

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.

take to obtain the enactment" of legislation which might impose penalties on private producers of arms.² This carried an intimation of lack of constitutional power, though it would seem to be incontrovertible that in connection with the international trade dealt with in the St. Germain Convention, the Federal Government has a plenary legislative power. The United States is now in the process of ratifying³ the Convention for the Supervision of the International Trade in Arms and Ammunition and Implements of War, opened to signature at Geneva on June 17, 1925, the provisions of which call for the exercise of the same powers as those of the St. Germain Convention.

It is the position of the United States with reference to a possible treaty on the private manufacture of arms which is of chief interest, however. Efforts to negotiate such a treaty have been under way since 1921, and since 1927 the Government of the United States has been participating in them. On April 20, 1927, representatives of the United States submitted observations⁴ to a Special Commission of the League of Nations concerning a proposal to forbid private manufacture of arms without license, declaring that such a proposal would not be "acceptable to the United States for the reason that the Government of the United States is powerless to prescribe or enforce a prohibition upon private manufacture which takes place under the jurisdiction of the States which form the Union of the Government of the United States. Federal authority in this respect extends only to the District of Columbia and the Federal territories and possessions. While the Government of the United States can exercise supervision or control of inter-State commerce, it has no authority over intra-State production."

This position was consistently maintained by American representatives during the continued negotiations, over a period of five years. On August 27, 1928, Mr. Hugh Wilson stated to the Special Commission that the United States was unable "to adopt an undertaking whereby we should license private manufacture. This power is not within the competence of the Government, but is reserved for control by the States."⁵ In connection with a 1928 draft convention, "the Delegation of the United States recalled its declaration of principle made previously to the effect that its Government is powerless to prescribe or enforce a prohibition or a system of licenses upon private manufacture which takes place under the jurisdiction of the States which form the Union of the Government of the United States."⁶ This declaration was repeated in 1929,⁷ when the draft convention reached an advanced stage.

² League of Nations Document, C. 758. M. 258. 1924. IX, p. 13.

³ The Senate gave its advice and consent on June 15, 1934; but pending the acceptance by other signatories of the United States' reservation as to Persia, the conditional ratification had not been deposited at Paris (September 1, 1934).

⁴ League of Nations Document, C. 219. M. 142. 1927. IX, p. 13.

⁵ *Id.*, C.F.A./2nd Session/P.V. 1, p. 12.

⁶ *Id.*, A. 43. 1928. IX, p. 5; C.F.A./3rd Session/P.V. 2, Dec. 7, 1928.

⁷ *Id.*, A. 30. 1929. IX, p. 7.

Nor was the position of the American Delegation changed when in 1932 the negotiations were resumed in the Disarmament Conference. On October 6, 1932, Mr. Hugh Wilson stated to the Conference Committee for the Regulation of Trade in and Manufacture of Arms:⁸

As regarded the American Government's position as applied to the manufacture of arms, its representatives had repeatedly explained that the Federal Government was not in a position to restrain or supervise production within the area of any one of the forty-eight States. That difficulty was not one that could be removed by legislation; it was a constitutional difficulty and was just as insurmountable an obstacle at that moment as it had been five years ago when it was brought to the attention of the League. The constitutional powers of the Federal Government in that connection were limited to matters of export, import and inter-State commerce. The United States could cooperate with the League in publicity on state and private manufacture. They could presumably accept limitation on export and import of munitions which would achieve the same results as the supervision of manufacture, but the latter, unfortunately, they could not undertake to do.

On October 8, 1932, it was again stated that the United States could not accept regulation of "private domestic manufacture," in "accordance with its Constitution."⁹

This self-imposed paralysis was of course wholly unnecessary. It is beside the point for present purposes to inquire into the desirability of participation by the United States in international control of the private manufacture of arms; but it is essential that within very wide limits the Government of the United States should have power to do by treaty what is thought to be for the interests of the United States, and no construction of the Constitution which would deprive it of such power is to be tolerated. When the matter was brought to the attention of the Department of State in 1932, this view was adopted by the Secretary of State, and the position taken at Geneva was reversed. Thereafter, the reservation previously made by the American Delegation was abandoned. On November 18, 1932, Mr. Hugh Wilson announced to the Bureau of the Disarmament Conference that though the United States had previously made reservations to certain articles of the draft convention "for constitutional reasons, those reservations had now been withdrawn," and that the United States was prepared "favorably to consider" the control of private manufacture, provided that state manufacture was also controlled and supervised, and on condition that substantial measures of reduction were inserted in the Geneva Convention.¹⁰ This statement has since been elaborated.

On May 19, 1934, President Roosevelt stated in a message to the Senate that "the private and uncontrolled manufacture of arms and munitions and the traffic therein has become a serious source of international discord and

⁸ League of Nations Document, Conf. D./C.C.F./P.V. 2, p. 12.

⁹ *Id.*, P.V. 3, p. 20 (as corrected).

¹⁰ Minutes of the Bureau, 30th Meeting, Nov. 18, 1932, I, p. 100.

strife," and that "the enlightened opinion of the world has long realized that this is a field in which international action is necessary."¹¹ On May 29, 1934, Mr. Norman Davis stated to the General Committee of the Disarmament Conference that the United States was willing to "work out, by international agreement, an effective system for the regulation of the manufacture of and traffic in arms and munitions of war."¹² This was followed on June 15, 1934, by the submission by the American Delegation of a memorandum containing suggestions for the assertion of "national responsibility for the manufacture of and traffic in arms," and for the establishment of a system of "general licenses for manufacture."¹³ This memorandum has led to substantial progress in the effort to deal with the problems of manufacture by international action.

Here, then, is a situation where an erroneous view of the constitutional powers of the Government of the United States with respect to the making of treaties has been clearly and unmistakably abandoned and corrected. It is unfortunate that for a period of five years the assertion of that view obstructed American participation in international coöperation. It is fortunate, however, especially when the United States has accepted an invitation to become a member of the International Labor Organization, that our position has been set right on this problem. The whole history suggests that there is but one course for the Department of State to pursue: it should proceed to make the treaties which the United States desires and needs, leaving to other agencies the assertion of the constitutional limitations, if any, which may be found to exist.

MANLEY O. HUDSON

THE PRINCIPALITY OF MONACO *v.* THE STATE OF MISSISSIPPI

By its decision in the case of the *Principality of Monaco v. The State of Mississippi*, rendered May 21, 1934,¹ the Supreme Court has clearly and unmistakably denied its jurisdiction to a foreign State to sue a State of the Union under Section II of Article 3 of the Constitution. The Principality of Monaco sought to recover upon repudiated bonds of Mississippi, relying upon a set of facts not unlike those in *South Dakota v. North Carolina* (192 U. S. 286), in which the court rendered a judgment against North Carolina. This exercise of the original jurisdiction of the Supreme Court by which one of the States of the Union may sue another involves "a distinct and essential principle of the constitutional plan which provided means for the judicial settlement of controversies between States of the Union, a principle which necessarily operates regardless of the consent of the defendant State."

¹¹ Department of State Press Releases, No. 242, p. 293.

¹² League of Nations Document, Conf. D./C.G./P.V. 82.

¹³ *Id.*, Conf. D./C.G. 171.

¹ Printed in the last number of this JOURNAL, p. 576. See editorial comment in that number, p. 527.