of war may help to restrain some hands. More hopeful, however, is the promise that the Assembly of the League of Nations may prove to be a public forum for the expression of alleged national wrongs and bring the power of public opinion to right grievances which have only a moral, not a legal basis. To speak in familiar terms, statute law must remedy the defects of the common law. It will be observed that the Covenant of the League of Nations leaves it optional to a state to resort to the regular procedure of arbitration or to bring its case before the Council or the Assembly of the League. Doubtless the latter procedure will be followed in cases where these political, as distinct from legal, questions are at issue. But it would lead us too far afield to speculate how far the League may in time undertake to right individual wrongs by the adoption of general international conventions. Sufficient for the day is the problem in hand. Security comes first; then other aspects of justice.

A like answer is to be given to the question whether certain matters, such as the regulation of national commerce or the exclusion of alien immigrants, which are now regarded by international law as "domestic questions," but which actually do cause friction between nations, may not in time be brought under the control of a general rule of law. At present, if a case involving such matters were to be presented to the Permanent Court, it could only dismiss the suit with the statement that the defendant could not be disturbed in the performance of a clearly legal act because of its injurious effect upon another state. There is, therefore, no need of a reservation of "domestic questions" from the jurisdiction of the Permanent Court or of the League. It is sufficient that certain questions be understood to be domestic ones, and the matter is settled. A future generation may be left to determine whether what has been a domestic question in the past may not henceforth be an international one.

C. G. Fenwick.

EXTRATERRITORIALITY IN CHINA

The present issue of the Journal contains two enlightening articles dealing with the question of the abolition of extraterritoriality in China,[1] written respectively from the American and the Chinese viewpoint.

It is interesting and encouraging to note the general similarity of the approach of the two authors to their subject. Whatever their differences as to the causes and history of extraterritoriality, they are in agreement not only in holding that it is an unfortunate anomaly which ought to be abolished, but that it can be abolished in a manner which will conserve the rights of all concerned and benefit both the foreigner and the Chinese.

[1] "Extraterritoriality in China," by Charles Denby, *supra*, pp. 667–675; "Foreign Jurisdiction in China," by N. Wing Mah, *supra*, pp. 676–695.

They are further in agreement that abolition must be gradual and that no definite period for its accomplishment can be fixed since the necessary prerequisite of the abolition of the present extraterritorial system is the establishment of a Chinese judicial system capable not only in theory but in actual practice of administering even-handed and enlightened justice both to the Chinese and to the foreigner. As Mr. Mah observes: "Although humane and scientific codes, and properly organized tribunals, are indispensable instruments, . . . what China most urgently needs are competent administrators of the law." Neither Mr. Mah nor Mr. Denby venture to estimate how long it is likely to take to secure such administrators and actually put them to work. As Mr. Mah says: "It is entirely problematical as to when the native Chinese judges will command confidence and respect, especially in view of the transitory changes now taking place and likely to continue in China for some years to come;" while Mr. Denby observes: "Intelligently handled there is no inherent reason why we should not have after some decades a creditable administration in China of laws adapted to the requirements of Chinese and of the foreigners there resident."

Mr. Mah and Mr. Denby, however, are again agreed that a beginning should presently be made upon the gradual process of abolishing extraterritoriality, and further that the first step is the formulation and promulgation of satisfactory judicial codes by China. Says Mr. Denby:

> There would be needed a code founded on foreign judicial practice and covering the needs of foreign litigants of whatever nationality; then a system of courts to carry out the execution of this code; then a time of probation with foreign expert judicial cooperation in training the magistrates of these courts.

Mr. Mah's suggestions as to a *modus operandi* lie along the same lines, although they are more detailed. They are as follows:

> To sum up, it would seem that the following principles should govern the disposition of the abolition of extraterritorial jurisdiction in China: (1) the adoption by China of the necessary legal codes, to wit, a civil, a criminal, and a commercial code, a code of civil procedure and a code of criminal procedure; (2) the reorganization of the existing Chinese courts, particularly in localities where there are treaty ports; (3) the establishment of "mixed" courts as an integral part of the regular judicial system, conferring upon foreigners the full benefit of Chinese laws; (4) the appointment as Chinese judges and procurators of foreigners learned in the law and experienced in administration irrespective of nationality, and at the unfettered discretion of the Chinese Government; (5) the provision for gradual and progressive relinquishment of extraterritorial rights by the treaty states corresponding to the ascertained fitness of Chinese judiciary to exercise jurisdiction over foreigners; and (6) the conclusion of an international agreement embodying the solemn promise of the treaty states to surrender their extraterritorial rights immediately upon the fulfillment by the Chinese judiciary

of certain elemental and progressive tests of judicial proficiency, the agreement to come into force upon ratification of the major treaty states on the one hand, and China on the other.

The plans of other competent experts such as Professor Willoughby and Mr. M. T. Z. Tyau, which are quoted in Mr. Mah's article, however they may differ in detail, are of the same general nature, except that Mr. Tyau has attempted to suggest a time limit within which the gradual abolition of extraterritoriality might be completed.

There is, however, a further suggestion which it is believed is not referred to by Mr. Mah or Mr. Denby, or by the experts from whom they quote, which it is submitted points out a second step in the gradual process of doing away with extraterritoriality which should follow hard on the first step as to which the experts seem to be in agreement.

This proposed second step is the prompt putting into force, in every treaty court, of the new Chinese codes as soon as they have been examined and found satisfactory by the treaty Powers.

While the new Chinese codes are in various states of advancement, they all could, and doubtless would if there were adequate inducement, be rapidly perfected and made ready for formal promulgation. These codes could then be submitted to the various treaty Powers, preferably through the International Commission of Inquiry provided for by the Washington Conference when it shall be constituted. They should then be examined by the commission, not of course with a view to ascertaining whether or not their provisions are such as would have been recommended to China by the respective Powers, but whether they constitute a reasonable legal system under which foreigners could properly be asked to live and transact their business in China. It is probable that these codes would be found in general to measure up to this standard, at least with such amendments as might readily be suggested by the commission and accepted by China. The codes having been formally accepted by the treaty Powers and promulgated, the suggestion then is that by agreement of the treaty Powers they be promptly put in force in every treaty court in China. This suggestion first came to the attention of the writer in 1919, in an article by Mr. H. G. W. Woodhead, not a lawyer but a layman, long editor of the *Peking and Tientsin Times*.

In the course of a very interesting article upon the abolition of extraterritoriality, published in March, 1919, in connection with the discussions then going on in China in anticipation of the decisions to be reached in regard to China by the Peace Conference at Paris, Mr. Woodhead said:

> The problem as it presents itself to us is this: a variety of Foreign Tribunals—some, such as the British Supreme Court, and the American Court for China, presided over by experienced Judges; others, far more numerous, presided over by Consular officials—endeavour to administer the laws of their respective nations, as modified to suit local needs, in the Treaty Ports. The result cannot be considered satisfactory. Cases

> are within our recollection in which three criminals of different nationalities, associated in the same crime, had to be tried by three different courts, the law, and the penalty inflicted, being different in each case. And one can imagine the complexity of a civil action in which (say) a Japanese sued a British subject in connection with property in American hands. If Chinese Tribunals cannot be trusted to administer justice to foreigners, is not the logical alternative that all foreign Tribunals in this country should administer *the same law*—Chinese law? Providing acceptable Civil and Criminal Codes are forthcoming, that, it seems to us, would be the first step in the solution of the problem of extraterritorial jurisdiction. Not only would it simplify legal proceedings in which foreigners are concerned, in this country; it would found precedents and furnish a model, for the Chinese Courts of the future. It would abolish the complexities arising from the conflict of laws of the various Treaty Powers.[2]

Mr. Woodhead summarized the remainder of his plan for the abolition of extraterritoriality as follows:

> The adoption of this plan would result in the abolition of Extraterritoriality being divided into three phases: 1. Chinese laws (approved by the Treaty Powers) administered in Foreign cases by Foreign Judges, with Chinese Judges as spectators; 2. Foreign and Chinese Judges jointly trying such cases with equal powers, in accordance with Chinese law; 3. Chinese Judges trying such cases, with Foreign Judges acting as Assessors. The transition from Extraterritoriality to China's complete judicial emancipation would thus be accomplished by stages, during which a competent Judiciary could be trained, and sound precedents established. The disappearance from the Bench of the Foreign Judge, when it came, would not then involve a complete break in the Judicial administration, but merely the continuation of a system established, and built up, with foreign aid. The Chinese legal codes would have been tested, and remedied where found wanting.

It will be observed that these latter suggestions do not differ in principle from those of Mr. Mah and Mr. Denby, but it is submitted that Mr. Woodhead's suggestion, that once the Chinese codes are perfected they be immediately put into force in every foreign jurisdiction in China, is a fresh contribution to the subject under discussion which deserves the careful consideration of all those interested in the abolition of extraterritoriality in China, and particularly of the International Commission of Inquiry to be appointed under a resolution of the Washington Conference, with a view to recommending such improvements in China's administration of justice "as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality".[3]

One great argument for the suggestion here made is that if it is sound it can be carried out with no greater delay than is necessary to perfect the new codes and secure their acceptance by the Powers, and the proposed

[2] The Peking Leader, March 6, 1919.

[3] Senate Document 126, 67th Congress, 2nd Session, p. 514.

International Commission of Inquiry provides convenient machinery for securing the approval of the Powers.

Further, there is no doubt that if China were given reason to hope that such a suggestion would be carried out it would be a great encouragement to exert every effort for the speedy perfection of the new codes. And once the plan was carried out and the codes were actually in operation in the treaty courts, it would again be a great encouragement and stimulus to the Chinese to show that they were capable of administering these same codes in their own courts. In other words, it is submitted that it would have a happy effect in putting an end to the present psychological impasse in which China is waiting for some tangible proof of the readiness of the Powers to abolish extraterritoriality before making serious efforts to improve her judicial system, and the Powers are awaiting serious efforts on the part of China to improve her judicial system before making any definite move in the direction of the abolition of extraterritoriality.

Moreover, it would at one blow and without waiting "for some decades," do away with one of the most serious, if not the most serious, objection to extraterritoriality from the point of view of the foreigner, namely, "the diversity, uncertainty and inadequacy of the laws applied by the consular courts of the various treaty states," which, according to Mr. Mah, constitutes "the first important indictment" against extraterritoriality. Once the codes were put into effect in all the treaty courts the foreigner when he goes to China would go there to live under the laws of China just as when he goes to England he goes there to live under the laws of England. The only difference would be that the laws of China would be administered by his own judicial officers. Thereafter, if a foreigner became involved in litigation in China his rights and his duties would be measured by Chinese law. It would no longer be true, as it is today, that his rights as a plaintiff vary according to the laws of the defendant's nationality while his duties are fixed by the laws of his own country.

Finally, as Mr. Woodhead has pointed out, the carrying out of this suggestion would not only not interfere with the carrying out of a comprehensive plan for the complete abolition of extraterritoriality, but it would be a great assistance in that direction.

If it be objected that the consular and other treaty courts would be called upon to administer a law with which they are unfamiliar, the answer would seem to lie first in the general advantages of the plan, and second, in the fact that many, if not most of the consular officers who preside in the consular courts of the various Powers are not lawyers and that their success or failure as judges in the future, as in the past, will depend upon their general good judgment and administrative ability rather than upon any technical learning in the law. And so far as the American Consular Service is concerned, the success which has been attained through the good sense and general high administrative ability of our consular officers in administering

American law in China as it is today, *i.e.*, a confused congeries of federal statutes, English common law, and judicially adopted territorial codes, gives every reason to believe that our consular officers would do at least as well in administering any reasonable scientific code.

With respect to courts such as the United States Court for China and H. B. M.'s Supreme Court for China, the experienced judges who preside in these courts could be trusted either to have or to speedily acquire the requisite facility in handling the Chinese codes which, like the Japanese codes, will doubtless owe much to the civil law and the codes of continental Europe.

In conclusion the prediction is ventured that in the very nature of things extraterritoriality in China is bound to go sooner or later as a result of evolution or revolution. The step suggested in this editorial is put forward as a modest installment on the evolutionary plan.

WILLIAM C. DENNIS.

TREATIES CONFERRING RIGHTS IN MANDATED TERRITORIES

On July 2, 1924, the President proclaimed two treaties signed with France on February 13, 1923, relating to rights in the French mandated territories of Cameroons and Togoland.[1] A similar treaty was made with Japan on February 11, 1922,[2] and Secretary of State Hughes has announced the policy of securing "fair and equal opportunities" in all the mandated territories.[3]

The first feature to strike attention is the year and a half interval between signature and proclamation. Apparently *The Federalist's* confidence that the constitution would permit greater "dispatch" in treaty-making has not been fully justified.[4]

The two treaties are practically identical. They recite the terms of the French mandates, "the United States consents to the administration" of the territory by France; the United States is accorded "the rights and benefits" enjoyed by members of the League of Nations under Articles 2 to 9 of the mandates; vested American property rights in the territories is not to be impaired; a duplicate of the annual report to the mandatory commission is to be sent to the United States; American rights under the treaty are to be unaffected by modifications of the mandate unless the United States shall have assented; and extradition treaties with France shall apply to the territories.

These treaties differ from the Japanese treaty of February 11, 1922, in some additions to the preamble, in the omission of provision for special

[1] Treaty Series (U. S.), Nos. 690, 691; Supplement, this JOURNAL, pp. 189 and 193.

[2] U. S. Treaties, 1910–1923, Vol. 3, p. 2723, and comments by C. N. Gregory, this JOURNAL, Vol. 15, pp. 419–427, Vol. 16, pp. 248–251.

[3] Address at Philadelphia, Nov. 30, 1923, *Current History Magazine*, Jan. 1924, p. 579, and address at New York, Jan. 23, 1924, this JOURNAL, Vol. 18, p. 243. See also notes appended to Japanese treaty, Feb. 11, 1922, U. S. Treaties, Vol. 3, p. 2728.

[4] *The Federalist*, No. 64 (Jay), No. 70 (Hamilton), Ford ed., pp. 429, 467.