EDITORIAL COMMENT

THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

The General Assembly of the United Nations, on December 11, 1946, appointed a committee consisting of the representatives of seventeen states to study the methods which might suitably be adopted to implement the obligation of the Assembly imposed by Article 13 of the Charter to initiate studies and make recommendations to encourage the progressive development of international law and its codification. The original members of the Committee were: Argentina, Enrique Ferrer Vieyra; Australia, W. A. Wynes; Brazil, Gilberto Amado; China, Shu-hsi Hsu; Colombia, Antonio Rocha; Egypt, Wabid Rafaat; France, Henri Donnedieu de Vabres; India, Dalip Singh; Netherlands, J. G. de Deus; Panama, Roberto de la Guardia; Poland, Konstanty Grzybowski; Sweden, Erik Sjoborg; Union of Soviet Socialist Republics, Vladimir Koretsky; United Kingdom, J. L. Brierly; United States of America, P. C. Jessup; Venezuela, Carlos Eduardo Stolk; Yugoslavia, Milan Bartos.

The Committee met at Lake Success on May 12 and elected the representative of India, Sir Dalip Singh, Chairman. The representative of the United Kingdom, Professor J. L. Brierly, was elected Rapporteur. Dr. Yuen-li Liang, Director of the Division of Development and Codification of International Law of the Legal Department of the United Nations Secretariat, acted as secretary of the Committee.

The General Assembly resolution of December 11 directed the Committee to study *inter alia* "the methods of enlisting the assistance of such national or international bodies as might aid in the attainment of its objectives." The names of such bodies have been collected by the Committee and the American Society of International Law is naturally on the list. On May 9, three days before the Committee's first session, a meeting was held in the Department of State in Washington upon the invitation of the Honorable Charles Fahy, Legal Adviser, of representatives of the following seven American organizations interested in coöperating in the work of the Committee: American Bar Association, American Branch of International Law Association, American Law Institute, American Society of International Law, Carnegie Endowment for International Peace, the Federal Bar Association, and the National Lawyers Guild. The representatives of these organizations met with Dr. Philip C. Jessup, the United States representative, Mr. Fahy, and other representatives of the Legal Department of the State Department. In an all-day session they discussed the problems involved in the progressive development of international law and its codification, and the methods to be followed. The Chairman of the Society's Committee on the Codification of International Law, Judge

Manley O. Hudson, has since been in communication with the United Nation's Committee in New York.

After holding thirty meetings, the General Assembly's Committee agreed upon a final report and adjourned on June 17. The report will be submitted to the next regular session of the General Assembly. It is printed in the Supplement to this number of the JOURNAL.* Professor Jessup submitted his report as the United States representative on June 19. When the General Assembly approves the procedure, the next step will be to determine the matters of substance involved in the progressive development of international law and its codification.

The terms of reference to the General Assembly are not explained in Article 13 of the Charter. On reading the Preamble of the Charter we find it stated that the peoples of the United Nations are determined to save succeeding generations from the scourge of war by, *inter alia,* establishing "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." Article 13 may be interpreted as a logical consequence of this general declaration; thus in the progressive development of international law, those rules of conduct which have a direct bearing upon international peace are entitled to receive primary consideration. Such a conclusion is in accord with the views of great jurists who have expounded the principles of international law and upon whose works we are dependent for its history and past development. For example, Immanuel Kant, the philosopher of Königsberg, in his essay entitled *Perpetual Peace,* published in 1795, contended that peace is the final goal of international law, and he proposed to preserve international peace by forming a voluntary, permanent congress of nations. "It is only in this way," he said, "that the idea can be realized of establishing a public law of nations which may determine their differences by a civil method, like the judicial proceedings among individuals, and not by a barbarous one (after the manner of savages), that is to say, by war." Again, a great English jurist, Sir Robert Phillimore, some ninety years ago emphasized the analogy between the subjection to law of the individual within the state and the subjection to law of the states themselves within the international community. Certain of his sentences are worth repeating here:

> To clothe with reality the abstract idea of justice, to secure by law within its own territories the maintenance of right against aggression of the individual wrong-doer, is the primary object of the state, the great duty of each separate society. To secure by law, throughout the world, the maintenance of right against the aggression of the national wrong-doer, is the primary object of the commonwealth of states, and the great duty of the society of societies. Obedience to the law is as necessary for the liberty of states as it is for the liberty of individuals.

* Below, Supplement, p. 18.

The first World War, like the second World War, was initiated with a disregard of the rights of nations recognized by both customary and conventional international law. Speaking of the situation as it existed in 1915, Elihu Root, then President of the American Society of International Law, declared at its annual meeting in Washington, "To give international law binding force, a radical change in the attitude of nations toward violations of law is necessary. Up to the present time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injustice was inflicted and the nation inflicting it. . . . There must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation." Mr. Root then asserted that "Rules may be so framed that a policy of aggression cannot be worked out except through open violation of law which will meet the protest and condemnation of the world at large, backed by whatever means shall have been devised for law enforcement."

When the Covenant of the League of Nations was adopted at the end of World War I, it contained for the first time a conventional recognition that "any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations" (Article II). The weakness of the League which finally led to its dissolution is a matter of history. The unanimity rule, based upon the theory that sovereign states are not bound by new law to which they have not consented, coupled with the flagrant disregard of their covenanted obligations by large powers which were members of the Council of the League, frustrated the primary purpose for which it was formed, namely, to achieve international peace and security. The United Nations has been substituted for the League as a more effective organization to accomplish what the League failed to do. So far as concerns the preservation of international peace the main difference between the two organizations is the modification of the unanimity rule so that in the United Nations the unanimous vote of only the five great powers is necessary in decisions involving the peace of the world and the suppression of aggression. Since world wars are not conducted by the small powers but only by the great powers, the futility of the change is obvious.

The first requisite of every civil society, beginning with the most primitive and progressing through the ages to the most civilized, is to safeguard the public peace in order to assure the security of its members. When, however, we step beyond national boundaries, we find that the community of states is totally deficient in the means of preventing or punishing breaches

of the international peace as such. Our modern world with all its advances in other respects is juridically impotent to preserve its own existence except by the primitive methods of self-redress discarded centuries ago in the evolution of national societies. Hence, the policies of the great powers to build great armaments and to form alliances to protect what they have, and the cries for security of every small and threatened state.

This deficiency in the development of the law of the international community is something more than a gap to be casually filled in the strengthening of international law by the slow processes of time and custom. The atomic bomb and other lethal weapons of mass destruction have out-moded such processes. The threats to the continuance of our civilization become more and more dangerous in the ruthless and widespread character of every recurring war. Conditions in the world today should make it clear to everyone that the most fundamental and vital international problem is the prevention of international aggression by legal precept and organized procedure freed from the delaying tactics of international debate or from frustration by the veto of a potential or actual aggressor.

The peace of the world today depends upon these words in Article 39 of the Charter of the United Nations: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken," and those decisions must be made by the unanimous vote of the five great powers. This is a fundamental structural weakness upon which it will never be possible to build a world based upon law and order. What is needed is:

First, a clear and unambiguous denunciation of aggression as a crime against international peace. Many such denunciations are already embodied in treaties and resolutions of international conferences, but without implementation they are useless. A statement to this effect was made recently by Mr. Warren R. Austin, chief representative of the United States to the United Nations, when he said: "Nothing happens as a result of conferences, proposals, recommendations and votes in the United Nations except as the member nations implement their talk and their votes with individual action." The International Military Tribunal at Nuremberg hanged some Nazi leaders for planning and engaging in international aggression. In the universal satisfaction with the retributory justice meted out to these captured enemies some would have us believe that the job of outlawing aggression has been completed; but the judgment of Nuremberg is a weak reed upon which to lean. Its chief value as precedent is that in case of another war, and we are victorious, and we catch the enemy criminals, we will try and execute them. The precedent, therefore, envisages another war. Our duty is to try to prevent another war.

Secondly, we must have a definition of aggression which the peoples of the world can understand. It cannot be left to the *ex post facto* delibera-

tions of a political body such as the Security Council of the United Nations. Up to the present time the great nations, including the United States, have deliberately refused to consider a definition of aggression on the ground that it is too dangerous because it might omit conditions that cannot be foreseen. This argument was advanced by Secretary of State Kellogg when he declined the French proposal that the Paris Pact for the Renunciation of War be limited to aggressive war. It was repeated by Secretary of State Stettinius in defense of the attitude of the delegation of the United States to the United Nations Conference at San Francisco. World peace and the preservation of our civilization cannot be made to depend upon the possibility of securing a perfect definition. We must start somewhere. As a beginning, the dropping of an atomic bomb in time of peace should be declared an act of aggression. We might go a step farther and incorporate in universal law the definition already agreed to by the United States and the other States of America in the Act of Chapultepec. Should our Soviet allies object to an American definition, we might suggest their own definition in non-aggression pacts which they concluded in 1932 and 1933 with Afghanistan, Czechoslovakia, Estonia, Finland, Latvia, Persia, Poland, Rumania, Turkey and Yugoslavia, that is, with all neighboring states except China and Japan.

Finally, the international act outlawing aggression should expressly state that the prevention or suppression of aggression should be the concern of every other state of the international community acting either collectively or separately. Experience with the League of Nations now being repeated with the United Nations has demonstrated the practical impossibility of obtaining international agreement for the application of sanctions against a law-breaking state, especially if a great power is concerned either directly or indirectly. It is essential that preventive or remedial action by any state or group of states should be legalized whenever it appears that the international security organization is impotent or unwilling to act.

It seems advisable to recall in this connection the legal position of the Government of the United States during the period from the outbreak of World War II on September 1 until we entered the war as a belligerent following the attack on Pearl Harbor. There is no doubt that at the beginning of the war we were and intended to remain neutral. In his message to Congress on September 21, 1939, President Roosevelt requested that the neutrality law of 1937, which had placed an embargo on the export of war munitions to any belligerent, be modified so that we might return to our historic foreign policy based upon the age-old doctrines of international law, that is, upon the solid footing of real and traditional neutrality. However, when Congress passed the Lend-Lease Act on March 11, 1941, we not only departed from our real and traditional neutrality but repudiated the principles of neutrality under which, in the *Alabama* claims case following the Civil War, we had held Great Britain liable and collected

an indemnity of over $15,000,000. These facts are mentioned, not for the purpose of criticism, but to add force to the argument that if we intend to abandon our traditional policy of neutrality permanently and take an effective part in maintaining peace and suppressing aggression throughout the world, we should not remain in the dubious position in which we found ourselves in the year 1941. Our position, as well as that of every other signatory, should be made clear that, in case of violations of the international agreement against aggression, we retain the right to act separately against any law-breaking state or in concert with such other states as may wish to join us in any case where the United Nations fails to act.

The most forceful argument that has been made by critics of our so-called isolationism is that our policy has encouraged war because of the belief that we would not take sides. It is further argued that if our eventual participation had been foreseen, the wars would not have started. An international organization in which one powerful member is capable of paralyzing collective action against aggression is as dangerous to the preservation of peace as any other form of isolation. If we must help police the world in order to save ourselves and our civilization, we should be free to do so without incurring the reproach from any quarter that our action is in violation of international law or treaties.

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PROPOSED INTERNATIONAL LEGISLATION WITH RESPECT TO BUSINESS PRACTICES

That agreements between private business enterprises engaged in international trade, which regulate the terms of competition between them, can have important effects upon the flow of that trade has long been apparent. During the period between the two World Wars, agreements of this nature were entered into on a broad scale, particularly in Western Europe.[1] Often these agreements were supported by government policy and sometimes supervised or participated in by government agencies.[2] The Nazi totalitarian state, as it prepared for World War II, utilized the position of German industry in many of these combines or cartels to the fullest extent possible for its political and military purposes.[3]

In the years 1935–1940, enforcement action under the anti-trust laws in the United States, with its traditional anti-trust policy and emphasis upon competition, was increasingly directed against these cartels, particularly where American companies had any share therein. Suits were commenced

[1] Edward S. Mason, *Controlling World Trade*, 1946, p. 11 (hereinafter referred to as Mason); Ervin Hexner, *International Cartels*, 1945, pp. 3–18 (hereinafter referred to as Hexner).

[2] Mason, p. 14; Hexner, pp. 12, 28–29.

[3] Wendell Berge, *Cartels, Challenge to a Free World*, 1944, p. 214; Mason, pp. 96–132. See also Joseph Borkin and Charles A. Welsh, *Germany's Master Plan*, 1943.