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THE UNITED NATIONS ORGANIZATION AND INTERNATIONAL LAW

HARROP A. FREEMAN

There are various methods of discussing the United Nations Organization and the Dumbarton Oaks proposals from which it ripened. One is to lampoon these plans as William Henry Chamberlin did, as the "Dumbarton Hoax", and as Dorothy Thompson did by quoting the Mad Hatter (Big Three) to Alice (the small nations): "It's very easy to take more than nothing." They can also be defended with humor, witness the following ditty:

A plan for peace, in war, evokes
Few Yeas, and perfect floods of Buts—
Yet the original Dumbarton Oaks
Were also, at the start, just nuts.

It is fitting that lawyers test the Organization against a desired system of international law. Since there have been too many mere catalogues of the United Nations Organization provisions and far too few attempts to define some of the necessary or desirable elements of an international legal system servient to the needs of our day, I offer the following as one contribution to such testing.

The present crisis requires a fresh approach. It must attempt to be more exact than that of the physical scientist for we are conducting our experiment in human lives.¹ When the old order was breaking up in the Thirty Years War, Grotius fathered international law by courageously employing sound and scientific scholarship. Against a broad historical, social, spiritual and legal background he restated the rules inherent in international intercourse.² Gro-

¹Not a few writers have recognized that international law, as well as other social sciences, "have an inveterate tendency to stick to their assumptions and to suffer constant defeat from experience rather than to change their assumptions in the light of contradicting facts." Morgenthau, *Positivism, Functionalism, and International Law* (1940) 34 AM. J. INT. L. 260, citing HOBGEN, *THE RETREAT FROM REASON* (1936) and LYND, *KNOWLEDGE FOR WHAT?* (1939).

²"No field of scholarly scientific investigation can offer such allurements and rewards as the vast field of international law. But it needs consecrated devotees who are willing to emulate Grotius and to avoid the ruts deeply worn by his successors. They must emulate his amazing historical knowledge, his powers of analysis, and above all his moral and spiritual appreciation of the motives that determine human conduct, human

tius' law of nations, because it was based on the normative forces of his day, *i.e.*, on natural law, the cultural residue from religion; on the concept of society as created by consent of the individual; on a strong European balance of power and on the international solidarity of the manufacturing and trading bourgeoisie, was able to fill the gap left by the fall of religious universalism. In our time, with the fall of *Pax Britannica*, men begin to sense the need for a modern counterpart.

OUR TIMES

Abraham Lincoln wisely remarked: "If we could first know where we are and whither we are tending, we could better judge what to do and how to do it." An evaluation of our times, of presently normative forces and of the status of international law is the bedrock foundation for our discussion. There is no better way to discover these than from the current writings of widely varied pens (preferably non-legal).

It has become axiomatic to our thinking that this is *One World*. Political and economic tides which ebb and flow in China also beat on American shores. Isolation, if it ever drew a valid breath, is now a dead issue. From *A* to *Zed* men sense this necessitous community.³ Therefore, we are faced on a global scale with the same existing, necessary international contacts and intercourse which Grotius faced on a half-world basis.

Professor Arnold Toynbee, in the fourth great volume of *A Study of History*,⁴ traces the breakdown of civilization; concludes that the world is at a turning point in history; recognizes that Judaeo-Christian culture is largely in control of the world; and poses the question whether that culture will be able to order and maintain society. Alexander Micklejohn defines the essence of that culture as universal brotherhood, reliance on reason rather than force, kindness as the intelligent course, and man losing self in society rather than solely serving self.⁵ Another writer, De Salles, lists the three great forces

order, and law." Editorial Comment, *The Renovation of International Law* (1942) 36 AM. J. INT. L. 631, 636-7.

³WILLKIE, *ONE WORLD* (1934). Three other books widely divergent in the policies they advocate, yet in agreement concerning where we are: To the late Nicholas J. Spykman in *AMERICA'S STRATEGY IN WORLD POLITICS* (1942) isolation is ridiculous; we are in and we may as well remain in the Balance of Power system. Walter Lippman in his *UNITED STATES FOREIGN POLICY, SHIELD OF THE REPUBLIC* (1942) is equally clear that isolationism is dead; he places his faith in a Big Three or Four in control of the world. Professor R. M. MacIver, in his book, *TOWARDS AN ABIDING PEACE* (1943), recognizes no escape from international cooperation, wants no escape, and urges a federation for all nations.

⁴(1939).

⁵EDUCATION BETWEEN TWO WORLDS (1942) 203-235:

(1) "... the basic belief of our culture ... is that all men are brothers."

(2) "... throughout its career that culture has drawn a contrast between 'the appeal

at work in the world as *nationalism*, *collectivism*, and *pacifism*.⁶ And Professor Gerhart Niemeyer,⁷ in a "conceptional renovation of international law," relates these forces to the international legal problem thus:

"If the world neither can do without an international order nor has suddenly lost its moral conscience, we necessarily come to the conclusion that the reason international law is ineffectual is that in its present form it neither serves the need, nor appeals to the moral sense of, the modern world." (p. 16)

"Past centuries were primarily inspired by . . . *Man Independent*. . . . Our generation seems to visualize . . . *Man Coordinate*." (p. 23)

"Law instead of acting as a dam, must become the helpful canal, through which functional coordination of states can be achieved." (p. 24)

Other legal writers have recognized these same underlying currents.⁸

Not only does the United Nations Charter recognize the "Big Three" but current literature displays an almost unbelievable advocacy of "power" and a recognition that Russia and the United States stand as *the two* dominant "powers."⁹ Yet to a degree never before experienced (in bombing and

to reason' and the 'resort to violence.' . . . Violence we have said is savagery. Civilization is reasonableness."

- (3) "Socrates summed up his wisdom in the phrase, 'Be intelligent; act critically.' And Jesus . . . said to his fellows, 'Be kind.' And in terms of sheer domination over the mind . . . no other pair of intellectual achievements can equal these two. . . . Intelligence is kindness. Kindness is intelligence."

- (4) "'Whosoever will lose his life for my sake shall find it' was the old doctrine. It is now replaced by the assertion that each of us in a well-organized society, yields to [I would say works through] the state . . . and that, in doing so, each of us becomes a free person."

So common are these views to all living great cultures that we may well ask whether they are normative on a global scale. See ARCHER, *FAITHS MEN LIVE BY* (1932); WIGMORE, *PANORAMA OF THE WORLD'S LEGAL SYSTEMS* (1928).

⁶DESALLES, *THE MAKING OF TOMORROW* (1941).

⁷NIEMEYER, *LAW WITHOUT FORCE* (1941) 16, 23, 24.

⁸An excellent review of the material is made by Morgenthau, *op. cit. supra* note 1, at 273-284:

- (1) "In the domestic field the regulative social force dominating all others is the state." In the international field there is "tension."
- (2) A rule of international law "is valid when its violation is likely to be followed by an unfavorable reaction. . . ."
- (3) ". . . there exist two obviously different types of international law, one founded upon the permanent and stable interests, the other based upon the temporary and fluctuating interests of states."
- (4) ". . . there exist functional relationships . . . between the law and . . . ethics and *mores*."
- (5) The doctrine of interpretation must be revised to become based on "social context."
- (6) ". . . the laws which govern the social relations of men" must be discovered and applied.

⁹WELLES, *TIME FOR DECISION* (1944) 306; FOX, *THE SUPER POWERS* (1944) 101; Marshall Smuts' Empire Parliamentary Association Speech; SPYKMAN, *AMERICA'S STRATEGY IN WORLD POLITICS* (1942).

devastation brought to the home, and in loss of manpower and wealth at every fireside) this has been a peoples' war and the demand is for a peoples' peace.¹⁰

Are not the following the correlaries in international law and international organization to these normative forces:

1. The people of the world form a community and require law and orderly procedures to govern and readjust their inter-relationships.
2. International law and international organization must be global and universal.
3. Nationalism is so virile that it cannot be disregarded. Internal problems, not affecting the world at large, must be left to the nation. But more and more, problems heretofore considered "national" are recognized to have serious international repercussions, and "national sovereignty," with its ultimate regnum, war, completely breaks the legal order and must be ended.
4. Insofar as nations or states are recognized, all are *not* equal and no mere verbiage of law can make them so. But the mere fact of inequality does not justify control of international organization and international law by the "great powers." Rather it imposes special obligations and responsibilities on the more influential. This is the true concept of "power."¹¹
5. Reliance on force as an instrumentality for achieving peace must be replaced by the focus of attention on cooperative, coordinate, functional activities which appeal to reason and make living together peaceful.
6. War, all instrumentalities for war, conscription and all systems having as their sole function the preparation for war, must be eliminated.
7. Provision must be made for the executive, legislative, and judicial function on the international level and proper balance between these must be maintained.
8. A place must be provided in the system for both collectivism and individualism.

¹⁰WALLACE, SIXTY MILLION JOBS (1945).

¹¹Throughout the 19th century international law recognized an abstract equality of states—Le Louis, 2 Dod. 210, 165 Eng. Repr. 1464 (1817); Schooner Exchange v. McFadden, 7 Cranch 116, 3 L. ed. 287 (U. S. 1812)—and many writers insist that this is the only rule of international law. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW (7th ed. 1923); DICKINSON, THE EQUALITY OF STATES (1920). Yet, chiefly as a supplement to fill the legislative and judicial void in international law, the Great Powers at the Congress of Vienna in 1815, the Congress of Paris in 1856, the Congress of Berlin in 1878, the Conference of Algieras in 1906, and the Conference at Paris in 1919 assumed responsibility (often in their own self interest) for disposing of various problems. The Universal Postal Union, the League, and the United Nations Organization recognize inequality. The Bretton Woods Monetary Agreement and the U. N. R. A. are a recognition of the added responsibility of more influential or richer nations. A good discussion is being currently presented by Jessup, *The Equality of States as Dogma and Reality* (1945) 60 Pol. Sci. Q. 527.

9. If this is to be a "peoples' peace," there must be greater emphasis on the operation of international law upon, and in favor of, the individual.

In the short compass of this article, I cannot outline a complete system, but I shall try to outline an adequate approach to several of the correlaries and then test the United Nations Organization against the stated correlaries.

THE JUDICIAL FUNCTION

We have said that international law and international organization are required to fulfill three salient functions: judicial, executive, and legislative. These correspond to the three methods of approaching the interpersonal relationships which constitute society: (a) assisting or carrying out accepted rules (executive), (b) changing or creating new interrelations (legislative), (c) adjudging or interpreting existing ones (judicial). Note, I did *not* say a legislature, an executive and a judiciary, for any of the functions may be combined, and any particular instrumentality may not fit old terminology describing machinery.

The lawyer is properly most interested in judicial instrumentalities. He knows that in the history of society the judicial office preceded all others; that parliament was originally a court; that "natural legal evolution tends first toward an international judiciary, and not toward international government or legislation";¹² that "law is woven into the habit of society as its warp and woof, while political governments are relatively superficial."¹³

Instrumentalities with Compulsory Jurisdiction for Conciliation, Arbitration, and Adjudication

Within the nation the need for all forms of judicial and quasi-judicial functions is recognized. Much of the work is done by agencies which are not courts: by shop committees; arbitration panels; draft, claims, and appeal boards; and similar agencies. In the international field, laymen rarely recognize that the judicial process has been chiefly exercised by quasi-judicial bodies: mixed claims commissions, conciliation boards, commissions of inquiry, temporary and permanent arbitration tribunals.¹⁴ These must be continued for they permit "compromise" and "negotiation" in matters of "na-

¹²Kelsen, *Compulsory Adjudication of International Disputes* (1943) 37 AM. J. INT. L. 397, 400.

¹³Jackson, *The Law Above Nations* (1943) 37 AM. J. INT. L. 297, 298.

¹⁴We may refer to the record of arbitration. A popular treatment is RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO* (1929) which traces over 450 cases successfully arbitrated. See also HUDSON, *BY PACIFIC MEANS* (1935); HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1943).

tional honor" and in conflicts not clearly within positive rules of law, a characteristic of certain judicial systems, particularly the Islamic and Oriental,¹⁵ which must be fitted into future international order.

What has been said ought not to detract from, but rather enhance, the importance of international courts. Although until 1921 no international court existed, national tribunals followed regular judicial procedure and decided cases under international law.¹⁶ Since 1922 the Permanent Court of International Justice has considered sixty disputes, given thirty-two judgments, twenty-seven advisory opinions, and two hundred orders. Its decisions have been applauded by the Bar and accepted by the nations. Fifty-nine countries, out of approximately seventy-five in the society of nations, adhered to the protocol setting up the Court and fifty-six, either under the "optional clause," or by multipartite and bipartite agreements, conferred compulsory jurisdiction. More than five hundred treaties have related to the Court.¹⁷

It is inaccurate to give the impression that either universal or mandatory jurisdiction under the old Permanent Court existed; but most of the basic judicial and quasi-judicial machinery needed was available, and sufficiently great strides have been made to demonstrate that the time has come to make international jurisdiction compulsory and universal.¹⁸

Jurisdiction of All Disputes

The Court's jurisdiction should also be extended to all disputes, of whatever nature. From 1860 to 1910 it was common to reserve from mediatory,

Certainly the Dogger Bank Commission of Inquiry, and the Jay Treaty, the Alabama Claims, and the North Atlantic Coast Fisheries arbitrations will always constitute milestones in international law to rank with any court decisions.

¹⁵II WIGMORE, *op. cit. supra* note 5, at 489.

¹⁶"International judicial organization is necessary to give international law the authority which, paradoxically, it now has principally in national courts." Editorial Comment, *Post-War Development of International Courts* (1943) 37 AM. J. INT. L. 276, 281.

The United States Supreme Court has decided approximately 158 international law cases, our lower federal and state courts hear 10 to 15 a year, the English Privy Council has determined over 200, and every major nation has participated in the national application of international law.

¹⁷HUDSON, *BY PACIFIC MEANS* (1935) 55.

¹⁸The Court is required to "represent the main forms of civilization and the principal legal systems of the world." The members of the Court have been chosen from Great Britain, France, Japan, Italy, the United States, the Netherlands, Brazil, Denmark, Cuba, Spain, Switzerland, Norway, China, Roumania, Yugoslavia, Germany, Belgium, Columbia, Poland, and Salvador.

The "optional clause" of Article 36 permitted the members to make "compulsory *ipso facto* and without special agreement . . . the jurisdiction of the Court in all . . . legal disputes concerning: (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." The Court gave decision in eleven "compulsory jurisdiction" cases without untoward events. P. C. I. J., Statute and Rules (1922).

arbitral, or judicial decision any matter affecting "vital interests," "independence," or "honor" of the parties.¹⁹ The recent tendency has been to provide for adjudication of all legal disputes.²⁰ Even this granted the nation an "out," for it could assert that the controversy was "political" rather than "legal." Since the existence of an unsettled conflict of any nature invites an appeal to force and is, therefore, a threat to peace, the next necessary step is clear—completely eliminate exemption from jurisdiction based on a nation's own decision that the controversy is "political."²¹ Hans Kelsen has done much to clarify the problem.²² The old view, he says, was that "legal disputes are disputes in which both parties base their respective claims . . . on positive international law; whereas [in] political disputes . . . at least one party bases its claim on other principles or on no principles at all." Therefore, "the legal or political character of a conflict depends exclusively on the discretion of the parties." But, "a positive legal order can always be applied to any conflict whatever. Only two cases are possible; either the legal order contains a rule obliging one party to behave as the other demands; or the legal order contains no such rule." In the first case the application of the legal order admits the claim; in the second it rejects it. *Ubi jus, ibi remedium*—"Where there is a right there is likewise a remedy." Another writer

¹⁹*Treaty of Paris* (March 30, 1856) Art. XII, 46 BRITISH AND FOREIGN STATE PAPERS (1865) 13; *Anglo-French Pact* (October 14, 1903), 96 BRITISH AND FOREIGN STATE PAPERS (1906) 35; *Hague Convention between the United States and other Powers for the Pacific Settlement of International Disputes* (October 18, 1907) Art. IX, 36 STAT. (1909-1911) 2199; *Root-Treaties* (1908-1909), I TREATIES AND CONVENTIONS (1910) 814.

²⁰*General Treaty of Arbitration between Chile and the Argentine Republic* (May 28, 1902), (1907) 1 AM. J. INT. L. SUPP. 292; *Treaty between the United States and Great Britain for the Advancement of General Peace* (September 15, 1914), 38 STAT. (1913-1915) 1853. Other similar "Bryan treaties" were concluded with various countries in 1913-14. See CARNEGIE ENDOWMENT, TREATIES FOR THE ADVANCEMENT OF PEACE (1920); LEAGUE COVENANT (June 28, 1919) Art. XII, providing for submission to arbitration, judicial settlement or the Council, 1 HUDSON, INTERNATIONAL LEGISLATION (1931) 1, 7; *United States-Mexican General Claims Convention* (1924), *United States Treaty Series*, No. 678; *Geneva Protocol for the Pacific Settlement of International Disputes* (October 2, 1924), (1925) 19 AM. J. INT. L. SUPP. 9; *The Locarno Arbitration Treaties* (October 16, 1925), 54 LEAGUE OF NATIONS TREATY SERIES (1926) 289, 303, 315, 327, 341; *Treaty between United States and France* (February 6, 1928), *United States Treaty Series*, No. 785. (Numerous similar treaties were entered into during 1928-29); *General Act of Geneva for Pacific Settlement of International Disputes* (September 26, 1928), (1931) 25 AM. J. INT. L. SUPP. 204, *United States Treaty Series*, No. 796; *Convention on Inter-American Conciliation* (1929), *United States Treaty Series*, No. 906.

²¹This would apply the well-known rule that no one can be judge in his own suit which holds good in international law, *Interpretation of the Treaty of Lausanne*, 1 HUDSON, WORLD COURT REPORTS (1934) 720, 726; and could be accomplished in one treaty, since consent can be given once and for all, *The Status of Eastern Carelia*, 1 HUDSON, WORLD COURT REPORTS (1934) 190.

²²Kelsen, *Compulsory Jurisdiction of International Disputes* (1943) 37 AM. J. INT. L. 397, 403-4.

has said: "This difference is not one between legal and 'political,' or between 'justiciable' and 'non-justiciable' conflicts; for every international conflict can be decided judicially. The real difference is between static and dynamic conflicts, between conflicts as to the law actually in force, and as to the change of the positive law."²³ That is the distinction already noted between the strictly judicial function on the one hand and the legislative function, to which equity is closely related, on the other.

I believe we can trust international tribunals, except where advisory opinions are authorized, to reject matters presented to them which do not involve a "case" or "controversy," just as municipal courts do.²⁴ Subject to that protection, there is not the slightest reason why they should not exercise the whole judicial function.

Power to Decide Cases Ex Aequo et Bono

All primitive legal orders, including international law, are primarily static;²⁵ and revolution at the internal level and war on the international plane have been a means of effectuating change. If this use of war is to be eliminated, a way of revising existing rules must be found. No legal order is stable until it provides, by *peaceful means within the order*, not only the security demanded by the static tendencies but also the change required by dynamic forces.²⁶ Although the power of revision or "peaceful change" belongs primarily to legislative instrumentalities, no judicial agency is wholly without it. The very process of judicial interpretation, the definition of "justice," and the development of equity show the judge as law "changer" as well as law "applier." "The life of the law has not been logic: it has been experience."²⁷ "The best and most rational portion of English law is in the main judge-made law."²⁸

Many proposals for separate international equity tribunals have been made.

²³Kunz, *The Problem of Revision in International Law* (1939) 33 AM. J. INT. L. 33, 44.

²⁴*The Status of Eastern Carelia*, HUDSON *op. cit. supra* note 21; *United States v. Evans*, 213 U. S. 297, 29 Sup. Ct. 507 (1908); *Nashville, Chattanooga & St. L. Ry. v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345 (1933).

²⁵BRIERLY, *THE LAW OF NATIONS* (1936) 59-61; POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922) 12-14.

²⁶As Kunz points out, *op. cit. supra* note 23. Pound, Demogue, Cardozo, Kocourek, Trentin, Lodijenshy, Brierly, Dickenson, Lauterpacht, LeFur, Scelle, and Verdross state this principle.

²⁷HOLMES, *THE COMMON LAW* (1881). Lecture 1, *Early Forms of Liability*.

²⁸Pollock, (1893) 9 L. Q. REV. 106. The story of Lord Mansfield, the one man parliament, is known to every first year law student. See also CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) Lecture III.

"Most jurists are opposed to this idea,"²⁹ and the tendency intra-nationally is to amalgamate law and equity.

Several precedents already exist for application of equity by international courts.³⁰ And competent studies are available to show the meaning of "justice," "equity," *ex aequo et bono* and their relationship to international law.³¹

There are some problems of international revision, similar to those found in the growth of common law and constitutional law, which are essentially judicial and can best be handled by a court. A few instances may be enumerated: interpretation to determine the meaning of, or extent of change effected by, a particular treaty or law; determination whether a treaty or law is void *ab initio* or voidable by reason of changed conditions (Cf. League Covenant Article XIX making this a political question); requirement that a complainant meet equitable qualifications (he who seeks equity must do equity, etc.). It is also a judicial function to decree revision where the procedure therefor is provided in the treaty or law.³² Revision of a political, *i.e.*, change of policy, character should be left to legislation, but the power to effectuate judicial and quasi-judicial revision should clearly be given to the courts.

Authority to Make Majority Decisions

The advisability of majority judicial decisions should need no demonstra-

²⁹Kunz, *The Problem of Revision in International Law* (1939) 33 AM. J. INT. L. 33, 50.

³⁰United States (Illinois Central R. R.) v. United Mexican States, United States-Mexico General Claims Commission, Opinions of Commissioners (1927) 15, "in accordance with the principles of international law, justice and equity." The Russian Indemnity Case, SCOTT, HAGUE COURT REPORTS (1916) 297, "it would be contrary to equity," and "Equity requires." Great Britain (Mexican Union Ry.) v. Mexico, British-Mexican Claims Commission, Decisions and Opinions of the Commissioners (1931) 157. "Based upon the principles of justice or equity." Administrative Decision No. 2, United States-German Mixed Claims Commission, Report of Decisions (1925) 7, "The Commission will not be bound by any particular code or rules of law but shall be guided by justice, equity and good faith." The Cayuga Indians, United States-Great Britain Claims Arbitration, Nielsen's Report 307. A rather complete review of international decisions based on "equity and justice" and an application of equity by looking through the corporate fiction. Great Britain (Eastern Extension Tel. Co.) v. United States, Nielsen's Report 73 "on the ground of equity." Italy (Gentini) v. Venezuela, Italy-Venezuela Mixed Claims Commission, Ralston's Report 724, applying prescription as "equitable and the outgrowth of a general desire for the attainment of justice." Various treaties (*e.g.*, PERMANENT COURT STATUTE) grant the right to decide *ex aequo et bono*, if the parties agree thereto.

³¹Orfield, *Equity as a Concept of International Law* (1929) 18 KY. L. J. 31. FRIEDMAN, THE CONTRIBUTION OF ENGLISH EQUITY TO THE IDEA OF AN INTERNATIONAL EQUITY TRIBUNAL (1935). BUSTAMANTE AND OTHERS, JUSTICE AND EQUITY IN THE INTERNATIONAL SPHERE (1936). HABICHT, LE POURVOIR DU JUGE INTERNATIONAL DE STATUES *ex aequo et bono* (Eng. ed. 1935).

³²Wilson, *Revision Clauses in Treaties since the World War* (1934) 28 AM. POL. SCI. REV. 901-909.

tion. Already the principle is accepted and employed by international tribunals.³³

Power to Utilize an Advisory Commission of Experts

We have said that functional international law must seek out and apply the rules which govern man's inter-relationships in full recognition of their social context. In municipal law the jury serves (albeit crudely) to make decisions accord to the accepted standards of the people. Local legislative bodies utilize law revision commissions, research staffs, and committees to explore the social context for their determinations. A modern court can do no less. The equivalent in international judicial problems for which the social context is extremely complicated, *e.g.*, "minority rights," is an advisory commission of experts.

*Jurisdiction to Give Advisory Opinions and
Declaratory Judgments*

Although in a mature legal order with a considerable constitutional legacy from the past it may be desirable to free the judges from political pressures by relieving them from granting advisory opinions, in the early stages of a legal system advisory opinions are often necessary. The method has been found serviceable in international law. Articles 65-68 of the Permanent Court of International Justice Statute expressly authorize the practice, and the Court has successfully employed it in twenty-seven cases. Most lawyers recommend its continuance.

The proposal for declaratory judgments is more novel, but equally logical. In municipal courts this procedure has allayed strife and settled rights before the controversy became bitter with each disputant defending his claim as a matter of "principle." It is a remedy functionally fitted to international law wherein it is essential that claims be settled before they become matters of "national honor." Particularly is this true, since the history of conciliation and arbitration shows that states will carry out their obligations once these have been determined.³⁴

Jurisdiction Over, and in Favor of, Individuals

The theory of *Man Coordinate* is rendering more tenable the existing international law rule that only nations are the subjects and objects of interna-

³³*Convention between the United States and other Powers for the Pacific Settlement of International Disputes* (October 18, 1907) Art. LXXVIII, 36 STAT. (1911) 2199; P. C. I. J., Ser. D, No. 1, Art. LV (1931).

³⁴See note 14 *supra*.

tional law. But man is not merely coordinate, he is also individual. This is emphasized in the "four freedoms" of the Atlantic Charter, in the proposal by the American Law Institute and American Bar Association of an "international bill of rights," and even in the insistence on trying individual war criminals.³⁵ These plans dictate an international judicial process able to short-circuit the state and operate on, and in favor of, minorities³⁶ and individuals. A possible groundwork for this procedure has already been laid in the limited recognition and protection of individual rights by the Permanent Court.³⁷

A state or nation apart from the individuals who compose it is meaningless. Its acts are the acts of individuals. It may insulate the "official" individual from the consequences of his acts by drawing the curtains of "national entity" and "sovereignty." Whole nations may be held responsible for a wrong and punished by war. Yet the fact remains that it is the acts of individuals which produce the results, which constitute the wrongs; and it is men, not states, who die in battle.

We are much closer to a functional international judiciary than we were in 1919. The time is ripe to take the next step—to give international courts compulsory, universal jurisdiction of all disputes with power to equitably decide cases in accordance with their social context.

³⁵All "bills of rights" are a recognition that ultimate sovereignty resides in the people, not in government; "inalienable rights" were formulated in England, France, and the United States to make clear that *even democratic* government should not be unrestrained. But the ultimate criterion of sovereignty—i.e., being above the law—is seen, in war, to impair man's inalienable rights both on the national and international plane. It is therefore being proposed to close about man the protection of "freedoms" internationally and courts have always been the ultimate protection of these rights. Justice Jackson has severely criticized "sovereign immunity" of Nazi big-wigs and whether making his law out of whole cloth or not proposes to try them as individuals. See his report to the President (1945) 39 AM. J. INT. L. SUPP. 178. The Three Power Declaration of Moscow contemplated the trial of war criminals. See Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Criminals* (1943) 31 CALIF. L. REV. 530; Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War* (1943) 37 AM. J. INT. L. 407. These contemplate international court procedure. For earlier proposals see: INTERNATIONAL LAW ASSOCIATION REPORT OF THE PERMANENT INTERNATIONAL CRIMINAL COURT COMMITTEE (1926) 110; *Proceedings of the International Conference on the Repression of Terrorism, Series of League of Nations Publications, Legal* (1938) V., 3; (1938) 32 AM. J. INT. L. 549; 3 REVUE INTERNATIONALE DE DROIT PENAL (1926) 466.

³⁶Since trusteeships are to be continued court procedure must be available to peoples, who are not nations, in order to gain definition of the trusteeships. See concerning access to courts for minorities, INTERNATIONAL LAW ASSOCIATION REPORT OF THE THIRTY-THIRD CONFERENCE, STOCKHOLM, (1924) 530-33.

³⁷German Interests in Polish Upper Silesia (Merits) Case, P. C. I. J., Ser. A, No. 7, p. 42 (1926) "respect for vested rights . . . forms part of generally accepted international law." German Settlers in Poland, (Advisory Opinion, 1923). P. C. I. J., Ser. B, No. 6, p. 25. The Danzig Railway Case, P. C. I. J., Ser. B, No. 15, p. 17 (1928). The Serbian Loan Case, P. C. I. J., Ser. A, No. 20, p. 41 (1929). Peter Pazmany University Case, P. C. I. J., Ser. A/B, No. 61, p. 221 (1933).

The question may have to be faced, whether a citizen of one nation may sue another nation.³⁸ It may even prove desirable to bring a portion of private international law (conflicts of laws) under international court jurisdiction. Regional courts may prove advisable, though I should prefer the formula found in our Constitution: "such inferior courts as [shall] from time to time [be] ordain[ed] and establish[ed]" by the legislative body (or by the Court) with appellate jurisdiction in the Permanent Court.³⁹ Whatever problems of this nature may be presented, we have in the above modifications created a judicial instrumentality capable of effectively administering international justice.

THE LEGISLATIVE FUNCTION

As we turn our attention to legislation, we should recall that the function of an instrumentality is more important than its structure. The central problem of international planning is to create the means of cooperation which will concretely demonstrate the advantages gained from common action in solving world problems, thus, both establishing order and creating the loyalty which will maintain it. Broadly, there are two methods available. One is to draw up a constitution conferring powers upon, and defining the relationships between, a legislature, an executive, and a judiciary, and have this adopted by the nations of the world. The constitution may create a legislature of representatives from nations which will enact laws operating on nations (league or confederation), or of representatives from people with laws operating on people (federation or union).

Functional Legislative Instrumentalities

The other approach may be called functional. It operates with or without a present constitution. It carries over the *ad hoc* committee system which has been set up during and prior to the old league and during and subsequent to this war. Labor problems had a way of crossing boundaries—the result, an International Labor Organization. Materials had to flow—therefore, Lend-Lease. People must be fed—*ergo*, the United Nations Relief and Rehabilitation Administration. Occupied countries required government—therefore, the joint board. There existed a need for international exchange—it produced the Old International Bank and the Bretton Woods Monetary

³⁸Chisholm, *Ex'r. v. Georgia*, 2 Dall. 418 (U. S. 1793).

³⁹Advantages and disadvantages of regional courts are discussed in Editorial Comment, *Post-War Development of International Courts* (1943) 37 AM. J. INT. L. 276, 278 and Note, *Regionalism in International Judicial Organization* (1943) 37 AM. J. INT. L. 314.

Agreements. Whatever the problem—displaced populations, currencies, trade, mandates, boundaries, minorities, tariffs, legal codification or revision—committees can be convened; can study the problem; can make their rules (legislation). When the need for coordination arises, constitutional government can be created, if it does not already exist, with some assurance of its continuance.

The factors favoring the functional approach seem to predominate. "Universality is the only real foundation for its (world organization) influence."⁴⁰ The greatest obstacle to world organization is national sovereignty. Nearly all planners, therefore, insist that a considerable portion of sovereignty must be surrendered.⁴¹ But even the power granted the League of Nations was too much for the United States, and other nations accepted with reservations.⁴² Compare to this our participation in United Nations collaboration, and our cooperation in the International Labor Organization, the Postal, the Telecommunication, and the Pan-American Unions, all of which are legislative or legislation recommending bodies. Although it is unwise to predict post-war policy from war agreements, it is interesting to note that *functionally* democracy and communism can work together, and that by Article 7 of the Mutual Aid agreement, Russia gave up her twenty-five year policy of economic autarchy, her closed economic system,⁴³ in order to cooperate on an *ad hoc* basis.

When nations seek to draw up a constitution as the first step in association, they invariably raise questions of voting, withdrawal, financial support, and veto. Any plan must, at best, be a compromise. For the nations do not yet know all of the issues on which action may be taken and they must attempt to protect themselves against the "hypothetical imponderable"—which in fact never happens. Not so functionally, where the cooperators feel a common need and know the limits of inquiry.

⁴⁰Lothian, *New League or No League*, INTERNATIONAL CONCILIATION (No. 325, December, 1936) 589, 600.

⁴¹MILLSPAUGH, PEACE PLANS AND AMERICAN CHOICES (1942); PAULLIN, COMPARATIVE PEACE PLANS (1943); CORBETT, POST-WAR WORLDS (1942).

⁴²For the history of American rejection see notes 61-68 *infra*. The Swiss reservations are in INTERNATIONAL CONCILIATION, (No. 152, July, 1920) and WORLD PEACE FOUNDATION, III THE LEAGUE OF NATIONS, (No. 3, June, 1920).

⁴³DEPT. OF STATE BULL. (July 11, 1942) 614. Economists agree that the most serious post-war economic problem is: Will the present closed economic systems continue, and will other nations follow their lead? Germany and Russia have demonstrated that even a pariah in international society can become powerful, create a large industry and isolate herself from world depressions *if* she used savings from human toil for capital investment ("guns not butter") and *if* she operates a closed economy with a totalitarian regime to enforce regulations. The wealthy countries are deprived of foreign openings for investments and have themselves a depression. To wean Russia away from economic autarchy is no mean accomplishment.

Further, the functional method is likely to bring to the solution of a problem the most capable and interested persons. Lawyers will re-formulate international law, and tradesmen and bankers will foster an international bank or trade association.

A possible combination of the two methods would be ideal. Ultimately, an Assembly chosen by the *peoples* of the world might lay down general terms and policies similar to the legislative standards and policy demanded by our Supreme Court for "legislative delegation." Temporarily, the agreement setting up a commission serves this purpose. The commission, like administrative agencies in our constitutional system, can propound the operative rules.

Majority Vote and Automatic Ratification

In addition to this instrumentation certain improvements over existing methods of legislation will be required. The old process of legislation by treaty adoption is laborious and slow. Many protocols which the nations really desired have not been acceded to for years.⁴⁴

The League Assembly was rendered practically inoperative by requiring unanimity. Legislation by majority or two-thirds vote (whether by commission or assembly) must be authorized. If certain types of legislation have to be submitted to each nation, as their insistence on sovereignty may require, it should be provided that the legislation shall come into effect either upon two-thirds ratification or upon a given date, if by then unrejected. These plans are not novel. Universal Postal Conventions, though subject to ratification, become effective on a fixed date; the Convention on Air Navigation authorized modification by a three-fourths vote; and constitutions are generally amended by less than unanimous consent.

Legislation Guided by the Interest of the Whole World Community

Another modification goes to the very essence of the legislative function. We have seen that the stability of a legal order depends upon formulated rules plus a peaceful method within the order for changing the rules. Existing laws are often out of harmony with demands and conditions. If the disharmony is too great, the laws become ineffective (are violated) or lose their validity. Only by revision (legislation) are laws kept valid.⁴⁵ The League

⁴⁴The 1929 amendment to the Permanent Court Statute was not ratified until 1936; the 1930 Protocol on Military Service came into force in 1937; the United States accepted the 1864 Geneva Red Cross Convention in 1882; Turkey ratified the 1881 Convention on Phylloxera in 1935; Paraguay acceded to the 1912 Opium Convention in 1943.

⁴⁵Nearly all jurists recognize this position. Part of the literature on the subject will be found in notes 23, 25, 26 *supra*.

recognized both the dynamic spirit of change, by Article XIX, and a static spirit of conservation, by Articles X and XVI. But these provisions reveal a fundamental misconception. Stability and change are regarded as antagonistic, whereas in fact they are complementary. Peace was equated to maintenance of *status quo* and change was considered a threat to peace.⁴⁶ The emphasis was on "security."⁴⁷

The formula employed in Article XIX was far too narrow. Treaty provisions may not "have become inapplicable." They may originally have been unjust and inept. Positive laws may need revision. Changes in international law may require adjustment of conditions based on the old rules.⁴⁸ It is ridiculous to require situations to "endanger the peace" before they are considered. Some writers recommend legislation when conditions would endanger "good understanding" between states. I prefer the wording of Scelle: "in the interests of the international community as a whole."⁴⁹

An Advisory Revision Commission

Legislation, due to the complicated problems with which it must deal, has become more than a process of enactment. It must discover problems disrupting the social structure, study their roots and social context, observe the workings of its own laws and adjust them to new conditions. Research committees of the League, the International Labor Organization, and similar organizations have performed remarkable service and constitute a pattern for international advisory revision commissions.⁵⁰

THE EXECUTIVE FUNCTION

I began by suggesting that our approach to the problem of establishing

⁴⁶Art. XIX: "The Assembly may from time to time 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." (Italics supplied). See also Arts. X, XI, XII, XV and XVI.

⁴⁷Any recognized modern world history will furnish the past record. A short review of attempts at security will be found in FREEMAN, *COERCION OF STATES IN INTERNATIONAL ORGANIZATIONS* (1944).

⁴⁸The problems of "lebensraum" and "access to raw materials" are bound up with the change which the League Covenant, the Locarno agreements, and the Paris Pact made in the international law rule that conquest or discovery and occupation gave title to territory. See Johnson and Graham's *Lessee v. M'Intosh*, 8 Wheat. 543 (U. S. 1823).

⁴⁹"Susceptible de dégager objectivement l'intérêt de la communauté internationale toute entière," quoted by Kunz, *op. cit. supra* note 23, at 52.

⁵⁰See Report of the International Labor Office on Reconstruction, Relief, and Rehabilitation, N. Y. Times, Nov. 11, 1943, p. 5, col. 1. The League's Economic, Financial, Fiscal and Economic Depressions Committees have continued their studies and issued reports in 1942-43. Cf. Reports of the New York State Law Revision Commission, Ithaca, New York, published annually.

and maintaining law and order must be scientific, based upon a penetrating analysis of history and socially normative forces. This is cardinal in planning executive instrumentation, for we have accepted the policeman as characteristic of the whole executive function.⁵¹ This conception colored our thinking in the thirties concerning administrative agencies. Many a lawyer's attitude was this: if the purpose of these agencies is to coerce recalcitrants, (and this view is an all too prevalent executive attitude) then—by *Jove*—we will show them how recalcitrant we can be.⁵²

The Executive Function is Leadership

But let us transpose our thinking into another area. Who is the best corporate executive? Is it he who bosses and drives, or he who organizes and leads? The word "executive" derives from the latin *ex*—out, plus *sequor*—follow; therefore, "lead out," "carry out." That is precisely the executive function in international law: to be "the helpful canal, through which functional coordination of states can be achieved."⁵³

The executive should, if possible, be non-political. It distinctly should not be a coterie of power states like the League Council. The Permanent Secretariat is more nearly the correct pattern for a central coordinating body.

Administrative Agencies

A special plea for international administrative agencies should be unnecessary. Administrative law has been central to European thought, has sprung almost full grown in two decades in Britain and America; its counterpart is found in Russia and is historically the foundation of Chinese government.⁵⁴

No complete listing can be made of the boards or committees which will be required for leading the nations in working together for the solution of common problems. Nor is it to be assumed that there must be any sharp differentiation between legislative and executive processes. Nevertheless, adminis-

⁵¹See particularly the "collective security" plans of Streit, Eichelberger and Eagleton. See also literature on international armies by Van Vollenhoven, Wright, Lord Davies, and the New Commonwealth Society; "quota" plans for such armies by the bridge expert Culbertson and others.

⁵²Any lawyer who practiced before administrative boards in the 1930's will recall Hugh Johnson's famous "cracking down" process and the attitude of some hearing examiners; and not a few of us have felt the hair at the nape of our necks rise at this treatment.

⁵³NIEMEYER, *LAW WITHOUT FORCE* (1941).

⁵⁴See for a comparison of the various administrative traditions, BARKER, *THE DEVELOPMENT OF PUBLIC SERVICES IN WARTIME EUROPE, 1660-1930* (1944). A very good bibliography on international administration can be found in ROGERS, *INTERNATIONAL ADMINISTRATION* (pamphlet) Public Administration Service No. 92.

trative instrumentalities to deal with the following types of international problems can be foreseen:⁵⁵

Relief, Rehabilitation and Reconstruction.*
 Temporary maintenance of intra-national order, where necessary.
 Trade.*
 Transportation.**
 Communications.**
 Banking, Finance and Investment.*
 Labor.**
 Production and Distribution of Food and Raw Materials.*
 Armaments and their manufacture.*
 Dependent Peoples and trusteeships.*
 Public health and drug traffic.**
 Population pressures.*
 Education, culture, and scientific interchange.*

This affirmative definition of the international executive function would be generally accepted. There might be some difference of opinion whether particular problems were international or national.

An International Police, Not an Army

The negative limits of the executive function also need to be defined, for many current proposals, particularly those for "collective security" or use of force by the central agency against member nations, seem functionally unjustified and out of touch with recent historical and sociological study.⁵⁶

Although I shall refer to other cases, I shall give particular attention to lessons from American history. In 1787, thirteen sovereign states, having experienced the defects of a loose league, yet fearful of power, attempted to create instrumentalities for establishing interstate law and order. Then, as now, it was proposed to give the central government power to employ force against a defaulting (aggressor) state.⁵⁷

No issue was more carefully studied and fully debated. In fact, upon its decision depended the type of government to be formed. Would such govern-

⁵⁵Agencies for those marked with a single asterisk have been attempted with little success; those with a double asterisk have been more successful. Only those for labor, public health, and drug control can be considered adequate.

⁵⁶The essence of all these plans is an international executive empowered to employ an international army or national armies of non-defaulting nations to compel a defaulting nation to carry out its obligation. See LEAGUE COVENANT, Art. XVI and note 51 *supra*.

⁵⁷The Virginia Plan proposed to authorize the federal government "to call forth the force of the Union against any member of the Union failing to do its duty under the articles thereof," I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, edited by Farrand, (1923) 34. The New Jersey proposal contained similar language, *id.* at 245.

ment represent, and would its laws operate upon people or states? The coercive plan was opposed by the leading delegates, and even by the exponent of strong central government, Hamilton.⁵⁸ *The Federalist*, and less familiar pamphlets of the day, branded the coercive plan with such terms as, "one of the maddest projects that was ever devised."⁵⁹ The provision was finally dropped and the die cast for a Constitution created by and operating upon "we the people." And in each state convention it was the same argument, the political fallacy of using force against states, which gained acceptance for the new system.⁶⁰ The courts have continued to recognize our plan of government as non-coercive.⁶¹

We shall fail to profit from history if we do not also carefully study the rejection of the League of Nations by the United States. President Wilson presented his plan for collective coercion (Articles X and XVI) as the "heart of the League" and stated that he would "insist upon it."⁶² The earliest reference to the proposal in Congress, and the first speech in analysis of the Covenant, rejected this "heart," traced the history of our rejection of coercive security in 1787, and concluded that force was no guarantee of peace.⁶³ The

⁵⁸See:

George Mason: "punishment could not in the nature of things be executed on the States collectively," *id.* at 34; *also id.* at 339-40.

Madison: "doubted the practicability, the justice and the efficacy of it . . . a declaration of war," *id.* at 54. "using force against . . . the states would prove . . . visionary and fallacious," *id.* at 164-5; *also id.* at 320 and 327.

Randolph: "impractical, expensive, cruel," *id.* at 256.

Hamilton: "It is impossible. It amounts to a war between the parties," *id.* at 284.

⁵⁹THE FEDERALIST, Nos. 15-22, is largely devoted to a scathing attack on the plan. Hamilton summarized a historical analysis: "the principle of legislation for sovereign states, supported by military coercion, has never been found effectual."—THE FEDERALIST, No. 16, 4.

See *also* pamphlets of Gerry, Webster, Jay, Smith, Mason and others in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE (Edited by Ford, 1888).

⁶⁰Hamilton, II ELLIOT'S DEBATES 233 (2d ed. 1876); Ellsworth *id.* at 197; Patrick Henry, III *id.* at 542; Randolph, *id.* at 117; Lee, *id.* at 181; Madison, *id.* at 130, 414; Nicholas, *id.* at 100, 243; Marshall, later Chief Justice, *id.* at 228, 554; Spencer, IV *id.* at 76, 163; Davis, *id.* at 155; Pinckney, *id.* at 256; and others.

These men were versed in the history of plans for use of force in other leagues and federations—Ancient Greece, Germany, Switzerland, Holland—to which they made frequent reference: I *id.* at 456; II *id.* at 218, 219, 234-5; III *id.* at 62, 129-32, 145, 181, 209-12; IV *id.* at 59, 195, 297, 326; V *id.* at 200, 210.

⁶¹See the remarkably complete discussion of the Supreme Court history from *Chisholm v. Georgia* to *Virginia v. West Virginia* in rejecting use of force against states by Rosenberg, *Brutum Fulmen, A Precedent for a World Court* (1925) 25 COL. L. REV. 783.

⁶²N. Y. Times, Mar. 5, 1919, n. 2, col. 4. See *also* MARBURG, DEVELOPMENT OF THE LEAGUE OF NATIONS IDEA (1928); 6 BAKER, WOODROW WILSON AND WORLD SETTLEMENT (1924) 452 *et seq.*; FLEMING, THE UNITED STATES AND THE LEAGUE OF NATIONS, 1918-1920 (1932) 109 ff. for general material on Wilson's attitude and the opposition.

⁶³57 CONG. REC. Part 1, p. 724, Part 2, pp. 1315-1318 (1918-1919).

Senate wanted to accept the League omitting the coercive elements; Wilson refused Senate compromise proposals.⁶⁴ The debate centered on Article X,⁶⁵ and these provisions cost Wilson the election.⁶⁶ Even Secretary Lansing raised serious question whether America could constitutionally participate in a coercive union.⁶⁷

Careful historical studies⁶⁸ show the wisdom of the British Commonwealth plan, whereby the Dominions are expressly "subject to no compulsion whatever."⁶⁹ The newspapers daily verify that in the Commonwealth common ties are exceptionally strong, yet in the Empire, which is controlled by force, they are broken or breaking. Collective coercion plans have usually been rejected and have never been successful in the Pan-American Union,⁷⁰ other federations,⁷¹ or the League.⁷²

If a sound legal order depends on protecting static tendencies while providing for change, what then about the Hitlers? Supreme Court Justice Ellsworth, who in 1787 vehemently protested against coercing the states, said:

"I am for coercion of law—that coercion which acts only upon delinquent individuals."⁷³

⁶⁴The record is traced with care by Fleming, *op. cit. supra* note 62.

⁶⁵*Id.* at 312.

⁶⁶N. Y. Times, Oct. 15, 1920, p. 2, col. 1. See further for historical surveys: JESSUP, ELIHU ROOT (1938) 399-410; PARKE, RECENT AMERICA—A HISTORY OF THE UNITED STATES SINCE 1900 (1941); HOLT, TREATIES DEFEATED BY THE SENATE (1933).

YOUNG, THE WILSON ADMINISTRATION AND THE GREAT WAR (1922) 312: "... it was a fact nowhere disputed that ratification would have taken place on November 19th, had not the President intervened with a letter to his partisans in the Senate to vote down the resolution of ratification with reservations."

⁶⁷Lansing submitted to President Wilson on December 24, 1918 a legal memorandum, entitled *The Constitutional Power to Provide Coercion in a Treaty*, which called attention to specific constitutional methods for declaring war, to our basic theory of non-coercive government. Fleming, *op. cit. supra* note 62, at 109.

⁶⁸KERR and KERR, THE GROWTH OF THE BRITISH COMMONWEALTH (1937); KEITH, THE CONSTITUTIONAL LAW OF THE BRITISH DOMINIONS (1933).

JACKS, *Alexander Hamilton and the Reform of the League*, INTERNATIONAL CONCILIATION (No. 325, December, 1936) 605, 619: "the British Commonwealth . . . and the United States . . . reveal[ing] the only principle on which an enduring League of Nations can be founded. . . . Both are non-coercive Leagues of Nations."

⁶⁹Balfour Report (1926); confirmed by Statute of Westminster (1931).

⁷⁰Proposals to give a central agency power to use force against members were rejected at least six times: 1826, 4 INTERNATIONAL AMERICAN CONFERENCES 184-201; 1847, TORRIES, UNION LATINO-AMERICANA 151, 204-227; 1901, CARNEGIE ENDOWMENT, THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, 1889-1928 40-44; 1907, *Convention for a Central-American Court of Justice*; 1933, *The Pan-American Union Bulletin* (1933) 320ff.; 1938, *International Conciliation* (No. 349) 147-8, 184-6, 243.

⁷¹PAULIN and FREEMAN, COERCION OF STATES IN FEDERAL UNIONS (1943) summarizes federal plans.

⁷²FREEMAN, COERCION OF STATES IN INTERNATIONAL ORGANIZATIONS (1944) carries the study in note 71 *supra* into international plans.

⁷³II ELLIOTT'S DEBATES (2d ed. 1876) 197. (Italics supplied).

But how determine when to arrest an individual? In municipal law you may urge from soap-box or platform changes in the existing order. When you urge forceful change, or there is imminent danger of such change, your liberty ends.⁷⁴ Create an international police, if security demands it, but an army is no substitute.

THE TRANSITION PROCESS

We need instrumentalities to aid in crossing from war to peace. These will, doubtless, not be the same agencies, or even similar to the agents, which will become permanent. We must realize that war is the ultimate weapon of nationalistic self-interest, and that peace is the product of a spirit which sees a nation's advancement linked to that of others.

Professor Pollard has wisely remarked that all wars are now "civil wars";⁷⁵ that is, wars now occur between nations who have so much in common, so many points of contact, that they should exist as a community. Therefore, our problem is to re-establish community promptly, without antagonism or bitterness. Relief, reconstruction, and rehabilitation are our proper implements—not extermination, force, and reparations.⁷⁶

No army would conduct a campaign without complete plans by a General Staff. At our peril, we would approach international problems without similar advice. To a degree never before approached, commissions studying and planning for peace have met in the various countries and have produced detailed plans. Although many of the proposals were not accepted—and some which were accepted would not be approved by this writer—their influence was great and it was recognized at San Francisco by the inclusion of forty-two consultants from these groups to the American delegation. One of the best statements, issued in 1944 by one hundred and fifty of the country's leading lawyers, was known as *International Law of the Future*.⁷⁷

These men recognized that "the States of the world form a community"⁷⁸ which "should be organized on a universal basis,"⁷⁹ to be governed by International Law⁸⁰ and "orderly procedures."⁸¹ Although the strength of na-

⁷⁴*Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1936); *Bridges v. State of California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941); CHAFFEE, *FREE SPEECH IN THE UNITED STATES* (1941).

⁷⁵POLLARD, *THE LEAGUE OF NATIONS IN HISTORY* (1918) 7, 24.

⁷⁶MOTHERWELL, *THE PEACE WE FIGHT FOR* (1943); HOOVER and GIBSON, *THE PROBLEMS OF LASTING PEACE* (1942).

⁷⁷CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *THE INTERNATIONAL LAW OF THE FUTURE* (1944).

⁷⁸*Id.* Postulate 1.

⁷⁹*Id.* Proposal 1.

⁸⁰*Id.* Postulate 2.

⁸¹*Id.* Postulate 6.

tionalism is admitted, sovereignty "is subject to the limitations of international law."⁸² Whether this means more than "a legal duty to carry out its obligations,"⁸³ "that conditions prevailing within its own territory do not menace international peace and order,"⁸⁴ or "foment civil strife in the territory of any other,"⁸⁵ or non-"intervention in the internal affairs of any other,"⁸⁶ or "to employ pacific means and none but pacific means in seeking to settle its disputes with other States,"⁸⁷ is not stated. The Permanent Court is to continue⁸⁸ with compulsory jurisdiction "over all disputes in which States are in conflict as to their respective legal rights,"⁸⁹ with power to give advisory and declaratory judgments and judicial treaty interpretation and revision.⁹⁰

The importance of "continuous collaboration by States to promote the common welfare of all peoples,"⁹¹ finds voice in their Principle 5. Even more specific is the complete list of functional agencies.⁹² A general Secretariat, an Executive Council, and a General Assembly are proposed,⁹³ the latter two together having power to "modify general rules of international law and to enact new general rules of international law."⁹⁴ The chief weaknesses of these proposals seem to me to be: the creation of an organization of sovereign nations,⁹⁵ the centralization of control in the Great Powers,⁹⁶ and the employment of coercion against nations who are left in possession of armaments.⁹⁷

CHARTER OF THE UNITED NATIONS

The United Nations Charter creates an international organization having six principal organs: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.⁹⁸ Its stated principles are: "sovereign equality" of all "peace-loving States," bound to "fulfill . . . the obligations assumed by them," to "settle their international disputes by peaceful means," and to "refrain . . .

⁸²*Id.* Postulate 3.

⁸³*Id.* Principle 1, Postulate 4.

⁸⁴*Id.* Principle 2.

⁸⁵*Id.* Principle 4.

⁸⁶*Id.* Principle 3.

⁸⁷*Id.* Principles 6, 7, Postulate 5.

⁸⁸*Id.* Proposals 12, 13.

⁸⁹*Id.* Proposal 17.

⁹⁰*Id.* Proposals 18, 20.

⁹¹*Id.* Postulate 2.

⁹²*Id.* Proposal 11.

⁹³*Id.* Proposal 14.

⁹⁴*Id.* Proposal 15.

⁹⁵*Id.* Proposals 2, 3, 16.

⁹⁶*Id.* Proposal 7.

⁹⁷*Id.* Particularly Postulates 1-6, Principles 1-10, Proposals 1, 3, 4, 6, 8, 9, 17, 18, 19, 22.

⁹⁸UNITED NATIONS CHARTER, Ch. III, Art. 7, 91 CONG. REC., July 2, 1945, at 7225.

from the threat or use of force."⁹⁹ Theoretically it is established by "we the peoples,"¹⁰⁰ and seeks "international cooperation," respect for "human rights," and "fundamental freedoms."¹⁰¹

In addition to this attention to rights of peoples, the Charter seems to be a major improvement over the League and even the original Dumbarton Oaks proposals, and to fairly closely parallel the normative forces and desired plan outlined above in several particulars. In spite of the organizational superstructure, the United Nations Organization also emphasizes "function." The "powers" of the Assembly are extremely limited but its "functions" are almost infinite. It may discuss "the general principles of cooperation" and "any questions relating to the maintenance of international peace and security."¹⁰² It "shall initiate studies and make recommendations" for "promoting international cooperation . . . development of international law and its codification," "promoting international cooperation in the economic, social, cultural, educational, and health fields,"¹⁰³ and to accomplish these purposes the Economic and Social Council is made one of the six coordinate branches.¹⁰⁴ The former specialized functioning international agencies, like International Labor Organization, Telecommunication Union, United Nations Relief and Rehabilitation Administration, are to be brought into relationship with the United Nations Organization¹⁰⁵ and new commissions are authorized.¹⁰⁶ The United Nations Organization is required to promote these cooperative functions¹⁰⁷ and "all members pledge themselves to take joint and separate action" to these ends.¹⁰⁸

Not only does the organization seek to create cooperative conditions to prevent frictions from arising, but the Charter gives attention to frictions at a much earlier stage than did the League. Chapter I uses the words "disputes or situations which might lead to a breach of the peace"¹⁰⁹ (similar to the League language). Later articles take cognizance of situations "likely to endanger international peace and security,"¹¹⁰ "likely to impair the general wel-

⁹⁹*Id.* Ch. I, Art. 2.

¹⁰⁰*Id.* Preamble.

¹⁰¹*Id.* Ch. I, Art. 1.

¹⁰²*Id.* Art. 11, 1-2.

¹⁰³*Id.* Art. 13, 1 a-b.

¹⁰⁴*Id.* Ch. X.

¹⁰⁵*Id.* Arts. 57, 63.

¹⁰⁶*Id.* Art. 68.

¹⁰⁷*Id.* Art. 55.

¹⁰⁸*Id.* Art. 56.

¹⁰⁹*Id.* Art. 1.

¹¹⁰*Id.* Art. 11.

fare or friendly relations among nations,"¹¹¹ "which might lead to international friction or give rise to dispute,"¹¹² or "any dispute."¹¹³

Reasonably adequate provision is made for the judicial function. Parties to disputes are first to "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, . . . other peaceful means of their own choice,"¹¹⁴ or "other tribunals."¹¹⁵ All members "are *ipso facto* parties to the Statute of the International Court of Justice"¹¹⁶ and "undertake to comply with [its] decision."¹¹⁷

The Court is empowered "to give advisory opinion on any legal question"¹¹⁸ and "to decide a case *ex aequo et bono*, if the parties agree thereto."¹¹⁹ Although jurisdiction is not compulsory, unless the parties agree in advance to make it so, and although it extends only to "legal" disputes,¹²⁰ the power to interpret the Charter and any international laws in the light thereof is recognized.¹²¹ The Court's procedure is simple and adequate¹²² and takes a long forward step in employing expert advisory commissions.¹²³ The sources of international law include only the "classical" listing¹²⁴ yet it is interesting to see the extent to which the Nuremberg trials are functionally setting aside such "classical" concepts as sovereign immunity and protection of subordinates acting pursuant to command.¹²⁵ The judges are chosen so as to represent "the main forms of civilization and of the principal legal systems of the world,"¹²⁶ and they decide cases by a majority of those present.¹²⁷

Only in lack of universal compulsory jurisdiction, in limitation to "legal" disputes, in providing that "only states may be parties in cases before the

¹¹¹*Id.* Art. 14.

¹¹²*Id.* Art. 34.

¹¹³*Id.* Arts. 34, 35.

¹¹⁴*Id.* Art. 33.

¹¹⁵*Id.* Art. 95.

¹¹⁶*Id.* Art. 93.

¹¹⁷*Id.* Art. 94.

¹¹⁸*Id.* Art. 96.

¹¹⁹STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38, 91 CONG. REC., July 2, 1945, at 7231.

¹²⁰*Id.* Art. 36.

¹²¹*Id.* Art. 34.

¹²²*Id.* Arts. 43-64.

¹²³*Id.* Art. 50.

¹²⁴*Id.* Art. 38.

¹²⁵Statement of Mr. Justice Robert H. Jackson to the President (1945) 39 AM. J. INT. L. 178 *et seq.*

¹²⁶STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 9, 91 CONG. REC., July 2, 1945, 7231.

¹²⁷*Id.* Art. 55.

Court," in restrictions upon advisory and equity jurisdiction, does the Court statute fail to come up to expectations.¹²⁸

Even the machinery of the United Nations Organization is more realistic than that of the League. It is not "to intervene in matters which are essentially within the domestic jurisdiction of any state."¹²⁹ An international trusteeship—a slight improvement on mandates—is created.¹³⁰ The need to obtain special agreements from the member states for the use of their armed forces is recognized.¹³¹ The General Assembly acts in a limited group of cases by a two-thirds majority and in all other cases by a simple majority.¹³² It has control of the purse.¹³³ The affirmative vote of seven members of the Security Council (including the five permanent members) assures council action.¹³⁴ The Secretary-General and Secretariat are formed into an effective administrative agency¹³⁵ and recording of treaties and diplomatic immunity are arranged.¹³⁶

So much then, for the portions of the Charter which approximate the needs of our times; at what points is the United Nations Organization out of harmony with normative forces and the proposals of this article?

1. The kernel of the plan is a reliance on force to be used against nations which remain "sovereign," as the means of guaranteeing peace.¹³⁷ The opening sentence of Chapter I equates "security" to "peace." The provisions authorizing and effectuating the use of force bulk larger than any others. A new organization, the Military Staff Committee, composed of the chiefs of staff of Great Britain, Russia, China, France, and the United States appears and is expected to formulate plans for "regulation of armaments."¹³⁸ Reliance for international "policing" is placed upon the armed forces of the separate nations, and particularly upon their air forces. There could be no less proper "policing" agency.¹³⁹

2. The organization is controlled by the Great Powers. On the Security Council they are given five permanent seats, compared to six non-permanent

¹²⁸UNITED NATIONS CHARTER, Arts. 36, 96, 91 CONG. REC., July 2, 1945, 7225; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Arts. 34, 36, 38, 65, 91 CONG. REC., July 2, 1945, 7231.

¹²⁹UNITED NATIONS CHARTER, Art. 2, 91 CONG. REC. July 2, 1945, 7225.

¹³⁰*Id.* Arts. 75-91.

¹³¹*Id.* Art. 43.

¹³²*Id.* Art. 18.

¹³³*Id.* Art. 17.

¹³⁴*Id.* Art. 27.

¹³⁵*Id.* Arts. 97-101.

¹³⁶*Id.* Arts. 102-105.

¹³⁷*Id.* Ch. I, Art. 2, Ch. V, Ch. VII.

¹³⁸*Id.* Art. 47.

¹³⁹*Id.* Arts. 45, 48.

two-year seats shared by all other nations, none of which is eligible for immediate re-election.¹⁴⁰ The Security Council has extensive, if not complete and controlling, powers in all legislative, executive and even judicial functions and its decisions are obligatory on all organization members.¹⁴¹ The General Assembly, the only body in which all member nations are represented, may "consider," "make studies," and "recommendations" on specified questions but "any such questions on which action is necessary should be referred to the Security Council."¹⁴²

3. There is no true legislative function. The method of creating or changing international law, as it was in the League, is by treaty.

4. The Charter gives free hand to the victorious nations to make and maintain such settlements of the war as they see fit, whether in harmony with the Charter or not.¹⁴³ If this contemplates that the treaties of peace, the settlements made, the punishments and reparations imposed, are not to be governed by the purposes and principles of the charter and are not to be revised under the Charter, then the security system is largely a freezing of whatever justice or injustice is contained in such settlements.

5. The amending process is cumbered by the same insistence, seen elsewhere, by the Great Powers to permit no action without their unanimous consent.¹⁴⁴ Even the appearance of less than unanimous consent in the Security Council is largely negated by the ability of any of the five major powers to eliminate a question from discussion.¹⁴⁵

It is generally recognized that the League failed because, both within and without the League, the nations were placing more emphasis on "security" than on "cooperative functioning." So also in the United Nations Organization we have these two emphases: security against war and cooperation to render resort to war unlikely. On the paramountcy of functional cooperation,

¹⁴⁰*Id.* Art. 23.

¹⁴¹*Id.* Chs. V, VI, VII, VIII, XII.

¹⁴²*Id.* Art. 11.

¹⁴³*Id.* Art. 107.

¹⁴⁴*Id.* Ch. XVIII.

¹⁴⁵*Id.* Art. 27. Interest currently focuses on whether the Iran question may thus be kept from decision.

it is believed, the success of the United Nations Organization and International Law in our day depends.¹⁴⁶

¹⁴⁶We watch with anticipation and anxiety the fledgling U.N.O. meetings in London. The apparent all-out decisions of Britain to rely on the Security Council, her submission of the British Honduras dispute, the candor and openness of discussion of Iran, Turkey, Greece, and Java and the actual compromise of part of that issue—albeit unsatisfactory—hold more promise than did the early meetings of the League. The quiet but persistent reports of sound organization of the functional agencies and the apparent intent of Mr. Lie to use his power to bring issues before the Council and Assembly portend considerable.

The action of the Supreme Court of Ontario in holding invalid a covenant restricting the sale of land to others than Jews as contrary to the U.N.O. Charter to which Canada was a party is a new departure. *Re Drummond Wren*, [1945] Ont. L. R. 778.

The other side of the slate is not promising. Russia has remained out of the World Bank and International Monetary Fund. Disturbing revelations of the agreements at Yalta persist and raise doubts as to the "behind the scenes" concessions concerning Iran and Greece. The plans of the general staff committee and reports concerning the military quotas for member nations are consistent only with the crassest power system.