and may accomplish great things for the advancement of the interests and welfare of all mankind. They must remember, however, that they are not the source of rights. Their justification for existence throughout international society consists in the success with which they aid men in the pursuit of happiness and in the perfection of those relations which it is the object of the law of nations to foster and safeguard.

PHILIP MARSHALL BROWN.

OPINION OF COMMISSION OF JURISTS ON JANINA-CORFU AFFAIR

The controversy between Greece and Italy over the assassination of the Italian General Tellini and other officials of the international boundary commission, at Janina, near the Albania border of Greece, and the subsequent occupation of Corfu by Italian forces, was settled by agreement of the parties through the mediation of the League of Nations and the Conference of Ambassadors in September, 1923.[1] The fact, however, that the settlement was reached through acceptance by the parties of the decision of the Conference of Ambassadors at Paris meant that it gave no definite answer to the various legal contentions advanced during the discussion in the League Council. These contentions involved interpretations of the Covenant and points of general international law of unusual interest. It is therefore gratifying that after settlement of the controversy they were submitted to a commission of jurists as abstract questions. This commission, selected by the states represented on the Council of the League, reported on March 13 to the Council, which unanimously approved the report, though representatives of Sweden and Uruguay thought that the answer given to the fourth question was not as explicit as desirable in distinguishing the cases in which coercive measures were and were not legitimate.[2]

The problems with which the Commission of Jurists dealt arose out of (1) the contention of Italy that "any discussion or any step taken by the League of Nations (in the Janina-Corfu affair) would be out of place owing to its clear incompetence";[3] (2) the contention of Greece that the Italian occupation of Corfu was "outside the terms of the Covenant," [4] and (3) the assertion by the Conference of Ambassadors that "it is a principle of international law that States are responsible for political crimes and outrages committed within their territory." [5] The first two problems involved an

[1] See editorial comments, this JOURNAL, Vol. 18, pp. 98–108.

[2] Monthly Summary of the League of Nations, Vol. 4, pp. 53–54, April, 1924.

[3] Minutes of the 26th Session of the Council, League of Nations, Official Journal, Vol. 4, p. 1287, November, 1923.

[4] *Ibid.*, p. 1281. See also p. 1277.

[5] *Ibid.*, p. 1294. See also statement of M. Politis of Greece, p. 1288, and of M. Hanotaux of France, p. 1297.

interpretation of Articles XII and XV of the Covenant, while the last concerned a general principle of international law.

The League Council had considerable difficulty in framing questions which would cover these problems because of the insistence of the Italian representative that they should not invite an answer which would reflect directly upon her conduct in a dispute which had been settled.[6] Finally, however, with the aid of a commission of jurists, the following five questions were framed:[7]

> Question 1. Is the Council, when seized at the instance of a Member of the League of Nations, of a dispute submitted in accordance with the terms of Article 15 of the Covenant by such a Member as "likely to lead to a rupture," bound, either at the request of the other party or on its own authority, and before inquiring into any point, to decide whether in fact such description is well founded?
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> Question 2. Is the Council, when seized of a dispute in accordance with Article 15, paragraph 1, of the Covenant at the instance of a Member of the League of Nations, bound, either at the request of a party or on its own authority, to suspend its enquiry into the dispute when, with the consent of the parties, the settlement of the dispute is being sought through some other channel?
>
> Question 3. Is an objection founded on Article 15, paragraph 8, of the Covenant the only objection based on the merits of the dispute on which the competence of the Council to make an enquiry can be challenged?
>
> Question 4. Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in these articles?
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> Question 5. In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory?

A long debate then ensued as to the authority which should be requested to answer the questions. Lord Robert Cecil of Great Britain, Mr. Branting of Sweden, and others wished an advisory opinion from the Permanent Court of International Justice, but this was opposed by M. Salandra of Italy and M. Hanotaux of France. M. Salandra objected to the submission of questions 3 and 4, and M. Hanotaux to the submission of question 4, on the grounds that the questions were not purely legal, but partly or mainly political; that for the settlement of political questions governments must have final say, and that even an advisory opinion of the court would be difficult to overrule because of the great prestige of that institution.[8] They

[6] Minutes of the 26th Session of the Council, League of Nations, Official, Journal, Vol. 4, pp. 1320–1321.

[7] *Ibid.*, pp. 1328, 1350. See also Records of the 4th Assembly, 18th Plenary Meeting, Sept. 28, 1923, and Monthly Summary of the League of Nations, Vol. 3, p. 215, October, 1923.

[8] League of Nations, Official Journal, Vol. 4, pp. 1329, 1338, 1339.

were less afraid of opinions expressed by a commission of jurists especially appointed by the governments concerned. Lord Robert Cecil agreed that the court could not decide political questions, that consequently merely an advisory opinion should be sought, and that final decision would rest with the Council or Assembly. He also agreed that "the authority of the Permanent Court is greater than that of any body that can be created *ad hoc*," and for this very reason thought its opinion should be asked.[9]

> There are objections, of course, as I am sure all my colleagues will realize, to bodies created *ad hoc*. I do not know what procedure would be adopted; a body of jurists might be appointed by the Council, possibly on the advice of the Secretariat, or we might even get some assistance from the Court; but, however these jurists were obtained, I am afraid one must recognize that, in the case of all arbitral or other bodies collected for a particular purpose, there is always a tendency to regard them as having been chosen because of the opinions they are likely to give. In other words, you do not get the same guarantee of absolute impartiality and disinterestedness that you do from a Court which exists permanently and to which you submit certain questions. . . .

Lord Robert's preference for resort to impartial legal authority was not, however, shared by all his colleagues. M. Salandra thought that "logically, in view of the character of the function of the Permanent Court of International Justice, we could not refer to it questions which, . . . are of a constitutional nature, that is, questions which would result in an authentic interpretation of the Covenant. Such an interpretation is reserved to the sovereign power—I mean the Council or the Assembly." [10]

Doubtless much of this debate was mere camouflage to conceal the immediate interest of Italy and France in preventing any authoritative criticism of coercive measures short of war in view of the Corfu and Ruhr occupations. Nevertheless, it disclosed genuine differences on the method which should prevail in defining the competence of League organs. M. Salandra, in insisting that the Covenant should be interpreted by the political authorities of the League, was but reflecting the practice in his own and most continental European countries, whereas Lord Robert Cecil's preference for judicial interpretation was in harmony with the traditions of England and more particularly of the United States. Some members of the Council without any immediate interest in supporting the French and Italian view were inclined to recognize the value of flexibility in developing the League Constitution. Thus, M. de Mello-Franco of Brazil, though recalling the part which courts had played in the development of many written constitutions, thought:

> The important organization of the League of Nations, created by the Covenant, which is its constitution, must follow the path of concilia-

[9] League of Nations, Official Journal, Vol. 4, pp. 1338, 1340, 1342.
[10] *Ibid.*, p. 1339.

> tion at the outset if it is to attain the ideal which its creators had in view. In the early stages of its existence, the Covenant must be applied in a spirit of great conciliation; we cannot have recourse to the rigid and vigorous methods which are employed in applying written constitutions, the development of which is already very advanced, thanks to the precedents which they have been able to follow and the judicial decisions which have been taken.
>
> The League of Nations, on the other hand, is only beginning to apply its constitution, the Covenant, which—as all the nations of America confidently hope—will become in the future the law of all the States of the world, and will allow the final rule of peace, law and justice to be established.[11]

At the suggestion of Viscount Ishii of Japan, it was finally decided to submit the questions to a special commission of jurists, one selected by each member of the Council, together with the Director of the Legal Section of the Secretariat, only, however, after Lord Robert Cecil had obtained unanimous consent to the following declaration, which, though taken in terms from the Covenant, in effect repudiates the Italian challenge to the League's competence and sustains his own answer to question 3:

> Any dispute between Members of the League likely to lead to a rupture is within the sphere of action of the League, and if such dispute cannot be settled by diplomacy, arbitration or judicial settlement, it is the duty of the Council to deal with it under Article 15 of the Covenant.[12]

The jurists met at Geneva from January 18 to 24,[13] and gave answers to the five questions which were unanimously approved by the Council on March 13.[14]

The first question was answered in the negative.

> I. The Council, when seized at the instance of a Member of the League of Nations of a dispute submitted, in accordance with the terms of Article 15 of the Covenant, by such a Member as "likely to lead to a rupture," is not bound, either at the request of the other party or on its own authority, and before enquiring into any point, to decide whether in fact such description is well founded.
>
> The Council may at all times estimate the gravity of the dispute and determine the course of its action accordingly.

[11] League of Nations, Official Journal, Vol. 4, p. 1343. See also *ibid.*, p. 1332, and Wright, "The Understandings of International Law," this JOURNAL, Vol. 14, p. 565.

[12] *Ibid.*, pp. 1345, 1346, 1351.

[13] The jurists were Adatci, Japan, Chairman; Lord Buckmaster, British Empire; Buero, Uruguay; de Castello Branco Clark, Brazil; Fromageot, France; Rolandi Ricci, Italy; Unden, Sweden; Van Hamel, Director of the Legal Section of the League Secretariat; de Villa Urrutia, Spain; de Visscher, Belgium. See Monthly Summary of the League of Nations, Vol. 4, p. 2, February, 1924.

[14] For replies, see Monthly Summary of the League of Nations, Vol. 4, p. 53, April, 1924.

This justifies the Council's consideration of the Italian-Greek dispute in spite of the Italian contention that it had no jurisdiction because the dispute was "not likely to lead to a rupture." [15]

The second question was answered in the main affirmatively.

> II. Where, contrary to the terms of Article 15, paragraph 1, a dispute is submitted to the Council on the application of one of the parties, where such a dispute already forms the subject of arbitration or of judicial proceedings, the Council must refuse to consider the application.
>
> If the matter in dispute, by an agreement between the parties, has already been submitted to other jurisdiction before which it is being regularly proceeded with, or is being dealt with in the said manner in another channel, it is in conformity with the general principles of law that it should be possible for a reference back to such jurisdiction to be asked for and ordered.

This justifies the Council's consideration of the Italian-Greek dispute in spite of the Italian contention that it had no jurisdiction because the dispute was being "satisfactorily settled by diplomacy." [16] It also justifies the Council's acquiescence in the settlement of the dispute by the Conference of Ambassadors at Paris. The Council's function is not to assert its authority, but to assist in any means of settlement agreeable to the parties. The answers to questions 1 and 2 seem to mean that formally the Council is barred from considering a dispute only by the fact of submission to arbitration or judicial settlement. The likelihood of the dispute leading to a rupture or the probability of its being settled by negotiation, mediation, or other means, are questions which cannot be raised by the disputants to bar the Council's jurisdiction, though at its own discretion the Council should refrain from making a recommendation if some other peaceful procedure in process shows prospects of success.

The third question was answered in the main affirmatively.

> III. Where a dispute likely to lead to a rupture is submitted to the Council, on the application of one of the parties, in accordance with the provisions of Article 15, paragraph 1, the case contemplated in paragraph 8 of Article 15 is the only case in which the Council is not to enquire into the dispute.
>
> In particular the reservations commonly inserted in most arbitration treaties cannot be pleaded as a bar to the proceedings.
>
> The Commission considers it desirable to observe that, where the case arises, the Council should, in determining the course of its action, have regard to international engagements such as treaties of arbitration or regional understandings for securing the maintenance of peace.

[15] See statement by M. Salandra of Italy, League of Nations, Official Journal, Vol. 4, p. 1288.

[16] See statements by M. Salandra, *ibid.*, pp. 1279, 1314; by Lord Robert Cecil, pp. 1279–1280, 1298, 1307–1308; by M. Hymans of Belgium, p. 1299; and by M. Guani of Uruguay, p. 1300. See also this JOURNAL, Vol. 18, p. 107.

This denies the Italian contention that the League cannot consider questions relating to the execution of the peace treaties unless all the interested parties ask for such consideration.[17] It means that the Council is barred from considering a dispute on account of its subject matter only when it finds that it "arises out of a matter which by international law is solely within the domestic jurisdiction" of a party so claiming, and it is made clear that the allegation that a dispute involves "national honor" or "vital interests" of one of the parties does not, as was suggested during the Council debate,[18] put a dispute in that category. If, however, the dispute is covered by an arbitration treaty between the parties or by a regional understanding like the Monroe Doctrine, the Council, though not barred from discussing the dispute, must, as required by Article 21 of the Covenant, respect such procedures for settlement.[19] Practically this would seem to mean that where American countries have agreed upon a mode of settlement of a dispute among themselves, the League should at once withdraw, as it did in the Panama-Costa Rica and the Chile-Peru boundary disputes.

The answer to the fourth question is undoubtedly the least satisfactory.

> IV. Coercive measures which are not intended to constitute acts of war, may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.

The jurists apparently admit that all self-help prior to submission to the League is not barred by the Covenant.[20] War is clearly barred by Article 12 prior to such submission, but retorsions, reprisals, occupations of territory, etc., are not necessarily war in the legal sense.[21] Such measures short of war may be used by members of the League prior to League consideration of the dispute, but only if of a character and under circumstances

[17] See statement by M. Salandra, League of Nations, Official Journal, Vol. 4, pp. 1279, 1288.

[18] See statement by M. de Mello-Franco of Brazil, *ibid.*, p. 1330.

[19] See statement by M. Guani of Uruguay, *ibid.*, p. 1329.

[20] See official Italian statement, *ibid.*, p. 1288, and elaborate argument by M. Salandra of Italy, p. 1314. The opposing view was vigorously expressed by M. Branting of Sweden, *ibid.*, pp. 1306, 1316. See also this JOURNAL, Vol. 18, p. 107.

[21] Professor Charles de Visscher, one of the jurists who prepared the report, has informed the writer that in his opinion Article 12 bars resort to all measures of coercion characterized by the use of force, because such measures in themselves always endanger the maintenance of peace. Measures of forcible coercion, it is true, have not always in the past led to war, but only because the state coerced is physically weak. Relative strength or weakness makes no difference in the rights of states; therefore, any act of coercion which, if applied against a great power, would inevitably lead to war, is legally the inauguration of war, whatever the relative strength of the states, and so is barred by the Covenant.

which will assure their approval by the Council.[22] Thus the Greek contention that the League rather than the perpetrator should describe coercive measures seems to be sustained.[23] "I am aware," said M. Politis, "that in an official communiqué published, I believe, yesterday at Rome, the acts of violence which have just been committed against Greece are described as pacific acts of a temporary character. It does not seem to me that it lies with the author of an act to describe it. Acts must be judged objectively, and it is for the Council to judge the acts regarding which Greece has the right to complain."

Articles 10 and 16 of the Covenant are not directly referred to in this answer, but apparently they also do not bar all measures of coercion short of war. Article 10 merely bars external aggression against the territorial integrity and political independence of states, and it seems clear that legitimate defense or punishment cannot be so characterized. In fact this distinction was recognized by President Roosevelt when he said in regard to the Monroe Doctrine: "We do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American Power."[24] Article 16, like Article 12, bars resort to war, not to measures short of war, and this article, though referred to by the Greek representative, was not made the basis of the Greek protest. "The Greek government," said M. Politis, "was accordingly inclined to profit by the doubt which might exist as to the character of the acts committed by the Italian Government in order not to take the initiative in asking for the application of Article 16."[25]

During the debate in the Council, doubt was expressed by Lord Robert Cecil whether coercive measures short of war were considered legitimate by international law even apart from the Covenant, though he recognized that such measures had frequently been employed.[26] The answer to question 4 seems to imply that they cannot be considered illegitimate under all circumstances. The Covenant clearly says nothing which increases the propriety of such acts; consequently if they are legitimate under certain circumstances for parties to the Covenant, they are *a fortiori* legitimate under like circumstances for states bound only by customary international law.

[22] This seems to be the logical interpretation of the answer, but Professor de Visscher informs the writer that, in approving the answer, he interpreted the term "dispute" in the third line to refer, not to the dispute as to the propriety of the coercive measures, but to the original dispute out of which the acts of coercion arose. Thus the answer, in his opinion, does not mean that the Council has power to pass upon the propriety of the coercive measures (which he believes are always prohibited by the Covenant if they involve the use of force), but merely upon the expediency, from the standpoint of settling the original dispute, of the maintenance or withdrawal of such measures which exist in fact.

[23] *Ibid.*, p. 1277.

[24] Message to Congress, December 3, 1901.

[25] League of Nations, Official Journal, Vol. 4, pp. 1277–1278.

[26] *Ibid.*, pp. 1323, 1339.

The jurists replied as follows to the fifth question.

> V. The responsibility of a State is only involved by the commission in its territory of a political crime against the person of foreigners, if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.
>
> The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.

This sustains the contention of Greece that under international law "if a crime is committed within the territory of a country, the only duty of that country is faithfully to enforce the law of the country for the punishment of the crime," and that an international responsibility arises only on proof of the allegation "that the government of the country has failed in its duty."[27] It also supports M. Hanotaux's comment on the telegram received from the Conference of Ambassadors, which asserted as "a principle of international law that states are responsible for political crimes and outrages committed within their territory," that this would not be true unless the words "for the repression of" were inserted after "responsible."[28]

It seems clear under international law that responsibility of states for crimes against foreigners on their territory is relative, not absolute. This holds true whether the motive for the crime is personal or political. State responsibility depends on the degree of negligence of the government, and the standard "all reasonable measures for prevention" suggested by the jurists does not appear to differ from that of "due diligence," "means at disposal" or others familiar to students of international law.[29] The statement that more rigorous protection is due to foreigners of recognized public character is also supported by practice and text writers.[30]

While these answers will not excite the enthusiasm of internationalists who hoped that the League would put an end to all violence in international affairs, they do show a healthy appreciation of international law. The commission of jurists clearly recognizes the League as an evolution of, not as a revolution from, the family of nations as it has existed under customary international law. But nevertheless they recognize that an advance has been made. They insist that the procedure for peaceful settlement defined

[27] League of Nations, Official Journal, Vol. 4, p. 1289.

[28] *Ibid.*, p. 1297. See also statement by M. Guani of Uruguay, p. 1324.

[29] See Borchard, Diplomatic Protection of Citizens Abroad, pp. 213, 217. The Inter-Allied Commission of Inquiry on responsibility for the murder of General Tellini proceeded on this theory of responsibility. In its final report of September 30, 1923, it found that Greece had been negligent in not suppressing the press campaign against General Tellini and in not warning him of the anti-Italian feeling in that region before the crime; in not making use of all available evidence in the judicial inquiry; and in not transmitting information immediately on discovering the crime which might have prevented escape of the criminals. See Levermore, League of Nations, 4th Year Book, pp. 402–409.

[30] *Ibid.*, pp. 216, 223.

in the Covenant imposes obligations upon members of the League which can not be evaded even by a great Power. It seems improbable that a member of the League will again deny the competence of the Council to inquire into a future international dispute involving, or in danger of involving, violence, when such dispute has not been submitted to arbitration or judicial settlement.

QUINCY WRIGHT.

REMISSION OF THE CHINESE INDEMNITY

On May 21, 1924, the President approved a joint resolution of Congress providing for the remission of further payments of the annual instalments due to the United States on the indemnity from China under the protocol of September 7, 1901, which settled the claims growing out of the Boxer disturbances. This joint resolution was approved almost sixteen years to the day from the time when the first step in this generous action of the Government of the United States was initiated by the approval of the joint resolution of May 25, 1908.

The original amount of the indemnity bond given to the United States by China on December 15, 1906, was $24,440,778.81 payable in irregular annual instalments over a period extending until 1940, with interest at 4% per annum. This sum represented the fractional share allotted to the United States by the diplomatic representatives of the Powers at Peking on June 14, 1902, from the bond for the lump sum of 450,000,000 taels delivered on October 13, 1901, by the Chinese plenipotentiaries to the dean of the diplomatic corps at Peking in accordance with Article 6 of the protocol of September 7, 1901. The Chinese Government subsequently signed fractional bonds for the amounts due to each government.

In asking Congress for authority to modify the Chinese bond so as to enable the United States to return a portion of the indemnity, President Roosevelt explained in his message of December 3, 1907, that "It was the first intention of this government, at the proper time, when all claims had been presented and all expenses ascertained as fully as possible, to revise the estimates and account, and as proof of sincere friendship for China voluntarily to release that country from its legal liability from all payment in excess of the sum which should prove to be necessary for actual indemnity to the United States and its citizens."

The joint resolution of May 25, 1908, authorized the President to modify the bond from China so as to limit the total payment to the sum of $13,655,492.69, with interest at 4% per annum, and to remit the remainder of the indemnity at such times and in such manner as he shall deem just. An executive order issued by President Roosevelt on December 28, 1908, gave his consent to the modification of the amount of the bond and directed that a