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Quincy Wright

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THE EFFECT OF THE WAR ON INTERNATIONAL LAW

BY QUINCY WRIGHT*

IT IS not the writer's purpose to illustrate the system of international law by instances of its observance or violation since August, 1914. This would require much more space than he has at disposal and has been well done in the recent volumes by Professor Garner.¹ He hopes rather, to make a preliminary effort toward stating the effect of the war on the international law of peace, war and neutrality, though with full realization that the time is not yet ripe for an adequate statement. The present article deals with the law of peace.

THE SOURCES OF INTERNATIONAL LAW

Writers generally hold that international law is founded on agreement and reason.² Agreement may be tacit, evidenced by practice which in time becomes usage. If adhered to from a sense of legal obligation, usage becomes custom which is a source of law.³ No practice can become undoubted custom in so short a time as six years. Thus we will not be justified in assuming that war practices have modified the law, though they may indicate a growing usage.

*Assistant Professor of Political Science, University of Minnesota.

¹J. W. Garner, *International Law and the World War*, 2 vols., London, 1920.

²"International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." Wheaton, *Elements of International Law*, Dana, ed., p. 23. See also Westlake, *International Law*, Cambridge, 1910, 1: 14. Grotius denominated that part of international law founded on agreement "jus gentium" and that part founded on reason "jus naturale," (*De Jure Belli ac Pacis*, Prolegomena, secs. 1, 41), while Vattel called that part founded on agreement "le droit des gens positif" divided according as agreement is presumed, express, or tacit into "droit volontaire, conventionnel, et coutumier," and that part founded on reason "droit des gens naturel ou necessaire." (*Le Droit des Gens*, Preliminaires, sec. 27.) See Oppenheim, *International Law*, 3rd ed., London, 1920, secs. 54, 57, on the division of the "Grotians" into two schools, "the naturalists" and "the positivists" pinning their faith respectively on reason and agreement. He notes that during the nineteenth century the positivists tended to gain the upper hand. (Sec. 59.)

³Oppenheim, *op. cit.*, sec. 17.

Agreement may also be express, evidenced informally by exchange of notes or formally by treaties and conventions. Only formal agreements are sufficiently permanent to constitute a source of international law. The peace treaties introduce certain novelties into the system of international law and with them we shall be concerned.⁴ It must be remembered, however, that treaty provisions are international law, only for the states that have ratified the treaty, and that several important states, including Russia, Mexico and the United States, have not ratified any portion of the peace treaties. The states which were neutral during the war have for the most part acceded to the portions of the peace treaties most affecting international law, those establishing a League of Nations.⁵

Natural reason operates as a source of law. Those rules and principles which in the opinion of a legally trained mind must be observed if the existing international society is to persist are valid law.⁶ Put in another way, we may say that assuming certain fundamental purposes of the family of nations, those principles and rules which are necessary for securing them are law. It is true that certain text writers deny the validity of this source of international law,⁷ but nevertheless diplomats and courts of arbitration appeal to reason,⁸ even more often than to

⁴The Treaty of Versailles with Germany, (June 28, 1919), the Treaty of St. Germain with Austria (Sept. 10, 1919), the Treaty of Neuilly with Bulgaria (Nov. 27, 1919), and the Treaty of Trianon with Hungary (June 4, 1920), each contains the League of Nations Covenant as the first 26 articles, as does presumably the Treaty of Sèvres with Turkey (Aug. 10, 1920), though the latter has been neither ratified nor published. Peace treaties have also been concluded by the Principal Allied and Associated Powers with Poland (Versailles, June 28, 1919), Czecho-Slovakia (St. Germain, Sept. 10, 1919), the Serb-Croat-Slovene State (St. Germain, Sept. 10, 1919) and Roumania (Paris, Dec. 9, 1919). All of these treaties except that of Sèvres have been printed in full in the Supplements to the American Journal of International Law from July, 1919, to Jan. 1921. The Treaty of Versailles has also been published in the Naval War College, International Law Documents, 1919, with a convenient index. An index has also been published by the British government as Treaty Series (1920) No. 1. Official publications with French and English texts in parallel columns have been issued by the French, British and United States governments, the latter as Sen. Doc. No. 85, 66th Cong., 1st Sess., and in English text alone as Sen. Doc. No. 49, *ibid.*

⁵Supra note 49.

⁶Westlake, *op. cit.* 1: 14-15.

⁷Oppenheim, *op. cit.*, secs. 15, 59; Hall, *International Law*, 7th ed., (Higgins), pp. 1-2.

⁸As examples see belligerent arguments for right of retaliation even though adversely affecting neutrals in German note, February 16, 1915, and British Memorandum, April 24, 1916, sec. 38, (Department of State, *European War*, 1: 57, 3: 77) and neutral reply in U. S. note, April 21, 1915, (*Ibid.* 1: 74-75). Mr. Carter's argument for the United States in

custom, treaty and authority in the practical determination of legal controversies.⁹ According to Bonfils:¹⁰

"Public international law proposes to reach a compromise between two actions, contrary in fact, that of the principle of autonomy of states, and that of the notion of the cosmopolitan society. Neither of these two principles ought to supplant the other, nor to be put completely to its practical application."

With this conception of the ultimate purpose of international law there seems to be substantial agreement among the writers¹¹ and there is no reason to believe that the war has altered it. Still there is the ideal of national independence. Still there is the ideal of a world society. We may assume the same fundamental principles of international law, though doubtless the experience of the war has shown that a change of emphasis from rights to responsibilities is necessary to maintain them, and that new conditions caused by inventions, in means of communication and transport, new instruments of warfare, and the more complete organization of populations for war have rendered former de-

the Behring Sea Arbitration of 1893 is largely based on pure reason. (1 Moore, *International Arbitrations*, 827 et seq.)

⁹Since diplomats usually accept without question rules of law well established by precedent, treaty or authority, controversies in practice frequently hinge on points to sustain which reason plays a prominent part. See Lawrence, *Principles of International Law*, sec. 10.

¹⁰Bonfils, *Manuel de droit international public*, 6th ed., (Fauchille) Paris, 1912, sec. 24, p. 10.

¹¹"Both schools [national or negative, and cosmopolitan or positive] profess to be advocates of peace, which the negative school hopes to realize by the principle of absolute non-intervention; the positive school by the principle of international organization carried to the extent of regulating national as well as international legislation; whilst the 'peace party,' rushing from the one extreme to the other, attempts to draw water at both wells. But whilst hopelessly conflicting in isolation, these two schools, when combined, become complementary; and it is their reconciliation, by the vindication of national freedom of action, not apart from, but in and through the recognition of international dependence, which constitutes the still very imperfectly solved problem of international law." (1 Lorimer, *Institutes of the Law of Nations*, London, 1883, 11.) Writers have often sought to reconcile these two aims of international law by a rule closely resembling that posited by the individualistic school of ethics. Thus Vattel says: "A nation is therefore free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation" (op. cit. Prelim. sec. 20), and Westlake thinks: "International rules ought to be made with due care that they shall not restrict liberty more than is necessary" (op. cit. 1: 18). With these compare Spencer: "Every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man." (*Social Statics*, chap. 4, sec. 3.) See also Hobbes, *Leviathan*, chap. 14; Thomasius, *Fundamenta juris naturae et gentium ex sensu communi deducta*, ed. 1718, p. 213, cited Lorimer, *Institutes of Law*, Edinburgh, 1872, p. 232; Kant, *Principles of Political Right*, (Trans. Hastie, 1891), p. 36, and *The Philosophy of Law*, (Tran. Hastie, 1887) p. 45, referred to Spencer, *Justice*, 1891, Appdx. A, and Wright, *The Enforcement of International Law*, U. of Illinois Studies in the Social Sciences, 5: 21-22.

ductions obsolete and have made necessary a reëxamination of many detailed rules.

Reason, as a source of law, may also be formalized in the writings of preëminent scholars.¹² The rules deduced from principle and crystallized in the texts of Grotius, Vattel, Wheaton, Bonfils, Hall, etc., rest on the same authority now that they did seven years ago. This source of law has not been affected by the war. It probably will increase our confidence in these writers to observe the justness of some of their forecasts. Hall writes in the preface of his third edition in 1889:¹³

“Looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. . . . It would be idle to pretend that Europe is not now in great likelihood moving towards a time at which the strength of international law will be too hardly tried. Probably in the next great war the questions which have accumulated during the last half century and more, will all be given their answers at once. Some hates moreover will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existences will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals; and most likely the next war will be great. But there can be very little doubt that if the next war is unscrupulously waged, it also will be followed by a reaction towards greater stringency of law. . . . I therefore look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist.”

While custom and authority, by which the major part of international law is firmly established, have not changed during the war, the peace treaties and reason guided by recent experience may inform us what tendencies of international law have been most stimulated by occurrences of the past six years.

¹²For classic statements of the authority of text writers in international law see Wheaton, *op. cit.* sec. 15, and Kent, *Commentaries*, 18, cited with approval by Gray, J., in the *Paquette Habana*, (1899) 175 U. S. 677, 44 L. Ed. 320, 20 S. C. R. 290.

¹³Hall, *International Law*, 7th ed., pp. xx-xxi.

THE SANCTIONS OF INTERNATIONAL LAW

On December 28, 1915, Mr. Elihu Root called the attention of the American Society of International Law to the serious effect which the war then raging was having upon the very foundations of international law.¹⁴

"Whether or not" he said, "Sir Edward Carson went too far in his recent assertion that the law of nations has been destroyed it is manifest that the structure has been rudely shaken."

"The barriers that statesmen and jurists have been constructing laboriously for three centuries to limit and direct the conduct of nations toward each other, in conformity to the standards of modern civilization, have proved too weak to confine the tremendous forces liberated by a conflict which involves almost the whole military power of the world and in which the destinies of nearly every civilized state outside the American continents are directly at stake. . . . For the present, at all events in all matters which affect the existing struggle, international law is greatly impaired."

With a retrospect of two years since the armistice can we qualify this interpretation of then present events?

It must be evident that to enumerate violations of the rules and principles of international law during the war and since, however disconcerting to the student and disturbing to the faith of the layman, is not to demonstrate the death or even the decadence of that body of law. Until the law has had a sufficient opportunity to react with appropriate remedies and punishments, whether by conscious judgments or natural consequences, we are not entitled to proclaim its obsequies. If the remedy is complete, the violation may ultimately demonstrate the vitality of the law. "International laws violated with impunity" continues Mr. Root, "must soon cease to exist," but international laws violated with disaster may be strengthened. Yet with due consideration to the remedies which have been exacted, the punishments which have been meted out, the Nemesis which in many cases has followed illegal action, it must be admitted that serious grounds exist for questioning the sufficiency of the sanctions of international law. We may investigate the progress made toward fulfillment of Mr. Root's prophecy that:

"Vague and uncertain as the future must be, there is some reason to think that after the terrible experience through which

¹⁴The Outlook for International Law, Proceedings, Ninth Annual meeting, American Society of International Law, 1915, p. 2. See also Munroe Smith, The Nature and the Future of International Law, Presidential address American Political Science Association, Dec. 28, 1917, Am. Pol. Sci. Rev. 12:8.

civilization is passing there will be a tendency to strengthen rather than abandon the law of nations."

International law is doubtless sanctioned in part by inertia and habit.¹⁵ Nations do as they have done because they lack originality to think of something new. So far as international law is observed for this reason alone it resembles the scientist's "law of nature." It is merely a generalization of past practice and can not be violated, because a new departure merely changes the law. So far as law is of this character it is descriptive and not formative. As civilization has advanced and states have become more self-conscious, their allegiance to habit has become less. The experience of the war has shown that the highly organized states of today do not blindly follow custom when important interests are at stake. Mere inertia is not likely in the future to prevent rapid changes in the law.

If, leaving the scientist, we follow the humanist and conceive of law as a guide for the conduct of intelligent beings, we find that law which changes rapidly is not law at all. Law from the humanist's point of view must be a permanent standard by which conduct can be measured. What is it that induces nations to conform their conduct to international law? Austin called international law "international public morality" and asserted that it was sanctioned only by the moral sense of nations.¹⁶ Others, though denying its exclusiveness, have considered the moral sanction important.¹⁷ Hobbes and Grotius called the performance of covenants a fundamental "law of nature,"¹⁸ and others have asserted that respect for the obligations of contract is elementary in morals, and the *sine qua non* of all society,¹⁹ yet the war began

¹⁵This is in varying degree true of all law. Maine speaks of a stage "in the infancy of mankind" when "law has scarcely reached the footing of custom; it is rather a habit." *Ancient Law*, p. 8.

¹⁶Austin, *Jurisprudence*, 173, 226. See also 2 Stephen, *History of the Criminal Law*, 25; Gray, *Nature and Sources of the Law*, sec. 285.

¹⁷Grotius, *op. cit.* Prolegomena, secs. 6-8; Vattel, *op. cit.* *Preliminaires*, sec. 7. "They (rules of international law) are enforced partly by a conscientious conviction that they are good and right." Lawrence, *The Principles of International Law*, sec. 9.

¹⁸Hobbes, *Leviathan*, chap. 15; Grotius, *op. cit.* Proleg., sec. 15. The jurist's "law of nature" is of course different from the scientist's "law of nature." See Lorimer, *Institutes of Law, Introduction*; Maine, *Ancient Law*, chap. iv; Bryce, *Studies in History and Jurisprudence*, chap. xi.

¹⁹"Fundamentum justitiae est fides, id est dictorum conventorumque constantia et veritas." (Cicero, *de Off.*, 1: 9.) "Pour donner quelque consistance au moral et quelque sûreté aux nations il faut supposer, par préférence à tout le reste, deux points qui sont comme les deux pôles de la terre entière: l'un que tout traité de paix juré entre deux princes est inviolable à leur égard." (*Directions pour le Conscience d'un Roi*, 6 Fen-

by the conversion of a treaty to a scrap of paper,²⁰ continued with repeated accusations of treaty repudiation²¹ and ended by allegations of a breach of the agreement on which the enemy laid down his arms, in the opinion of some by the states which ratified the treaty of Versailles,²² and, in the opinion of others, by the state which refused to ratify.²³ Machiavelli denied that nations had any morals and was followed in effect by Frederick the Great and Treitschke.²⁴ Though few accept this harsh conclusion we may question whether, in view of recent experience the world would not be naïve to rely on the conscience of nations as a guarantee of international law where important national interests are at stake.²⁵

elon, *Oeuvres*, 319, ed., 1810.) "A treaty-breaking state is the great enemy of nations, the destroyer of their happiness, the obstacle of their progress." (2 Phillimore, *Commentary on International Law*, 57.) "A cardinal maxim of justice in all its forms, whether between man and man, or between nation and nation is the maxim, 'keep faith.'" (Creasy, *First Platform of International Law*, p. 40.) See also Hall, *op. cit.* p. 360.

²⁰Sir Edward Goshen, British Ambassador at Berlin thus reports his interview with Chancellor Bethmann-Hollweg on August 4, 1914: "I found the Chancellor very agitated. His Excellency at once began a harangue which lasted for about twenty minutes. He said that the step taken by His Majesty's Government was terrible to a degree; just for a word—'neutrality'—a word which in war had so often been disregarded—just for a scrap of paper, Great Britain was going to make war on a kindred nation who desired nothing better than to be friends with her." *British Parl. Pap.*, Misc. No. 8, 1914; Garner, *op. cit.* 2: 192.

²¹See for example Austrian comment on Italian repudiation of the Triple Alliance, (Baron Burian, Austro-Hungarian Foreign Minister to the Duke of Avarna, Italian Ambassador, May 21, 1915, *Italian Green Book*, No. 77) and United States comment on the German repudiation of "solemn assurance" to discontinue submarine warfare (Secretary of State Lansing to Ambassador Gerard, Feb. 3, 1917, *U. S. Dept. of State, European War*, 4: 409.) See also U. S. comment on German violations of the treaty of 1828, *Ibid.*, 4: 417. Charges by both belligerents of violation of the conventional law of war were of almost daily occurrence. See especially protests against violations of the Geneva convention by both belligerents and by the International Committee of the Red Cross Society at Geneva, Garner, *op. cit.* chap. xx, and p. 512.

²²See Observations of the German delegation on the Conditions of Peace, May 29, 1919, Official Summary, printed in *Sen. Doc.*, No. 149, 66th Cong., 1st Sess., and printed in full, *International Conciliation*, Oct. 1919, No. 143. See also, Keynes, *The Economic Consequences of the Peace*, N. Y. 1920, pp. 60-65.

²³4 MINNESOTA LAW REVIEW, 35.

²⁴Machiavelli, *The Prince*, chap. 18; Treitschke, *Politics*, (Eng. Trans., N. Y. 1916), chap. 3.

²⁵Examples of a cynical attitude toward treaties have not been wanting in the past. "Then the astonished Dutchmen asked, if the Hudson River belonged to the King of England, in what light was the treaty of Hartford to be regarded. As mere waste paper, was the reply; it had never been ratified by any governing authority in England whether parliament, Lord Protector, or King." (1 Fiske, *The Dutch and Quaker Colonies*, ed. 1902, 327, with reference to treaty of Sept. 19, 1650.) "Treaties at best are but complied with so long as interest requires their fulfill-

But if nations will not observe law from the promptings of conscience, will they not from an understanding of its utility? "Natural Law," says Grotius, "is reinforced by utility."

ment; consequently they are virtually binding on the weaker part only, or in plain truth they are not binding at all." (Irving, *Knickerbocker History of New York*, book 5, chap. 4.) "Two centuries ago Spinoza had avowed what Mackintosh terms 'the absurd and detestable maxim' that states are not bound to observe their treaties longer than while the interest or danger which first formed the treaties continues, but this doctrine had, until lately, found few advocates in theory." (Creasy, *First Platform of International Law*, London, 1876, p. 41.) "In a recent historical work, Jäger's *History of the Franco-Prussian war*, I read the following passage, which is evidently intended to annihilate me: 'Only a very narrow-minded politician could wonder that Prussia seized that moment (1870) for breaking the treaty.' (Of Paris 1856 neutralizing the Black Sea). The historian probably did not contemplate the application of that principle to Alsace." (2 von Beust, *Memoirs*, Eng. Trans., London, 1887, 222.) "Did any impartial person blame Prussia or Austria because, in 1813, they violated the treaties which bound them to the first Napoleon, and not only did not fight in his ranks, as their engagements required, but brought their whole military force into the field against him, and pursued him to his destruction? . . . Yet it was as true of those treaties as it is of the treaty of 1856, that, disadvantageous and dishonorable as they might be, they had been submitted to as the purchase-money of peace, when the prolongation of war would have been most disastrous. . . . If, though not fit to be perpetual, (a treaty) has been imposed in perpetuity, the question when it becomes right to throw it off is but a question of time. No time having been fixed, Russia fixed her own time, and naturally chose the most convenient. She had no reason to believe that the release she sought would be voluntarily granted on any conditions which she would accept; and she chose an opportunity which, if not seized, might have been long before it occurred again, when the other contracting parties were in a more than usually disadvantageous position for going to war." (J. S. Mill, *Treaty Obligations*, *Fortnightly Review*, N. S. 1870, p. 715). "All contracts between great states cease to be unconditionally binding, as soon as they are tested by 'the struggle for existence.' No great nation will ever be induced to sacrifice its existence on the altar of fidelity to contract when it is compelled to choose between the two." (2 Bismarck *Reflections and Reminiscences*, London, 1898, 270). "A great nation does not surrender what it possesses except under the pressure of extreme necessity; all treaties making concessions are acknowledgements of such a necessity, not moral obligations. If every people justly reckons it a point of honour to tear to pieces by force of arms treaties that are disgraceful, how could honour enjoin patient adherence to a convention like the Caudine to which an unfortunate general was morally compelled, while the sting of the recent disgrace was keenly felt and the vigour of the nation subsisted unimpaired?" (1 Mommsen, *History of Rome*, Bk. 2, chap. 6, *Dickson's Trans.*, 377) "We must beware of judging a great crisis from the advocates' Philistine standpoint. When Prussia broke the Treaty of Tilsit the civil law would have pronounced her wrong, but who would dare assert that she was guilty now? Not the French themselves. This applies to international treaties less devoid of all morality than that which Prussia was compelled to conclude with France. Every state reserves to itself the right to be judge of its own treaties, and the historian must not condemn, without searching deeper to discover whether it is fulfilling its unqualified duty of self-maintenance." (Treitschke, *Politics*, English Trans. 1916, 1: 96.) See also Bernard, *Lectures on Diplomacy*, London, 1868, p. 85; 5 Moore, *International Law Digest*, 338-341.

"As a citizen," he continues, "who violates the civil law for the sake of present utility, destroys that institution in which the perpetual utility of himself and his posterity is bound up; so too a people which violates the laws of nature and nations, beats down the bulwark of its own tranquillity for future time."²⁶

To the same effect says Vattel:²⁷

"The laws of the natural society of nations are so important to the welfare of every state that if the habit should prevail of treading them underfoot no nation could hope to protect its existence or its domestic peace, whatever wise and just and temperate measures it might take."

War, however, is itself the negation of society. Whatever may be said of the international law of peace, can the law of war be sanctioned by utility? It would seem that if the law of war is of such character that violations inevitably react disastrously upon the violator, it would be well sanctioned. The war witnessed the working of this nemesis. Illegalities led to reprisals, atrocities stimulated recruiting, disregard for the fundamental rights of neutrals made neutrals enemies. The history of the war is full of evidence that violation of the law of war does not pay in the long run.²⁸

If violation of international law is inevitably against the long run interest of the violator, then further enlightenment is the only need, for the lives of states are long. They can afford to forego a present advantage for a sure though distant gain. Machiavellian statesmen and ruthless generals need instruction as to the inevitable consequences of their acts rather than persuasion to be good. This may be true but the nemesis may be far off. Even enlightened statesmen may be skeptical of its inevitableness.²⁹ The war has not increased confidence in enlightened self-interest as a sanction for international law.

The sanction of municipal law is the force of organized society which quickens reason by making certain and swift the consequences of violation of law, otherwise slow and vague.³⁰ Only by organization has positive law been maintained within the

²⁶Grotius, *op. cit.* Proleg., secs. 16, 18.

²⁷Vattel, *op. cit.* Prelim. sec. 22.

²⁸See Garner on effect of devastation, *op. cit.* 1: 322; on effect of air raids, 1: 488; on effect of deportations, 2:184 and Kellogg on effect of terrorism, *Atlantic Monthly*, 122: 289, (Sept. 1918) Garner is of the opinion that collective fines were effective in attaining their immediate object, 2: 362.

²⁹We may recall the Socratic paradox, that though Virtue is Knowledge, yet Virtue can not like Knowledge be taught. Plato, *Protagoras* and *Meno*.

³⁰Root, *op. cit.* Proc. Am. Soc. of Int. Law, 1915, pp. 4-5.

state. Anarchists alone have sufficient confidence in human nature to advocate an abandonment of police and courts, substituting therefor a reliance upon moral sense and enlightened self-interest. Is philosophical anarchy more likely to be successful outside of the state? Writers on international law have thought not and have asserted the necessity of conscious sanctions. Public opinion has been defended as a sufficient sanction.³¹ The reality of its pressure is evident by the anxiety which belligerents showed to justify their acts before the world, but it has not proved sufficient in the face of determined policies of aggression.

The conviction growing from the war, that international law must be better sanctioned was realized in the peace treaties by the more definite organization of the family of nations in a League. Although compulsory settlement of legal controversies is not provided for, yet all controversies must be submitted to either conciliation, arbitration, or judicial settlement (art. 12) under penalty of economic and military coercion by the League, (art. 16) and if submitted to arbitration or judicial settlement the award becomes enforceable by the League (art. 13). The financial liability of states (art. 231) and the penal liability of individuals for violations of the law of war (art. 228) was also definitely recognized by the treaty of Versailles.

THE SUBJECTS OF INTERNATIONAL LAW

A subject of international law has been defined as one "upon whom [international] law confers rights and imposes duties."³² This does not, however, adequately distinguish between subjects and objects of international law. Thus Westlake says "it would be pedantic to deny that the pirate and the blockade runner are subjects of international law"³³ and Oppenheim's argument denying that status to such individuals as well as heads of states and diplomatic officers seems to carry a suggestion of pedantry.³⁴

"If we look more closely into these rights, it becomes quite obvious that they are not given to the favoured individual by the law of nations directly. For how could international law, which is a law between states, give rights to individuals, con-

³¹Root, *The Sanctions of International Law*, 2 *Am. Journ. of Int. Law*, 451, (1908). Mr. Root himself, however, most clearly realized the insufficiency of this sanction in the address of 1915 just referred to.

³²Borchard, *The Diplomatic Protection of Citizens Abroad*, N. Y., 1915, p. 16.

³³Westlake, *Collected Papers on Public International Law*, Cambridge, 1914, p. 2.

³⁴Oppenheim, *op. cit.* 1: 457, 460.

cerning their relations to a state? What the law of nations really does concerning individuals is to impose the duty upon all the members of the family of nations to grant certain privileges to such foreign heads of states and diplomatic envoys, and certain rights to such foreign citizens, as are on their territory. And, corresponding to this duty, every state has by the law of nations a right to demand that its head, its diplomatic envoys and its citizens be granted certain rights by foreign states when on their territory. Foreign states granting these rights to foreign individuals do this by their municipal laws, and these rights are, therefore, not international rights, but rights derived from municipal laws."

Perhaps the discussion can be taken out of the realm of metaphysics if we confine the term subjects of international law to those entities which are competent to appeal directly to established international processes for the enforcement of their rights under international law. Recalling that international law consists of those rules and principles for the violation of which states are responsible,³⁵ we may conclude that subjects of international law include all entities, whether states, protectorates, colonies, corporations, or individuals that can bring action by some recognized and reasonably effective process against a state (other than that of which it is a member or subject) to remedy an alleged violation of its rights. Thus to determine what entities at any given time are subjects of international law we must examine the condition of international organization. As Borchard points out,³⁶ the international prize court provided by the XII Hague convention of 1907, if established would have made individuals to a limited extent subjects of international law since it afforded them recourse against belligerent states alleged to have violated their rights on the high seas. The practice of diplomatic protection of citizens abroad does not, however, render individual subjects of international law, because although their rights and duties are measured by international law, yet they have no recourse except by the grace of their government.³⁷ If, however, an international court for the settlement of pecuniary claims were established giving direct recourse to individuals with claims against foreign governments, such persons would become, in so far, subjects of international law.³⁸ Whether the recourse

³⁵Wright, *The Enforcement of International Law*, p. 13.

³⁶Borchard, *op. cit.* p. 17.

³⁷*Ibid.*, pp. 356, 363.

³⁸Such a court has often been recommended. Borchard *op. cit.* pp. 328, 373, 443, 864; Wright, *12 Am. Journ. Int. Law*, 89.

against the state offered to aliens in national courts applying international law, such as prize courts, renders such aliens subjects of international law raises a much discussed question. But in view of the ultimate subordination of such courts to national legislation we must answer in the negative.³⁹

The most important subjects of international law are sovereign states, which have recourse against other states by diplomacy, arbitration, reprisals or war. Since the beginning of the world war the number of sovereign states has been increased. Poland, Czecho-Slovakia, Finland, and the Hedjaz have been generally recognized and admitted to the League of Nations. Austria-Hungary has ceased to exist, its two components, reduced in area, have been recognized as independent states. Montenegro seems to have united with Serbia and much former Austrian territory to form the Serb-Croat-Slovene state commonly called Jugo-Slavia.⁴⁰ From the former territory of Russia and Turkey a number of de facto states have grown up, some of which may ultimately receive general recognition. In this class are Lithuania, Esthonia, Latvia, Ukrainia, Georgia, Azerbaijan, Armenia, the Far Eastern Republic and various other governments in Siberia.⁴¹

There has also been a change in the condition of certain states under special status. Belgium and Luxemburg have been relieved of the neutralization imposed by the treaties of 1839 and 1867 respectively. Luxemburg still regards herself as neutralized by internal legislation but has agreed to alter this legislation so as to conform with requirements of the League of Nations Covenant including the duty to permit the passage of troops authorized by the League.⁴² Switzerland continues under the neutralization created by the Treaty of 1815 and the League of Nations has recognized her exemption from any obligation "to take part

³⁹Borchard, *op. cit.* p. 17; Wright, *The Enforcement of International Law*, pp. 15-17, 223-228; The Zamora, L. R. [1916] 2 A. C. 77.

⁴⁰A useful list of the states of the world is given in Oppenheim, *op. cit.* 1: 188.

⁴¹The first seven named applied for admission to the League of Nations at the meeting of the Assembly, Dec., 1920. Though this was refused the three Baltic States and Armenia were admitted to participation in the technical organizations of the League. In view of the hopes of Armenia, Lord Rebert Cecil, representative from South Africa, thought this was "to offer not a stone in place of bread but rather a puff of smoke." (League of Nations Assembly, Provisional Verbatim Record, 27th Plenary Session, Dec. 16, 1920, pp. 11-12.)

⁴²Treaty of Versailles, art. 31, 40. League of Nations Assembly, *op. cit.* 26th Plenary Session, Dec. 16, 1920, p. 6.

in any military action or to allow the passage of foreign troops or the preparation of military operations within her territory."⁴³ This exemption is not in reality a reservation since the Treaty of Versailles of which the League of Nations Covenant is a part itself recognizes the special status of Switzerland.⁴⁴ Albania was neutralized under the protection of an international commission of control on gaining her independence in 1913.⁴⁵ Her status at present, however, appears to be that of a sovereign state and as such she has been admitted to the League of Nations.⁴⁶

The treaties have given formal sanction to the distinction long existent in fact between great powers and other states.⁴⁷ The United States of America, The British Empire, France, Italy, and Japan, designated the Principal Allied and Associated Powers in the treaties are recognized in the former class and if members of the League of Nations are accorded permanent membership in the Council (art. 4). Germany, Austria and Russia on the other hand have ceased for the time being at least to be "great powers."

States members of the League of Nations occupy a special status under the treaties and this status affects not only their relations among each other but also their relations with states not members of the League. Thus member states are guaranteed against violation of their territorial integrity and existing political independence by outsiders (Art. X), and may enlist the aid of the League to compel outsiders to submit controversies to peaceful settlement (Art. XVII). The League of Nations at present has forty-seven members, thus including all recognized sovereign states except Germany, Hungary, Turkey, Russia, United States, Mexico, Abyssinia, Afghanistan, Monaco, and Lichtenstein. The

⁴³League of Nations, Official Journal, (1920) 2: 58.

⁴⁴Art. 435. Furthermore, Swiss neutralization is an "international engagement . . . for securing the maintenance of peace" and so is expressly recognized by Art. 21 of the Covenant. See Swiss Official Commentary, printed in the League of Nations, World Peace Foundation, Vol. 3, No. 3, pp. 151-152, (June, 1920). See also Message of Swiss Federal Council to the Federal Assembly, Feb. 17, 1920, International Conciliation, No. 152, pp. 321, 325, (July, 1920).

⁴⁵Mehemed Bey Konitza, The Albanian Question, reprinted from the Adriatic Review, International Conciliation, No. 138, p. 767, (May, 1919). Sayre, Experiments in International Administration, N. Y. 1919, pp. 56-59.

⁴⁶League of Nations Assembly, op. cit. 28th Plen. Sess., Dec. 17, 1920, pp. 3-10.

⁴⁷Lawrence, Principles of International Law, secs. 113-115. Dickson, The Equality of States in International Law, Cambridge, 1920. Chap. VIII. Oppenheim, op. cit. sec. 116 denies that there is a difference in legal status.

protectorates of Andorra, San Marino, Iceland, Danzig, Egypt, Tunis, Morocco, Mongolia and Thibet are not members of the League of Nations though their protecting powers are in each case members.⁴⁸ On the other hand, five self-governing and partially self-governing colonies of the British Empire, Canada, Australia, New Zealand, South Africa and India are full members of the League and have therefore become subjects of international law.⁴⁹

The League of Nations is itself an entity which can enter into direct relations with outside states as well as its members and is therefore a subject of international law. As Oppenheim emphasizes, it "is in every respect an international person *sui generis*, something not to be likened to anything else, for it is neither a state nor a federal state (*Bundesstaat*), not a confederation of states (*Staatenbund*), nor a mere alliance."⁵⁰

Although the treaties accord special rights and privileges to peoples under a mandatory, and to individuals, racial minorities and national groups in various East European States, and although the League of Nations guarantees these rights and privileges,⁵¹ these entities have not been made subjects of international law. None of these individuals, racial minorities or national groups have a direct method of enforcing their rights and privileges but must in each case get an independent state to champion their cause. Thus the Roumanian treaty provides:⁵²

"Roumania agrees that any member of the Council of the League of Nations shall have the right to bring to the attention of the council any infraction, or any danger of infraction, of any of these obligations, and that the Council may thereupon take such action and give such direction as it may deem proper and effective in the circumstances."

Though article 22 of the League of Nations Covenant recognizes that "the wishes of these communities [to be put under class A mandates] must be a principal consideration in the selection of the mandatory" it makes no provision for appeal by rep-

⁴⁸For list of states and protectorates with discussion of their status, see 1 Oppenheim, 167, 188.

⁴⁹Annex to Art. 26, League of Nations Covenant, Oppenheim, *op. cit.* 1:170; and Allin, 4 MINNESOTA LAW REVIEW, 117, 190, (Jan. Feb. 1920). These Colonies have access to the Permanent Court of International Justice, 14 Supp. Am. Journ. of Int. Law, 378.

⁵⁰Oppenheim, *op. cit.* 1: 269.

⁵¹League of Nations, Official Journal, 1920, 2: 55-56.

⁵²Art. 12, 14 Supp. Am. Journ. Int. Law, 329. Similar provisions are in the treaties with Poland (art. 12), Czecho-Slovakia (art. 14), and the Serb-Croat-Slovene State (art. 11).

representatives of these communities to any organ of the League. The mandatory power and not the people under the mandate makes an annual report to the mandate commission.

Furthermore, although the principle of national self-determination was applied in arranging boundaries in the enemy territory,⁵³ and though plebiscites were provided for in several regions,⁵⁴ yet unrecognized national groups were not in any sense accorded a status under international law. They may, however, appeal to the League of Nations by persuading a member state to champion their cause. Thus Article XI of the Covenant declares it "to be the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstances whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." Sir Frederick Pollock says, with reference to international consideration of the Irish question:⁵⁵

"There is only one way in which this could happen, namely that the government of the United States should declare Irish-American sympathy with unsatisfied nationalist claims in Ireland to be capable of disturbing good understanding between Great Britain and the United States. That is a possible event if a solution is not reached within a reasonable time, but it is more likely that a confidential intimation from the United States would not only precede formal reference to the Council but avoid the necessity for it."

The Permanent Court of International Justice authorized by article XIV of the League of Nations Covenant and provided for in detail by the Geneva meeting of the Assembly is "open of right" only to the states mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations. "Other states" may, however, "have access to it" under conditions determined by the Council of the League.⁵⁶ No provision is made, as in the Central American court of justice in effect from 1907 to 1917 and in the proposed International Prize Court, for suits begun by private individuals.

⁵³Haskins and Lord, *Some Problems of the Peace Conference*, Cambridge, 1920, pp. 19-20.

⁵⁴Schleswig, Allenstein, Marienwerder, Silesia, Saar Valley, Eupen, Malmedy, Teschen, Zips, Arva, and Klagenfurt. See Haskins and Lord, *op. cit.* under these names in index.

⁵⁵Pollock, *The League of Nations*, p. 131. This statement assumes that the United States is a member of the League.

⁵⁶14 *Supp. Am. Jour. Int. Law*, 378.

Thus the essential subjects of international law are still sovereign states, although the implications of sovereignty have been somewhat modified. The League of Nations unquestionably tends to decrease the rights and powers of its members and to increase their obligations and responsibilities, with the purpose, however, of better securing those rights and of enlarging the capacity of each to exercise its powers.

"By accepting the League, states recognize that their existence depends upon the general maintenance of law, and consequently that they must prefer the claim of that law for defense, as against the lure of an immediate national profit.⁵⁷ Thus, though international law will continue to aim at preserving the independence and autonomy of states, it must be assumed that its own preservation is more important. It follows that international law can no longer be conceived by text writers as a series of deductions from an assumed fundamental right of states to exist. The responsibility of states to assure the existence of the law will have to be conceived as even more fundamental."⁵⁷

THE OBJECTS OF INTERNATIONAL LAW

The extent to which states can actually exercise their subjective sovereignty can be ascertained by examining their jurisdiction or the control which they in fact exercise over material things, called by Oppenheim "the objects of international law" and classifiable as territory, individuals and the high seas.⁵⁸ The dominating conception of international law since the peace of Westphalia has been that territory must be under the exclusive and complete jurisdiction of one state.⁵⁹ Conditions of joint jurisdiction and partial jurisdiction have been rare.⁶⁰ The principle of exclusive and complete territorial jurisdiction is recognized in the League of Nations Covenant by the guarantee of "territorial integrity" and "existing political independence" to members of the League (Art. X) and by the exclusion from consideration in the Council or Assembly of disputes "arising out of a matter which by international law is solely within the domestic jurisdiction" of either party (Art. XV, par. 8). However, the treaties contain a number of specific exceptions to this principle. Thus a number of rivers of Europe are put under control of inter-

⁵⁷Wright, 13 Am. Pol. Sci. Rev., 556, (Nov., 1919).

⁵⁸Oppenheim, op. cit. Part II, sec. 290.

⁵⁹Maine, *Ancient Law*, pp. 103-112; Westlake, *Collected Papers*, pp. 133-134; Hall, op. cit. p. 19; Borchard, op. cit. pp. 3-6; Wright, *Enforcement of International Law*, p. 21.

⁶⁰See 1 Cobbett, *Leading Cases in International Law*, 110-116; Hicks, *The New World Order*, N. Y. 1920, pp. 185-192; Sayre, *Experiments in International Administration*, pp. 56, 79, 92.

national commissions and are thus removed to a certain extent from the jurisdiction of the states through which they flow. This is by no means a new departure since the internationalization of rivers and other means of transport has been provided by treaties since 1815.⁶¹ The internationalization of two areas of territory, Dantzic and the Saar valley, is a more novel experiment. These areas are under a virtual protectorate of the League of Nations, Dantzic permanently and the Saar valley for fifteen years, at which time a plebiscite will be taken on the question of maintenance of the existing regime, union with France or union with Germany.⁶² The system of colonial mandates contemplates a limited jurisdiction by the mandatory power in the territory under the mandate. The League of Nations Covenant itself states the important limitations which the mandatory power must observe in behalf of the native population and other members of the League. These limitations will be specified in detail in the document conferring the mandate which is exercised "in behalf of the League" and is subject to the supervision of the Council acting with the advice of a permanent mandatory commission (art. 22).⁶³

Aside from these specific exceptions from the exclusive territorial jurisdiction of certain states, several general principles are accepted by parties to the treaties which limit their discretion in matters hitherto regarded as domestic. These limitations, it should be emphasized, are not detailed rules but general principles which the states accept as a guide for future legislation and treaty making. They relate to such matters as the regulation of railroads and other means of transit (art. 23e),⁶⁴ the protection of racial and national minorities and native populations (art. 23b),⁶⁵ the maintenance of labor standards, (art. 23a),⁶⁶ the lim-

⁶¹Hicks, *op. cit.* pp. 192-197; Sayre, *op. cit.* pp. 38, 88, 131.

⁶²Treaty of Versailles, arts. 100-108; 46-47 and arts. 16-40 of annex following art. 50. For organization of governments see League of Nations Official Journal, 2: 45-55.

⁶³See also Memorandum of the Secretary General on Mandates, July 30, 1920; Reports of M. Hymans adopted by the Council, Aug. 5, 1920, and Oct. 26, 1920, and Constitution of Permanent Mandates Commission approved by the Council Dec. 1, 1920, printed as annexes 3, 4, 10, 14 in League of Nations Assembly Document, No. 161, reprinted from League of Nations Official Journal. See also Hicks, *op. cit.* pp. 176-185.

⁶⁴See also special regulations on German Railways, arts. 365-369, 372-374.

⁶⁵Special treaties with Poland, Czecho-Slovakia, Roumania, and the Serb-Croat-Slovene state deal with this subject. *Supra* note 4.

⁶⁶A special labor organization is set up by Part XIII of the Treaty of Versailles, arts. 387-426, and a labor bill of rights is included as art. 427.

itation of the white slave and opium traffic (art. 23c), the limitation of armaments (art. 8),⁶⁷ the control of arms traffic (art. 23d),⁶⁸ and the prevention of disease (art. 23f).

Second only in importance to the conception of exclusive and complete territorial jurisdiction has been that of the complete jurisdiction of a state over its citizens or nationals. The privileges guaranteed to natives in mandate territory by the League of Nations can not be regarded as limiting the jurisdiction of states over their nationals because these natives do not in reality owe allegiance to the mandate power,⁶⁹ but the similar privileges guaranteed to racial and national minorities in certain states of Eastern Europe is such a limitation, for which precedents may be found in the treaty of Berlin, of 1878.⁷⁰ The privilege accorded in most cases to the inhabitants of transferred territory to choose their nationality and to migrate is in accord with most cession treaties of recent times.⁷¹ The rights of labor (art. 23a) and native races (art. 23b) stated as general principles in the treaties would seem to somewhat limit the jurisdiction of the contracting states over their subjects. The doctrine of racial equality proposed by Japan, and which if accepted in good faith might have had a radical effect on the power of states to discriminate in legislating for their nationals, was rejected.

The freedom of the seas or the absence of national jurisdiction on the high seas in time of peace except over national vessels has been accepted as international law since the controversies of Selden and Grotius in the seventeenth century focussed the issue. The United States has always been an ardent protagonist of free-

⁶⁷German military, naval and air forces are reduced and subjected to an interallied commission of control by Part V of the Treaty of Versailles, arts. 159-213. "In order to render possible the initiation of a general limitation of the armament of all nations Germany undertakes strictly to observe" these clauses.

⁶⁸A special treaty for the control of traffic in arms, signed by most of the powers at St. Germain, Sept. 10, 1919, was endorsed by the League of Nations assembly, 22nd Plenary Session, Dec. 14, 1920, p. 3.

⁶⁹"A mandatory on behalf of the League" does not enjoy sovereignty over the inhabitants, though by art. 127 of the treaty of Versailles the "native inhabitants of the former German oversea possessions shall be entitled to the diplomatic protection of the Governments exercising authority over those territories."

⁷⁰See guarantee of minority rights by treaty of Berlin in Bulgaria (arts. 5, 8), Montenegro (arts. 27, 30), Serbia (arts. 37, 39), Roumania (arts. 44, 50), and Turkey (arts. 41, 42). See recent treaties *supra* note 65.

⁷¹Treaty of Versailles, arts. 37, 85, 91, 106, 113. Full option of nationality is not permitted in Alsace-Lorraine, Annex following art. 79 and art. 278. See also treaties *supra* note 65.

dom of the seas asserting with success that it implies coöperation for the suppression of pirates like the Barbary Corsairs, acceptance of the flag as *prima facie* evidence of the nationality of vessels, and free access to landlocked seas through straits like the Danish sounds.⁷² The treaties increase freedom of the seas in time of peace by assuring free access to the sea through internationalized rivers and ports.⁷³ The objects for which a free sea has been sought are also promoted by the guarantees for an open door to members of the league in various undeveloped regions (art. 22, 23e).

Freedom of the seas in time of war has been subject to such varied interpretations that no assured meaning can be assigned to the phrase. In law, however, it would seem to mean that belligerents may interfere with enemy and neutral navigation of the high seas to the extent that international law permits and no more. Controversy has arisen because the indefiniteness of the law in this respect has left a wide margin for the play of national policies. The belligerent assertion of maritime jurisdiction during the war beyond that heretofore recognized, by the sowing of mine fields, the proclamation of submarine war zones, the practice of routing and searching neutral vessels in port and the extension of the doctrine of continuous voyage to blockade aroused neutral protest but was not dealt with by the treaty. The covenant appears to contemplate an extreme use of commercial blockade in wars authorized by the League of Nations (art. 16) a method in accord with President Wilson's second point.⁷⁴

In general the effect of the war on the objects of international law has been to limit the exclusive and complete jurisdiction of states over territory and persons. The interest of the family of nations as organized in the League has been recognized with reference especially to means of transport and communication, the

⁷²Moore, *Principles of American Diplomacy*, pp. 103-134; Schuyler, *American Diplomacy*, N. Y. 1886, pp. 193-367.

⁷³The Elbe, Oder, Niemen, and Danube are declared international rivers for portions of their courses. (Art. 331.)

⁷⁴The Second point of Jan. 8, 1918, suggested "Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants." In accepting the fourteen points by a note of Nov. 5, 1918, the allies pointed out that "clause two relating to what is usually described as the freedom of the seas, is open to various interpretations, some of which they could not accept. They must, therefore, reserve to themselves complete freedom on this subject when they enter the peace conference."

protection of peoples liable to oppression and the equality of opportunity for the exploitation of undeveloped regions.

TRANSACTIONS IN THE NORMAL RELATIONS OF
INTERNATIONAL LAW

International transactions are usually classified according as they involve the relations of peace, war, or neutrality. Peace is the normal relation of states; war and neutrality are abnormal relations. The established instrumentalities for conducting normal international relations, foreign offices, diplomatic and consular officers, have been added to by the various organs established by the League of Nations. The Assembly and Council of the League are quasi-diplomatic gatherings the members of which enjoy the usual diplomatic privileges and immunities (Art. 7). The Secretariat with its many technical divisions is a central advisory and clerical organ, while such bodies as the mandates commission (art. 22), the disarmament commission (art. 9), the international labor office, (art. 393) etc., are given special supervisory functions. A permanent international court is authorized by the Covenant (art. 14) and a detailed code organizing it and defining its jurisdiction has been accepted by the assembly and will be effective when ratified by the members of the League.⁷⁵ These new organs, together with the bureaus of existing administrative unions coordinated under the supervision of the League (art. 24) and the Hague bureau and permanent court of arbitration recognized by it (art. 13), will offer greatly improved facilities for the transaction of international business and the settlement of international controversies.

The most important peaceful transactions of states are the settlement of controversies, the establishment of permanent regulations and obligations, and the transfer of territory. In all of these matters legal principles seem to be growing up which limit the former complete liberty of the immediately interested states. Thus members of the League of Nations are required to submit controversies to the permanent court, to arbitration, or to conciliation by the Council or Assembly (art. 12), and states not in the League are virtually compelled similarly to submit controversies with League members (art. 17). In such cases the award of ar-

⁷⁵League of Nations Assembly, *op. cit.* 21st Plen. Sess., Dec. 13, 1920, p. 13. For text submitted by the Council, which however was somewhat modified by the Assembly see *Supp. Am. Journ. Int. Law*, 14: 371 (Oct. 1920).

bitration or of the international court is enforceable by the League (art. 13), while recommendations of the Council or Assembly can not be enforced unless unanimous with exception of the parties to the dispute (art. 15), though a delay of nine months from submission must ensue before war can be resorted to (art. 12). Thus the former liberty of states to settle their controversies by force or self help is considerably impaired.

Permanent obligations and regulations are practically always embodied in written documents called treaties or conventions, but the value of these instruments depends upon the confidence of the parties that they will be respected. Maintenance of a scrupulous respect for treaty obligations, a principle approved in the London Conference of 1871⁷⁶ and emphasized by its violation on the outbreak of war in 1914,⁷⁷ is declared in the preamble to be one object of the League of Nations. To sanction this principle, treaties entered into by members of the League do not become binding until registered with the Secretariat which forthwith publishes them (art. 18). The members, however, agree not to make treaties inconsistent with the League Covenant and to abrogate such treaties already existing (art. 20), though "international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace" are expressly stated to be consistent with the Covenant (art. 21). To assure necessary adaptation to new conditions and to avoid a perpetuation of the status quo the assembly is authorized to "advise the reconsideration by members of the league of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world" (art. 19). The instrumentalities set up by the League for the giving of technical advice and for periodic discussion with representatives of other nations will greatly facilitate the making of treaties of permanent benefit. In fact, by the Covenant itself, the members agree to work for treaties improving labor conditions, reducing armaments, preventing disease, securing freedom of communication and transit, equitable treatment for commerce, etc., (arts. 8, 23).

Transfers of territory, heretofore, have been in theory matters of concern only to the ceding and acquiring state.⁷⁸ In practice

⁷⁶Hall, *op. cit.* p. 365. *Supra* note 19.

⁷⁷*Supra* note 20.

⁷⁸Hall, *op. cit.* pp. 46-48.

the interest of the inhabitants has sometimes been recognized⁷⁹ and this interest was recognized in the peace conference which in general based its allocations of territory on the principle of self determination.⁸⁰ Plebiscites were provided in several doubtful regions.⁸¹ The League of Nations Covenant recognizes that in class A mandates "the wishes of these communities must be a principal consideration in the selection of the mandatory" (art. 22).

In practice the interest of neighboring states has also been a real influence in limiting the power of states to cede or acquire territory. Thus the United States has forbidden transfers in the New World except to her⁸² and this "regional understanding" aspect of the Monroe Doctrine is recognized in the Covenant (art. 21).

Finally the interest of the family of nations as a whole, in preventing transfers by conquest, which has been growing in recognition for a hundred years,⁸³ has been stated as law in article 10 of the Covenant by which the members "undertake to respect and preserve as against external aggression" each other's territorial integrity. The family of nations, however, has an equal interest in preventing the perpetuation of an undesirable status quo. This interest in change is given recognition by a declaration that it is "the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." (art. 11), and by authority given to the Assembly "from time to time to advise the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world" (art. 19). Thus it appears that a definite international law of real

⁷⁹Ibid., and Wambaugh, *A Monograph on Plebiscites*, N. Y. 1920, p. xxvii.

⁸⁰Supra note 53.

⁸¹Supra note 54.

⁸²See Pres. Polk's message on Yucatan, April 29, 1848; Pres. Grant's message on St. Domingo, May 31, 1870; Senate Resolution suggested by Magdalena Bay incident Aug. 2, 1912, conveniently collected in *A League of Nations*, vol. 1, No. 5 (June 1918). See also decision of Central American Court of Justice on Gulf of Fonseca case, 11 *Am. Journ. Int. Law*, 676, 730, (July 1917).

⁸³Wright, 13 *Am. Pol. Sci. Rev.*, 558-559; Resolution of Pan-American Congress, 1890, Moore, *Digest* 1: 292; Cobbett, *op. cit.* 2: 245.

estate is developing which will substitute legal title and peaceable transfer, subject to an advisory international eminent domain, for conquest and holding by force.

The war and peace have tended to increase the importance of express agreement as a source of international law and to emphasize the need of definite organization for its sanction. With reference to the principles of the law itself certain tendencies, still rather indefinite, are suggested by the foregoing inquiry. From a subjective standpoint international law tends to recognize that the enjoyment of sovereignty is conditioned by the assumption of responsibility for the maintenance of law. Viewed from an objective standpoint it tends to recognize a greater number of concrete limitations upon the jurisdiction of states over their territory and nationals out of consideration for the rights of minorities, freedom of transit and equality of economic opportunity. Viewed from the standpoint of international intercourse, while according to states almost complete liberty to settle controversies, establish permanent international regulations and transfer territory by peaceful means, international law tends more definitely to discountenance the conduct of such transactions by violence.

(To be continued.)