THE OUTLAWRY OF WAR

A series of lectures delivered before the Academy of International Law at The Hague and in the Institut Universitaire de Hautes Etudes Internationales at Geneva

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As for Hugo Grotius, he took over the doctrine of the just war as it had been developed by his predecessors. He introduced a new element only in holding that war as a war of execution should and must be waged not only for one's own right but also for the right of others. The idea that war may be conceived only as punitive war in the service of justice was thereby logically developed.[1] For the rest it cannot be said that Grotius considered the just war from a new, original point of view.[2]

The later jurists did not allow the doctrine of the just war to be completely forgotten,[3] but they dealt with it only incidentally[4] and did not try to develop it on the basis of its modern evolution. The prevailing doctrine of international law in the eighteenth and nineteenth centuries was hardly familiar with types of war forbidden from the point of view of law. It emphasized only certain moral obligations which the states had to fulfill in this respect.[5]

This development of the doctrine of the just war evidently had a close connection with the fact that the unity of the Christian world had been destroyed in the Middle Ages by the Reformation. The idea of the community of peoples became of secondary importance. Instead the idea of the sovereignty of the individual states took the lead.[66] The jurists of the eighteenth and nineteenth centuries did not oppose such a development. On the contrary, they regarded the *jus belli ac pacis* as an important part of the independence of the individual state. But meanwhile, in thinking too much of the idea of what is legal, they forgot, to use an expression of Anselm Feuerbach, the idea of what is just. Under these circumstances the statesmen found it easy to declare every war justified, especially since, to quote Immanuel Kant, they invoked the opinion of the jurists only to defend war but never to prevent it.[77]

§ 2. THE IDEAS OF THE CHAMPIONS OF A LEAGUE OF NATIONS

A. Before the war

So far as the champions of international understanding are concerned, they have from the beginning turned their attention above all to the creation of an international organization and a system of international arbitration, through the existence of which war between individual states would lose its *raison d'être.* A league of nations and arbitration were particularly

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[1] Cf. *De jure belli ac pacis,* II. xxv. 6.

[2] Cf. Bourquin "Grotius et les tendances actuelles du droit international," Revue de droit international et de legislation comparée, 3d ser., VII (1925), 112 if.; Knight, The Life and Works of Hugo Grotius (London, 1925), p. 20I; Lange, op. cit., p. 316.

[3] Cf. Le Fur, *op. cit.;* Strisower, *op. cit., pp.* 13 if.; also Redslob, *Histoire des grands principes du droit des gens* (Paris, 1923), pp. 469 if.

[4] Cf. Lammasch, *op. cit.,* p. 50.

[5] Cf. Tambora, *"Das Recht Krieg zu führen,"* in *Zeitschrift für internationales Recht,* XXIV, 41ff.

[6] Walther Schücking, *Die Organisation der Welt* (Leipzig, 1909), pp.37, 39.

[7] *Entwurf zum ewigen Frieden,* chapter entitled *"Zweiter Defintiv-Artikel*"; also Ter Meulen, *op. cit.,* p. 326.

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in the center of the great projects of William Penn, Abbé de Saint Pierre and Immanuel Kant. When the peace movement was organized in the course of the nineteenth century and gradually took a stronger hold upon public opinion throughout the world, the idea of forbidding war or of declaring it a crime was not placed at the head of the peace program, either. Settlement of all disputes by arbitration and disarmament were the primary demands made at the end of the nineteenth century by the Interparliamentary Union,[1] the world peace congress[2] and the peace societies of the individual countries.[3]

But even if, in the main, war was combated only indirectly, even if the problem of the outlawry of war in its present form was unknown before the war, yet even before the war the question of the justification of armed conflicts was a burning one for those interested in the peace movement. The Paris World Peace Conference of 1878 adopted a resolution which declared *"que la guerre offensive est un brigandage international*."[4] The majority of the members of the peace societies before the war took the position that aggressive war, not however defensive war, must be rejected. When therefore the third and seventh world peace congresses at Rome and Budapest in 1891 and 1896 adopted provisional principles of international law, they recognized the right of the states to defend themselves. No one arose at that time to combat the right of self-defense.[5]

But when later the former French captain of artillery, Gaston Moch, one of the veterans of the peace movement before the war, made the motion at various world peace conferences[6] that the right of self-defense be exactly determined and that only that state be permitted to exercise it which has already made an honest proposal to its opponent to settle the dispute peaceably, it appeared that a considerable number of English and American advocates of peace denied the right of defensive warfare for religious and other reasons. This view was held by the minority in the world peace congresses. But it was not deemed proper to decide the question by a majority vote; the difference of opinion on the right of self-defense was merely recorded. Continental adherents of peace, especially in Belgium, Germany, France and Austria-Hungary, expressly recognized, during these negotiations, the admissibility of defensive warfare. Among them were the winners of the Nobel prize, Alfred H. Fried, Henri La Fontaine and Ludwig Quidde.[7]

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The question of the punitive war (Sanktionskrieges) was taken up at a late date in

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[1] Cf. *Union Interparlementaire, Résolutions des Conférences et Décisions principales du Conseil (2d* ed. by Chr. L. Lange, Brussels, 1911), pp. 7 ff.

[2] *Résolutions textuelles des Congrès universels de la Paix* (Berne, 1912), pp. 1 ff.

[3] Cf., e. g., the statutes of the French Peace Society, La Paix par le Droit, or those of the Deutsche Friedensgesellschaft.

[4] *Résolutions textuelles des Congrès universels de la Paix,* p. 1.

[5] *Troisième Congrès international de la Paix* (Rome, 1892), pp. 142, 143; *Bulletin officiel du VII Congrès universel de la Paix* (Berne, 1896), pp. 46-55.

[6] *Bulletin officiel du VIII Congrès universel de la Paix* (Berne, 1897), pp. 43 ff.; *Bulletin officiel du XII Congrès universel de la Paix* (Berne, 1903), pp. 136 ff.; *XVIIIe Congrès universel de la Paix* (Stockholm, 1911), pp. 218 ff.

[7] Cf. Wehberg, *"Der Verteidigungskrieg auf den Weltfriedenskongressen der Vorkriegszeit," Friedenswarte,* 1924, pp. 330 ff.

peace circles, namely at the World Peace Conference at i The Hague in 1913. The ideas concerning the legitimacy of the military application of sanctions were so divergent in each congress that no definite resolution was passed on this subject, either.[1] Among the peace advocates this question led to the same differences to which it led among the jurists. When Professor C. van Vollenhoven of Leyden proposed, in 19 13,[2] the creation of an international fleet which would act in the case of violations of the decisions of international courts or of neutrality, only Erich,[3] van Eysinga[4] and Schücking[5] were favorable to the proposal. The jurists as well as the peace advocates before the war were silent on the question of execution. This is all the more surprising since in the organization projects up to the end of the eighteenth century, as Ter Meulen has shown,[6] the idea of execution appeared again and again; it also played an important part in the plans of the two great Quakers William Penn[7] John Bellers. [8] Probably this circumstance is due to the fact that the problem of organization had before the war been relegated far to the background and that the discussions were restricted to arbitration and to the limitation of armaments.

The period before the war, therefore, by virtue of its essential tendencies, accorded the problem of the outlawry of war only a secondary importance. This was quite clear during the discussions in the two great Hague Peace Conferences. Aside from the laws of war, perfection of arbitration and limitation of armaments were the subjects of most of the deliberations. Elsewhere the same tendencies prevailed. The so-called Bryan treaties are most nearly the forerunners of the movement to outlaw war. These treaties in effect prohibited every war which was not preceded by an international investigation. But even they did not attempt to declare a defensive war criminal.

B. After the outbreak of the World War

Surprising though it is, the idea of the outlawry of war did not assert itself after the outbreak of the war. In many drafts, and particularly in the best known drafts of a league of nations, only the attempt of a peaceful settlement of disputes was declared obligatory, on the plan of the Bryan treaties. But a decision of conflicts by war, after the failure of eventual attempts, at settlement, was not prohibited. Of the private drafts which expressed different opinions, that of the Belgian Paul Otlet, who in 1917 declared every war a "crime against humanity," deserves special mention.[9] In the last year of the war the view that every war between individual states should be [p. 8] prohibited was affirmed.
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The committee of jurists at The Hague in 1920, and the International Law Association in 1922 and 1926, advocated a High Court of International Justice, which some day will

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1 *Bulletin officiel du XXe Congrès universel de la Paix* (La Haye, 1913), p. 110.

2 Roeping van Holland, *De Gids* (Amsterdam, November, 1910).

3 *Probleme der internationalen Organisation* (Breslau, 1914), pp. 54 ff.

4 "La Police Internationale," Zeitschrift für Völkerrecht und Bundesstaatsrecht, 1911, pp. 527 ff.

5 *Der Staatenverband der Haager Konferenzen* (Munich and Leipzig, 1912), p. 289.

6 *Op. cit*., pp. 348 ff.

7 Op. cit., p. 174.

8 Qp. cit., p. 178.

9 Art. 10 of the *Constitution mondiale de la Sociétê des Nations* (Geneva, 1917).

probably become a reality.[1] But until this has been achieved, the states should be asked to introduce in their national penal code rules concerning the punishment of those responsible for war, and the form of the procedure to be followed in such cases.[2] Only when national justice is insufficient should the High Court of International Justice be appealed to.

III. THE FORMS OF THE INTERDICTION: TREATY AND CHANGE OF CONSTITUTION

If the states are to be asked to outlaw war, they should not only be asked to do so by an international convention and in a manner which is constantly to be perfected. If the states are sincere in their desire to eliminate war, as we do not doubt, then they should consider the question whether they are ready to introduce in their constitutions a renunciation of war. That would be worth more than beautiful sentiments, and the movement for the outlawry of war would make considerable progress if the statesmen in all the states were to make the solemn declaration: "We deem the idea of the outlawry of war to be sacred. We wish therefore without hesitation and without reservation to renounce war once and for all, and to introduce this principle in our constitutions.

§ 1. THE "JUS BELLI AC PACIS" IN THE NATIONAL CONSTITUTIONS

Almost all the constitutions of the world are in need of improvement so far as the question of the outlawry of war is concerned. The *jus belli ad pacis* has up to now passed as an inalienable right of the sovereign state, so that even in the most modern constitutions there is no material restriction of the public power with regard to the right of declaring war. But there are a certain number of exceptions which should be carefully enumerated.

Thus on the motion of Mirabeau, Article 4 of the decree of the French National Convention of May 22, 1790, which was later introduced in the constitution of September 3, 1791, stated: "The National Assembly declares that the French nation renounces the undertaking of any war with a view to making conquests, and that it will never employ its forces against the liberty [p. 109] of any people."[3] The debates of the National Assembly at that time had borne on the question who should have the decision in matters of peace and war. But the men of the French Revolution did not content themselves with solving

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[1] Cf. Pella, La criminalité collective des Etats et le droit penal de l'avenir (2d ed., Bucharest, 1926); Politis, Les nouvelles tendances du Droit international, p. I 13; Saldana, "La justice pénale internationale," Recueil des Cours (Académie de Droit international), X, 227; Vadasz, "Juridiction criminelle internationale," Revue Sottile, 1927, p. 274; International Law Association, Report of the thirty-first Conference, I, 63; Report of the thirty-third Conference, p. 74; Report of the thirty-fourth Conference, p. 277; the articles of Volume III (1926) in the Revue internationale de Droit penal; the questionnaire of the Friedenswarte (April, 1927), and the replies of numerous jurists.

[2] Cf. Pella, *"La propagande pour la guerre d'agression," Revue de Droit international* (Lapradelle-Politis), 1929, p. 174; idem, *Les Modifications d'ordre international qu'importe le Pacte de Paris. Rapport présente au XX VIIIe Congrès universel de la Paix,* 1929.

[3] Cf. Buss, *Geschichte und System der Staatswissenschaft* (Freiburg, 1839), pt. I, p. ccclxix; Redslob, *"Völkerrechtliche Ideen der französischen Revolution,"* in *Festgabe für Otto Mayer* (Tübingen, 1916), pp. 279 ff.*;* Mirkine-Guetzevitch, *"La Révolution française et l'idée de renonciation à la guerre," La Révolution française,* LXXXII, no. 3 (1929), pp. 255 ff.

this problem. The debates on the question who should declare war in the name of France led to an elaborate discussion of a much broader problem, namely, the legitimacy of war in general. The debates of that time were on a very high plane. It is useless to review them in detail. We may say, however, in this connection, that the members of the French National Convention of 1790 were far from giving full freedom to the executive power so far as defensive war is concerned. Even in case of defensive war the government, according to the decree of May 22, 1790, had to make an immediate report to the legislative body (Art. 3). If, according to the report in question, the legislative body decided that war should not be waged, the executive power had to take immediate measures to check hostilities and to prevent others (Art. 5). If it appeared that the hostilities already begun were equivalent to a culpable aggression, then the author of the aggression had to be regarded as *"coupable de lèse nation"* (Art. 4). Likewise the guilty party was held responsible if hostilities were not immediately checked after the parliament had given orders. In other words, the French people deemed the most substantial guarantees necessary against all defensive wars which were frivolously undertaken.

In the course of its development the French Revolution abandoned its great program for the outlawry of war. The provisions of the decree of May 22, 1790, lost their obligatory character during the Napoleonic era.' Later the step taken in 1790 was continued by the South American states.[1]

The constitutions of Venezuela (Art. 13, No. 8, and Art. 112 of March 28, 1864; Art. 142 of June 13, 1893; Art. 120 of April 27, 1904, and Art. 138 of August 4, 1909), and of Ecuador (Art. 116 of March 14, 1878), of the Central American Republic founded temporarily in 1895 between Nicaragua, Honduras and Salvador (Art. 4 of the treaty of the Union of Amapa, June 30, 1895) have recognized the principle of arbitration. They state that the clause of unlimited arbitral jurisdiction (excluding all war) will be introduced in the international treaties of the states in question. The constitution of San Domingo goes still further (Art. 20 of May 20, 1880; Art. 101 of June 12, 1896; Art. 102 of March 20, 1908). It states that no war should be declared without a previous attempt to settle the dispute pacifically. It provides also that a clause be introduced in all international treaties by virtue of which an arbitral tribunal is to be instituted before hostilities begin.

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The most important constitutional articles of South America are those of Brazil of February 24, 1891. According to Article 31, No. II, the Federal Congress can authorize the government to declare war only if the appeal to arbitration has been impossible or has failed. Article 88 contains also the principle that Brazil can in no case participate in a war of conquest, either directly or indirectly, either by itself or by reason of an alliance with another nation. Later Uruguay, in Article 79 of the constitution of October 15, 1917, adopted Article 31, No. II, of the Brazilian constitution.

Among the European states Portugal was the first to follow this example. Article 26, No. 14, of the constitution of August 21, 1911, gives the congress the right to declare war

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[1] Cf. *Segunda-Conferencia Internacional Americana,* Mexico, 1901, p. 316; Moch, *Histoire sommaire de l'arbitrage permanent* (Monaco, 1910), p. 61; Sa Viana, *L'Amérique en face de la conflagration européenne* (Rio de Janeiro, 1916), p. 20; Boissier, *Le Contrôle parlementaire de la politique étrangère en Europe et au Canada en 1924* (Geneva, 1926), p. 69.

only where there is no question of an appeal to arbitration or where the appeal has failed, unless there is danger of an attack or in case an attack has already been begun by enemy forces. Moreover, Article 76 declares that the principle of arbitration is the best method for the settlement of international disputes, with reservation of the obligations contained in the treaties of alliance.

Finally we note Article 57 of the fundamental constitutional law of the Netherlands, in its form as modified by the law of November 10, 1922. According to this article, the king should try to "settle the disputes with foreign powers in the judicial way and by other pacific means."

So far as we know there are no other constitutional stipulations which contain positive juridical limits to the right to declare war. A far-reaching motion made in 1916 in the Swedish parliament called for the abolition of the right to declare war as stated in paragraph 13 of the constitution. It was approved only in the first chamber and rejected in the second.[1]

If it must be admitted that all these constitutional provisions are not perfect, they represent nevertheless a considerable advance over the laws of the majority of states. Not without reason did a number of states, in the deliberations of the Assembly of the League of Nations, make repeated references to the above constitutional provisions, in order to prove that their policy was favorable to the League of Nations.[2]

Finally we may say that from the formal point of view the two following constitutions contain interesting guarantees for the maintenance of peace. In the first place, Article 43 of the Latvian constitution of February 15, 1922, provides that the president of the Republic, in taking measures necessary for the defense of the country, must at the same time call together the parliament, which shall decide upon peace or war. Moreover, Article 33 of the constitution of Czechoslovakia of February '29, 1920, provides that for the declaration of war a three-fifths majority of all members in both chambers is necessary.

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§ *2.* THE APPEAL OF THE INTERPARLIAMENTARY UNION

The constitutions of the various states are therefore very important for the outlawry of war, and the task which they must accomplish in this respect should be all the more evident in view of the experiences gained during the Great War. This was realized in good time. The Central Organization for a Durable Peace published a *Recueil de rapports sur les différents points du programme-minimum.*[3] Here the Swede Carl Lindhagen demanded in 1918 that after the Great War the idea of "war" should be eliminated from the constitutions as a malicious idea and one which should be given no consideration. Not long after, Professor C. van Vollenhoven (Leyden) published a celebrated work, translated simultaneously into three languages and entitled *The Three Phases of International Law.*[4] He declares that the following is a decisive question for the future of international law:

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[1] *Organisation centrale pour une pain durable* (The Hague, 1928) IV, 349.

[2] Cf. *Actes de la Ve Assemblée. Séances plenières* (Geneva, 1924), p. 75 (address of the representative of Brazil, Mello-Franco), and p. 190 (address of the representative of San Domingo, De Castro)

[3] The Hague, 1918, IV, 338.

[4] The Hague, 1919, pp. 92 ff.

"Are you ready, sovereign state, to join with the other states in eliminating completely from your constitution the right to declare war, and to say that your military forces will be used only to protect the violated law, on the basis of universal treaties?" Van Vollenhoven continues: "Whoever replies heartily in the affirmative, wants the League of Nations and a durable peace. But whoever replies that he would like to, but that his wars of aggression are always purely defensive and that his sovereign right could not exist except through the force of his sovereign sword, he draws the mask from his own face, covers himself with shame and desires not eternal peace but the eternal anarchy of Vattel."

No doubt under the influence of the book of Van Vollenhoven the official commission of Dutch experts in their *Principles of the League of Nations* published in January, 1919, declared: "The right to make war is irreconcilable with the League of Nations."[1]

In the same year Wilhelm Kaufmann, professor at the University of Berlin, in an article on the community of the peoples and the constitution of the German democracy,[2] proposed the introduction of the following article in the new German constitution:

> The German democracy expressly recognizes that under present circumstances it would be a terrible crime against the community of the nations for a people belonging to this community to undertake or provoke a war of aggression.

The movement in favor of the constitutional outlawry of war was given a strong impetus by the American movement. The outlawry of war through the constitutions of the various states forms a special chapter in *The Outlawry of War* by Morrison.[3] To be sure, Morrison would make the constitutional amendment contingent upon the good will shown by the other [p. 112] nations in following this example. On the other hand a resolution presented to the Senate on April 23, 1926, by Senator Frazier and later elaborated by the Women's Peace Union, called for the outlawry of war in the United States Constitution.[4] Finally the suggestion of the American ambassador Houghton to make the decision as regards war and peace depend upon a popular plebiscite attracted considerable

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[1] Grotius, *Annuaire international pour 1918,* The Hague, p. 115.

[2] In the supplement to *Republik* of January I, 1919. Recently reprinted in *Friedenswarte,* 1928, pp. 234 ff.

[3] Chicago, 1927; especially p. 43.

[4] Cf. Hearing before a subcommittee of the committee on the judiciary, United States Senate. Sixty-ninth Congress. Second session on S. J. Res. 100. A joint resolution proposing an amendment to the Constitution of the United States relative to war. January 22, 1927. The resolution of Senator Frazier of December 9, 1927, reads as follows: "Joint Resolution proposing an amendment to the Constitution of the United States prohibiting war. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein): That the following article is proposed as an amendment to the Constitution, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three-fourths of the several States: Article 1, Section 1. War for any purpose shall be illegal, and neither the United States nor any State, Territory, association, or person subject to its jurisdiction shall prepare for, declare, engage in, or carry on war or other armed conflict, expedition or invasion, or undertaking within or without the United States, nor shall any funds be raised, appropriated, or expended for such purpose. Section 2. All provisions of the Constitution and of the articles in addition thereto and amendments thereof which are in conflict with or inconsistent with this article are hereby rendered null and void and of no effect. Section 3. The Congress shall have power to enact appropriate legislation to give effect to this article." In England a similar demand was recently made by G. Spiller in a pamphlet entitled "The Abolition of Aggressive War by Comprehensive Legislation," (London, 1928).

attention.

All these efforts were crowned by the resolution of the Twenty-second Interparliamentary Conference at Berne on August 25, 1924. At that time the Union, after hearing a report of Professor Walther Schücking, adopted the following resolution without any opposition:

It recommends to the national groups to submit to their parliaments drafts for a constitutional amendment looking toward:

a. The interdiction of any recourse to war, with reservation of the obligations assumed according to Article 16 of the Covenant of the League of Nations;

b. The obligation of resorting to arbitration or to other amicable or judicial means for the solution of differences with other states, in every case where an amicable arrangement has not been attained by direct negotiations.[1]

In his report to the Conference Professor Schücking stated:[2]

In its second part the resolution of the juridical commission turns to aggressive wars and demands that the constitution of each state be supplemented by provisions rendering such wars impossible in future, by virtue of the fact that in the guaranty pact submitted to the approval of all the governments in accordance with the resolution of the Fourth Assembly of the League of Nations, aggressive war is stigmatized as an international crime. The catastrophe of the Great War has given us a better understanding of this problem. According to the theory of the law of nations which prevailed before the Great War, war was considered as a legitimate means for the realization of right, but in practise the difference between right and interest was not always observed; indeed, it was sometimes even abandoned in theory. The jurisprudence of the last century dropped the study of the difference between a just war and an unjust war because of the lack of a superior instance to decide this question. In view of this state of affairs the Covenant of the League of Nations achieved great progress because there was established for the future, on precise juridical principles, the difference [p. 113] between a legitimate and an illegitimate war. But just as in the Middle Ages an absolute interdiction of the feud through the Truce of God followed the restriction of the feudal prerogative, which interdiction, in the Eternal Peace of 1495, branded force as a crime, just so there are forces at work to-day which reject all legitimate war and appraise the appeal to force by the individual state as a crime. It is in keeping with the historical traditions of our Union to march in the van of this movement. It is from this point of view that we recommend the amendment of the national constitutions by a provision proscribing in principle all war, of course with the reservation of the obligations resulting from Article 16 of the Covenant of the League of Nations, whereby the members agree to lend each other mutual support against a state which has broken the Covenant. Such a constitutional provision would go much farther than the restrictions which at present the public law of certain states impose upon the right to declare war, by submitting the question, for instance, to the consent of the parliament. Even when the constitution of a state already prescribes the form of law for every declaration of war, as is the case in Germany, an absolute constitutional interdiction of every declaration of war would still have a great juridical importance, since it would then be necessary to follow the special procedure required in most of the states for a change in the constitution. This is already the case in the constitution of Czechoslovakia (Art. 33).

In the deliberations of the juridical commission of the Interparliamentary Union of April 3 and 4, 1924, which prepared for the deliberations of the plenary assembly, there was no opposition, either, to the idea of the outlawry of war in the constitutions of the various states. There was discussion only on a suggestion presented by La Fontaine (Belgium). The latter proposed that instead of the phrase "with reservation of the obligations assumed according to Article 16 of the Covenant of the League of Nations" there should be substituted "with reservation of the general or regional obligations contracted by the states for their mutual defense in case of armed aggression." But this proposal was defeated and the original

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[1] *Union interparlementaire, Compte rendu de la XXIIe Conférence tenue à Berne et Genève* (Lausanne, 1925) pp. 458, 657.

[2] *Idem,* pp. 190 ff.

wording was adopted.[1]

The Governments would certainly take a laudable step if they adopted the suggestions of the Interparliamentary Conference of 1924.

§ 3. THE OUTLAWRY OF WAR IN THE NATIONAL CONSTITUTIONS

No doubt it is difficult to formulate the outlawry of war in such a way that it can be adopted in all the constitutions of the world. The same difficulties arise which led to differences of opinion between Mr. Kellogg, the American Secretary of State, and M. Briand, the French minister. The German Cartel for Peace which comprises all the German peace organizations, has recently taken up this problem with the cooperation of the present writer, and on April 30, 1928, it decided to submit to the Reichstag and to the Government of the Reich a petition wherein it asks that Article 35, paragraph 2, of the Weimar Constitution, whereby the declaration of war and the conclusion of peace are effected by virtue of a law of the Reich, be replaced by the following provisions:[2]

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1. The German Reich renounces in future the recourse to war. International disputes should in future be settled exclusively by pacific means, or by mediation, or by an arbitral tribunal, or by an appeal to the Permanent Court of International Justice.

2. The rights and obligations provided by Article 16 of the Covenant of the League of Nations remain the same. Military measures in accordance with Article 16 of the Covenant can, however, be taken only by law of the Reich, and they must have been decided upon by the majority requisite for constitutional modifications.

3. Military acts decreed contrary to these provisions shall automatically be declared criminal. A special law shall determine the punishment incurred in such a case by the responsible authors, as well as the form of the procedure to be taken against them.[3]

This proposal, which could be adapted also to the constitutions of the other countries, insofar as they belong to the League of Nations,[4] is based [p. 115] upon existing law. Its

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[1] *Procès-verbal du Comité de Rédaction de la Commission des Questions juridiques. Séance du 3 avril 1924.* (Not printed.)

[2] This petition was presented to the Reichstag on November 17, 1928. Cf. *Friedenswarte,* 1928, pp. 360 ff. See also Kurt Hiller, *"Staatsrechtliche Folgen des Kellogg-Pakts," Berliner Tageblatt,* December 4, 1928. This petition of the cartel was described by the government as "impracticable" because the necessary qualified majority for such an amendment to the Constitution does not exist in the Reichstag. Cf. *Friedenswarte,* 1929, p. 277.

[3] *Friedenswarte,* 1928, p. 178.

[4] The general assembly of the French peace society La Paix par le Droit adopted the following two resolutions at Nancy on October 30, 1928:

I. The general assembly of La Paix par le Droit,

Considering that the Covenant of the League of Nations has taken away from the governments of the states belonging to the League every competence for the conclusion of secret treaties:

Considering also that the Kellogg Pact takes away from the public powers every competence to undertake an offensive war for a purpose of national policy;

Deems that it is necessary to revise the text of Articles 8 and 9 of the constitutional law of July 16, 1875, in the following way.

Article 8. No ratification of a treaty shall be given except with the consent of the Chambers, and every treaty must be registered verbatim with the Secretariat of the League of Nations.

Article 9. No declaration of war shall be made and no mobilization shall be decreed except with the consent of the Chambers, a consent which shall be obtained only after the Chambers have determined that the country is in a situation of legitimate defense or that it is obliged to give international assistance by virtue of the Covenant of the League of Nations, by virtue of the pact for the renunciation of war, or by virtue of any treaty of assistance or of guarantee concluded in the sense of these two pacts.

purpose is not to solve the problem definitely. This will be possible only if more progress is achieved in the international field in the future than there has been in the past. But since it

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II. Considering that the citizen has the right to demand respect for his life and his liberty within the limits of the constitutional and legal guarantees,

The Assembly deems that it is urgent to study the organization of an internal and international jurisdictional control of the acts of the public powers, with a view to assuring the respect of the constitutional principles above enunciated. This jurisdictional control should be able to be exercised by the citizens themselves individually and collectively.

In the course of the session of the general council of the Union of Associations for the League of Nations, which met at Prague early in October, 1928, the French Association for the League of Nations moved that the following resolution be placed upon the agenda of the assembly:

Considering,

a) That the creation of the League of Nations, with the profound transformation which it presupposes in the relations of the states, took place later than the promulgation of most of the existing constitutions;

b) That the Briand-Kellogg Pact has solemnly proclaimed the condemnation of war as an instrument of national policy;

That from this interdiction there follows for the citizens a veritable right to peace, and that this right should be inscribed in the contract which binds the citizens to the government, that is to say in the national constitution;

That the citizen should likewise have a recourse against the government of his country when it commits the crime of resorting to war without having exhausted all political and juridical possibilities of resolving an eventual conflict by pacific means;

And, reciprocally, that the government which tries loyally to apply the Kellogg Pact in its letter and spirit should be protected by the constitution against those citizens who by appeals to hatred, by instigation, by the diffusion of false information or otherwise try to compromise the sincerely pacific action of the said government;

The International Union of Associations for the League of Nations earnestly invites the national associations to act with a view to bringing the legislation of their country in harmony with the Briand-Kellogg Pact and in a general way with the provisions of the League of Nations.

The Italian delegate Professor Gallavresi was not favorable to the French proposal. In the course of the discussion the French delegation withdrew its motion, reserving the right to present it again later. *(Bulletin del' Union internationale des Associations pour la Société des Nations,* 1928, no. 5, p. 34.)

Later, on February 23, 1929, the political and juridical commission, in its session at Brussels, adopted the following text:

The Assembly earnestly invites the national associations to study the constitutions and the legislation of their respective states and to work out if necessary those modifications which will harmonize their national legislation with the Covenant of the League of Nations and with the Kellogg Pact. *(Bulletin de l'Union internationale des Associations pour la Société des Nations,* 1929, no. 2, p. 49.)

The thirteenth plenary session of the International Union of Associations for the League of Nations at Madrid (May 20 to May *24,* 1929) limited itself, in a general resolution on the "organization of peace," to expressing the wish "that the members of the League of Nations may strive to draw all political and legal consequences from the treaty for the renunciation of war." *(Union internationale des Associations pour la Société des Nations, XIII Assemblée Plénière, 1929* (Brussels, 1929), p. 115.)

Finally the XXVII World Peace Congress at Athens (October 6 to 10, 1929) adopted the following resolution on the Kellogg Pact and national constitutions:

Considering,

a) That the creation of a League of 'Nations, with its far-reaching modifications in the relations of the states, is not in harmony with most of the existing constitutions;

b) That the Kellogg Pact solemnly demands the condemnation of war as an instrument of national policy, the Twenty-seventh World Peace Congress asks the governments and peoples of the world which have signed the Kellogg Pact to bring their constitutions in harmony with it and to adopt in the said constitutions a paragraph with the obligation that they must solve all international disputes in a pacific manner…

seems desirable to outlaw war in the constitutions of the various states as soon as possible and without awaiting the elaboration of an ideal international pact, existing law must be used as a basis. In reference to Article 16, defensive wars are permissible. The obligations resulting from alliances which were established only to supplement Article 16 will be maintained in their entirety.

The provision, whereby wars of aggression are constitutionally prohibited and wars of defense and of sanction can be decided upon only by a qualified majority of the legislative organs, would be of immense importance. For up to now the constitutions have not generally provided for the approval of the national representation as necessary in case a defensive war must be undertaken. On the contrary, it is possible to install the military powers regularly without consulting the legislative organs. If in future even defensive war cannot begin without the approval of the national representation, and if this approval itself depends upon the qualified majority, no defensive war could then be frivolously undertaken. The obstacle would be still greater if it were possible some day to introduce in a pact for the outlawry of war a provision whereby a defensive war could not be declared before an international [p. 116] instance has decided as to its legitimacy. The more any event is likely to injure humanity, the more necessary it becomes to restrict it by substantial protective measures. It is natural that, against the dangers of a modern war which to-day menace the peoples more than ever, there should be guarantees of a novel amplitude, national as well as international. These precautionary measures should be taken before the armed conflict has broken out and before the actual power has passed into the hands of the generals.

We should recall that at the time of the discussions of the German Cartel for Peace, Hellmut von Gerlach was the only one to raise objections to paragraph 2. According to this paragraph, measures adapted to Article 16 of the Covenant should not be undertaken except by law of the Reich and by a majority required for constitutional amendments. Von Gerlach stated that this made it more difficult still to execute Article 16 and was even equivalent to sabotage against it. He proposed the elimination of paragraph *2.* But it must be said that, on the one hand, the national representation is bound by the obligations of Article 16 of the Covenant, and that on the other hand, in view of the far-reaching nature of military sanctions, the decision must be rendered more difficult. By eliminating paragraph 2, defensive war would not be made dependent upon a law of the Reich to be passed only by the majority provided for constitutional amendments.

§ 4. CONDITIONAL OR UNCONDITIONAL MODIFICATION OF CONSTITUTION?

It may now be asked whether the states should renounce absolutely the right to declare war, or whether this renunciation should depend upon other powers and upon corresponding modifications which they may introduce in their constitutions. Since war is a crime, the commission of this crime must be renounced absolutely. If it is a question of limiting armaments, a state may say with some reason that it can bind itself to such a program only if its neighbor does the same. But in contrast to this latter problem, the renunciation of the right of war implies no danger. The example set by each separate state would have such a moral influence upon the other powers, by obliging them to outlaw war, that in the final analysis the danger of a foreign attack would be diminished and the security of each state would be greater.

When recently the German Reich prohibited the importation of arms to China, Stresemann, minister of foreign affairs, declared in the Reichstag on March 29, 1928: “We know very well that it is impossible to prevent completely the traffic in arms with China, if the states do not

take all measures against the manufacture of arms or against the traffic in arms with China, so far as such measures have not already been taken. It would be well to find an international solution to this problem. We, for our part, are ready to cooperate. But we do not care to wait until the cumbersome apparatus of international agreement gets into motion. We desire to prevent the traffic in arms … by a German law."

[p. 117]

In the same way it is a question for every state to decide whether it is going to wait, before outlawing war, until "the cumbersome apparatus of international agreement" gets into motion, or whether it means to renounce war definitely by a law modifying its constitution.

IV. DRAFT OF AN INTERNATIONAL TREATY FOR THE OUTLAWRY OF WAR

We shall try now to draw up an international treaty on the outlawry of war. At the head of these proposals we must inscribe three principles:

First, necessity of clearly determined legal obligations; secondly, creation of an international control; thirdly, necessity of provisions for security in case the treaty has been violated.

As regards the necessity of clearness, we have already stated that no exception to the principle of the outlawry of war should be passed over in silence. The nations should know exactly what their obligations are. Only in this case can the treaty have that broad basis without which it would be too much exposed to the danger of violation. The problems concerning the pacific occupation of foreign territory, war of defense and that of sanction, the fulfillment of the obligations resulting from the Pact of Locarno and other treaties should be expressly laid down in this treaty. It seems to us possible to introduce in this pact all these reservations without weakening its moral effect. Indeed, let us not forget that for the members of the League of Nations all reservations can be traced in the final analysis to Article 16 of the Covenant, to the condition of considering defensive war as a war of sanction waged by delegation, and to the obligations resulting from the Pact of Locarno and from other treaties as supplementary to the obligations provided by Article 16 of the Covenant of the League of Nations.

But a treaty for the outlawry of war admitting defensive war (and war of sanction) as it has been admitted up to now, would contain an enormous gap. If every government can, under certain conditions, take up arms when it believes subjectively that it may do so, when it affirms from its point of view that there is necessity for defensive war (or for war of sanction), the very purpose of the treaty is in danger of being overlooked.

On the other hand we should not disregard the fact that the interdiction of defensive war can be carried out in practise only if the states are guaranteed the security of their vital interests by other means. Hence it is necessary to try by all means to strengthen the League of Nations, so that the exclusive protection of the vital interests of the states will be entrusted to it. The only question is how this idea can be realized in a pact for the outlawry of war so long as the United States steadfastly refuses to enter into legal relations with the League of Nations.

First of all one could try to define "defensive war." But after studying all the attempts at such a definition we must say that it is fruitless to try to [p. 118] fix objectively the concrete conditions for a defensive war and the motives justifying it, namely, a case of aggressive war.