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LIMITATIONS ON NATIONAL SOVEREIGNTY IN INTERNATIONAL RELATIONS¹

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Among the traditional political conceptions which in recent years have become the object of almost irreverent attack, is that which ascribes the quality of absolutism to that often elusive, but ever present, double-faced creation of the jurists which bears the name of sovereignty. Text-writers, sometimes in unqualified terms, still persist in claiming for it the unrestricted supremacy which was attributed to it in an age when its wielders everywhere were absolute monarchs; but an increasing number, less influenced by legal theories than by realities, see in it only the "ghost of personal monarchy," as Hobbes characterized it, "sitting crowned on the grave thereof."

On the one side the attack is directed by a new school of political writers, who deny its very existence or maintain that it is not an essential constituent attribute of the state. According to them, the notion is useless if not fallacious; the theory is discredited by the facts of modern state life and the term should be abandoned and expunged from the literature of political science.²

¹ Presidential address delivered before the American Political Science Association at Washington, D. C., December 29, 1924.

² Their views are analyzed and evaluated by F. W. Coker in a recent work entitled, *Political Theories of Recent Times* (1924) by Merriam, Barnes, and others, Chap. III.

On the other side, it is attacked by writers on international law who, while affirming that sovereignty is a necessary attribute of the state, and that viewed as the manifestation of a purely internal power it is legally unlimited, maintain that in its external manifestations, that is, when the exercise of the power which flows from it affects the rights or interests of other states or their nationals, the traditional theory as commonly formulated by jurists and expounded by text-writers is an "archaic," "unworkable," "misleading," and even "dangerous" political dogma—a "baneful fiction" which no longer corresponds with the facts of international life or practice and is, indeed, incompatible with the existence of a society of states governed by a recognized and generally observed system of international law. The term "sovereignty," entirely correct in its purely internal connotation as descriptive of the relation between a superior and an inferior—between the state and its subjects—is inapplicable to the relations between equal and independent states and should, they maintain, either be eliminated from the literature of international law, or the traditional theory should be revised and reformulated so that it will conform to actual international practice.³

³ Among those who entertain this view or appear to sympathize with it may be mentioned: Borchard, "Political Theory and International Law" in Merriam, Barnes and others, *Political Theories of Recent Times*, (1924) Chap. IV.; Brown, *International Realities* (1917) p. 66; also 9 *Amer. Jour. of Internat. Law*, p. 324 and 11 *ibid.*, p. 159; Butler, "Sovereignty and the League of Nations," *British Year Book of International Law*, 1920-21, p. 38; Brierly, Shortcomings of International Law," *ibid.*, 1924, pp. 12-14; Dupuis, *Le Droit des Gens et les Rapports des Grandes Puissances*, etc., (1920), pp. 7, 482; Hill, *The Rebuilding of Europe* (1917) Chap. I; also *Proceedings Amer. Society of Int. Law*, 1916, p. 15; Krabbe, *The Modern Idea of the State*, (trans. by Sabine and Shepard) p. 248; Pillet, *Les Droits Fondamentaux des États*, etc. 5 *Revue Générale de Droit International Public*, (1898) p. 73; Ralston, *Democracy's International Law*, (1922), pp. 20 ff; Reinsch, "Administrative Law and National Sovereignty," 3 *Amer. Jour. of International Law*, (1909) p. 10; Scelle, *Le Pacte des Nations*, (1919), p. 94; Schücking, *L'Organisation Internationale*, 15 *Revue Générale de Droit International Public*, (1908), p. 22; Snow, "International Law and Political Science," 7 *Amer. Jour. of International Law*, (1913), p. 326; and Sir John Fischer Williams, "International Law and International Financial Obligations Arising from Contract," *Bibliotheca Visseriana*, (1924), vol. II., p. 24.

With the views of the first group of combatants I am not here concerned; those of the second group I fully share and I purpose to examine them briefly in the light of the actual conditions of international life and of international practice. The time at my disposal does not permit a discussion of the nature of the limitations to which the freedom of the State is subject in its relations with other States. It is believed that some of them may, in the present state of the development of international law, be properly regarded as legal restrictions; others are physical, moral, or social; others still, are political, resulting from the practical necessities of international comity or interest. Their technical character is of no great consequence; the important fact is that they are recognized as actual limitations and in practice are generally observed.

Briefly stated, the theory of sovereignty to which exception is taken attributes to the state absolute and unlimited legal power as over against other states and their nationals, subject to no control except that which is self-imposed—the right to determine its own manner of life, to determine and regulate its own domestic policies, to be the judge of its own international obligations, to set its own standards of national conduct, to choose freely its own form of government and to alter it at will—all this without accountability to anyone.⁴

As is well known, the notion of sovereignty originated in the fourteenth century to meet an intolerable situation which then existed. National states were in the process of emerging from the chaos of the Middle Ages and their monarchs found themselves engaged in a struggle with both external and internal adversaries: notably the Empire, the Papacy, and the feudal nobility, who sought to impose upon them their own wills and to prevent the realization of a rapidly developing aspiration of nationality. The kings of France, in particular, refused to recognize any superiors, from within or without, and the French

⁴ The theory is well stated by Dupuis, *op. cit.*, p. 484; by Hill, *Rebuilding of Europe*, Chap. I. and *World Organization and the Modern State*, Chap. I. and by Lansing, "Notes on World Sovereignty," *1 Amer. Jour. of International Law*, pp. 107, 303.

jurists came to their assistance with a legal theory which served both as a weapon of defense and a justification for the claim of royal supremacy.⁵ In the sixteenth century the conception underwent a transformation; not implying originally the notion of total independence, it was now clothed in the formula of absolutism and was conceived of as the attribute of a power which is not limited by any other will than its own, internal or external. Bodin has been reproached with having been the first jurist to formulate the theory in these terms, but an examination of his discussion of sovereignty will show that what he had in mind was nothing more than the supremacy of the monarch over his own subjects in his own territory and his freedom from the control of other real or pretended sovereigns, such as the Emperor and the Pope, who were endeavoring to reduce him to a condition of dependence upon them. He says expressly that the sovereignty of the state is comprized in this one thing, namely, to give laws to all and each of the citizens and to receive none from them;⁶ that is, it was an internal power—the power merely of a superior over an inferior. He admitted that the sovereign was limited by the law of God, the law of nature, and the law of nations. Sovereignty thus limited is far from being absolute and the reproach to which Bodin has been subjected hardly seems deserved.

It remained for later jurists “taking refuge in abstractions and fictions,”⁷ to apply the term which etymologically and

⁵ Compare the explanations of Sabine and Shepard, introduction to their translation of Krabbe, *The Modern Idea of the State*, (1922), pp. XVIII.-XXX.; of Gierke, *Political Theory of the Middle Ages*, pp. 87 ff. and of Carré de Malberg, *Théorie Générale de l'Etat*, vol. I., (1920), pp. 73 ff. M. Carré de Malberg states that both the idea and the word were of French origin. The theory, he says, was born of the struggle during the Middle Ages on the part of the Empire, the Papacy, and the feudal seigneurs. Compare also Meyer, *Lehrbuch des Deutschen Staatsrechts*, 6th ed. p. 5; Rehm, *Allgemeine Staatslehre*, p. 40; and Duguit, *L'Etat*, vol. I, pp. 337 ff.

⁶ *De la République*, I, 8. Compare Hill, *World Organization and the Modern State*, p. 21.

⁷ Le Fur, *L'Etat, La Souveraineté et le Droit*, *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, Bd. I (1907), p. 16. Compare also the views of Borchard, *op. cit.* p. 125 and Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), p. 102.

historically is descriptive of the relation between a superior and an inferior—between the state and its subjects—to the relations subsisting between separate states. External sovereignty, as one manifestation of it came to be called, was assimilated to internal sovereignty, so that the state was regarded as possessing the same legal right to exercise its will *à l'extérieur* as the French say, that it has over subjects in its own territory. Thus it came to pass that by the end of the eighteenth century Europe found herself under the “incubus of a malign and sinister heritage”⁸ of a juristic theory which attributed to the state an absolute and unlimited legal power, not only over all persons and things within its own territory, but also complete freedom of action in its relations with other states or their nationals, subject to no restraint except that imposed by its own will. This theory of auto-limitation found many partisans among the jurists of the nineteenth century, especially among the Germans⁹ and it has frequently been adopted by judicial tribunals.¹⁰ It is, however, only a legal theory, flattering indeed to national pride, but it is not the principle which is acted upon in practice. In the present state of the development of international law and international relations it cannot be admitted that states are bound only by their own wills, when their conduct affects other states or their nationals.¹¹ The theory is incon-

⁸ It is so characterized by David Jayne Hill in his *Rebuilding of Europe*, p. 14.

⁹ Notably Jellinek, *Lehre von der Staatenverbindungen* pp. 34–36; *Recht des Modernen Staates*, pp. 465–7; and *Gesetz und Verordnung*, pp. 196 ff.; von Liszt, *Völkerrechtlichen Staatenverbandes*; Treitschke, *Politics* (Eng. Trans. by Dugdale and de Bille), pp. 28 ff. and 97; and Ullmann, *Völkerrecht* (1908) p. 6. Compare also de Louter, *Droit International Public Positif*, p. 172, who lays down the broad proposition that considered *à l'intérieur* sovereignty is subject to no other will than its own and that *à l'extérieur* “it signifies absolute independence of all those with whom the sovereign State maintains relations on a complete footing of equality.”

¹⁰ Compare the following from the opinion of Chief Justice Marshall in the case of the *Schooner Exchange v. McFaddon* (1812) 7 Cranch 116: “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”

¹¹ The theory of absolute sovereignty qualified by the doctrine of self-limitation is attacked especially by Nelson, *Die Rechtswissenschaft Ohne Recht* (1917), p. 59; by Kelsen, *op. cit.*, p. 189; by Borchard, *op. cit.* p. 132; and by Krabbe, *op. cit.*, pp. 233 ff.

sistent with the existence of a system of international law which is itself based on the principle of reciprocal rights and responsibilities and involves the very negation of the right of a state to do what it pleases subject to no restraint except that which it has voluntarily imposed upon its own freedom of action.

A society of states in which each member is bound only by its own will would, as Dupuis justly remarks, be an "anarchy of sovereignties."¹² They would, in the language of Hobbes, be in "the state and posture of gladiators with their weapons pointing and their eyes fixed on one another." No state could claim any rights which others would be bound to respect; there could be no justice or injustice as between them, and each would be free to determine fully and finally the limits of its own freedom of action and the measure of its own international responsibility, if any were admitted.

Properly interpreted, sovereignty is a term of constitutional law and political science and not of international law, and it implies nothing more than the legal right of the state to determine its own internal life, regulate its own purely domestic affairs and make law for its own subjects within its own territory. Its power ends at the frontier and even within the national territory it is limited by the rights which international law recognizes as belonging to the subjects of other states domiciled or engaged in business therein. When the manifestation of the will of the state takes effect *à l'extérieur* it is limited by the rights of other states and of their nationals, to say nothing of the rights of the society of states as a whole. The limitation is enforced through the principle of international responsibility which is one of the foundations of international law, and which all civilized states act upon in practice in their relations with one another.¹³

¹² *Op. cit.* p. 7. Some writers have pointed out that the theory of absolute sovereignty is clearly inconsistent with the principle of international justice the promotion of which is one of the objects of international law. In this connection Willoughby suggests that the exercise by a state of a legal right which is inconsistent with justice might very well be regarded as itself an illegal act. *Procs. Amer. Soc. of Int. Law*, 1922, p. 21.

¹³ To this effect see Bluntschli, *Theory of the State* (Oxford trans.) p. 495, who remarks that the State "is not all-powerful, for it is limited externally by

Vattel, in his day, recognized the limitations when he said a nation is master of its own actions so long as they do not affect the proper and just rights of others.¹⁴ Hall,¹⁵ one of the most respected of modern writers on international law, thus states the limitation: "A state has a right to live its life in its own way, so long as it keeps itself rigidly to itself and refrains from interfering with the equal rights of other states to live their life in the manner which commends itself to them."

If we examine in the light of practice the so-called fundamental inherent rights of sovereign states, as they are customarily enumerated in the textbooks, we shall find that they are far from being absolute and unlimited. Take the usually asserted right of the state to establish (and alter at will) such form of government as it chooses. Such a right is emphatically denied by authorities of high repute¹⁶ and in practice it has never been admitted. It was denied by the Powers in 1814 when Napoleon invoked it as a right under the law of nations,¹⁷ and on several

the rights of other States and internally by its own nature"; Dupuis, *op. cit.*, pp. 7, 494; Fauchille, *Traité de Droit Int. Pub.* (1922) t. I, p. 432; Fiore, *Droit Int. Cod.* (trans. by Borcharde), pp. 42, 170; Funck-Brentano et Sorel, *Précis du Droit des Gens*, p. 7; Hill, *World Organization and the Modern State*, pp. 39, 140; Lawrence, *Principles of International Law*, p. 116; Lorimer, *Institutes of the Law of Nations*, vol I, pp. 47, 139 (who remarks that no jural entity can be absolutely independent of any other and that the doctrine of absolute independence when applied to States amounts to a total repudiation of international responsibility); Merignac, *Traité de Droit Int. Pub.* t. I, p. 525; Oppenheim, *International Law* (3rd ed.), vol. I. p. 194; and Pillet, 1 *Rev. Gén. de Droit Int. Pub.* 5 and 5 *ibid.*, p. 73.

¹⁴ *Le Droit des Gens*, Introd., sec. 20.

¹⁵ *International Law* (3rd ed.) p. 46. Compare also De Visscher (*La responsabilité des Etats, Bibliotheca Visseriana*, t. 2, p. 90) who remarks that "the responsibility of States is, in the international order, the necessary corollary of their equality. If the mutual recognition of their sovereignty implies for each of them the liberty of action which is necessary in the pursuit of their own ends, it places upon each in return the restrictions imposed by the coexistence of other States whose rights are equal to theirs." Compare also the Declaration of the Rights and Duties of Nations adopted by the American Institute of International Law at Washington in 1916 to the effect that every nation has a right to exist and develop itself and to be free of control by other States, so long as it does not interfere with or violate the rights of other states.

¹⁶ For example by Pillet, 5 *Revue Générale* 86; and Hill, *World Organization*, p. 140.

¹⁷ Dupuis, *op. cit.* p. 488.

occasions since then changes in existing forms of government were opposed and sometimes prevented by the action of other states whose safety and the general peace were believed to be menaced by the proposed changes. The establishment of a government which is "notoriously opposed to the existing order of affairs" is admitted to be a matter of concern to international society,¹⁸ and when recognition is sought for newly-established governments practice shows that other states are not indifferent to the character of those which they are asked to recognize.¹⁹ There were indeed official pronouncements during the World War from which it might be deduced that the maintainance of autocratic governments will no longer be tolerated in the present democratic order of the world.²⁰ All statesmen and text-writers are agreed that a state is bound to maintain a form of government which is capable of fulfilling its international obligations and it has often been asserted in international controversies that every state is bound to maintain judicial tribunals so constituted that they may be expected to render impartial and substantial justice to aliens.²¹

It is frequently asserted that every state has a right to extend or contract at will its territorial domain by purchase or cession, but this right, like others, is not admitted in practice. If the safety of other states or the general peace are threatened by territorial changes objection will be interposed and instances are by no means lacking in which they have been prevented by the opposition of other states or by the Powers collectively.²²

¹⁸ Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, p. 86.

¹⁹ Thus the refusal of the United States government to recognize the Soviet government of Russia has apparently been influenced to some extent by the character of that government as well as by its policies. Compare Harriman, "The Recognition of Soviet Russia," *Proceedings of the American Society of International Law*, 1924, p. 92.

²⁰ For example, President Wilson's War Message to Congress, April 2, 1917. See in this connection the comment of Wright, 17, *Amer. Jour. of Int. Law* (1923) p. 240.

²¹ Moore, *Digest of International Law*, vol. II. p. 5; Borchard, *Diplomatic Protection of Citizens Abroad*, p. 213, and Wright, *Control of American Foreign Relations*, p. 14.

²² Some instances are referred to by Brierly in the *British Year Book of International Law* for 1924, p. 13. He adds that "the supposed absolute right of a

There has been much discussion lately of the right of every state to regulate its own domestic affairs. Such a right will not be contested. But what are "domestic affairs?" In case there is a controversy between two states, one claiming that its legislation or conduct are domestic matters and therefore within its exclusive jurisdiction, the other claiming that they are matters of international concern, who is the judge as to whether they belong to the one or the other domain? In some recent political utterances language has been employed which amounted to an assertion that each state not only has a right to regulate its own domestic affairs but also the right to determine for itself what are such affairs. This claim cannot be admitted and it is not in accord with international practice. Thus, when Italy by an act of parliament in 1912 created a state monopoly of the life insurance business and expropriated the business of foreign private companies without indemnifying them for their losses, the act was the object of protest on the part of certain foreign governments which vigorously denied that a state has a right under international law to deprive in this way aliens of their property rights and invoke as a defense its alleged sovereignty in respect to matters which it chooses to regard as purely domestic. And when Uruguay in the same year passed a similar law the protests of Great Britain and France were such as to cause the Uruguayan legislature to rescind its action and abolish the monopoly.²³

State to alienate its own territory is a fiction which is suggested to us, not by anything in the practice of States, but by our preconceived notions of what sovereignty ought to imply." Westlake (*Collected Papers on International Law*, p. 131) remarks that a State may alienate its sovereignty subject to the rules of the Society of States, one of which makes every alteration of the map of Europe a matter of common interest to that quarter of the globe, as a landed proprietor may alienate his property subject to the laws of his country."

²³ As to these incidents see Audinet, *Le Monopole des Assurances sur la vie*, 20 *Revue Générale de Droit Int. Pub.* (1913), p. 5; Jèze, 29 *Revue de Droit Pub.* 433 ff. and 30 *ibid.* pp. 58 ff.; and Scelle 30 *ibid.* 637 ff. and 653 ff. In the case of a sulphur monopoly established by Sicily in 1838, an indemnity was awarded upon arbitration, to a foreign national whose rights had been prejudiced by the monopoly (Borchard *op. cit.* p. 182). In the case of Henry Savage an indemnity was likewise obtained on behalf of an American citizen on account of a loss which he had sustained in consequence of the establishment by Salvador of a state monopoly of the manufacture and sale of gunpowder (Moore, *International Arbitrations* p. 1855).

In September of last year the government of the United States addressed a protest to the government of Roumania against a recently enacted mining law which was deemed to be confiscatory of the rights of an American oil company. The reply of the Roumanian government that the legislation complained of was enacted in the exercise of its right of sovereignty and dealt with matters of purely domestic concern was, of course, not admitted, as a legitimate defense to the American claim. Such protests are common in the relations of modern states.

Manifestly if each state were admitted to be the sole and final judge as to what matters fall within its exclusive jurisdiction it might in many cases avoid all responsibility for injuries to other states or their nationals by alleging that its acts fell within its reserved domain of domestic jurisdiction. The Covenant of the League of Nations²⁴ and the recent Geneva Protocol for the Pacific Settlement of International Disputes²⁵ both recognize the exclusive jurisdiction of states over so called domestic affairs, by relieving them of the obligation to arbitrate disputes arising out of such matters; but it should be observed that both conventions expressly limit the exemption to disputes arising out of matters which "by international law" are solely within the jurisdiction of the party so claiming. No party can therefore avoid the obligation to arbitrate by showing that the matter giving rise to the dispute is such merely by reason of its own constitution or laws or because it is so regarded by its own authorities.²⁶ This was the issue before the Permanent Court of International Justice in the French Nationality Cases when the French government contended that the determination of matters of nationality belonged to the exclusive jurisdiction of the state. The British government denied that this was true when it involved the imposition of nationality upon the subjects of other states against their will²⁷ and its view was sustained by the

²⁴ Article 15, sec. 8.

²⁵ Article 5.

²⁶ Compare the observations of M. Castberg in the Swiss *Revue de Droit International*, 1922, p. 198.

²⁷ See especially the argument of Sir Douglas Hogg, *Acts and Documents Relating to the Judgments and Advisory Opinions of the Permanent Court of International Justice*, Series 6, pp. 26 ff.

decision of the court.²⁸ The court also took occasion to observe that whether a matter is or is not solely within the jurisdiction of a state is essentially a relative question and depends upon the state of development of international relations. It results therefore that what may properly be regarded as a domestic matter today, may be a matter of international concern tomorrow.

As Secretary Hughes pointed out in his address before the Canadian bar association in 1923 the "most troublesome sources of irritation are to be found in the subjects which States properly decline to regard as international in the legal sense." And advert- ing to the general practice of excluding from arbitration dis- putes arising out of domestic policies, he said: "but in these days of intimate relations, of economic stress and of intense desire to protect national interests and advance national oppor- tunity, the treatment of questions which, from a legal standpoint, are domestic, often seriously affects international relations. The principle, each nation for itself to the full extent of its powers, is the principle of war, not of peace."

The assertion frequently made that the jurisdiction of a state over all persons and things within its territory is "absolute and exclusive"²⁹ is, as a statement of legal theory, indisputable, but it would be pure self-deception to allow ourselves to believe that it enunciates the rule which states actually apply in their intercourse with one another.³⁰ That jurisdiction is limited legally by the principle of international responsibility and it is limited in fact by considerations of mutual benefit and advantage which in practice make necessary "a relaxation of that absolute and complete jurisdiction which sovereignty is said to confer."³¹

²⁸ *Collection of Advisory Opinions*, Series B, p. 24.

²⁹ It was so stated by Chief Justice Marshall in the case of the *Schooner Exchange v. McFaddon*, quoted above. To the same effect see Lawrence, *Principles of International Law*, 7th ed. p. 199.

³⁰ Compare Briery, "Shortcomings of International Law," *British Year Book of Int. Law*, 1924, p. 13 and Krabbe (op. cit.) p. 240, who justly remarks that "whenever any interest has been recognized as having legal value by an international legal community, the competence of the State as a legal community undergoes a limitation with reference to the valuation of such interests."

³¹ So admitted by Chief Justice Marshall in the case of the *Schooner Exchange*.

The obligation of the state to protect foreigners within its territory and to make reparation for injuries which they suffer in consequence of the fault of the state is asserted by all writers on international law;³² it has been affirmed by international arbitration tribunals in hundreds of cases,³³ and the principle is uniformly acted on in practice by governments. From this obligation results the universally recognized reciprocal right of states to protect their nationals abroad, to demand redress for wrongs imputable to the authorities of a foreign state in which they are domiciled and to intervene in their behalf. This admitted right of diplomatic protection necessarily limits the sovereignty of the state in which aliens are domiciled or engaged in business and the increasing influx and settlement in large numbers of aliens in certain states has had the effect of accentuating correspondingly the extent of the restriction.

When we turn from the limitations on the internal sovereignty of the state, that is, its sovereignty over persons and things within its territory, to the consideration of its freedom of action *vis à vis* other states we find that this freedom is limited by the body of customary international law—one of the chief objects of which is the imposition of restraint upon the external conduct of states—and by conventions whereby states assume obligations and renounce their liberty of action in respect to certain matters. International law requires states to abstain from certain conduct, to acquiesce in the exercise within their territory of the authority of other states in certain cases, to prevent their officers and subjects from doing certain acts and to make reparation for the violation by the latter of the law creating these obligations.³⁴

³² See especially Anzilotti, 13 *Revue Générale*, p. 6, and the authorities there cited; Borchard, *Diplomatic Protection of Citizens Abroad*, especially chaps. IV–VIII; DeVisscher, *op. cit.* pp. 89 ff.; Wright, *Control of American Foreign Relations*, Chap. 10, and Audinet, 20 *Revue Générale*, pp. 12, 16, who asserts that it is a principle of international law that a State is bound to accord to foreigners in its territory the same *civil* rights that it accords to its own nationals.

³³ See notably the decision of Martens in the Case of the *Costa Rica Packet* (5 Moore, *Hist. and Digest of International Arbitrations*, 4453); and the cases cited by Ralston, *International Arbitral Law and Procedure*, Chap. X.

³⁴ Compare Wright, *The Enforcement of International Law Through Municipal Law in the United States*, p. 22.

The acceptance of this law is an essential condition upon which states are admitted to the society of nations; its binding effect is not therefore dependent upon their consent; and it has frequently been asserted by governments that a state which repudiates its authority places itself outside the pale of international intercourse.³⁵

It is a striking tribute to its supremacy that never in any official public act, as Rivier remarks, has any state in our time dared to declare that it would not be bound by this law or its precepts.³⁶ The formal consent of the state is, of course, necessary in the case of conventions enunciating new rules of international law, and it is free to give or withhold that consent, but as regards the generally received customary law—the common law of nations—it is otherwise. In practice states act upon this principle.³⁷

³⁵ See the protest of the diplomatic corps at the capital of Ecuador (1888) and a communication of the United States government to the Ecuadorean government relative to a law passed by the Congress of Ecuador which was pronounced to be "subversive of the principles of international law by which . . . the ultimate liability of governments to one another must be determined," Moore, *Digest of International Law*, vol. I, p. 6. As to the acceptance of international law as a condition of membership in the family of civilized nations, see Maine, *International Law*, p. 38; Phillimore, *International Law*, vol. I, p. 78; Borchard, in Merriam and Others, *Political Theories of Recent Times*, p. 130; Wright, *Control of American Foreign Relations*, p. 358; and Hill, *Procs. Amer. Soc. of Int. Law*, 1916, p. 15. Pillet (1 *Revue Générale*, 10-11) remarks that this principle is a necessary consequence of international society, just as the laws of mechanics are the resultant of elementary physical forces. Hall (*op. cit.* 4th ed. p. 42) very properly remarks that no State living under international law can free itself from its restrictions except by a positive act of withdrawal from the family of nations.

³⁶ *Droit des Gens*, t. 1, p. 22.

³⁷ Westlake (*Collected Papers*, pp. 78-79) declares that when a rule of international law is invoked against a State it is not necessary to show that the State has in fact assented to the rule either diplomatically or by having acted on it. It is enough to show that the general consensus of opinion within the limits of European civilization is in favor of the rule. "International society is not a voluntary but a necessary one and the men who compose any State derive benefits from that society and cannot at their pleasure adhere to it in part and not altogether." Even Lord Alverstone, while insisting in the West Rand Gold Mining case upon the necessity of assent, admitted that a rule of international law was binding if it was "of such a nature and has been so widely and generally accepted that it can hardly be supposed that any State would repudiate it."

It is quite true that in case of conflict between municipal and international law, courts and executive authorities are bound by the former rather than the latter; but this does not mean that municipal law is superior to international law, for the international responsibility of the state cannot be altered in the slightest by such contravening legislation. A state is entirely free to enact such legislation and may compel its own courts to apply it, its executive authorities to enforce it and its subjects to obey it, but it cannot compel other states to recognize its validity.³⁸ It is one of the elementary principles of international law and one that is constantly acted upon in practice that the municipal law of a state is not the measure of its international responsibility and it cannot be invoked as a defense to a claim put forward by another state for reparation for wrongs to the citizens of the latter done in violation of international law.³⁹ It amounts to little in effect, therefore, to concede to national sovereignty the right to enact and enforce legislation contrary to international law, when in the same breath it is declared that if the right is exercised the state exercising it will be held responsible and compelled to make reparation for injuries sustained by other states in consequence thereof.⁴⁰

³⁸ On various occasions the government of the United States has released conscripted aliens, liquor smugglers seized outside the three-mile limit and vessels engaged in taking seals in the open seas when the constitutionality of the municipal legislation under which these acts were done was upheld by the Courts. (See the cases of *ex parte Larrucea*, 249, *Fed. Rep.*, 981 and *In re Cooper*, 143, U. S., 472.) The persons and ships were released upon demand, because the municipal legislation under which they were conscripted or seized was admittedly in contravention of well-established rules of international law. In such cases the American government evidently proceeded on the principle that international law is superior to municipal law.

³⁹ See especially Borchard, *Diplomatic Protection to Citizens Abroad*, p. 181. Compare in this connection an instruction of Secretary of State Bayard to the United States Minister to Colombia, Oct. 13, 1886, Moore, *Digest* vol. II, p. 4. The United States Supreme Court in the *Chinese Exclusion Cases* (130 U. S. 600), while upholding the constitutionality of an act of Congress passed in violation of treaty obligations admitted that the act constituted no defense in international law.

⁴⁰ As Krabbe (*Modern Idea of the State*, p. 234) pertinently remarks, nothing is gained by distinguishing between a legal competence which remains intact and a competence to act which is limited.

It is only when the injured state chooses to submit to such legislation, or is too weak to exact reparation, that the contravening rule of municipal law really prevails over the rule of international law. Therefore, those who like Kohler and Pillet⁴¹ assert that international law is supreme over municipal law are not merely expressing an ideal but are stating what in practice is a fact. It is believed that this was the view entertained by the early writers on international law.⁴² And it makes no difference whether the rules of international law are regarded by jurists and text-writers as law in the technical sense of the term or something else, so long as they are deemed to be binding and for the violation of which states will be held liable.⁴³ It is equally immaterial whether, as is sometimes contended,⁴⁴ courts and executive authorities when they apply its rules enforce them rather as rules of municipal law from which they are assumed to derive their validity, than as rules of international law. The effect is the same whichever view is adopted. The important fact is that the rules are regarded as binding and are applied.

Finally, the assertion sometimes made that each state being independent may interpret for itself how far the principles of international law are applicable, and that in practice states "interpret it for themselves usually as they find it expedient"⁴⁵

⁴¹ *Völkerrecht des Privatrechtstitel, Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1908, p. 209. *Le Droit International Public, etc.*, 1 *Rev. Gén.*, pp. 9-10; also article *Les Droits Fondamentaux des Etats, etc.*, 5, *ibid.*, p. 82.

⁴² Thus Richard Hooker in his *Ecclesiastical Policy* (I, 10), published in 1592, said the "strength and virtue of the law of nations is that no particular nation can lawfully prejudice the same by any of their several laws and ordinances any more than a man by his private resolutions the law of the Commonwealth wherein he liveth or annihilate that whereupon the world hath agreed."

⁴³ Compare Scott, "*The Legal Nature of International law*, 1 *Amer. Journal*, 832.

⁴⁴ For example, by Willoughby, "The Legal Nature of International Law," 2 *Amer. Jour. of Int. Law*, 357.

⁴⁵ This is the view of Professor R. N. Gilchrist, in his *Principles of Political Science*, p. 128. He adopts the Austinian view that the rules of international law are rather rules of international morality than rules of law. He admits that they are usually observed, but asserts that "ultimately the individual states have to say what laws apply to them and how they apply."

is not well-founded in fact. It may be the legal theory but it is not in accord with the practice. States, of course, sometimes assert a claim to be the judges of the applicability and the meaning of the law, just as they sometimes assert a claim to judge of the measure and nature of protection which they are obliged to afford to foreigners and of the degree of responsibility which they owe to other states, and occasionally they are able to impose their interpretation upon weaker states, but their right to do so is never admitted and in controversies between states of equal strength the attempt usually fails.

If we examine the limitations on the freedom of national action established by treaties and conventions we shall be struck by their number and variety. It may now be said that the civilized world is knit together by a vast net-work of international agreements the number of which is said to be in the neighborhood of 25,000⁴⁶ and the number is rapidly increasing.⁴⁷ An examination will show that the most of them limit in some way the freedom of the contracting parties.⁴⁸ To appreciate the full extent and diversity of these limitations it would be necessary to make a digest of all the treaty collections in existence. During the past fifty years a large number of multi-

⁴⁶ This is the estimate of Mr. D. P. Myers in an article on "The Control of Foreign Relations," in the *American Political Science Review*, vol. 11, p. 24.

⁴⁷ Between May, 1920 and October, 1924 the Secretariat of the League of Nations registered 764 treaties. The average is now about 175 per year.

⁴⁸ Thus treaties of arbitration, treaties providing for the investigation of disputed facts, and treaties obliging the parties to submit their disputes to the Permanent Court of International Justice limit their freedom in respect to the making of war and the same may be said of treaties by which the parties obligate themselves not to employ certain weapons or instrumentalities for injuring an enemy, not to erect fortifications on their frontiers or in certain parts of the interior or not to construct certain types of war ships or ships above a certain tonnage or in excess of fixed ratio. The State's freedom of action is especially limited by commercial treaties obliging each party to admit the subjects of the other to enter, reside and carry on business in its territory, to own and dispose of land, to have access to its courts, to attend its public schools, to be exempt from conscription and compulsory loans, to receive the same protection in their persons and property as are afforded to nationals and to depart freely with their goods and effects in case of war.

lateral conventions have been concluded between groups of states and in many cases between virtually the whole body of states, the effect of which has been to create a net-work of common obligations the performance of which necessarily reduces in large degree the domain of national freedom of action. Many of these conventions obligate the parties to enact certain specified legislation or to revise their existing legislation; to take specific measures to facilitate the execution of the treaties; to refrain from certain conduct and to forbid and prevent their subjects from doing certain acts.⁴⁹

The fact that the limitations established by conventions are self-imposed does not affect their character as actual restrictions upon the freedom of the parties.⁵⁰ Theoretically any party may break them or repudiate them *in toto*, but in fact its right to do so is not admitted and in practice it is rarely done, for the principle *pacta sunt servanda* is universally recognized to be the foundation of conventional international law. The only way by which a state may preserve its sovereignty unimpaired is by refusing to enter into conventions which place restrictions upon its exercise. The right to so refuse, of course, belongs to every state, but under the conditions of modern international life the assumption of treaty obligations and the admission of restraints upon national liberty of action is, in fact, often a matter of necessity rather than of choice if national rights and national

⁴⁹ See notably the so-called White Slave Convention (analyzed by Renault in *9 Rev. Gén.* 497 ff.), the Radio Telegraph Convention, the North Sea Fisheries Convention, the Convention for the Simplification of Customs Formalities, the Convention of February 9, 1920 concerning Spitzbergen, the Washington and Genoa international labor conventions, the Barcelona and Geneva Conventions of 1921 and 1923 relative to communications, transit, etc. As to the nature of the limitations created by the last-mentioned conventions see De Visscher, *Droit International des Communications*, especially pp. 7 ff.

⁵⁰ Schücking, (*op. cit.* p. 122) pertinently points out that these who, while admitting that the State may be bound by its own will, deny that it can be bound by a foreign will are in error, since self-imposed obligations in fact involve the subjection of the State to the control of a foreign will. Thus where a State obligates itself by treaty to surrender fugitive criminals, upon the demand of another State, it is no longer free to act upon its own will but must obey the will of a foreign government when a just demand for extradition is made.

interests are to be secured and advanced.⁵¹ A state which should persistently refuse to admit any conventional limitations whatever upon its sovereignty would ultimately find itself outside the pale of international intercourse and deprived of rights which are essential to its existence and progress.

The old theory of absolute sovereignty *vis à vis* other states fitted in very well with the actual conditions of international society at the time it was formulated by the jurists. Today the situation is totally different. In the place of an "anarchy of sovereignties" we have a society of interdependent states, bound by law and possessing a highly-developed solidarity of interests. Economically the world has become in large degree a unit; it has acquired the character of a delicate organism, each part of which is affected by whatever occurs in other parts.⁵² Writers are not in agreement as to when the transformation of the international community from an aggregation of "distinct sovereignties," as Marshall characterized it, into a juridical society of states actually took place. The date is immaterial; the fact that the transformation had already taken place even before the establishment of the League of Nations is admitted by nearly all writers on international law.⁵³ For a long time the society of states was without organization or institutions and it is not yet fully organized, but it was never purely anarchistic

⁵¹ Compare Wehberg, the *Problem of an International Court of Justice* (trans. by Fenwick) p. 3; and Von Liszt, *Das Völker-recht*, p. 10. Chief Justice Marshall, in the case of the *Exchange v. McFaddon*, while affirming the "absolute and exclusive" sovereignty of every nation within its own territory added that their "mutual benefit being promoted by intercourse with each other and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice . . . of that absolute and complete jurisdiction . . . which sovereignty confers."

⁵² Norman Angell in his *The Great Illusion* (especially chap. III) and in his *American and the New World State* (chap. I) has pointed out how delicate is this organism and how easily economic and financial disturbances in one part of the world react upon other parts. Compare also Wehberg, *op. cit.* pp. 1 ff.

⁵³ See notably Westlake, *Collected Papers*, p. 3; Pillet 1 *Rev. Gén.* 3; Rivier, *Droit des Gens*, vol. I., p. 8; Jitta, *La Rénovation du Droit International*, pp. 185-6; Hill, *World Organization*, chap. III; Lawrence, *The Society of Nations*, chap. I; and the resolution of the American Institute of International Law adopted at Havana, Jan. 23. 1917.

as Jellinek asserted,⁵⁴ from the time it came to be regarded as being governed by law.

Respectable authority indeed is not lacking for the view that even before the establishment of the League of Nations the world had already advanced from the stage of a mere society and had acquired the character of a federation possessing a corporate juristic personality, and that the law by which the rights and duties of its members in their relations with one another are determined is imposed upon them by the society of states and is not the result of agreement among them.⁵⁵ Those who adopt this view maintain, quite logically, that the law of the society of states is superior to the law of any particular member and that the term "international" law is therefore self-contradictory and unscientific and should be replaced by some such term as "super-national" or "supranational" law.⁵⁶ If we disregard the legal theory and consider the facts and practice we shall find much to support this view.

⁵⁴ See Oppenheim's criticism of Jellinek's view, *The Future of International Law* (1921) p. 9. As Oppenheim points out organization is not essential to the existence of a juridical society.

⁵⁵ Such was the thesis of the late Alpheus H. Snow who asserted that "it is not going beyond the fact to say that at the present time the nations and peoples of the world are, by agreements, by commerce, by relationships, and by institutions indissolubly and federally united, so that they together constitute a body politic and corporate which is the law-giving personality above the nations." He adds that it is not necessary that it should be formally created as an institution, its functions defined and organs and agents provided; it exists by recognition of the nations, that is, by society at large. See his article "The Law of Nations" 6 *Amer. Jour. of Int. Law* (1912), p. 894; also his *American Philosophy of Government*, p. 427. French translation in *Rev. Gén.* 1912, pp. 309, 318. Compare also Scott, *The Recommendations of Havana Concerning International Organization*, (1917), pp. 40-41.

⁵⁶ So Mr. Snow maintained in the article cited above. Compare also Hull, *Procs. Amer. Soc. of Int. Law* (1911) pp. 280-289, who advocates a somewhat similar change of terminology. See also Pillet, 5 *Revue Générale*, p. 87, and Krabbe, (*op. cit.* pp. 245-6) who remarks that the term "international" law is really a misnomer and that since "the law of nations has now developed into a super-national constitutional law it would be better in the future to use this term, thus carrying out in terminology the parallelism between national and super-national law." Sir James Fitzjames Stephen in his *History of the Criminal Law of England* (vol. II, p. 35) observed that international law is not law so far as it is international nor international so far as it is law.

Whichever view we adopt regarding the legal nature of the society of states, we are bound to reject the theory that in fact it is nothing more than an anarchy of sovereignties. In its present state of development the absolutist conception of sovereignty, viewed in its external manifestations, is wholly incompatible with the existence of that society and it ought to be abandoned along with that other useless fiction known as the equality of states.⁵⁷

As already stated above, the term is not only inapt, unscientific and confusing, but the notion itself is misleading and even dangerous since it gives rise to illusions and creates a mentality which has often proved to be an obstacle to the maintenance of peace and the advancement of the common interests of states. The pretended "prerogative" of sovereignty has often been invoked to justify national conduct which was in violation of the rights of other states and the common interests of the society of states. It has afforded the basis of the claim asserted by states to close rivers to navigation by peoples inhabiting the upper territory through which they flow, to forbid the transmission of radio telegrams through the air above their territory,⁵⁸ to exclude foreign aircraft from navigating the air above

⁵⁷ Westlake suggests that the term should be replaced by the word "independence," which is a negative conception and implies the notion of freedom from the control of other states rather than the right of a superior to command and control an inferior. Scelle *op. cit.*, p. 94, also advocates this change of terminology on the ground that "independence" connotes an idea of social relations among States analogous to the liberty of individuals. In fact the term "sovereignty" envisaged from the point of view of its external manifestations is used by many writers on international law as synonymous with "independence." See the discussion by Crane in his *The State in Constitutional and International Law*, pp. 49 ff. Hall, *op. cit.* p. 19, remarks that the theory of absolute sovereignty is not necessary to the concept of a legal relation between States. Brierly (article cited, p. 14) suggests that since the traditional theory of sovereignty is qualified by actual practice, it might be reformulated on the basis of the analogy found in the municipal law of many states by which qualifications are imposed on the ownership and use of private property. On this point see also Phillimore, *International Law*, vol. I, (1st. ed.) p. 433 and vol. II, p. 313.

⁵⁸ Rolland, *La Télégraphie Sans Fil et le Droit des Gens*, 13 *Rev. Gén.* 75; Fauchille, *La Télégraphie sans Fil et le Droit International*, 47 *Revue de Droit Int. et de Lég. Comp.*, p. 7 ff.

them,⁵⁹ to confiscate the property of aliens, and to repudiate debts due to foreign bondholders.⁶⁰

An almost superstitious attachment to the theory and the disinclination to abate a jot or tittle of the substance has been the chief obstacle to the organization of the world for the promotion of common economic interests and the establishment of safeguards for the maintenance of the general peace. As is well-known, the conventions of 1907 for the creation of the International Court of Arbitral Justice and the International Prize Court were opposed on the ground that the obligation which they established to have recourse to the former and to allow appeals from national courts to the latter would amount to a surrender of the sovereignty of the states which were parties thereto.⁶¹ Those who so contended overlooked, however, the

⁵⁹ A right now definitely affirmed by the International Air Convention of 1919. (Art. 1.)

⁶⁰ See the reply of the Soviet government of Russia to the Genoa Conference (*New York Times* May 12, 1922). The late Senor Drago in an article entitled *Les Emprunts d'Etat et leurs Rapports avec la Politique Internationale*, published in the *Revue Générale de Droit International* for 1907, pp. 251 ff, invoked the principle of national sovereignty to sustain an argument that when a State defaults in the payment of bonds held by foreigners, or even repudiates them, other States whose nationals sustain losses in consequence thereof have no right to protest or intervene. The issuing of bonds, he argued, is a power of sovereignty and there is no denial of justice in the failure to pay them, because there is no international court with jurisdiction to hear and determine complaints arising therefrom. See the trenchant criticism of this perversion of the concept of sovereignty, by Sir John Fischer Williams in the *Bibliotheca Visseriana*, vol. II, pp. 21 ff.

It may be observed that during the controversy in 1901 between Venezuela and certain foreign governments relative to claims for unpaid bonds issued by the Venezuelan government and held by nationals of the other governments the Venezuelan government, invoking the rights of sovereignty in domestic matters, insisted that the national laws of Venezuela were conclusive as to the merits of the claims in controversy. This contention, of course, was not admitted and it was denied by the mixed commissions to which the claims were ultimately submitted. See G. W. Scott, "Use of Force to Recover on Contract Claims," 2 *Amer. Jour. of Int. Law*, p. 82.

⁶¹ Such was the contention of Barbosa, Beernaert, Carlin, and others. Their arguments are summarized by Nippold, in *Die Zweite Haager Friedens Konferenz*, Bd. I, 93 ff. Such also was the contention of Von Liszt, *Das Völkerrecht*, p. 13, and Pohl in a monograph entitled *Deutsche Preisengerichtbarkeit; Ihre Reform durch das Haager Abkommen vom 18 October 1917*. (Tubingen, 1911.) Pohl argued that an international prize court would be a super (*überstaatliche*) institution to which states would be subordinate.

important facts that the establishment of both courts was a purely contractual matter depending upon the voluntary consent of the states which ratified the Conventions, that the duration of both Conventions was limited, and that by their express terms the privilege of denunciation was reserved to the parties. The ratification of the Conventions would, therefore, have entailed no surrender of sovereignty any more than is involved in the assumption of other treaty obligations.⁶² It is hardly necessary to add that the supposed loss of sovereignty which it would entail has constituted the main argument against the United States joining the League of Nations or even cooperating with it in the accomplishment of its more important objects.

It may not be improper to observe that governments and statesmen in their attitude toward the rights of sovereignty have not always applied the same standard to other states which they insist must be applied to their own; that is, while claiming for their own country an absolute and unlimited sovereignty they have on occasions, asserted that the sovereignty of other states is qualified and limited by the rights of all.⁶³ Thus in

⁶² This was pointed out by Schücking, *op. cit.*, pp. 99, 122, 124; by Hold von Ferneck, *Eine Lanze für den Prisenhof*, *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, Bd. 6 (1913) pp. 1 ff. Compare also Oppenheim, *The Future of International Law*, p. 44, and Root 15 *Amer. Jour. of Int. Law*, p. 8.

⁶³ American statesmen have uniformly maintained the theory of the absolute and exclusive sovereignty of the United States but during the controversy with Colombia concerning the Isthmian Canal treaty it was contended by high authority that the sovereignty of Colombia was limited by the right of other states to have the canal constructed in any event. Compare the following from an address of Mr. Elihu Root on "The Ethics of the Panama Question" before the Union League Club of Chicago, Feb. 22, 1904 (printed in Senate Document no. 471, 63rd. Congress, 2d. Session, p. 39): "By the rules of right and justice universally recognized among men and which are the law of nations, the sovereignty of Colombia over the Isthmus of Panama was qualified and limited by the right of the other civilized nations of the earth to have the canal constructed across the Isthmus and to have it maintained for their free and unobstructed passage." As a universal principle equally applied, this view we believe is sound, but in the particular controversy it was put forward by those who asserted it as a justification of conduct by their own government, the rightfulness of which was denied by that one whose sovereignty had been contested. Would they have admitted the validity of the principle asserted if it had been applied to their own country?

controversies that have arisen, the view of a particular government as to whether sovereignty is unlimited or qualified has often depended upon the answer to the question, whose sovereignty was actually involved, its own or that of the other party?

It is entirely natural that states should manifest a reluctance to assume obligations the effect of which would be to limit their own freedom of action and especially those which involve in any degree a renunciation of what they consider their sovereignty. "The theory of absolute and exclusive sovereignty," as an eminent French jurist remarks, "flatters the national pride, favors ambition and gives the illusion of security. Pride rejoices in being master and in not being obliged to bow before any other master; ambition finds pleasure in the right of undertaking everything for which strength promises success; the mirage of omnipotence gives to weakness the illusion that absolute sovereignty covers it and that the state cannot without peril renounce this shadow of protection."⁶⁴

It is believed, however, that this reluctance of states to admit even self-imposed limitations upon their own freedom has often been due in part to a misconception of what is really involved in the acceptance of such limitations, and in part to the failure to appreciate fully the benefits which would result to themselves and to the community of states, in the reciprocal assumption of obligations and the renunciation of unlimited freedom of action. In fact, no surrender of sovereignty results from the voluntary assumption of contractual obligations; sovereignty is lost only when a state has been deprived, against its will, of its freedom of action, by an external power.⁶⁵ It is hardly necessary to observe also that the renunciation of liberty of conduct through treaty engagements is usually reciprocal; whatever one party renounces the other party or parties renounce equally, so that as among themselves they are all left on the same footing of equality as before the renunciation.

Manifestly, if every state should, in practice, conform its conduct to the theory of absolute sovereignty and refuse to

⁶⁴ Dupuis, *Le Droit des Gens et les Rapports des Grandes Puissances*, p. 495.

⁶⁵ Compare Oppenheim, *The Future of International Law*, p. 11.

assume any obligations which involved restrictions upon the exercise of its sovereignty, the condition of international society would, indeed, be that which Hobbes in his day conceived it to be. Limitations upon liberty is the price which must be paid for all social progress, whether it be local, national, or international. All advance in the development of conventional international law, in the progress of international organization, and in the promotion of the common interests of the community of states, has come through mutual restraint and concession voluntarily imposed or granted by states.⁶⁶ Particular states have often found that their own security and welfare could be better promoted by surrendering their sovereignty and uniting in federal unions rather than by remaining independent.

More and more, states in general have found it to their advantage to accept limitations upon their freedom; they have found that the benefits obtained thereby usually more than compensate for the loss of the freedom thus sacrificed; often indeed it has been a matter of necessity in order to acquire essential rights and advantages which could not otherwise be obtained. It is believed that the guiding principle which should be followed in determining whether an international obligation can be safely assumed or a restriction upon national sovereignty accepted, should be sought less in the extent of the obligation than in the value of the object sought to be accomplished. The price exacted may sometimes seem excessive, yet the object to be achieved may be of immense value to the state and of inestimable benefit to international society as a whole.

⁶⁶ Compare on this point the remarks of the late Secretary of State, P. C. Knox, before the Pennsylvania Society of New York, December 11, 1909, published in 4 *Amer. Jour. of Int. Law* 181 and an address of Viscount Grey on the League of Nations, *New York Times*, June 30, 1918.