opportunity of securing a reversal of the decision below, it is not an effective remedy which needs to be resorted to. Judge Bagge was drawn by counsel into the metaphysical labyrinth of the distinction between questions of fact and of law in English jurisprudence, but worked his way out by concluding that the appealable legal grounds were ineffective to secure a reversal of the Board's finding of "fact" that the requisition and taking were Russian acts.

The disposition of the preliminary question on the exhaustion of local remedies will now presumably prepare the way for the determination of the substantive question whether Great Britain is liable for the seizure or use of the vessels; and here the claimants will presumably have to show before an international tribunal that the seizure or taking was not Russian but British, or if the taking was Russian, that the use was British and that hence Great Britain is under a duty to make compensation.

EDWIN M. BORCHARD

THE RUSSIAN SOVIET UNION AND THE LAW OF NATIONS

The diplomatic representative of Russia at a certain European capital when asked his views concerning international law replied enigmatically that "it would be better if the world were under one system." The views on this subject of the Russian Ambassador to the United States, Mr. Alexander A. Troyanovsky, as adumbrated in his address before the American Society of International Law at its annual banquet in Washington on April 28, 1934, are of special interest. He, too, was enigmatic, though the following excerpts from his address may serve to indicate the drift of his argument.

> International law is a collection of the rules directing the relations among nations. These rules are effective only in so far as the nations themselves accept them, of their own will. The source of the regulating lies in the nations, and not in a superforce acting from above the nations.
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> . . . . .
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> I think that only very precise international treaties duly signed can give us an acceptable basis for international relations, and consequently for international law. Vague ideas and general rules can constitute a very good stimulus for the further development of treaties and international law, but the world situation badly needs exact formulas and determined obligations.
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> . . . . .
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> Public opinion, the press, statesmen, diplomats, must not spare their efforts to create coöperation of the Powers for support of existing international law in the form of signed treaties and obligations, along with necessary changes of obsolete agreements.[1]

It is obviously true that international law is not imposed on nations by legislation: "its rules are effective only in so far as the nations themselves accept them, of their own will." But if it be implied thereby that any

[1] Proceedings, Am. Soc. Int. Law, 1934, pp. 195–197.

nation may frustrate the operation of international law, as universally applied and accepted, by its own interpretation of rights and obligations, such a conclusion is unsound and dangerous. The statement of the court in West Rand Central Gold Mining Company, Limited *v.* The King [2] (Law Reports, 1905) on this very point is much closer to the truth.

> It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be a part of international law by their frequent practical recognition in dealings between various nations.[2]

In contrast with, and in opposition to this statement of international practice, the cornerstone of the argument of the Russian Ambassador would appear to consist in the assertion that "only very precise international treaties duly signed can give us an acceptable basis for international relations, and consequently for international law." The proposition that "conventional" law, namely, by treaty agreements, is the most authoritative source of international law has had an increasing number of advocates, notably since the creation of the League of Nations, which is apparently held by many to be a kind of international legislature. As a matter of fact, it should be immediately affirmed and readily recognized that the great bulk of international law, universally accepted and long respected in practice, has never been embodied in treaties, though this practice has often been reflected by various conventional agreements. It is true that such multilateral agreements as the Barcelona Convention on Communications and Transit, the Minorities Treaties of Paris, and Resolutions of the Council and the Assembly of the League of Nations, have been held by many publicists to constitute rules of international law. Furthermore, the advocates of the codification of international law would seem to contemplate legislation by treaty agreements. It is certainly a moot point whether treaty agreements affecting international rights and obligations are not essentially limited in application and scope; that is to say, they apply only as between the signatories, and often represent compromises dictated by political considerations

[2] Law Reports (1905), 2 K. B. 391; this JOURNAL, Vol. 1 (1907), p. 217.

which are in turn subject to constant revision. Such an agreement is exemplified by the Declaration of London of 1909 defining the rights and duties of neutral nations. It would seem quite inaccurate to call such agreements international law in the strict juristic and scientific sense.

Treaty agreements, like statutory legislation, would seem to be most unsubstantial and unreliable sources for a genuine system of jurisprudence. True law—*jus, droit, recht,* as contrasted with *lex, loi,* and *gesetz*—is a body of consistent principles and rules which have grown up gradually and logically out of the practical necessities of society, independently of ephemeral legislation and arbitrary opinions, judicial or otherwise. There is what Gareis and others have termed *necessitas juris.* This is what Duguit affirmed in a rather extreme form when he stated that "law is not a creation of the state, that it exists without the state, that the motive of law is altogether independent of the state, and that the rule of law imposes itself on the state as it does upon individuals." [3] This is what James C. Carter had in mind when he said:

> Law begins as the product of the automatic action of society, and becomes in time a cause of the continued growth and perfection of society. Society cannot exist without it, or exist without producing it. *Ubi societas ibi lex.* Law, therefore, is self-created and self-existent.[4]

Lord Coke summed up the whole matter most cogently in the assertion that "the wisdom of the law was wiser than any man's wisdom." Just as there undoubtedly is a common law independent of all statutes, so there is an international common law quite independent of shifting treaty agreements and pronouncements by congresses and by the League of Nations. There is more hope for the evolution of a rational law of nations through the decisions of the Permanent Court of International Justice than through the injunctions of treaties or through quasi-legislative enactments by the League of Nations.

The contention, therefore, of the Russian Ambassador that only very precise treaties duly signed can give us an acceptable basis for international law would seem unsupported by either opinion or practice. Its significance, however, as an indication of a fundamental issue for the Russian Soviet Union is worthy of special consideration. It can hardly be taken as a mere personal point of view. Why should Russia wish to restrict international law solely to treaties? The answer would seem fairly obvious and is to be deduced from the Bolshevist philosophy of society and government. A new state has been created which breaks absolutely with the past, even to the extent of virtually denying the principle of state continuity, by the repudiation of the obligations of the Government of the Czar. It is a state based on the principle of class warfare throughout the world as well as within Russia. The rest of the world is under the control of capitalism. The law of nations

[3] *Traité de droit constitutionnel,* 2d ed., Vol. I, p. 33.
[4] Law, Its Origin, Growth and Function, p. 129.

has been created by a capitalistic society. It prescribes respect for rights of private property and the protection of liberty of person and conscience,—rights virtually denied by the Russian Soviet Union. Bolshevist theory looks forward to an international classless society where frontiers are eliminated and where a new universal system of jurisprudence prevails.

It is, therefore, no wonder that the contention is advanced that international law can have no real value for Russia which is not based on specific treaties to be negotiated afresh by this new state. No embarrassing points must be raised concerning the responsibility of Russia under the accepted international common law for the treatment of aliens, concerning its responsibilities for the obligations of the state, and for the execution of foreign judgments in Russia which are generally executed in all other countries. The acceptance of certain portions of the law of nations, such as the rights of diplomats and of sovereign states, must therefore be interpreted as a temporary opportunistic policy dictated by practical necessities until the rest of the world may have accepted Bolshevist principles and is under a new system of international law. In this sense we would seem warranted in interpreting the closing words of the Ambassador's remarkably interesting address:

> International law as a law of force and justice can be saved and supported only with a certain minimum of international unity, which does not close the door to progress and adapts itself to changing conditions. If this is not realized, the breakdown of international law, in whole or in part, is inevitable.

PHILIP MARSHALL BROWN

THE TREATY-MAKING POWER OF THE UNITED STATES IN CONNECTION WITH THE MANUFACTURE OF ARMS AND AMMUNITION

In a recent number of this JOURNAL,[1] attention was called to statements made by representatives of the United States at international conferences with respect to constitutional limitations on the treaty-making power of the Federal Government in the United States, and brief reference was made to a declaration concerning a proposed international convention for the supervision of the private manufacture of arms. The history of this declaration may not be generally appreciated, and as it points the way to an escape from a stultifying attitude which has been taken at various times, it would seem to deserve some additional emphasis.

Trade in arms and manufacture of arms, though cognate subjects, have in recent times been dealt with separately. The United States was a signatory of the Convention for the Control of the Trade in Arms and Ammunition, signed at St. Germain, September 10, 1919, but it refused to ratify the convention. On September 12, 1923, in a letter to the Secretary-General of the League of Nations, the Secretary of State explained this refusal by saying that the Government of the United States was "not in a position to under-

[1] Pitman B. Potter, "Inhibitions Upon the Treaty-Making Power of the United States," this JOURNAL, Vol. 28 (1934), p. 456.