EDITORIAL COMMENT

IMMUNITY OF NEUTRAL SEA-BORNE COMMERCE

Since the publication in the October number of this JOURNAL of an editorial comment on the radical departure by the present Labor Government of Great Britain from the traditional British policy on the venerable issue between the Freedom of the Seas and Control of the Seas, two notable contributions have been made to the discussion. One of these contributions is President Hoover's suggestion, in his recent Armistice Day speech, that neutral vessels "laden solely with food supplies" for the civilian population in belligerent countries should be immune from interference by belligerent forces. The other suggestion is contained in the British "White Paper," prepared in the Foreign Office and recently published with the approval of the present British Government, and is in effect that the issue between sea control and sea freedom has been resolved in favor of the former by reason of the League Covenant and the Kellogg Peace Pact. Although neither of these suggestions is addressed to any other government for concurrence or action, and President Hoover expressly stated as to his suggestion that it was not made as "a governmental proposition to any nation," they both emanate from high governmental authority and naturally have attracted widespread comment and discussion.

President Hoover's suggestion is based in part upon the extraordinary success of his own personal efforts in delivering food supplies to the civilian population in Belgium during the World War. He cites this experience as evidence of the practicability of the idea, and points out that "the Belgian Relief Commission delivered more than two thousand ship loads of food through two rings of blockade and did it under neutral guarantees continuously during the whole World War." In addition to the high moral purpose of eliminating starvation as a weapon of warfare, his suggestion also embodies the political purpose of removing one of the impelling causes of increasing naval armaments and military alliances, because, as stated by him, "the fear of an interruption in sea-borne food supplies has powerfully tended toward naval development in both importing and exporting nations. In all important wars of recent years to cut off or protect such supplies has formed a large element in the strategy of all combatants." He adds: "The protection of food movements in time of war would constitute a most important contribution to the rights of all parties, whether neutrals or belligerents, and would greatly tend toward lessening the pressure for naval strength. Food stuffs comprise about twenty-five per cent of the commerce of the world, but would constitute a much more important portion of the trade likely to be interfered with by blockade." President Hoover accordingly expresses the

belief that the suggestion, if adopted, "would act as a preventive as well as a limitation of war."

In aid of its practicability, the suggestion also embodies the idea that food supply vessels should be placed on the same footing as hospital ships, as to which the 10th Convention adopted at the Second Hague Conference, in 1907, provides, in Article III:

> Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral countries, shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents, with the previous consent of their own government and with the authorization of the belligerent himself, and that the latter has notified their name to his adversary at the commencement of or during hostilities, and in any case, before they are employed.

This article replaces a similar article in the corresponding convention adopted at the First Hague Conference in 1899 as to all Powers ratifying the new convention. The provisions of the earlier convention remain in force as to Powers which ratified it but did not ratify the later convention. In the earlier convention hospital ships supplied from neutral sources were not required to be placed under the control of any of the belligerents.

In order to harmonize President Hoover's suggestion with the obligations imposed upon the members of the League of Nations by Article 16 of the League Covenant, it is necessary to read into it the condition that it is not intended to sanction furnishing food supplies to a belligerent country which has been declared by the League to be a covenant-breaker, and against which the League has declared an economic blockade. Article 16 of the Covenant declares that any member of the League, which resorts to war in disregard of its covenants, shall "*ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State, whether a Member of the League or not." In that situation the League members would be under obligation to prevent all intercourse thus prohibited between the Covenant-breaking State and the United States, although not a member of the League.

It is, of course, possible that the League members would be willing to except from the prohibitions of this article the supplying of food to the civilian population of a Covenant-breaking State, if starvation was the alternative, but such an exception would require a new agreement by the members of the League amending Article 16 of the Covenant to that extent. On the other hand, it is also possible that some of the members of the League might maintain that the purpose of Article 16 was to prevent war, and that the

benefits resulting from mitigating the hardships of war would be overbalanced by the evils resulting from the prolongation of the war through furnishing food supplies to belligerent countries. Moreover, it must be noted that the question of feeding the civilian population in territory occupied by an invading army, as in the case of Belgium, is a different matter from feeding the civilian population in a belligerent country, where, under modern war conditions, the entire resources of a country are requisitioned for war service, and the civilian population would not, strictly speaking, be non-combatants as they were in Belgium during German occupation.

The British White Paper apparently is designed primarily to justify to the British people the adherence by the British Government to the so-called Optional Clause in the Statute of the Permanent Court of International Justice. The nations adhering to this Optional Clause declare that "they recognize as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning" certain specified justiciable questions, namely: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

Apparently the compelling reason for adhering to the Optional Clause at this time is that the Kellogg Peace Pact does not provide any machinery for the pacific settlement of disputes, and the British Government consider the signature of the Optional Clause as a logical consequence of the acceptance of the Peace Pact, because, "if the Pact of Peace is to be made fully effective, it seems necessary that the legal renunciation of war should be accompanied by definite acts providing machinery for the peaceful settlement of disputes."

The White Paper, recognizing that British public opinion "is naturally sensitive as regards any action which might be considered as unduly limiting the exercise of British sea power in time of war," then takes up, and explains the views of the British Government on the question: "Whether the signature of the Optional Clause would, by exposing the legitimacy of British belligerent action at sea to the decision of an international court, hamper the operations of the British navy in time of war." On this point the conclusion is announced that the question can have no practical importance because nations which are members of the League of Nations and parties to the Peace Pact can be neutrals in any future war. This explanation, so far as it relates to members of the League, is merely a repetition of the reason given by President Wilson for not insisting upon the inclusion in the League Covenant of his second "Peace Point," which provided for the freedom of the seas to neutral sea-borne commerce. At that time he expected that the United States would become a member of the League, and, accordingly, as

such member, for the same reason now explained in the British White Paper, could not be a neutral in any future war.

In so far as this explanation affects the British nation and the other members of the League, it is not a matter of concern to the United States, but, unfortunately, the White Paper, by coupling the Kellogg Peace Pact with the League Covenant, was suspected of extending, by implication, this theory of the abolishment of neutrality in future wars so as to apply also to the United States, which, although not a member of the League, is a signatory of the Peace Pact. An official statement has since been made on the part of the Government of the United States to the effect that an examination of the text of the White Paper, which meanwhile had come to hand, shows that the argument of the White Paper "does not apply to the position of the United States as a signatory of the Kellogg-Briand Pact," and that "as has been pointed out many times, that Pact contains no covenant similar to that in the Covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor."

Whatever may be the implication arising from the terms of the White Paper, the Government of the United States is entirely correct in repudiating any obligation under the Kellogg Peace Pact to go to war with any nation violating the terms of that pact. It was distinctly stated in the report of the Senate Committee on Foreign Relations, at the time the Senate gave its advice and consent to having the United States become a signatory to the Kellogg-Briand Treaty, that "the treaty does not either expressly or impliedly contemplate the use of force or coercive measures for its enforcement as against any nation violating it. It is a voluntary pledge upon the part of each nation that it will not have recourse to war except in self-defense, and that it will not seek settlement of its international controversies except through pacific means, and if a nation sees proper to disregard the treaty and violate the same, the effect of such action is to take it from under the benefits of the treaty and to relieve the other nations from any treaty relationship with the said power."

Although the implication, which at first was generally attributed to the White Paper, is thus readily refuted when tested by the official record, nevertheless, there is another equally disturbing implication arising from the White Paper which calls for serious consideration. This implication is that, even if the United States is assured of parity in sea power with Great Britain, the United States, under the Kellogg Pact, is not at liberty to use its sea power to protect its own neutral commerce at sea in a war sanctioned by the League of Nations.

Although, as shown above, in accordance with the official record of the understanding of the United States in ratifying the Peace Pact, it imposes upon a party thereto no obligation to become a belligerent in case of war between other signatories, at the same time it does impose a very definite obligation upon the United States to find, if possible, some peaceable means

of settling any dispute in which it might be involved with any of the belligerents, thus requiring the United States to maintain a position of neutrality in any war among the signatories, unless such war involved the vital interests of the United States.

Accordingly, if the League of Nations should invoke its authority under Article 16 of the Covenant, and demand the enforcement of an economic blockade against a member declared to be a covenant-breaker, and the British Government, on behalf of the League, should undertake to use its sea power to prevent the United States from furnishing food supplies or having other intercourse prohibited by Article 16 with the offending state, the United States would be bound by the Kellogg Pact not to attempt by force to exercise its right as a neutral to continue such intercourse. Assuming that the vital interests of the United States were not involved, it would have no choice but to acquiesce peaceably in whatever action the British navy might take to enforce the blockade declared by the League, and to submit the whole question to arbitration. Such a blockade might present a new question of international law, but the question of the legality of a blockade sanctioned by the League could not be decided by the United States alone. It may well be argued that a law which the League members have imposed upon themselves by adopting the Covenant is international law so far as they and the Permanent Court are concerned, and as such would be binding even upon a covenant-breaking state.

The question is distinctly one of those listed for compulsory arbitration in the so-called Optional Clause of the Court Statute which Great Britain has now accepted. The United States, although not yet a member of the Permanent Court, would, nevertheless, be equally bound to submit this question to arbitration either by the court or by some specially constituted tribunal, because all of the questions listed for compulsory arbitration in the Optional Clause, which are quoted above, are universally recognized as legal questions of a justiciable character, and the United States by its traditions and official declarations, is thoroughly committed to the policy of settling such questions by arbitration.

In this connection it is important to take note of the following extracts from the White Paper:

> . . . His Majesty's Government further consider that our acceptance of the Optional Clause makes no difference to the principle that prize cases must be decided first in our own prize courts before any question of a reference to the Permanent Court could arise.
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> The rule of international law that arbitration cannot be claimed unless and until the remedies provided by municipal courts have been exhausted is, in their opinion, as applicable to prize courts as to any other municipal tribunals. Moreover, the function of prize courts is to decide whether the action of the captor was legitimate, and until a final decision on this point has been given by those courts, it cannot be known whether any case for international complaint has arisen.

On this theory of the law the United States would be obliged, by reason of the Kellogg Pact, to await the outcome of arbitration, but Great Britain, on the other hand, relying upon the superior obligation of the League Covenant, which was not superseded by the obligations undertaken by the League members in signing the Kellogg Pact, would claim, with every hope of success in its own prize courts, and in the Permanent Court, to be justified in exercising force to give effect to Article 16 of the Covenant. This recourse to arbitration would undoubtedly postpone the decision of the question at issue until after the end of the war, and thus indirectly accomplish the enforcement of the economic blockade against the covenant-breaking State throughout the war period, leaving the United States to whatever relief, if any, in the way of reparation or subsequent settlement of the question the decision of an arbitral tribunal might offer.

If the United States is willing to be placed in this position of inferiority at sea during a war in which it is a neutral, it would seem to be preferable to establish that situation on a basis of treaty stipulations voluntarily entered into by the United States, rather than to have it imposed by other nations through international agreements to which the United States is not a party.

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THE NEW PROTOCOL FOR AMERICAN ACCESSION TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

The several proposals advanced prior to 1929 for American accession to the Protocol of Signature of the Permanent Court of International Justice have been discussed in this JOURNAL.[1] At the present time a new proposal, in the form of a protocol, has received the official approval of practically all the signatory states, and of the executive branch of the United States Government. It has also been endorsed by Senator Swanson, senior Democratic member of the Senate Committee on Foreign Relations. It is the result of suggestions made by Mr. Elihu Root to a Committee of Jurists which met in Geneva in March, 1929. Presumably it will in due course be submitted to the Senate of the United States for advice and consent to ratification. Like most documents of the kind, it is the outgrowth of several draft texts, although its original basis has emerged from examination by numerous international bodies with probably fewer changes than fall to the lot of most drafts of international agreements.

The Committee of Jurists referred to above, was called together by the Council of the League of Nations on December 14, 1928, in response to a resolution adopted by the Assembly of September 29th of that year. The committee was originally assembled to consider whether any amendments of the Court Statute would be desirable. On March 9, 1929, however, the Council charged the committee with examining also the question of the ac-

[1] This JOURNAL, Vol. XX, pp. 330, 552; Vol. XXI, p. 1; Vol. XXII, pp. 599, 776.