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IN DISCUSSING the question of what sort of an institution an international court should be to make it proper for the United States to support it, I shall assume that such a tribunal, and more particularly one that is to comprise all governments of the world, will have for its main purpose the gradual reduction, and finally, the total abolition, of war between nations. In other words, it must be competent to draw within its jurisdiction issues of such importance that, unless the Court intervene, governments may be expected, with reason, to go to war for their decision, notwithstanding the enormous sacrifices which even a victorious war demands, and the fundamental unreasonableness of war as an instrument of obtaining national ends, which, as an abstract proposition, everybody admits.

Moreover, I shall assume that such a court is to be a court of law and not a mere committee of arbitration. It does not require much analysis to comprehend that an arbitration is not judicial process at all, except as an auxiliary means, but is in its essence merely a special form of diplomacy. Therefore, no arbitration between independent states ever has prevented a war, or will ever be able to do so, for the reason that it is not resorted to until the governments concerned have made up their minds not to go to war anyway. Experience shows that in most cases arbitrations result in compromises, which is proof of itself that the arbitrators did not decide on what is right but what is expedient. If the distinction between justiceable and non-justiceable international issues has any clear meaning at all, it must be that a question is justiceable when it is of such minor importance that an adverse decision would affect no vital interests of the losing nation; and in practice, it does mean just that. Even when a nation agrees to a so-called compulsory arbitration, it merely promises in advance to submit to the judgment of disinterested persons such minor issues, but reserves to itself the right of determining whether an issue is justiceable or not; nor does that change the fact that the tribunal will consider what is expedient in the premises, rather than what is right. There is nothing but a formal analogy between an arbitration tribunal and a court of justice. A court decides not what is wise and prudent for the parties to do, but what they have a right to do no matter how inexpedient insistence upon such right may appear in practice.

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By an international court of justice, I therefore mean a tribunal which decides what the rights of the parties are; and the notion of right depends on the existence of a binding law which creates such rights; and the first question I shall discuss is whether the existing World Court at The Hague is such a tribunal.

It will be useless to go a single step further unless we first clear our minds regarding a fundamental difference that exists regarding the nature of law itself. In every group of lawyers there will be some who, either from the nature of their training, or tradition, or intellectual predisposition, adhere to the conception which, in the English-speaking countries, we connect with the name of John Austin and the so-called analytical school. They will maintain that law is nothing more than what the supreme power in the land commands; that law is what the government enforces either as a standard of judicial decision or as an executive rule of action. To persons of this way of thinking, the question of adhering to the World Court must seem a comparatively trifling detail. If they proceed logically, they must first create an international super-government to make a law which a world court may apply. In practice, they should advocate our joining the League of Nations and accept its court as a matter of detail. For if they have any faith at all in the possibility of abolishing war, they must look to a political rather than a juridical organization for accomplishing that purpose. To them, law is a mere tool of politics, having no force, meaning, dignity, or even existence, except such as the political branches of government give it.

I am happy to observe, however, that, at the present time, a majority among those of us who give serious thought to these fundamental questions seem to belong to another type of lawyer. For these the Law is a much more important and fundamental thing than it is to the Austinians. It precedes, logically and even historically, the political functions of the State. It takes its origin in the habits and customs followed by the people in their intercourse with each other, together with those notions of just and moral conduct which are generally accepted among their fellow men. It is the function of courts to formulate these customs and notions into rules and precepts, so that they may be better understood in all their bearings and consequences. As social conditions become more complicated, it becomes expedient that the political departments of the government should also help in the task of formulating, expanding, and, from time to time, even correcting the formless mass of customary law; but it is an axiom of wise and effective legislation to keep all statutory law, and all other rules created by governments, in full accord with the existing habits, customs, and moral principles of the people.

If such is the true conception of law in its fundamental character, there is nothing illogical or impracticable in the adherence of the United States to a world court, even while we utterly refuse to make ourselves subject to a political world government such as the League of Nations is in its conception and would be in practice, if it ever acquired the requisite prestige and power.

Whether or not we should favor our joining such a tribunal will then depend on whether we consider it to possess the necessary characteristics of a Court of Law. That is to say, we must inquire whether the Court has at its service a body of formulated law according to which it may render decisions; and as the reason for our joining such a court is not merely to smooth the way for the settlement of minor disputes, but a hoped-for possibility of preventing war, we must also inquire whether the law within the jurisdiction of the Court deals with those subject matters out of which war threatens to grow from time to time, as shown by history and a study of human nature.

The theses I desire to establish are therefore:

1. That at present there is no body of world law regulating matters of sufficient importance to threaten war;
2. That it is practicable and desirable to create such a body of law by agreement among the nations, and
3. That for the purpose of promoting such legislation it may be expedient for the United States to adhere to the existing World Court, with modifications and restrictions substantially like those provided in the various measures now pending in Congress.

I

The Present Law of Nations

In an assembly of lawyers, it is superfluous to do more than recall to your attention that what is commonly known as international law is in no sense world law, if thereby be meant a body of rules deriving sanction either from the mutual agreement of all the governments on the globe, or from custom to which mankind as such, independent of national divisions, has with common consent adhered. It is nothing more than the domestic law of the several sovereign entities, and international only in the sense that it deals with the relations of the government to other governments, or with those of citizens of one nation to those of another, so far as each government separately chooses to recognize such relations as affected by rights and duties. Or you may call it international law because a part of it, at least, is a *Jus gentium,* a law of all the nations in the ancient Roman sense, being uniform everywhere. Its nearest analogy is our own common law; when a Wisconsin court administers a rule of the common law, it may indeed be identical with the corresponding rule of New York, or of England; but it is nevertheless

Wisconsin law alone, and not law derived from some super-authority to which Wisconsin, New York and England are equally subject.

This is not a mere theoretical distinction, but one of grave practical consequences. The first of these is that any proposed world court cannot have any jurisdiction to administer any sort of customary law, for all custom is the custom of a definite nation, though it may be uniform with that of other nations. Whatever law a world court may consider binding, it must be derived from some rule to which the governments affected thereby have given their assent, expressly or by necessary implication. Hence it is eminently proper that the constitution of the present world court contains a section (Art. 38) enumerating the sources where may be found the law—such as it is—which the court is to apply, and including therein, among other things, the so-called "principles of international law" and the "writings of recognized international jurists."

The second consequence of the really national character of the law of nations is that, as a matter of fact, there is hardly a single provision of what is commonly called international customary law which either has not at some time been repudiated by one nation or the other, or is not liable to be so repudiated. The only exceptions are rules of morality so elementary that nobody will think of disputing their binding force. Probably no nation today will claim the right of gouging out the eyes of their prisoners of war, or of selling the women and children of their enemies into slavery. Beyond that, I am not so sure that there is a single rule of international law definitely considered binding under all circumstances. No nation hesitates to exercise upon occasion its sovereign right as an independent state, to amend or repeal that portion of its national law which goes by the name of international. During the late World War, every belligerent, without a single exception, has deliberately broken rules of conduct which, during peace, had been solemnly proclaimed as international customary law in public declarations, in the writings of experts, and in the decisions of arbitration tribunals. This was done, not as pardonable offenses in the heat of the struggle, not by over-zealous subordinates, but by the governments themselves, officially, and with a claim of right because the safety of their respective countries required it. A rule, which may be set aside by any party subject to it whenever such party deems its effect disadvantageous to itself, certainly cannot be called law in any reasonable sense of the word.

But even in times of peace, long-standing and highly important rules of international custom have failed of recognition by some nations. There are few rules of greater antiquity, and more definitely asserted in the books, than that the national jurisdiction extends into the open sea no farther than a cannon shot would carry, or one marine league. Yet in the hard-fought case of the Ship *Franconia* (*Queen v. Keyn,* L.R.

12 Exch. Div. 63, 292. 1876) the British courts decided that no such rule was binding on Great Britain, and it was necessary to pass an act of Parliament to bring that country into line with the rest of the world.

The principle underlying this actual condition of international law is found in the fact that no country, either today or in the past, has ever dared to base its conduct toward other countries on juridical instead of political grounds. Political action is of necessity based, ultimately, on physical force; but the law is based, in its last analysis, on some principle of ethics inherent in the constitution of the Universe itself. The circumstance that the political authorities usually have the duty of enforcing obedience to the law often leads incautious thinkers to assert that law also is based on force. The fallacy is easily discovered. When the judgment of the court has correctly decided to whom a piece of property belongs, every person feels that if he disobeys that judgment, he is dishonest, although obedience will render him penniless. He does not obey simply because he is afraid of the sheriff; and if he should choose to disobey because the sheriff somehow could not reach him, he would yet in his heart know he was doing wrong. In the intercourse of nations, until now, such feeling of a duty going far beyond the mere fear of the greater physical power of one's opponent, has never yet been an effective motive. No government has yet been found to say: "It is true, if we surrender to our neighbor this disputed territory, we shall cease to be a powerful state, and our people shall be tremendously handicapped in their economic and cultural activities; yet we are willing to surrender it because it is clear that our opponent has the better title to that province." Not until the universal public opinion of the world has come to that stage, can the relations of the various countries be said to be on a basis of law, instead of force.

What is now called international law is simply a feeble compromise between the rule of force and the rule of law. With a few trifling exceptions, it deals with nothing more than the so-called rules of civilized warfare. In other words, it recognizes war as the normal method of settling international disputes, but endeavors to soften the terrors and cruelties inherent in war. A little clear thinking will show the futility of this attempt. If my life depends on killing my enemy, and it is admitted that I am justified in defending my own life to the extent even of killing him, it is useless to call out to me, while we are clinching in the death struggle: "Use only one hand in strangling him! You hurt him too much by using both!"

It is evident, therefore, that the customary part of so-called international law, except as its provisions are also part of the law of the several nations, is not law at all in any true sense. How is it with international treaties and conventions? Surely these constitute a body

of law. It is in effect recognized as such by the parties, and is as fit to be interpreted and applied to the facts by a court as are the domestic laws.

An affirmative answer to such a question seems obvious at first, but upon closer analysis doubts arise. When two private parties enter into a treaty—we call it a contract in their case—they discover that the laws of their country are very far from upholding their treaty just because they both signed it. The document may contain provisions flagrantly unfair to third parties; then the courts will hold it void for being against public policy; or its provisions may contemplate immoral acts, or may be prohibited by law, and again it is held void; or it may have been induced by fraud, or one of the parties has signed it because of fear of injury or death. In all these cases the law holds the contract, be it ever so solemnly attested, null and void, or at least voidable at the will of the party. None of these safeguards exist in the case of international treaties. There is no law permitting the World Court to scrutinize the contents of a treaty or to inquire into the circumstance of its signing, and to hold it void in such cases as would avoid any private contract. All it can do is, if necessary, to interpret a doubtful meaning of the text and to ascertain the facts with a view to finding whether the treaty is applicable to them. Of itself, that is a valuable function. The World Court has already decided a number of cases of this character. Arbitration tribunals also, for generations, have again and again interpreted texts, ascertained facts, and by the light of such incidental, quasi-judicial labors formulated their awards on the basis of expediency and compromise. Yet, wars have followed each other with dreary regularity and there is not the slightest prospect that they will cease, until a body of law is created that will regulate the intercourse of nations, or governments, in times of peace. Then the "rules of civilized warfare" and the elaborate doctrines regarding the rights of belligerents and neutrals, and of the capture of ships and cargo at sea, and the rest of what now mocks our juridical conscience by a shadowy imitation of real law, would become obsolete in short order.

II

A Genuine International Law

If the immense mass of international treaties now considered to be in force and forming the basis of the present political geography of the globe, could be subjected to the same scrutiny to which private contracts are subjected in order to insure their conformity to the law of contracts, there is little doubt that easily one half of them would be thrown out as invalid. In fact, the books on international law recognize this when they lay down the doctrine that the class of treaties,

known as political ones, are considered valid only *rebus sic stantibus*, as long as the state of the world is as it is at the moment of signing. In accord with the prevailing foggy character of so-called international law, it is not clear just what the authorities mean by political treaties. Sometimes, the term is restricted to treaties of alliance or neutrality, and analogous agreements. At other times it may include all treaties touching the sovereignty of the "high contracting parties," like treaties of disarmament, or fishing and navigation rights of aliens in territorial waters. Again, the term may embrace delimitations of national boundaries. It depends, I suppose, on whether you are interested in upholding or avoiding any given treaty. Similarly, the clause *rebus sic stantibus* is delightfully vague. Who shall say what mundane change alters or does not alter the circumstances on which the continuance of such a treaty depends? Laymen, and I am sorry to say, some lawyers, are apt to be profoundly ignorant of this curious character of treaties, and fondly imagine them to be in the nature of contracts which an honest man keeps even to his own hurt. Sometimes even leading politicians display this naïve ignorance, like the German Chancellor at the outbreak of the World War, who quite needlessly made a shamefaced admission that he marched into Belgium in defiance of a treaty. He might have said that the changed circumstances had abrogated the treaty of Belgian neutrality, and would have been just as honest in saying so as all the professional diplomats and international jurists in the world.

Aside from the fact that political treaties are mere shams as a matter of diplomatic principle, it is also true that practically all the frontiers in Europe and Asia, and a large number of those in the Western hemisphere, are the results of treaties obtained under duress after wars. The vicious principle of basing the relations of one government toward another on force, instead of law, invades even such apparently innocent affairs as commercial treaties entered into in times of nominally profound peace. For many a small country has consented to making unfavorable commercial arrangements, from fear of the threatening power of a large neighbor.

Against all these evils and injustices, which of necessity will breed a constant succession of wars, the existing World Court, or any world court that might be substituted for it, is for the present as powerless as the engineers of the world are against the procession of the equinoxes. Before a court can aid in the prevention of war, we must somehow create a body of laws which will lay down definite rules regarding the rights and duties of nations, rules as definite, although possibly not as complex, as those regulating the relations of man to man in our domestic law.

Sometimes, it is imagined that the World Court itself will gradually create such rules as a body of what some people choose to call "judge-made law." This is a misconception. Judicial analysis can never create legal principles; it can only develop those given to it either by the unconscious growth of custom or by deliberate acts of legislation. It is true that very important and extensive fields of jurisprudence have been thus developed, both in the common law jurisdictions and in countries where written codes prevail; I need only recall to you the whole vast field of equity. However, in all such cases, the underlying principles have been given to, not developed by the judiciary. The World Court will have to be furnished with the seed from which to grow a crop of international, judge-made law; and as there is no world government which may legislate by virtue of its supreme authority, we shall have to agree upon the principles from which an elaborate body of living world law may some day be developed by the World Court. Legislation by agreement is nothing new in legal history. I only need to recall the manner in which our federal government was created by sovereign states agreeing on the principles of a common, partial sovereignty.

It is impossible to forecast with accuracy what the character of this future world law will be, or to predict what parts of international conduct will be covered by it. Only this would seem altogether certain, that the present international customary law will occupy a very small portion of the field and will constantly shrink in importance, as the object for which alone world law has a reason to exist is more completely realized, which is the elimination of force and war from the conduct of civilized peoples. There are a few broad departments, however, which quite obviously will have to be covered at the very beginning of the new era of law instead of violence.

To my mind the first and most far-reaching step of world legislation should be to bring all treaties, conventions, and agreements between nations under a rule analogous to that of private contracts. Without some law of this kind it is useless to hope for the abandonment, by any self-respecting people, of the possibility of righting its wrongs by force when opportunity offers. Where, as has happened not so very long ago, a belligerent, approaching exhaustion but still able to defend himself for a long period, is induced to lay down his arms and render himself helpless, by promises that peace will be made on the basis of a fair compromise, embodied in a series of definite propositions; and where his enemies thereupon, disregarding their fourteen points, force upon him a treaty calculated to destroy his economic life, render him defenseless for all future time, take away his colonies, cut off one fourth of his nationals and place them under alien governments notoriously filled

with bitter race hatred against them, and finally force upon their victim a pretended confession of crimes that should put him outside of the pale of humanity—a law which would recognize a treaty of this kind as valid could not possibly command the obedience and respect of mankind. The world legislation will have to declare, for the future at least, any such agreement void on about every ground on which contracts may be avoided: fraud, duress, repugnancy to public policy, immorality. It is a fact, however, that almost every treaty of peace concluded since the day when the Romans circumvented the need of any treaty by either killing or selling into slavery the entire Carthaginian people, would have to be declared void on similar grounds, although these may not always lie so open to the light of day as in the cases of Versailles and St. Germain. The crazyquilt condition of national boundaries in Europe, and the diabolical mess of hatred and fear between nations the world over, are the result of the vicious and absurd system of compelling a government by superior power, to sign a disadvantageous agreement under conditions of force, violence, incendiarism, and bloodshed, and then expecting the people thus abused to live up to such an agreement with loyal good faith and in a spirit of friendship to their tormentors.

This custom of centuries filled with incapacity and wrong having become impossible for the future, the next step toward substituting a reign of law for force will be to adopt a set of definite principles according to which the boundaries of the several nations and governmental units may be arranged. The principle of the self-determination of peoples has fallen into some disrepute because it has so often been invoked hypocritically for purposes the reverse of just. Yet I do not believe that a better foundation for the territorial division of the globe could be found. Any fairly compact region inhabited by people recognizing the obligations of civilized life, having common traditions, language, economic interests, and a degree of consciousness of belonging together, and being distinct from other similar groups, should be, primarily, entitled to live under an independent government of their own, and the world code should establish this right. The actual condition of the globe, however, makes the literal realization of the principle obviously impossible. It will have to be modified by definite rules recognizing the effect of geographical, economic, and social circumstances which create a practical necessity for a certain number of one nationality living under the sovereignty of another. Instead of trying to blind itself to such considerations, the law would provide rules for the just government of these alien elements—rules of law, but not discretionary commands as are now being attempted in similar cases by the political agencies of the League of Nations. The code would also recognize the existence of a number of empires, uniting under a single sovereignty

various nationalities and national states. This is, in many cases, an arrangement advantageous to all concerned. One of these empires, the Austro-Hungarian Monarchy, has just been forcibly dismembered, with the result that each of the component nationalities is more miserable and dissatisfied than ever before. The world code would recognize such composite governments as historical growths, but would afford legal rules calculated to prevent injustice to any of the constitutive national or political units.

A third group of international relations which must be regulated by world law in order to eradicate one of the most important sources of war danger consists in the treatment of those parts of the world inhabited by so-called uncivilized races, perhaps better described as peoples on a low plane of economic and social development. In close connection therewith, the code should provide rules to prevent unfair and hostile discriminations in the obtaining of the natural products that serve as raw materials for the industries of mankind.

Probably by this time you will be ready to exclaim: "A pretty big job, to bring about an international law of this kind!" So it is. But I am firmly convinced that no other way is open by which the abolition of war may some day be realized. It seems to me little more than sentimental play, to agitate for the substitution of "law for war," for universal disarmament, and other things of that sort, unless we first create a world law. Political methods, such as are contemplated by leagues of nations, by proposed super-governments with armies to keep the peace as an international police, by improved facilities for arbitration, associations for making war upon war, and all the rest of these well-meant activities, must necessarily fail because these methods are all based on force exercised at the discretion of some superior power. They can only perpetuate the feelings of fear and hatred between nations, which form the psychological background of the present miserable condition. Moreover, such political agencies will prove even more difficult to make effective and permanent than the creation of a code of laws. It will be found that they can live only if they busy themselves with comparative trifles, after the manner of arbitration tribunals. I believe that all unprejudiced observers will find this to be the case with the activities of the present League of Nations. Such institutions unquestionably are convenient and useful in many ways, but they have nothing to do with the abolition of war.

I do not expect that a code of genuine international law will or can be established next year, or the year after next. There are too many selfish interests in the several countries, each of which would find itself disadvantaged by one necessary provision or the other in any proposed code. It is not necessary that the World Law should spring from a

single international conference, all complete and fully armored, as Pallas Athene sprang from the head of Zeus. It is quite possible to cover at first only a few subjects, those encountering least resistance. Which those may be, and how such legislation may best be brought about, is not a legal question but one for politicians and diplomats. As lawyers, however, I hold it to be our duty, first to clear our own minds by discussion and study; and next, when we are convinced that a world law can and should be created, to throw our whole professional weight into the scales, so as to induce the proper political authorities to take the necessary steps toward a beginning. I can discern certain tendencies in economic life which before long may bring some extremely powerful allies to the aid of the movement. I mean the growing tendency of gigantic combinations of capital to expand their interests without regard to national boundaries, especially in developing sources of raw material. They will soon discover the advantage of having such enterprises protected, to a certain extent at least, by world law, instead of being at the mercy of conflicting, narrow, and selfish national interests, and in all disputes having to rely on the use of force, or the threat of force, by their home governments; especially as such aid may be given freely or grudgingly, as purely political exigencies may suggest. The moment that these interests succeed in getting the several governments to agree on laws applicable to their particular affairs, other interests, economic, social, racial, cultural, will want similar laws regulating the subjects closest to their hearts. The current toward a genuine international code may then set in with a rush that will sweep aside all opposing nationalistic or partisan interests and ambitions.

III

The Present World Court and the United States

I believe that these considerations amply show how a World Court, to be effective for preventing war, must be a court of law, and not a mere arbitration tribunal with the usual auxiliary functions of a judicial character; and they prove further, that such a World Court of Law cannot exist until there is a code of international law, regulating those important fields of intercourse between nations from which wars are likely to arise. If that is true, the first impulse will be to conclude that the United States have no reason to adhere to the World Court maintained under the auspices of the existing League of Nations; especially, as there is danger that by such adhesion our government might appear as guaranteeing any part of the treaty under which the League of Nations was created—to guarantee it, notwithstanding the emphatic repudiation of both the treaty and the League by the American Government as well as the American people.

Some very able and influential members of the United States Senate have drawn that conclusion and are vigorously combatting the participation of our country in the World Court, as proposed by President Coolidge and his predecessor.

Nevertheless, I am inclined to believe that no harm can come either to our country or the cause of permanent peace, if we join the Court; and that some good may be accomplished thereby, particularly in the direction of bringing about the creation of a genuine and effective code of world law. Provided, of course, that sufficient guarantees are given by the other governments: first, that we are not held in any way to guarantee the repudiated treaties of 1919, or any other international political arrangements in Europe; and secondly, that we are to have a voice of fully equal weight with any power, member of the League or not, in all matters concerning the constitution of the Court and the election of judges and officials. These reservations are substantially contained in the various measures now pending before the Senate.

As we have repeatedly asserted, the World Court at present is substantially a committee on arbitration, a tribunal of expediency and good policy rather than of law. There would seem to be no particular reason why it would not be as good an arbitration committee for us as the old Hague Court, still functioning side by side with the World Court. We are fully committed to the practice of arbitration in all justiceable cases, but it is for ourselves to judge whether a dispute is justiceable or not. The discretionary function of the Court does not exclude, however, its exercise of properly judicial functions where, and as far as, there is any law covering the subject of litigation. We have seen that every arbitration tribunal which ever sat has done so, in the interpretation of treaties, the ascertaining of facts according to legal methods, and upon other occasions. The constitution of the World Court expressly authorizes such judicial functions, especially in regard to the interpretation of treaties "establishing rules expressly recognized by the contesting states" (Section 38, par. 1 of Statute establishing the Court). This provision, it seems to me, implies that while there may be few such rules now, many more may be adopted by international conventions.

If the United States is a member of the World Court we shall be in a much more favorable position to urge the adoption of such rules than if we are mere outside critics. Moreover, we shall be able to participate in the eventual amendment of the court constitution, so as to change it from a primarily arbitrating commission into a truly judicial body. These considerations seem to me to outweigh entirely the objections drawn from the connection of the Court with the League of Nations, or any fancied predisposition to enveigle the United States into mingling with the turmoil of European political troubles. The latter could only

be done by provisions in awards, imposing on us political functions in Europe, such as supervising the execution of treaties to which we are not parties. There is nothing compelling us to accept such unwelcome honors.

After all, our present participation or non-participation in the World Court is only indirectly of importance. What is of the greatest importance to the people of this country, and to the whole world, is the creation of a World Law, the transfer of international relations from the dominion of force and arbitrary violence to that of orderly procedure and justice. As lawyers, we have a special duty, and I trust a special inclination, to do our share in bringing about such a signal triumph of the beneficent power to which our profession is consecrated, the power of Justice through Law.