declaratory judgment the discretion of the Secretary of State. Heretofore it had not been possible to obtain a judicial review of the Secretary's discretion, even on a question of law. While the court does not approve injunction or mandamus, it does hold that the Secretary of State should have been included in the declaratory decree, together with the Secretary of Labor, because he had refused the passport "solely on the ground that she had lost her native-born American citizenship." Thus, the Secretary's refusal of a passport solely on a question of law may now be reviewed by a petition for a declaratory judgment, leaving unaffected his discretion to refuse a passport on other grounds.[15] This is an important advance in the law, as was suggested in the editorial cited above. Native citizens, like naturalized citizens, may now be able to obtain a declaration of their disputed citizenship status, a procedure first successfully invoked in the case of Winston Guest.[16] This should be expressly provided for in the new citizenship code, which will probably have to be changed in several respects [17] to bring it into conformity with the authoritative opinion of the Supreme Court in the Elg case.

EDWIN BORCHARD

UNDECLARED WARS

The age of chivalry when men of honor refused to attack each other without fair warning would seem long past. The procedure now followed by certain nations is to strike swiftly before your opponent is aware of your intention.

This conduct is naturally abhorrent to nations that still cling to some of the traditions of chivalry. Nevertheless, the unpleasant fact must be faced that there is logical justification for the undeclared war. In fact, in most instances it would appear to be absolutely necessary. Once an international dispute has reached the stage where it seems incapable of peaceful adjustment, the aggrieved nation will resort to arms only under such conditions as offer the most favorable prospect for success. It would be absurd to expect the aggressor nation to summon politely another nation to mobilize its army, navy, and air forces for combat on a certain date, as did the ancient Romans, with elaborate ceremonial pleasing to the gods. On the other hand, it would be perfidy of the basest sort to attack without any intimation whatever of a grievance for which due redress is demanded.

[15] A declaratory decree against a responsible defendant serves all the purposes of a coercive remedy, like injunction or mandamus, while avoiding all the technical pitfalls of such a remedy. It is not conceivable that a government official would defy a declaratory judgment, but if that should happen, supplementary coercive relief is available.

[16] The final decision of Judge Jennings Bailey, United States District Court for the District of Columbia, of Jan. 25, 1937, is unreported, but the hearing of Dec. 7, 1936, on the demurrer is reported in 64 Wash. L. Rep. 1098–1100 (1936) and gives an adequate description of the disposition of the case.

[17] The Proposed Code of Nationality Laws rests on the theory that a parent's loss of American citizenship carries along with it that of a minor child who acquires the parent's nationality under the foreign law. *Cf.* Sec. 405, Pt. 1, p. 77.

The necessity for a formal declaration of war is stressed by some of the writers on international law with arguments based more on moral grounds than legal. Actually, such a procedure would not appear to be enjoined either by positive international law or by modern practice. Molloy summarized early practice as follows:

> A general war is either solemnly denounced or not solemnly denounced; the former is when war is solemnly declared or proclaimed by our king against another state. Such was the Dutch War, 1671. An unsolemn war is when two nations slip into war without any solemnity; and ordinarily happeneth among us. Again, if a foreign prince invades our coasts, or sets upon the king's navy by sea, hereupon a real, though not solemn war may, and hath formerly, arisen. Such was the Spanish invasion in 1588.[1]

Brevet Lieutenant Colonel J. F. Maurice, in a report to the British Board of Trade in 1870, disclosed that from 1700 to 1870 there had been 107 instances of the commencement of hostilities between nations without the semblance of a formal declaration of war.

Unpleasant as it is to recall the fact, the United States has had several undeclared wars of its own. Commercial intercourse with France was suspended by Act of Congress on June 12, 1798, and merchant vessels were authorized by another Act on June 15 to arm in self-defence. On July 8 Congress authorized naval vessels to capture armed French privateers. The United States Navy took 85 French prizes, of which two were public vessels. Altogether, some 365 French privateers were captured during the extraordinary "restricted" and undeclared war that lasted from 1798 to 1801.

On January 15, 1811, Congress passed an Act enabling the President to take possession of any part of Spanish Florida which might serve as a base of operations for England. Both West and East Florida were invaded by General Jackson and General Matthews. In 1916, Congress authorized President Wilson to invade Mexico. A number of lives were lost on both sides, though fortunately neither side proclaimed or acknowledged a state of war. And again, in 1918–1919 the United States participated in an undeclared war against the Russian Soviet Union.

An examination of the historical record reveals that the formally declared war has been the exception, and that hostilities, as a rule, have preceded a declaration of war. Such declarations, moreover, have been mainly for the purpose of fixing the date of the commencement of hostilities to avoid legal complications, and also to effectuate the neutrality of third parties.

When it comes to the law on the subject, we find that the Hague Convention of 1907 merely provided:

> 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.

[1] Cited in Hall's International Law, 8th edition, p. 446.

This plainly leaves the door wide open for the commencement of hostilities without adequate warning. It is sufficient, evidently, to show that the nations concerned have been engaged in a controversy offering no apparent peaceful solution. Such was the case in the Russo-Japanese war of 1904, which began on February 6, simultaneously with the formal announcement by Japan of the rupture of the pending negotiations and of the suspension of diplomatic relations. The solemn declaration of war was issued by the Emperor of Japan on February 10.

Diplomatic negotiations, as a rule, even with modern facilities for communication by telephone and radio, continue over an appreciable length of time. They progress step by step to the point where there is a deadlock and an actual or implied ultimatum. What exactly constitutes an ultimatum of the kind required by the Hague Convention of 1907 has been defined by Oppenheim as follows:

> Ultimatum is the technical term for a written communication by one state to another, which ends amicable negotiations respecting a difference, and formulates, for the last time, and categorically, the demands to be fulfilled, if other measures are to be averted. An ultimatum may be simple or qualified. It is simple, if it does not include an indication of the measures contemplated by the Power sending it. It is qualified, if it does indicate the measures contemplated, whether by retorsion, or reprisals, pacific blockade, occupation of a certain territory, or war.[2]

Under modern conditions of warfare, particularly in view of the swiftness and ease of aërial attack, where surprise is essential, and also by reason of easy communication by telephone and radio, the warning of the end of peaceful negotiations may be given abruptly and without formality. The essence of the whole problem is the necessity for quick effective action to obtain redress for alleged grievances which negotiations have failed to achieve.

We see, therefore, in the light of theory and practice, that the problem of the undeclared war remains largely an academic one which involves considerations more ethical than legal. And this is true also of the self-denying declaration embodied in the General Treaty of 1928 for the Renunciation of War, generally entitled the Kellogg Pact. This agreement, while purporting to renounce the use of war, really consecrated the vague and dangerous right of self-defence. The various signatories explicitly reserved the right to resort to war and to judge for themselves "whether circumstances require recourse to war in self-defence." [3] Within four years of the signing of this Pact occurred three breaches of the Pact, namely, the aggression by Russia against China in 1929, the occupation of Manchuria by Japan in 1931, and the invasion of Colombia by Peru in 1932. The more recent instances of warlike acts by Japan, Germany, and Italy are too vividly in mind to require comment. It is necessary, however, to stress the lamentable and unforeseen consequence of the Kellogg Pact in encouraging aggressor nations hypocritically to avoid any formal declaration of war in order to elude the constraints of this pious declaration.

[2] Oppenheim's International Law, Vol. II, 5th ed., p. 247. [3] Oppenheim, *op. cit.*, p. 156.

Still another most unexpected inducement to avoid a formal declaration of war, as revealed in the case of the conflict now going on between Japan and China, has been the natural desire to escape the disabilities of recent neutrality legislation of the United States, whereby the shipment of arms and munitions of war to belligerents is automatically forbidden. The question presents itself whether, in the absence of a formal declaration of war by either side, it should not be incumbent on neutral nations to brush all legal niceties aside and openly acknowledge a state of war where the laws of war and neutrality should apply. Nations intent on peace and determined to uphold the reign of law have a solemn duty to avoid any implied connivance in the evasion of international obligations. Neutrality is not merely to conserve national interests, but also to preserve an impartial rôle which may enable a nation to affirm with vigor the responsibilities and rights of peoples under international law.

The situation is certainly a most unhappy one. It is stultifying to discover that an idealistic agreement such as the Kellogg Pact, and neutrality legislation conceived for a generous purpose, should actually conduce to the fiction of the undeclared war. We are confronting the stark reality that, until men and nations reflect a much higher code of ethics and are ready to settle their differences in a spirit of mutual consideration, they will continue to obey the law of the jungle, which is to strike suddenly without warning. The problem is not legal or economic: it is moral and spiritual. We are witnessing a general lowering of ethical standards throughout the world. International law obviously will have no greater value than in the content changed men and nations will give to it. Nations composed of greedy individuals will have few scruples in undertaking undeclared wars of aggression. Individuals cannot be changed merely by legislation or institutions, or by economic systems. The desire of men for selfish profit and aggrandizement will only be curbed and eliminated by a thoroughgoing spiritual revolution. International law is not a schoolmaster or a preacher. It rises morally and ethically no higher than the great reservoir of human beings who compose international society. The ultimate problem of the law of nations is the individual. What we most need is a declared war on human selfishness, hate, lust and fear. "There is enough for every man's need but not enough for every man's greed."

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SOME ASPECTS OF TREATY INTERPRETATION

> The first rule of hermeneutics, legal or otherwise, is that interpretation means finding in good faith that meaning of certain words, if they are doubtful, which those who used the words must have desired to convey, according to the usage of speech . . . the existing laws, common sense, and the general intent of that whole of which the doubted passage forms a part; and does not mean what ingenuity may apparently succeed in forcing into a passage.[1]

These words of Umpire Francis Lieber in an arbitral decision nearly seventy years ago seem to illustrate a tendency on the part of arbitral

[1] J. B. Moore, International Arbitrations, III, 2522.