York and the District of Columbia

The use of the air as a medium for ultra-rapid communication and transportation is still so new that the legal terminology relative thereto is still uncertain and ambiguous. Some use air law to embrace both radio and aeronautical law. To others air law connotes the body of law that is evolving around the art of aeronautics defined by Webster as the art of sustained flight. This latent ambiguity with respect to the inclusiveness of the term air law is evidenced by its varying uses in the titles of the two leading quarterly legal reviews in these fields, namely, the *Air Law Review* and the *Journal of Air Law*. The *Air Law Review* includes both the legal fields of radio and aeronautics. The *Journal of Air Law* devotes itself exclusively to the law of aeronautics.

In this brief paper the discussion of air law will be limited to the evolution of aeronautical law in the international realm in time of peace.

We are prone to think of aeronautics as a new physical art expanding phenomenally since the turn of the twentieth century. This is true in large part. Aeronautics, however, includes sustained flight by aircraft lighter as well as heavier than air. Heavier than air flight, or aviation, began with the Kitty Hawk flight of the Wright brothers in 1903. Lighter than air flight, however, stretches far back into the eighteenth century. A local French ordinance of April 23, 1784,¹ made balloon ascensions depend on obtaining previous permission.

With the advent of aviation or heavier than air flight, international aerial transport began to assume substantial economic and social importance. The current rate of progress in this field appears from recent figures released

¹ *Jahrbuch der Wissenschaftlichen Gesellschaft für Luftfahrt E. V.* 1935/36, p. 44.

by Pan American Airways. During 1937 international air travelers numbering 47,722 passed through the Miami airport on flights between the United States and Central and South America. This represented an increase of 12,000 or 33% for 1937. The range and momentum of this new international activity is shown by current air route mileage.

Through the international aerial gateways at Miami, Brownsville, Los Angeles, and San Francisco, the aerial network stretches 50,695 miles linking industrial centers of the United States with world markets of fifty-one countries and colonies, including the three Americas on the south, Alaska, the Orient, and Australia. This is more than twice the air route mileage of any other World Power. This striking growth of international aviation both in volume and range has sprung from the coordination and control of certain physical factors peculiar to the art and related to legal problems of an international regulatory character. Increasingly aviation is high-speed, long-distance transport. It tends to ignore or overrun political boundaries. Its maximum social and economic utility derives directly from its time-annihilating characteristic. Its utility mounts directly and proportionately to distance covered. The principal limiting factor in the growth of this new art has been safety. The adaptation of radio to aeronautical uses as a safety factor is one of the outstanding features in stimulating the growth of aviation. In international aviation the safety factor assumes a broader connotation and significance. It concerns not only the safety of the individual, but also in a wider sense it relates to a collective or public or national safety of the subjacent political sovereignties. This is increasingly recognized in international air transport by the establishment of national controls in customs, immigration, and public health matters.

Safety, therefore, is clearly the key factor about which the whole international aerial regulatory régime is evolving. Safety in all its varied relationships cannot be insured without regulation. Regulation to be effective must be exercised and enforced by political authority. Since the trend of aviation is to transcend all political boundaries, and since effective regulation must be coextensive with the physical operating areas of the art, regulation must be effectuated and synchronized on all political levels, local, national, and international.

If the maximum development of the aeronautical art rests on political regulation, it should be interesting to trace the steps by which the law has contributed to the growth of this new art in time of peace.

Aéronautics involves the projection of the transportation art into the air. Radio has done the same thing in communications. Functionally it is related to older forms of transportation based on such elements as land and water. Its purpose is the carriage of persons and property. We may expect, therefore, to find certain concepts common to the law of carriers projected into the aerial realm and modified sufficiently to conform to the peculiar conditions of the art. Some of these legal developments will be regulatory in character. Others will be substantive in character, cutting

sharply across old fields of the law and impinging upon long and deeply rooted legal concepts. This is illustrated by the pending conflict between the land owner and the air navigator.

In the field of international law of the air historical development has also been directed by certain physical and political conditions. The international area is the sphere in which *aéronautics* enjoys its maximum utility. The scientist using the language of the formula might restate this basic principle in some such form as this: the utility of *aéronautics* increases as the square of the distance. A corollary of this principle from the political angle is that *aéronautics* will ultimately render its greatest service in the international field. It is here, however, that regulation becomes increasingly difficult because of the diversity of sovereign political authority and lack of sanctions. Any international regulatory régime must depend on contractual arrangements among independent political entities. The normal regulatory régime embraces three distinct steps. The first is legislative, setting up a body of law. The second is administrative, comprising the machinery for applying the law. The third is adjudicative, involving the decisions or rulings resulting from the application of the law.

To what extent has the international historical development conformed to the above analytical or functional approach?

The legislative stage now seems to be more fully developed than either the administrative or the adjudicative stages.

International *aéronautical* legislation has taken two principal forms as multilateral and bilateral conventions. The multilateral conventions derive from international legislative assemblies or international conferences called for the purpose of discussing and formulating broad principles of substantive or administrative law of the air. These international conferences may be grouped into pre-war and post-war series with respect to time and the state of the art.

The pre-war conferences began as early as 1909 with the organization at Paris of the International Juridic Committee on Aviation.¹ This committee outlined a code of the air January 16, 1910. Successive annual congresses were held at Paris in 1911, Geneva in 1912, and Frankfurt in 1913. General theories of *aërial* jurisdiction were debated but the art had not progressed to the point of forcing the formulation and adoption of any general regulatory convention.

With the advent of the World War *aéronautical* devices were promptly adapted for both defensive and offensive uses. Developments dealing with air law in war time belong properly to another paper. It is, however, a significant historical fact that general war time *aéronautical* uses contributed much to the rapid post-war peace time aviation development.

In the decade following the close of the war three international conferences were convened which considered international legal problems of the air. The Paris Peace Conference of 1919, the Spanish-American Congress

¹ *Law Notes*, April, 1914, p. 8; 19 *American Law Reporter*, p. 1292.

on Aërial Navigation at Madrid in 1926, and the Sixth International Conference of American States at Havana in 1928 all considered international aërial legal problems and resulted in the signature of conventions. Following these conferences dealing with public air law problems were the Warsaw Conference of 1929 and the Rome Conference of 1933, both dealing with international private aërial law. These international conferences also negotiated international conventions. The Paris Air Navigation Convention of 1919¹ resulting from the Peace Conference and signed by twenty-nine states, was submitted to the Senate June 16, 1926, but it has never been ratified due to its intimate relationship with the League of Nations. The first two articles constitute the Magna Charta of International Law of the Air. Article 1 provides that "The high contracting parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory."

This broad declaration of absolute sovereignty was modified by Article 2 providing "Each contracting state undertakes in time of peace to accord 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."

The Madrid Congress of 1926 produced the Ibero-American Convention of November 1, 1926, signed by twenty-one states and ratified by five. It embodied principles similar to the Paris Convention, including absolute sovereignty over superjacent air space.

The Sixth International Conference of American States, convened at Havana in 1928, signed the Havana Convention for Commercial Aviation² for the western hemisphere on February 20, 1928.

This convention differs in some respects from the Paris Convention, but

¹ International Air Navigation Convention. Text, annexes and amendments to June, 1924. Washington, Government Printing Office, Dec. 1, 1924.

Examen du Principe de la Convention Internationale Portant Réglementation de la Navigation Aérienne de Oct. 1919, Henri-Cousinier, Paris, 1929.

La Convention Internationale du 13 Oct. 1919 portant Réglementation de la Navigation Aérienne, Roper, Paris, 1930; 4 Air Law Rev., p. 348.

"The International Air Navigation Conventions and the Commercial Air Navigation Treaties," Fagg, Fred D., Jr., 2 So. Cal. J. Rev., pp. 430-54.

"Deutschland und das Pariser Luftverkehrsabkommen," Wegerdt, Dr. Alfred, 2 Zeitschrift für das Gesamte Luftrecht, 25 (1928).

"Les Articles 23 et 28 de la Convention du 13 Oct. 1919 et leur Développement Souhaitable," Bobinski, *Il Diritto Aeronautico*, 1931, p. 575.

"International Convention for Air Navigation and the Pan American Convention for Air Navigation: A Comparative and Critical Analysis," Warner, Edward P., 3 Air Law Rev., pp. 221-308, July, 1932.

"Regulation of International Air Navigation under the Paris Convention," Bouvé, Clement L., 6 Journal of Air Law, pp. 299-324, July, 1935.

² "Does the Havana Aërial Convention Fulfill a Need?" Cassidy, Louis C., 2 Air Law Rev., pp. 39-43.

"Havana Convention on Commercial Aviation," Hotchkiss, Henry G., 2 Air Law Rev., p. 254 (note).

includes the basic principles of absolute sovereignty (Art. I) and freedom of innocent passage (Art. IV). Article 32 provides that each contracting party "shall procure as far as possible uniformity of laws and regulations governing aërial navigation." Very little progress has been made in compliance with this direction.

The Permanent Committee of the International Public Health Office in Paris at its session of April 29, 1932, adopted an International Sanitary Convention for Air Navigation.¹ The International Sanitary Convention for Air Navigation was left open for signature at The Hague on April 12, 1933. It was signed by the United States on April 6, 1934, and later it was ratified and became effective on November 22, 1935. It contains detailed provisions for the establishment of sanitary aërodromes, international transmission of health information, and applicable measures in case of plague, cholera, typhus, and smallpox.

During the post-war decade, with its international conventions dealing with certain aspects of public international aërial law, came a period of international legislation in the field of private international aërial law. Resolutions were passed by the Advisory and Technical Committee on Communications and Transit of the League of Nations in 1922, by the International Chamber of Commerce in 1923, and by the International Aëronautic Federation in 1924 recommending to the various governments that they formulate a uniform system of private aërial law. The First International Conference on Private Aërial Law convened at Paris on October 27, 1925. The Warsaw Convention² Relating to Air Transportation, signed October 12, 1929, resulted from the Second International Conference on Private Aërial Law. Thirty-two nations were represented by delegates and the United States sent an observer. The United States Senate consented to adherence on June 15, 1934.

From the Third International Conference on Private Aërial Law at Rome in 1933 came the Convention on Aircraft Liability to Third Parties on the Surface.³ There are other international legislative acts of a multilateral

¹ Department of State Treaty Series, No. 801.

² *Konferencja Warszawska, Warszawa, 1930.*

³ *La Convention de Varsovie*, D. Goedhuis, 1933, Nijhoff, The Hague; 4 *Air Law Rev.*, p. 348.

La Convention de Varsovie, Maschino, 1930, *Droit Aérien*, 4; 4 *Air Law Rev.*, p. 348.

"*Zum Warschauer Luftprivatrechtsabkommen Rom, 1930.*" 4 *Rubel's Zeitschrift fuer Ausländisches und Internationales Privatrecht*, 244; 4 *Air Law Rev.*, p. 348.

"International Unification of Private Law Rules on Air Transportation and the Warsaw Convention," Sack, Alexander N., 4 *Air Law Rev.*, p. 389, Oct., 1933.

"The Warsaw Convention and the C.I.T.E.J.A.," Latchford, Stephen B., 20 *Am. Bar Assn. Jour.*, p. 753, Dec., 1934.

"[11] *International Luftprivatrechtskonferenz Rom. May 1933.*" Oppikofer, Hans, 3 *Archiv für Luftrecht*, p. 320.

"*La Convention de Rome 29 Mai 1933 pour l'Unification de Certaines Règles Relatives aux Dommages Causés par les Aéronefs aux Tiers à la Surface et les Législations Nationales.*" Kaffal, A., *Rev. Générale de Droit Aérien*, July-Sept., 1934, p. 510.

character¹ which cannot be discussed here because of the limited time available.

In addition to the multilateral pacts, there is a much larger number of bilateral international conventions. These directly negotiated agreements beginning just before the war, grew in number during the post-war period.² Many of these negotiated by the United States are Executive Agreements based on an exchange of notes. Generally the subject matter of these bilateral arrangements is narrow in scope including only the special interests of the parties. They embrace such matters as the right of entry of civil aircraft, the recognition by each country of certificates of airworthiness for aircraft exported from the other country as merchandise, and issuance by each country of licenses to nationals of the other country authorizing them to pilot civil aircraft.

No regulatory legislation directed toward the control of a great branch of transportation can be effective without adequate administrative agencies. This is applicable to the international as well as the national and local regulatory areas. This second or administrative stage of the regulatory régime of international aviation has not fully developed as yet. C.I.N.A., or the *Commission Internationale de Navigation Aérienne* was created in July, 1922, under Article 34 of the Paris Convention of 1919. It was placed under the League of Nations and given control of all matters of public and technical regulation, as the administrative agency under the Paris Convention of 1919.

In May, 1925, the First International Conference on Private Aerial Law, meeting at Paris, formed C.I.T.E.J.A., the International Committee of Aerial Legal Experts. This continuing quasi-administrative body represents thirty-three nations, including the United States.

Under the Havana Convention for Commercial Aviation certain administrative functions are imposed on the Pan American Union by the provisions of the convention. These functions are not comprehensive enough to form a well-rounded administrative agency. The explanation may be due partly to the fact that international aviation has not developed as broadly and intensively in the Americas as on the European continent, although the actual mileage of international air routes is greater.

The adjudicative or decisional stage in international aviation has been slow in developing. Such decisions as have been made have not been under the arbitration clauses of the conventions but by the decisions of a national court in applying certain provisions of an international convention. The principal decisions are the following by the British courts:

Grein v. Imperial Airways, Limited, Oct. 23, 1935, 7 *Journal of Air Law*, p. 128.

Phillipson v. Imperial Airways, Ltd., 157 L. T. R. 112 (K. B. 1937), 8 *Air Law Rev.*, p. 357.

¹ "Multipartite Aerial Agreements," Gibson, 1931, 5 *Temple L. Q.*, pp. 404-424.

² "Untested Air Rights in Our Treaties of Friendship, Commerce, and Consular Rights." Ewing, Hampton D., 4 *Air Law Rev.*, pp. 48-57.

International air law up to the present time has reflected a tendency toward regionalism. The Paris Air Navigation Convention and the Havana Convention for Commercial Aviation are the focal centers about which evolve the international aérial legal developments in their respective hemispheres. Attempts to bridge this geographical gulf have been but partially successful. The early attempt to bridge the gulf by the Ibero-American Convention proved abortive. In the field of private international aérial law the attempt has had a little more success. This is shown by the adherence of the United States in 1934 to the Warsaw Convention of 1929. It is possible that this convention may eventually obtain other Pan American nations as adherents and thus become an effective bond in drawing the two great systems together. The future growth of international aéronautical law, if it be sound, is bound to follow the evolution of the art itself. Stratosphere I and II will go into use in the next few weeks. These are the first cylindrical bodied completely supercharged transport aircraft designed for scheduled operations at 25,000 feet. Manufacturers have now been asked to design air liners carrying 100 passengers 5,000 miles through the stratosphere at speeds up to 300 miles an hour. The greatest future development of the aéronautical art appears therefore to lie in the international field with rapid development of both inter-continental and transoceanic flight. This growth will create a further demand for international legislation in the field of both public and private international aérial law. The international agency which will lend stability and continuity to this development is already in existence and functions efficiently. This organization is the Committee of International Aérial Legal Experts, better known as the C.I.T.E.J.A.¹

This committee is now composed of the representatives of some thirty-three nations. It was organized and held its first meeting at the Ministry of Foreign Affairs in Paris, May 17-21, 1926. It meets once a year and is now divided into four commissions or sub-groups meeting twice a year. It is from this hard-working international agency that much may be expected in the future development of private international aérial regulation.

Mr. Stephen Latchford, of the State Department, recently appointed by the President as Chairman of the American Section of C.I.T.E.J.A., in an address before the Federal Bar Association has sounded a timely note of caution "against a hasty adoption of international conventions which might be regarded as premature."² It may be that the international legislative developments in this field already have progressed to a point where it will

¹ *Le C.I.T.E.J.A. Son Origine, Son But, Son Oeuvre*, Paris (37 *Av. Rapp.*), Sudre, 1930 *Droit Aérien*, p. 31; *Ide*, 3 *Journal of Air Law*, p. 27 (1932).

² *De l'Organisation Internationale de l'Aviation Civile*, Sudre, Edmond, *Secrétaire Générale du C.I.T.E.J.A.*, *Rev. Gén. du Aérien*, 1932, p. 1.

"The Warsaw Convention and the C.I.T.E.J.A.," Latchford, Stephen B., 20 *Am. Bar Assn. Journal*, p. 753, Dec., 1934.

³ Address delivered by Mr. Stephen Latchford, of the Treaty Division, Department of State, before the Federal Bar Association, Jan. 21, 1936.

be wiser to await additional growth on the administrative and adjudicative phases.

Again, the growth of international aviation is reflected in the action just taken by the Cairo Telecommunication Conference in adopting a plan for radio channels for the world's seven main intercontinental air routes, including calling and safety service channels. Certain current features of our national policy may be determinants in the international field. These include pending legislation for a new Civil Aeronautics Authority (H. R. 9738, S. 3845), as well as the formulation of a policy for export of helium for lighter than air flight. Already the menace of the flying fortress is having a direct effect on the rapid relocation of the world's heavy industry, particularly in Europe and Asia.

In any event, the law under the impact of this fast-moving art has shown sufficient flexibility to push its regulatory régime out into the penumbra of the stratosphere. In view of these rapid developments, what is to be said of the common generalization that the law is static, inflexible, and incapable of conforming to change and progress?

Chairman REEVES. Discussion of this interesting paper will be led by William R. Vallance, Assistant to the Legal Adviser of the Department of State.

Mr. WILLIAM R. VALLANCE. Mr. Chairman and members of the Society: I am sure we have all been given a very interesting insight into the problems of air law in the international field.

I wish to invite your attention first to two decisions that have been rendered by English courts interpreting the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, and proclaimed in the United States on October 29, 1934 (49 Stat. 3050), which Mr. LeRoy mentioned. These decisions are of interest because the United States is a party to that convention.

The first case is *Grein versus Imperial Airways, Ltd.*, 53 Ll. L. R. 51; 155 Law Times Reports, 386, decided by Mr. Justice Lewis in King's Bench Division October 23, 1935, reversed in part by the Court of Appeal July 13, 1936, [1937] K. B. 50; 55 Ll. L. R. 318. It is also reported in 1936 U. S. Aviation Reports, 184. The question of what constitutes international carriage was before the court in that case. A round-trip ticket from London to Antwerp, via Brussels, Belgium, had been issued by the defendant to the deceased. On December 30, 1933, the liner *Apollo* hit a radio mast at Ruysselede, Belgium, on the return trip from Brussels, and Grein, a passenger, was killed. His widow sued for damages. The defendant claimed the right to limit the amount of damages to 125,000 francs under Articles 1 (2)¹, 17, 20

¹ Article 1 (2) reads as follows:

"1. (2) For the purposes of this Convention the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a

and 22 of the Warsaw Convention, upon the ground that an international carriage was involved. The trial court held that it was not an international carriage. At the time of the accident Belgium was not a party to the convention. But the Court of Appeal held it was an international carriage since it involved carriage to a place outside of Great Britain and return. Lord Justice Greene said:

. . . In approaching the construction of such a document as this Convention it is, I think, important at the outset to have in mind its general objects so far as they appear from the language used and the subject-matter with which it deals. The object of the Convention is stated to be "the unification of certain rules relating to international carriage by air." By "unification of certain rules" is clearly meant, "the adoption of certain uniform rules," that is to say, rules which will be applied by the courts of the high contracting parties in all matters where contracts of international carriage by air come into question. The rules laid down are in effect an international code declaring the rights and liabilities of the parties to contracts of international carriage by air; and when by the appropriate machinery they are given the force of law in the territory of a high contracting party they govern (so far as regards the courts of that party) the contractual relations of the parties to the contract of carriage of which (to use language appropriate to the legal systems of the United Kingdom) they become statutory terms.

The desirability of such an international code for air carriage is apparent. Without it questions of great difficulty as to the law applicable to a contract of international carriage by air would constantly arise. Our courts are familiar with similar questions arising under contracts of through carriage otherwise than by air; and it is easy to imagine cases where questions of the greatest difficulty might arise as to which law or laws governed the contract and whether different laws might not apply to different stages of the journey. . . .

. . . It was not considered useful to class as "international carriage" cases where the carriage begins in the territory of a state adopting the Convention and ends in one which does not adopt it or *vice versa*. The reason, I think, is that the courts of the non-adopting state would not be bound by the Convention and there would accordingly be no possibility of uniformity of decision. The fact that in cases such as this the Convention does not apply is, in my judgment, no argument in favor of the view that the present case is not one of international carriage.

On the other hand, where the contract of carriage provides for a descent in foreign territory, the fact that the carriage begins and ends in territory belonging to the same state would not necessarily prevent questions from arising in the courts of that state as to the law applicable

transshipment, are situated either within the territories of two high contracting parties, or within the territory of a single high contracting party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same high contracting party is not deemed to be international for the purpose of this Convention."

to that part of the flight which took place over the foreign territory in question. Accordingly, the Convention makes express provision for this case. . . .

The second case is *Phillipson versus Imperial Airways, Ltd.*, reported in 157 Law Times Reports, 112, 58 Ll. L. Rep. 207, decided in 1937. An appeal was dismissed by the Court of Appeal on March 3, 1938. (Weekly Notes, March 19, 1938.) In that case the complainant and defendants had entered into a contract on March 5, 1935, in London whereby the defendant was to carry a box containing 5000 gold sovereigns and 5000 U. S. gold eagles by air from London to Brussels. There was a provision in the contract that the conditions of the Warsaw Convention should apply to damages arising in connection with "international carriage." If the convention applied, suit could be brought within two years but if not, suit must be brought within six months after the loss. The gold was stolen at Croydon Aerodrome in England before the transportation started.

The plaintiff commenced this action more than six months but less than two years after the theft. The plaintiff's contention was that an "international carriage" was involved within the meaning of Article 1 (2) of the Convention; and that, therefore, the action might be maintained within two years. Defendants answered that Belgium was not one of the "high contracting parties" to the Warsaw Convention at the time the cause of action arose.

The suit was dismissed by Justice Porter in King's Bench. He held the contract was not for "international carriage" and, therefore, the right of action was extinguished by the inaction of the plaintiff until after the agreed period of limitations had expired. Belgium did not ratify the convention until October 11, 1936, whereas the gold was stolen on March 5, 1935. The contract was for carriage, from the place of departure situated in the land of a high contracting party, England, and to the destination in the territory of a signatory to the convention, Belgium, which had not at the time of the theft ratified the convention and was not bound by it. "High contracting parties" as used in Article 1 (2) therefore was held to imply a carriage between two countries that were bound by the terms of the convention. And as Belgium had not ratified it, Justice Porter held that the contract was not subject to the terms of the Warsaw Convention.

I also invite attention to the similarity of legal questions arising in regard to aviation to those which have arisen with respect to radio. Among the current problems there may be mentioned the importance of islands on which landing fields can be constructed for trans-oceanic airplane service. The question concerning American rights in the island of Yap which arose at the Paris Peace Conference¹ was settled on February 11, 1922, at the Limitation of Armament Conference at Washington by the convention between the

¹ See United States Foreign Relations, 1921, Vol. 1, pp. 89, 91, 95.

United States and Japan.¹ The island of Yap was important on account of its usefulness as a landing point for cables and as a place for the erection of a radio station. Similar questions have arisen with respect to aviation, particularly in the Pacific Ocean concerning the islands of Canton and Enderbury. As you will recall, they were placed under the jurisdiction of the Interior Department by a Presidential Proclamation dated March 3, 1938 (Federal Register, March 8, 1938, Vol. 3, p. 609). See also Federal Register, Vol. 1, p. 469. You will find it interesting to read recommendations about the use of islands and other points as relay stations and monopolies of communication facilities, discussed at the Washington conference in 1920.² Title to land in Polar regions becomes important in connection with international air flights.³

The administrative control of aeronautical activities has been the subject of legislation in various countries throughout the world, usually with a view to centralization of such administration in one governmental agency in much the same way that control over all radio stations has been accomplished. In the Congress of the United States a number of bills have been introduced to accomplish this purpose: H. R. 9738, introduced by Congressman Lea on March 4, 1938, and pending before the House Committee on Interstate and Foreign Commerce, provides in Section 802 for the work of the Department of State in negotiations with foreign governments in coöperation with the proposed Civil Aeronautics Authority established by the bill. A somewhat similar bill, S. 3845,⁴ introduced by Senator McCarran, was reported by Senator Copeland from the Senate Committee on Commerce on April 19, 1938.

An Inter-American Technical Aviation Conference was held at Lima from September 15 to 25, 1937, at which delegates from the Governments of Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, United States of America, Mexico, Panama, Peru, Uruguay and Venezuela were represented. Thirty-two resolutions were adopted at the close of the conference. The most important resolution was the first one, which provided for the creation and maintenance of a "Permanent American Aeronautical Commission, preferably composed of jurists and aviation experts appointed by each government." The purposes of the Commission were stated to be:

¹ See Arts. III and IV, U. S. Statutes at Large, Vol. 42, p. 2151; AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp., Vol. 16 (1922), pp. 96-97.

² See U. S. For. Rel., 1920, Vol. 1, pp. 159, 161.

³ "Acquisition of Sovereignty over Polar Areas," Charles Cheney Hyde, Iowa Law Review, Vol. XLX, p. 286; "Who Owns Antarctica?" Charles Cheney Hyde, The Independent Journal of Columbia University, Vol. 3, No. 9; "Political Rights in the Arctic," David Hunter Miller, Foreign Affairs, Vol. 4, p. 47; "National Rights in Antarctic," David Hunter Miller, *ibid.*, Vol. 5, p. 508; "Title to Land in Antarctica," William R. Vallance, Fed. Bar Assn. Journal, Vol. 1, p. 53.

⁴ S. 3845 was passed by Congress June 13, 1938, Congressional Record, p. 11911.

To realize in periodical sessions:

(a) The gradual and progressive unification and codification of international public and private air law;

(b) The coördination and development of mutual interests in technical subjects related to aircraft, pilots, airways, and facilities for air navigation, including airports and operation practice and procedure;

(c) The organization and marking of inter-American air routes and the possible coördination of local air services as between themselves and in relation to the services of international air lines.

It was further recommended that the proposed commission should "discuss and pass upon proposals and projects submitted by the national commission of each state relative to the approval of codifiable technical or juridical subjects or to the modification or amendment of those already approved." It may also make recommendations to the states for the modification or amendment of provisions in the national laws or regulations which are not in accord with the standard approved.

This recommendation is a praiseworthy effort to bring about uniformity in the regulation of aviation on a regional basis as a supplement to previous efforts to work out such regulation by multilateral conventions to have effect throughout the world.

In conclusion permit me to suggest that this Society should take a much greater interest in the development of international law relating to aviation and that consideration should be given to more intensive study of this rapidly developing subject by an appropriate committee of the Society. This youthful, but already essential, means of transportation deserves more attention from this Society.

Chairman REEVES. The discussion of this subject is now open.

Professor QUINCY WRIGHT. Mr. Chairman, it struck me that the recommendation which the last speaker made, to give more attention to the subject of air law, is particularly timely. My attention was especially attracted to the relationship between our discussion of yesterday evening and a certain statement in Mr. LeRoy's excellent paper. As you will recall, yesterday evening there was a great deal of discussion as to the trend of international law in the future. Most of the speakers insisted that what the law is, should be distinguished from what the law ought to be; but when discussion was entered into, it always proved to be about what the law ought to be.

I find in my own experience whenever I discuss with Professor Borebard what the law is, I get along very well, but when I come to discuss what it ought to be, I usually find myself differing. There were obviously two groups last evening, which divided on the question whether international law is going to move in the direction of organizing the world community or in another direction. With reference to that controversy, it seems to me we have heard nothing in this series of meetings more important than the statement by Mr. LeRoy that we may expect very soon aircraft that can

carry a hundred people 5,000 miles, at a rate of 300 miles an hour. I think that if we do not consider such technological developments with relation to the future of international law—indeed, the fairly near future of international law—there is a sociological lag in our deliberations which bids ill for international law. Let us consider such developments in relation to the recent demonstrations of civilian bombing by aircraft, and the statement of Colonel Lindbergh a year ago that there is no defense against aircraft except reprisals against the enemy. In such a situation the future of international law may not have the alternatives which were suggested last night. Is not international law faced with the alternatives, either to go out of existence in a jungle world, or else to strive successfully for a more adequate development of the community of nations?

Chairman REEVES. I will ask Senator Thomas to take the Chair.
(Vice-President ELBERT D. THOMAS now presiding.)

Chairman THOMAS. Is there any further discussion?

Admiral WILLIAM L. RODGERS. Mr. LeRoy spoke of a case of condominium Powers prevailing in the wide ocean for the sake of radio communications. I should think in time of war that would make for very great difficulty, because if one of the condominium Powers is neutral and the other is belligerent, we would be thrown altogether off of our base. Perhaps you may recall in that connection that forty years ago there was a condominium of the United States, Germany and England in the Samoan Islands, which failed entirely, and it was broken up and the islands were divided among the Powers.

Chairman THOMAS. Is there any further discussion on this point? If not, we will proceed with the program. The next topic is "Neutral Rights and Duties" by Professor Philip C. Jessup, of Columbia University.

INTERNATIONAL LAW OF THE AIR: NEUTRAL RIGHTS AND DUTIES

By PHILIP C. JESSUP

Professor of International Law, Columbia University

Mr. Chairman, ladies and gentlemen: I think the inclusion of this topic on the program is a partial response to the challenge which was made by Mr. Charles Warren in an article in the *AMERICAN JOURNAL OF INTERNATIONAL LAW* for April, 1935. At that time Mr. Warren very properly took the international legal profession to task for ignoring the subject of air law, particularly in relation to the law of neutrality. Some of the speakers who have just discussed air law in time of peace have commented upon this same point.

I think Mr. Warren's criticisms made in 1935 are still very largely applicable. Very little has been done upon this subject since his remarks were made. There have been occasional discussions. The Research in

International Law under the Harvard Law School is proceeding with a draft of a code upon the subject, but it seems to me it remains true that our literature is still extremely lacking in discussions of this topic. I think the remarks of Mr. Vallance and Mr. Wright are extremely well taken in this regard.

I shall not attempt any all-inclusive exposition of the law of the air in so far as it affects neutral rights and duties. I regret to say to Dr. Kunz that I have no theory on the subject. It seems to me we have on this subject very little specific law now in existence. On the other hand, there are a good many aspects with regard to which I believe, should an issue arise before an international court, the court would have little difficulty in reaching a decision on the question by application of principles and of analogies. While I think that would be the actual result in an adjudication, I think there are great dangers in the application of analogy of sea law to air law. I believe it has been apparent already in various parts of the field of private air law that the admiralty law or sea law is not wholly applicable. I think that is equally true with regard to the public law of the air. Nevertheless, that is the main basis from which we are able to proceed. And I think it gives us, perhaps, a more useful basis than any laws applicable to land warfare and the obligations of neutrality on land.

Probably the most useful body of doctrine which we have to apply to our consideration of this subject is contained in the admirable Report of the Commission of Jurists which met at The Hague under the chairmanship of John Bassett Moore in 1923¹ in response to a resolution of the Washington Conference on the Limitation of Armaments. And Admiral Rodgers, who played a distinguished part in that commission, is present, which embarrasses me very much because I have to talk about those rules.

I regret to see in the audience persons who are familiar with the technicalities of air law, with regard to which I am wholly ignorant, who will also check me up on my inaccuracies in that field. I shall merely attempt to call attention to some problems and suggest some of the fields in which it seems to me law now exists and to indicate some directions in which I think the law might possibly develop.

By way of preface to that, and because of its interest to us in this country, I can call attention to the applicability of the Neutrality Act of 1937 to questions of aircraft.

Under Section 13 (c) of the Act of 1937, a vessel is defined to include aircraft. Under another paragraph of Section 13 a vehicle is also defined to include aircraft. Apparently those provisions were put in in 1937, having been omitted in 1935 and 1936, in response, perhaps, to Mr. Warren's suggestions (which were always influential and which have had great effect in our neutrality legislation) that the subject must be dealt with. However, the attempt to deal with it merely by way of definition has been wholly

¹ Printed in AMERICAN JOURNAL OF INTERNATIONAL LAW, Supp. January, 1938 (Vol. 32), p. 1.

inadequate. As a result of the definition, under Section 2 of the Act it becomes illegal, in case certain proclamations are issued by the President, for American aircraft to carry certain articles to a belligerent or to other countries for the use of a belligerent.

Under the President's proclamation of May 1, 1937, aircraft are included as "arms, ammunition and implements of war." And under the regulations for the issuance of licenses by the National Munitions Control Board,¹ we find, by paragraph 32, that if American aircraft are flown or shipped from the United States for a temporary sojourn abroad they will not be considered to have been exported within the meaning of Section 5 of the Act, which requires a license, if they are to be piloted by American pilots and if they are not to be disposed of abroad. The possibilities of evasion seem to me to be very real in that connection.

By Section 6 of the Neutrality Act, American aircraft are forbidden to transport arms, ammunition and implements of war to or for a belligerent, and so on.

In Section 7 we have an illustration of one of those gaps which I think distinguish this particular bit of legislation. Section 7 is that which applies to the use of American ports as a base for supplying belligerent warships hovering off our coast. As the section works out in the light of Section 13 (c), we find it prevents aircraft from supplying warships off our coast but does not cover the case where surface vessels could go out from our ports to supply aircraft off our coast.

Under Section 8, armed merchant aircraft can be barred like armed vessels from our ports. Probably that can be done without the assistance of the Neutrality Act.

Under Section 9 it becomes unlawful for American citizens to travel on belligerent aircraft. But the President has power there to make reservations. If there were a war local to Europe, the President probably would make it possible, even in the case of the belligerency of the British Empire, for Americans to travel on Canadian planes flying between Montreal and Ottawa.

Under Section 10 it may also be illegal to arm American aircraft in their foreign flights.

I think those are the effects of the inclusion of Section 13 (c) upon our neutrality law—obviously an utterly inadequate handling of aircraft in regard to neutrality. I think the subject could have been handled adequately by Congress if intelligent study had been given to the subject by that body. Yet much of the situation requires international agreement and can not be disposed of by national legislation.

Turning now to the general international field in regard to which international agreement or clarification is necessary, I should like to speak first of the problems arising in regard to neutral duties in neutral territory.

¹ See *International Traffic in Arms* (5th ed.), Department of State Publication No. 1147.

First, I think we must notice that the accepted rule in regard to sovereignty of the air provides neutral states with the power to carry out the duties which I believe neutrality imposes upon them in some instances in regard to the operations of aircraft. I believe we can say that under the customary international law today a neutral state has a duty to use the means at its disposal to keep belligerent military aircraft from entering neutral territory in time of war. I believe that to be established by the practices of the World War, by the acceptance given to those practices and by the confirmation which we find in principle and in the good sense of the Rules of The Hague in 1923. That rule, of course, contrasts with the comparable obligation of the neutral Power in regard to warships and surface vessels. There the neutral is not required to exclude, although it has a privilege to exclude. In regard to military belligerent aircraft, I believe the neutral state now under international law has a duty to exclude. And if the aircraft enter, I believe the neutral has the duty to use the means at its disposal to intern those craft.

The general rule of international law with regard to the neutral's duty to prevent its territory from being used as a base of operations by a belligerent would, I think, impose upon a neutral Power the duty to see that no aircraft, no matter what its nationality or character, is used as a point from which to observe military operations of a belligerent with a view to informing the belligerent; that is, aircraft hovering over neutral territory observing the disposition of troops or vessels and then communicating those results to the belligerent, if permitted by the neutral, would constitute a breach of neutrality. And that duty is recognized by Article 46 of The Hague Rules of 1923.

I think a very difficult question is presented by analogy to the rules of international law governing the obligation of the neutral states to prevent outfitting of hostile expeditions, of which cases the *Alabama* claims are the chief symbol. In regard to ships, the neutral's duty is to see that they do not go out if it is believed, or if the neutral has reason to believe, that they are intended to cruise or engage in hostile operations against a neutral. In the case of aircraft it is so much more simple in many ways actually to equip that aircraft for operations against a belligerent, that I am inclined to believe it may turn out that there will be imposed upon neutral governments an absolute duty to prevent aircraft from going out to engage in the service of a belligerent in any way whatever. I am inclined to think that is the only way in which an adequate check can be placed upon aircraft going out to serve in a military capacity. But on that point I think no law is as yet settled.

In the second place, I wish to deal very briefly with the questions of aircraft engaged in the carriage of neutral commerce. Some references to the importance of the subject are found in Mr. LeRoy's paper. He has referred to the capacity of modern planes. According to the *Herald-Tribune* of March 16, the specifications of the Pan American Airways, for which

manufacturers have been submitting bids, call for planes which will carry a 12-ton pay load on a 5,000-mile flight. It is immaterial whether the figures are exact. The point is that 10-ton or 12-ton loads can be carried a distance sufficient to cross the Atlantic Ocean. We must realize that the carriage of ten tons of one of the rare metals of great importance in the munitions industry—manganese, tungsten, antimony, nickel or copper—is very important. Multiply it by a few additional planes and you have an important factor in war commerce. Similarly, if you contemplate a plane carrying ten tons of gold bullion for the purpose of bolstering foreign exchange, having in mind, for instance, our cash and carry principle, that is also an important element. Moreover, the carriage of ten tons of chemicals may be of very considerable military importance. The records of flights which are now customary as a commercial matter, showing the amount of machinery and parts of machines and engines customarily carried by air, indicate the very great importance of commercial carriage by aircraft of, we will say, other aircraft engines or replacements or supplies.¹ I do not think we can ignore the possibilities of a situation in which it will be a relatively simple matter for aircraft carrying a load of 10 to 15 tons to fly non-stop from New York to Central Europe. And when that stage of development of aviation is reached we will have to revise very considerably our ideas which are at present based upon the supremacy of sea power.

The question, from the point of view of international law and rights and duties of neutrals, is: What is going to happen to these planes carrying these important shipments to a belligerent or to a neutral for trans-shipment to a belligerent?

In the first place, consider the matter of visit and search by other aircraft. That matter was discussed at The Hague in 1923. The draft submitted by the British and American Governments favored the adoption of a rule permitting visit and search by military aircraft of neutral aircraft. The Dutch vigorously opposed it.

... the custom and practice of international law is limited to a right on the part of belligerent warships to capture after certain formalities merchant vessels employed in the carriage of such commerce [*i.e.*, contraband, etc.]. No justification exists for the extension of those rights to an aircraft, which is a new engine of war entirely different from a warship and unable to exercise over merchant vessels or private aircraft a control similar to that exercised by a warship over merchant vessels. Consequently there is no reason to confer on a military aircraft the right to make captures as if it were a warship, and no reason to subject commerce to capture when carried in an aircraft. In developing international law the tendency should be in the direction of conferring greater, not less, immunity on private property.²

However, the rule was finally adopted in Rule 49 of The Hague Rules of 1923.

¹ Details may be found in the Air Craft Year Book, 1937.

² Moore, *International Law and Some Current Illusions*, p. 235.

It is admitted in the Hague discussions about Article 50 of The Hague Rules that such visit and search in the air is impossible. The Rules therefore permit the belligerent aircraft to require the neutral aircraft to deviate to some place where it can land. In other words, it is impossible at this time to carry out visit and search in the air by parachutes or anything of the kind; you have to have the plane on the ground.

I have not time to discuss it in detail, but take the Pan American flights from Manila to Hong Kong. Suppose there should actually be war between Japan and China—which is a possibility. Japan might say these planes are carrying arms to the Chinese. They might require them to deviate to some of the Japanese islands where they could be examined. Planes in normal flight might not carry sufficient gas to make that detour. In that case you must require the neutral plane to provide itself with sufficient fuel to take into consideration emergencies of that kind.

But, by way of hypothesis, take a state of war between Italy and Great Britain and a plane flying from New York to Great Britain with important supplies encountered by an Italian military plane over the Atlantic; the only place to which the Italian plane could require deviation is to the Mediterranean or to Italy. It is quite unlikely the plane would have enough fuel to enable it to make a deviation of that extent. It is conceivable that it might, but it is just as conceivable that it might not. The difficulties of adjustment in that situation are very obvious.

It seems to me that because of those difficulties, particularly in trans-oceanic shipments, the only possible way of regulating the situation in the future is by the adoption of some system whereby the belligerent will exercise his rights before the plane leaves on its voyage, and perhaps after the plane arrives at its destination.

I believe in that way, with some sort of certification system, that ordinary commercial flights between two neutral countries could be adequately safeguarded. I do not have time to go into the details of the way in which I believe it could be safeguarded, but I believe it is feasible generally. I think it could be worked out.

With regard to flights to a belligerent country from a neutral, that system, of course, would not work unless there were certain types of flights which both belligerents felt they should allow to go through because of a mutual advantage. It is conceivable, for instance, belligerents might say, "We should both like to have one or two planes a week carrying sealed pouches of mail and carrying passengers who are not reservists but ordinary business passengers." Both of them might agree on such flights and such flights might be certified and might be given safe passage. And I think it is feasible to work out ways in which to identify them so that they can pass safely.

I have just one more minute, but I want to mention two other points. The first is the question of air blockade, which is one of the obstacles

which these commercial aircraft might meet. I suppose if one were to create a rule of international law on the subject of air blockades he would have to set up at present as a test of the effectiveness of that blockade, the old rule of making entry dangerous rather than the modern test of actually preventing entry and egress.

I suppose under existing law a good case can be made out for the theory of the right of a belligerent to establish an air blockade by anti-aircraft guns and perhaps by the coöperation of planes, and perhaps also—I do not know anything about the technical side of it—by the floating nets which one reads that the British propose to use for anti-aircraft defense. Perhaps they can be utilized. Perhaps there are other devices still unthought of which can be utilized.

In principle, however, it seems to me impossible to deny the possibility that a belligerent might legally as well as actually establish a blockade by air. I should assume any neutral plane attempting to pass through that blockade zone would run the risk of being shot down. I see no way in which warnings can be given as in the case of surface vessels. I think if a blockade were established, neutral planes would have to keep away from that air-blockaded frontier or run the risk of being shot down.

I should think where an air blockade and a sea blockade were combined on the same coast that one would have to deal in a sense with each one separately. Different tests would be applicable to the sea blockade and to the air blockade. The sea blockade might be effective as to sea but not as to air. It might, therefore, be a valid blockade as to sea but not as to air, and *vice versa*. Similarly, I think aircraft can lawfully be used now for the enforcement or for assistance in enforcing a sea or surface blockade and making it still more effective.

One other and last point, and that is the use of aircraft against surface vessels for the purpose of visit and search. At the discussions at The Hague in 1923 it was eventually necessary to abandon any attempt to arrive at a rule on that subject. The British, French and Italians were in favor of the right of military aircraft to compel the deviation of merchant vessels. In other words, they contemplated that belligerent aircraft might roam the seas and might signal to merchant vessels and direct them to deviate to port for visit and search, and a violation of the orders of the aircraft might result in destruction of the vessel by bombs. The United States, The Netherlands and Japan were opposed to this principle, insisting that there must first be some visit and search, by analogy to the rules of surface warfare. Practically it seems impossible for aircraft to land and carry out a visit and search. Frequently the sea would be too rough. It might be smooth enough for them to land but not sufficiently smooth to enable them to take off again and they could not risk landing. Furthermore, their vulnerability on the surface is much greater than that of submarines.

It seems to me, therefore, if any law is to be developed on this subject,

that the rôle of the aircraft against surface vessels must be confined to coöperation with naval operations of the belligerent. In other words, aircraft might sight the ship and might require the merchant vessel to proceed at a reduced speed upon a defined course for a certain length of time. The aircraft would then signal to one of its naval vessels to come up and visit and search. That is a plan, I understand, which is being developed by naval strategists and it is one which I think might eventually be embodied in the law.

There is no time here for discussion, but I merely wish to associate myself with those who have spoken heretofore at our meetings this year in favor of the notion that it is worth while to attempt to secure agreement upon this field of law, and that the mere fact that we have witnessed breaches of law in the immediate past and in the present is no reason for giving up an attempt to reach some sort of international agreement upon rules for the protection of neutral commerce by air and for the treatment of surface commerce by belligerent aircraft.

Chairman THOMAS. The discussion on this topic will be led by Morton W. Royse, of New York.

Mr. MORTON W. ROYSE. Mr. Jessup has covered the question in a broad way, so I shall only deal with a few incidentals.

First of all, without entering last night's dispute on the meaning of law, I might say something about international rules in terms of aviation. The law of war, particularly the rules dealing with aviation, has grown exclusively out of military practices; and at bottom it has always been the military establishments that determined the rules. In other words, the rules of warfare are the product of war and not a code imposed from without. One may go even further and say that not even governments determine these rules, unless we assume that the military establishment of a country is the real government in time of war. The significance of this, as far as our discussion today is concerned, is that it is the methods of warfare, or their general effectiveness, that set the limitations that will be imposed. In other words, in determining the question of neutrality in regard to aircraft, the limitation set on the use of aircraft is pretty certain to be determined by the efficiency of aircraft in modern warfare, on land or at sea. For instance, England in trying to preserve her sea power might readily support, particularly at present, an attempt to protect neutral air traffic in war time, for the same reason that she opposed submarine warfare at the Washington Conference in 1921.

In my opinion it is not certain that commercial air traffic can be made sufficiently neutral to impress governments in time of war. A primary difficulty is the fact that there is no real distinction between civil and military aircraft. As Mr. Jessup would have pointed out had he more time, the modern commercial plane can be turned into an efficient bomber with little difficulty. For a long time, commercial aircraft people and some military

people denied this, at least in public. But I think it is pretty well accepted now. The fact that you really do not have a distinction between military and civil aircraft complicates the problem. It is no longer a question of converting a very obvious surface vessel, but of swiftly converting aircraft in commercial traffic. In other words, it is quite useless to classify aircraft as civil or military, the prime consideration being the use to which an aircraft is put. In other words, you have to substitute actual service or usage for the old classification of form and structure. And when you come to that you enter a broad, nebulous field. The draft code drawn up by Mr. Jessup tries to meet this problem by a system of certifying aircraft engaged in bona fide neutral traffic. We are still considering the difficulty of getting some sort of agreement on neutral air traffic. Belligerents can not be sure, at least for the present, that aircraft ostensibly in commercial traffic are not, in fact, used for observation or espionage. Even incidental observation may be regarded as dangerous, because of the large areas seen from aircraft.

Moreover, belligerents can not be sure that aircraft in alleged neutral traffic are really operating for commercial reasons or for the purpose of getting planes over to a belligerent. In other words, the cargo may be less valuable and of much less importance than the aircraft itself, let us say as a potential bomber. In other words, traffic coming from one country to another may stop in some neutral country, and then be transferred to a belligerent. We can not be sure that an aircraft leaving here in commercial traffic may not eventually end in some belligerent country. The prices paid in time of need for aircraft or other supplies would probably make for a lot of smuggling or trans-shipment.

Mr. Jessup raised the question of outfitting hostile expeditions in a neutral state. If a prohibition of this sort were applied to aircraft, you would have to prohibit all aircraft shipments, because every aircraft might be viewed as an expedition. Even aircraft parts, I should think, might be taken as part of an expedition, because they can be assembled very rapidly and used for that purpose. Mr. Jessup, I believe, would have all aircraft shipments, including aircraft parts, prohibited from neutral states.

With regard to visit and search, as Mr. Jessup said, that problem was quite a thorny one in 1923 at The Hague, and they never could agree.

In regard to the question of deviation, Mr. Jessup has said in effect that there should be some analogy with maritime rules; in other words, that there should be search at some time or other before a vessel is forced to deviate for a long distance, as to some distant port. As Mr. Jessup said, the British and French and Italians favored the deviation. And this is rather remarkable for Great Britain which, after all, more or less established the old maritime law. It is not clear why Great Britain adopted this view, unless she assumed she would have command of the air in future wars at sea. Another view is that aircraft will go out and spot vessels and will not be satisfied with oral messages—and that the power to bomb will be a sufficient threat to force

a vessel to deviate. Once the effectiveness of such operations is demonstrated, it can be assumed that governments will not give up the practice. Some allowance may thus have to be made for deviation. Otherwise you are trying to outlaw a method of warfare only to have the prohibition disregarded in time of war.

My last point is air blockades, as against neutral air traffic. It seems to me there can not be an air blockade in the sense of a surface blockade. You have here three dimensions. And I can not conceive of any Power having sufficient aircraft to patrol an area to a point where they can say, "This area is covered." In other words, it would all be more or less a matter of chance. I should say if a square mile were patrolled by five airplanes, another airplane, a so-called neutral airplane, could still slip through at high altitudes or under certain weather conditions.

Chairman THOMAS. Our Secretary, Mr. Finch, wishes to read a communication.

Secretary FINCH. Mr. Chairman, it was the desire of the Committee on Program to have an officer of the Navy here to discuss naval questions with reference to international law of the air in time of war. The Committee invited Lieutenant-Commander W. D. Sample to perform that function, and he has sent a letter regretting his inability to do that. But it is of such a character that the Chairman of the Committee on Annual Meeting, to whom the letter is addressed, thinks we should read it into the record before the general discussion. Mr. Dickinson, the Chairman of the Committee, is here but modestly insists upon remaining in the rear of the room and has asked me to read the letter. This is Lieutenant-Commander Sample's letter:

I regret that I am unable to accept your invitation to lead the informal discussion on naval questions. These questions, as you undoubtedly are well aware, may be considered to be very much in a formulative state at the present time and it appears desirable to keep them in this flexible status until particular events or situations may dictate a decision on some or all of these questions. It is accordingly considered undesirable to have a public expression of opinion which might appear to represent official Navy Department views on those questions and thereby needlessly tend to crystallize opinion on them at this time.

I would like to take the liberty, however, to suggest a question which may be of interest to your discussion. If Professor Jessup's paper deals with neutral rights and duties in the same manner as this subject was handled in a draft of regulations on neutral rights in the air which he was instrumental in preparing last fall, it appears likely that he will continue to give belligerent aircraft the character of troops rather than of vessels which will permit them no use of neutral territory, under any conditions, without penalty of internment. If this should be the case it may prove of interest to your discussion to consider conditions under which it would be desirable and justifiable to give long range naval aircraft the character of vessels and afford them substantially the same treatment in regard to use of neutral waters or territory as is now afforded belligerent men-of-war. In this connection it will be necessary to determine a means for differentiating between long range aircraft operating more or less independently and relatively shorter range aircraft operating more or less directly in cooperation with surface forces either afloat or ashore and therefore retaining more closely the character of troops rather than of vessels. In reaching any determination on these

questions it would be well to examine carefully the manner in which any proposed provisions would affect the interests of the United States were the United States a belligerent in order that provisions that may prove undesirably restrictive could be avoided.

That is the end of the pertinent part of this communication from Commander Sample.

I might say by way of explanation that the draft regulations which have been referred to in this letter, and by other speakers, and mentioned by Professor Jessup, are a part of the draft convention on neutrality, with the accompanying very illuminating comment, that Professor Jessup is now preparing as the Reporter of the Harvard Research in International Law. We expect to have the privilege of reproducing that draft as a supplement to the *AMERICAN JOURNAL OF INTERNATIONAL LAW* next year. You will all have the benefit of that next year, together with the valuable list of authorities and citations that the Reporter is appending to the comments.

Chairman THOMAS. The subject is now open to discussion.

Mr. JOHN C. COOPER, JR. It is a great pleasure for me to tell Professor Jessup publicly how much those of us who have had something to do in the past with the international law of aviation feel he is helping the situation in the work he is doing for the Harvard Research. And I now want to second the suggestion that has been made that this Society give this topic further consideration.

As Chairman of the American Bar Committee on Aeronautical Law several years ago, I had the pleasure of being named, with the then Assistant Secretary of Commerce, as the first American representatives on the CITEJA; and had the pleasure of being the Chairman of the Delegation at the Rome Conference. I, therefore, had some occasion in the past to realize something of the concepts which are growing up on the law of the air. And my only reason for having anything to say today is to urge, as Commander Sample has in his letter, that this matter is still in a state of flux, and there are not sufficient rules and examples, not sufficient concrete background, I think, as yet to promulgate a theory, if I might refer to Professor Kunz's discussion last night.

Having said that, I want to be so bold as to indicate one matter in which I have perhaps not agreed with Professor Jessup in the past in some of the private discussions which we have had, and to urge that when the rules are written finally, be they by way of informal writings of scholars which come to be taken as authorities, or by way of draft conventions which have the sanction, such as they may have, of signed conventions, that the position of the neutral aircraft will be considered from the point of view of the neutral state and not from the point of view of the belligerent state.

I disagree with Mr. Royce that every character of aircraft can be converted for military use; and I do not agree that you can not recognize the aircraft in the air, whether it is subject to conversion or not.

The long-range scheduled air transport is a very valuable vehicle. Its

owners are subject to the police powers of the neutral government where it is domiciled. It is inconceivable that such an aircraft would be flown to a belligerent state for the purpose of being turned over to the belligerent in violation of what I assume would be a statute of the neutral where the aircraft is owned. And I want to urge, when this matter is further considered, that the rules be not so framed as to limit the legitimate commerce of the neutral, even though it be with a belligerent.

Professor Jessup does not agree with me. I particularly call your attention to this character of problem: Suppose England were at war with an Asiatic Power; would it be consistent with justice that American aircraft engaged in trans-oceanic commerce with England should be prevented from flying and carrying on such commerce?

Captain CORLEY P. MCDARMENT (Army Air Corps Retired): Mr. Chairman, I have had nineteen years' military experience as an Army pilot. I just wanted to say a word in connection with some practical applications of aerial blockades.

It has become the practice in the Spanish Civil War for aircraft to dive upon neutral vessels which are carrying contraband of war and to drop a note upon the deck notifying the crew to take to the boats; and after the crew has taken to the boats the ship is bombed. Presumably the aircraft pilot knows that the ship is carrying contraband. That is a practice that has grown up and will probably be accepted. So far I have heard none of the great Powers protesting. As to whether or not those cases have come up for adjudication in admiralty courts, I do not know. But I just call attention to that particular practice which has grown up. It may become an element which will affect the theory of international law of the air.

The matter of visit and search while in the air is very amusing to me. Having been a military pilot for a number of years, I know the difficulties that would be entailed in searching another aircraft while going through the air at possibly 300 miles an hour, that is, by means of parachutes or "sky hooks" or something of the sort. Another point is that military craft are, as a rule, not as long of range as transport airplanes. Transports can go much farther than the military craft can go. That is because of the military equipment which must be carried and because their gas supply is less. This gives transports an advantage in "hot pursuit" if the speeds are equal. However, the Spanish Loyalists have shot down or have fired across the nose of French airplanes and caused them to land for search and they have taken off the passengers. That is a concrete example or an exact case of seizure and search by aircraft against other aircraft, of a neutral country. I just wanted to call attention to those particular concrete things which are incidental to the new international law of the air.

Professor JAMES W. GARNER. Would the uncertified aircraft carrying contraband be destroyed in case it could not be deviated to some place where it could be searched? I might complicate the question a little bit more by

assuming that the aircraft is carrying not only munitions and contraband but also noncombatant passengers. What would happen to them? They can't be searched.

Professor JESSUP. In answer to Mr. Garner and partly also in answer to Mr. Cooper, such commerce as it was felt was legitimate and should be protected, would be governed entirely by some form of certification, as I said. I think Mr. Cooper agreed, although Mr. Wright did not agree wholly. Those planes could generally be identified. I should say that all other craft would take the air at the risk of being shot down at sight. And if we had such a rule then your case of the innocent noncombatant passengers flying on the contraband-laden, uncertified aircraft would be rare, and the rule that would grow up under such a system would be that passengers would not travel except on certified aircraft.

As Mr. Cooper pointed out, I believe it is very difficult to adjust such a situation fairly so that you do not place an absurd burden upon states where the war is remote. But when you attempt to draft any rule which distinguishes between proximate and remote in terms of aerial operations with the probable developments in aviation in the course of a year or five years, or ten years, I think you are up against an impossible problem.

It does not seem to me at all fantastic to assume that in the case of a war between, let us say, Great Britain and an Asiatic Power ten years from now, the planes of the Asiatic Power could operate over the Atlantic and return. You may say that that is fantastic. There are many things being done today in aviation which were utterly fantastic twenty years ago. Personally, out of the depth of my ignorance of any of the technical details, I find nothing fantastic in connection with aviation. The idea of a stratosphere plane flying 5,000 miles and carrying a thousand passengers is all right. I have no objection to thinking in those terms. I would go so far as to contemplate trips to the moon, if you please. But I do not think we need deal with that in this convention of international law. But it seems to me you have an almost impossible problem in trying to distinguish between proximate and remote.

My only answer to the difficulty which Mr. Cooper raises is that if in reality from a factual point of view military operations by air are remote from the scene of the commercial traffic, then the commercial traffic will feel, without bothering with any regulations of circulation or otherwise, that because of their remoteness they will not be interfered with; and unless they are engaged in what amounts to important traffic with a belligerent, the other belligerent will probably allow them to proceed.

Nevertheless, I still maintain that if you have American aircraft flying even on regular schedules on commercial transport routes from the United States to Great Britain when Great Britain is engaged in war with another Power, wherever that Power is located, if those planes are carrying contraband of war to Great Britain, if the other belligerent can get at them they

will do so, and they will claim they have a right to intercept them; and you have to satisfy that legitimate claim.

Mr. COOPER. Professor Jessup, you probably misunderstood me. My point was this: Under your system of certification you do not propose to certify traffic between a neutral country and a belligerent country at all. Isn't that correct?

Professor JESSUP. Yes. But, as I suggested this afternoon, it seems to me it is quite possible that your belligerent might agree to some traffic with other belligerents and that that traffic would be certified.

Mr. COOPER. That is the point. I am objecting to the belligerent's having the right to agree that American aircraft may fly from the United States to one of those belligerents, carrying nothing but neutral goods or neutral persons. I don't think the belligerents should have the right to agree or not to agree to that. I think that it is an American right which should be preserved.

Professor JESSUP. May I say there, Mr. Chairman, I think there is great difficulty in discussing this question of certified shipments by air. I think it is rather unfair to the rest of the audience to carry on discussions which we have had elsewhere which deal with a particular project for certification which has been applied to both shipments by surface transport and by air transport. And the whole problem is tied up with the surface problem, and we really can not discuss it separately. If you can find the solution to this problem of traffic between neutrals and belligerents by sea, then I agree that the same solution might be applicable to traffic by air. Although Mr. Cooper does not like my plan with regard to traffic by air, he refuses to tell me what his solution for the contraband problem is. Until he does that I think the other way is the only solution.

Chairman THOMAS. Is there any further discussion?

Professor QUINCY WRIGHT. I would like to draw attention to a phase of the air problem which has scarcely been touched upon. Perhaps the threat in time of peace to use aircraft in hostilities—with or without war—is likely to be the most important influence of this invention upon international law. The problem I have in mind is how we can reduce the nuisance value of the threat of aerial bombardment. It strikes me that the possibility of making such a threat today has enormously weakened the sanctions of international law. It has tremendously augmented the capacity of a relatively weak state to violate international law with impunity merely by saying, you have to accept my violation or I will drop bombs on your big cities.

The potentiality of that threat is not related to the capacity of the weak state to win a war. Even if it is certain to be defeated in the war, still it is a threat that may be very potent because no state, especially an industrial state with great concentrations of population and wealth, likes to have bombs dropped on its cities. If the weak state can do two things—build several hundred bombing aircraft and create the impression in the world that it is very ruthless and desperate, it can get away with almost anything.

We have had plenty of illustrations of that. One can not imagine a country in Italy's vulnerable position getting away with such a gross violation of international law as was involved in the Ethiopian matter, at any time during the nineteenth century before the invention of aircraft. But today, simply by making the threat of aerial bombardment and creating, by propaganda, the impression it will carry out this threat, Italy was able to get away with a violation of law formally condemned by nearly all states.

I confess I have no solution for this problem, except progress in international organization and in national morals. The military situation has been changed because formerly a military threat was not effective unless the state that made it had the capacity to win the war which might result. Today, even though the threatening state will certainly lose the war, still its threat may be effective. It is this circumstance that has weakened the sanctions of international law. Formerly only the few very powerful states could violate international law with much hope of success, and they tended to neutralize each other by forming a fairly stable balance of power. Now many weak states may violate international law with impunity because of the nuisance value of their air forces. This is a fundamental problem which we have to consider in treating the effects of aerial inventions upon international law.

Professor PERCY E. CORBETT. I must apologize for taking more of the time of this conference, but I shall excuse myself upon the ground of the extreme interest that this discussion has aroused in me. I have listened to a number of more or less diplomatic suggestions of war between Great Britain and certain specified and unspecified Powers. I should like to see this problem considered from another point of view. And in presenting that point of view, I am going to be quixotically diplomatic. I am going to suggest the possibility of war between the United States and an unnamed Asiatic Power.

Now, in the event of such a war I want you to consider, please, the position of Canada as a possible neutral. How is Canada going to try to preserve her neutrality according to the standard laid down by Professor Jessup? Supposing this unspecified Asiatic Power should determine to use the Aleutian Archipelago and the British Columbian coast as a route for airplanes. I can not imagine a system of floating or fixed nets, and I can not imagine a Canadian air force of sufficient strength to prevent their passage. Yet failure to do so, according to Professor Jessup—and I entirely agree with him in this—would be a technical violation of Canadian neutrality. But how are we going to prevent it? You may say the most practical way would be to invite the United States to prevent it, allow them to come in and have full use of our territory and seacoast for the purpose of preventing passage through that air in which we have unlimited sovereignty. But if we granted such permission, I submit we ourselves should be committing an act of war against that unspecified Asiatic Power.

Now, I have one general reflection arising from this difficulty or series

of difficulties suggested by the discussion this afternoon. I do not want to put the discussion upon a sentimental or emotional plane; but I can not listen without regretting tremendously that we should have to assume that the process of departure from the conception of neutrality toward collective action in which there would be no neutrals properly so-called has come to a halt, and that it is necessary for us again to consider the situation in the event of war on an entirely pre-League basis. But I suggest that the difficulty of preserving neutrality in such cases and protecting neutral rights in the air would be very great and that the energy and ingenuity which would have to be applied to surmounting that difficulty would, if applied to the business of achieving an effective collective system, be more productive.

Professor JESSUP. May I say just one more word? I think Professor Corbett must have misunderstood me or I misunderstood him. I intended to apply to the situation you described the old test of the use of the means at the neutral's disposal; and I thought I had indicated that in such cases the measure of the neutral's duties would be the use of the means at its disposal to prevent the threatened invasion of its territory. So in the case of the Asiatic Power using Canadian territory, if the Canadian Government were physically unable to prevent it, I think it would not be guilty of a breach.

Professor HERBERT WRIGHT. Should we not have Mr. Warren give us the benefit of his reaction to the discussion here this afternoon?

Chairman THOMAS. Mr. Warren is called for to come forward and react.

Mr. CHARLES WARREN. Mr. Chairman and brethren of the Society: I think I ought to be content with having started this discussion. I am really not competent to carry it on. As very often happens, a man starts something going that he can not always control or take much part in after he starts it.

But there are a few points regarding Mr. Jessup's most admirable paper that impressed me. One is with regard to this attempt to frame rules regarding commerce carried on neutral aircraft. That attempt seems to me to be very theoretical and not likely to work out in practice. And I suspect that the law of commerce by aircraft will be in the direction that a neutral sends out aircraft at its own risk, and for this reason: Consider the difficulties of a neutral attempting to assert its rights in case of a violation by the belligerent of these rules which we are framing; what will happen? A neutral aircraft goes out and there is a certain rule provided by Professor Jessup; the belligerent meets that aircraft, and what happens to it? Without warning or ability to give warning of attack, the aircraft disappears off of the face of the earth. What was the expression during the war—"spürlos versenkt"? The aircraft disappears into the atmosphere. And, except under very exceptional circumstances, the neutral's government would not be able to prove the violation. Practically, therefore, there will be very little chance of a neutral government asserting its rights or its claims as to a

violation. Hence, I suspect that, as a practical matter, no matter what rules are framed, the neutral will send out its aircraft with passengers on it at its own risk. As I say, that is a practical way of looking at it and has nothing to do with legal formulae or attempts to draw up rules.

The second point that occurs to me in Professor Jessup's paper is with reference to the right of a belligerent aircraft to bomb an innocent neutral merchant vessel. As Professor Jessup has said, that was the stumbling-block at the 1923 Conference. No two nations actually agreed. Professor Jessup, as I understand it, rather favors the doctrine that a belligerent aircraft may require an innocent neutral merchantman to deviate from its course, and if it does not do so it may be bombed from the air—that is, deviate from its course until it meets some other vessel. He makes that qualification. I wonder if that is a principle that the United States ever ought to stand for? As long ago as The Hague Conference the nations were civilized enough to agree that innocent civilian population, even of a belligerent, should not be bombed from the air in an unfortified city. I do not see why the innocent neutral citizens should be subject to any greater danger than in 1907 we thought the innocent civilian belligerent citizens should not be subject to. In other words, I believe thoroughly that the United States at least ought never to admit the right of a belligerent aircraft to bomb our innocent citizens on our innocent merchant vessels.

Professor JESSUP. May I have just a moment to respond to Mr. Warren on his first point?

May I suggest, Mr. Warren, even at the present time commercial aircraft in trans-oceanic flights are communicating with their home office by radio about every fifteen minutes, and that in time of war it could report the visit of military aircraft, just as in the case of ships in the World War when fired on by submarines. They would radio the fact that they were being fired upon. I think the evidence of liability of a belligerent could be established.

In regard to your second point, may I point out that under the sea rules, when a belligerent had so ordered a neutral merchantman to stop for visit and search, if the neutral merchantman did not obey the order but attempted to flee, the warship could fire upon the merchantman and compel him to stop.

My thought was merely by analogy to that, that if an aircraft acting in conjunction with a surface vessel or a submarine vessel says to the merchant vessel by a note, as suggested here, or by radio, "Proceed at slow speed for 12 hours until our naval vessel comes up," if the surface vessel attempts to escape, then I think, just as in the case of the warship, the belligerent plane should have the right to use force to compel the neutral vessel to stop.

Mr. WARREN. But there is a very great difference between being bombed from the air and being subjected to a cannon shot from a vessel. Allow me also to ask you this: Suppose the deviation was made so that the

innocent merchantman might meet a submarine which immediately proceeds to sink without warning?

Professor JESSUP. Do you mean a submarine of the opposing belligerent?

Mr. WARREN. No; of the same belligerent.

Professor JESSUP. Naturally we would have to assume that the belligerent is going to comply with what rules we have. The submarine rules adopted at London in 1930 have now been ratified by 27 states, including all of the great Powers. It doesn't seem to me they would recognize one rule but violate the other. It seems to me they might as well violate the first rule and bomb the merchant vessel at sight instead of waiting for the submarine.

If you want to obey a rule and you have a rule which is reasonable, it will be generally observed. By and large, the practice of 300 years indicates that, unless very inconvenient, belligerents would rather obey the rules; it works out better in the long run. I think the idea is to work out something which is not an undue handicap to the belligerent and which respects neutral rights as far as possible and presents a reasonable compromise.

President BESSIE C. RANDOLPH (Hollins College). I would like to ask a question of Professor Jessup. A little while ago he spoke of the necessity or probable necessity of having neutral aircraft certified on the ground before it starts on its flight. I would like to hear Professor Jessup comment a little further upon how this procedure of certification would work, who would do the certifying, where, and so on.

Professor JESSUP. The system which I have in mind, Miss Randolph, is a combination of plans which have been used in the past, a combination of the old systems in existence in the seventeenth and eighteenth centuries where neutrals issued certificates to vessels, combined with the system used by the Allies during the World War for certifying neutral vessels and giving them safe conduct.

Very briefly, the plan I have in mind would be this: Let us assume that there is a shipment of goods going by air; the aircraft is to take off from New York for Sweden, let us say. I would say that at the airport that aircraft and its lading should be supervised by a representative of the neutral state, being the United States in this case, and by representatives of both of the belligerents, in order to see that the lading corresponded with the manifest. Both belligerents also would have the opportunity to examine the manifest to see to whom the goods were consigned.

If necessary, I think it could also be provided that the neutral government, after having supervised the loading, could seal the cargo compartments of the plane to make sure there was no subsequent loading or transfer of cargo, and upon arrival of the plane at its neutral destination, again the representatives of both belligerents might be entitled to supervise the unloading, to make sure that the cargo is arriving properly.

It might be necessary, as was done during the World War, to require the neutral government of the state of destination to give the same guarantees with regard to the ultimate disposition of the cargo, that is, to assure its consumption in the neutral state and guard against continuous voyage.

Chairman THOMAS. There seems to be a lull in the discussion. That means there are only one or two things for the Chairman to do, either make a speech himself or adjourn the meeting. I think I shall make a speech.

This is a subject, I am sure, that everyone who has taken part in will agree is so involved that probably since we have gone into three-dimensional warfare the solution for the law for this three-dimensional warfare will be some sort of fourth-dimensional proposition. And probably that would be a very good way for us to leave the discussion tonight for further consideration.

However, I have been asked to do one thing which is not right on the subject, and that is to report to those teachers of international law who are visiting here the interesting things that are on the Senate executive calendar at the present time. And I am sure there are a number of things which will find a place in our next year's program.

First, probably, in the way of interest, everything that has been done this year and last is comparatively small but exceedingly interesting. You have already mentioned the helium bill which, of course, was an Act and not a treaty. I would add to that the bill for the control of the exportation of scrap tin, which is entirely international in its characteristics; the sugar treaty, which was ratified, is a treaty which is probably more economics than international law, but one in which you will be intensely interested, if it is successful.

There are on the Senate calendar at the present time two international labor office conventions, and four more of these conventions are now being considered and I think will find a place on the calendar in the near future.

There is also on the calendar the treaty which will bring ultimately an end to our extraterritorial rights in Egypt, with, so far as the committee is concerned, the promise that there will be more getting rid of extraterritorial rights in other places as time goes on.

From the standpoint of academic discussion, the most interesting treaty, the one which will probably occupy more of your time in the classrooms than any of the others, is the one which will renew our treaty relations with Siam. There is a simple provision in that treaty which has the aspects of real discussion and a real extension into our international treaty-making of the characteristics of our American Federal system.

As you know, in some of our States, Asiatics are barred from holding certain kinds of land. Siam may justly object to allowing our nationals to hold land there if her nationals can not hold land here. A very interesting and, I think, new feature in our treaty-making formula has been evolved. There are about seven States in the American Union which bar Asiatic

aliens from holding certain kinds of lands. The treaty will provide that the citizens of all the States which have no laws of that kind will have the same rights in Siam, for example, as the Siamese would have in our country. The point I make here is that we are using—and I hope no one from the State Department will get after me for saying this—our American Federal system to our own advantage. There should be no objection to this on the part of Americans.

I now declare the meeting adjourned until 8:15 this evening.

(Thereupon, at 4:25 o'clock p.m., a recess was taken until 8:15 o'clock p.m.)

SEVENTH SESSION

JOINT MEETING WITH THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Friday, April 29, 1938, 8:15 o'clock p.m.

The meeting was called to order by JESSE S. REEVES, Vice-President of the Society and Director of the Conference.

Chairman REEVES. In the arrangement of what I think you will all agree with me is a very good program for these sessions, the Committee has for this evening turned from some of those lighter topics to more weighty matters of the law, such as suggested to us last night by one of the speakers. So the topics tonight have to do with war, declared and undeclared war, which may not be war at all. The first paper of the evening is on the subject of "War declared and the use of force." In the treatment of the subject we are to have the pleasure of listening to Professor George Grafton Wilson, of Harvard University.

WAR DECLARED AND THE USE OF FORCE

By GEORGE GRAFTON WILSON

Professor of International Law, Harvard University

In the course of the discussion last night, it was affirmed that some of the subjects were too broad, so the topic "The use of force" will be treated by others.

The topic "War declared" now before you is not too broad, as it is a line. It is the legal line over which a state now passes in going from peace to war.

Mythology, ethnology, and archaeology all give ample evidence of the early existence of war and at times war seems to have been the main interest of life. An estimate has been made that for three thousand years prior to the middle of the nineteenth century there were thirteen years of war to one year of peace.¹ Thousands of treaties of peace and friendship were made after these wars and many of these, according to their terms, were to remain in force "forever" or "in perpetuity." The average duration of these agreements seems to have been less than five years.

Among many tribes which were regarded by Europeans as uncivilized, there were conventional methods of declaring war, and a tribal attack without previous declaration was regarded as dishonorable. A delay between the declaration and attack was often customary. An intimation as to the methods to be used in the attack or a statement as to where it would begin was sometimes given with the declaration. In ancient Mexico some arms and supplies were sent to the opponent with the declaration "as it was held to be a discreditable act to attack any unarmed or defenceless people."²

¹ Novicow, *War and Its Alleged Benefits*, p. 14.

² Bancroft, *Native Races*, p. 423.

Alberico Gentili published in 1588 a formal treatise on the law of war. In this book he defines war as "a lawful contest of armed public forces" (*Bellum est publicorum armorum justa contentio*).¹ Gentili maintains that the purpose to resort to war should be made known to the other party in order that he may have an opportunity to give satisfaction or remove the cause. The earlier standards are approved by Gentili, and he cites with approval the statement of Cicero, "It seems that no war can be regarded as just, unless it has been announced and declared, and unless satisfaction has been demanded." This was the Roman practice till the end of the Republic.

In ancient times to engage in war without first making declaration was regarded as contrary to divine law and as reducing men to the level of beasts. In many of these early declarations there was a provision that the actual hostilities would not begin till after 33 days, and it was considered unjust to declare war and begin hostilities at the same time. That defensive action might be taken immediately was regarded, however, as just.

As the European family of Christian nations developed and as the influence of chivalry spread, it came to be regarded as perfidious for a state to engage in hostilities against another state without previous declaration. Grotius in 1625 said that war should "be publicly declared and in fact proclaimed so publicly that the notification of this declaration be made by one of the parties to the other."² Bynkershoek in the early eighteenth century regarded declaration as the honorable method of entering into war, but not as absolutely essential. The practice of prior declaration had already begun to decline before the end of the seventeenth century.

It is not always possible to distinguish as war a struggle which may develop within a state and spread in some form to other states. Civil wars are rarely declared, though some act affecting another state may lead to a proclamation of neutrality or other action by a foreign state which would produce the same effect as a declaration of war by the parent state. This was the case in 1861 when President Lincoln on April 15 called out troops and summoned a special session of Congress, and on April 19 "set on foot a blockade of the ports" of the Southern States "in pursuance of the laws of the United States and of the law of nations in such case provided." As this was a blockade proclaimed by the President in pursuance of international law, Great Britain was entirely justified in proclaiming on May 13, 1861, "a strict neutrality in and during the aforesaid hostilities."

It goes almost without saying that the word "war" was used between 1700 and 1900 to describe many and differing relations, and therefore that hostilities of any kind might be viewed as involving many and differing degrees of obligation.

Of the 125 or more struggles which had been called wars during these two centuries, only about one in ten had been formally or informally declared. Nearly one-half of these 125 wars seem to have been begun with-

¹ *De Jure Belli*, Bk. I, cap. 2.

² *De Jure Belli ac Pacis*, lib. III, cap. iii, 5.

out declaration in order to take the opponent by surprise, action regarded in early times as dishonorable. Even the United States in its declaration of war against Spain in 1898 made a *post facto* declaration on April 25, 1898, stating "that war exists and that war has existed since the 21st day of April A.D. 1898, including said day, between the United States of America and the Kingdom of Spain." This *post facto* declaration of war by the United States came before the Supreme Court of the United States in the case of the *Pedro* (175 U. S. [1898] 354), and was sustained as lawful in that case by a five to four decision, Mr. Justice White, Mr. Justice Brewer, Mr. Justice Shiras and Mr. Justice Peckham dissenting.

In the case of the *Argon* in 1904, during the Russo-Japanese War, it was held by the Sasebo Prize Court that the vessel becomes liable from the time when it becomes clear that one state has put an amicable settlement beyond hope, but diplomatic negotiations in time of crisis are not generally made public. In this case the court decided that war began when the Japanese fleet sailed at 7 a.m., February 6, 1904, from "Sasebo with the object of attacking the Russian fleet." Again it may safely be affirmed that the objective of a fleet in time of an international crisis is not usually made public nor is advance notice of the time of sailing made known. Such methods of dating the opening of hostilities are therefore entirely unsatisfactory.

The Hague Conventions of 1899 and 1907, particularly those of 1907, had in view the establishing of peace through the setting up of international courts, the limitation of hostilities, and the definition of the scope and methods of hostilities and of neutral relations. These were further elaborated in the unratified Declaration of London, which the United States at the beginning of the World War had hoped would be made operative. Prize courts during the war to a large degree respected the international law of war and neutrality as currently accepted.

The worthy aspiration that World War conditions should never recur produced, after 1920, a large crop of varied proposals, agreements and laws, and particularly propaganda aiming at a short cut to a state of permanent peace. Often these plans disregarded the labors of many years and of many men who had built up a system which, in so far as the declaration of war was concerned, had been entirely effective under the unparalleled strain of the years 1914 to 1918. Recent pronouncements and laws have often been the product of abnormal war and peace psychology and have introduced as a natural sequence confusion in practice and understanding. There has been a child-like faith in untested panaceas instead of agreements based upon the sound experience embodied in such rules as those of the Hague Conventions. These 1907 conventions, it is true, often supported the position of Grotius nearly 300 years earlier, when he said,

Least of all should that be admitted, which some people imagine, that in war all laws are in abeyance. On the contrary war ought not to be undertaken except for the enforcement of rights; when once under-

taken, it should be carried on only within the bounds of law and good faith.¹

In the *Prolegomena* to his great work on the *Law of War and Peace*, 1625, in the midst of the Thirty Years' War, Grotius also says suggestively, in a manner worthy of consideration in these later years,

Fully convinced, by the considerations which I have advanced, that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.²

The wars of the nineteenth and early twentieth centuries had brought to the attention of those concerned with international affairs the importance of formal procedural agreements in regard to war. In the original proposal of the Czar of Russia in 1898 for an international conference upon urgent questions, it was suggested that, "First, no political nor diplomatic questions—past, present or future—will be discussed; second, no secret suggestions or arrangements will be permitted, and sessions of the conference to be open and public; third, present armaments not to be considered or disturbed, but if possible find a way to avoid further increase" and in a general way to make "triumphant the conception of a universal peace." This conference, commonly called the First Hague Peace Conference, did consider conventions on the laws and customs of war on land and the adaptation to maritime warfare of the principles of the Geneva Conference of 1864, and certain declarations in regard to the use of projectiles as well as several resolutions.

The Second Hague Peace Conference, 1907, profited by the work of the Conference of 1899. At the Second Conference the restrictions upon the declaration of war were extended in two directions: (1) removing one lawful cause of declaration of war, and (2) making previous declaration obligatory.

The restriction upon the causes for which war may be undertaken is found in 1907 Hague Convention II, in which the parties "agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals." This obligation is, however, not applicable if the debtor state renders a pacific settlement impossible. The threatening situation in 1902 arising in consequence of the non-payment by Venezuela of claims of Germany, Great Britain and Italy, and the proposed blockade of Venezuelan ports by European Powers had strained the Monroe Doctrine to such a degree as to focus attention on the use of force to collect debts. The

¹ *De Jure Belli ac Pacis*, Carnegie Classics, *Prolegomena*, Sec. 25.

² *Ibid.*, Sec. 28.

Drago Doctrine advocating the prohibition of the use of force for the collection of debts had met with general approval in South America.

A progressive elimination one by one of the possible causes of war is a commendable method of limiting the range of the lawful declaration of war, and this Convention II removes the recovery of contract debts from the list of causes for war.

The Hague 1907 Convention III related to the opening of hostilities, and Article I provides, "the contracting Powers recognize that hostilities between them must not commence without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war." This convention limits hostilities to the time subsequent to an unequivocal warning which shall give reasons, which reasons could no longer include failure to pay contract debts because barred by Convention II, or an ultimatum to which the threatened party might accede and avoid the conflict. A very potent automatic sanction stimulating declaration prior to hostilities was embodied in the second article of Convention III which provided that

The state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may even be made by telegraph. Nevertheless, neutral Powers cannot plead the absence of notification if it be established beyond doubt that they were in fact aware of the state of war.

Thus Hague Conventions II and III of 1907 took significant steps toward the elimination of undeclared hostilities from relations between states. Claims for contract debts, now eliminated, had been the ostensible cause of many hostilities. A reasoned declaration of war or an ultimatum with a conditional declaration brought the state making the declaration and the grounds of its action under public scrutiny, a deterrent varying with circumstances, and the obligation to notify neutrals might also add a deterrent.

The Second Hague Peace Conference, 1907, after careful survey, had stated in the preamble to the Convention Relative to the Opening of Hostilities

that it is important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning;

That it is equally important that the existence of a state of war should be notified without delay to neutral Powers.

This was approved by a unanimous vote of the 44 states represented at the conference, and the convention was generally ratified by the states of the world at subsequent dates.

Other conventions have been closely related to or conditioned on this convention relating to the declaration of war. Some of these other conventions as they related to a period of war would not become legally operative until a declaration had been made. Thus there were removed many uncertainties which had previously prevailed concerning the existence of war.

Action under Hague Convention IV, 1907, relating to the Laws and Customs of War on Land was no longer a matter of policy, wishes, or uncertainty, but, as Professor Holland said, became applicable "to troops and others, who have no concern with the mechanism of diplomacy." Manifestly the conventions relating to the laws of neutrality would also be conditioned upon the existence of war and therefore on Hague Convention III. Such conventions as that relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities would depend upon the existence of enemy merchant ships and therefore on the declaration of war. The Convention Relating to the Conversion of Merchant Ships refers to a time of war, as do the conventions relative to submarine mines, naval bombardment, etc.

As a result of the Convention of 1907 prohibiting the commencement of hostilities without previous declaration, a large body of law was established and to become effective of a definite time, and it was anticipated that this would be further clarified by the Declaration of London, proposed in 1909, but never ratified though often cited.

The effect of the Hague Convention requiring ultimatum with a conditional declaration prior to the opening of hostilities may be seen in the attitude of Italy toward Turkey in 1911 when relations between these states were strained. In this ultimatum of late September, it was said,

During a long series of years the Government of Italy never ceased to make representations to the Porte upon the absolute necessity of correcting the state of disorder to which the Government of Turkey had abandoned Tripoli and Cyrene. These regions should be admitted to the benefits of the progress realized by other parts of the Mediterranean and Africa.

This transformation which is imposed by the general exigencies of civilization constitutes for Italy a vital interest of the first order by reason of the slight distance separating these countries from the coasts of Italy. Notwithstanding the attitude taken by the Government of Italy, which has always accorded its loyal support to the Imperial Government in the different political questions of recent times; notwithstanding the moderation and patience shown by the Government of Italy; its views concerning Tripoli have been badly received by the Imperial Government, but more than that, all enterprises on the part of Italians in the regions mentioned have been systematically opposed and unjustifiably crushed.

The Imperial Government, which to the present time has shown constant hostility toward all legitimate Italian activity in Tripoli and Cyrene, quite recently, at the eleventh hour, proposed to the Royal Government to come to an understanding declaring itself disposed to grant any economic concession compatible with treaties in force and with the higher dignity and interests of Turks; but the Royal Government does not feel itself in a position to enter such negotiations, the uselessness of which has been demonstrated by past experience and which far from constituting a guarantee for the future, would be themselves permanent causes of disagreement and conflict.

The Royal Government has received from its consular agents in

Tripoli and Cyrene information that the situation is extremely grave because of the agitation prevailing against Italian subjects, and which is evidently incited by officers and other functionaries of authority.

This agitation constitutes an imminent danger, not only to Italian subjects, but to foreigners of all nationalities, which requires them, for their own security, to embark and leave Tripoli without delay.

The arrival at Tripoli of Ottoman military transports, which the Royal Government has not failed to observe, appears preliminary to serious events, aggravates the situation, and imposes on the Royal Government the obligation absolutely to prepare for the dangers which will result.

The Italian Government, having the intention henceforth to protect its interests and its dignity, has decided to proceed to the military occupation of Tripoli and Cyrene.

This solution is the only one that will give Italy power to itself decide and itself attend to that which the Imperial Government does not do.

The Royal Government demands that the Imperial Government shall give order that the actual Ottoman representative shall not oppose the measure which will, in consequence, be necessary to effect this solution without difficulty. An ultimate agreement will be requested between the two Governments to regulate the definite situation which will arise.

The Royal Embassy at Constantinople is ordered to demand a decisive response on this subject from the Ottoman Government within 24 hours of the presentation to the Porte of the present document, in default of which the Italian Government will consider itself as being obliged to proceed immediately with measures destined to assure the occupation. Ask, in addition, that the response of the Porte within the period of 24 hours shall be communicated also through Turkish Embassy at Rome.

Thus, before the World War the reasoned ultimatum was used.

The reply of Turkey to the Italian ultimatum, though conciliatory, was not regarded by Italy as satisfactory.

The following is the text of the declaration handed to the Porte by the Italian Embassy:

Carrying out the orders of the King, the *chargé d'affaires* of Italy has the honor to notify that the period accorded by the Royal Government to the Porte with a view to the realization of certain necessary measures has expired without a satisfactory reply reaching the Italian Government.

The lack of this reply only confirms the bad will or want of power of which the Turkish Government and authorities have given such frequent proof, especially with regard to the rights and interests of Italians in Tripoli and Cyrenáica.

The Royal Government is consequently obliged to attend itself to the safeguarding of its rights and interests as well as its honor and dignity by all means at its disposal.

The events which will follow can only be regarded as the necessary consequences of the conduct followed for so long by the Turkish authorities.

The relations of friendship and peace being therefore interrupted between the two countries, Italy considers herself from this moment in a state of war with Turkey.

The undersigned consequently has the honor to make known to your highness that passports will be placed at the disposal of the *chargé d'affaires* in Rome, and to beg your highness to hand him his own passports.

The Royal Government has likewise commissioned the undersigned to declare that Ottoman subjects may continue to reside in Italy without fear of an attack on their persons, property, or affairs.

DE MARTINO

September 29, 1911.

It was also determined that the moment from which the war would be considered as existing would be 2.30 p.m., September 29, 1911.

At the beginning of the World War in 1914, and in general throughout the war, the conventional provisions in regard to the declaration of war were observed.

On July 22, 1914, Austria sent to Serbia an ultimatum demanding that Serbia condemn and undertake to suppress propaganda against Austria, stating the manner and place of the publication of this condemnation, and that reply would be waited at the latest till 6 p.m., July 25, 1914. The reply of Serbia being in the opinion of Austria inadequate, diplomatic relations were immediately broken off, war against Serbia was declared at noon, July 28, 1914, and the American Ambassador in Vienna was requested to forward the following to his government:

To end subversive intrigues issuing from Belgrade directed against the territorial integrity Austro-Hungarian Monarchy, Imperial and Royal Government July 23 sent to Royal Servian Government note in which were formulated series of demands, for acceptance of which delay of forty-eight hours was granted Royal Government. Servian Government not having replied to note in a satisfactory manner, Imperial and Royal Government is under necessity in protecting its rights and interests, of having recourse to the force of arms.

Austria-Hungary having just addressed to Servia formal declaration in conformity with Article 1 of the convention October 18, 1907, relative to opening of hostilities, therefore considers itself in a state of war with Servia.

Minister for Foreign Affairs declares that Austria will conform itself in the scene of hostilities on condition that Servia proceeds analogously to the stipulations of convention of The Hague, October 18, 1907, and of London, February 26, 1909.¹

Of this on July 30, 1914, American Minister Vopicka in Serbia suggestively says in his message: "I will not here comment upon the possible effects throughout Europe of this war."

On July 31, 1914, the German Chancellor telegraphed to the German Ambassador at St. Petersburg as follows:

¹ U. S. Foreign Relations, 1914, Supp., p. 19.

In spite of still pending mediatory negotiations, and although we ourselves have up to the present moment taken no measures for mobilization, Russia has mobilized her entire army and navy; in other words, mobilized against us also. By these Russian measures we have been obliged, for the safeguarding of the empire, to announce that danger of war threatens us, which does not yet mean mobilization. Mobilization, however, must follow unless Russia ceases within twelve hours all warlike measures against us and Austria-Hungary and gives us definite assurance thereof. Kindly communicate this at once to M. Sazonof and wire hour of its communication to him.

At 7.10 p.m., August 1, 1914, the following telegram marked "Important" was delivered to the Russian authorities:

In case the Russian Government gives no satisfactory answer to our demand, will your excellency, at 5 o'clock this afternoon (central European time), kindly hand to it the following declaration:

The Imperial Government has endeavored from the beginning of the crisis to bring it to a peaceful solution. In accordance with a wish expressed to him by His Majesty the Emperor of Russia, His Majesty the Emperor of Germany, in coöperation with England, applied himself to the accomplishment of a mediating rôle toward the cabinets of Vienna and St. Petersburg, when Russia, without awaiting the outcome, proceeded to mobilize her entire land and naval force.

Following this threatening measure, occasioned by no military preparation on the part of Germany, the German Empire found itself confronted by a serious and imminent peril. If the Imperial Government had failed to meet this peril, it would have jeopardized the safety and even the existence of Germany. Consequently, the German Government was obliged to address the Government of the Emperor of all the Russias and insist upon the cessation of all these military measures. Russia having refused to accede to this demand, and having manifested by this refusal that her acts were directed against Germany, I have the honor, by order of my Government, to make known to your excellency the following:

His Majesty the Emperor, my august Sovereign, in the name of the Empire takes up the defiance, and considers himself in a state of war against Russia.

I urgently ask that you wire the hour of arrival of these instructions, and of their carrying out, according to Russian time.

Kindly ask for your passports and hand over protection and business to the American Embassy.

In many other cases the exact time, even to the minute, of beginning war, was made known, as in Germany against France, 6.45 p.m., August 3, 1914; Great Britain against Germany, 11 p.m., August 4, 1914; United States against Germany, 1.18 p.m., April 6, 1917, etc. The exact time when the war came to an end by the Treaty of Versailles was also known for most states with the deposit of ratifications "by Germany on the one side and by three of the Principal Allied and Associated Powers on the other hand" at 4.15 on the afternoon of January 10, 1920. The United States, however, continued the armistice, though complications arose in consequence of the

Joint Congressional Resolution which declared the war at an end on July 2, 1921, and the treaty restoring friendly relations between the United States and Germany was not signed till August 25, 1921, to be effective on ratification, and ratifications were exchanged November 11, 1921, and the treaty itself was proclaimed November 14, 1921.

The World War in the matter of determination of the time of commencement and ending of hostilities had marked a serviceable step forward. Third states knew when neutral obligations and rights succeeded to those of peace, liabilities in matters of insurance and in many other respects were definitely marked in time, and many complications, once common, were removed. The belligerents who had made declarations in the World War had also presented statements of the motivation.

It is true that the observance of the convention providing for a prior declaration did not prevent the World War. It did in some cases, however, delay hostilities and made it possible for third states to know their status and legal relations, because neutral obligations were consequent on declaration.

On May 10, 1933, Paraguay, observing Hague Convention III, 1907, issued a reasoned declaration of war against Bolivia reviewing the acts of Bolivia and also stating that the declaration was made "in order that other states, and especially the neighboring nations, may be able to regulate their relations with the belligerents." In the Argentine declaration of neutrality of May 14, 1933, the preliminary statement was: "The instructions established by the Hague Conventions of July 29, 1899, and October 18, 1907, will be observed in the fulfillment of this neutrality." The neighboring states in their proclamations of neutrality also based their action on named Hague conventions. The Chaco War was declared terminated October 28, 1935. It was thus known when the war between Paraguay and Bolivia began and when it ended. These important facts enabled other states to accommodate their acts to the legal status and to avoid complications which might otherwise arise through uncertainty.

The ancient maxim *pacis sunt servanda*, though often disregarded in earlier times, was again brought forward and polished up after the World War in the hope that agreements solemnly made between states for perpetuity might be respected longer than a brief decade or two. It was thought at Versailles in 1919 that the world was ready for collective security, and many small and new states looked cheerfully to the future and to a permanent court of international justice to adjudicate international differences under the Covenant of the League of Nations, the object of which was "to promote international coöperation and to achieve international peace and security," among other methods by "a scrupulous respect for all treaty obligations."

Though the Treaty of Versailles became effective January 10, 1920, a revolution in Germany was under way within two months, and President Ebert of the German Republic was forced to leave Berlin. International

controversies immediately arose, and early (February 7) in 1921 Switzerland refused permission to armed forces to cross Swiss territory even though these were proceeding to maintain the authority of the League of Nations in the Vilna plebiscite. This disturbed the confidence of some who anticipated the use of a collective force to assure that the Covenant of the League of Nations would be made effective. From lack of dominant authority, the Vilna area changed hands a half dozen times and then remained a disputed area for two years longer. The Saar Basin, on the other hand, for which detailed provision had been made in Section IV of the Treaty of Versailles, became the object of a plebiscite on January 13, 1935, which, under supervision of an international force, was carried through successfully.

It was soon realized that Article 10 of the Covenant of the League of Nations, in which states had seen a guaranty for the security for the territorial status quo of 1920, would not support expectations which, perhaps, should never have been raised. Other proposals having in other forms similar objectives were devised.

The widely heralded Treaty for the Renunciation of War (Pact of Paris), August 27, 1928, in force, July 24, 1929, when read with its preamble, was a pale negative shadow of Article 10 of the Covenant of the League of Nations. Article 10 of the League Covenant provided

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, the Council shall advise upon the means by which this obligation shall be fulfilled.

The Treaty for the Renunciation of War, substituting a unilateral declaration for a multilateral agreement, in its first article provided

The high contracting parties solemnly declare in the names 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 II of this treaty recommends to the signatories observance of treaties to which they were already parties.

The idea had been spread for some years, particularly after the United States entered the World War in 1917, that this was "a war to end war." People of the victorious states were in an optimistic temper in 1920. They signed at Versailles a treaty embodying a form of collective security and cooperation for which the negotiators were not ready but for which they made strong claims. The need of national action in the use of force was contemplated as relatively less important than formerly, and it was expected that Germany would adapt itself to these new arrangements.

On the physical side of state relationships, limitation of armament, ratios in armament, disarmament, and other proposals were later advanced and to some extent made operative.

On the legal side new proposals were also made. The suggestion for the outlawry of war attracted many who did not realize the difficulties in outlawing a status. Others saw hope in a unilateral denunciation of war by a multipartite agreement, and many and varied propositions were brought forward for popular support.

International law should be distinguished from international policy which may change with national parties. International law is a formulation of the international will and supposed to be reasonably stable. It has been amply demonstrated in Europe, Asia, and Africa since 1919 that states are political entities and that, in spite of many international agreements aiming in a formal way to regulate the conduct of states, they still pursue national political ends, and that up to 1938 power politics prevails over peace politics. Some in high places in governments have regarded treaties as convenient statements of current policies to which their successor will not necessarily be bound. President Wilson in his address to the Senate, January 22, 1917, had predicted that such a document as that later called the Treaty of Versailles would "be accepted in humiliation, under duress, at an intolerable sacrifice, and would leave a sting, a resentment, a bitter memory upon which terms of peace would rest, not permanently, but only as upon quicksand."¹

While this prediction has been justified, not all his prophecies have proven equally true. The World War was not a "war to end war" nor can it be said "the business of neutrality is over"; indeed, progress in building up respect for sound principles of international relations is slow.

An international law more than most other law must, in these days, from its very nature, be largely self-enforcing or embody in its operation commensurate advantages to all parties in order to ensure respect for its provisions. So a law relating to economic relations to be effective must in the long run be advantageous to the parties concerned, as in a tariff. A law relating to the conduct of hostilities must especially be of commensurate military advantage to both belligerents, as in the care of wounded in the field. The interests of neutrals and of belligerents in time of war may be opposite, but it may be of capital importance that each know the law and particularly the exact time at which the belligerents may lawfully take hostile action, otherwise conflicts in regard to rights and duties may endanger the relations of belligerents and neutrals themselves.

For a third state to proclaim two or more foreign states to be at war prior to any declaration by these states, and to list other states as neutral, is to introduce new and unfortunate complications into international relations. The opposing parties may still be negotiating and hoping for a satisfactory adjustment, or one party may find in the proclamation of a state of war by the third state justification for the use of force in a more extreme manner against its opponent, and also for exceptional measures against third states,

¹AMERICAN JOURNAL OF INTERNATIONAL LAW, Spl. Supp., Vol. 11 (October, 1917), p. 320.

without assuming the obligations of a belligerent. Other foreign states may be placed under restrictions which should rest upon them only when they are neutrals in consequence of a war instituted and made known by those engaged in lawfully declared war.

That a state may establish and maintain an embargo at any time, and for any reason it may see fit, and take the consequences, is not denied, but such an action should not be proclaimed to be in consequence of war when no foreign state has made known the existence of war. It may be more advantageous for a party not to declare war but to resort to the use of force against a weak state when third states may proclaim the enforcement of restrictions which the party using force might itself otherwise have to impose after making a declaration of war and at a risk of becoming involved with third states.

Proposals have been seriously made in international conferences to penalize personally military personnel carrying out government orders even to the extent of making such persons outlaws and as such liable to punishment in any state whether such state was or was not concerned in the use of force. This military personnel would be at the same time liable to their own government if they did not carry out their orders.

There has always been a tendency to create the impression that any new form of offensive weapon is barbarous and unlawful. This has been the case even from the days of the introduction of gunpowder. It may be said, however, that new weapons of offense have developed as so-called physical civilization has developed. The mind of man has shown a comparable capacity in developing means of defense, though temporary advantages may have followed for the party introducing the new instrument of offense in war.

Physical research and its results have been little concerned with non-physical law, as is shown in the reversals in recent years in what was once proposed as international law for the air, *viz.*, "the air is free." Now there have been formulated rules for use of radio and of aircraft in the time of war, though not all of these rules have been agreed upon internationally.

President Coolidge, in opening the Sixth International Conference of American States, Habana, January 16, 1928, reviewing the history of the American states and their methods of "resolving international differences without resort to force," said,

If these conferences mean anything, they mean the bringing of all our people more definitely and more completely under the reign of law. After all, it is in that direction that we must look with the greatest assurance for human progress. We can make no advance in the realm of economics, we can do nothing for education, we can accomplish but little even in the sphere of religion, until human affairs are brought within the orderly rule of law. The surest refuge of the weak and the oppressed is in the law. It is preeminently the shield of small nations. This is necessarily a long, laborious process, which must broaden out from

precedent to precedent, from the general acceptance of principle to principle.¹

The aspiration for peace was voiced in the pronouncement of President Roosevelt in 1933 of a "good neighbor" policy. Secretary Hull at the opening of the Buenos Aires Conference in 1936 had, among other objectives, enunciated as vitally important for the Western World "a common policy of neutrality" and that "International law should be reestablished, revitalized, and strengthened." On his return, speaking of the work of the Conference, he said, "This welding of inter-American friendship has now become a powerful, positive force for peace throughout the world" (January 13, 1937).

Judging from the past, progress in international relations is of slow development, and international peace, like Heaven, "is not gained by a single bound." Two short steps toward regularizing and clarifying relations between states were taken under the Hague Conventions of 1907 in eliminating contract debts as a cause of war and in requiring a reasoned declaration before commencement of hostilities. These conventions were gradual steps in the right direction toward order under law, and they have been effective, under great provocation to set them aside, while the idealistic and visionary projects for a short cut to peace in half-baked treaties since 1920 have proven, as President Wilson prophesied in 1917, but an international "quicksand."

Chairman REEVES. The discussion of this topic will be led by Albert E. Hindmarsh, Assistant Professor of International Law at the Fletcher School of Law and Diplomacy.

Professor ALBERT E. HINDMARSH. The last remark which Professor Wilson made reminds me that the Japanese are not the first to be troubled by the problem of finding a name for the use of force short of war. The Japanese, however, quite contrary to the general view that they have no sense of humor, have displayed a rather interesting type of humor in locating a name for the events in China. They do not talk about war; they talk about the "jihen." "Jihen" means literally an incidental or unexpected thing. If the subject were not so tragic we might see in that termination something of the strange unrealism which surrounds it.

I can not be certain that my remarks will serve as an effective point of departure. To some extent I have relied upon the assumption that the topic itself is sufficient to enliven debate, because it seems to me it calls, in the final analysis, for an attempt, at least, to distinguish between war *de jure* and the use of force short of war.

For Grotius the definition of war, and the resultant distinction between peace and war, were questions of fact; any "condition of contention by force" was war and there existed no condition of interstate relations intermediate between peace and war. During the nineteenth century, however, statesmen and jurists alike, seeking to justify the use of coercive measures

¹ Report of the Delegates of the United States of America, p. 68.

while at the same time evading the legal onus and moral opprobrium increasingly attached to belligerent status; abandoned the objective approach of Grotius. Today, it is the layman, the "man on the street," who has inherited the view of Grotius, for he asks with evident reproach: If the fact of opposing forces, engaged in deadly combat on land, sea, and in the air, is not war, what is war?

The layman's reproachful challenge, the legal consequences which we associate with war, and the universal condemnation of war—all seem to demand, as of logical necessity, a workable definition of war. Nevertheless, it is doubtful whether any such definition is available. Of the many offered, one group, constituting a majority, stresses the element of "contest" or "armed force"; in practice, however, war *de jure* has frequently preceded the use of armed force and armed force has frequently been employed, even on a vast scale, in the absence of *de jure* war. At best, the "contest" theory identifies a usual accompaniment of war; it seems to answer the question, What is war? It falls short of definition because the usual element, armed force, is in fact neither characteristic nor unique.

Another class of definitions describes war as a condition of interstate relations characterized by certain legal consequences. Such an approach seems futile, for one avowed purpose of definition is precisely to determine when these legal consequences become operative. The predication of war upon the existence of these legal consequences produces this vicious circle: The existence of a state of war depends upon the legal consequences which constitute a state of war. A variation of this "status" theory emphasizes the requirement of "intent" as made manifest by a declaration of war or some other overt act. Here the circle is peculiarly vicious, for it yields the view: States are at war when they intend to be at war. Moreover, since intent can be determined only by acts, the intent test rests wholly upon subjective grounds. True, historically, such a test has been often applied, but the unreality to which it leads is only too apparent; in recent years and at this moment it has served to clothe in legality acts of war, even to the consummation of military conquest, which nullify the moral and legal restraints imposed by the modern world upon disturbers of peace.

It is possible to compound a definition of both the contest and status theories: War is a relation which exists when there may be a properly conducted contest between states. Besides suffering from the contradictions suggested above, such an approach seems to overlook the fact that reprisals have been held to require the application of certain laws of war; that is, reprisals too must be "properly conducted." They are, in fact, a form of contest and they characterize a status or relation between states.

Confronted by consistently vain attempts to secure a workable and acceptable definition of war, one may be tempted to ask whether, after all, a definition is practically necessary. To what purpose do we seek a definition? To provide third states with the means of dating the existence of

neutral rights and duties? On four occasions third states have, in effect, declared themselves neutral in the face of continuous denial of or refusal to admit the existence of *de jure* war by alleged belligerents; such was the action of Great Britain and France in 1861, Great Britain in 1884, the United States in 1902 and again in 1935. In the first three instances there was a sufficient test in the existence of a hostile blockade, and in the last case President Roosevelt offered as evidence merely the fact of hostilities between Italy and Ethiopia. Do these instances not suggest that third states, where there is actual need or a real desire to manifest neutrality, are in a position to interpret the factual situation, to apply objective tests unimpeded by the absence of a precise definition of war?

Do we need a definition as a basis on which to invoke collective action against an aggressor where war is used in prior agreements as a test of aggression? The Committee of Six of the League of Nations did not think so in October, 1935; it noted the facts of invasion and military engagements in Ethiopia and, using as evidence chiefly these acts of war, concluded that Italy and Ethiopia were at war; further, it stated that "it was not necessary that war should have been formally declared for Article 16 of the Covenant to be applicable. . . ." Again, we have a significant collection of post-war treaties, beginning with that between the U.S.S.R. and Turkey, December 17, 1925, in which "military action" and similar tests are used, not only to indicate the fact of aggression, but as a basis of neutrality. The conventions signed at Buenos Aires in December, 1936, use the phrase "war or virtual state of war"; the treaty between Germany and Poland, January, 1934, used the simple criterion of "force."

Do we need a definition to date the changed relationships of the active states? It may be safely assumed that their actions will be determined, not by the application of a formula, but by military exigencies, especially if it is made clear that third states will apply objective tests in any case.

In brief, there are signs that practice has begun to ignore the unrealistic distinction between force and war, between war *de facto* and war *de jure*. The current need is for a more liberal interpretation of the word "war" where it is now employed in those post-war treaties which seek, fundamentally, to eliminate or minimize, not a status, not a theory, but the fact of increasing horror and destruction under any and all names.

Chairman REEVES. The discussion will be continued now from the floor. I want to keep the discussion, if possible, on the question raised by Professor Wilson, and particularly some of the highly controversial questions propounded by Professor Hindmarsh, as to which I am sure there must be some very considerably different points of view as to war conditions, and so on.

Professor HERBERT WRIGHT. Mr. Chairman, there was one point in Professor Wilson's remarks which perhaps needs a little further emphasis, and that is that the Hague Convention No. 3 of 1907, on the opening of

hostilities, makes no distinction between the alleged aggressor and the innocent party with regard to the obligation of making a declaration of war prior to commencing hostilities. It simply says: "The contracting Powers recognize that hostilities between themselves must not commence without a previous and explicit warning," and so on, as he quoted it. The innocent party, therefore, is obliged to make such a declaration, even though the alleged aggressor has failed to do so.

MR. H. MILTON COLVIN. Professor Hindmarsh spoke of force as being the criterion of war. Of course, the Orientals are more familiar with negative force than we are, but it is recognized in the Western world in the form of an economic boycott. You can starve out the nation by economic boycott and the people will die as certainly as if killed with bullets. I only raise the question with Mr. Hindmarsh, if he would care to comment upon whether economic force thus exercised would be war?

PROFESSOR HINDMARSH. I simply point to the deficiencies of the definitions available. Of perhaps 85 or 90 examined, a little more than half seem to be based on the concomitant of armed force. I presume you direct your question to the last part of my remarks in which I suggested perhaps that objective tests should be applied. I do not mean to imply that the objective tests are confined to the firing of a broadside from a battleship. But surely in the last 17 or 18 years none of us, whether layman or otherwise, has failed to recognize the existence of that obvious element of war called force. I do not pretend to define the economic boycott or economic blockade and some finer forms of pressure that have within them the disguised elements of force.

PROFESSOR QUINCY WRIGHT. Mr. Hindmarsh recognizes the distinction between war in the material sense and war in the legal sense, a distinction which has been referred to often in the courts of the United States. In the Prize Cases, you will recall, Justice Nelson declined to take the view of the majority, which was that war in the legal sense existed with President Lincoln's proclamation of blockade. Justice Nelson took the view that war in the legal sense could not begin without an Act of Congress because the Constitution gave to Congress exclusive power to declare war. However, the law of the United States now is that the President can create a state of war in the legal sense in spite of the statement in the Constitution. It is fair to say on a great many occasions he has. For instance, in the case which Professor Wilson referred to, where the Congress antedated the Spanish War to the time when the President declared a blockade in defense against the war Spain had already declared on us. To me the distinction seems an important one. War in the legal sense involves not a question of hostilities as between belligerents but the question of rights with respect to contracts, the question of neutral rights of property at sea, the right of a belligerent to make seizures and condemn property, and a host of situations the legal solution of which depends upon whether or not there is a legal state of war.

It is quite obvious to anyone who studies history that hostilities of more

or less violence are taking place much of the time. I had a careful study made of the use of the armed forces of the United States during its history and found there were 181 distinct cases where the armed forces of the United States had been used for purposes other than the suppression of internal mob violence, although our histories do not record that many wars. These occurred at various times. I think there were as many as 34 years in the 160 years of American history when none of these episodes occurred; but in all of the other 126 years, armed forces were used at some time—perhaps in the Caribbean Sea, perhaps across the Mexican frontier, perhaps fighting Indians, perhaps in operations in China or the Pacific Islands. If in every one of these cases where armed forces are used it is war in the legal sense, we would be very much at war. I do not think it is possible or practicable to adopt the purely objective test and say that whenever soldiers are engaged in hostilities under orders or a naval ship is being used in active operations, that there is war in the legal sense. We would have too many of them, and often the cases are so unimportant that the tremendous legal consequences which attach to the legal state of war ought not to apply. Thus the element of intention has to enter into the conception of war in the legal sense.

It is usually said that some state has to manifest the intention to make war by a declaration or other overt act before war in the legal sense exists. Professor Hindmarsh seemed to think that such an intention was not a practical thing to determine. As you recall, an English judge once said a state of mind is a question of fact, the same as any other fact, to be determined by appropriate evidence. It seems to me it has not proved impracticable to determine that a state has manifested an intention to make war. Of course, if it does it by explicit declaration, the evidence is clear. If it does it by ultimatum with a time limit, that also is easy. It may manifest its intention by other methods. In fact, if one studies the report of the Council committees which dealt with the Ethiopian war, he will find that the Committee attached great importance to the expressions of intention on the part of the Italian Government and the Italian High Commissioner in East Africa. The Committee concluded, as Professor Hindmarsh pointed out, that these circumstances constituted "resort to war" in the sense of Article 16 of the Covenant, even though there had been no formal declaration.

Recent treaties which have attempted to prevent war have not been interested in preventing the legal status of war. Their interest has been to prevent the losses of life and property which attend the use of armed forces. That has brought about confusion, because in the League of Nations Covenant the phrase used in Articles 12, 13 and 15 is "resort to war." There has been a great deal of literature on the question, whether that phrase "resort to war" applies whenever hostilities occur or only when there is a legal state of war. Of course, one is in a vicious circle if he insists it applies only to a legal state of war, because the effect of the application of Article 16 of the

Covenant would be to abolish the legal state of war. A legal state of war implies a situation where both states are equal, where there is no legal distinction between the aggressor and the victim.

The intention of the Covenant was to abolish that situation whenever Article 16 is applicable by distinguishing between the aggressor and the victim. Thus, under the system of Article 16 you can not have war in the legal sense at all. So jurists have been confronted by the dilemma, that before Article 16 can be put into operation there must be a legal state of war, but if Article 16 is in operation there can't be a legal state of war. There has been a large amount of literature about that, but I don't think the tangle has been entirely solved. Apparently the conclusion, suggested by the Manchurian case, the Chaco case, and the Ethiopian case, is that Article 16 goes into effect when and only when either party manifests the intention to create a state of war, but this intention should be frustrated by application of the Covenant which does not permit the members to recognize a state of war in such circumstances.

I merely wish to emphasize the fact that I think that in any legal consideration of this problem we must distinguish carefully between war in the legal sense and war in the material sense. War in the legal sense is something quite apart from the use of armed force. It is the name given to a situation where the normal rights and duties of states are converted into the extraordinary rights and duties of belligerents or neutrals. The determination of the existence of that intention is a question of evidence. On the other hand, the existence of war in the material sense is something to be judged by evidence not of intentions, but of the activities of military forces in the field. The two may meet because the scale and objectives of military operations may give evidence of an intention to create a state of war and even where the intention is clear, states may be bound by treaties not to recognize "a state of war."

Dr. KUNZ. Of course it is impossible in a very short time to attack such a vast problem. But I would like to say just a few words. First, in my opinion there must be a distinction in a procedural convention whether it creates only a certain procedure, or whether it makes the act void. For instance, the Third Hague Convention of 1907 prescribes for the signatories of this convention that they make a reasoned declaration of war. If a state, even a party to this convention, does not declare war, it commits a violation of the convention. But the state of war, nevertheless, remains war in the sense of international law, producing rights and duties between the belligerents, and between belligerents and neutrals. What the Covenant of the League creates, is a certain procedure which must be followed. Therefore, a state which resorts to war in violation of the Covenant, of course, is guilty of a breach of the Covenant; but, nevertheless, it remains a war. The Covenant creates a distinction between legal and illegal wars, but not between wars and non-wars.

Our problem is really, first of all, the distinction between war and non-war; and within war we have the further distinction between declared war and undeclared war. This problem, of course, existed long prior to the World War and the League of Nations. It was the problem of the distinction between hostilities or armed reprisals and war. But this problem became particularly acute; for if a legal treaty, like the Kellogg Pact or the League of Nations Covenant, uses the word "war," it must be taken as a technical expression in the sense of international law. International lawyers are not speaking the layman's language. Of course, a layman could also say a whale is a fish. But that doesn't prevent the scientific man from saying it is not. There is a sharp distinction between war and non-war.

States or foreign offices have at once seized the state of the law in order to get around the League of Nations Covenant and in order to get around the Kellogg Pact, because the states were willing only to renounce war. But even under the Kellogg Pact a war which was started, be it a declared or an undeclared war, nevertheless remains war, only it is an illegal war. It is a war begun with a breach of the treaty. The Kellogg Pact does not outlaw war. It makes war only under certain conditions violative of the Kellogg Pact. This positive law can not be supplemented by jurists, because the states have to determine what the violation of international law is. And the states were not prepared in the League of Nations Covenant and Kellogg Pact cases to outlaw the use of force, because if they were prepared, they would have done so. I would like to direct your attention to the fact that the difference between war in the sense of international law and use of force is well known to the foreign offices. May I quote the Second Hague Convention of 1907 which forbids the recourse to force for the collection of debts. Therefore, the difference is well known, at least since 1907, to practical statesmen. And, again in 1932, the great Powers concluded, although bound *inter se* by the Kellogg Pact, the No Force Pact at Geneva.

Now, a second remark I would like to make is that a clear distinction must be drawn between general international law and the particular international law created by treaties. For instance, I agree perfectly that in the Ethiopian case the League of Nations members had a different legal position than that of the non-members; for instance, the United States.

And that brings me to a third point. I would quote here an article by Professor Wilson in the AMERICAN JOURNAL OF INTERNATIONAL LAW, in which he said, "What would have been the position of the United States declaring by proclamation of the President that there existed a state of war between Italy and Ethiopia if two days later the League of Nations had not taken the position it took?" But I answer that the President declared only a state of war "within the meaning of the Senate Joint Resolution." War in the sense of the Senate Joint Resolution may not necessarily be war in the sense of international law.

May I say a word about neutrality? Every international lawyer will

agree with me that the United States cannot be neutral as to Spain at the present time in the sense of international law, because, if there be a civil war, neutrality by ourselves necessarily presupposes the recognition of the insurgents as belligerents; which we have not done. Therefore, the neutrality which we apply under the Joint Resolution of 1937 or the Neutrality Act of 1937 is not necessarily the same thing as neutrality in the sense of international law; it is only neutrality in the sense of the American Neutrality Act of 1937 which, therefore, as you see, must not necessarily be the same thing.

Mr. HERBERT S. LITTLE. Mr. Chairman, I want to address myself for just a moment to the thoughts expressed by Mr. Wright with reference to the intention of Italy. He did not finish the quotation from the English judge, who said that the condition of a man's mind is as much a state of fact as the condition of his indigestion. It would indeed be just as difficult for us to determine their intention as to determine the condition of the digestion of a Hitler, a Mussolini or the Rulers of Japan.

The intention test makes it altogether too easy for a nation which is attempting to avoid a treaty obligation to masquerade its real objectives in its own self-serving statements of purpose. It is too subjective. It seems to me if we are to attempt to work out a satisfactory solution of this problem, we must adopt some objective tests, as Professor Hindmarsh has indicated.

I would like to suggest, in the first place, that the deliberations of the Hague Conference of 1907 should disillusion us somewhat as to the value of the declaration of war, either as a method of warning a country that it is about to be invaded or as a method of making war more humane. You will remember that as to the first article of the Convention Relating to Opening of Hostilities there was a debate as to whether 24 hours would be sufficient for a belligerent. During the debate, the pious wish was expressed by a Russian general that this time limit, though insufficient, would be a precedent and that in later days perhaps a greater length of time would be provided, so that disarmament would be a practical possibility. Not only that, but the 48-hour notice to neutrals was finally given up without a great deal of debate.

Furthermore, I think we must realize that the attempt at that time to require a reasoned declaration of war was not very constructive because a statement of a reason in such a declaration would be merely a self-serving declaration by a country as to its own intention. It would not be very valuable from an objective point of view.

May I suggest, in conclusion, that in recent centuries the courts have gotten off the tracks laid down by Grotius by failing to look upon war as a juridical function. They have forgotten the *bellum justum*. They have forgotten that at least as originally conceived by Grotius the *bellum justum* served a useful function in the structure of international law as a coercive measure, since the very concept of law is that of coercion. Coercion is present in municipal law and it also has to be in international law.

Until such time as an adequate system of collective security is established, it seems to me to be necessary, although unfortunately so, to regard war as lawful in the event it is the only redress of a state whose rights have been violated. In this way war would only be recognized as legal if it performed a juridical function. Actual warfare waged by aggressor nations would not be legal merely because not declared. If we limit war to such a function, then as the German legal philosopher Kelsen has pointed out, we get away from the notion that all belligerent rights spring, as Mr. Royse said this afternoon, from the practices of war and not from the concepts of international law.

I say, therefore, that the belligerent rights of any state should not spring from war itself but from the right to wage war, which is in harmony with the original rules laid down by Grotius. It is only a short step from this position to the eventual doctrine of collective security in an international community.

If we read the decisions of courts, and particularly the American and English decisions, we find that there is no longer any reasoned distinction between wars which were lawfully waged and those unlawfully carried on. The courts confine themselves to discussions of the question "Does war exist?" whether declared or undeclared. Unfortunately, the law has become buried under the morass of what Roscoe Pound used to refer to as the "jurisprudence of conceptions." If we can rid ourselves of the unrealistic fictions which have thus developed in the law, perhaps we can again limit war to its proper function until such time as the nations can agree upon a substitute.

Chairman REEVES. We must turn now, having due regard to the division of time and the rights of the reader of the following paper and those who care to participate in the discussion, to the second paper of the evening, the subject of which is "Responsibility for Damages to Persons and Property of Aliens in Undeclared War." This topic will be discussed in the principal paper by Professor Clyde Eagleton, of New York University.

RESPONSIBILITY FOR DAMAGES TO PERSONS AND PROPERTY OF ALIENS IN UNDECLARED WAR

BY CLYDE EAGLETON

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The subject assigned to me refers to "undeclared war"; but I take it that those who worded it had in mind something wider than this—specifically, such a situation as exists in China today. A state of war, whether declared or undeclared, is one thing; a situation of conflict which is not war is another thing. The necessity of distinguishing between these two situations thus complicated my problem from the beginning, though it has proven to be not so embarrassing as I had at first anticipated. We are dealing also with

the situation of aliens in belligerent territory, and this raises a question as to the belligerent to which the claim should properly be addressed.

In the building of international law, neutrals have done much more to protect their rights upon sea than upon land. In the Preamble to the Hague Convention V of 1907, the signatories are "desirous of defining the meaning of the term 'neutral,' pending the possibility of settling, in its entirety, the position of neutral individuals in their relations with the belligerents"; and the German delegation at this conference attempted to secure a statement of the law concerning the position of neutrals within the territory of war-making states.¹ Such a law has never been made; and we must turn to other principles of the law of nations for the answer to this question. I found an article in the JOURNAL of this Society, written in 1915 by Mr. E. M. Borchard, in which he said:

both in international and municipal law there has been a marked and growing tendency to relieve individuals and their property from the losses incident to war, and to cast the burden upon the State.

In the course of the article he establishes the increasing extent to which indemnity has been provided for individuals, either by law or by grace, in both municipal and international fields, and he concludes:

The growing tendency to impose upon belligerents and neutrals a strict compliance with the rules of war in the interests of private property, under the penalty of pecuniary liability, and to regard war as a national disaster, the burdens of which should be distributed equally over the whole nation, should not be permitted to be interrupted or impaired.²

This sentence from Mr. Borchard may be regarded as the keynote for the most of this paper. It was stated in broader terms by the Abbé Grégoire in 1793: "Les peuples doivent en paix se faire le plus de bien et en guerre le moins de mal possible."³

According to Article 22 of the United States Instructions to Armies in the Field, "The principle has been more and more acknowledged that the unarmed citizen is to be spared in person and property as much as the exigencies of war will permit." Likewise, the Regulations annexed to the Hague Convention of 1899 with respect to the Laws and Customs of War on Land,

¹ See J. L. Kunz, *Kriegsrecht und Neutralitätsrecht* (Wien, 1935), p. 233.

² "Private Pecuniary Claims Arising out of War," E. M. Borchard, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 9 (1915), p. 306. "Die Unterscheidung zwischen bewaffneter Macht und Zivilbevölkerung unter der Schutz der letzteren in ihrer Person und in ihrem Eigentum im Landkrieg, der wichtigste Fortschritt gegenüber dem Kriegsrecht früherer Zeiten, in denen auch die Zivilbevölkerung mit Leib, Leben und Vermögen dem Feind verfallen war, getötet, versklavt, fortgeschleppt, misshandelt, ihres Eigentums beraubt werden durfte, bildet die auch von der anglo-amerikanischen Kriegsauffassung voll anerkannte fundamentale Basis des ganzen Kriegsrechts und ist auch heute das geltende positive Recht." Kunz, *op. cit.*, p. 75.

³ Quoted in Norman Bentwich, *The Law of Private Property in War* (London, 1907), p. 12.

a convention which was ratified by 25 states and adhered to by 21 others, asserts in Article 23 g:

It is especially forbidden . . .

To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

This article was renewed in the Convention of 1907, and Article 3, added to that convention, said:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

These principles of international law, now well established in practice, mark a long progress from the days when the property, and even the person, of private individuals were regarded as legitimate booty of war. It is now clearly recognized that the mere existence of war does not give unlimited right to take or destroy the property of private individuals; such seizure or destruction must bear a proven relation to the actual needs of fighting.¹ The belligerent may requisition, but he must pay for what he takes; he may destroy or damage, but only, as Dr. Hyde puts it in his usual carefully chosen words, that property "which, unless seized or destroyed, presents an obstacle to a military operation or jeopardizes the safety of his troops."² If the belligerent does not observe these principles, he may be held responsible in international law, and may be called upon to make reparation.

In the application of these rules, I have been unable to discover a differentiation between the property of aliens and that of nationals, though of course, international law protects the alien whereas the national is at the mercy of his own state; nor have I been able to discover that any differentiation is made between types of hostilities, whether formal war, civil war or insurgency, or just plain hostilities or fighting. "It is rather immaterial," asserts the Japanese writer, Shinobu, with regard to the conflict at Shanghai in 1932, "from a practical point of view, whether a given war is a legal one, or simply a *de facto* war. The essential point is that, once hostilities are commenced, the belligerents should adhere morally, if not legally, to the principle of acting in consistent compliance with the requirements of the rules of war and not ignore them on account of the war's being non-legal."³ The princi-

¹ "Das Privateigentum ist im Landkrieg prinzipiell unverletzlich; aber diese prinzipielle Unverletzlichkeit ist keineswegs eine absolute. Eingriffe sind erlaubt, sowohl aus Gründen militärischer Nothwendigkeit, wie auf Grund besonderer, dem Kriegführenden völkerrechtlich zustehender Ermächtigungen; endlich kommen noch Eingriffe in das Privateigentum als *Repressalie* in Betracht." Kunz, *op. cit.*, p. 76.

² C. C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (Boston, 1922), II, p. 306.

³ J. Shinobu, *International Law in the Shanghai Conflict* (Maruzen, Tokyo, 1933), p. 58; see also p. 209. "The measure of private rights in war and the extent to which they are subject to belligerent rights depend on the existence of a state of war, and not on a declara-

ple upon which such claims are based is respect for the individual; whether he be a national or not, or whether it be war or not. It would be impossible, within my time limits, to classify the rules and cases, but I offer a few illustrations.

In the case of *Putnegat's Heirs*, under the Convention with Mexico of July 4, 1868, Commissioner Wadsworth said:

It is the seizure of private property for the public use, and its loss or destruction while so employed, whether by the enemy or by the government, that entitles the owner to payment.¹

During our own Civil War, General McClellan occupied the house of a British subject, John Turner, as a hospital, and burned the house in the face of the approaching enemy; damages were allowed to Turner.² The Spanish Treaty Claims Commission allowed compensation where property was used or consumed by the Spanish forces for their benefit, "the theory being that wherever it appeared that the Spanish army had been advantaged by the use or consumption of private property, the property should be paid for."³ The German-American Mixed Claims Commission awarded damages to Mrs. Mathilde Baker, an American national, for the destruction by shellfire of her property in France, after it had been occupied by German soldiers.⁴ And on May 20, 1919, during the invasion of Hungarian Bolsheviks into Czechoslovakia, the property of Michael Szarnovsky, apparently an American citizen, was requisitioned by the Czechoslovak Army.

tion of war or a recognition of belligerency. The indicia of a state of war may be said to be an armed contest between two states or parts of the same state conducted by regularly organized military bodies and having an avowed political object in view." Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, 1925), p. 100.

¹ J. B. Moore, *International Arbitrations* (Washington, 1898), IV, p. 3720. Many other such cases, involving or not involving responsibility, are to be found in this volume. The American Chilean Claims Commission under the Treaty of August 7, 1892, laid down the following principles in Shrigley's Case: "(a) Neutral property taken for the use or service of armies by officers or functionaries thereunto authorized gives a right to the owner of the property to demand compensation from the government exercising such authority. (b) Neutral property destroyed or taken by soldiers of a belligerent with authorization, or in presence of their officers or commanders, gives a right to compensation, whenever the fact can be proved that said officers or commanders had the means of preventing the outrage and did not make the necessary efforts to prevent it. (c) Acts of simple marauding or pillage practised by soldiers absent from their regiments and from the close vigilance of their commanders do not affect the responsibility of governments. Such acts are considered as common crimes, subject only to ordinary penalties." *Ibid.*, p. 3712.

² *Ibid.*, pp. 3684-3685; see also M. Whiteman, *Damages in International Law* (Washington, Department of State Publication No. 961, 1937), II, p. 1431.

³ Whiteman, *op. cit.*, II, p. 1431. See, on this topic, Borchard, *op. cit.*, p. 104.

⁴ Mixed Claims Commission, United States and Germany, *Administrative Decisions and Opinions of a General Nature* (Washington, 1925), p. 685; quoted in Whiteman, *op. cit.*, p. 1423.

Czechoslovakia paid him for actual loss, refusing his demand for expected gain.¹

These are all cases in which a neutral was awarded damages for losses suffered within the belligerent area; and they occurred in various types of hostilities—revolution and civil war, formal war, and invasion not regarded as war. They, and many other such cases, rest upon the principle above affirmed: that where a belligerent derives advantage from the taking or using or destroying of private property, this property must be paid for. This principle covers requisitions, of course; it includes also the taking or using of property in advance of actual fighting, to be used for shelter or other such purpose; and such property, it has been held by various tribunals (though not by all) must be paid for, even though destroyed by the shells of the enemy, since it was the use of the property for shelter which caused firing to be directed against it.² The precedents are not clear as to the occupation of property during actual fighting, with resultant damage; but it is not unreasonable to maintain, if reparation is based upon the advantage to the belligerent and the loss to the individual, that reparation should be made by the belligerent for the seizure and use of property with consequent damage, even in the path of actual fighting, since its use has still been to the advantage of the belligerent and to the loss of the individual. The steady growth of the rule protecting private property and the corresponding growth of the responsibility of the belligerent afford ground for hoping that tribunals will now award damages wherever a belligerent, either for offense or defense, injures neutral property through its use for his own advantage in his conduct of fighting.

We have been talking of requisition, seizure, or use of private property,

¹ *Whiteman, op. cit.*, p. 919. The Congress of the United States, in 1937, authorized payment (Pub. No. 74, 75th Cong., 1st Sess.) of the claims of certain citizens of Nicaragua arising out of the military occupation of Nicaragua by United States forces in 1921 and later.

² "With regard to the first claim, the umpire is of opinion that the farm was occupied by Spain for military use without the owner's consent, express or implied; that it was situated in a district permanently occupied by the Spanish forces; that it is usual in such cases to give compensation. . . ." *Wilson's Case, Moore, Arbitrations, IV*, p. 3675.

"General Jauregin was doubtless justified in self-defense in taking refuge in Bowen's house; but it was certainly his doing so which brought Carvajal's attack upon the house during which the claimant was wounded. The umpire therefore considers that he is entitled to compensation on both these accounts" [damage to house, and personal wounds]. *Bowen's Case, ibid.*, p. 3721.

"General Corona had undoubtedly a right to appropriate Elliott's property, if necessary for the defense of the country against the French invaders, or to devastate it, if the war required it. The demands of war are even more absolute than those to save one's life, and, nothing appearing to the contrary, he was obliged to do it. But in all such cases it is expected that the government will repay for the injuries done as much as may be in its power, so that claimant seems to be fairly entitled to compensation. . . ." *Elliott's Case, ibid.*, p. 3720. See also *Willett's Case, ibid.*, p. 3743; and the case of *Mrs. Mathilde Baker*, above cited (note 4, p. 258, *supra*).

and in these cases reparation must usually be made. The "imperious necessities of war" govern other situations. Just what this phrase means is most uncertain, though it seems to be true that responsibility may nowadays be assessed for actions which were formerly regarded as imperative. The Venezuelan Claims Commission of 1903

accepted the view that a government is not liable for damages suffered by neutrals owing to the imperious necessity of military operations within the radius of operations of war or as a consequence of battle, incidentally caused by the means of destruction employed in the war which are not disapproved by the law of nations.¹

Damage done by shellfire, when not wanton or misdirected negligently, brings no liability;² but for other types of injury, even within the area of actual combat, claims have often been allowed, though sometimes disallowed.³ Damages have been awarded where property was injured—such as growing crops, buildings, forests, et cetera—needlessly or purposely; or where insufficient diligence was displayed in protecting such property. The Spanish Treaty Claims Commission, in the case of the Central Teresa Sugar Co., allowed damages "caused by the neglect and failure of the Spanish authorities in the island of Cuba to afford due protection to claimant's property, accompanied by discrimination practiced against it as an American citizen."⁴ During the Revolution of 1911–12 in China, Imperial troops set fire to the city of Hankow in order to dislodge rebel forces; compensation was paid for the consequent losses to the China and Java Export Co., a New Jersey corporation.⁵ Again, the Nationalist Government of China in 1927 paid for the losses occasioned to Americans in Nanking, saying:

In accordance with the well accepted principles of International Law, the Nationalist Government undertake to make compensation in full for

¹ Whiteman, *op. cit.*, p. 1284; see also p. 1421; Borchard, *op. cit.*, p. 103.

² "The United States cannot be responsible for any injury caused by the shells thrown in the attacks upon Vicksburg." Cleworth's Case, Moore, Arb., IV, p. 3675.

³ Awards were made in the case of Barrington (crops, fences, etc.), Moore, Arb., IV, p. 3674; Chouveau (cotton destroyed), *ibid.*, p. 3705; Bertrand, *ibid.*; Labrot (forest cut down to give range for guns), *ibid.*, p. 3706; Hollenbeck (hotel burned for defense purposes), *ibid.*, p. 3716.

Responsibility was denied in Shattuck's Case (crops), Moore, Arb., IV, p. 3668; in Wilson's Case (see note 2, p. 260, *supra*), in so far as destruction was due to military operations; for the burning of Columbia by General Sherman, *ibid.*, p. 3676; in Sterling's Case (crops and other property), *ibid.*, p. 3686; in Rigg's Case, *ibid.*, p. 3668; and in the case of Blumenkron, p. 3669; see also Whiteman, *op. cit.*, II, p. 1481 *et seq.*

"Neutral's property in a belligerent territory shares the fate of war the same as that of subjects or citizens. If injured or destroyed in battle or siege, in the absence of circumstances evincing wantonness or culpable neglect on the part of the government whose jurisdiction it is, the public law furnished the owner no redress against such government." Castel's Case, Moore, Arbitrations, IV, p. 3710.

"The destruction of private property in war where no military end is served is illegitimate." Borchard, *op. cit.*, p. 261.

⁴ Whiteman, *op. cit.*, II, p. 1429.

⁵ *Ibid.*, p. 944.

all personal injuries and material damages done to the American Consulate and its officials and to American residents and their property in Nanking.¹

In the past, plundering and damages caused by irresponsible soldiers and marauders have been excused;² it is believed that tribunals of today would not hold that there is no liability in such cases. The United States Rules for Land Warfare of 1914 (§ 334) forbid devastation: "As an end in itself, as a separate measure of war, devastation is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army."³

Pillage is formally prohibited by Article 47 of Hague Convention IV of 1907; and it is not to be believed that pillage and rapine would be excused in the case of soldiers not accompanied by officers, by an international tribunal of today. This view was strongly and eloquently put by Halleck, writing as far back as 1861:

We do not, at the present day, often hear, when a town is carried by assault, that the garrison is put to the sword in cold blood, on the plea that they have no right to quarter. Such things are no longer approved or countenanced by civilized nations. But we sometimes hear of a captured town being sacked, and the houses of the inhabitants being plundered, on the plea that it was impossible for the general to restrain his soldiery in the confusion and excitement of storming the place; and under that softer name of plunder it has sometimes been attempted to veil 'all crimes which man, in his worst excesses, can commit; horrors so atrocious that their very atrocity preserves them from our full execration, because it makes it impossible to describe them.' It is true that soldiers sometimes commit excesses which their officers cannot prevent; but, in general, a commanding officer is responsible for the acts of those under his orders. Unless he can control his soldiers, he is unfit to command them.⁴

¹ Press Release, American Consulate General, Shanghai, April 3, 1928. See also Whiteman, *op. cit.*, pp. 962-963.

² "The umpire is of opinion that when in time of war and in the enemy's country straggling soldiers and marauders go about robbing and destroying property it cannot be considered that it is an injury done by authorities of the country whose troops are invading an enemy's country." Buentello's Case, Moore, *Arb.*, IV, p. 3670 (Convention of 1868 for Mexico); see also *ibid.*, the cases of Dresch (p. 3669), Antrey (p. 3672), Giles (p. 3704), and Shrigley (quoted in note 1, p. 259, *supra*). See Borchard, *op. cit.*, § 103.

Contra: "It has been alleged that in the above mentioned instance the sacking was done by released prisoners, and by a mob belonging to the population of the town; but, if that were so, it was the military force commanded by officers who put it in the power of convicts and incited the mob to assist them in their acts of violence and plunder." Jeannotat's Case, Moore, *Arb.*, IV, p. 3674 (Convention of 1868 with Mexico). See also the cases of Brooks (p. 3672), and DuBois (p. 3712).

³ See Hyde, II, p. 308; Hall (8th ed., Oxford, 1924), § 186; Kunz, *op. cit.*, p. 83: "Unbedingt verboten ist die Plünderung Städte oder Ansiedlungen dürfen, selbst wenn sie in Sturm genommen werden, nicht der Plünderung preisgegeben werden, ein sehr bedeutender Fortschritt gegen die Kriegspraxis früherer Zeiten"; J. W. Garner, *International Law and the World War* (London, 1920), I, § 209; Borchard, *op. cit.*, p. 248.

⁴ Quoted in Moore, *Digest*, VI, pp. 918-919.

Accordingly, the shocking excesses of the Japanese army during the recent occupation of Nanking cannot be excused on the ground that they were acts of irresponsible soldiers; and it is to the credit of the Japanese Government that it has accepted responsibility for their crimes. A Japanese note of February 12 says: "As regards compensation for loss and damage, it is the intention of the Government to let such matters be settled as far as possible on the spot, and for this purpose they have been maintaining intimate contact with the American authorities there."¹ As I said earlier, the same rules of responsibility as for formal war seem to be accepted for civil or for "undeclared" war.

The law regarding aerial bombardment is somewhat uncertain today: the rules proposed by the Commission of Jurists upon the Revision of the Rules of Warfare which met at The Hague in 1922-23 perhaps reflect the greatest amount of authority. Their Report was signed by representatives of the United States, Great Britain, France, Italy, Japan, and The Netherlands. Article 22 of this Report reads:

Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property, not of a military character, or of injuring non-combatants, is prohibited.²

In the comment accompanying this article, the authors say: "The conscience of mankind revolts against this form of making war in places outside the actual theater of military operations, and the feeling is universal that limitations must be imposed. . . . No difficulty was found in reaching an agreement that there are certain purposes for which aerial bombardment is inadmissible." At this meeting, the Japanese delegate advocated "a general prohibition of aerial bombardment of towns and villages outside of the immediate area of military operations, whatever the nature of the object to be attacked."

There can be little doubt of the responsibility of Japan for the bombing of the British Ambassador, and for the sinking of the *Panay*; and it is again to the credit of Japan that she has accepted responsibility and, in the case of the *Panay*, has paid over two millions of dollars in compensation of the injuries there inflicted.³ All the more would the bombardment of historic monuments, hospitals, missions, and schools be prohibited. The difficulty

¹ Department of State, Press Release, Feb. 19, 1938.

² AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 32 (1938), Supp., p. 23. See also Art. 25 of Hague Convention IV of 1907; P. W. Williams, "Legitimate Targets in Aerial Bombardment," AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 23 (1929), pp. 570-581; Spaight, *Air Power and War Rights* (2nd ed., London, 1933), pp. 18, 48, 238.

Shinobu says that these rules, like the unratified Declaration of London, "though no more than a book-law, should equally be taken as standard principles in regulating war in the air for the present and future." *Op. cit.*, p. 170.

³ New York Times, April 19, 1938. According to Shinobu, Japan apologized and accepted responsibility for the accidental bombing of the Chinese Yung-An mill, outside the field of conflict at Shanghai, in 1932. *Op. cit.*, pp. 120-129.

in these cases, of course, lies in establishing that the buildings upon which bombs were dropped were not being used for military purposes, or close to military objectives. Where it can be shown that aerial bombardment has damaged neutral property in violation of the above rules, it is believed that reparation should be made. Certainly recent examples of such bombardment, as for example at Barcelona, have stimulated the "conscience of mankind" in support of tribunals which may award such reparation.

I have said that the above rules apply to the property of neutrals in belligerent territory, and that they are applied for every type of hostilities, whether war, declared or undeclared, or civil war or insurgency. The principle involved is that of the protection of private property; and the wording of the Hague Convention, above quoted, makes it reasonable to say that the burden of proof is upon the belligerent to show that his seizure or destruction of private property was imperiously demanded by the necessities of war. This principle of responsibility of a state for injury to private property is reinforced, we may note in passing, from another direction. States nowadays frequently make provision for the reimbursement of their own citizens for losses incurred as a result of war operations, on the ground of communal responsibility or national solidarity. This payment may be made from the national treasury, or from indemnity collected from a defeated enemy; in either case it is clearly a voluntary act, not obligated by international law. But the question then arises: If a state voluntarily repairs the injuries of its own citizens, must it not do the same for neutrals in its territory? This was the chief contention made by the Swiss Government in its interesting fight to secure indemnification for the losses suffered by its citizens in various belligerent nations during the World War.¹ While the Swiss have thus far not been successful enough with their effort to establish a valuable precedent, a strong argument has been put forth to show that neutrals are entitled to share in the reparation voluntarily made by a state to its own citizens. In any case, that states should thus make good to their own citizens, and sometimes to neutrals also, is further recognition of the principle, steadily strengthened throughout the centuries, that private property must be protected against the hazards of war.

We come now to the question: Who is to be held responsible? A Japanese spokesman, toward the beginning of the present conflict in China, intimated that under present rules of international law, China must be responsible for all injuries suffered in her territory, no matter by whom committed. In behalf of this position, Japan can cite some precedents from

¹ A. de La Pradelle, *Causes Célèbres du Droit des Gens. Les Suisses et les Dommages de Guerre* (Paris, 1931).

"A state must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances." Basis of Discussion No. 22(b), League of Nations, Conference for the Codification of International Law, Basis of Discussion, III (1929, V.3).

the past—precedents which I believe are now overruled. When the United States, in 1854, bombarded Greytown in an effort to reduce the lawlessness in that place, the French Government advanced claims for the destruction of the property of French subjects as a result of the bombardment. To this claim Secretary of State Marcy replied:

If there were persons in Greytown when it was bombarded who did not belong to the political organization there established, and who suffered in consequence of that bombardment, they can only resort for indemnity, if entitled to it, to that community. It was to that community they committed their persons and property, and by receiving them within its jurisdiction it assumed the obligation of protecting them. Nothing can be more clearly established than the principle that a foreigner domiciled in a country can only look to that country for the protection he is entitled to receive while in its territory, and that if he sustains injury for the want of that protection, the country of his domicile must indemnify him.¹

Secretary Marcy was able to cite a number of previous precedents for this position;² it was accepted by Lord Palmerston and used by him to defend England; and there are other precedents, such as that of the *Brig General Armstrong*.

This argument results from the theory of territorial sovereignty: because of its exclusive control within its own territory, a state is usually held responsible for injuries committed within that territory. But, as I have said in an earlier work, responsibility depends upon control; "it is necessary to consider the possibility of the interjection of an outside power, limiting in some respects the internal freedom of action which a state may possess."³

¹ Mr. Marcy, Secretary of State, to Count Sartiges, French Minister, Feb. 26, 1857, Moore, Digest, VI, p. 928. Lord Palmerston in 1857 accepted this statement, and used it to excuse the British Government from responsibility for injuries occasioned at Sebastopol: "Those who go and settle in a foreign country must abide the chances which befall that country; and if they have any claim, it must be upon the government of the country in which they reside; but they certainly can have no claim whatever upon the government which thinks right to commit acts of hostility against that state." *Ibid.*, p. 939.

In the case of the *Brig General Armstrong*, the United States addressed to Portugal a claim based upon the failure of Portugal to restrain a British attack upon an American vessel within the territorial waters of Portugal at Fayal, though it was clearly impossible for the Portuguese at that point to have prevented the superior British naval strength from the attack. Moore, International Arbitrations, II, p. 1071.

² The King of the Two Sicilies made compensation to citizens of the United States for the wrongful acts of Murat, Moore, Digest, I, p. 249; the Belgian Government was called upon by the United States to pay damages for injuries resulting from the Dutch bombardment of Antwerp in 1830, *ibid.*, VI, pp. 942-948; Great Britain demanded indemnity from Tuscany for damages to a British citizen occasioned by Austria in 1852, *ibid.*, VI, p. 929. Other cases cited by Marcy were the British bombardment of Canton, and the British bombardment of Copenhagen in 1807. See also Moore, Digest, I, p. 249 *et seq.*

³ C. Eagleton, The Responsibility of States in International Law (New York, 1928), p. 27; also at p. 28: "Where capacity to execute does not attach, responsibility should not be imposed." See Q. Wright, "Responsibility for Losses at Shanghai," AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 26 (1932), pp. 586-590.

This position is supported by various authorities. The *Institut de Droit International*, at its 1927 meeting, proposed the rule (Article 7) that a state is not responsible in case of riot, insurrection, or civil war, if it has used normal due diligence and has given to aliens the same protection as to nationals.¹ The Preparatory Committee for the Conference for the Codification of International Law, which met at The Hague in 1930, made a similar proposal.² And finally, I quote Article 14 of the draft code on Responsibility of States prepared by the Harvard Research in International Law:

A State is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another State, only if it has failed to use due diligence to prevent such injury.³

Theory thus denies the claim that the territorial state must always be responsible for whatever happens within its territory; and, in spite of the precedents above quoted, numerous cases support theory. As far back as the Commission on the French Indemnity of 1831, France was held liable for the seizure of American vessels in Holland;⁴ and the United States-Peru Commission of 1841 dismissed a claim against Peru on the ground that "the injuries complained of were committed by the *Spanish authorities in Callao*."⁵ The United States and Great Britain were held to be liable for damages to Germans as a result of their intervention in Samoa in 1899.⁶ For damages done to a British subject, Philip Walker, during the American attack upon Vera Cruz in 1914, the United States was willing to make reparation, though with the usual statement that it was an act of grace.⁷ Great Britain and France reimbursed an American college in Turkey for its occupation during the World War; they also paid for the destruction in Rumania of property of the Standard Oil Company.⁸ In 19 cases of damage done to American property as a result of direct military action by Japanese troops in Shanghai in 1932, the Japanese Government paid damages, though with

¹ *Annuaire de l'Institut de Droit International. Session de Lausanne* (Bruxelles, 1927), p. 332.

² League of Nations, Conference for the Codification of International Law, Bases of Discussion, III, Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners (1929, V.3), Nos. 21 and 22.

³ *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 23 (1929), Spl. Supp., p. 196. The Comment upon this Article says: "Where the forces of another state temporarily displace the local government, against that government's will, the principal condition of responsibility is removed." It has temporarily and *pro tanto* no power in its own territory. It is, therefore, proper to relieve it of responsibility in such cases when the acts causing injury to aliens are attributable to the state intervening, and not to the government which has been displaced. The same rule would apply where bombardments or interventions by other states are the direct cause of injury. The bombarding or intervening state should then have responsibility, according to general principles, as a result of injuries unlawfully inflicted upon aliens."

⁴ Moore, *Arbitrations*, V, p. 4473.

⁵ *Ibid.*, p. 4603.

⁶ Malloy, *Treaties, Conventions, etc.*, II (1910), pp. 1591-1595.

⁷ Whiteman, *op. cit.*, II, p. 964.

⁸ *Ibid.*, pp. 1384, 1430-1431.

the same statement which the United States usually makes, that it was *ex gratia*.¹ During the present conflict in China, the Japanese Government has expressed willingness to pay, and has paid damages caused by its own action in the case of the bombing of the U.S.S. *Panay*; and a newspaper dispatch dated April 11, from Tokyo, states that the Japanese Government on that day paid to the Seventh Day Adventist Mission in South China the sum of \$2,365 for injuries caused by bombing in September.² In view of such cases, it does not seem possible today to maintain that an intervening state, whether formally at war or not, can escape responsibility for acts injurious to aliens, done within the territory of another state. And, aside from this theoretical approach, tribunals have consistently in practice levied damages against that belligerent state which caused the injury; this, it would seem, furnishes the decisive answer.³

I now suggest that the field of responsibility has been much widened in such cases by recent treaties and by the development of customary international law. In earlier days, it was quite legitimate for a state to intervene by force in another state, whether in formal war or not; today, such a use of force by one state against another may, under certain treaties and conditions, be regarded as illegal. Thus, in the first place, a state which goes to war without a preliminary declaration of war has illegally resorted to war, or else is not engaged in war at all. Shinobu says:

A State which opened hostilities otherwise than in compliance with the Hague Convention can not escape the charge of having committed an international delinquency, but it may at the same time carry on the hostilities thus opened, and a state of war will ensue, accompanied by the coming into force of the rights and duties of belligerents *inter se* and between belligerents and neutrals, just as in hostilities duly commenced on notification.⁴

But if a state has committed an international delinquency by resorting to

¹ Information furnished by the Department of State.

In certain insurance cases (*Dong Tai Yuen Provision Store v. United Trading Corporation*, agents for the Thuringia Insurance Co. of Germany; *Shanghai Hwa Hsing Fire and Marine Insurance Co.*), the Chinese judge held that fire insurance companies were not liable on the ground that the damage was due to "foreign invasion." *China Year Book*, 1933, p. 719.

² *New York Times*, April 12, 1938.

³ Article 3 of Hague Convention IV, above quoted, of course holds a belligerent responsible for violation of the law of war.

Shinobu accepts the principle "that unlawful injury to the lives or property of enemy civilians or of foreigners, by whatever means accomplished, will necessarily involve responsibility therefor." *Op. cit.*, p. 209.

Sir John Simon, in a note of February, 1932, asserted that the British Government "must, in this unfortunate conflict between China and Japan, hold each side responsible for any loss to British life and property that may be caused by their respective armed forces." Quoted by Q. Wright, "Responsibility for Losses in Shanghai," *loc. cit.*, p. 586. Mr. Wright suggests as a better principle responsibility of the territorial state if there is lack of due diligence; otherwise, responsibility for the aggressor state.

⁴ Shinobu, *op. cit.*, p. 34.

war without declaration, responsibility follows for all injuries resulting from this illegal act; nor can it claim the rights and duties of a belligerent. If it is not legally at war, then it has neither rights nor duties under the law of war; its responsibility is not for violations of rules for the conduct of war, but for all injuries occasioned by its hostile action, since its liability is based upon the original illegality of resorting to war without declaration.

Again, a state bound by the Covenant of the League of Nations, or by the Pact of Paris, or by other instruments calling for peaceful settlement of disputes, may possibly commit an illegal act merely through invasion or use of force within the territory of another state; and if it thus commits an illegal act, responsibility follows, as a general principle of law. If Japan has violated the Nine Power Treaty, she is responsible not merely to China, but also to the other signatories of that treaty.¹ In Article 15 of the Protocol for the Pacific Settlement of International Disputes, signed at Geneva in 1924, it was agreed that

the whole cost of any military, naval or air operations undertaken for the repression of an aggression under the terms of the Protocol, and reparation for all losses suffered by individuals, whether civilians or combatants, and for all material damage caused by the operations of both sides, shall be borne by the aggressor State up to the extreme of its capacity.

The same principle is stated in Article 6 of the so-called Budapest Articles of Interpretation, prepared by the International Law Association, concerning the legal consequences of a breach of the Pact of Paris, which says: "A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or its nationals." Indirectly and negatively, the same idea is supported by the Hoover-Stimson doctrine, which refuses to recognize changes in a legal situation produced by the use of force contrary to a treaty. Whether an international court would today hold that the use of force against another state in violation of a treaty constitutes in itself an illegal act calling for responsibility and reparation, I do not know; I am myself sure that it would have ample justification for such a decision, and I am sure that public opinion throughout the world would support such a judgment.²

The principle of which I speak, though no effort has been made to state it as law until our own day, finds latent support in earlier cases. Even in

¹ See C. G. Fenwick, "The Nine Power Treaty and the Present Crisis in China," *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 31 (1937), pp. 671-674; A. de La Pradelle, *op. cit.*, pp. 325-329.

² Professor Wright, speaking of the situation at Shanghai in 1932, says: "For determining responsibility for most of the damage, it would be necessary to decide first whether either the Chinese or Japanese forces initiated military action in violation of existing treaties or international law. If the Japanese activities were not justified under the circumstances, then Japan would be liable for all of the damages, whether sustained by Chinese nationals or by nationals of third states." *Loc. cit.*, p. 589.

the Greytown case, cited as evidence of lack of responsibility, the United States took the position that its attack upon Greytown was beyond discussion justified; and the Court of Claims, in a case arising out of it, said: "The claimant's case must necessarily rest upon the assumption that the bombardment and destruction of Greytown was illegal and not justified by the law of nations."¹ In the Samoan case above cited, the decision of the King of Sweden as arbitrator, holding the United States and Great Britain responsible, was based upon their "unwarranted" acts.² Article 231 of the Treaty of Versailles may be regarded not merely as a vindictive act: it imposed upon Germany responsibility "for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies." If this was a statement of a principle not at that time recorded in law, it was a principle which has gained ground rapidly since, and is now entitled to recognition and enforcement by international tribunals.

All through the centuries in which war has reigned supreme, with no law to restrict its employment, there has been a moral condemnation of the state which wages an unjust war. Today, to some extent, we are declaring such use of force to be illegal; and insofar as it is illegal, responsibility follows for the damages occasioned by its use. It will doubtless require some time and many precedents to work out rules for the application of the principle; but the principle is recognized, and can be applied by international tribunals. The state which resorts to illegal war must henceforth face a heavy responsibility for damages which it occasions, whether to neutrals or to the victims of its attack.

Chairman REEVES. The discussion of this interesting paper will be led by Frederick S. Dunn, Professor of International Relations, Yale University.

Professor FREDERICK S. DUNN. I take it the real question that the Program Committee had in mind in connection with Mr. Eagleton's paper was this: Where an alien sustains an injury as a result of hostile operations, is the legal responsibility of the country causing the damage in any way affected by the fact that hostilities were commenced without a declaration of war? I assume that the interest is in the effect of a declaration of war or of no declaration of war rather than in the general subject of responsibility for war damage. On this question it seems to me Professor Eagleton played safe. He answered it both ways. In the beginning he took one position, but at the end of his paper he took quite a contrary position.

In the beginning Professor Eagleton said: "Nor have I been able to discover that any differentiation (in responsibility for injuries) is made between

¹ *Perrin v. U. S.*, 4 Ct. Cls. 543, at 547. The conclusion is, apparently, that the claimant would have had a just claim if the attack on Greytown had been illegal.

² Malloy, *Treaties, Conventions, etc.*, II, pp. 1592, 1595.

types of hostilities, whether formal war, civil war or insurgency, or just plain hostilities or fighting." He supported that by reference to some statements, among others, of Professor Borchard, which made it clear that he was referring to the question of declaration of war. Later on in his paper he seemed to argue that a state which goes to war without a preliminary declaration of war has illegally resorted to war and its responsibility for damages to aliens is much greater. He says: "But if a state has committed an international delinquency by resorting to war without declaration, responsibility follows for all injuries resulting from this illegal act; nor can it claim the rights and duties of a belligerent."

To answer the real question it seems to me one must first ask: Is there any difference in extent of responsibility of a state for damages to aliens in war and in peace? If there is no difference, the question suggested by the Program Committee is of no importance. It seems to me that, in spite of Professor Eagleton's somewhat optimistic account of the present state of the law as to the protection of aliens during hostilities, there is still a large difference in the legal responsibility of a state in peace and in war. Where a state is admittedly at war, it is released from responsibility for damage to aliens sustained during actual military operations; for example, in battle, during a bombardment or an attack upon a town, and, in general, for all acts regarded as of imperious necessity in the conduct of war. I do not understand that Professor Eagleton denies that statement. In a state of war it is likewise not required to compensate aliens for losses resulting from interference with certain types of sea-borne commerce. These are valuable privileges which are conceded by law to belligerents. Doubtless they are conceded by law because of the conviction that belligerents would take them anyway. But, at any rate, this is a privilege granted to belligerents.

The next question is: How does this belligerent status come into existence? Heretofore that question has been comparatively easy to answer because we thought we knew when states were at war; and when they were at war they had belligerent rights. It was customary to say that these belligerent rights depended upon an external objective state of facts, commonly symbolized by the word "war." If this state of facts existed, then belligerent rights existed. It made no difference whether the parties bringing this about were justified in doing so or whether the state of facts was preceded by a declaration of war. But in recent years it has become increasingly difficult to recognize this state of facts.

Professor Hindmarsh has brought out very clearly the problems involved in establishing this state of war. Clearly it does not depend upon actual fighting or upon a breaking off of diplomatic relations, or any other simple test.

Professor Eagleton did not address himself to the problem except to state in his opening paragraph that a state of war, whether declared or undeclared, is one thing, and a state of conflict, which is not war, is another.

After suggesting that interesting idea he dropped it and went to something else.

Professor Wright has brought out the fact that it is practically impossible to devise an objective test for deciding when a state has this belligerent status which gives it these privileges that I have mentioned, and when it has not. There has also been some criticism of the idea that this can be determined by the subjective intention of the state that is conducting hostilities.

Definition is a matter of convenience. It depends upon the purpose you have in mind. I think myself that it is idle to try to formulate an objective definition of war that will hold good for all purposes. For the specific purpose of deciding when a state that intends to seek its objectives by some resort to hostilities is entitled to relieve itself from responsibility for injuries to aliens within the zone of hostilities, it seems to me that we could clearly rely upon the state's own expressed intentions. We can leave it to the state to decide when it is going to assert these belligerent rights.

I see no reason why we should feel unhappy, from this particular standpoint, over Japan's failure to assert a belligerent status in the present Chinese situation. It seems to me that if she did assert a belligerent status, the United States would have very little basis for making the claims for damages which she is now making as against Japan for injuries to private American property in the zone of hostilities. Japan does not choose to have this present situation declared as war. And American citizens and other aliens are profiting by that choice, because Japan is now settling for damages sustained by alien property within the zone of hostilities. I see no reason why we should push her to the assertion of belligerent rights, which would cut off legal claims now being made for those damages. It seems to me that so long as it remains voluntary with a nation whether it will pursue its objectives by force or not, it should also be voluntary with that nation to claim the advantages of belligerent status. A nation should not be compelled to accept this limitation of its legal responsibility for damages unless it wants to, especially since aliens are very much better off if it does not.

Therefore, I suggest that the matter of deciding whether a state is to have belligerent rights or not should be left to the state that intends to resort to force in the pursuit of its objective. I do not think that this has to be done by a declaration of war. The state might merely indicate that at a particular moment it would assert its belligerent rights; that is, that it would claim the limitation of responsibility that flows from a belligerent status. Of course, that might lead third states to proclaim neutrality immediately which, of course, belligerent states are not always anxious for them to do. But so long as we still admit that states can bring about this condition of war by their voluntary act, I think we have to admit that they also are entitled to decide whether they are going to proclaim a belligerent status or not.

Chairman REEVES. The topic is now open for discussion from the floor.

Professor HERBERT W. BRIGGS. Mr. Chairman, I must confess I have

been somewhat worried by the approach of Mr. Wright this evening when he suggested that intent was an essential element of the concept of war. I was strongly inclined to associate myself with Mr. Hindmarsh, who adopted the objective definition. I have even quoted with approval the remark of Sir John Fischer Williams that there are two ways of deciding whether war exists in the legal sense: The objective test—when certain acts are done and we say war exists; or the subjective test—when we say war exists only when one or the other of the parties intends a war to exist. I don't think a declaration of war or a non-declaration of war makes any particular difference. Sometimes the attitude of third parties is important. Third parties may decide for themselves whether or not, in their opinion, where their rights are involved, it is proper for them to recognize that a state of war exists.

But it seems silly to me to maintain that war does not exist in Spain merely because neither party has recognized that war exists, because parties to the farcical non-intervention agreement refuse to admit that war exists. And it is for a reason like that that I was inclined toward an objective approach, to say that "we know certain acts have occurred. Therefore, war exists."

I suppose we are interested in the problem of when war exists merely because of the legal consequences involved. And I find myself in a dilemma. Suppose I adopt the objective test. We know that war exists, in fact, in a material sense. I reach that point. But now I say we are interested in the fact because of the legal consequences. Do the legal consequences of a state of war flow automatically from an application of this objective test?

Some time ago a number of Loyalist troops escaped into France. If a war existed, according to the objective test, France would be under the obligation, as an automatic consequence of war, to intern these troops. But these troops were housed and fed and sent back to fight again. And France, no more than either one of the belligerents, believed any legal consequences flowed from any objective situation taking place. France acted on the theory that no war existed and, therefore, she was under no obligation to intern them.

The objective test of when war in the legal sense exists may thus become as ridiculous as the subjective test. Rejecting the subjective test because it seems contrary to fact, we apply our neat objective formula and determine that war exists because of certain facts, yet no legal consequences flow automatically from our conclusion. The dilemma remains as to how to tell when war exists in the legal sense.

It has been suggested that as far as the rights of third states are concerned, it may not be essential to determine when war exists. Professor Eagleton and Professor Dunn have suggested we can define our rights without saying that they are *neutral rights* or *rights in time of peace*; we recognize a situation which is neither war nor peace, and perhaps we have legal rights which flow therefrom.

I think Professor Wright's way is the easier way, the way to which we are accustomed. If a state expresses plainly an intent, then we know the consequences. But we are facing a new problem. We are facing a situation where war is actually being waged but the parties are not willing to admit it. In the problems we are discussing now it seems to me we are merely approaching a solution. The approaches of Mr. Dunn and Mr. Eagleton are worthy of our consideration.

MR. WILLARD B. COWLES. Mr. Chairman, I would like to have heard more of the content of the cases which Mr. Eagleton passed over without an analytical discussion of their exact holdings. As I understand the law in so far as it relates to the use of armed force in the absence of a formal war, in the middle of the last century, it was just the opposite from that stated by Mr. Eagleton. In the opinion of the Court of Claims in the case of *Perrin v. United States*¹ a statement from Secretary of State Seward to Senator Charles Sumner appears, in which the Secretary of State purported to recite the practice of states at that time.

The case grew out of the Greytown incident referred to by Mr. Eagleton. A substantial amount of merchandise owned by certain French nationals was destroyed during the Greytown burning and bombardment. The French owners later presented a claim against the United States, first to Congress and then in the United States Court of Claims. When the case was before Congress, at the request of Senator Sumner, the Secretary of State gave an opinion on the law at that time. After reciting the practice of states, he said:

The principle affirmed is, that one who takes up a residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chose to reside; and his only claim, if any, is a personal one against the government of that country in which his own sovereign will not interest himself.²

In discussing the Greytown case Mr. Eagleton made the point that the French Government pressed claims against the United States on behalf of French nationals whose property was injured there. But the significant fact would appear to be, not that the French Government pressed such claims, but that it acquiesced in the refusal of the United States to pay the demands.

In support of his conclusion, just quoted, the Secretary of State pointed out the following evidences of the practice of states in such cases: "The British Government, upon the advice of the law officers of the Crown, declared to Parliament its inability to prosecute similar claims."³ That was to say, that alleged claims of British subjects resulting from the bombardment of Greytown could not legally be pressed against the United States.

¹ 4 Ct. Cls. 543 (Decided May 17, 1869).

² 4 Ct. Cls. at 548-549.

³ 4 Ct. Cls. at 548.

EIGHTH SESSION

JOINT MEETING WITH THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Saturday, April 30, 1938, 10:00 o'clock a.m.

The meeting was called to order by PHILIP MARSHALL BROWN, Vice-President of the Society and a member of the Conference.

Chairman BROWN. You will notice from the program that this morning's session is to be devoted, first of all, to a conclusion of preceding discussions and then to a business meeting. It will be necessary to reserve sufficient time for the business meeting itself. Therefore, the Chairman will announce that the discussion will have to terminate at 11 o'clock. It is hoped that the discussion will be sufficiently animated in the meantime to make up for the briefness of time allotted.

The Chair is ready to hear any comments that anybody may wish to make on the subject of any of the addresses or remarks which have been made in the preceding sessions.

Professor CLYDE EAGLETON. Mr. Chairman, I should like to clear myself with regard to the charge of inconsistency which was made last night by Mr. Dunn. There was some ground for Mr. Dunn's accusation. Nevertheless, I think there is very little inconsistency there.

What I tried to do in the first part of the paper was to show that responsibility exists for violations of individual rules of the law of war, and that it exists regardless of the type of hostilities involved, whether a formal war, or insurgency or civil war, or hostilities, or declared war or undeclared war. Incidentally, so far as I was concerned, that was a great discovery, that the same rules applied to all situations. I think that is clearly established in practice.

In the later part of the paper I suggested a new rule, a rule which would say that responsibility derives from an illegal war. In the earlier days there was no thought that war was illegal. Responsibility did not arise from the fact and could not arise from the fact that the war itself was illegal; it could arise only from the fact of a violation of the law of war.

I now propose (at the end of the paper) that we have a new rule, in which responsibility would arise, not from an act in violation of one particular rule of war, but from the original illegality of going to war itself. If this rule were accepted—and I said I did not know whether an international tribunal would accept it or not—then it would replace the earlier rule, and the responsibility would arise from the illegality, not of violating a rule of war for the conduct of war, but the original illegality of going to war itself. Consequently, I think there was no inconsistency in the position.

With regard to the rule of the Hague Convention that war must be declared, I put the alternative that, if not declared, it is either illegal or not war at all. I may have mixed things up a little bit by that statement. The

point is that I was talking of two different illegalities. In general, I intended no inconsistency and I think it was not there.

Mr. LESTER H. WOOLSEY. Mr. Chairman, I just want to add a word to the discussion in regard to the beginning of a war. We have had from Professor Wilson the question enveloped somewhat in an atmosphere of humor and by others enveloped in philosophy and psychology. I do not know what mine will turn out to be. But there is one thought I have not heard expressed here which I would like to bring out: that is, that it takes two to make a quarrel.

It has been said here that a declaration of war is the beginning of hostilities and that the beginning of hostile acts by a war-intentioned nation is the beginning of war, but it seems to me that if the other party in the controversy is submissive and refuses to fight back, we do not have a war. If that country were invaded it might not resist. That is or was the theory of the Society of Friends, I believe. If I understand their attitude toward war, it was that, even if our country were invaded, we should not resist. Perhaps the majority of them do not go that far today. But to avoid war they are willing to go to great lengths in non-resistance.

Now, is it war, if the attacked country does not resist? Isn't this the distinction between hostile acts short of war (use of force, pacific blockade, reprisals, etc.) and war; that is, the distinction being whether or not the other party resists?

We speak of tariff wars, trade wars, and all kinds of wars; but the kind of war we are talking about is that in which there is a contest of arms. If the other party does not use arms in the contest, then I query whether that is a war.

When the United States invaded Mexico and took Vera Cruz, I don't recall whether Mexico made much resistance or not, but perhaps she did to some extent. But if Mexico had not resisted, that would not have been a war, as some of our courts have held, and in my opinion it would simply have been a hostile act short of war.

Perhaps that does not aid us a great deal in deciding when a war begins, but I think it puts the test a little further along in the process, making it depend upon the second party. Then what acts of the second party would indicate that there is a war? The answer is public armed resistance. Clearly, in my opinion, China is resisting Japan by force of arms in a major conflict. And I believe that is a war under my theory. And so, of course, there is a war in Spain, although I do not wish to bring into this discussion the question of civil wars. That is a little more complicated. I wish to raise for consideration this thought of armed resistance as a test of war.

President BESSIE C. RANDOLPH. I should like to ask Dr. George Gratton Wilson for some further comment on a point which I think was not touched upon last night. Before an actual, technical, legal war begins it is in many cases preceded by some kind of hostilities. It is the desire of the

League of Nations or a large group of Powers more nearly concerned to keep that struggle in a condition of *hostility* but not to allow it to mature into *war*. Of course, that will go on all of the time.

Now, suppose in the case of the struggle last summer between China and Japan the League of Nations or some large group of Powers had tried very hard to work out some plan; suppose the United States—for good and sufficient reasons of its own—had seen fit to acknowledge the struggle as being a *war* and had proceeded in her own interests to invoke the neutrality law; what would be the position of the United States or any other Power that chose to step out in front of other Powers and acknowledge a state of public war when the other Powers, whether organized as a whole community of nations or as an interested group of Powers, are trying their very best to keep the thing in a condition of hostilities and not war—to ameliorate it in some way? We all know perfectly well that the minute technical war is declared public opinion in that country is apt to take on a more inflammatory character and that to stop a war is more difficult than to choke it off while it is still in a condition of hostilities, even major hostilities.

I would like to ask Dr. Wilson to comment on that, if he will.

Chairman BROWN. The Chair some years ago having been in the position of being asked questions by Professor Wilson, has the special pleasure now of calling upon him to answer this question.

Professor GEORGE GRAFTON WILSON. If I had read all of the paper last night that was prepared I would have touched upon this very question that President Randolph has raised, namely, that if a third party does proclaim neutrality—that is a phrase that was used, I think—before either of the parties declares war, the tendency would be to check any further attempts on the part of the contending parties to come to a favorable understanding, and will have a tendency to introduce a condition of actual hostilities, because it will seem that the party proclaiming neutrality thinks that there is justified a state of war in that particular country. This may answer the question, although I am not quite sure.

President BESSIE C. RANDOLPH (Hollins College). The very serious question is, whether a Power should gratuitously, from the point of view of the mediator, choose to say whether it is public, legal war?

Professor WILSON. Or even to stop their further attempts at adjustment of the difficulty, which adjustment is the purpose of a prior declaration with a reasoned argument in it. If one takes the trouble to read the reports of the Conference at The Hague, he will find that the object was to have a prior argument of the case. Then there might be a reasoned declaration, that is, a formal declaration so that everyone would know the grounds of the war. What we have done now is to introduce a period of uncertainty with regard to all international relations involving the use of force which takes us back into the middle of the last century as shown in many cases cited last night. In 1907 the states of the world got together very seriously and said,

"You must present your case with a reasoned argument as to why you are going to war."

In the World War there were 51 declarations, or perhaps there were more, determining when war began. Then there was a conclusion of the war period on the 10th of January, 1920, with an actual moment when the war ended, so far as most states were concerned— not for the United States, because we like to go by ourselves.

Later there came a period of introducing uncertain elements. Take, for instance, the treaty that received so many signatures, a treaty which said that the Powers would renounce war as an instrument of national policy but reserving the right to go to war for self-defense, they themselves to determine what self-defense is. As judges I leave to you to determine how far that will check or has checked the going to war.

With a large and complicated collection of agreements and the like, we now have uncertainty in the place of a definite, legal status which we had prior to 1920.

Professor CHARLES G. FENWICK. May I ask Mr. Wilson a question, just as a point of information, not of controversy? Does Mr. Wilson think there is now technical war between Japan and China?

Professor WILSON. No. Neither does Russia; neither does Japan. In Japan's recent reply to Litvinov it was said events in China were "incidents more or less accidental, having nothing in common with a state of war"— that it was perhaps merely an attempt on the part of Japan to act in a sort of philanthropic manner to uplift the international morale of the Chinese people.

Professor QUINCY WRIGHT. I don't know whether Dr. Wilson felt this was desirable or not. I have to agree with the point of view expressed by Mr. Dunn last night when he said he thought it was advantageous to everybody else in the world that there should not be war in the legal sense. The main difference is in the effect on neutrals. If you have war in the legal sense, it means belligerents have a large number of privileges in relation to neutral commerce at sea, and also, in the area of hostilities privileges to destroy and injure neutral property without paying compensation. It would seem in the general interest of the world to prevent a legal state of war being established just as long as possible. Nationals of third states could go on with their commerce much more satisfactorily. If, in the Far Eastern affair, legal war existed, Japanese warships anywhere on the high seas would have the right to visit and search American ships and capture any carrying contraband or breaking a blockade. That would be a great inconvenience to us and to others. So it seems to me that any advantage in definiteness of having legal war would be far more than compensated by the disadvantages which the neutral would suffer in every other way. Thus it is better, both from the standpoint of stopping hostilities early, and also from the standpoint of preventing hostilities from spreading, to allow these situations which are not war in the legal sense to go on.

I think the same considerations favored the development of the so-called "pacific blockade" during the nineteenth century. Of course, that was a very much discussed procedure, but on the whole the jurists and statesmen during the nineteenth century felt it was better, if a state was determined to resort to coercion that it employ a pacific blockade where it could not affect the commerce of third states, rather than to have a full-fledged war. You will recall in the Venezuela episode of 1902 the Powers proposed a pacific blockade. The United States said it could not recognize that such a blockade could affect American vessels. So the European Powers went ahead and declared war. But after the three blockading Powers had declared war on Venezuela, we were not so sure we liked it and we began a process which resulted in arbitration. The process, according to President Theodore Roosevelt's account, involved some threats of violence to Germany, if she would not accept the suggestion of the United States. The point which interests us now was that by forcing the Powers to recognize legal war, we had created a situation where they might go a good deal further, and perhaps encroach upon the Monroe Doctrine.

It seems to me desirable to prevent a legal state of war from being established just as long as possible. If neither of the parties that is fighting wants it to be a legal war, why not say, "All right, let's not have a legal war"?

President RANDOLPH. That was my point—the desirability of keeping the struggle open for the purpose of mediation and in some condition short of war.

Professor GEORGE B. NOBLE. In connection with the statement of Professor Wright that the legal status of neutrals is not affected if there is no war, I wonder if that is strictly correct, after the occurrence of the Spanish insurrection. I understand as a result of the situation there that the British Foreign Office did recognize the right of both parties to interfere with neutral commerce within the three-mile limit. If that is on a comparable status with international war, is it correct to say that neutral commerce is not interfered with at all, assuming that no war is formally declared? I wish Professor Wright would answer that.

Professor QUINCY WRIGHT. I said on the high seas. If it is not legal war, the belligerent has no right to interfere with neutral commerce on the high seas. With respect to territorial waters or the land territory, the rights would be limited, I would say, to the sovereign rights of the state in time of peace. Doubtless, in time of peace the state can interfere to a large extent with the rights and property of foreigners in their territory. But I think I would agree with what Professor Dunn said yesterday, that in that case the foreign state's rights—you should not call it a neutral state in such a case, because there is no war—the foreign state's rights would be exactly what they are in time of peace. If either of the belligerent factions within the territory interferes with neutral property, destroys it or seizes it, the foreign state would have a right to demand compensation on the basis, not

of the law of war, but of the law of peace. I think that was substantially the position that the British took in the so-called Bilbao blockade last year. They finally came to the conclusion that they could escort British ships to the three-mile limit, but after the ships got into the three-mile limit they were subject to the jurisdiction of the Spanish authorities.

Chairman BROWN. It would assist the Chair in allocating the remaining time if he could know how many have further remarks to make and would like to participate in the discussion. Will those who desire to participate in the discussion later on please raise their hands?

Professor FENWICK. There will be a great many more gentlemen who will want to speak here.

Chairman BROWN. It will not preclude others from taking part; but we have to plan for our business meeting and we want to be sure that everyone has an equal share in the discussion.

The Chair will recognize Mr. Myers.

Mr. DENYS P. MYERS. I have been exposed to this problem of war for a great many years, and I have acquired some ideas which to me have rather clarified the matter. I want to lay some of them before you.

It seems to me that in the past we had rather a clear conception of war, even though it did not exactly jibe with normal law. It was this: That states normally lived in a condition, let us say, of civil rights; but each of them always reserved to itself the unilateral right of stepping out of that system and prosecuting its own objectives against another state by war. And the distinctive feature of the system was that, in that abnormal legal condition, what you took you kept. In the period between Grotius and the war of 1914, there were various efforts to regularize or restrict that condition. That effort came to be expressed, in Wheaton's analysis of the thing, as a distinction between "perfect" and "imperfect" war. By his "perfect" war, I understand was meant a condition in which one state prosecuted war against another and said, "Anything we see or can get we are going to take." His "imperfect" war seems to me to have been one in which a state said, "We have a particular problem or a group of problems that we are going to settle with you, if we can." In other words, there was a restricted objective of that war. The unlimited liability of this prewar conception of war seems to me to have been its essential factor. It is entirely logical that an evolution against that conception has gone on.

The declaration of war was an attempt to determine what kind of a resort to force a state was undertaking. The declaration was supposed to include a statement of objects; in other words, the announcement amounted to saying that "I am going to attempt to take some particular thing from you." In the nature of the thing, once you got started for one objective you probably ended up with a good many others, either in hand or obtainable.

As a result of the war of 1914, we attempted still further to restrict that conception, and in Article 12 of the Covenant of the League of Nations it

was decided that one possible method of restriction was to say: "You shall not go to war until you have attempted to settle your dispute by some third-party method." "Resort to war" under that article, according to my reading of the record, referred to war solely in that older meaning. Immediately you had an attempt to restrict war, however, you encountered the tendency of states to get their own way with respect to many things, some of which were general and some of which were limited. At the present time, it seems to me there are three possibilities.

To me, war, properly so-called, should be considered as an unrestricted attempt to coerce the other fellow without regard to any particular limits. In this same conception, you have also hostilities, which are simply a bout over a limited objective.

Then as a third possibility I see the presence of force in the international system. Force, in my own conception, consists of an attempt to coerce, and may be used alternatively. It may be used for your own purpose or it may be used for a collective purpose. In other words, the use of force for a collective purpose would very closely approximate our present conception of a police force, the objective of whose activities is not a unilateral objective of the state itself but an objective of the international community.

So I see three stages of the thing afloat in our minds at present. War is a condition that a state resorts to when it is insistent upon having its own way despite any other considerations. Hostilities are a condition where a state seeks either a limited object or possibly a more or less common object; and on that other states will have various views. The attempt to use force may be for a unilateral purpose or a multilateral purpose. That is how it lies in my mind, to which these distinctions afford a certain amount of clarification to our problem.

Professor WILSON. I suggest we limit the discussions to three minutes, and that no speaker have a second try until after he has the permission of the floor.

Chairman BROWN. If there is no objection to this suggestion, the Chair will proceed to use these autocratic dictatorial powers to limit the time of each speaker. This should not, however, intimidate anyone.

President RANDOLPH. Mr. Chairman, I have just two or three words to say that are not on this particular subject of war; they are on a general matter. And, if it is in order, I would like to speak now. It is not on the subject of propaganda but on the general question that has come up here.

Mr. ALBERT LÉVITT. I move, Mr. Chairman, that President Randolph be allowed to speak three minutes out of order.

President RANDOLPH. I don't know whether Professor Borchard is here this morning, but I hoped he would be present because I have several dirty digs for him that I have been saving for a long time.

Chairman BROWN. They will reach him.

President RANDOLPH. One of these digs has been in cold storage ever

since last April. It is one of the dearest wishes of this organization, Mr. Chairman, that in the classroom or outside, or anywhere that we may happen to exert even a little influence, that we may be able by that influence to extend the breadth and the depth and the strength of international law.

Night before last Mr. Borchard intimated that it was all basically wrong (like one of these geological faults you read about in California) to say for a moment that nations should pass judgment on each other, to say whether they are aggressors or victims, that it could not be done, and the more we try to do it, through the League of Nations or anything else, we just get deeper and deeper into trouble, and that we would better attend to our own business and pass judgment on our own national policies and so on and so on.

I would like to suggest here just one thing, for us as educators of youth, to some degree. I think it would be quite impossible to make the distinction that some of us are thinking about between the development of international relations, on the one hand, and the development of international law, on the other. If lawlessness prevails in the field of international relations, it will certainly prevail in the realm of international law. And I submit, Mr. Chairman, that it is quite impossible for us or for anybody dealing with the rising generation to be able to look them in the face and say that we can not undertake, that we are too lazy or too stupid or too cowardly, to make a difference between the victim and the aggressor. That is an educational fact. With the younger generation coming on, they will have to be convinced that this distinction can be worked out in some way. We can not expect to have violence and a destructive attitude, a public-be-damned attitude between the nations in the field of extra-legal-international relations and expect the system of international law to survive.

Chairman Brown. The Chair will recognize Dr. Kunz, who desires to make a statement.

Dr. Kunz. Of course, it is impossible to say anything in three minutes, especially as I think it would be very necessary to clarify the situation from the ground. It is absolutely necessary to distinguish between what is desirable and what is the law. What is desirable, of course, has subjective meanings, and it is perfectly logical to have different opinions; but if we come to the question of what is the law, no international lawyer would deny that there is no war in China. This is, after all, only a theoretical argument, but because no practice is possible without theory, it has far-reaching consequences. There is no precedent in history where a state of war has existed with diplomatic relations going on, as is the case with China and Japan. It is clear further that the situation which exists in China is legally tremendously different. The blockade which Japan has declared is directed only against Chinese vessels.

I would further like to say a few words, because Professor Reeves has asked me to do so, with regard to the remarks of Mr. Quincy Wright of

yesterday, namely, the real difference comes from a difference of theoretical opinion about what war is. Professor Wright believes that the illegal war under the Covenant is no war, because of Article XVI. *In my opinion this is not so.* We have distinguished between the laws of war and laws of neutrality. No neutral can exist in a legal sense without war; but war can exist without neutrals. In the League of Nations Covenant war has not been eliminated. To say so is a theoretical mistake. It has not been eliminated for two reasons: First, because there are many kinds of war possible, perfectly legal under the Covenant. Second, it has not been eliminated because even though war is illegal, it nevertheless remains war.

I have said no understanding of international law is possible—I mean *scientifically*—without theory. But no theory of international law is possible without the theory of law. In consequence of the oneness of law in the legal system, the same problem comes up everywhere, whether in municipal or international law. May I say, for instance, that law has two possibilities or more, but at least two. If a state which is a member of the League of Nations resorts to war, it is creating a state of war, but the League of Nations could have provided, but has not done so, that this will be no war at all. This is clearly illustrated by the Ethiopian strife.

Take, for instance, the problem of treaties. A treaty may be illegal but, nevertheless, a valid treaty, or a treaty may be not only illegal but void. May I illustrate under Article 20 of the Covenant that if a League of Nations member, after the League of Nations Covenant had come into effect January 19, 1920, concluded a treaty with another member of the League incompatible with the Covenant, this treaty is not only illegal but is void, and no treaty has come into existence. But if a League of Nations member after 1920 concluded a treaty with a non-member of the League which is incompatible with the Covenant of the League of Nations, the treaty is valid but illegal, and a special sanction is provided for it in Article 16, paragraph 4, that the League of Nations member may be expelled from the League. But the treaty remains valid. But a treaty between two members of the League of Nations which is incompatible with the Covenant is not only illegal but is void. The same problem arises in common law.

The same question may arise, let me say, with regard to marriage. If a man or woman who is legally married marries a second time, that party commits a crime known as bigamy; but, in addition to that, the second marriage is void. But let us say, for instance, a man or woman is legally divorced but at the same time is forbidden by the judgment to enter into a second marriage within a year; if the marriage is entered into it will be a violation of the decree laid down by the judge, but it may, nevertheless, be a valid marriage.

You see, therefore, that these problems of the form and structure and essence of the law go through the whole realm of law, whether municipal or international law.

Professor BENJAMIN H. WILLIAMS. The impression I get from this discussion is that there is no legal definition of what war is, or, if there is, this group is not aware of it. There are so many conflicting notions that have been presented here that you can hardly say that there is any clear law as to what war is, since so many able jurists disagree. On second thought, that is only a very reasonable reaction to the world situation. We are in a period of history where plans for world organization to prevent war are born but not yet in effect.

It seems to me that if the League of Nations were an effective organization, it would clarify the meaning of the term "war." There could then be no question that the present armed conflict in China would be regarded as a war. I can not imagine that the Japanese invasion would not be a resort to war in violation of the Covenant. Otherwise the League would mean nothing. But since the League of Nations Covenant is not effective, the confusion results.

Another evidence of the confusion is the application of the neutrality statute. The President is supposed to put the statute into effect when he finds that a condition of war exists. He found that a condition of war existed in Ethiopia but does not find that one exists in China. Certainly the Chinese conflict is waged on a much larger scale than was that in Ethiopia at the time he made the decision. There have been hundreds of thousands of casualties, and I understand that as many as 40,000,000 people have been driven from their homes. Yet he does not find that a condition of war exists there. It seems to me that is an evidence of confusion. He probably has a very good reason for finding that a condition of war does not exist there, the very good reason being the desire not to apply the neutrality statutes. Nevertheless, it does show much uncertainty as to the meaning of the term "war."

Mr. JAMES W. RYAN. Mr. Chairman, if it is in order, I move that it be declared the sense of this meeting that a state of *de facto* war exists between Japan and China.

The reason I make the motion is this: American foreign trade with the Orient is being substantially interfered with by the present state of uncertainty with respect to what under the usual and necessary commercial contracts the legal relations of the contending countries are under international law toward what in a state of war would be called neutral nationals and property. There is evidently neither peace nor war. There may be no war in a highly technical legal sense, but there is surely war in fact. Yet if war exists, a whole new set of legal conceptions comes into application under the dichotomy existing in international law between the rules applicable in time of peace and the rules applicable in time of war. At the present time the factual situations arising are those normally covered by the war rules, and if they are not covered by the war-time rules, the peace-time rules are inadequate and practically impossible of application to such situations

because they are of abnormal and unprecedented existence in time of peace. The character of goods carried by the steamship companies operating to the Orient now during this state of uncertainty is very different from what it was before that uncertainty existed. It is now artificially stimulated by what might be called war supplies. Substantial interference with normal foreign trading is, of course, to be expected under economically and politically disturbed conditions. But without artificial and avoidable restrictions a large part of normal foreign trading would still be carried on. But the fact is that this continuing part of normal foreign trade is being cut off. This should be prevented.

Take the case of American exporters selling goods in the Orient. Before this state of uncertainty existed, or before these hostilities, there were large markets in the Orient for American goods. Those markets, in large part, have been lost. What we have now is a kind of artificial market.

I think it is clearly to the interest of all countries that have foreign trade with these countries that their business should not be cut off in this way, and their national interests sacrificed, without any reasonable or fair discussion or consideration of the matter by the nations collectively interested, because one nation committing acts of war on its own initiative believes that it will gain benefits by not formally declaring that it is in a state of war, and by saying, as Professor Wilson has suggested, that "We are doing this for philanthropic purposes." This is especially so if they are doing everything that a nation at war would do.

I do not think it is a realistic point of view at all to say that the other nations of the world who are interested, but whose interests have not been taken into consideration or given their proper and relative value and protection, should, as a matter of policy, just sit back and not insist on a common conference in the matter by all countries interested to ascertain and express what is reasonable and just according to the common or collective judgment. Professor Wilson in effect admitted that the assumption that no war exists is not supported by the facts. International law would be purely academic and a strange kind of law if it did not take the facts into consideration. I think the sound point of view is that which Mr. Woolsey expressed, that is, that a state of war exists there, and that legal relations under international law should be defined accordingly.

The practical problem is this: American exporters who sell goods in the Oriental markets have to take out insurance under conditions of war, or what amounts to war, against risks that are not ordinary business risks. It is only ordinary business risks that are insured under the usual marine insurance policy issued by commercial insurance companies or underwriters. These other risks are carried during war conditions under a so-called war-risk policy. We have at the present time in those disturbed areas a variety of situations which in every realistic sense are the same as those existing in a state of war; yet they are not covered by a war-risk policy conditioned on war

being declared and defining its insured risks and provisions in the legal phraseology as to neutrals, belligerents, captures, requisitions and so forth customary and proper in times of formal war, and they are not covered by the ordinary marine risk policy; and you can not get insurance against them either in England, the United States, or any other country except by new forms of quasi-war-risk policies with a rough combination of old clauses and new clauses and definitions which have been devised on an underlying theory of "as if" war existed (with rights of "as if" neutrals and "as if" belligerents in somewhat chaotic state), but which have not been judicially clarified by a series of decisions to make the coverage clear and certain. The net result is that, because of this new and uncertain legal vocabulary having to be invented and used, novel, uncertain and serious risks are added to the trading venture, the whole field of legal conceptions is thrown into more or less confusion, and such uncertainties tend seriously to interfere with normal trading.

So I think it is the duty of a body like this, consisting of men who have given great consideration to the subject of international law, when a new situation of this kind arises, to look through to the root of the matter and say realistically, "This is in effect a state of war and so declare," thus bringing into proper application the long-settled principles and legal conceptions of international law, and clarifying the legal situation and putting it on a realistic basis.

That was in the form of a motion, if it is in order.

Chairman BROWN. Is the motion seconded?

Professor FENWICK. I think it is a tradition of our Society not to adopt resolutions.

Chairman BROWN. Precisely. First of all, the Chair has not heard any second to this motion.

Mr. ALBERT LÉVITT. Mr. Chairman, in order to get this matter of the Constitution of the Society before the Council, I will second this motion. The constitutional provision does not prevent the Society from adopting resolutions; it simply gives two methods of procedure for further action. One is in the discretion of the Chair and the other is action by three members of the Society.

Chairman BROWN. In accordance with Article 7, of the Society's Constitution, the Chair will refer this resolution to the meeting of the Executive Council, unless there is objection on the part of members of the Society.

It is so ordered.

We will now consider for a few minutes longer the discussion. Mr. Finch, the Secretary, tells me that it will be possible to continue the discussion for possibly 15 minutes longer.

Mr. LÉVITT. Mr. Chairman, again I feel like a fool rushing in where some of you wiser folks fear to tread.

President Randolph raised a problem which I think we should consider. The entire discussion of yesterday struck me as being so utterly futile that I wondered when we were going to get some serious action on the problems which are presented by present-day conditions.

Yesterday forenoon, just before taking the train, I saw a little incident outside of the Pennsylvania Station that fits in so well with a topic of discussion by this Society that I want to bring it to you. If each of you goes back to your boyhood days you will remember that when you stood up with the other fellows in the schoolyard and you put your foot down on the dirt and drew a line and said "I dare you to cross that line," it meant fight, if you crossed the line, or it meant crawl if you did not. That is the situation that the country is in today. I say all of this talk about law, international law, between sovereign Powers, is bunk. Law does not exist. And those of us who are talking about it are simply talking about a myth.

Every one of the nations whose nationals are killing the nationals of other nations have signed some sort of an agreement that it would not resort to this killing of other human beings. Not a single one of them, including the United States, so far as I have been able to determine after rather intensive research, intended to live up to that particular document. Furthermore, it would be a rather startling thing to me if anyone in this Society, or anywhere, could point out to me any treaty which makes it mandatory upon the nation that signed that treaty to live up to the provisions in the treaty. Every state can say, "We did not promise not to do the thing which we are doing now." And if you can find any treaty, even the Kellogg Pact, which does not leave an opening to every nation that signed it to go to war, I will come and eat the Kellogg Pact in front of this Society.

It seems to me we ought to become a little more realistic. The people over in China and Japan, in Spain and in Ethiopia, and in other countries are dying. That is the important thing. They are being maimed; they are being killed; their wives and families are being bereft. All of this nonsense about war as legal and war as not legal is simply fatuous. Why not get down to the basis of saying that if you want to know what war is, look at the situation; and if the armed forces of any character of one nation are on the territory of another for any reason whatever without the permission of the other nation, that is war? We can say, "You have no business being in the United States with your armed forces unless we say you can do so, and if you are here otherwise, you are here illegally and we will do what we can about it." But, God help us, there isn't much we can do.

Professor FENWICK. I hoped Mr. Warren might speak to the general subject. We have great respect for his views, and we would like to hear him.

Mr. CHARLES WARREN. I don't believe I have anything to say.

Admiral WILLIAM L. RODGERS. I would like to ask if someone will comment on the action of the British Government in giving directions to its

cruisers to sink submarines of a nationality unknown, and what the consequence of that form of action on the part of an alleged neutral is?

Professor QUINCY WRIGHT. I understand that was based upon an agreement of the Mediterranean Powers in view of the fact that "acts of piracy" had been committed. I understand the agreement reached among Great Britain and France and other Mediterranean Powers, to which Italy later subscribed, provided that, in view of these circumstances, in the zone where sinkings had taken place, submarines would be subject to sinking at sight by the war vessels of the participating states, if there was evidence that the submarines had attacked a non-Spanish merchant vessel contrary to the conditions of Part IV of the London Treaty of 1930.

Admiral RODGERS. I would like to ask Mr. Wright if it is piracy when a cruiser of any sort acts under orders of the government. The essential definition of piracy, as I understand it, is that the pirate has no friends and, therefore, he is like a mad dog and anybody can shoot him. But if a ship is acting under orders of a responsible and recognized government, it has backers. And in the case of trying to treat such a ship as a pirate it opens the way to reprisals. That is a very unfortunate state of affairs when you attempt to define an act as piracy when the alleged pirate has responsible friends and can resort to reprisal.

Professor WILLIAMS. May I ask if the Admiral knows just what government was responsible for these submarines?

Admiral RODGERS. It is quite unknown. They are alleged to be Russian, German and Italian, as well as Spanish. Nobody knows.

Professor QUINCY WRIGHT. Isn't that what makes it piracy? No government will acknowledge responsibility for the actions of these submarines; so in those circumstances it seems to me they can properly be called pirates.

Admiral RODGERS. Yes; but it would be very unfortunate, I think, for any cruiser which attacks one of these submarines to make any prisoners, because then their friends would turn up. If prisoners are made in such a case, it is a diplomatic error, I should say.

Chairman BROWN. The Secretary would like to make a brief statement.

Secretary FINCH. I would merely like to interject that there is no reason why all of the members of the Society should not be thoroughly enlightened on the problem that the Admiral has raised. In the current number of the *AMERICAN JOURNAL OF INTERNATIONAL LAW* we have an article by Raoul Genet, Director of the French review of international law, entitled "The Charge of Piracy in the Spanish Civil War," in which he supports very thoroughly the view expressed by Admiral Rodgers.

Chairman BROWN. It seems to me that is good publicity.

Our time for discussion is now about up. The Chair notices in the audience a gentleman who is responsible for the program for this session, and he wonders whether Mr. Dickinson would care to say a few words.

Mr. JOHN DICKINSON. No, Mr. Chairman. I have nothing in particular to say at this time, except I am delighted to see that the meetings have been so well attended as they have been.

Chairman BROWN. Are there any other remarks before we close the discussion?

Professor QUINCY WRIGHT. In regard to the resolution which was suggested, I do not think anyone would object to its substance. I think everybody recognizes that there is a *de facto* war in China. The only question is whether there is war *de jure* in China. It is my impression that the majority here are of the opinion that there is not a *de jure* war in China.

Mr. Ryan spoke of the difficulty of carrying on trade in the Far East. I am wondering whether the difficulty would be any less if a *de jure* war were recognized. That would mean that Japan would prevent any trade whatever with China, as she would have the legal right to do, by enforcing a blockade of the China coast. Would that improve the situation?

With regard to the final word of Dr. Kunz, if he wants to use the same word to apply to two situations which are legally very different, of course, he is free to do so. It is a question of terminology. I think since the legal situation is different in "a state of war" and "illegal resort to war", it is better to use different words. It is just a question of clearness of speech.

Chairman BROWN. This discussion between Mr. Wright and Dr. Kunz might well be left for a future radio discussion at the University of Chicago. I am sure all of us would be delighted to listen in. Mr. Finch suggests it would make an admirable article for the JOURNAL of the Society.

In terminating this discussion may the Chairman be permitted to say just one word?

We have been rightly challenged here repeatedly to face realities. The Chair considers himself in the category of a realist. He realizes that the world is fast moving into a state of international lawlessness comparable to that of the Middle Ages, a lawlessness which seems to reflect a general lowering of the individual morale throughout the world, a lessening of regard for obligations and for rights. It seems to me we can not be oblivious to that fact. But in the discussions we have had here we have been reminded, and I hope at this moment we will recall this truth to mind, that disregard of law and violation of law in no way vitiates the law itself; that if gangsters and racketeers and mayors of cities disregard the law, it still remains law. The remedy may be delayed. The remedy may be ineffective for the time being; but violations in the long run always require recognition and some form of reparation.

Furthermore, it seems to the Chair most desirable that we should again take to heart the profound and stimulating paper presented at the opening session of the Society by Dr. Kunz wherein he reminded us that we have a solemn and sacred responsibility, in the midst of this international lawlessness, to remain true to our profession and to be clear in our understanding of

the "teoría" of law. It is not a question of how violators care to interpret the law; it is a question of how we professional students of jurisprudence understand those principles of law which do apply eternally, as Dr. Kunz has reminded us, in every and all situations. I venture, therefore, to say a word here of solemn consecration to our task and faith that law in the long run will triumph. Those of us who have attended these sessions should be grateful for the interest manifested here in these discussions. This interest clearly discloses the fact that there is an army of people yet who believe in the inherent sacredness of law and have faith that in the long run it will triumph.

The Chair now declares the discussions closed.

NINTH SESSION

Saturday, April 30, 1938, at 2:15 o'clock p.m.

Presiding: Charles G. Fenwick, Professor of Political Science, Bryn Mawr College.

Chairman FENWICK. Before beginning the business meeting we are now prepared to discuss further the proceedings of the conference; and any issues relative to the program of the earlier sessions are in order. I should like very much if someone would comment upon courses that deal with international jurisprudence. I was much interested in the course Carleton College gives, which seems to be attempting to consider the foundations of the law and not merely the technical details.

Will some of our members who are doing work in some special field, not already covered by the proceedings on Thursday morning, discuss the course? Will someone speak to the subject of the kind of a course that would come under the head of a course in international jurisprudence, and yet be adapted to college students and not a graduate course?

I have always tried to comfort myself for my failures thus far by saying that sometime I would write a great work on international jurisprudence, in ten volumes. One can extend the number of volumes in order to encourage oneself to do the big thing that doubtless never will get done—but at any rate a treatise on international jurisprudence.

What about some course on international jurisprudence that is now being given, that is, an analysis of the science of international law? We have had a number of comments upon the way in which professional schools are intent upon training men to use international law as a tool in their legal practice in the future. But we have overlooked the science of the subject, which is vital to its advancement.

I have listened to the proceedings of the American Society of International Law this morning with much wonder and amazement. I held in with considerable difficulty when I listened to the rehearsal again of the laws of war, wondering whether it would ever be possible to have a meeting of the Society in which there would be no discussion of the laws of war, but solely a discussion of the law of peace. But all this, of course, with apologies to those who read the able papers on declarations of war and on belligerency.

Will someone speak to the question of a college course on the science of international law? Professor Stone spoke of the work at Carleton College. What other courses are being given?

Professor CLARENCE A. BERDAHL. I am not giving such a course as the chairman has in mind and I am not at all certain that that particular kind of a course is being given at the University of Illinois. I see Professor Garner is not here. I think, in view of his absence, I might merely suggest that it

seems to me Professor Garner is now more and more throughout the years giving something approximating that kind of a course.

As perhaps some of you know, our field there is pretty well divided. Mr. Garner gives the work in international law; Mr. Mathews gives the work in foreign relations and diplomacy and I give the work in organization or government. It is a division of the field which might be pretty clear. But I believe in view of the way Professor Garner more and more throughout the years has been developing his course, it is overlapping pretty definitely into these others. That is, Mr. Garner's course in international law, as it is being given, I think is very well adapted to the undergraduate. It is an undergraduate course and is becoming more and more popular, partly because of his own excellence as a lecturer and the desire of more and more students for some work with him before they graduate, but also, I should say, because it is not legalistic in character, even though it is a course in international law, giving the students some considerable appreciation of the rules of law involved, approaching the matter from the thoroughly analytical point of view and I think more and more throughout the years interpreting it with considerable of his own criticism, which I think in earlier years he did with much more hesitation.

Chairman FENWICK. Thank you very much, Professor Berdahl. We all know what Professor Garner stands for in the philosophy of our subject. I, for one, would like very much to attend a course of his on the science of international law.

Professor MARTIN, are you doing any work in the field of the science or the theory of international law of an undergraduate character?

Professor CHARLES E. MARTIN. No; I think not. We give a course in the science of jurisprudence. The work on the subject of international law is given in the law school.

Chairman FENWICK. Does the course on jurisprudence include international jurisprudence as a part of it?

Professor MARTIN. Yes; it is included as a part of the regular course in theoretical jurisprudence. We also offer a course in what we call the "Introduction to Public Law." One third of this particular course is given over to the consideration of the theory of international law and its relation to constitutional law. So we do not have any precise course on international law or the theory of international law as such in the undergraduate college. A course on "International Government" covers elementary international law as well as organization.

Chairman FENWICK. How much of your course—I do not want to be too persistent, but I know you are doing a very interesting work—would be given over to a critical analysis of what the law is; for example, along the lines of our discussion on Thursday night, at the opening meeting of the Society?

Professor MARTIN. Do you mean the course on international law itself?

Chairman FENWICK. Yes. How much of your course would it be? Would it be a few opening lectures, or more?

Professor MARTIN. Rather more, I would say. The first two weeks of the course are given over to the theory.

Chairman FENWICK. Needless to say, at Toledo they are giving a full share of the theory of international law, if I can draw an inference from the description we have had.

Professor KIRK H. PORTER. We too have a course in jurisprudence that is open to undergraduates and we find that a great many students who intend to go into the law college are inclined to take that course. I suppose Professor Van der Zee spends the great majority of his time in jurisprudence and not in the international field. I would feel very doubtful if a whole course devoted to international jurisprudence would be of very great advantage.

Professor T. V. KALLIARVI. At the University of New Hampshire we are giving three different courses in this precise subject—a year's course in international law, a year's course in international relations, and a semester course in jurisprudence.

The course in international law is not given a strong legalistic emphasis, but aims to emphasize the relationships which exist between states and the way in which states and national organizations deal with each other as a way of life. Therefore, many of the courses which we have heard discussed from the standpoint of the law schools are perhaps a little beside the point for us. We consider international law as having a definite, practical value. And we are attempting to find in the subject those rules which we can recognize as applicable to a given situation. That may not be orthodox, but it seems to work.

Our classes in international relations and international law run from 25 to 30 in number. The jurisprudence classes are about the same. In jurisprudence we deal with the general principles of public law. Naturally it is very cursory and does not aim to do what any of the jurisprudence courses do in law schools. International relations is given an historical interpretation and I think we have been quite successful with it. The course in international relations is about twelve years old, the course in international law about fourteen years, and the course in jurisprudence is about seven or eight years.

Chairman FENWICK. Would Professor Russell care to comment on that aspect of the teaching of international law? We all know his volume on theories of international relations, and I personally think it very valuable. Professor Russell, will you tell us something along that line?

Professor FRANK M. RUSSELL. May I say at the outset that I concur with the opening remarks of the chairman on the question of the elimination of war. I should like to see somewhat more emphasis laid on the means of crowding it out from the twentieth century society and less on the manner of its conduct. But to answer the specific question raised, at the University of

California three or four years ago we worked out a major in international relations. It came about incidentally in connection with a movement at California to break down a rigid departmentalization and to introduce flexibility into the students' upper division programs. Therefore, in connection with that, we developed a series of majors which would serve to break down this rigidity. One of the first majors introduced was in international relations. It consisted of one upper division course in international law, six units for the year, a course in international organization, one on international politics, and a number of other courses in the field of political science, which might or might not be taken in making up a 28-unit major.

In addition to these courses, which may be regarded as the heart of the major, specified courses in population, immigration, natural resources, and international trade were required as essential to an understanding of the forces and conditions with which statesmen have to deal in the formulation of foreign as well as domestic policies. For equally obvious reasons certain courses in history likewise were required. Finally, a certain number of units from a fourth group of courses dealing with geography, anthropology, social psychology, etc., were required. There has been a great deal of interest in this major. Our experience reminds me of the remark of Professor Garner the other day as to the number of students who wanted to take international relations and specialize in international affairs. This became the most popular major of the several that had been established. And of course the students who take it want to know what it will fit them to do after they get their degrees. To such a query I have always replied that the opportunities in this field are very limited and that the major is cultural rather than vocational; that students should not take it with the idea of going out and getting a job at all.

Chairman FENWICK. We all want to bear in mind that we are training our students not merely for the technique of a profession, but for the larger business of trying to keep the world worth living in.

Professor MONTELL E. OGDON. I am not sure whether I understood Dr. Russell. In the meetings of the Society, of course we have devoted a great deal of time this year to the discussion of the laws of war. Some of them were discussed in a rather technical way, and there have been certain opinions expressed that too much respect was paid to the institution of war. But did I understand Dr. Russell to say something to the effect that we should not study the law of war or should not emphasize it so much in our study?

Professor RUSSELL. All I said was I would like to see a greater amount of energy, or as one expressed it the other way, more of the ingenuity that we use in working out a war code expended in this other direction.

Professor OGDON. You do not think we can undertake the solution to our problems unless we do understand the institutions pretty well, do you?

Professor RUSSELL. No, I do not.

Professor OGDON. I am glad to hear you say that, Professor Russell, because I personally feel that the law of war is an institution which must be recognized. It is one of the greatest factors in our world community and if we are going to abolish it we must certainly find out the nature, causes and purpose of it.

I am wondering if perhaps our trouble is not the fact that we are studying war too much but rather do not have exactly the right approach to it sometimes.

I certainly do not enjoy listening to all of the discussion about the facts of war and the new inventions of war. I wish we could approach the subject of war more from the point of view of interests and needs of the human being.

We studied about the technicalities of bombardment and the technicalities of aviation. I think this is proper when we look at it from the point of view of the individual, the people who make up the society, and from the point of view of the institutions of society. Then we can proceed to build law on the basis of our social institutions—not law that is based upon the facts of war.

Let us take diplomatic immunity, for example. That question was raised last night a time or two. We had the bombing of the British Minister who was on a diplomatic mission from the capital at Nanking to Shanghai, and we had the bombing of the U. S. S. *Panay*. In those instances the Japanese said, "We could not distinguish the markings. We could not see the Union Jack of the British diplomatic corps and we could not see the markings on the gunboat."

So some people said, "Well, the ambassador should never have been there. The *Panay* should never have been there. The diplomatic officers should never have been on the gunboat. They should all have been withdrawn."

Must we not study the nature and effects of war? Should we withdraw the diplomats and let the war take over everything, or should we look at the function of the diplomat and be prepared to defend that function?

It seems to me if we were to withdraw the diplomat and look at the problem from the point of view of the necessities of war, we would be sacrificing a peaceful institution for a purely belligerent institution. That might eventually destroy international law. If we withdraw our diplomats, we will be sacrificing an institution which is essential to any peaceful society. So, let us look at the problem of war from the point of view of the essential things of the society of nations and let us study the means by which the society of nations can safeguard institutions necessary for international intercourse.

I don't know how far we can extend that same principle to other institutions but certainly there are other types of intercourse that are essential, and perhaps certain types of trade that are essential.

I think we need to study more the conditions of war, not from the point

of view of the technicalities of war, but from the point of view of the institution. Therefore, I devote one full semester of my course to international differences and their settlement. We first take up the nature of the disputes and the causes of the disputes, just as you would in any seminar course in law. We then take up the various types of procedure for settling disputes. And war is merely one type of procedure for settling disputes. We need to know how war functions. I do not think we will solve our problems by ignoring or placing less emphasis upon the institution of war.

Chairman FENWICK. I did not understand Professor Russell to say that he would ignore the subject of war, but that it was being subordinated.

For the benefit of those who came in a few minutes late, we opened our discussion with the question as to how far in our colleges courses are being given which bear upon the science of international law, or, to use the larger word, jurisprudence, and how much of the course is given to the analysis of what makes up the law.

I hope we may confine our discussion not so much to the substance of the law, but how we are teaching it, as we are here for the time as teachers. I do not want to anticipate, but I would be very much interested in hearing from Professor Quigley as to how far he goes into this aspect of the problem.

Professor HAROLD S. QUIGLEY. At Minnesota I think the tendency in recent years has been somewhat in the direction that has been explained as developing at California. We have on the one hand expanded our work in international law proper. That is now a three-term course instead of a two-term course, as it was a few years back. In addition, we are carrying on an older course in international organization and a new course, probably stimulated by Mr. Russell's book, on theories of international relations.

But I should say that the larger tendency in the exploration of the subject of international relations at Minnesota in recent years has been in the direction of developing curricula that will admit work from the fields of economics, political science, history, geography and languages, with the aim of providing, not only for the graduate students but also for the undergraduate,—we have, by the way, such curricula looking toward both the M.A. and Ph.D.—a combined approach, because our feeling has been that if we confine attention too much to the subjects in the field of political science it will give too narrow an appreciation of the group interests.

I think Professor Ogdon was trying to make the point that it is not so much that the subject of war does not deserve our attention as that so much attention is given to the legal aspects—or illegal aspects—of war and so little to the causes that promote it.

Chairman FENWICK. I am glad you laid stress upon the relation that courses in economics have. I wish very much Professor Staley could have remained with us. It was with great regret to me that our discussion was confined entirely to the issue of propaganda, and we scarcely gave any thought to Professor Staley's very valuable paper.

Professor IVAN M. STONE. I simply wish to ask a question, Mr. Chairman. I wonder how many of these institutions are combining their field of concentration with work for honors in international law or international relations?

Chairman FENWICK. Mr. Russell, are you combining your work with honors?

Professor RUSSELL. No.

Chairman FENWICK. I fancy there are not very many colleges that have yet started the honors system. At Bryn Mawr we have honors work, and you can take honors in international law, international law and relations. I don't know whether anyone is interested to speak to that point.

Professor K. C. LEEBRICK. Our honors system at Syracuse is that they may lead to honors in international relations. We have a basic course in international relations which takes in the part that law plays in international relations, and it does include the other social sciences, particularly economics. We have two courses, with one I teach, in the functioning of international organization, which does not take up international law *per se*, but, of course, has to take it up as a secondary matter. Professor Ketcham does teach a course in international law. Most of these students have had the preliminary course in international relations and major in political science. Quite a number of them are going into law. Some of them are not, but simply going to major in political science. It so happens there are only about a fifth of the class ordinarily who are taking both international law and the functioning of international organization.

I find it very helpful when I have students in my class in the functioning of international organization who are also taking international law. Professor Ketcham and I very often have to get together because we find we are making different definitions or approaching things from different points of view. But we have found so far that they are not incompatible. That is the set-up as we have it in the School of Citizenship and Public Affairs at Syracuse. In addition, there is a graduate course in international law for those going toward the Ph.D. or M.A.

Professor PHILIP C. JESSUP. I came in late, but I understand from your summing up a moment ago that you were asking for a discussion of the basic theory in the teaching of international law. I should merely like to draw your attention in that connection to the study made under the title of *American Science of International Law* by Professor Kunz, which was published in a volume issued by the New York University Press, I believe. In that very interesting study, Dr. Kunz surveys the writings of Americans in the field, particularly from the point of view of considering the emphasis that had been laid in this country upon the theory or basic concepts in the subject. Then I think he delivers a very well directed criticism to some of our tendencies in the United States. I think the reading of that survey is an immensely helpful thing for anyone teaching in the field.

Chairman FENWICK. Thank you. That is something we are all glad to know, if we don't know it already. There are so many, I am sure, who are doing interesting work whom we would like to have speak. Would Professor Bradley speak for a moment on the question of how far his course goes into the theory of the subject?

Professor PHILLIPS BRADLEY. We have only one course of study, in which I try to bring together the general underlying problems, economic as well as political, in the field of international relations, and then to deal with the mechanisms and principles which are operative for the solution of international disputes. I am expecting under the new honors major plans which we are initiating at Amherst, that it will be possible to have an advanced course, a seminar course in the senior year, in which international law can be dealt with more specifically. At the present time I devote about thirty per cent of the year's work to international law, particularly to the principles underlying the settlement of disputes.

Chairman FENWICK. Professor Wright, you ought to have an idea on the theory of the law.

Professor HERBERT WRIGHT. We have in our law school a course in jurisprudence given by one of the members of the law faculty. He is an Oxford Ph.D., by the way, and has a degree in canon law besides. In the course of the year he invites in professors from the other faculties, the professor of canon law, the professor of Roman law, and myself as professor of international law to give a lecture or two on the jurisprudence of their respective fields. Each lecture is only a two-hour session, with a half hour or so of discussion afterwards on the part of the students. He has found it quite useful to adopt that line of action in interesting his students in the course.

Professor H. ARTHUR STEINER. I have listened with a great deal of interest to the discussion of these problems. Naturally, we face them in comparable degrees everywhere. My own experience in offering courses in international law has been limited to a relatively brief period of eight or nine years, during which time I have never twice offered the course in the same way. I have given up hope of striking a permanent balance between theory and practice.

At Los Angeles we are trying to approach international law from an objective basis. We look upon the state not so much as a personified abstraction as an association of individuals, and we look to international law primarily as a series of norms and standards which guide individual behavior, whether of diplomatic officers or private citizens. So perhaps there is an undue emphasis in our instruction upon those situations in international law which involve the individual—such questions as the responsibilities of states, to take a case in point.

In addition, we try very earnestly to debunk international law. Our search for a realistic approach revolves very largely around the problem of finding out what meaning is being read in the year 1938 into symbols and

phrases that were coined in the seventeenth and eighteenth centuries. This means that we must emphasize the development of legal concepts. In that we are aided to a very marked extent by the fact that Professor Haines offers a rather advanced course in general jurisprudence. And the people who take international law may very possibly have been exposed to that course as well as to our general courses in American foreign policy or international relations.

Professor CLYDE EAGLETON. In reply to Mr. Steiner and Mr. Ogdon, permit me to make one remark, that it seems to me that what they need is a course in international government rather than a course in international law.

Professor STEINER. I understand your interest in a certain very valuable book. When I said that we offered a course in international relations, I should have defined the term. To us that is fifty per cent or sixty per cent international government and introductory international law. The person exposed to our international relations course does pick up the elements of international law which would be needed for normal comprehension. But since we have a technical course in international law, it seems unnecessary to belabor the general student of international affairs with legal abstractions. Such students today exhibit an awesome curiosity concerning the facts of social life, and in many different spheres. They insist that we inform them of the dynamic currents in international relations, that we test static forms and theories in the light of day-to-day experience.

Chairman FENWICK. That raises what has been all along a difference of opinion between quite a number of us. I wish my friend Professor Potter were here so that I could discuss once more whether international law and international organization can be kept distinct. I have always maintained that international organization or, if you will, international government, was an essential part of the law, and that you could no more have a course on international law and eliminate organization than you could have a course on constitutional law and say nothing about Congress, the President, or the Supreme Court, but merely discuss statutes of Congress and the decisions of the courts. That is a perennial dispute when Professor Potter is around.

Professor GRAHAM STUART. We try very hard to distinguish between the two because we have followed the custom of using Professor Fenwick's text on international law; and we find that that does not necessarily preclude a course on international organization.

I would like to get the assistance of this conference on a problem that came up just before I left, which is very bothersome.

We have been giving a course in international law both in the political science department and the law school, courses in international problems, politics, international relations, and so on. But a group of students suddenly decided that we need a course on peace. I thought we had covered the field in these various approaches, but the students who want this course have not taken any work in our department and they went to the Department of

Education, Department of Psychology, Department of History—they did not come to us—and they said, “We insist upon having a course on peace.”

I would like to know how I am going to handle that. Has anyone run into that problem in other parts of the country? It is bothering me, and I would like some assistance, particularly so because David Starr Jordan, at Stanford, did give a course at one time on the biology of war, treating war from a biological standpoint. So I suppose there is something to be said along that line. And I would like a little support on this attempt I am going to make at shelving the idea of a course presented solely from an emotional or biological standpoint.

Professor LEEBRICK. We had the same thing at Syracuse.

Professor N. D. HOUGHTON. We have the same sort of problem that has been mentioned here. Our students in that group have conducted at Arizona all during the year a series of programs in which they had lectures from university men and imported speakers, and they maintained considerable interest, not only among the students but among the townspeople. They want a course that they call “Peace Science and Tactics.” They are frankly pessimists and they want the course to offset the course in military science and tactics.

That is all I want to say, except that I do want to know what to do about it.

Mr. DENYS P. MYERS. Mr. Chairman, I just want to make a remark.

Chairman FENWICK. I don’t know whether you can qualify as a teacher; but you have been turning out pamphlets for many years that have been very valuable to us teachers; so we are glad to hear you.

Mr. MYERS. I am connected with the Fletcher School, so I suppose in a way that qualifies me.

I think both of these proposals raised by Mr. Stuart and Mr. Houghton should be “sunk without a trace.”

Professor STUART. How do you mean to do it?

Mr. MYERS. I suppose the faculties will have to wangle that.

I have been in the peace business for something more than twenty-five years, and my deliberate conviction is that peace is becoming one of those weasel words of which you have to know the connotation before you can do anything with it.

If you are going to make any advance in putting it on the map of international organization it has got to be taken out of the realm of emotionalism and translated into various forms of organization and methods. In other words, peace is not a thing that you can ever aim at and get. Peace is a form of living according to certain recognized safe and standard rules of life. Instead of concentrating upon an ideology, which first and last is coming to mean just about everything to all kinds of people, it is far more useful, far more constructive, to examine the methods by which peoples and states can live together in an orderly manner. If you are to have that kind of regime,

you must understand the principles of such a regime. If you can put them into operation, then peace is an incidental by-product.

You might just as well try to control the weather by dealing with some particular phase of the many elements that go to make it up as to assume that you are going to talk about peace in its philosophical, psychological and social aspects and believe that you are enabling your nation to solve its problems with other countries or to maintain its legitimate position in the world. Getting a lot of students overtrained in such abstractions is bound to prove out as a national delusion. You cannot accomplish anything really constructive in education by satisfying your own mind with respect to moral values unless they are really articulated with the facts and conditions that make for peace or war.

I don't know how you can do it in your faculties, but I think you ought to kill such a proposal.

Chairman FENWICK. I am very much disappointed to find that the former Director of the World Peace Foundation is no longer with his Foundation.

Professor HERBERT WRIGHT. May I just suggest to Professor Stuart that possibly if he changed the name of one of his present courses to bring in the word "peace," it might answer his difficulty.

I have been giving a course for the last several years called "International Organization for World Peace," for want of a better name. It does not cover the whole range of international organization, but covers amicable methods of settling international disputes, beginning with direct negotiations and coming down to judicial settlement, in which there is ample opportunity to bring in the question of avoiding the causes of war, by explaining the causes of such controversies and such attempts to remedy them as reciprocal trade agreements, and so on. I think perhaps a change in the name of his course and putting in the word "peace" might fool some of the objectors.

Professor STUART. I will go one better than that. I am going to tell them that the original name of the course is "International Organization for World Peace" and I simply left out the word "peace," but now, since they insist upon it, back it will go.

But if it is at all possible to have the sense of this meeting, I would like to have it stated that it is ridiculous to try to offer a course on world peace which is based upon the emotional approach, which is apparently what they want.

Chairman FENWICK. Suppose you were giving a course on peace in the United States, would you do it emotionally or would you study constitutional law and the possibilities of its development?

Professor ELLEN D. ELLIS. This seems to me something that we should welcome rather than the reverse. Those courses are being given in a great many other departments than the department which really should be giving the fundamentals. I believe that, if the appeal is really being made

to the political science departments, those departments should certainly take up the request and give some foundation training in the subject of war and peace.

Professor KALLJARVI. At the University of New Hampshire, we call this course "War and Peace." It is a semester course which has been relegated to the Department of Philosophy.

Chairman FENWICK: Professor Wright, I am reminded of the old way in which the authorities, such as Oppenheim, used to have one volume on peace and another on war and neutrality. Arbitration was in the volume on war and neutrality. It was not in the volume on peace at all.

Professor BERDAHL. Mr. Chairman, I shall not take up very much time, but I am somewhat amazed at the difficulty these people have in preventing such courses. Do they not have departments of military training or do they have no American Legion in the vicinity?

I fancy if we seriously attempted to introduce the word "peace" into the title of a course in our university there would be very serious difficulty in bringing it about, because of the efforts of those groups. We are extremely fearful of the word.

Now I shall add to that that we had to a certain extent the same problem in our university. A group of students a couple of years ago did, through some rather important leaders of the students, propose such a peace course, with the result that some of us took such cognizance of it as to meet with them and discuss the problem. And I think we were able to enlighten the leaders of the movement to the point that they realized that the course of the type they were thinking of, which was essentially an emotional course, was not in itself an appropriate course; and that, otherwise, the work was probably being covered in various courses at the university.

On the other hand, while perhaps I haven't any more sympathy with that type of course than has been expressed here, and I have great fear of emotional treatment of that problem, nevertheless, I think we ought to appreciate the point of view of the large number of students who cannot take all the courses in political science and many of whom cannot take any of them in view of their other problems. It may be that they ought to receive some sympathy with respect to an appropriate kind of course. Sometimes I have felt that perhaps we lacked that sympathy with the problems of many students, at least in our large universities, that we should have.

We have established a division of social sciences. One of the first new courses proposed before the committee was a course of this same general nature, but it couldn't get anywhere because of these very elements I have spoken of. The American Legion would immediately get busy. It is suspicious enough that Professor Garner and I merely teach in the international field.

Professor BENJAMIN H. WILLIAMS. We too gave a course in peace at the University of Pittsburgh, although it did not live up to our expectations.

It took up such matters as a study of the history of war, its causation, the effect of war on nations, and methods of war prevention. It was dropped because of the fact the department was not large enough to continue with so much specialization; and we give most of that material now in the various courses of political science, international law, international relations, and diplomacy. The students get their emotional escape in activities on the campus. We have a very active peace organization among the students. I think they sent some two hundred communications to the Department of State recently expressing the hope that the United States would not be involved in the war in China, and they organized a boycott of Japanese goods. Of course that part of it should be conducted outside of the classroom, if they want to do it.

As to the more academic part of it, I think it would be perfectly good to have a specialized course in peace. But it seems to me also that the factual material may be developed through the other courses.

Professor RUSSELL. I just desire to suggest to Professor Berdahl that the very elements he assumed might oppose a course on peace might desire to have it established.

Let us take a hypothetical university in which there is compulsory military training over two years and there is an idea on the part of the students and other elements to have that training put on a voluntary basis. The military and other elements can be depended upon to oppose this for obvious reasons, and may eventually be quite taken with the idea of satisfying the pacifists by suggesting or supporting a compulsory course on peace to parallel the compulsory work in military training.

Chairman FENWICK. You give me an idea that I think is very interesting for the colleges that happen to have near contacts with the American Legion. Why not give a course on an international police force, building up to it through international organization and the necessity of a world order, and then asking whether it is feasible to have an international police force.

Professor THOMAS H. HEALY. I might be able to contribute a small idea in connection with this discussion because it happens that I have had considerable contact with this problem, which arises naturally, and the criticism of the compulsory feature of it.

At one time I was chairman of the National Defense Committee of the American Legion. So maybe I can help express their view.

Chairman FENWICK. Have you repented of that?

Professor HEALY. Not entirely, because I agree with the last speaker that the Legion is not objecting to having proper peace courses even in connection with an R. O. T. C.

I took this matter up not only with the Legion and so-called pacifist and patriotic organizations, but also with the War Department and the active head of the whole R. O. T. C. and the Chief of Staff of the Army and the Secretary of War. They realize this problem just as well as has been brought

to the attention of some of our members here by demands in their individual universities.

After giving this matter careful consideration over a period of years we came to the conclusion that probably the best solution was to meet the problem at its very source, to incorporate into the R. O. T. C. corps a reasonable number of lectures on the problems of peace or obstacles to peace, causes of war, the proposed cure, and so on. That has actually been done in some universities.

I understand the R. O. T. C. corps at Princeton, for example, as a compulsory feature of it, has a certain number of lectures on the problems of peace. But we came to the conclusion that it was folly to have a separate course on peace not directly related to and connected up with the R. O. T. C., which is the crux of the matter.

The War Department, or at least the Secretary of War, thought it would be a good idea if a small volume could be prepared that would fit in with an R. O. T. C. corps, giving that as part of the course and giving the peace angle, causes of war, and so on. Such a volume was prepared a couple of years ago. If I am not violating the rules of modesty, I prepared it myself at the suggestion of a number of these people who are interested in this problem. It is called *National Defense and Peace*. It is an analysis of the whole relations of peace to war and defense in the R. O. T. C., and the obligations for military service and the religious angle of it, the pacific rights, and it covers the whole field in a small handbook.

That handbook was approved not only by a number of peace leaders but also by the Secretary of War, and it was actually introduced in a number of R. O. T. C. corps. I haven't gotten any royalties yet, so I don't know how many. But I know that they put it into a number of them primarily to meet this very problem you have brought up here.

If you could bring in the peace problem simultaneously with the others, many of the leaders, including the American Legion, felt you would be giving a fairer course, and at the same time you would remove much of the agitation for a separate peace course which would be like a fish out of water. That has actually been used with the approbation of the War Department. It has been used and it will be used, and probably on an increasing scale. Professor Eagleton got out a little handbook, if I am not mistaken, which somewhat covered the same purpose.

The solution I am recommending to you is that there should not be any separate course, but if there is agitation about the R. O. T. C., then require a certain amount of peace discussion in the R. O. T. C. And I will tell you that the official schedule for the R. O. T. C. provides for a number of lectures on that subject.

They say the difficulty in the past has been that the military officers were so busy on the strictly military phases of it that they had neither the time nor the background to treat it themselves; and a group of us came to the

conclusion that maybe the professors of international law, international relations and political science could help out the R. O. T. C. department by going in at regular intervals and giving these conferences. That has been done in some places. That may be a partial solution of the problem.

Chairman FENWICK. I am going to recommend another chapter for your book, if you won't think it impertinent. I went to a tea about a week ago and I was warned that there was going to be a fighting admiral there, so I was told, "Don't say anything about peace. Don't let him know that you are connected with a peace movement."

I went up to him and said, "I am very glad to meet you. Don't you think in this day of anarchy and lawlessness in the world we ought to have an American Navy big enough to form part of a great international organization to keep the peace?"

The admiral turned into an internationalist for the rest of the afternoon, and we had common ground in discussing how the peace of the world might be kept.

Professor HEALY. I think there is a lot of misapprehension around this country as to the stand of the American Legion on this matter. They are a powerful group in the country and they exercise a very potent weapon when it comes to votes. They are dedicated to peace. Make no mistake about it. That is one of their prime platforms. So far as the War Department goes, I had the opportunity to discuss it with the Secretary of War and General Staff. They are interested in peace. What they want is some way of helping educators to offer a peace program. They are not interested in war.

I don't know about the Navy. I stick to the Army and the American Legion. If you give them half of a hand, I think they would appreciate it.

Professor HERBERT WRIGHT. I can speak for the attitude of the Navy.

Professor JESSUP. I was just going to add one word on the Legion and back up what Mr. Healy has said. I happened to do some work as Chairman of the Foreign Affairs Committee of the Legion in New York State, and I know for a fact they were trying to promote the study of international affairs in the Legion Posts themselves.

Unfortunately, from my point of view, I think the Legion was not sufficiently intense in continuing that angle of its work, and I am sorry to say I do not think the Legion has made the most of the recommendations of that one of its committees. But I agree entirely that that movement has existed in the Legion and I hope it will become even more vigorous than it has been.

Professor HELEN D. REID. I do not see why it is necessary to be so disturbed over the question of having a course on peace. It looks to me from this discussion as if we need to know ourselves what peace is. Why wouldn't it be better to have this demand on the part of the students to know something about peace? Why not give them an intelligent course? We do want to prevent their going off on tangents without sufficient background. Why not encourage them into getting a broad understanding of the problems of

peace and war. I don't think any of us know the method of solution. Perhaps some of us do; but I, for one, am not sure I know anything about the permanent solution. But shouldn't we take advantage of the interest that has been aroused by whatever means and whatever methods and divert that interest into a constructive solution?

Chairman FENWICK. I see that Professor Reid supports Professor Ellis. That is a rather interesting suggestion. It is a chance to tell the boys something under the name of peace.

Professor STUART. The unfortunate thing, as I said, was that they approached the philosophy, education and history departments and they got the support of these professors, who I think know very little of the subject and it has become sort of an avalanche of opinion that I do not think can be regulated as nicely as was suggested. It was apparently a demand, and it was then followed up in the student paper, a demand to go back to Mr. Jordan's idea of the biological approach.

Chairman FENWICK. Give them a straight course on organization and call it peace.

Professor EAGLETON. Mr. Chairman, Miss Reid said a large part of what I intended to say. I think these courses are going to have to be given, partly because there is a demand, more especially because of the emotional attitude that we now have. It makes it imperative, it seems to me, for the universities to give courses and to provide some scientific basis for the discussion that is going on in this country today. There is a most tremendous confusion in it.

I have been wanting to answer Mr. Stuart's question. I am quite convinced you can give a course of a high standard of university scholarship on this subject.

There are many serious topics which can be investigated at great length by the students. Take the question of education as a means of removing war; or take disarmament, or the causes of war. Many people say you have to remove the causes of war. And the whole question of peaceful change comes in—and the outlawry of war, passive resistance, psychology. All of the different departments of the university enter into it. It could take a year's time without any weakening of the standards of the university at all. I am convinced that that kind of a course is coming.

Professor MARTIN. I think a great deal of the discussion about Mr. Stuart's problem has been somewhat theoretical. They want to study peace from their own point of view. We have had the same experience. Their representatives submitted a list of subjects and a list of lecturers, and asked that we give them credit in the form of a political science course. I replied that we would have to select the lecturers ourselves and determine the subjects.

I observed the selection of people on and off the campus having a certain ideology. It is an extremely restricted approach.

They applied to other departments on the campus. There were about six or seven of the lecturers in this campus lecture series who came from a very unrelated department. I told them to apply to this department, which department should approach the curriculum committee. And the curriculum committee referred them back to the political science department.

It is a very real problem. I think the only thing to do is to insist upon university channels of procedure; to insist upon the curriculum committee assigning this particular course to those who are competent to give it. They are asking that it be a general course and that all prerequisites of every kind be waived.

This raises the problem of whether or not they are competent to enter into a study of these important questions.

Dr. MILTON H. COLVIN. I think those of us who have been teaching international law in the law schools have been more restricted than the teachers of international law in the academic courses in political science. In my experience in teaching international law in the law schools I found a number of students had the idea that not only in the law, but also in history, war is taken for granted.

We have a section of textbooks on international law, devoted to the international law of war. If we start with the premise of peace as the normal relationship of nations and consider war as an interruption to peace and what could be done to prevent these interruptions of normal relations between nations, we would start with a premise on which it would not take long to build up a more enlightened approach to international law and a better instructed public opinion.

I have attempted to satisfy that desire in teaching with a number of lectures following this order of consideration. My point is that the emotion of the students which has caused them to canvass the various university departments with regard to peace is entirely logical. I would think it deplorable if the young men and women of America did not have those kinds of emotions. And those emotions can be directed through constructive channels by the proper approach to the study of international law and relations.

Professor CHARLES HODGES. I am extremely interested in the trend of this discussion. And I think I will say for my colleague at Stanford that it had a tremendous grip on the campus in those days, and it meant something. I think we might just as well recognize that we run into patterns of teaching and of resistance to courses. And I think before we have another conference—which I trust we are going to have with most of us present—we will have experienced a very considerable change in what might be called student trend. Whether or not there will be professorial adjustment to these student trends, of course, is open to question.

I believe in a way it is a confession of inadequacy to simply say that we will exercise our Czarist rights of intellectual control over the situation.

I believe you have something which is not completely introduced from

the outside. We are all suspicious as to where any idea comes from. I can recall that International Conciliation was regarded as a course which was under some suspicion and that the Cosmopolitan Clubs, which were then being fostered by a very important institution which you can possibly recall, represented activities which were distinctly pacifist and open to a great deal of question on the part of the more vigorous part of the campus.

Therefore, we have, if possible, to inquire as to the direction of this sentiment and whether or not we are not already satisfying it under a multiplicity of approaches. I think the basic material is all here, that it has substantially all been here; that it has been in our hands. I think many of us suffer from a sort of egoism with regard to the acuteness of our scientific attitude toward these things. Personally I do not think we are so nearly scientific as we think we are.

Chairman FENWICK. I am reluctant to bring the discussion to a close, but we do have a business meeting after this. We do not want to delay the business meeting so long that those who have to take trains will run out on us.

Professor HERBERT WRIGHT. I would like to say a word with reference to the attitude of naval officers with respect to peace. It was my good fortune last year to lecture to the naval officers in the Postgraduate School of the Naval Academy at Annapolis, a group of about one hundred officers who had been out of the Academy for seven or eight years. My sympathetic attitude to peace was known to the naval authorities before they selected me. But they allowed me to make out my own syllabus, which consisted of three sessions: First, the general principles of international law, based chiefly upon the ninth edition of Wilson's text-book; second, fundamental American foreign policies and the application of the principles; third, the problems of the Far East. At no time was any suggestion made to me as to what I should or should not say. I encouraged discussion in the classroom. They asked questions and I answered the questions they asked me right from the shoulder. And I found it a delightful group to work with. They were just as anxious for peace as anybody else, as even Professor Fenwick.

Chairman FENWICK. I am very glad that Professor Wright and Professor Healy have both laid stress upon the approach to the American Legion. As I see it, the American Legion has the idea that anybody in favor of peace is in favor of having his wife insulted and himself kicked. That is not at all our conception of peace. So I recommend to Professor Healy that his final chapter should be "International Organization to Maintain Peace." And maybe that would give them the international mind, out of which might come a little more readiness to consider the department of international law.

Professor EAGLETON. I propose we now go to the business meeting, and, after that, that we continue the discussion as long as anyone cares to remain.

Professor G. B. NOBLE. I wish to make just one remark, and that is that Professor Martin referred to the fact that the pressure for these courses came from those who really do want the emotional approach. I think, as a

matter of fact, that is quite true. But I do not believe in any case they would admit it to be true. What they actually would admit, I think, is that they want to discuss the techniques of peace.

Chairman FENWICK. I am sure this discussion has been very helpful to all of us. It certainly has been to me. And it has made me feel that the annual program of our American Society of International Law ought always include as one of its topics just such a subject as we have been discussing. I could hope that our teachers conference might meet annually. We are now in a stage of development where we need the benefit of mutual discussion. Certainly it would be very helpful to meet every year. Five years is too long a time between conferences.

I now yield the chair to Professor Jessup.

(Professor Philip C. Jessup then took the chair.)

BUSINESS MEETING

Chairman JESSUP. The first item on the program of the business session is the election of officers. I believe Professor Berdahl has a report to submit.

Professor BERDAHL. The Committee on Nominations consists of Miss Ellen Deborah Ellis, Mt. Holyoke College; Professor F. A. Middlebush, of the University of Missouri; Professor K. C. Leebrick, of Syracuse University; Professor Benjamin H. Williams, of the University of Pittsburgh, and of myself.

Your committee unanimously proposes as the officers for the next conference the following:

For Director: Charles G. Fenwick, Bryn Mawr College.

For Chairman of the Executive Committee: Professor Harold S. Quigley, of the University of Minnesota.

For Chairman of the Committee on Publications: Professor Fredrick S. Dunn, of Yale University.

I assume, Mr. Chairman, that nominations from the floor are in order. I am willing to wait to see if there are nominations from the floor. If not, Mr. Chairman, I would like to make a motion.

Chairman JESSUP. Are there any further nominations from the floor? I hear none.

Professor BERDAHL. I move that the report of this committee be accepted and that the Secretary be instructed to cast the unanimous ballot of the conference for the persons nominated.

(The motion was duly seconded and carried.)

Chairman JESSUP. The Secretary will cast one ballot for the officers named.

Professor HERBERT WRIGHT. The ballot has been cast. May I inquire whether there was any nomination for the office of Secretary?

Chairman JESSUP. There was no nomination and in the past I believe no Secretary has been elected in advance, a Secretary being elected at the conference.

We have previously not had a standing office of Secretary to continue between conferences. However, I believe the present Secretary would continue in office until succeeded by another Secretary.

The next order of business is the presentation of resolutions of the Publications Committee, by Professor Wilson.

Professor ROBERT R. WILSON. Mr. Chairman, you will recall that three matters were referred to the Committee on Publications. Shall I read these one at a time?

Chairman JESSUP. Perhaps that would be better.

Professor WILSON. I believe most of you have copies, as they were distributed at the luncheon yesterday. The first resolution is as follows:

The Sixth Conference of Teachers of International Law and Related Subjects, realizing the need of improving the extent and scope of publications of the international conferences and commissions of the American Republics,

1. Commends the successful production of the publications of the Seventh International Conference of American States by the Government of Uruguay as a demonstration of the practical utility of uniform printing standards;

2. Notes that standards of uniform printing are, in accordance with Resolution LIV of the Seventh International Conference, in force for the publications of the international conferences of American States;

3. Recommends (a) that the Governing Board of the Pan American Union consider the formulation of a plan whereby the proceedings and records of the international conferences of American States may be even more promptly edited and published, (b) that the Governing Board authorize the publication of its minutes from the beginning, and (c) that the Governing Board authorize the publication of its current proceedings in whatever form seems practicable.

I move the adoption of that resolution.

(The motion was duly seconded.)

Chairman JESSUP. The chair would remind you that this is the result of a proposal made by Mr. Denys Myers in the first meeting of the conference, at which time it was suggested that the matter be referred to the Committee on Publications with instructions to report at this time. I believe copies of the resolution have been circulated. Is there any discussion?

There seems to be none.

(The motion was put to a vote and carried.)

Professor WILSON. I believe you also have the second resolution before you, but I shall read it.

The Sixth Conference of Teachers of International Law and Related Subjects (a) suggests to the Governing Board of the Pan American Union the development of the Union's various series of informational

publications, and their wider distribution through its system of depository libraries, and (b) recommends coördination in the production and distribution of the records of inter-American activities other than those of the international conferences of American States, and the concentration within the Pan American Union of both production and distribution of all such material as soon as the budget will permit.

I do not think this needs discussion, Mr. Chairman. We have already discussed it at some length.

Professor HERBERT WRIGHT. May I suggest the word "its" instead of "the" before the word "budget"? It might refer to the budget of the United States otherwise.

Chairman JESSUP. Do you accept that change, Professor Wilson?

Professor WILSON. I do.

Professor QUINCY WRIGHT. Both of these resolutions appear to be addressed to the Pan American Union. Why shouldn't this second one be put in as paragraph 4 of the first one? It seems to be a related subject. I do not comprehend the reason for having a separate resolution.

Chairman JESSUP. Will you please explain that, Mr. Wilson?

Professor WILSON. I cannot see any objection to having it combined. If Mr. Myers has no objection, I have none, Mr. Chairman.

Professor HERBERT WRIGHT. I think Mr. Myers' idea was that he wanted these things kept distinct in the eyes of the Pan American Union. He had consulted officials of the Department and that was their opinion.

Chairman JESSUP. They might receive separate attention.

The question has been raised, Mr. Myers, as to whether the two resolutions originally drafted by you should be combined into a single resolution or whether there is a particular purpose in keeping them separate.

Mr. MYERS. There is a particular purpose in doing it, Mr. Chairman. The second resolution, that is, the shorter one, involves certain budgetary matters and, therefore, should be considered on a different basis than the other.

Chairman JESSUP. Is there any further discussion? Are you ready for the question?

(The resolution, having been duly seconded, was put to a vote and carried.)

Chairman JESSUP. Are there any further resolutions?

Professor WILSON. I have one additional resolution. I regret that those who proposed it did not hand it to us in time to have it mimeographed. I shall read it slowly for the information of the body. It is as follows:

The Sixth Conference of Teachers of International Law and Related Subjects, appreciative of the publications of the Committee on Far Eastern Studies of the American Council of Learned Societies, and of the Institute of Pacific Relations, which publications have given American scholars greater access to Oriental materials,

1. Expresses interest in the publication of translations into English

(a) of articles by Oriental scholars in the vernacular, on international law and relations, and on Far Eastern government, public law and politics, and (b) of documents of Asiatic Governments printed in their official languages, and,

2. Expresses the hope that a quarterly journal for such publications may be established, and that the Committee on Far Eastern Studies and the Institute of Pacific Relations may find it advisable and possible to establish or assist toward the establishment of such a journal.

I move the adoption of the resolution, Mr. Chairman.

(The motion was duly seconded, put to a vote, and carried.)

Chairman JESSUP. The chair has been asked by the Committee on Publications of the Department of State to respond to the instructions of the conference on the first day and present to the conference the following resolution:

The Sixth Conference of Teachers of International Law and Related Subjects, reiterating the interest manifested by two prior conferences in the expansion of the publication program of the Department of State;

Noting with satisfaction the achievements recorded in the reports of the Conference's Committee on Publications;

Asserts its conviction that the continued development and expansion of that program is necessary both for purposes of scholarship and for the democratic control of the conduct of the foreign relations of the United States; and

Records its appreciation of the whole-hearted coöperation which its committees have constantly received from the Department of State and its officials; and

Congratulates the Department of State on its admirable publication record, which has been made largely through the devoted efforts of Dr. Wynne, Chief of the Division of Research and Publication, strengthened by the support of Assistant Secretary of State Messersmith; and

Expresses also its gratification at the intelligent and generous interest which the Committees of both Houses of Congress have taken in supporting this program; and

Urges upon both the Department of State and the Congress the need for constant attention to the steadily progressive furtherance of the publications program of the Department of State.

Professor HERBERT WRIGHT. Mr. Chairman, this resolution was presented to the Conference on Thursday morning by Professor Padelford in order that it might be conveyed to the Department that afternoon. As it was adopted by the Conference, no further action seems necessary.

Chairman JESSUP. The Committee on State Department Publications also asks me to report to the conference its recommendation that it be discontinued and that its functions be included in those of the Committee on Publications. In view of the fact that the Committee on Nominations has suggested no nomination for the Committee on State Department Publications, I assume this committee automatically lapses and, therefore, the recommendation of the committee would seem to require no action.

The Committee on State Department Publications, before going out of existence, however, has one further suggestion to lay before the conference, which is that the conference might well express its desire that the Committee on Publications cooperate fully with the Committee on State Department Publications of the American Society of International Law.

Do you wish to take any action along that line?

Professor QUINCY WRIGHT. I would be glad to move that the Committee on Publications be instructed to do so.

(The motion was duly seconded and carried.)

Professor ALBERT A. RODEN. May I ask one question in connection with cooperation with other bodies? Does anyone here know if there are similar bodies of teachers of international law in Far Eastern countries? Something has been said in connection with reducing this gap of fifteen years in our *Foreign Relations* Series. I had an unofficial statement from a former State Department man that one country in particular had been a little backward in giving consent. I am wondering, for instance, if any Far Eastern power has a similar body with which we can cooperate in getting pressure on that country.

Chairman JESSUP. Can anyone give any information on that subject as to a body in Far Eastern countries which might cooperate with us in bringing pressure on their own government?

Professor QUIGLEY. There is a very active Chinese organization in the social sciences, the Chinese Social and Political Science Association. I don't know whether or not there is one in Japan.

Professor QUINCY WRIGHT. There is the Japanese Council of the Institute of Pacific Relations. Its address is Nihon Kokusai Kyokai, 12, 2-Chome, Marunouchi, Tokyo, Japan.

Chairman JESSUP. Unless there is a motion made on the subject, I assume this discussion will be taken into consideration by the Committee on Publications.

Professor QUIGLEY. May I propose another resolution which would have been brought in by the Committee on Publications had it not involved the service of a member of that committee? It is as follows:

The Sixth Conference of Teachers of International Law and Related Subjects expresses its appreciation to the Librarian of Congress, the Chairman of the Committee on Library of the United States Senate and the Chairman of the Committee on Library of the United States House of Representatives for their great service to scholars and teachers in creating a collection of official publications of many countries and in promoting an international exchange of official publications between the United States and various countries.

The Conference expresses the hope that these activities, and particularly those relating to the collection of Chinese and Japanese Government documents, will be continued and expanded.

I move the adoption of the resolution.

Chairman JESSUP. Is there a second to that motion?

Professor WILSON. I should like to second the motion because it gives me an opportunity to express my very great appreciation of the cooperation of Mr. Childs, who has served for the last five years as a member of our Committee on Publications. While Mr. Childs is not, so far as I know, a teacher of international law and related subjects, I am sure that every American teacher of these subjects and every investigator is greatly indebted to him. I therefore welcome the chance to second this motion.

(The motion was put to a vote and carried.)

Professor HERBERT WRIGHT. I was not present at all the sessions, but did not the conference earlier adopt a resolution to appoint a Committee on Teaching?

Chairman JESSUP. There was a discussion of the question of a survey of curricula and of a request to the Carnegie Endowment. Is that the matter you have in mind?

Professor WRIGHT. I thought there was a committee appointed to study curricula in small colleges.

Professor EAGLETON. A resolution was passed. I offer the following resolution:

Resolved, That the Sixth Conference of Teachers of International Law express its gratitude to the Carnegie Endowment for International Peace for the generosity which has made possible the meeting of the conference; for its hospitality as is evidenced in the luncheon given to the conference, and in other ways; and for its recognition of the importance of these conferences to the improvement and encouragement of the teaching of international law and related subjects.

Chairman JESSUP. The chair rules that matter is not debatable and suggests it be adopted by the raising of hands.

(The motion was put to a vote and carried.)

Chairman JESSUP. The chair recognizes Professor Healy.

Professor HEALY. I suggest a resolution as follows:

Resolved, That the Sixth Conference of Teachers of International Law and Related Subjects records its very deep regret that the sickness of Dr. James Brown Scott has deprived it for the first time of the inspiration and invaluable guidance that he, as the founder of our organization, has given us at all previous meetings. We wish for him a most speedy recovery.

Chairman JESSUP. The chair will give the conference an opportunity to adopt the resolution by acclamation.

The motion is carried.

Is there any further business?

Professor HERBERT WRIGHT. Before we adjourn, would you mind describing particularly what the functions of the Secretary will be with regard to these proceedings?

Chairman JESSUP. I think it will be the same as last year, Mr. Wright, that is, the drafting of the record.

Professor WRIGHT. I just wanted to be sure.

Professor NOBLE. Arising out of the discussion of last Wednesday of the limitation of vocational opportunities it seemed to me that it might be worth while to consider whether it would be desirable to make a study of these opportunities, not with a view, obviously, of encouraging students to come into the field, but with a view to being able to state to them clearly and distinctly what the professional opportunities might be with respect to the situation in the foreign office and foreign service, and how much they can anticipate there, and what the opportunities are in other branches of government, and what the opportunities are in private business, and perhaps what the qualifications are if they want to teach.

From time to time I have felt inadequately informed to advise students who are interested in this particular problem.

As Professor Russell pointed out with regard to the situation in California, we do not pretend to be a vocational school in any sense of the word. Yet we should like to be able to advise the students as fully and as intelligently as possible.

It occurs to me that one function this group might perform would be to have a study made of that problem. And I should like to read this resolution:

Resolved, That a study be made of the vocational opportunities in the general fields of international law and relations, with a view to making clear to all interested persons the nature and extent of the openings of a professional character that exist in these fields.

I move the adoption of that resolution.

(The motion was duly seconded.)

Chairman JESSUP. I think the resolution is in order. Is there any discussion?

Professor EAGLETON. It seems to me this is the same sort of work which I myself once did on the Committee on Fellowships, and so on. I am not trying to slip anything by Professor Noble, but I know his interest in the matter, and I would like to suggest that Mr. Noble be asked to undertake the study and report to the next conference. I will not make the motion; I just suggest it.

Professor NOBLE. I would like very much to have the Committee on Curricula do that.

Chairman JESSUP. Do I understand your motion suggests the appointment of a committee for the purpose of making this study?

Professor NOBLE. I think the committee would have to be appointed, whether or not it would be a separate committee from the one now studying the curricula problems.

Chairman JESSUP. I assume a separate committee would be necessary because the task is quite different.

Professor NOBLE. They are not necessarily identical.

Chairman JESSUP. Do I understand your motion is that a separate committee be appointed for the purpose of *making this study* and that the Director of the conference be authorized to appoint that committee? I am trying to understand just what your motion is.

Professor NOBLE. That a study be made. That is my recommendation.

Chairman JESSUP. You do not make any recommendation as to how it should be made?

Professor NOBLE. Only that it be made by a committee.

Chairman JESSUP. And that the committee be appointed by the Director, which would be Professor Fenwick?

Professor NOBLE. Yes, that is right.

Chairman JESSUP. Is there any further discussion? If not, the question will be put to a vote.

(The motion was then put to a vote and carried.)

Chairman JESSUP. That committee will be appointed by the new Director, who has just been elected.

Is there any further miscellaneous business?

Professor EAGLETON. Mr. Chairman, one of the difficulties of these conferences in the past has been the fact that committee reports come up after we have assembled here, and we have no previous knowledge of them, and we are without sufficient time to discuss the reports. Some of them are quite voluminous, and some, I think, are quite important. It has been suggested that such reports be prepared in advance.

I am not quite sure how I should word this motion, but I would like to move that committees that have reports to give out at the next conference prepare them in sufficient time to have them mimeographed and distributed in advance to the members of the conference.

Professor QUINCY WRIGHT. I assume the ideas would be submitted to the Director.

Chairman JESSUP. Yes. I think the intention was that as a part of the preparation for the next conference, arrangements would be made so that the committee reports could be mimeographed and circulated to the members of the conference.

Professor WILSON. That involves some difficulties. If the committee is scattered all over the country it is difficult to get in advance the approval of the complete report of the committee.

Chairman JESSUP. Isn't it true those reports are generally circulated by mail to the members of the committee?

Professor WILSON. Yes. But generally there come back some suggestions. It is possible if there is sufficient advance notice as to when the conference will be held.

Chairman JESSUP. For instance, with the study of the curricula and the study of vocational opportunities, presumably that work would begin

in the near future. It may be another year or two or three years before we have another conference. It would certainly seem that those reports might be completed and circulated among the members of the committee and then mimeographed in time for submission before the opening of the next conference.

Professor WILSON. I merely meant to suggest that it would be desirable in so far as it is possible to do it. I do not wish to hold committees to this rule if it does not seem practicable.

Chairman JESSUP. I think that would be understood. Is there any further discussion of the motion?

(The motion was duly seconded, put to a vote and carried.)

Professor HEALY. I propose the following resolution:

Resolved, That it is the sense of this meeting that the Director and the members of the four committees are due a vote of thanks for the admirable manner in which they have handled the arrangements for this meeting, so profitable to all concerned.

If it is not out of order I would like to make a motion for a vote of thanks to those concerned.

(The motion was duly seconded and carried.)

Chairman JESSUP. Is there any further miscellaneous business?

Dr. COLVIN. Mr. Chairman, I would like to make a suggestion that I believe if this conference would go on record as favoring conferences and meetings more frequently, and annually, if possible—

Chairman JESSUP. Of course, the chair will entertain a motion on that; but I am inclined to think that the experience has been that the Endowment has been very glad to provide for these conferences as often as they felt it was possible for them to make the appropriation. And the experience in the past has been that each year the Director and Chairman of the Executive Committee of the conference have discussed with various individuals and with the officers of the Endowment the question as to whether it would be possible to have another conference that year; and as soon as all concerned felt that it would be feasible to meet, a meeting has been held.

I believe, Professor EGGLETON, that has been our experience since the last meeting, has it not?

Professor EGGLETON. Yes; it has been.

Chairman JESSUP. It has been discussed annually, and the conference was called as soon as the Endowment felt it could arrange for it.

Dr. COLVIN. I have just returned from Alaska and am not sure I am a member of this conference, though I have been of previous ones. So I doubt whether I am eligible to make such a motion as an invited guest, but I would suggest a motion that this organization go on record as favoring more frequent meetings of the conference and attempting to secure financial assistance from the universities to supplement that given by the Carnegie

Professor HEALY. With all due respect to the worthwhile character of that motion, is the gentleman competent to make the motion?

Dr. COLVIN. I asked that question myself.

Chairman JESSUP. I have a list of the members of the conference here. I regret I do not find Mr. Colvin's name on the list of members of the conference. Since the point has been raised, the chair will have to rule the motion is not in order.

I assumed, of course, that we had been intelligent enough to avail ourselves of your service as one of our members, but apparently we slipped up on it and did not do so.

Dr. COLVIN. I was at the previous conference. My interest has not been weakened but has been strengthened because of my connections with the Government.

Chairman JESSUP. That is why I made the suggestion. But since the point was raised the chair rules the motion is not in order.

Professor REID. Apropos of the question just raised, I wonder if you might want to make a motion in a somewhat different way. It seems to me that the problem has been raised very fairly this time that we do need to meet more frequently. There is a meeting of the American Society of International Law every year. In connection with the American Society of International Law, might it not be possible to have a regular meeting of this conference so that there might be an opportunity in connection with the program of the American Society of International Law for a meeting of the professors in that field to discuss their common problems at that time?

Chairman JESSUP. Is that a motion?

Professor REID. I wish to make it in the form of a motion, if you desire.

Chairman JESSUP. Is there a second?

There seems to be no second.

Professor QUINCY WRIGHT. There is no motion before the house?

Chairman JESSUP. No; there is no motion before the house.

What is the pleasure of the conference? Is there further discussion of this matter we have been considering?

Is there any further business?

If not, I think that ends the business meeting. In the absence of the new Director, Professor Fenwick, I shall ask Professor Quigley, as the new Chairman of the Executive Committee, to take the chair for the continuance of the general discussion.

(Professor Harold S. Quigley then took the chair.)

Chairman QUIGLEY. Are there any further remarks on the question Professor Fenwick proposed earlier, on the curricula of the small colleges?

I think it is getting rather late now. Perhaps no member desires to continue the discussion.

Professor RODEN. One question with respect to the curricula. Was that limited to the small colleges?

Chairman QUIGLEY. Yes.

Professor EAGLETON. The resolution was to investigate the curricula of small colleges. It was for the committee to decide and lay down its own limitations, and the committee is to be appointed by the Director.

Professor RODEN. I am just curious as to the extent of the scope of the work of this committee and the work of the Director. I believe that the small colleges are doing an interesting bit of experimentation which a representative committee might very profitably explore.

Professor EAGLETON. It will require some investigation to know how far they can go in that study. On the other hand, it will be limited by the amount of assistance that they can get, if any. Therefore, it would be better to leave it to the committee to work out for itself.

Chairman QUIGLEY. Is there any further discussion?

Professor HOWARD WHITE. Aside from the question of what are small colleges I would like to refer to whatever committee is appointed a suggestion that they associate with themselves on that committee a representative of a school of education who has concerned himself with the question of how much can be taught. Professor Stone's summary of the courses taught in small colleges to me was not encouraging. It suggested that individual instructors were frequently offering to undergraduates in substance the courses which they had taken as graduates and felt competent to present to undergraduates. I think we should consider seriously the contribution of experts in education in answering the question how much can profitably be taught to undergraduates in this field, as well as what are the best methods for instruction in this field.

Chairman QUIGLEY. Are there any other remarks on this subject?

Professor EAGLETON. One of the Canadian delegates to this conference raised the question as to whether or not such a study should be extended to include Canada. I think the committee might take that into consideration when they are studying the question.

Chairman QUIGLEY. If there is nothing further, I will now declare this conference adjourned *sine die*.

(Whereupon the conference adjourned at 4:35 o'clock p.m., *sine die*.)

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